How Long the Shadow?
Command Responsibility for War Crimes in Australian Law

Glenn Raymond Kolomeitz

A thesis submitted in partial fulfilment of the requirements of the award of the degree of Doctor of Philosophy

The University of Adelaide

School of Law

Research Unit on Military Law and Ethics

January 2023

TABLE OF CONTENTS

LIST OF TABLES

ABSTRACT

From the ashes of the Second World War and motivated by a desire to combat impunity for war crimes, the modern doctrine of command responsibility evolved as a critical norm of international law. With the advent of the Rome Statute of the International Criminal Court (ICC), the international community broadly recognised that primary responsibility for the enforcement of the doctrine rests with national jurisdictions. Australia was commendably quick to recognise the importance of the Rome Statute, but the subsequent manner of implementation of the command responsibility provisions into domestic Australian law raises questions. Further, the extent to which any gaps in implementation may trigger the complementarity provisions of the statute and thus the jurisdiction of the ICC over matters to which Australia might otherwise claim primacy is in question. Moreover, whether Australia's domestic provisions provide an effective means of ensuring the responsibility of commanders, and thus deter war crimes and combat impunity, is uncertain.

This dissertation critically examines the passage of the doctrine of command responsibility into domestic Australian law and analyses its elements in the Rome Statute and Australia's Commonwealth Criminal Code. By necessity, and in light of the elemental deconstruction provided herein, this dissertation analyses and applies Australia's military command doctrine and associated degrees of authority through the lens of the principle of command responsibility and the relevant legislative provisions, and overlays such analysis on the major case study of the Inspector-General of the Australian Defence Force Afghanistan Inquiry ('Brereton Inquiry').

Four inter-related conclusions and an available outcome are offered. Firstly, with the rejection of the mental element of recklessness from the statute, and the jurisprudential determination that the 'should have known' standard of fault in the statute is akin to negligence, a clear divergence exists between the statute and code provisions. Second, this divergence establishes differing scopes of criminality which, in turn, adversely impacts the necessary coherence, credibility and legitimacy of the system of international criminal justice. Third, divergence to this extent could prejudice the system of complementarity and trigger the jurisdiction of the ICC over Australians. Fourth, the exculpation of the higher chain of command in the Brereton Inquiry evidences a manifestly flawed interpretation of command responsibility and

Australia's command and control structures and a flawed application of the law of command responsibility to the facts of command and control in Afghanistan.

The available outcome flowing from these conclusions is the excision of the command responsibility provisions from the overarching principle of complementarity. Australia then retains primacy over aspects of cases arising from the Brereton Inquiry whilst the ICC assumes jurisdiction over the responsible commanders. This outcome fulfils the intent of the Rome Statute to fill the impunity gap and that of the doctrine to ensure those most responsible are brought to justice. It simultaneously injects into the Australian military operational ethos the deterrent effect which the threat of the prosecution of commanders has on the conduct of subordinates in terms of compliance with the laws of war.

DECLARATION

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name, in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name, for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint-award of this degree.

I give permission for the digital version of my thesis to be made available on the web, via the University's digital research repository, the Library Search and also through web search engines, unless permission has been granted by the University to restrict access for a period of time.

I acknowledge the support I have received for my research through the provision of an Australian Government Research Training Program Scholarship.

Signature: …….

Glenn Raymond Kolomeitz

10th January 2023

Dated: ……

ACKNOWLEDGEMENTS

The completion of this research and resultant dissertation has been a fascinating and enjoyable journey on which I was accompanied by many people who deserve acknowledgement and my gratitude. I am indebted to my supervisors, Professor Dale Stephens (Captain RAN) and Associate Professor Matthew Stubbs (Lieutenant RAN), both from the University of Adelaide's Research Unit on Military Law and Ethics. Dale once told me that Matthew could 'write the book on how to complete a PhD'. Their different yet complementary styles, and very active and encouraging approach to my supervision, tells me they could both write that book. We've had a good laugh too. I thank the staff at the Law School whose responsiveness enabled me to get on with the job and I acknowledge Ms Kate Leeson for her professional thesis editing service. This journey, however, goes back much further – to the Army Year 12 course and the Army Educational Corps officers who introduced a young corporal to a love of lifelong learning and professional development. I am also grateful to the soldiers of the 3rd Battalion, the Royal Australian Regiment ('Old Faithful') and the Special Operations Task Group with whom I deployed to East Timor and Afghanistan respectively and from whom I learnt so much.

The writing of this dissertation coincided with the fall of Afghanistan to the Taliban and the resulting humanitarian crisis. In that light, I am enormously grateful to the compassionate and professional team at GAP Veteran & Legal Services who have worked tirelessly with me on a *pro bono* basis securing visas and evacuations for thousands of Afghans who worked for Australia. This work helped Australia honour its obligations to our former colleagues and is Talmud: Sanhedrin 37a exemplified. At the time of writing, that mission continues.

Most importantly, I am eternally grateful to my immensely tolerant and amazing wife, Dr Emma Gilchrist, and my equally amazing children, Nicholas and Lara. Being the spouse of a police officer or of a soldier is demanding – in the course of our marriage, Emma has been both. Having Nicholas while I was deployed to Afghanistan was undoubtedly stressful, but Emma soldiered on. In more recent times, when I've been immersed in research and only physically present at home, Emma has run both the household and a medical practice. Nicholas and Lara have often missed out on kicking a footy or playing Minecraft with me but have always shown a keen interest in what I was doing behind a literal wall of books. Thanks guys. If this work contributes to policy, practice or academia, your sacrifice and support have helped make that happen.

ABBREVIATIONS

ABiH	Army of Bosnia and Herzegovina
ADF	Australian Defence Force
API	First Additional Protocol to the 1949 Geneva Conventions
C2	Command and control
CJTF	Commander Joint Task Force
CO	Commanding officer
CONOPS	Concept of operations
DRC	Democratic Republic of Congo
HQ	Headquarters
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IGADF	Inspector-General of the Australian Defence Force
IMT	International Military Tribunal (Nuremberg Tribunal)
IMT-FE	International Military Tribunal for the Far East (Tokyo Tribunal)
JPEL	Joint Prioritised Effects List
JSCOT	Joint Standing Committee on Treaties
JTF	Joint Task Force
MAP	Military appreciation process
MEAO	Middle East Area of Operations
MCCOC	Model Criminal Code Officers Committee
NATCOMD	National command
NATO	North Atlantic Treaty Organization
OPCOMD	Operational command
OPCON	Operational control
OSI	Office of the Special Investigator
OTP	Office of the Prosecutor (International Criminal Court)
SOTF	Special Operations Task Force
SOTG	Special Operations Task Group
TACOMD	Tactical command

TACON	Tactical control

CHAPTER 1
INTRODUCTION

> Special Operations Task Group troop, squadron and task group Commanders bear moral command responsibility and accountability for what happened under their command and control.[1]
>
> Responsibility for right conduct rests with those commanders, officers and soldiers who command and control the lethal force set in motion by the political hierarchy.[2]

1.1 Research motivation and trigger

This research examines the legal doctrine and law underpinning the concept of command responsibility as applied in the Australian context. As is developed in subsequent chapters, Australian law on command responsibility, as it presently stands, does not exist in a vacuum. Rather, it has evolved in practice over time and in legislation from international treaty arrangements. The author's motivation to undertake research of this nature arose whilst serving as a legal officer in the Australian Army on multiple operational deployments overseas and, subsequently, whilst serving as a military prosecutor in Australia. In the latter role, as a peripheral observer to the failed prosecution of Australian special forces soldiers involved in an incident in Afghanistan involving civilian casualties, on the basis of the interpretation of a particular mental (fault) element of the subject offence as alleged,[3] the author's motivation to further explore the elements of offences under Australian war crimes law was cemented. It was, however, the Inspector-General of the Australian Defence Force Afghanistan Inquiry (the 'Brereton Inquiry') and, significantly, its findings pertaining to the issue of command responsibility for the crimes alleged in the inquiry[4] which triggered the focus of the research on that discrete yet complex area of the law.

Notwithstanding the inquiry was of an administrative rather than a criminal nature, the findings of the Brereton Inquiry tended to exculpate, to a standard less than the criminal standard of

---

[1] Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report* (Final Report, November 2020) pt 3, 472.

[2] Brian Orend, *The Morality of War* (Broadview Press, 2006) 106.

[3] *Re Civilian Casualty Court Martial* (2011) 259 FLR 208, 225.

[4] The Brereton Inquiry report referred to throughout this thesis is the publicly released version inclusive of redactions. Aspects of the report have not been made public at the date of writing.

proof,[5] the chain of command above the highly operational patrol commander level from responsibility other than from what Brereton terms 'moral command responsibility'.[6] Whilst Brereton states that '[c]ommand responsibility is both a legal and a moral concept',[7] the doctrine is, of course, one of law. Extrapolating a moral dimension is irrelevant to any analysis of criminal liability under the law which defines the doctrine. Jurisprudence on the doctrine lacks a moral dimension[8] for reason of the clear and necessary demarcation between law and morality in adjudicating criminality generally and specifically in the context of war crimes.[9] Earlier arguments assigning moral responsibility in the context of war crimes, including, relevantly, the insulation of military superiors from exposure to criminal sanction,[10] have been described as 'failing to articulate legally cognizable harms, however compelling these theories of moral responsibility may be'.[11]

Major General Justice Brereton is not alone, however, in viewing the failings of higher command in the context of command responsibility through a moral rather than a legal lens. The Australian Special Operations leadership itself, in this instance the Special Operations Commander Australia Major General Adam Findlay, described the 'one common cause' of the identified misconduct as being 'poor moral leadership' whilst neglecting to consider the legal culpability of the chain of command including, relevantly, the Special Operations Task Force commanders and higher commanders at the Joint Task Force level.[12]

---

[5] IGADF (n 1) pt 3, 27, 30.

[6] Ibid 471–2.

[7] Ibid 473.

[8] Matthew Lippman, 'Humanitarian Law: the Uncertain Contours of Command Responsibility' (2001) 8(2) *Tulsa Journal of Comparative & International Law* 1, 93.

[9] See William Lietzau and Joseph Rutigliano, 'History and Development of the International Law of Military Operations' in Terry Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2nd ed, 2015) 14, 24.

[10] See William Generous, *Swords and Scales: The Development of the Uniform Code of Military Justice* (Associated Faculty Press, 1973) 201.

[11] Amy Sepinwall, 'Failures to Punish: Command Responsibility in Domestic and International Law'(2009) 30(2) *Michigan Journal of International Law* 251, 254.

[12] Nick McKenzie and Chris Masters, 'Special Forces Chief Acknowledges War Crimes, Blames "Poor Moral Leadership"', *The Age* (Melbourne, 28 June 2020) 55, quoted in Tom Frame, *Veiled Valour: Australian Special Forces in Afghanistan and War Crimes Allegations* (UNSW Press, 2022) 391.

Wading in the sea of debate on the 'legal positivism' versus 'natural law' theories is well beyond the scope of this thesis other than to contend the objective, empirical standard[13] applied in war crimes trials to date has left little room for arguments of morality in determining issues of legal validity. Indeed, in its contribution to the 1919 Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties, the United States expressly rejected any moral element of responsibility on the basis of inadmissibility due to its lack of legal consistency.[14] As Cullison concisely states, 'one important function law serves in many societies … is to remove morality from legal disputes [such that] law-makers generally settle disputes at a practical level and leave underlying moral issues unsettled'.[15]

The responsibility of commanders and other superiors for war crimes committed by subordinates has long been considered a general principle of criminal law in international criminal courts and tribunals along with the principle of individual criminal responsibility.[16] It follows that, in the application of the principle of complementarity in its purest form, any consideration of command responsibility in a domestic legal setting will properly treat the doctrine as a general principle of criminal law.[17]

The Statute of the Nuremberg Tribunal did not expressly include provisions on command responsibility; however the indictment at the Nuremberg Trials described such crimes as 'violations of international conventions, of internal penal laws, and of the *general principles*

---

[13] Alan Cullison, 'Morality and the Foundations of Legal Positivism' (1985) 20(1) *Valparaiso University Law Review* 61, 61.

[14] *Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities* (Annex II to Report, 4 April 1919) in (1920) 14 *American Journal of International Law* 95, 128.

[15] Cullison (n 13) 64, citing Neil MacCormick, 'A Moralistic Case for A-moralistic Law?' (1985) 20 *Valparaiso University Law Review* 1.

[16] See, eg, Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff Publishers, 2008) 85, 143; Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (TMC Asser Press, 2003) 6–8; Roy Lee, 'Introduction' in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (Kluwer Law International, 1999) 1, 31–2.

[17] See, eg, Jann Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press, 2008) 1–2.

of criminal law as derived from the criminal law of all civilised nations'.[18] Similarly, the Tokyo International Military Tribunal considered the international law of war crimes 'may be supplemented by *rules of justice and general principles of law*'.[19] The notion of these crimes being considered through the lens of moral standards was not an aspect of the Tribunal's deliberation beyond subsequent analyses in the context of the Genocide Convention.[20]

The foundational point as to the legal nature of the doctrine as it applies in a domestic context is stated succinctly by Mettraux as follows: 'Domestic law provides the basis to establish what responsibility and duties a superior had within the system in which he exercised a position of authority to prevent and punish crimes of subordinates.'[21]

The term 'moral' command responsibility is not an element of the doctrine of command responsibility at international law and it does not appear in the provisions of Australia's Commonwealth Criminal Code addressing command responsibility. Brereton's exculpation of the chain of command above the level of patrol commander from any criminal liability warrants greater attention in the form of an in-depth study of the law on point. These particular findings, it is contended, leave many questions open as to the application of the doctrine and, indeed, the Australian criminal law provisions, to the allegations of war crimes identified in the Brereton Report. It is the existence of these questions which triggered this study.

1.2 Terminology

The research subject of this thesis centres on the doctrine of command responsibility. Whilst the doctrine has been referred to variously as command responsibility or superior responsibility

---

[18] Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression* (United States Government Printing Office, 1946) vol 1, 31 (emphasis added).

[19] *USA v Araki (Separate Opinion of the President)* (Tokyo International Military Tribunal, 4 November 1948) in Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford University Press, 2008) 635 (emphasis added). See also John Pritchard and Sonia Zaide (eds), *The Tokyo War Crimes Trial* (Garland Publishing, 1981) vol 21.

[20] Bernard Victor Aloysius Röling, *The Tokyo Trial and Beyond*, ed Antonio Cassese (Polity Press, 1993) 96.

[21] Guénaël Mettraux, *The Law of Command Responsibility* (Oxford University Press, 2009) 60, paraphrasing *Prosecutor v Ntagerura (Appeal Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-46-A, 7 July 2006) [342]–[343].

or command and superior responsibility, both Article 28 of the Rome Statute[22] and section 268.115 of the Commonwealth Criminal Code[23] distinguish between the responsibility of military and military-like commanders and that of other superiors. In that light, and noting this research centres on the responsibility of military commanders, the doctrine is referred to as command responsibility throughout this work.

1.3 Research questions

This research comprises a set of nine interrelated analytical questions as follows:

(1) What is the purpose of the doctrine of command responsibility in international criminal law and how did it evolve to the point of its inclusion in Article 28 of the Rome Statute?
(2) What is the purpose of division 268 of the Commonwealth Criminal Code and in particular of section 268.115?
(3) How are the mental elements of Article 28 of the Rome Statute defined in the statute?
(4) How are the fault elements of section 268.115 of the Criminal Code defined in the code?
(5) How have the mental elements of Article 28 been interpreted at international law?
(6) How have the fault elements of section 268.115 been interpreted in Australian case law?
(7) Does the implementation of command responsibility in division 268 meet Australia's obligations under the Rome Statute?
(8) If Australia's implementation does not meet our obligations, does it trigger the application of the principle of complementarity under the statute?
(9) Do the provisions of division 268, in implementing Australia's obligations, provide an effective means of ensuring the responsibility of the commanders in whom the Australian public place their trust?

[22] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 28 ('*Rome Statute*').

[23] *Criminal Code Act 1995* (Cth) sch 1, s 268.115 ('*Criminal Code*').

1.4 Methodology

This is qualitative research using a case-based analysis of precedent using court reports and other legal documents as source material[24] and textual (documentary) analysis of other source material and is a positivist, doctrinal thesis. In terms of process, this research undoubtedly draws upon thematic analysis as a guiding set of principles since themes are identified, links and connections established and/or variations in case outcomes identified and a narrative provided about the data.[25] Noting this research is, at its core, exploratory research – examining or confirming whether an issue or problem exists and, if so, defining it[26] – inductive reasoning is relied upon, that is, a theory is induced from the data which is then capable of assessment by the extent to which the theory fits the data.[27] This statement of methodology is largely consistent with the methodologies employed by common lawyers on a regular basis.[28]

1.5 Scope and structure of the research

As a necessary precursor to the analysis of Australia's implementation of the command responsibility provisions of the Rome Statute, this study takes a deep consideration of the history and evolution of the doctrine of command responsibility. This is important in order to properly deconstruct and examine the requisite elements of the mode of liability both in international law and in domestic Australian law since jurisprudence on elemental construction and application is relevant in determining the implications of Australia's ratification and implementation of Article 28 of the Rome Statute. The scope of the research is thus broad enough to encompass the relevant international jurisprudence on the doctrine whilst refining the study to a focus on the Rome Statute provisions and, subsequently, the Australian Criminal Code provisions. Noting this is a comparative analysis, the research, by necessity, diverges into an analysis of the general principles of criminal responsibility under Australian criminal law such that the primary disciplinary focus of the work is international criminal law and the

[24] Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2013) 927.

[25] Alan Bryman, *Social Research Methods* (Oxford University Press, 5th ed, 2016) 587–8.

[26] Cane and Kritzer (n 24) 928.

[27] Vivienne Waller, Karen Farquharson and Deborah Dempsey, *Qualitative Social Research: Contemporary Methods for the Digital Age* (Sage, 2016) 20–1.

[28] Cane and Kritzer (n 24) 927.

secondary focus is domestic criminal law as encapsulated in the Commonwealth Criminal Code.

In light of the fact that a trigger for this research is the relevant findings and recommendations of the Brereton Inquiry into alleged war crimes by Australian special forces in Afghanistan, and that inquiry report is a major case study throughout this work, the applicable substance of and commentary on that report extends the scope of this research to include command and control structures and command philosophies in the Australian Defence Force. This is reflective of the multidisciplinary nature of this research and is demonstrative of the fact that the legal and elemental concepts of command and control, as described in the statute and code provisions on command responsibility, do not exist in a bubble but, rather, are part of the broader reality of the application of international humanitarian law and international criminal law in armed conflict. Drawing on the exceptional work of Nybondas in the area of command responsibility:

> Authors of legal writings who have a military background urge an understanding of the position of the military commander and of the circumstances in which they operate by the civilian jurists who act as prosecutors or judges in cases where international humanitarian law is applied.[29]

As the author of this doctoral writing, and in light of my military background, I concur with the authors considered by Nybondas. A work of this nature cannot be comprehensively undertaken from a purely legal perspective. The circumstances of command and control, and the philosophies and doctrines applied by commanders in the exercise of such command and control, must be considered in an analysis of this nature.

Following the introduction of the topic, including its contextual trigger and motivation, and an articulation of the research questions in this chapter, Chapter 2 discusses the evolution of the doctrine of command responsibility with a particular emphasis on the development of the elements of the mode of liability. Chapter 3 deconstructs and discusses the elements of command responsibility in the Rome Statute and sets the scene for the subsequent analysis of Australia's implementation of Article 28 into Australian criminal law in Chapter 4. By way of

[29] Maria Nybondas-Maarschalkerweerd, 'The command responsibility doctrine in international criminal law and its applicability to civilian superiors' (PhD Thesis, University of Amsterdam, 2009) 243.

natural progression, Chapter 5 discusses the means by which command responsibility may be proven under Australian law by deconstructing and analysing the physical and fault elements deriving from subsection 268.115(2) of the Criminal Code and, significantly, establishing the basis on which the elements of the doctrine in the Rome Statute and those in the code are distinguished.

Chapter 6 subsequently incorporates the command and control aspects of Australian military operations, including doctrinal and philosophical concepts of command and control, in order to properly analyse the findings and recommendations of the Brereton Inquiry and related commentary through the lens of the legal doctrine and legislative provisions. Chapter 6 also considers the implications of the 'remote commander' concept on the application of the law of command responsibility from an Australian perspective. Having set a baseline for an analysis of any divergence between the Rome Statute and Criminal Code provisions in earlier chapters, Chapter 7 expressly articulates such divergence in the application of the doctrine and discusses the implications thereof.

Chapter 8 synthesises the conclusions reached in the course of analyses in the substantive chapters and, by way of conclusion, addresses the research questions and the foundational thesis of this work – that Australia's implementation of Article 28 into Australian law via its incorporation into the Commonwealth Criminal Code, inclusive of the application of pre-existing general principles of criminal law in the code, has diverged from the terms of the Rome Statute to such an extent that the scope of conduct establishing criminal responsibility has been altered. Chapter 8 additionally addresses the trigger to this research by demonstrating the extent to which the findings and recommendations on higher command responsibility in the Brereton Report are a fundamentally flawed interpretation and application of the law.

CHAPTER 2
THE EVOLUTION OF THE DOCTRINE OF COMMAND RESPONSIBILITY

> The present trial does not begin at the end of a period of wrong, to make an end to it, but is being surrounded by the surge of the waves of a furious torrent, on the surface of which the wreckage of a civilization, guarded through the centuries, is floating hopelessly.[30]
>
> The fact that in the history of international humanitarian and criminal law so much attention and energy concentrated rather early on command and superior responsibility is due to the observations that its practical importance for ensuring respect and obedience to humanitarian law and, thereby, its contribution to the prevention of crimes under international law, was obvious right from the beginning.[31]

2.1 Introduction: the tidal ebb and flow of the doctrine

Military strategic thinkers have, for centuries, contemplated the notion of the responsibility of commanders for the conduct and outcome of warfare. More than two thousand years ago, the Chinese warrior philosopher Sun Tzu dictated that 'when troops flee, are insubordinate, distressed, collapse in disorder, or are routed, it is the fault of the general'.[32] This classical treatise was, however, devoted to military strategy and operational tactics rather than compliance with legal standards of humanitarian behaviour in war. Nonetheless, Sun Tzu did contemplate the fair treatment of captured enemies,[33] albeit not in the context of command responsibility, although the two concepts appear in the one text. In his Renaissance treatise on leadership and power, Niccolò Machiavelli contemplated the responsibility of military leaders in the position of heads of state through the prism of military ability, or *virtù*, 'a word translated into English by such terms as "talent", "skill", "ability", and "prowess", but seldom "virtue" in

---

[30] Final Argument by Dr Kurt Kauffmann, Defence Counsel for Ernst Kaltenbrunner, in Office of United States Chief of Counsel for Prosecution of Axis Criminality (n 18) supp B, 275.

[31] Roberta Arnold and Otto Triffterer, 'Article 28 – Responsibility of Commanders and Other Superiors' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (CH Beck Hart Nomos, 2nd ed, 2008) 795, 808.

[32] Sun Tzu, 'The Art of War', tr Samuel Griffith in Mark McNeilly, *Sun Tzu and the Art of Modern Warfare* (Oxford University Press, 2001) 237, 295.

[33] Ibid 249.

an ethical sense'.[34] In his roughly contemporaneous treatise, *The Art of War,* Machiavelli maintained the focus on the responsibility of commanders to ensure the military skill of subordinates and to 'suppress all disturbances, rather than fomenting them',[35] a statement which has also been described in translation as a duty to prevent 'disorders' amongst subordinates.[36] When read in the context of the overall work and, indeed, in the context of the responsibilities of military leadership as articulated in *The Prince*, Machiavelli's reference to the duty to prevent 'disturbances' or 'disorders' applies to order in the course of military action as compared to any duty to prevent violations of what would later become norms of military humanitarian conduct. The 'duty to prevent', as required by Machiavelli, is far removed from the 'duty to prevent' which forms the basis of the doctrine of command responsibility for war crimes as considered in later chapters. Clausewitz, in the first book of his seminal work *On War,* unambiguously rejected any notions of moderation in warfare[37] and venerated the military talents of generals above all else.[38]

The notion of the responsibility of command in a general sense evolved independently of and as a precursor to the responsibility of the commander as a mode of criminal liability. It has, however, been contended that 'the natural development of the former would lead to inevitable inclusion of the latter'[39] and the two references from Sun Tzu's *The Art of War* lend some weight to that argument. Putting aside the argument as to the inevitability of the evolution of the doctrine from merely operational responsibility to criminal liability, it is clear such responsibility in antiquity was considered through the lens of military outcomes alone. The lack of any express reference to the liability of commanders for the conduct of their troops, in contexts which, today, would fall under the broad umbrella of international humanitarian law, suggests that command responsibility in historical strategic discourse was purely a military

[34] Cary Nederman, 'Introduction' in Niccolò Machiavelli, *The Prince On the Art of Power,* tr WK Marriott (Watkins Publishing, 2012) 4, 14.

[35] Niccolò Machiavelli, *The Art of War,* tr Ellis Farneworth (Da Capo Press, 1956) 40 [trans of: *Dell'arte de la Guerra* (1521)]

[36] Niccolò Machiavelli, *The Art of War,* tr Henry Neville (Dover Publications, 2006) 29 [trans of: *Dell'arte de la Guerra* (1521)]

[37] Carl von Clausewitz, *On the Nature of War,* tr J. Graham (Penguin Books, 2005) 7 [trans of: *Vom Kriege* (1832)].

[38] Ibid 59.

[39] William Parks, 'Command Responsibility for War Crimes' (1973) 62 *Military Law Review* 1, 1.

concept in terms of strategic or tactical outcomes. A clear demarcation thus exists between the responsibility of commanders for the conduct of subordinates in achieving military objectives and such responsibility for the conduct of subordinates in their compliance with standards of humanitarian behaviour in warfare. This chapter does not entirely discard historical statements as to the responsibility of commanders for the conduct of subordinates in achieving military objectives.

As norms of international humanitarian law developed so too did the responsibility of commanders for their enforcement – that much becomes apparent as this analysis progresses. It would be irresponsible to ignore the responsibilities accorded military commanders in the centuries preceding the formal acceptance of international humanitarian norms. This stems from the fact that inherent in the doctrine of command responsibility is a layer of practical military necessity in the form of the need to maintain discipline in order to effect military operations.[40] That fact is clear in the historical antecedents to the development of the legal doctrine. Indeed, even Machiavelli, with his strict adherence to the commander's responsibility for the execution of battle plans, contemplated that consideration may need to be given to other more disparate concepts in the course of battle, as follows:

> Military theory could not stop with making rules for the formation of the correct battle order; it had also to scrutinize the course of events during the combat action … [Machiavelli] had made a perfunctory acknowledgement of the importance of the role of the general.[41]

This recognition on the part of one classical military theorist that command responsibility may extend beyond the order of battle and the conduct of operations to other, undefined, concepts clearly sets the scene for the analysis provided in this chapter and for the development of liability for the violation of humanitarian norms in warfare. Nonetheless, demarcation between the two notions of responsibility is essential in order to properly do justice to any analysis of the doctrine through its intended lens of criminal liability. Whilst the former concept of responsibility may undoubtedly inform the development of the latter to some extent, this

[40] See, eg, Land Warfare Development Centre, *Command, Leadership and Management* (Land Warfare Doctrine, LWD 0.0, 17 November 2003) 2-20.

[41] Felix Gilbert, 'Machiavelli: The Renaissance of the Art of War' in Peter Paret (ed), *Makers of Modern Strategy from Machiavelli to the Nuclear Age* (Princeton University Press, 1986) 11, 30.

chapter considers the evolution of the latter concept into the legal doctrine of command responsibility as it is known today.

As is shown, such evolution is far from a smooth continuum evidencing the progressive development of this area of law which somehow reflects the changing nature of warfare and leadership in warfare. Rather, it ebbs and flows like a tidal current of law with the acceptance or rejection of, or silence on, earlier decisions on the application of the doctrine appearing with each wave of jurisprudence or treaty law.[42] The first wave considers pre-World War II treatments of the doctrine in the form of domestic law and treaty provisions and commentary, which went largely untested in terms of practical application. The latter stages of this wave, however, generated momentum in the areas of elements of liability and requisite duties, which are given substantial attention as a precursor to discussion of third wave developments in the aftermath of the Second World War – an era to which greater attention is traditionally given in considering command responsibility.

The second wave is what this thesis describes as the 'high-water mark' of the doctrine including the seminal judgment in *Yamashita* and subsequent decisions of that period which either ebbed or flowed from the high threshold test established in *Yamashita*. The third wave evidences attempts by the ad hoc tribunals to refine the rules as broadly articulated in the post-Second World War jurisprudence and thus articulate a largely consistent doctrinal position. Consistent with the overall theme of this research, the analysis of each evolutionary wave includes, where possible, consideration of the elements of offences applied in the application of the doctrine.

Analysis of the evolution of the doctrine is significant insofar as it evidences a continued focus on the fact that, from a normative perspective, positions of command have a critical role to play in the enforcement of norms of international humanitarian law. Regardless of the ebb and flow of the substantive nature of the doctrine in terms of the extent of liability imposed, the quantum of requisite knowledge in imposing liability, the material nature of the conduct being by commission or omission or, indeed, whether mental elements beyond knowledge have been considered relevant, the normative responsibility of commanders remains a constant. This chapter thus explores the fluid development of the elements of the doctrine within its consistent

[42] A view exists that the jurisprudence on the doctrine is merely confused.

intent to ensure humanitarian law is observed through inherent mechanisms of command. To quote the United States Supreme Court in the case of *In Re Yamashita*, 'the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates'.[43]

2.2 The first wave: pre-World War II narrow treatment of the doctrine

The period that this thesis refers to collectively as the 'first wave' of the evolution of the doctrine extends from the generally recognised advent of modern international humanitarian law to the post-First World War trials, during which the concept of command responsibility was treated very narrowly. Arguably such narrow treatment is merely reflective of the fact that international humanitarian law was, itself, in its infancy through much of that period. Notwithstanding that argument, the first wave did bring with it some foundational bases on which the doctrine was to subsequently build and from which much later jurisprudence was to draw.

2.2.1 Lieber Code to Hague Conventions

The 1863 Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber of the US War Department and subsequently referred to as the 'Lieber Code', considers the responsibility of commanders for war crimes committed by subordinates at Article 71, which provides:

> Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeeds.[44]

Whilst this provision does impose responsibility on commanders for the actions of their subordinates, it is limited to acts of commission on the part of the commander in ordering or encouraging the commission of the acts which would constitute war crimes in a contemporary setting. Article 71 of the Lieber Code thus provides a very narrow application of command

[43] 327 US 1, 15 (1946).

[44] United States War Department, 'Instructions for the Government of Armies of the United States in the Field' (1863) art 71 in United States War Department, *The 1863 Laws of War* (Stackpole Books, 2005) 49.

responsibility relying exclusively on the intentional conduct of the commander as opposed to any element of negligent or reckless dereliction of duty. As Dinstein states, 'command responsibility is all about dereliction of duty'.[45] The Articles of War annexed to the 1863 instructions do, however, provide for the criminal liability of military superiors for the conduct of subordinates in the event the latter engages in 'mutiny or sedition'[46] or 'disorders'[47] and the superior fails to suppress and/or report such conduct. Whilst these articles do not expressly contemplate the responsibility of commanders for the commission of war crimes by subordinates, they do provide the layer of liability by omission to act which is at the heart of the doctrine as it is presently applied.

The general legal responsibility of commanders over subordinates, and the resultant fundamental humanitarian law principle of 'responsible command',[48] was established in the Hague Regulations of 1899 and 1907, in the context of according the rights of belligerents to members of armed forces. Article 1 of the Regulations annexed to Convention No 4 provides, inter alia, as follows:

> The laws, rights, and duties of war apply not only to the army, but also to militia and corps of volunteers, fulfilling the following conditions:–
>
> 1. That of being commanded by a person responsible for his subordinates.[49]

Whilst an argument has been posited that the criminal concept of command responsibility may 'constitute a penal derivative' of the principle of responsible command at international law,[50] the treaty provisions do not expressly address such responsibility on the part of commanders

[45] Yoram Dinstein, *The Conduct of Hostilities under the Law of Armed Conflict* (Cambridge University Press, 2004) 238.

[46] United States War Department, 'Articles of War: An Act for Establishing Rules and Articles for the Government of the Armies of the United States' (1863) art 8 in US War Department, *The 1863 Laws of War* (n 44) 5.

[47] Ibid art 32, 11.

[48] Chantal Meloni, *Command Responsibility in International Criminal Law* (TMC Asser Press, 2010) 35.

[49] *Hague Convention IV Respecting the Laws and Customs of War on Land*, signed 18 October 1907, 36 Stat 2277; TS 539 (entered into force 26 January 1910) annex art 1.

[50] Mettraux (n 21) 55.

through the prism of criminal law with its requisite imposition of penal sanctions.[51] Notwithstanding Article 1 is very narrowly constructed in terms of its application to the qualification of lawful combatants with respect to rights and obligations, commentary on the passage of the regulations contemplated instances 'where a military officer refuses to receive well grounded complaints, or declines to receive demands for redress, in respect to the acts or conduct of the troops under his command'.[52] Further, Article 3 of the 1907 Fourth Convention provides for the general responsibility of a party to a conflict for crimes committed by soldiers of the party. Article 3 provides as follows: 'A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to make compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.'[53]

The Hague Conventions do not expressly provide for the accountability of individual commanders, notwithstanding commentary which references individual liability. Such commentary arising from the Hague Peace Conference evidences a 'growing recognition and acceptance of the principles of individual culpability for violations of the international law of war crimes'.[54] Further, the compensatory terminology adopted in Article 3 and the absence of any reference to criminal penalties makes it clear the convention does not contemplate criminal liability.

Noting the Hague Conventions are the earliest examples of modern multinational treaties codifying the laws of war,[55] these foundational statements arising from the Hague Peace Conferences and expressed in Article 1 of the Hague Regulations and Article 3 of the Fourth

---

[51] Maria Nybondas, *Command Responsibility and its Applicability to Civilian Superiors* (TMC Asser Press, 2010) 12.

[52] Alexander Pearce Higgins, *The Hague Peace Conferences and other International Conferences Concerning the Laws and Usages of War: Texts of Conventions with Commentaries* (Cambridge University Press, 1909) 264.

[53] *Hague Convention IV Respecting the Laws and Customs of War on Land* (n 49) art 3.

[54] Timothy McCormack, 'From Sun Tzu to the Sixth Committee', in Timothy McCormack and Gerry Simpson (eds), *The Law of War Crimes: National and International Approaches* (Kluwer Law International, 1997) 31, 43.

[55] Ann Ching, 'Evolution of the Command Responsibility Doctrine in Light of the Celebici Decision of the International Criminal Tribunal for the Former Yugoslavia' (1999) 25(1) *North Carolina Journal of International Law and Commercial Regulation* 167, 171.

Hague Convention undoubtedly set the scene for subsequent conventional articulation of command responsibility.[56] The humanitarian law principle of responsible command has been described as providing an 'interpretive tool to determine the scope of the doctrine of command responsibility'.[57] This interpretive tool would later be used by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in its consideration of its jurisdiction in matters involving command responsibility.[58] In its analysis of the jurisdictional scope of the doctrine, the ICTY drew and applied the nexus between the principle of responsible command and the doctrine of command responsibility in an authoritative manner. The Appeals Chamber in *Hadžihasanović* held that 'command responsibility is the most effective method by which international criminal law can enforce responsible command'.[59] It is the notion of responsible command, as established in the Hague Conventions, which underpins the normative basis of the doctrine – that the authority vested in command appointments is the means by which the protections afforded under international humanitarian law are maintained.

2.2.2 The 1919 Commission and Leipzig Trials

In the immediate aftermath of the First World War collective responsibility was accorded Germany and its allies, as stated in the 'War Guilt Clause' of the *Treaty of Versailles* which sought to provide a legal basis for Germany's responsibility and a lawful justification for demands for reparations.[60] Articles 228 and 229 provided a mechanism by which individuals could be held responsible for committing acts 'in violation of the laws and customs of war'.[61] Article 228 considered such liability in the context of the individual's 'rank, office or employment which they held under the German authorities'.[62] These treaty provisions are

---

[56] See Ilias Bantekas, 'The Contemporary Law of Superior Responsibility' (1999) 93(3) *American Journal of International Law* 573, 573.

[57] Mettraux (n 21) 54.

[58] See, eg, *Prosecutor v Hadžihasanović (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-01-47-AR72, 16 July 2003) ('*Hadžihasanović Appeal Jurisdiction Decision*') [16].

[59] Ibid.

[60] James Whisker and Kevin Spiker Jr, *Command Responsibility: Holding Military Leaders Accountable for Their Troops* (Academica Press, 2020) 53.

[61] *Treaty of Peace Between the Allied and Associated Powers and Germany*, signed 28 June 1919, ATS 1 (entered into force 10 January 1920) art 228 ('*Treaty of Versailles*').

[62] Ibid.

vague in terms of the breadth of individual liability. Noting the doctrine of command responsibility was immature at the time of the drafting of the *Treaty of Versailles*, a reasonable inference exists that Articles 228 and 229 were limited to individual liability for war crimes by commission as opposed to the broader liability afforded under the doctrine encompassing conduct by omission with respect to the criminal acts of subordinates. During preliminary peace conferences, in advance of the conclusion of the treaty, consideration was given to the prosecution of the German military and political leadership in addition to the 'material perpetrators of the crimes'.[63]

Such consideration manifested in the establishment of the Commission on the Responsibilities of the Authors of the War and the Enforcement of Penalties. The commission was required to inquire into and report on, inter alia, the following issues:

> 1. The responsibility of the authors of the war.
> 2. The facts as to breaches of the laws and customs or war committed by the forces of the German Empire and their Allies … during the present war.
> 3. The degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staffs, and other individuals, however highly placed.[64]

Chapter III of the commission's report, entitled 'Personal Responsibility', provided commentary in support of the report's conclusions which goes to the heart of the doctrine of command responsibility and the broad intent of the doctrine as a mechanism of deterrence, the mitigation of the effects of war and the enforcement of humanitarian law. In that regard, the commission commented that persons 'in high authority were cognizant of and could at least have mitigated the barbarities committed during the course of the war. A word from them would have brought about a different method in the action of their subordinates'.[65] Significantly, this commentary sets down elements of the conduct constituting criminality under the doctrine. Cognizance of the offending of subordinates equates broadly to the mental element of knowledge, albeit the extent of requisite knowledge is unclear. The use of the term

---

[63] Meloni (n 48) 37.

[64] *Report of the Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties* (Report, 29 March 1919) in (1920) 14 *American Journal of International Law* 95.

[65] Ibid 117.

'cognizant' tends towards a requirement of specific knowledge on the part of commanders as opposed to some lesser standard of knowledge akin to constructive knowledge along the lines of what would later be defined as a 'reason to know' test.[66] The language in the report of the commission evidences a historical view that the requisite mental element of command responsibility is actual knowledge.[67]

As considered in later analyses in this thesis regarding elements of this mode of criminal liability under the Rome Statute and under Australian criminal law, cognizance may equate to awareness which subsequently has relevance to a determination of the mental element of knowledge. Similarly, this commentary as to the ability of persons in authority to influence the conduct of subordinates goes to the duty of commanders and other superiors to prevent the commission of war crimes by their subordinates. Perhaps more significantly, in terms of an elements analysis, the United States' delegation submitted reservations to the commission's proposals which included what that delegation considered to be fundamental requirements in establishing liability on the basis of omission,[68] as follows:

> To establish responsibility in such cases it is elementary that the individual sought to be punished should have knowledge of the commission of the acts of a criminal nature and that he should have possessed the power as well as the authority to prevent, to put an end to, or to repress them. Neither knowledge of commission nor ability to prevent is alone sufficient. The duty or obligation to act is essential. They must exist in conjunction, and a standard of liability which does not include them all is to be rejected.[69]

The importance of this statement in a relatively obscure report submitted in a process of treaty making cannot be understated. This is a clear recognition of the doctrine of command responsibility in its purest form – liability for conduct by omission on the part of superiors for the acts of subordinates. It also sets down an elemental test for the application of the doctrine

---

[66] SC Res 827, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN Doc S/RES/1877 (7 July 2009) art 6(3) ('*ICTY Statute*').

[67] Gideon Boas, James Bischoff and Natalie Reid, *International Criminal Law Practitioner Library Volume I: Forms of Responsibility in International Criminal Law* (Cambridge University Press, 2007) 159.

[68] Meloni (n 48) 39.

[69] *Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities* (n 14) 143.

to afford criminal liability to individuals which is reflective of subsequent developments to date. It does, however, retain the narrow treatment identified in this first wave of its evolution insofar as this test requires strict knowledge on the part of the superior of the commission of the acts of subordinates as opposed to any mental elements less than knowledge, which surfaced as the doctrine evolved.

Whilst the *Treaty of Versailles* provides for a very narrow application of the doctrine of command responsibility, the report of the treaty's precursory commission opens the door to a broader application of the doctrine akin to more contemporary developments. The fact the commentary and conclusions in the commission's report did not subsequently make their way into the treaty in the broad terminology proposed is likely a result of dissent on the part of delegations to the commission. The Japanese delegation, for example, dissented from a resolution to prosecute 'highly placed enemies on the sole ground that they abstained from preventing, putting an end to, or repressing acts in violation of the laws and customs of war'.[70] Nonetheless, the treaty demanded the instigation of tribunal proceedings against Germans in high authority[71] which culminated in the prosecution of a number of high-ranking officers before the Supreme Court of the Reich at Leipzig. These trials saw the sole conviction of a mid-level officer of the rank of major on the basis of command responsibility,[72] albeit his guilty finding was determined due to an act of commission in ordering the execution of prisoners rather than responsibility by omission which defines command responsibility *stricto sensu*.[73]

What is clear from those trials is that principles consistent with the doctrine of command responsibility as it is applied today were considered and applied by the Court,[74] at least in the context of the sole conviction recorded. At the very least, the notion of affording criminal liability to a superior for failing to prevent criminal offending by a subordinate was not foreign to international law by the time of the war crimes trials in the aftermath of the Second World War.[75]

---

[70] Parks (n 39) 12.

[71] *Treaty of Versailles* (n 61) arts 227, 228.

[72] Parks (n 39) 12; Whisker and Spiker (n 60) 57.

[73] Meloni (n 48) 41–2.

[74] Boas, Bischoff and Reid (n 67) 148.

[75] Nybondas (n 51) 20.

Regardless of the outcomes of the trials which generated from the *Treaty of Versailles* and its contributory commission, this episode makes a valuable contribution to any analysis of the evolution of the doctrine and, significantly, to analyses of the requisite elements underpinning the mode of criminal liability provided by command responsibility. The consideration of mental elements, the ability to prevent or suppress offending, and the duty of commanders to act, which first arose during this post-First World War period, also provides an appropriate segue to the next wave of the evolution of the doctrine in the aftermath of the Second World War.

2.3 The second wave: post-World War II application of the doctrine

The doctrine of command responsibility is broadly viewed as having a significant nexus with the war crimes trials following the Second World War, notwithstanding the statutes underpinning the major international military tribunals at Nuremberg and Tokyo did not contain explicit provisions pertaining to command responsibility.[76] Indeed, the most significant cases in terms of the articulation of doctrinal and legal elements came from subsequent military trials conducted under the auspices of single-country prosecutions as opposed to the international military tribunal regime.[77] The prosecution of atrocities in the aftermath of World War II did, however, spawn a proliferation of treaty regimes[78] and an 'explosion in the codification of customs of warfare'.[79] This proliferation of law relating to conduct in war included doctrinal developments and jurisprudence in respect of the liability of individuals for their conduct and, relevantly, for the conduct of subordinates.

It is this increased focus on individual criminal liability which largely distinguishes this 'second wave' of the evolution of the doctrine from its earlier iteration. Concurrent with that focus is a broadening of the application of the doctrine such that a stricter degree of liability was progressively applied over the period encompassing the post-World War II trials

[76] Greg Vetter, 'Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)' (2000) 25(1) *Yale Journal of International Law* 89, 105.

[77] Ibid 108.

[78] Timothy McCormack, 'Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law' (1997) 60(3) *Albany Law Review* 681, 720.

[79] Ching (n 55) 174.

culminating in the strict standard applied in *Yamashita*, considered in detail below. This section discusses the development and application of the doctrine during that period and introduces the array of cases which provide elemental analyses of relevance to the evolution of the doctrine as it is now known and which lay the foundation for later jurisprudence.

2.3.1 The London Charter and the Nuremberg Tribunal

Early reports of atrocities committed by the Axis powers led the Allies to revisit the intent of the Commission on the Responsibilities of the Authors of the War and the Enforcement of Penalties but, as Burnett put it, 'this time the Allies would not be denied justice'.[80] An argument that the convictions recorded against the Nazi major war criminals at the Nuremberg International Military Tribunal (IMT) were 'only modestly influenced by the doctrine of command responsibility'[81] certainly carries weight insofar as the weight of evidence demonstrated conduct by participation more often than conduct by omission.

To reject outright the significance of the IMT trials to the development of the doctrine of command responsibility, however, is to ignore the clear language of the London Agreement, to which was annexed the Charter of the IMT which served as the statute of the Tribunal. Article 6 of the charter stated, inter alia: 'Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.'[82]

Central to the mode of liability in Article 6 is the notion of the existence of a common plan or conspiracy. In preparing indictments it was considered that 'conspiracy caught everyone in the

[80] Western Burnett, 'Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra' (1985) 107 *Military Law Review* 71, 84.

[81] Meloni (n 48) 50.

[82] United Nations, *Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 82 UNTS 280 (8 August 1945) art 6, in Office of United States Chief of Counsel for Prosecution of Axis Criminality (n 18) vol 1, 5.

net regardless of their actual responsibility for specific acts'.[83] The responsibility of persons as ancillaries to the principal offending is thus limited to criminality arising directly from the plan or conspiracy. This statement is clearly in the nature of conduct by commission rather than by omission, which is at the core of liability under the doctrine. Indeed, the Tribunal's hesitancy to convict on the basis of omission is plainly evidenced in the judgment of the Nuremberg Tribunal regarding the defendant Karl Dönitz, formerly the Grand Admiral of the German Navy. In that judgment, in which the killing of survivors of shipwrecked vessels by German U-boat crews was found proven and certain orders by Dönitz were relied upon, the Tribunal held: 'The Tribunal is of the opinion that the evidence does not establish with the certainty required that Dönitz deliberately ordered the killing of shipwrecked survivors. The orders were undoubtedly ambiguous, and deserve the strongest censure.'[84]

The fact the killing of survivors by U-boat crews under the overall command of Dönitz was found proven to the requisite standard, and the fact that orders under the defendant's hand were introduced into evidence but found to be too ambiguous to convict him for ordering the killing demonstrates the Tribunal's adherence to imposing criminal liability for conduct by commission. It unambiguously ignores liability for conduct by omission such that the doctrine of command responsibility in its purest form is distinguished from the decisions at Nuremberg. This judgment does not contemplate the omissive 'failure to prevent' element of the doctrine.

It is, however, the broad apportionment of liability to those in positions of authority which gives the statement in Article 6 of the charter weight in the development of the doctrine. The fact that Article 6 is limited to participatory conduct does not negate the influence of the Nuremberg Tribunal on the development of the doctrine of command responsibility. Whilst convictions recorded by the IMT were for conduct by commission, largely due to the fact the extent of participation by leaders in the subject offending made any consideration of conduct

[83] Richard Overy, 'The Nuremberg Trials: International Law in the Making' in Philippe Sands (ed), *From Nuremberg to the Hague: The Future of International Criminal Justice* (Cambridge University Press, 2003) 1, 16.

[84] International Military Tribunal Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal* (Official Record, 1947) vol 1, 313.

by omission to act unnecessary,[85] the jurisprudence of the IMT provides the earliest clear enunciation of individual responsibility under international criminal law. Statements to that effect have been cited since that time before the ad hoc tribunals.[86] As the judgment states: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[87]

The Nuremberg Tribunal is perhaps as famous for its trial of non-military leaders as it is for its proceedings against senior military officers. In this regard, the concept of command responsibility has been described, almost colloquially, as a much broader concept than the doctrine warrants, a phenomenon likely attributable to the criminal liability afforded the major war criminals at Nuremberg.[88]

The legacy of Nuremberg and its emphasis on individual responsibility arising from a conspiracy to commit crimes would resurface in Jerusalem in the 1961 trial of Adolf Eichmann. As Arendt stated, albeit somewhat contentiously, 'the Eichmann trial, then, was in actual fact no more, but also no less, than the last of the numerous Successor trials which followed the Nuremberg trial'.[89] The District Court of Jerusalem held that:

> The extent to which any one of the many criminals were close to, or remote from, the actual killer of the victim, means nothing as far as the measure of his responsibility is concerned. On the contrary, in general, the degree of responsibility increases as we

[85] William Fenrick, 'Some International Law Problems Related to Prosecutions before the International Criminal Tribunal for the Former Yugoslavia' (1995) 6(1) *Duke Journal of Comparative & International Law* 103, 112.

[86] Meloni (n 48) 13. See also Andrew Clapham, 'Issues of Complexity, Complicity and Complementarity: From the Nuremberg Trials to the Dawn of the New International Criminal Court' in Philippe Sands (ed), *From Nuremberg to the Hague: The Future of International Criminal Justice* (Cambridge University Press, 2003) 30, 31.

[87] International Military Tribunal Nuremberg (n 84) 223.

[88] Fenrick (n 85) 110.

[89] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Viking Press, 1963) 242.

> draw further away from the man who uses the fatal instrument with his own hands and reach the higher ranks of command.[90]

The Court in *Eichmann* clearly identified the concept of the 'remote commander' which would come to contemporary prominence before the International Criminal Court in the *Bemba* case.[91] This concept is considered in greater detail in the analysis of Australia's hierarchical structure on operational deployments in later chapters of this thesis. Significantly, the *Eichmann* judgment identified the fact that the subjective gravity of the conduct of commanders by act or omission is 'not well reflected in traditional modes of liability in national criminal law' due to the fact the remoteness of command can never satisfy objective elements of domestic crimes.[92] This point, again, becomes relevant to later analyses of Australian law on the doctrine in this thesis. Whilst synergies have been drawn between the Nuremberg Tribunal and the *Eichmann* trial, particularly in the broad context of command responsibility, it should be noted that the core mode of superior liability underpinning the Nuremberg judgments was the existence of a conspiracy, whereas criminal conspiracy was expressly rejected by the trial judges in *Eichmann* contrary to the Attorney-General's argument in closing for the prosecution.[93] Notwithstanding that distinction, it is clear that the IMT at Nuremberg made a contribution to the evolution of the doctrine of command responsibility, albeit not necessarily the 'landmark contribution'[94] enthusiastically espoused by Whisker and Spiker, and the *Eichmann* judgment added to that contribution.

2.3.2 The Tokyo Trials

The Tokyo Charter, which laid down the constitution including the rules of proceedings, the jurisdiction and the functions of the International Military Tribunal for the Far East (IMT-FE),

---

[90] *Attorney-General v Adolf Eichmann* (1961) 36 ILR 18, 197. See also *Prosecutor v Blaškić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [788] n 1716 ('*Blaškić Trial Judgment*').

[91] *Prosecutor v Bemba (Judgment)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08, 21 March 2016) ('*Bemba Trial Judgment*'); *Prosecutor v Bemba (Judgment on Appeal)* (International Criminal Court, Appeals Chamber, Case No ICC-01/05-01/08, 8 June 2018) ('*Bemba Appeal Judgment*').

[92] Héctor Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Hart Publishing, 2010) 3.

[93] Lord Russell of Liverpool, *The Trial of Adolf Eichmann* (William Heinemann, 1962) 290.

[94] Whisker and Spiker (n 60) 68.

largely mirrored the London Charter which established the Nuremberg Tribunal.[95] A key distinction between the Nuremberg and Tokyo charters was that in the latter only defendants who were charged with 'crimes against peace' as stand-alone charges, or with 'crimes against peace' and 'war crimes' or 'crimes against humanity', were brought to trial, the upshot being that allegations of crimes against peace were a prerequisite to other charges.[96] Article 5 of the Tokyo Charter provided that: 'The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offences which include Crimes against Peace.'[97]

The charter went on to list the crimes 'for which there shall be individual responsibility',[98] which included conventional war crimes, and restated verbatim the 'common plan or conspiracy' caveat to the mode of liability afforded leaders and other accessorial parties to the offending in Article 6 of the *Charter of the International Military Tribunal* at Nuremberg, discussed above. The Tokyo Charter clearly recognised the individual responsibility of those in positions of command but, as at Nuremberg, adopted a conduct by commission approach to such responsibility rather than a conduct by omission approach which is a core component of the doctrine in its strict application.

In terms of the application of the doctrine of command responsibility, this limitation on the jurisdiction of the Tribunal tended to remove military commanders from the prosecution's list other than those who were 'chosen and indicted for exemplary punishment'.[99] More operational or tactical commanders were left to be considered for prosecution by Allied national tribunals. This, again, is consistent with the Nuremberg approach to selective prosecutions. The majority judgment of the Tokyo Tribunal included significant commentary on command responsibility which included analyses of the required elements and consideration of the hierarchical layers of command.

---

[95] Röling (n 20) 2.

[96] Ibid 3.

[97] Boister and Cryer (n 19) 8.

[98] Ibid.

[99] Alan Lyon, *Japanese War Crimes: The Trials of the Naoetsu Camp Guards* (Australian Military History Publications, 2000) 15.

With respect to the responsibility for war crimes against prisoners, the Tribunal held that, 'in general, the responsibility for prisoners held by Japan may be stated to have rested upon', inter alia, 'military or naval officers in command of formations having prisoners in their possession'.[100] The liability imposed by way of a breach of duty was emphasised in the judgment as follows:

> It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes. Such persons fail in this duty and become responsible for ill treatment of prisoners if:
>
> (1) They fail to establish such a system.
>
> (2) If having established such a system, they fail to secure its continued and efficient working.
>
> Each of such persons has a duty to ascertain that the system is working and if he neglects to do so he is responsible. He does not discharge his duty by merely instituting an appropriate system and thereafter neglecting to learn of its application. An Army Commander or a Minister of War, for example, must be at the same pains to ensure obedience to his orders in this respect as he would in respect of other orders he has issued on the matters of the first importance.[101]

The requisite mental or fault element was described as follows:

> Such persons are not responsible if a proper system and its continuous efficient functioning be provided for and conventional war crimes be committed unless:
>
> (1) They had knowledge that such crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or
>
> (2) They are at fault in having failed to acquire such knowledge.[102]

A fault element of direct knowledge of the commission of crimes was expressly imposed, as was an alternative element of constructive knowledge in the case of failure to acquire such knowledge. The latter, whilst imposing an affirmative duty to acquire knowledge of the commission of crimes, imposed a standard akin to the 'should have known' standard of fault,

---

[100] Majority Judgment of the International Military Tribunal for the Far East, 12 November 1948, in Boister and Cryer (n 19) 82.

[101] Ibid 83.

[102] Ibid.

discussed in the analysis of *Yamashita* below, and more broadly in elemental analyses in this thesis. Further, this articulation of the requirement of knowledge includes the notions of a 'failure to prevent' and the 'power to prevent', both of which were enlivened in later evolutions of the doctrine.

On its face, this judgment reflects a mode of liability arising from a breach of duty and subsequent omission to act akin to the doctrine in its strict application. It is important, however, to place this judgment in the context within which defendants were selected and indictments laid. As discussed above, the charter provided for jurisdiction over commanders where an underlying plan or conspiracy existed such that ancillary liability was limited to criminality arising from the plan or conspiracy. This tends towards conduct by commission[103] and is evidenced on the material facts of the trials demonstrating the particular conduct of the military defendants and their respective roles in positions of command authority.[104] The judgment does, nonetheless, provide a valid source of judicial reasoning on the application of the doctrine. This judgment is especially significant in terms of its articulation of the responsibilities of high office and the ability of such office to take action as well as the reliance on the assurances or reporting of subordinates. The latter point is stated as follows:

> It is not enough for the exculpation of a person, otherwise responsible, for him to show that he accepted assurances from others more directly associated with the control of the prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or to any other circumstances he should have been put upon further enquiry as to whether those assurances were true or untrue.[105]

Whilst the *Hirota* case[106] involved the responsibility of non-military superiors rather than military commanders, the IMT-FE determined that Hirota's reliance on assurances that war

[103] But see Röling (n 20) 74 in which Justice Röling considers the Tokyo judgment to mark a 'big step forward in upholding responsibility for omission'.

[104] See Boister and Cryer (n 19) 594–625.

[105] Majority Judgment (n 100) 83.

[106] Hirota Kōki was the Foreign Minister of Japan in 1933 and was the Prime Minister when Japan signed the Tripartite Pact with Germany and Italy but was removed from office by the Japanese military in 1938. The IMT-FE found that as Foreign Minister, between December 1937 and February 1938, Hirota received reports of Japanese atrocities after the fall of Nanking but was derelict in his duty in 'not insisting before the Cabinet that immediate action be taken to put an end to the atrocities … [h]is inaction amount[ing] to criminal negligence':

crimes would be halted, knowing that such assurances were not being implemented, as opposed to taking more affirmative action, was a dereliction of duty amounting to criminal negligence.[107] The Tribunal thus relied on the duty aspect of the doctrine but applied a negligence mental element to the failure to act on reports of war crimes. This, in effect, imposed a requisite standard of proactivity on the duty.[108]

A mental element of knowledge was expressly applied to the fact of the occurrence of war crimes and to the fact the defendant did not take steps to prevent their occurrence. On its face, this would appear to be a case of conduct by omission but the very high degree of knowledge held on the part of Hirota in combination with his apparent acquiescence in the ongoing commission of crimes may tend towards offending by commission. Further, Count 55 on the indictment alleged the defendants 'deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches thereof, and thereby violated the laws of war'.[109] The form of the indictment thus evidences an intention on the part of the prosecution to allege conduct by commission of the actions grounding the charges.

This indictment provides a mechanism of imposing command responsibility in the absence of express command responsibility provisions by alleging 'negative criminality'.[110] The caveat that the disregard of duty 'thereby violated the laws of war' tends, however, to revert the offending conduct from a mode of liability to a discrete offence against the laws of war. Such reversion is inconsistent with the doctrine as it has evolved to date and, in many respects, as it evolved to the date of the indictments at Tokyo. This gives rise to a 'separate offence' argument[111] which, again, is inconsistent with the doctrine *stricto sensu* as it has evolved since the post-Second World War trials.

Lord Russell of Liverpool, *The Knights of Bushido: A Short History of Japanese War Crimes* (Cassell & Company, 1958) 289. See also Sandra Wilson et al, *Japanese War Criminals: The Politics of Justice After the Second World War* (Columbia University Press, 2017) 95.

[107] Boister and Cryer (n 19) 604.

[108] van Sliedregt (n 16) 129.

[109] Indictment, in Boister and Cryer (n 19) 33.

[110] Vetter (n 76) 108.

[111] See, eg, Robert Cribb, 'Conventional War Crimes: The International Military Tribunal for the Far East and the Ill-Treatment of Prisoners of War and Civilian Internees' in Viviane Dittrich et al (eds), *The Tokyo Tribunal: Perspectives on Law, History and Memory* (Torkel Opsahl Academic Publisher, 2020) 177, 185.

Reminiscent of the earlier decision of a national military tribunal in *Yamashita*, the IMT-FE determined 'that crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge'.[112] The imputation of knowledge, either directly or constructively, on the basis of the prevailing circumstances is a relevant consideration in later analyses of the doctrine in the Rome Statute and under Australian law. A further relevant source of judicial reasoning drawn from the Tokyo judgment is the dissenting opinion of Justice Röling in which the learned judge argued that a supreme military commander may only be charged with a failure to prevent war crimes in very limited circumstances.[113] Röling drew substantially on dissenting opinions in *Yamashita* in positing and subsequently describing the individual elements of a three-part test in order to determine liability of commanders for omissions to act.

The elements were stated as knowledge, power and duty, and are 'correlated in that the duty may imply the duty to know. Ignorance is no excuse in case the person in charge could and should have known.'[114] 'Power' was subsequently equated with a legal duty to exercise the power to prevent the criminal acts and the duty exists once knowledge and power manifest.[115] In terms of the fault element of knowledge, Röling clearly contemplated the constructive 'should have known' standard as espoused in *Yamashita* and later jurisprudence on point. The elements, as articulated by Röling, are thus: '(1) that he knew or should have known of the acts of the subordinates; (2) that he had the power to prevent the acts; and (3) that he had the duty to prevent these acts'.[116]

Of relevance to the element of 'power' is the practical concept of control, that is, the extent to which the commander could exercise control over subordinates. This has highly operational implications, as will be seen in subsequent analyses of the doctrine in contemporary application in this thesis. The Tokyo Tribunal, in its recorded findings on the attribution of command responsibility, did not afford weight to the extent or degree of control commanders had over

[112] Majority Judgment (n 100) 83.

[113] Röling (n 20) 11.

[114] Opinion of the Member for the Netherlands (12 November 1948), in Boister and Cryer (n 19) 706.

[115] Ibid 706–7.

[116] Ibid.

subordinates.[117] The Tribunal did not consider evidence of an absence of tangible or real control on the part of the non-military superiors in affording liability for the conduct of military offenders in the field. This aspect of the judgment was criticised by Röling in his dissenting opinion, the substance of which was limited to non-military superiors.[118] That limitation does not, however, deny the opinion weight when considering the notion of 'effective' control in a contemporary military setting.

2.3.3 Yamashita: high-water mark of the doctrine

The first case to expressly deal with the issue of command responsibility following World War II was *United States v Yamashita.* This case has been described by Landrum as marking the 'high point for a commander's criminal responsibility for subordinates' actions'.[119] If Landrum's description of the application of the doctrine is to be accepted, Yamashita was 'judged against the strictest standard ever devised to hold a commander responsible for the actions of his subordinates',[120] thus marking the high-water mark of the doctrine of command responsibility. General Tomoyuki Yamashita was charged with 64 specific charges involving the murder and mistreatment of prisoners and civilians by subordinates and one 'general comprehensive charge'[121] in the nature of command responsibility, which stated, inter alia, as follows:

> while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes … and he … thereby violated the law of war.[122]

---

[117] van Sliedregt (n 16) 129.

[118] Röling (n 20) 75.

[119] Bruce Landrum, 'The Yamashita War Crimes Trial: Command Responsibility Then and Now' (1995) 149 *Military Law Review* 293, 298.

[120] Ibid 294.

[121] Richard Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* (Scholarly Resources, 1982) 80.

[122] Transcript of Proceedings, *Before the Military Commission Convened by the Commanding General United States Army Forces, Western Pacific: Tomoyuki Yamashita* (AG 000.5, 24 September 1945) 31, in Lael (n 121) 80.

The breach of duty which had, by this time, become requisite in establishing liability under the head of command responsibility is expressed in this indictment as is the permissive nature of the outcome of the breach. The indictment does not express whether such permission was direct or implicit, which leaves open the implied requirement to suppress or prevent such crimes in order to avoid liability. Significantly, the caveat that the offending conduct by omission to act 'thereby violated the law of war', which was replicated in Count 5 of the indictments before the Tokyo Tribunal, is indicative of an approach which seeks to create a discrete offence, as discussed above.

The terms of the indictment do not specify a mental element nor do they particularise the conduct of subordinates subject of the breach of duty by Yamashita. In answering the charge on arraignment, counsel for Yamashita requested a bill of particulars specifying the crimes in greater detail and asked the following questions:

> The charge said that he 'failed to discharge a duty.' When? Where? Dates and places? It said that there was a 'permitting' of troops to commit atrocities. Did that mean that he actually gave a permission? Or was the participle used to connote the automatic result of the failure to discharge a duty – as when we say that release of a lever 'permits' wheels to turn? If the former, when was any such 'permission' given? Where? To whom?[123] Failed to control what 'operations of the members of his command'?[124]

Notwithstanding the prosecution objected to this request,[125] details of this nature go to either the elements of the doctrine or a condition requisite to its application. As identified by Mettraux, 'the commission of a crime by subordinates is a condition of application of the doctrine though not an element of it'.[126] The prosecution in *Yamashita* did subsequently specify the particulars of 123 more charges in a Bill of Particulars but did not particularise any instance of neglect of duty or any 'acts of commission or omission as amounting to a "permitting" of

[123] Frank Reel, *The Case of General Yamashita* (Octagon Books, 1949) 33.

[124] Lawrence Taylor, *A Trial of Generals: Homma, Yamashita, Macarthur* (Icarus Press, 1981) 121.

[125] Ibid 121–2.

[126] Guénaël Mettraux, 'Command Responsibility in International Law – The Boundaries of Criminal Liability for Military Commanders and Civilian Leaders' (PhD Thesis, London School of Economics and Political Science, 2008) 51.

the crimes in question'.[127] Defence counsel argued Yamashita was 'not accused of having done something or having failed to do something, but solely of having been something, namely commander of the Japanese forces'[128] and, 'by virtue of that fact alone is guilty of every crime committed by every soldier assigned to his command'.[129] This argument attempted to raise the issue of vicarious liability, that is, that Yamashita was being prosecuted solely for the actions of subordinates but it neglects the substance of the doctrine which was, it is contended, clearly articulated in the charge.

Criminal liability arises through a personal dereliction of duty by the commander such that acquiescence with the crimes is evidenced and thereby contributed to by the commander. The criminality arises in the dereliction of duty such that the commander is not a party to the crimes of the subordinates[130] but, rather, is a principal in his or her own criminal conduct by omission. In rejecting the argument on appeal, the United States Supreme Court in *In Re Yamashita* held that: 'The gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by permitting them to commit the extensive and widespread atrocities specified.'[131]

The Supreme Court went so far as to emphasise the point that the duty of commanders to control troops under their command is an affirmative duty such that a claim of ignorance on the part of commanders must fail.[132] This 'gist' of the doctrine has been adopted and, indeed, the statement of the principle cited with approval in international jurisprudence on point since the post-World War II trials.[133] In fact, the 'gist' of the doctrine was formalised when it was described as the 'mode of liability view' by the International Criminal Tribunal for the Former

[127] United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (His Majesty's Stationery Office, 1948) vol 4, 12.

[128] Ibid.

[129] Transcript of Proceedings (n 122) 86–7.

[130] See, eg, *Prosecutor v Musić ('Čelebići') (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [400] ('*Čelebići Trial Judgment*').

[131] *In Re Yamashita*, 327 US 1, 14 (1946).

[132] Ibid 15–17, 25–6.

[133] See, eg, *Čelebići Trial Judgment* (n 130); *Hadžihasanović Appeal Jurisdiction Decision* (n 58) [23].

Yugoslavia (ICTY) in *Halilović*.[134] This articulation of the duty was the extent of the Supreme Court's adoption of the military commission's determination in *Yamashita* at first instance. The Supreme Court 'merely held that a commander has a duty to protect prisoners and civilians'[135] but neither endorsed nor rejected the strict standard applied by the military commission. This standard has itself been the subject of debate. In making their plea for dismissal on the basis of the vicarious liability, discussed above, defence counsel contended the prosecution case established no 'fault' on the part of Yamashita,[136] the inference being that any conviction would be based on the application of a strict liability standard.

In closing argument, the prosecution in *Yamashita* asked the military commission to apply a mental element of negligence to its determination and equated the case to one of negligent manslaughter.[137] The defence contended that the test was not one of negligence but, rather, one of intent and that Yamashita could not be convicted on the basis of what others consider he must have known.[138] Whilst negligence may certainly apply to the performance of duty, the negligent manslaughter argument can be discarded at the outset as being entirely inconsistent with the facts as alleged and with the doctrine more broadly as it stood at the time of the delivery of the judgment in *Yamashita*. The breach of duty was, at no stage, particularised as generating from conduct akin to the negligent performance of duty, especially resulting in what is clearly the domestic criminal law outcome of negligent manslaughter. The allegation was always that Yamashita 'knew' or 'should have known' or, indeed, 'must have known'[139] of the atrocities committed by his subordinates such that his failure to suppress or punish the offending conduct constituting the breach of duty was at some higher standard than mere negligence. The allegation was also always that Yamashita had acquiesced in the offending conduct. That does not mean that criminal negligence had no part to play in the development of the doctrine and its application to the facts of individual cases. Indeed, culpable negligence

---

[134] *Prosecutor v Halilović (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-01-48-T, 16 November 2005) [91]–[100] ('*Halilović Trial Judgment*'), discussed in Sepinwall (n 11) 256.

[135] Landrum (n 119) 298.

[136] See Lael (n 121) 82; Landrum (n 119) 296.

[137] Taylor (n 124) 131; Reel (n 123) 165.

[138] Allan Ryan, *Yamashita's Ghost: War Crimes, MacArthur's Justice and Command Accountability* (University Press of Kansas, 2012) 234.

[139] United Nations War Crimes Commission (n 127) vol 4, 17.

has been relied upon as the mental element grounding the breach of duty in cases in which conduct by omission rather than by commission was alleged.[140]

The United Nations Security Council certainly contemplated criminal negligence or acquiescence in its consideration of the situation in the former Yugoslavia and the viability of establishing an international criminal tribunal in response to that conflict.[141] The Security Council, in stating those concepts in the alternative, provides for an inference that negligence was not, in fact, contemplated as a mental element but, rather, as an alternative physical element to the physical element of acquiescence. This statement is thus unhelpful in determining the requisite mental elements especially considering the statute subsequently underpinning the ICTY expressly cited a standard of actual or constructive knowledge.

Similarly, the suggestion by defence counsel in *Yamashita* that intention is the requisite mental element – that the commander intended that the offending by subordinates would occur – is consistent with offending conduct by commission in which the commander is complicit in the principal offences through accessorial liability, but such liability is not under the head of command responsibility *stricto sensu*. If, as the defence counsel suggested, intentional acquiescence were the requisite test, liability would only be imposed where a commander had actual knowledge of the offending conduct of subordinates, meaning a very high threshold test of culpability would exist. Such liability would largely be in the nature of accessorial liability after the event. That situation, again, is inconsistent with the status of the doctrine as it evolved to that date.

The American military commission, in convicting Yamashita, delivered a written judgment which explicitly detailed its findings regarding the issue of command and control[142] but failed to clearly articulate the basis on which his lability was determined, that is, whether absolute liability or some more limited standard of liability was applied. Further, the commission did not state whether knowledge on the part of Yamashita of the crimes of subordinates featured

[140] See, eg, *Abbaye Ardenne* case reported in United Nations War Crimes Commission (n 127) vol 4.

[141] *Letter from the Secretary General to the President of the Security Council*, UN Doc S/1994/674 (24 May 1994) 17.

[142] United Nations War Crimes Commission (n 127) vol 4, 129.

as an essential mental element in its findings.[143] The closest the military commission came to any analysis of mental elements was in refuting Yamashita's plea of 'complete ignorance'[144] of the occurrence of the crimes, relying, almost exclusively, on the physical element of the failure of Yamashita to provide effective control of troops under his command to ground the conviction.[145]

Putting aside for the moment what was lacking in this case, the decision in *Yamashita* at first instance and on appeal established two precedents which would ground the doctrine into the future. This case confirmed the duty of commanders to control their subordinate forces in order to prevent breaches of the laws of war and it established two requisite elements: 'some degree of knowledge' of the crimes on the part of commanders and an ability to prevent their commission.[146] The requirement of knowledge on the part of the commander, regardless of the extent of such requisite knowledge, clearly rebuts any suggestion the offence is one of strict liability. Lael contends that the military commission imposed on commanding officers an 'awesome' standard[147] akin to 'strict accountability'[148] but did not go so far as to expressly state a standard of strict liability had been imposed. Whilst *Yamashita* is said to have 'carved out *mens rea* and *actus reus* elements',[149] the case left a number of questions unanswered which would later be articulated by the United Nations War Crimes Commission, discussed below. *Yamashita* undoubtedly advanced the doctrine such that later iterations of command responsibility in codified form would draw on its precedent to varying extents. As Dunnaback suggests, these instruments codifying the doctrine 'reaffirm the core elements of command responsibility from *Yamashita* and attempt to answer the doctrine's open-ended question'.[150]

---

[143] Burnett (n 80) 91.

[144] Transcript of Proceedings (n 122) 4061–3.

[145] Ibid.

[146] Michael Smidt, 'Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations' (2000) 164 *Military Law Review* 155, 180–1, discussed in Jeremy Dunnaback, 'Command Responsibility: A Small-Unit Leader's Perspective' (2014) 108(4) *Northwestern University Law Review* 1385, 1393.

[147] Lael (n 121) 123.

[148] Ibid 127.

[149] Dunnaback (n 146) 1393.

[150] Ibid 1394.

The Rome Statute at Article 28 expressly adopts the 'knew or should have known' test and the requirement of 'effective command and control' in order to ground the charge.[151] The statutes of the international criminal tribunals for Rwanda and the former Yugoslavia both applied a 'knew or had reason to know' test in their respective provisions on command responsibility.[152] This has been described as evidencing the elevation of the Yamashita standard to the customary international law level.[153] The decision in *Yamashita* has, however, been criticised for its ambiguity in terms of the application in real time of the 'knew or should have known' standard and the determination of effective control on the part of the commander.[154] Such criticism largely relates to the application of the law to the facts in that case and, indeed, on the interpretation of the law in the particular factual setting by the military commission.[155]

From the perspective of an immediately developing body of law beyond the post-World War II trials, the *Yamashita* decision had an impact on United States military law regarding command responsibility. General Douglas MacArthur, in his capacity as the military authority charged with reviewing the court record and approving the sentence imposed, insisted that the command responsibility decision in *Yamashita* form part of United States military law.[156] President Truman subsequently wanted the law of command responsibility precisely defined such that it would leave little room for interpretation.[157] The United States Attorney General drafted the following provisions for Truman:

> A commander is responsible if he has actual knowledge, or should have knowledge, that troops or other persons subject to his control are about to commit or have

[151] *Rome Statute* (n 22) art 28(a).

[152] SC Res 955, UN Doc S/RES/955 (8 November 1994) annex, art 6(3) ('*Statute of the International Criminal Tribunal for Rwanda*'); *ICTY Statute* (n 66) art 7(3).

[153] Smidt (n 146) 207.

[154] Timothy Wu and Yong-Sung Kang, 'Criminal Liability for the Actions of Subordinates – The Doctrine of Command Responsibility and its Analogues in United States Law' (1997) 38(1) *Harvard International Law Journal* 272, 297.

[155] See, eg, Lael (n 121) 123.

[156] Tim Maga, *Judgment at Tokyo: The Japanese War Crimes Trials* (University Press of Kentucky, 2001) 24.

[157] Ibid.

> committed a war crime and he fails to take the necessary and reasonable steps to ensure compliance with the law of war or to punish violators thereof.[158]

The United States, in adopting the test articulated in *Yamashita*, clearly stipulated the requirement for actual knowledge or constructive knowledge on the part of commanders as to the commission of war crimes by subordinates. Constructive knowledge, in this instance, expresses the 'should have known' test adopted in *Yamashita* which is a strict application of the doctrine. In that regard, it was not merely the decision in the *Yamashita* case which set the high-water mark of the doctrine. The acceptance into United States military law of this strict standard of accountability set a legislative precedent which would be tested in later jurisprudence on the doctrine including by the United States itself in matters arising from military operations in South Vietnam.

Similarly, the finding in *Yamashita* that the nature of the crimes committed by subordinates provided prima facie evidence of knowledge on the part of commanders was later articulated as a test in the United Kingdom Ministry of Defence *Manual of Military Law* of 1958. The test, as stated therein, was that a commander was responsible if 'he has actual knowledge or should have knowledge, through reports received by him or through other means'.[159] Whether or not this test elevates the requirement of constructive knowledge to the *Yamashita* threshold is unclear. The requirement that reports were received by the commander tends towards the actual knowledge end of the spectrum whilst the ambiguously termed 'through other means' requirement tends to leave the test open to application at the more constructive end of the knowledge spectrum. More contemporary analysis by the United Kingdom Ministry of Defence provides some guidance in this respect in stating that 'possession of the means of knowledge may be regarded, in appropriate circumstances, as being the same as knowledge itself'.[160] This statement draws on the test of knowledge provided in the *Čelebići* decision of the ICTY, to be discussed in detail later in this chapter.

---

[158] 'Briefing Note from United States Attorney General Tom C. Clark to President Harry S. Truman' (29 October 1945), in Maga (n 156) 25.

[159] Ministry of Defence, *Manual of Military Law* (Part III, 1958) [631], quoted in Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, 2005) [16.36.1].

[160] Ministry of Defence, *The Manual of the Law of Armed Conflict* (n 159) [16.36.6].

At the very least, as Lael put it, after 1955 'the prevailing legal precedent for assessing the degree of a commander's responsibility remained the Yamashita proceedings'.[161] The provisions provided to Truman also lay the foundation for the 'control' test and the requirement of commanders to 'take necessary and reasonable steps (measures)' to prevent and/or punish offenders, both of which would feature prominently in subsequent developments in the law to the present time. Noting the core elements of the doctrine, as defined in *Yamashita*, have been reaffirmed in Article 28 of the Rome Statute, it is important, at this juncture, to consider arguments that are critical of the Yamashita standard from the perspective that the nature of warfare has changed so fundamentally that such a standard is no longer relevant or appropriate.[162] In making this argument, Ryan contends that 'even organised armies no longer adhere to the straightforward … chains of command that characterized the combat arms of World War II'.[163]

The analysis of Australian command and authority structures in later chapters, including the applicability of command responsibility provisions to both centralised and decentralised command and control structures, tends to rebut this contention. Further, the conflict in Ukraine, which is ongoing at the time of writing, evidences predominantly conventional warfare involving state-on-state forces[164] inclusive of command hierarchies which fit the Article 28 model[165] and, thus, the Yamashita standard. This contemporary application tends to overcome the revisionist arguments which attempt to discredit the historical relevance and contemporary application of *Yamashita*.

2.3.4 The doctrine as applied by the subsequent Nuremberg trials

In order to establish a uniform legal and jurisdictional basis on which trials other than the Nuremberg IMT could be conducted by the Allied nations, the Allied Control Council passed

---

[161] Lael (n 121) 122–3.

[162] See, eg, Ryan (n 138) 337.

[163] Ibid.

[164] See, eg, Lionel Beehner et al, *Analyzing the Russian Way of War: Evidence from the 2008 Conflict with Georgia* (Modern War Institute at West Point, 2018) 3–6; Richard Shirreff, *War with Russia* (Coronet, 2016) 4–5; Michael O'Hanlon, *The Future of Land Warfare* (Brookings Institution Press, 2015) 82–108.

[165] See, eg, Asymmetric Warfare Group, *Russian New Generation Warfare Handbook* (Asymmetric Warfare Group, December 2016) 1.

Law No 10.[166] This enabling law did not expressly provide for command responsibility as a mode of criminal liability but it did allow for the responsibility of those who 'took a consenting part' in the commission of the crimes.[167] The concept of taking a consenting part connotes a degree of participation equating to conduct by commission rather than conduct by omission, which is the core physical element of the doctrine of command responsibility.

In a 1944 directive, the United States defined 'taking a consenting part in the commission of a war crime' as including the 'omission of a superior officer to prevent war crimes when he knows of, or is on notice as to, their commission or contemplated commission and is in a position to prevent them',[168] but this definition was never incorporated into any order promulgating the directive.[169]

Had the United States Directive of 1944 been adopted and promulgated, the notion of conduct by omission to act would have expressly formed part of the United States' application of Control Council Law No 10. In the absence of any promulgation of that definition of this mode of liability on the part of commanders, and the subsequent application of this broadened scope of liability, the only reasonably available inference is that it was not subsequently intended that conduct by omission to act was to apply. Taking part in conduct is clearly committing the crime by some form of affirmative action and the requirement of consent merely delineates such conduct from involuntary or forced acts. In that respect this component of the Control Council Law is not command responsibility in its strict sense, but the inclusion of this concept does evidence consideration of a degree of liability beyond purely accessorial liability.

The concept of taking a consenting part in such crimes did not arise ab initio in Law No 10 but, rather, appeared in this context some years earlier, in 1943, at the Moscow Conference during

---

[166] Allied Control Council, *Control Council Law No 10 – Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity* (20 December 1945). See also Valerie Hébert, *Hitler's Generals on Trial: The Last War Crimes Tribunal at Nuremberg* (University Press of Kansas, 2010) 28–9.

[167] Allied Control Council (n 166) art 2, n 2.

[168] Joint Chiefs of Staff, JCS Directive 1023/3, *Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders* (25 September 1944), in John Jay Douglass, 'High Command Case: A Study in Staff and Command Responsibility' (1972) 6(4) *International Lawyer* 686, 687.

[169] Parks (n 39) 17.

which the representative heads of state of the Allied powers declared that German soldiers and Nazi Party members 'who have been responsible for, or have taken a consenting part in'[170] war crimes would be tried in the countries in which the crimes were committed. This statement, termed the Moscow Declaration, clearly distinguished between responsibility for the commission of such offences and participation by consent. This distinction is significant, albeit subtle, insofar as 'taking a consenting part in' crimes demands actual participation whereas being responsible for crimes connotes something less than, or certainly different to, direct participation. An unavoidable inference is that the Allied powers contemplated a mode of liability other than direct commission of the crimes well in advance of the preparation of criminal indictments in the aftermath of the war.

2.3.5 Abbaye Ardenne

The Allied nations subsequently enacted their own legislation concerning command responsibility to be applied in the conduct of their respective war crimes trials in Germany. One such case, which preceded the Nuremberg Tribunal, was the Canadian prosecution of SS Brigadeführer Kurt Meyer in the *Abbaye Ardenne* case, named after the Ardenne Abbey in which the defendant had his regimental headquarters. In a subsequent analysis, the ICTY contended in the *Halilović Judgment* that the Canadian authorities considered command responsibility to be a manifestation of accomplice liability pursuant to the applicable Canadian legislation,[171] which provided:

> Where there is evidence that more than one war crime has been committed by members of a formation, unit, body, or group while under the command of a single commander, the court may receive that evidence as *prima facie* evidence of the responsibility of the commander for those crimes. Where there is evidence that a war crime has been committed by members of a formation, unit, body, or group and that an officer or non-commissioned officer was present at or immediately before the time when such offence was committed, the court may receive that evidence as *prima facie* evidence of the responsibility of such officer or non-commissioned officer, and of the commander of such formation, unit, body, or group, for that crime.[172]

---

[170] United Nations Information Organisation, *Moscow Declaration on Atrocities by President Roosevelt, Mister Winston Churchill and Marshal Stalin* (1 November 1943) 35.

[171] *Halilović Trial Judgment* (n 134) [43]. See also Meloni (n 48) 50.

[172] *War Crimes Regulations 1946*, 10 Geo 6, c 73, regs 10(4), 10(5).

Whilst these provisions do not define the extent of liability of a commander for the actions of subordinates relating to evidentiary matters rather than matters of substantive law,[173] the prosecution relied on these provisions in grounding the charges of war crimes in command responsibility for war crimes committed by subordinates and inciting and counselling the commission of war crimes by subordinates,[174] an argument which was accepted by the Judge Advocate.[175]

Relevantly, in terms of elements of the offences under the command responsibility head, the prosecution contended the defendant was responsible due to 'wilful or criminal negligence and failure of the accused to perform his duties as commander of the troops concerned'.[176] This statement, when considered alongside the terminology of one limb of the Canadian law underpinning the charges, tends to stand in contrast with the views of the ICTY in *Halilović*. Rather than being associated with accessorial liability, the term 'failure to perform duties as commander' when read with the stand-alone term 'while under the command of',[177] suggests a discrete and individual mode of liability rather than a mode of liability afforded by the encouragement of or assistance with the commission of offences by others. In this respect, it is contended, this Canadian case aligns with other jurisprudence on the doctrine in which the breach of a duty of command is at the core of the offending.

Further, whilst the prosecution expressly articulated a mental element of 'negligence' attached to the conduct of the failure to perform duties, the Judge Advocate found the relevant offences proven in applying the mental element of 'knowledge' to the failure to exercise a duty to prevent the commission of the war crimes, that is, that the commander 'knowingly failed to prevent its commission'.[178] In light of the fact that the regulation underpinning the mode of liability is of an evidentiary nature rather than being substantive offence-creating law, it does not stipulate the applicable elements of offences. It is thus open to establish the requisite elements on the determination of the Court.

---

[173] United Nations War Crimes Commission (n 127) vol 4, 129.

[174] Ibid 98–100.

[175] Ibid 108.

[176] Ibid 100.

[177] *War Crimes Regulations 1946*, 10 Geo 6, c 73, reg 10(4).

[178] United Nations War Crimes Commission (n 127) vol 4, 108.

On the face of the judgment, the mental element of negligence may attach to the failure to exercise the duty, whilst knowledge is apparently the applicable standard pertaining to the commander and the commission of war crimes by his subordinate, that is, knowledge on the part of the commander that war crimes were being committed. The problem is, however, that the Judge Advocate expressly held that the commander 'knowingly failed to prevent'[179] the commission of the crimes, that is, the element of knowledge was explicitly attached to the failure to perform the duty to prevent the crimes. The facts of the case are ambiguous with respect to the accused's knowledge of the commission of the crimes and, as such, are largely unhelpful in deconstructing the elements of the offences as determined and ruled upon. The Judge Advocate did helpfully state a number of considerations in determining the responsibility of the commander, as follows:

> The rank of the accused, the duties and responsibilities of the accused by virtue of the command he held, the training of the men under his command, their age and experience, anything relating to the question whether the accused either ordered, encouraged or verbally or tacitly acquiesced in the killing of prisoners, or wilfully failed in his duty as military commander to prevent, or to take such action as the circumstances required to endeavour to prevent, the killing of prisoners.[180]

The term 'wilfully' may have been intended to equate to 'knowingly' with respect to the failure to exercise the duty to prevent the crimes but, again, is not helpful in establishing whether knowledge of the commission of the crimes was required in order to secure convictions under the command responsibility mode of liability and, if so, the extent of the requisite knowledge. What is clear is the fact this passage sets a subjective test in ascertaining command responsibility which would surface to varying extents in later waves of the evolution of the doctrine.

[179] Ibid.

[180] Ibid.

2.3.6 The Hostage Case

The Nuremberg trial of *United States v Wilhelm List*,[181] also known as the *Hostage Case*, has significant precedential value in terms of its articulation of the requisite knowledge standard in grounding the liability of commanders, its exposition of a duty to inquire, the responsibility of commanders over subordinate units, and its consideration of the notion of the 'remote commander'. The latter issue came to a head in the International Criminal Court (ICC) appellate decision of *Bemba* 70 years later.

In refuting the argument posited by General Wilhelm List that he had no knowledge of war crimes committed by subordinates, the Tribunal held that:

> The matter of subordination of units as a basis of fixing criminal responsibility becomes important in the case of a military commander having solely a tactical command. But as to the commanding general of occupied territory who is charged with maintaining peace and order, punishing crime, and protecting lives and property, subordinations are relatively unimportant. His responsibility is general and not limited to a control of units directly under his command.[182]

In implicitly imposing a duty to inquire whilst further rebutting the defence contention of a lack of knowledge on the part of the accused, the Tribunal held that

> want of knowledge of the contents of reports made to him is not a defence … any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on this face, constitutes a dereliction of duty.[183]

In linking the duty to inquire with the peripherally related attempt to exculpate commanders on the basis of absence from headquarters, the Tribunal declared: 'it would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during war time'.[184]

---

[181] *United States of America v List (Wilhelm)*, Trial Judgment, Case No 7, (1948) 11 TWC 757, 19th February 1948, International Military Tribunal.

[182] United Nations War Crimes Commission (n 127) vol 8, 71.

[183] Ibid.

[184] Ibid 70.

The *Hostage Case* judgment clearly accepted the 'knew or should have known known' standard and, from an evolutionary perspective, contributed to later debate on the codification of the doctrine. In the course of discussion on the proposed Article 86 of Additional Protocol I to the Geneva Conventions, an amendment was put forward removing the 'or should have known Hostage Case wording as too vague'.[185]

2.3.7 The High Command Case

The subsequent Nuremberg trial of *United States v Wilhelm von Leeb*[186] has been described as the most important trial in the aftermath of the Second World War to address the issue of command responsibility.[187] Known as the *High Command Case*, this trial has been described as applying a more limited standard of liability on commanders than that applied in *Yamashita* – akin to giving commanders the 'benefit of the doubt on the knowledge issue'.[188] This purported benefit of the doubt is significant from more than just a rhetorical perspective. In the *High Command Case* the Tribunal analysed in some detail the practical functional and hierarchical structures within which the role of command and commander–subordinate relationships exist. This, of course, was in direct recognition of the fact that the foundation of the doctrine – the breach of a duty – was recognised under international humanitarian law as deriving from the fundamental principles of hierarchy and subordination within military structures.[189] In describing the liability of the thirteen senior German officers on trial in the *High Command Case*, the Tribunal held:

> Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility. The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means co-extensive. Modern war such as the last war, entails a large measure of de-centralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most

[185] Lawrence Rockwood, *Walking Away from Nuremberg: Just War and the Doctrine of Command Responsibility* (University of Massachusetts Press, 2007) 152.

[186] *United States of America v Wilhelm von Leeb et al*, Case No 12, (1948) 11 TWC 462, 27–28 October 1948, International Military Tribunal.

[187] Parks (n 39) 38.

[188] Landrum (n 119) 298–9.

[189] Monica Feria Tinta, 'Commanders on Trial: The Blaškić Case and the Doctrine of Command Responsibility under International Law' (2000) 47 *Netherlands International Law Review* 293, 308.

> assuredly not of every administrative measure. He has the right to assume that details entrusted to subordinates will be legally executed.[190]

This point becomes especially relevant in later chapters of this thesis in which degrees of authority in the Australian command structure are analysed. For present purposes, it suffices to say this reference to an inherent right of commanders to assume the lawful execution of orders by subordinates carries, by implication, a requirement of some degree of knowledge on the part of commanders in order to be culpable under the doctrine. The requirement of a mental element of knowledge of the principal offending tends to rebut any suggestion the doctrine is one of strict liability. The prosecution, however, advanced the argument, albeit implicitly, that strict liability applied in this case and cited *Yamashita* by way of authority[191] relying, arguably, on the 'must have known' test posited by the prosecution in that case.[192] As discussed in preceding sections, this contention was not expressly supported in *Yamashita* and was subsequently rejected by the Tribunal in the *High Command Case*.

Concurrent with the rejection of the application of strict liability to this crime, the mental element of negligence again surfaced in this case with respect to the performance of duty by the commander. Significantly, the breach of the duty to prevent the commission of war crimes by exercising adequate supervision over subordinates was considered as requiring negligence to a high degree of culpability. The Tribunal held that:

> There must be a personal dereliction. That can only occur where … his failure to properly supervise his subordinates constitutes criminal negligence on his part … it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.[193]

In stark contrast to the Tribunal in *Yamashita*, the Tribunal in the *High Command Case* articulated the mental elements applicable to the physical elements of the criminal conduct of subordinates and the breach of duty by the commander. It held, by unavoidable inference, that some degree of knowledge applied to the former and expressly that negligence applied to the

---

[190] United Nations War Crimes Commission (n 127) vol 12, 76.

[191] Ibid.

[192] See ibid vol 4, 17.

[193] Ibid 108.

latter. Any assessment that this case imposed a strict liability standard is clearly rebuttable on the facts and the judgment of the Tribunal. More contentious, perhaps, is the extent of knowledge that the Tribunal required in the *High Command Case*. Pappas argues persuasively that this case demanded actual knowledge on the part of commanders insofar as a commander 'must have actual knowledge of the crimes'[194] of subordinates in order to be held criminally liable. This, of course, stands in conflict with the notion of constructive knowledge as enlivened in the 'should have known' standard adopted implicitly in *Yamashita*.

The question is thus whether the purported 'benefit of the doubt' given to commanders in terms of the knowledge requirement elevated the standard to one of actual knowledge or whether the 'should have known' standard applied. In making the 'benefit of the doubt' argument, Landrum relies on the statement of the Tribunal on the decentralisation of military command rather than advancing any particular quantum of requisite knowledge, in that 'a commander cannot know everything that happens within the command, so the prosecution must prove knowledge'.[195] Smidt contends the decentralisation of command statement merely invokes a requirement for 'some knowledge of the crimes'.[196] The term 'some' is an indicium of quantum, albeit vague, such that it negates a requirement for actual knowledge.

Recourse to the ratio decidendi of the decision of the Tribunal itself is warranted notwithstanding it does not expressly provide for actual or constructive knowledge. The Tribunal held that commanders of occupying forces 'must have knowledge of these offences and acquiesce or participate or criminally neglect to interfere in their commission'.[197] This statement was, however, made in the rejection of a prosecution argument urging the imposition of a strict liability standard such that knowledge to any extent would be irrelevant. Lael concludes the Tribunal can only have meant to impose a standard of actual knowledge due to the extent to which the *High Command* decision went in explaining the exigencies of military

[194] Caroline Pappas, 'Law and Politics: Australia's War Crimes Trials in the Pacific 1943–1961' (PhD Thesis, University of New South Wales, 1998) 235.

[195] Landrum (n 119) 299.

[196] Smidt (n 146) 182.

[197] United Nations War Crimes Commission (n 127) vol 4, 77.

command and the fact it appeared to 'flirt with should have known reasoning' but then rendered verdicts based on evidence of actual knowledge on the part of the accused.[198]

It is clear the *High Command Case* ebbed away from the high-water mark set in Yamashita by both articulating the requisite mental elements and describing a level of knowledge required in order for commanders to be held liable under the doctrine. That level of knowledge is undoubtedly higher than the 'must have known' standard called for in *Yamashita* and is likely to be higher than the 'should have known' standard subsequently adopted in that case. The argument thus exists that *High Command* set a lenient standard which does not require commanders to make attempts at discovering any misconduct on the part of subordinates.[199] *High Command* joined the *Hostage Case* in its tidal flow away from *Yamashita* but went one step further in rejecting the latter's assumption that under normal circumstances a commanding officer should know of violations within the commander's own area of command.

Discussing the culpability arising from acquiescence in the criminal offending, the Tribunal went on to state that the subject offences 'must be patently criminal' in order for liability to attach to the commander.[200] Lael has analysed this simple statement as follows:

> Even if a commander learned of abusive actions or killings by subordinates, the High Command court further ruled, he may be held accountable only if he realized they were clearly in violation of the law and then acquiesced in their commission.[201]

This analysis of that aspect of the decision in *High Command* demonstrates the further ebb of the doctrine away from *Yamashita* and towards a less stringent standard of accountability on the part of commanders.

---

[198] Lael (n 121) 125–6.

[199] Eugenia Levine, 'Command Responsibility: the Mens Rea Requirement' (Research Paper, Global Policy Forum, February 2005) [26].

[200] United Nations War Crimes Commission (n 127) vol 4, 77.

[201] Lael (n 121) 126.

2.3.8 Riding the wave to hard and fast rules on the doctrine

As the United Nations War Crimes Commission stated in 1948, '[t]he law on this matter is still developing and it would be wrong to expect to find hard and fast rules in universal application'.[202] In an attempt to find applicable rules the commission scoured the domestic law of Allied nations, as evidenced in the following passage from the *Schonfeld* case, in which the British Judge Advocate stated:

> In English law, a person can be held responsible for the commission of criminal offences committed by others, if he employs them or orders them to act contrary to law. He would, in such circumstances, be criminally responsible for the crimes of his employees whether he was present or not at their commission. Criminal responsibility might also arise, in the case of a person occupying a position of authority, through culpable negligence.[203]

This statement expressly draws on the common law of criminal complicity in the form of accessorial liability with the conduct component comprised of the actual commission of an act or acts.[204] It also allows for liability, again under the common law, for conduct by omission in the event a duty was owed and breached by a failure to act reaching the standard of culpable negligence.[205] Whilst helpful in terms of setting the terrain for analysis of the doctrine, this articulation of domestic law sets a very high threshold for liability in the factual circumstance of conduct by omission. By considering the fault element of negligence, the Judge Advocate does leave the discussion open to matters of 'duty' and breach of duty in the context of 'failure to act' but it does not provide guidance on the mental requirements of the doctrine or to the extent of the duty in terms of 'control' and the related ability to influence the conduct of subordinates. In that regard, the civil analogy is of little assistance when applied in the factual setting of military conflict including military hierarchical arrangements inherent therein. In its commentary on the issue of the application of domestic law to international legal doctrines, the commission stated:

---

[202] United Nations War Crimes Commission (n 127) vol 4, 85.

[203] *Trial of Franz Schonfeld and Nine Others* (British Military Court, Essen, Case No 66, 11–26 June 1946), quoted in United Nations War Crimes Commission (n 127) vol 11, 70.

[204] See Peter Gillies, *The Law of Criminal Complicity* (Law Book Company, 1980) 15.

[205] Ibid 128.

> In the present state of vagueness prevailing in many branches of the law of nations, even given the fact that there are no binding precedents in International Law, such introduction therein of tested concepts from municipal systems is all to the good, provided that they are recognised to be in amplification of, and not in substitution for, rules of International Law.[206]

It is far from clear that the statement of the Judge Advocate in *Schonfeld* amplifies the doctrine of command responsibility in any meaningful way. Whilst the international legal doctrine of command responsibility undoubtedly has some commonality with accessorial liability and the broader concept of criminal complicity, the Rome Statute of the ICC expressly distinguishes between command responsibility and other forms of criminal liability. Article 25 of the statute is dedicated to affording individual criminal liability, inter alia, to persons who solicit, induce, aid, abet or otherwise assist, or in any way contribute to the commission of offences subject to the jurisdiction of the Court.[207] Article 28 separately provides for the criminal responsibility of commanders and other superiors 'in addition to other grounds of criminal responsibility under [the] Statute'.[208]

Indeed, in its search for hard and fast rules on the application of the doctrine, a number of questions were asked and left unanswered by the commission, as follows:

> (i) How far can a commander be held liable for not taking steps before the committing of offences, to prevent their possible perpetration?
>
> (ii) How far must he be shown to have known of the committing of offences in order to be made liable for not intervening to stop offences already being perpetrated?
>
> (iii) How far has he a duty to discover whether offences are being committed?[209]

The responsibility for establishing some of these hard and fast rules would fall on the ad hoc tribunals some four decades later.

---

[206] United Nations War Crimes Commission (n 127) vol 1, 80.

[207] *Rome Statute* (n 22) art 25(3).

[208] Ibid art 28. See also *ICTY Statute* (n 66) arts 7(1), 7(3); *Statute of the International Criminal Tribunal for Rwanda* (n 152) arts 6(1), 6(3); *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, signed 16 January 2002, 2178 UNTS 137 (entered into force 12 April 2002) annex, arts 6(1), 6(3).

[209] United Nations War Crimes Commission (n 127) vol 4, 87.

2.4 The third wave: refinement by the ad hoc tribunals

The international military tribunals in Nuremberg and Tokyo, and the subsequent trials conducted under the auspices of the Allied Control Council Law No 10, developed an early set of rules regarding the individual liability of commanders under international law.[210] In more recent times, the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) attempted to refine the rules, as did the case law of those tribunals.[211] In a report submitted to the United Nations Security Council recommending the establishment of the ICTY, the Secretary-General included draft provisions on superior responsibility for inclusion in the establishing statute. That aspect of the report defined command responsibility as engendering liability for omission to act[212] and emphasised that a superior officer 'should also be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates'.[213]

The statutes of the ICTY and ICTR subsequently incorporated identical provisions regarding command responsibility which were reflective of Article 86(2) of Additional Protocol I (API), discussed below, albeit with variations in the terminology articulating the 'knowledge' standard and absent the detailed statement of the duty of commanders as grounding culpability which expressly appears in Article 87 of API. Article 7(3) of the ICTY Statute and Article 6(3) of the ICTR Statute provide as follows:

> The fact that any of the acts referred to in Articles … of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[214]

---

[210] Olásolo (n 92) 13.

[211] Ibid.

[212] *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc S/25704 (3 May 1993) [35].

[213] Ibid [56].

[214] *ICTY Statute* (n 66) art 7(3); *Statute of the International Criminal Tribunal for Rwanda* (n 152) art 6(3).

A substantial line of authority would subsequently generate from the tribunals interpreting these provisions and later assisting in the interpretation of elements of the doctrine in the Rome Statute. Notwithstanding that contribution to the contemporary evolution of the doctrine, the ICTY and, to a lesser extent, the ICTR have been described as 'not provid[ing] for a uniform and unambiguous determination of what the nature of command responsibility is'.[215] In that light, this section provides a cursory overview of the relevant decisions of the tribunals in order to ground later analyses in chapters dedicated to the elements of the doctrine in the Rome Statute and in Australian law.

Whilst this study is limited to the application of the doctrine to military commanders, the jurisprudence of the ICTY and the ICTR evidences a comingling of military and non-military command cases generating persuasive authority to such an extent that both are discussed and applied in this thesis.[216]

2.4.1 Čelebići: the knowledge standard ebbs while the elements flow

The ICTY in the case of *Prosecutor v Musić*,[217] referred to as the *Čelebići* decision, expressly considered the doctrine of command responsibility as a stand-alone mode of liability for the first time in an international tribunal since the Nuremberg and Tokyo tribunals. In addition to discussing the evolution of the doctrine of command responsibility to the date of the decision, *Čelebići* was the first decision of an international criminal tribunal to hold an accused liable under a codified articulation of the doctrine. Describing the elements of the doctrine broadly, *Čelebići* held that Article 7(3) of the ICTY Statute provided for the following essential elements:

(i) The existence of a superior–subordinate relationship;

---

[215] Elies van Sliedregt, 'Command Responsibility at the ICTY: Three Generations of Case Law and Still Ambiguity' in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) 1, 4.

[216] See *Čelebići Trial Judgment* (n 130) [378] in which the Tribunal stated that the doctrine 'extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders'.

[217] *Čelebići Trial Judgment* (n 130).

> (ii) The superior knew or had reason to know that the criminal act was about to be or had been committed; and
>
> (iii) The superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[218]

These foundational elements would subsequently be built upon by the ICTY and the ICC and appear, in varying constructs, in Australian legislative provisions enacting the doctrine. The ICTY in *Orić* added a fourth element requiring proof that a 'principal crime' has been committed by a subordinate and such crime is an international crime in accordance with the statute.[219]

Evidencing the historical ebb and flow of the doctrine, in *Čelebiči* the Tribunal held that the 'knew or should have known' test had been replaced by the 'knew or had reason to know' test stated in Article 86 of Additional Protocol I,[220] discussed below. This case specified a test in the alternative as to the requisite mental element of knowledge to incur liability:

> 1. He had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes … or
> 2. Where he had in his possession information of a nature, which at the least, would put him on notice of the risk if such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.[221]

This statement confirms that actual or constructive knowledge is required at first instance whilst concurrently rejecting the duty to obtain information as espoused in the *Hostage Case*, discussed above. The latter point was confirmed in detail later in the decision:

> A superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates … it is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in

---

[218] Ibid [346].

[219] *Prosecutor v Orić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-03-68-T, 30 June 2006) [294] ('*Orić Trial Judgment*').

[220] Arnold and Triffterer (n 31) 829.

[221] *Čelebići Trial Judgment* (n 130) [383].

> order to ascertain whether offences were being committed or about to be committed by his subordinates.[222]

From a practical perspective, satisfying the 'had reason to know on the basis of information available to him and warranting additional investigation test' no longer required the commander to actively search for the information.[223] Liability is thus only imposed for a commander's 'failure to acknowledge information already available to him'.[224] Significantly, the Tribunal expressly contrasted its construction of the knowledge requirements in Article 7(3) with the 'knew or should have known' test stated in the Rome Statute of the International Criminal Court.[225]

The Appeals Chamber in *Čelebići*, in affirming the position of the Trial Chamber, summed up the mental element as excluding negligence and expressly rejected any application of vicarious liability to the doctrine of command responsibility since 'vicarious liability may suggest a form of strict imputed liability'.[226]

Of particular relevance to later analyses of Australia's command and control structures and operational hierarchy in this thesis, *Čelebići* laid the foundation for the central place of the superior–subordinate relationship in later codifications of the doctrine by the ICC and the Australian legislature. In *Čelebići* the Trial Chamber held that the doctrine is 'clearly articulated and anchored on the relationship between superior and subordinate'.[227] This statement was accepted and taken further by the ICTY in *Kunarac* in which it held that

---

[222] Ibid [393].

[223] Arnold and Triffterer (n 31).

[224] Ibid 829–30. See also *Prosecutor v Kayishema (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No ICTR-95-1-T, 21 May 1999) [225]–[228] in which the Tribunal contrasted the point as stated in *Čelibići* with the operative provisions of the Rome Statute in which a more active duty is imposed on commanders to inform themselves of the activities of subordinates in circumstances where the commander 'knew or should have known' of the conduct of the subordinates.

[225] *Čelebići Trial Judgment* (n 130) [393].

[226] *Prosecutor v Musić ('Čelebići') (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-T, 20 February 2001) [239] ('*Čelebići Appeal Judgment*').

[227] *Čelebići Trial Judgment* (n 130) [647].

command responsibility may apply to 'a colonel commanding a brigade, a corporal commanding a platoon or even a rankless individual commanding a small group of men'.[228]

2.4.2 Bagilishema: ICTR confusion on the flow of negligence

In the ICTR decision of *Prosecutor v Bagilishema*,[229] the Trial Chamber held that liability could be established under a third basis other than actual or constructive knowledge on the facts of that case in which the accused failed to properly supervise the operation of certain activities under his control. The Tribunal determined that gross negligence applied in the context of liability by omission to act, the omission 'taking the form of criminal dereliction of a public duty'.[230] In unambiguously rejecting the Trial Chamber's invocation of negligence in the doctrine, the Appeals Chamber in *Bagilishema* held that 'references to "negligence" in the context of superior responsibility are likely to lead to confusion of thought'.[231]

The *Bagilishema* decision on appeal also succinctly stated a general principle of law[232] that it is unfair to hold an accused 'responsible under a head of responsibility which has not clearly been defined in international criminal law'.[233] This point is discussed in greater detail in later chapters of this thesis addressing the implementation of the doctrine into Australian law and the implications of divergence in the elements of the doctrine as implemented. In particular, later analyses consider the problems arising from ambiguity between the terms of the Rome Statute and those of the Commonwealth Criminal Code from the perspective of unfairness and the rights of an accused.

---

[228] *Prosecutor v Kunarac (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-23-T, 22 February 2001) [398].

[229] *Prosecutor v Bagilishema (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-95-1A-T, 7 June 2001) ('*Bagilishema Trial Judgment*').

[230] Ibid [897].

[231] *Prosecutor v Bagilishema (Reasons for Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-95-1A-T, 3 July 2002) [35] ('*Bagilishema Appeal Judgment*').

[232] See Raimondo (n 16) 110.

[233] *Bagilishema Appeal Judgment* (n 231) [34].

2.4.3 Blaškić: the knowledge standard flows into negligence and then ebbs

After reviewing the post-World War II jurisprudence, the Trial Chamber in *Blaškić*[234] applied the 'had reason to know' formulation, purportedly influenced by Article 86(2) of Additional Protocol I in its interpretation,[235] in rejecting the *Čelebići* Trial Chamber construction of the knowledge standard. The Tribunal determined that negligence in relation to the failure to acquire knowledge is sufficient to satisfy command responsibility on the following grounds:

> If a commander has exercised due diligence in the fulfillment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties.[236]

Notwithstanding the Appeals Chamber in *Čelebići* subsequently rejected this position, instead affirming the earlier 'had reason to know' position of the Trial Chamber in that case, and the Appeals Chamber in *Blaškić* similarly rejected the *Blaškić* Trial Chamber negligence standard in favour of the *Čelebići* standard, the negligence standard was later preferred by the ICC in *Bemba.*[237] Similarly, the Appeals Chamber in *Blaškić* determined the 'had reason to know' standard does not carry with it an automatic implication that a commander has a duty to obtain information. In that regard it held that 'responsibility can be imposed for *deliberately* refraining from finding out but not for negligently failing to find out'.[238]

On the failure to exercise control once knowledge is established, the Trial Chamber in *Blaškić* held that 'the test of effective control exercised by the commander implies that more than one

---

[234] *Blaškić Trial Judgment* (n 90).

[235] Robert Cryer, 'Command Responsibility at the ICC and ICTY: In Two Minds on the Mental Element?', *EJIL Talk!* (Blog Post, 20 July 2009) <http://ejiltalk.org/command-responsibility-at-the-icc-and-icty-in-two-minds-on-the-mental-element/>.

[236] *Blaškić Trial Judgment* (n 90) [332].

[237] *Prosecutor v Bemba (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 15 June 2009) [432] ('*Bemba Decision on the Confirmation of Charges*').

[238] *Prosecutor v Blaškić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-T, 29 July 2004) [406] (emphasis in original) ('*Blaškić Appeal Judgment*').

person may be held responsible for the same crime committed by a subordinate'.[239] This implicit component of the test of effective control is uncontroversial and clearly recognises the hierarchical nature of military command including the levels and degrees of command and control. Having regard to this reasoning, an analysis of the degrees of command and control is undertaken in a later chapter of this thesis addressing the proof of command responsibility under Australian law.

2.4.4 Strugar: calming the water on knowledge and the need for additional information

The ICTY case of *Prosecutor v Strugar*[240] has been described as 'a classic if not exceedingly rare case of the effective application of superior responsibility'.[241] This is arguably due to the facts of the case in which: (1) actual knowledge on the part of the accused was ruled out by the Tribunal but, rather, he was convicted on the basis of the 'had reason to know' test due to an intentional failure on his part to obtain additional information;[242] (2) the accused had the material ability and authority to prevent the commission of the crimes;[243] and (3) the accused had the material and legal authority to investigate or take disciplinary action against the direct perpetrators of the crimes.[244]

Pavle Strugar was a Lieutenant-General who was charged with individual liability for inchoate offences and with command responsibility for the actions of subordinates in military units several levels of command below his position. This case provided a clear application of the law pertaining to the requirement to obtain further information once on notice as to the risk of offending, as follows:

> The risk that [offences were] occurring was so real, and the implications were so serious, that the events … ought to have sounded alarm bells to the Accused, such that

[239] *Blaškić Trial Judgment* (n 90) [303].

[240] *Prosecutor v Strugar (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) ('*Strugar Trial Judgment*').

[241] William Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, 2008) 317.

[242] *Strugar Trial Judgment* (n 240) [416].

[243] Ibid [405].

[244] Ibid [414].

> at the least he saw the urgent need for reliable additional information, ie, for investigation, to better assess the situation.[245]

Schabas describes command responsibility in the application of the 'had reason to know' standard as 'in some respects taking the form of an autonomous offence' which is better described as a form of criminal negligence.[246] That characterisation appears to be at odds with the later jurisprudence of the ad hoc tribunals which expressly rejected 'references to negligence'[247] but, as discussed above, negligence was applied in earlier decisions of both the ICTY and ICTR.[248]

2.4.5 Hadžihasanović: ICTY turbulence in defining the command relationship

The ICTY Appeals Chamber decision in *Prosecutor v Hadžihasanović*[249] has been described as divisive[250] in its treatment of temporal aspects of the superior–subordinate relationship and the governing notion of effective control. In the factual scenario in which a commander initially did not know of the commission of crimes but, once informed, failed to punish or report such offending, the Appeals Chamber held that command responsibility only manifests when it can be proven the crimes were committed by a subordinate after the commander had assumed command over that subordinate.[251] At first glance, this finding may appear to be self-evident but the issue created division before the Trial Chamber at first instance and in the interlocutory appeal of this decision. The prosecution, in its submissions before the Trial Chamber, cited the *Kordić* trial judgment as follows:

> The duty to punish naturally arises after a crime has been committed. Persons who assume command after the commission are under the same duty to punish. This duty includes at least an obligation to investigate the crimes to establish the facts and to

[245] Ibid [417].

[246] Schabas (n 241) 319.

[247] See *Bagilishema Appeal Judgment* (n 231) [35].

[248] See, eg, *Bagilishema Trial Judgment* (n 229) [897]; *Prosecutor v Akayesu (Judgment)* (International Criminal Tribunal for Rwanda, Chamber I, Case No ICTR-96-4-T, 2 September 1998) [489].

[249] *Hadžihasanović Appeal Jurisdiction Decision* (n 58).

[250] See, eg, van Sliedregt, 'Command Responsibility' (n 215) 6; Barrie Sander, 'Unravelling the Confusion Concerning Successor Superior Responsibility in the ICTY Jurisprudence' (2010) 23(1) *Leiden Journal of International Law* 105, 105.

[251] *Hadžihasanović Appeal Jurisdiction Decision* (n 58) [51].

> report them to the competent authorities, if the superior does not have the power to sanction himself.[252]

This argument seeks to extend the liability to post-crime commanders on the basis the duty to punish or report is not extinguished by a change in command post-event. Whilst that is not, it is contended, an unreasonable argument in light of the broader intent of the doctrine to suppress war crimes through mechanisms of hierarchical command, the finding on appeal, in essence, turned on the requisite existence of effective control on the part of the commander. Effective control is, after all, an essential element of the liability imposed under the doctrine. The Appeals Chamber, in rejecting the extension of liability to commanders who took command after the commission of the principal offence, relied on the text of Article 7(3) of the ICTY Statute which, the majority held, stemmed from Article 86(2) of API.[253]

This requirement of 'temporal coincidence'[254] appears in Article 28 of the Rome Statute in the terms 'committed by forces under his or her effective command and control'[255] and subsequently would have application to an analysis of Australia's command responsibility provisions in light of the enactment of identical terms. Notwithstanding the dissenting opinions in *Hadžihasanović*, the upshot is that 'a commander cannot fairly be held responsible for crimes not occurring on his watch'[256] and that rejection of liability extends to the duty to punish or report post-crime. This decision narrowed the scope of the doctrine insofar as its temporal application goes, thus evidencing an ebb in the tidal movement of command responsibility which has been maintained to date. Subsequent decisions of the ICTY, however, evidenced a significant flow which broadened the scope of the doctrine beyond that considered in prior jurisprudence and they are discussed below.

---

[252] *Prosecutor v Kordić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2-T, 26 February 2001) [446] ('*Kordić Trial Judgment*').

[253] *Hadžihasanović Appeal Jurisdiction Decision* (n 58) [53].

[254] van Sliedregt, 'Command Responsibility' (n 215) 6.

[255] *Rome Statute* (n 22) art 28(a).

[256] Theodor Meron, 'Revival of Customary Humanitarian Law' (2005) 99(4) *American Journal of International Law* 817, 825.

2.4.6 Blagojević and Orić: a tidal wave of offending flows to commanders

In *Prosecutor v Blagojević*, the Appeals Chamber of the ICTY held that the term 'commission' of crimes by subordinates, in its attribution of responsibility to subordinates, encompassed all modes of participation by the subordinate and 'not only the "commission" of crimes in the restricted sense of the term'[257] and the term 'commit' attracts 'the term's broader and more ordinary meaning'.[258] This position was accepted in *Orić*, in which the Appeals Chamber held that a commander 'can be held criminally responsible for his subordinates' planning, instigating, ordering, committing or otherwise aiding and abetting a crime'.[259]

Noting that an element of the command responsibility mode of liability is that the commander failed to prevent or punish the principal offending, the Trial Chamber in *Orić* held that a commander was liable on the basis of command responsibility for a failure on the part of a subordinate commander to prevent offences.[260] This concept, described by van Sliedregt as 'multiple superior responsibility'[261] and by Mettraux as 'perpendicular command responsibility',[262] carries with it the implication of a 'remote link to the perpetrator'.[263] The Appeals Chamber in *Orić* considered the remoteness of the nexus between the higher commander and the offending subordinate to be irrelevant provided the requisite element of 'effective control', being the threshold test of the superior–subordinate relationship underpinning the doctrine, existed. The Tribunal held:

> Whether the effective control descends from the superior to the subordinate culpable of the crime through intermediary subordinates is immaterial as a matter of law; instead, what matters is whether the superior has the material ability to prevent or punish the criminally responsible subordinate.[264]

---

[257] *Prosecutor v Blagojević (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-02-60-A, 9 May 2007) [280].

[258] Ibid [281].

[259] *Prosecutor v Orić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-03-68-T, 3 July 2008) [21] ('*Orić Appeal Judgment*').

[260] *Orić Trial Judgment* (n 219) [489].

[261] van Sliedregt, 'Command Responsibility' (n 215) 10.

[262] Mettraux, *The Law of Command Responsibility* (n 21) 134–7.

[263] van Sliedregt, 'Command Responsibility' (n 215) 10.

[264] *Orić Appeal Judgment* (n 259) [20].

The concept of multiple superior responsibility and the remoteness of command have clear application in the Australian context of military hierarchical command structures and the application of the doctrine of mission command, both of which are analysed in the setting of command responsibility in a later chapter of this thesis.

This broadening of the scope of the doctrine has, however, attracted criticism. Mettraux identifies the fact that the post-World War II precedent set by *Yamashita*, the *High Command Case* and the *Hostage Case* limited the responsibility of commanders to the conduct of direct subordinates who were principal offenders responsible for the commission of the underlying crimes in their own right.[265] This argument garners some support in the decision of the ICTR in *Bagilishema* in which the Appeals Chamber held, in restating the effective control test, that command responsibility requires the commander to have the 'material ability to prevent offences or punish the principal offenders'.[266] The reference to principal offenders is key.

The fourth element of the doctrine, added in *Orić*, that a 'principal crime' had been committed by a subordinate[267] appears, on its face, to support reliance on the principal nature of the offending as grounding that aspect of the test. This, it is contended, fails to recognise the reference to 'a subordinate', a term which suggests the requisite subordination may be at any level below the commander, as opposed to 'the subordinate', a term which tends towards a more direct hierarchical link. In practical terms, a subordinate may be any person of a rank below that of the superior while reference to 'the subordinate' connotes a person of more immediately subordinate rank to the superior. This argument may, however, be nugatory in the later analysis of Article 28 of the Rome Statute and the provisions implementing Article 28 into Australian law in light of the terminology expressed therein.

2.5 The fourth wave: codification and ICC doctrinal determination

Whilst Additional Protocol I to the 1949 Geneva Conventions (API) predated the ad hoc tribunals, this chapter includes this development in the fourth wave of the evolution of the

---

[265] Mettraux, *The Law of Command Responsibility* (n 21) 135.

[266] *Bagilishema Appeal Judgment* (n 231) [50].

[267] *Orić Trial Judgment* (n 219) [294].

doctrine due to its significance as a codification of the doctrine alongside the codified provisions of the Rome Statute and the influence the API provisions had on Article 28 of the Rome Statute. The statutes and subsequent jurisprudence of the ICTY and ICTR described the doctrine as a corollary of subordinate liability[268] rather than a separate mode of liability. In contrast, Article 28 defines command responsibility as a 'new and independent modality of individual responsibility',[269] putting to rest lingering questions about the status of the doctrine in that regard.

Answering this question has, it is suggested, ensured that a restrictive formulation of the doctrine as a mode of liability corollary to that of subordinates can no longer be applied and, in so doing, has ensured the intent of the doctrine to suppress war crimes through the hierarchical chain of military command is exercised. As Langston states, this codified avoidance of a restricted formulation should, in turn, prevent domestic 'unsafe' tribunals applying the doctrine in a manner which avoids the prosecution of its own nationals.[270] This point is relevant to later analyses of the implications of any divergence in the implementation into domestic law of Article 28.

2.5.1 Codification in Additional Protocol I: calming the tidal flow of commanders' duty

API is the first contemporary manifestation of the doctrine of command responsibility as codified in a treaty. Article 86 of API, which is entitled 'Failure to Act', provides as follows:

> 1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
> 2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was

[268] See, eg, *Strugar Trial Judgment* (n 240) [359].

[269] Arnold and Triffterer (n 31) 799.

[270] Emily Langston, 'The Superior Responsibility Doctrine in International Law: Historical Continuities, Innovation and Criminality: Can East Timor's Special Panels Bring Militia Leaders to Justice?' (2004) 4(2) *International Criminal Law Review* 141, 157.

> committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[271]

The failure to act in paragraph 1 of Article 86 is expressly limited by the existence of a duty to act such that the responsibility of those in positions of authority is implied into the provision. That implication is given express weight in paragraph 2 in which the subordinate–superior relationship is overlaid on the duty and the circumstances grounding the conferral of liability are described. This provision also makes it clear that the doctrine is being applied in its strict sense, that is, by conduct by omission as opposed to conduct by the commission of offending acts. This provision evidences a commitment to introduce 'a rule of international law on omission'[272] and goes some way to answering some of the questions left unanswered by the United Nations War Crimes Commission in 1948.

Article 86(2) of API was described as a rule of customary international humanitarian law in international armed conflict[273] in the International Committee of the Red Cross (ICRC) study on customary rules of international humanitarian law applicable in international and non-international armed conflicts. Rule 153 is stated as:

> Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.[274]

From the perspective of an elements analysis, the terms of this rule are similarly framed to those of Article 86(2), albeit with some differences in the constructive knowledge element. Further, Article 86(2) is limited to the commission or future commission of crimes, whereas Rule 153 also addresses the commission of crimes in the past. As observed by Garraway, it is

---

[271] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1979) art 86 ('*Additional Protocol I*').

[272] International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, 1987) 1006.

[273] Jean-Marie Henckaerts and Louise Doswald-Beck, *International Committee of the Red Cross: Customary International Humanitarian Law* (Cambridge University Press, 2005) vol 1: Rules, 558–9.

[274] Ibid 558.

disputable whether the inclusion of past conduct by subordinates 'truly reflects customary international law' as the rule is presently drafted.[275]

In terms of mental elements, actual knowledge is expressly provided for in Article 86(2) as is constructive knowledge, although the latter is not expressed in the direct 'should have known' terminology employed in earlier jurisprudence. The term 'should have enabled them to conclude' on the basis of information and prevailing circumstances does, it is contended, infer a 'should have known' standard into the provisions. This contention is supported to some extent in the International Committee of the Red Cross's commentary on the protocols which, in drawing on the judgment in the *Hostage Case*, states: 'According to post-war judicial decisions, the tactical situation, the level of training and instruction of subordinate officers and their troops, and their character traits are also pieces of information of which the superior cannot claim to be ignorant.'[276]

Paragraph 2 leaves open the requisite mental element in respect of the physical element of the failure to act once the knowledge – actual or constructive – of crimes is acquired. The question, of course, is whether the failure of the commander to act must be intentional, thus providing a high threshold test for culpability, or whether some degree of negligence is applicable such that a lower threshold applies. The commentary is unhelpful insofar as it merely states: 'this element in criminal law is far from being clarified, but it is essential, since it is precisely on the question of intent that the system of penal sanctions in the Conventions is based'.[277]

The commentary provides three essential preconditions to affording liability under Article 86, as follows:

a) The superior concerned must be the superior of that subordinate ('his superiors');
b) He knew, or had information which should have enabled him to conclude that a breach was being committed or was going to be committed;

[275] Charles Garraway, 'War Crimes' in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, 2007) 377, 382.

[276] International Committee of the Red Cross (n 272) 1014.

[277] Ibid 1012.

c) He did not take the measures within his power to prevent it.[278]

Read alone, this commentary tends to limit the extent of liability of the chain of command to more immediate commanders in the chain. Noting the articles are intended to be read together,[279] Article 87, which is entitled 'Duty of Commanders', tends to broaden the extent of liability such that the concept of a superior 'should be seen in terms of a hierarchy encompassing the concept of control'.[280] It follows that liability applies to 'all those persons who had command responsibility, from commanders at the highest level to leaders with only a few men under their command'.[281] On its face, however, the express reference to 'his superiors' tends to rebut the multiple superior responsibility/perpendicular command responsibility concept articulated in *Orić*, discussed above. This does not, it is contended, negate the threshold requirement of effective command and control in the superior–subordinate relationship and, thus, does not allow a lack of 'direct' linear command in the relationship to displace the existence of effective command and control as the threshold test.

Article 87 attempts to remove some of the residual uncertainty surrounding the codification of the doctrine. Article 87 provides as follows:

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol.
2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.[282]

[278] Ibid.

[279] Ibid 1011.

[280] Ibid 1013.

[281] Ibid 1019.

[282] *Additional Protocol I* (n 271) art 87.

Article 87 confirms the requirement of command and introduces an extended responsibility over others under the control of the commander. This demarcation between 'command' and 'control' contrasts with later codifications of the doctrine in the Rome Statute in which command and control form two requisite limbs of the one test. Paragraph 3 introduces a cognitive component of 'awareness' in lieu of the 'knowledge' component in Article 86. Noting the principles codified in API were not tested until the advent of the ICTY and ICTR, the jurisprudence of those tribunals is helpful in determining where 'awareness' fits in the knowledge spectrum. In *Karemera*, the ICTR Trial Chamber held that:

> The Chamber is satisfied that Karemera had actual knowledge that his subordinates were about to commit crimes or had in fact committed them … the massacres and attacks committed by the Interahamwe, members of the Civil Defence Program, local officials who were part of the territorial administration, and administrative personnel in the Ministries controlled by the MRND, among others, were so widespread and public that it would have been impossible for Karemera to be unaware of them.[283]

The Tribunal unambiguously equated actual knowledge with awareness in this decision. Subsequent international criminal tribunal and court decisions built on this equation of actual knowledge with awareness. In *Taylor*, the Special Court for Sierra Leone expressly defined actual knowledge as 'the awareness that the relevant crimes were committed or about to be committed'.[284]

The ICC, in the *Bemba* decision, considered indicia of actual knowledge on the part of the commander as including 'the notoriety of illegal acts, such as whether they were reported in media coverage of which the accused was aware [and] such awareness may be established by evidence suggesting that, as a result of these reports, the commander took some kind of action'.[285]

---

[283] *Prosecutor v Karemera (Judgment and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44-T, 2 February 2012) [1530].

[284] *Prosecutor v Taylor (Judgment)* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-T, 18 May 2012) [497].

[285] *Bemba Trial Judgment* (n 91) [193].

Article 87 of API also recognises the concept of degrees of command in its consideration of levels of responsibility and this recognition, it is suggested, forms a precursor to the notion of 'effective' command and control in later codifications including in the Rome Statute of the International Criminal Court.

2.5.2 The Rome Statute: turning the tide on the ad hoc tribunals?

The treaty provisions in the Rome Statute of the International Criminal Court have been described as undoubtedly the most significant in the history of the doctrine of command responsibility,[286] notwithstanding the domestic implementation of the Rome Statute more broadly is generally sadly lacking among states parties to the statute. In any event, Article 28 has been described as containing 'the longest definition of a single modality concerning individual criminal responsibility under international law'[287] such that, it is contended, this codification of the doctrine is the culmination of the waves of jurisprudence evidencing the evolution of the doctrine. From an elemental evolutionary perspective, Article 28 differs from the earlier statutory articulation of the doctrine at the ICTY and ICTR in its requirement that commanders 'prevent or repress' the commission of offences or 'submit' such matters for investigation and prosecution.[288] These duties are cast in the alternative such that if the commander cannot prevent the occurrence of the offences the commander is obliged to repress them.

If the commander cannot repress the offences the commander has a duty to submit the matter for investigation and prosecution. This interpretation was stated succinctly by the Pre-Trial Chamber of the ICC in *Prosecutor v Bemba*, as follows:

> The duty to punish requiring the superior to take the necessary measures to sanction the commission of crimes may be fulfilled in two different ways: either by the superior himself taking the necessary and reasonable measures to punish his forces, or, if he does not have the ability to do so, by referring the matter to the competent authorities. Thus, the duty to punish (as part of the duty to repress) constitutes an alternative to the third duty … namely the duty to submit the matter to the competent authorities.[289]

---

[286] Nybondas (n 51) 15.

[287] Arnold and Triffterer (n 31) 798.

[288] *Rome Statute* (n 22) art 28(a)(ii).

[289] *Bemba Decision on the Confirmation of Charges* (n 237) [440].

The first and second alternative duties appeared in the alternative – 'prevent or repress' – in Article 86(2) of API and as a discrete duty in Article 87(1) insofar as that provision describes the duty as 'to prevent and, where necessary, to suppress and report', the upshot being that the inclusive term 'and' creates a cumulative rather than alternative duty. As with the provisions of the ICTY/ICTR statutes, this is a vastly different approach to the duty than that taken in Article 28 of the Rome Statute. This led Cryer to state: 'the ICC is looking, whilst showing considerable respect at times to the jurisprudence of the ICTY and ICTR, to create a separate regime of what might be termed Rome law'.[290] Robinson identifies different approaches between the jurisprudence of the ICTY and ICTR and the terminology of Article 28 in terms of causation. He argues that 'Tribunal jurisprudence took an early wrong turn in concluding that the "failure to punish" branch of command responsibility is irreconcilable with a contribution requirement, [leading] to a rejection of causal contribution'.[291] Similarly, Sherman identifies the distinction between ICTY and ICTR jurisprudence and the law applied by the ICC in stating that the causality requirement in Article 28 'puts the ICC in stark contrast to ICTY, which on multiple occasions … explicitly rejected a causation element'.[292] Nerlich similarly notes the disparity regarding causation but describes the causal link between the commander's failure to act and the base crime as being a 'quasi-causal link [since] an omission cannot cause a result'.[293] Whilst Robinson confirms the common approach of both, that the 'modified mental element' of 'should have known' is akin to criminal negligence, he infers that the expressed requirement of causal contribution in Article 28 is an intentional bypassing of 'the problem that led to the complex command responsibility discourse in the first place'.[294]

---

[290] Cryer (n 235).

[291] Darryl Robinson, 'How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution' (2012) 13(1) *Melbourne Journal of International Law* 1, 2.

[292] Michael Sherman, 'Standards in Command Responsibility Prosecutions: How Strict, and Why?' (2018) 38(2) *Northern Illinois University Law Review* 298, 324.

[293] Volker Nerlich, 'Superior Responsibility under Article 28 ICC Statute: For What Exactly is the Superior Held Responsible?' (2007) 5(3) *Journal of International Criminal Justice* 665, 672–3, 673 n 33. An analysis of the strict nature of the causative relationship, be it quasi-causal or otherwise, is beyond the scope of this thesis.

[294] Robinson (n 291) 4–5. But see Miles Jackson, 'Causation and the Legal Character of Command Responsibility after *Bemba* at the International Criminal Court' (2022) 20(2) *Journal of International Criminal Justice* 437 in which the author accepts that all decisions and judgments as well as opinions, both concurring and dissenting, in all chambers in *Bemba* describe Article 28 as a mode of liability for the crimes of subordinates but goes on to

That intentional deviation between Tribunal jurisprudence and Rome law is no more apparent than in the *Bemba* decisions of the various chambers of the ICC.

2.6 Conclusion

The analogous first wave of the evolution of the doctrine provided a solid, albeit narrow, foundation on which the doctrine could build. Whilst earlier articulations of the responsibility of commanders for the actions of subordinates were limited to acts of commission on the part of the commander, such acts being akin to accessorial liability, a layer of liability for omission to act was contemplated in the context of mutiny or sedition as opposed to any notion of liability related to the humanitarian conduct of warfare. Similarly, the humanitarian law principle of responsible command did not articulate command responsibility as a concept envisaging criminality but it was subsequently used as an interpretive tool in determining the scope of the doctrine as it evolved. Significantly, the notion of responsible command established in the *Hague Conventions* underpins the normative basis of the doctrine, being that the authority vested in command maintains the broad intent of international humanitarian law to afford protections in war.

Personal responsibility, including the responsibility of commanders, was subsequently addressed in the aftermath of the First World War and mental elements akin to knowledge were contemplated, albeit in uncertain terms. The *Treaty of Versailles*, whilst providing for a narrow application of the doctrine, did evidence the fact that affording criminal liability to superiors for failing to prevent offending by subordinates was not a foreign concept to international law at that time.

On any analysis, the post-World War II jurisprudence on the nature of the liability arising from the doctrinal concept of command responsibility was far from uniform.[295] Indeed, this period evidences the ebb and flow of the doctrine in what can be described as a tsunami of legal determinations. The significance of the military tribunal cases, including *Yamashita* and the *High Command Case*, which go beyond that of the international military tribunal cases, is in

argue that the causal clause 'as a result of' in Article 28 should be interpreted as establishing a separate offence of omission.

[295] *Halilović Trial Judgment* (n 134) [48].

what has been described as their synthesised effect in determining that 'a commander's knowledge of widespread atrocities within the command area was rebuttably presumed rather than irrebuttably presumed'.[296] This presumption of the existence of a key mental element to the mode of liability demonstrates a move towards a stricter application of the doctrine whilst continuing to steer away from strict liability on the part of the commander.

An unavoidable conclusion arising from the Nuremberg Tribunal and subsequent trials in the European theatre is that commanders will not be held to a standard of strict liability.[297] Similarly, the Tokyo Trials and other trials in Asia evidence a rejection of a standard of strict liability, notwithstanding the high threshold of the duty imposed on commanders in *Yamashita*. An irrebuttable presumption of knowledge such that strict liability is, by default, imposed on commanders would be to stretch the application of the doctrine beyond the already high threshold applied in these cases. The presumption of the existence of a mental element does not alter the fact that the degree of requisite knowledge to impose liability has been held to be substantially less than actual knowledge but, rather, may include constructive knowledge as articulated in the terms 'ought to have known'. What this statement does, rather than affecting the scope of the mental element, is to delineate exactly where the evidentiary burden lays in terms of the knowledge element.[298]

Of equal significance in terms of the evolution of the doctrine is the observation that 'jurisprudential advances have been a feature of the law of command responsibility'[299] since the *Yamashita* trial. This fact alone, which is increasingly apparent in analyses of the application of the law in the jurisprudence of the ad hoc tribunals, evidences an increasing maturity in the doctrine and greater clarity in the law such that the tidal flow towards the Rome Statute's articulation of the doctrine was somewhat smoothed in advance. The law was, however, far from settled in the aftermath of the trials arising from World War II.[300]

[296] Vetter (n 76) 107–8, quoting Landrum (n 119) 298.

[297] Whisker and Spiker (n 60) 88.

[298] Vetter (n 76) 108.

[299] Mettraux, *The Law of Command Responsibility* (n 21) 11.

[300] United Nations War Crimes Commission (n 127) vol 4, 87.

The ad hoc tribunals undoubtedly advanced the doctrine including, significantly, its requisite elements, beyond that established in the post-World War Two tribunals. This went some way towards answering the questions which were identified and left unanswered by the United Nations War Crimes Commission in 1948 but ambiguity remained in the jurisprudence of both the Rwanda and former Yugoslavia tribunals. The *Čelebići* Trial Chamber formulated the elements of the superior–subordinate relationship, the knowledge standard, and the failure to prevent or punish and these were subsequently endorsed by the Appeals Chamber in that case and accepted in subsequent trials before the ICTY and ICTR. The ICTY jurisprudence evidences a three-generational line of decisions which, consistent with the analogous theme of this chapter, is akin to three distinct tidal flows. The first flow, commencing with *Čelebići*, set the foundation for the specification and interpretation of elements. The second flow undertook a deep analysis of the nexus between commanders and subordinates in the offending conduct including the concept of 'successive superior responsibility'[301] and identified two distinct approaches to the doctrine – the first being a mode of liability and the second being a separate offence based on a failure to act. The third flow ebbed in the loosening of the ICTY's connection between commanders and offending subordinates and largely set the scene for subsequent elements analyses in the application of Article 28 of the Rome Statute by the International Criminal Court.

The latest wave in the evolution of the doctrine, Article 28 of the Rome Statute and ICC jurisprudence on those provisions, evidences a tidal flow of law, notwithstanding the quantum of case law generating from the ICC is minimal in comparison to that of the ICTY/ICTR and, indeed, earlier tribunals. Article 28 has defined the doctrine in practical application to be a separate mode of liability to that of the offending subordinates. This is more significant than it may appear on its face in light of the fact that such definition avoids a restrictive formulation which, in turn, is likely to prevent the application of the doctrine in a manner which avoids the prosecution of commanders in circumstances in which prosecution is otherwise available. By way of example, limiting the application of command responsibility to accessorial liability on the part of commanders may limit the possibility of prosecution or, indeed, conviction, in light of any additional requirements in proving the commander was an accessory to the principal offending. Whilst the first treaty codification of the doctrine in API informed the drafting of

[301] See Sander (n 250).

Article 28, particularly in terms of essential elements, and ICTY/ICTR jurisprudence on the doctrine drew on API and was subsequently considered in the jurisprudence of the ICC, the first judicial pronouncements on Article 28 in *Bemba* undoubtedly turned the tide on both API and the ad hoc tribunals.

In *Bemba* the ICC went to great lengths to define the doctrine and its constituent elements and, as will be shown in later chapters, somewhat controversially brought the normative basis of the doctrine into focus with its appellate decision on the concept of remote command. Significantly, Article 28, as confirmed in *Bemba*, provides a strict standard of knowledge akin to that imposed in *Yamashita* and, as a result, imposes a positive or active duty on commanders to acquire such knowledge of the conduct of subordinates. The Pre-Trial Chamber in *Bemba* also brought the function of command, including levels within the military hierarchy, into sharp focus with its analysis and subsequent validation of the concept of multiple layers of command responsibility as opposed to limiting responsibility to 'direct' vertical lines of command. Concurrently, this case confirmed the requirement for temporal proximity between the effective control exercised by the commander and the occurrence of the offending conduct by subordinates.

The tidal ebb and flow of the doctrine has culminated in Article 28 and related jurisprudence. At the international level, the law of command responsibility is settled in many material respects. It is settled that the doctrine is a separate mode of liability to that of the subordinates. The issues of omission and constructive knowledge are settled, as is the issue of the imposition of a positive or active duty on commanders to acquire knowledge of offending conduct. As a result of Australia's adoption of the Rome Statute and its implementation into domestic Australian law, the jurisprudence on Article 28 features prominently in the following analysis of the elements of command responsibility as it presently stands in both the Rome Statute and Australia's Commonwealth Criminal Code.

CHAPTER 3
THE ELEMENTS OF COMMAND RESPONSIBILITY IN THE ROME STATUTE

> The superior becomes the means international law uses to achieve the maximum degree of protection of those fundamental interests which are damaged by the commission of international crimes.[302]

3.1 Introduction

Articulating the doctrine of command and superior responsibility in the form of a legal definition has been recognised as 'the longest definition of a single modality concerning individual criminal responsibility under international law'.[303] Whilst it has been contended that articulating the elements of individual crimes in order to establish criminal culpability is a new concept in international criminal practice,[304] it is clear from the jurisprudence of the post-Second World War tribunals and the ad hoc tribunals that attempts at doing just that were considered critical to the establishment of criminality, at least insofar as mental elements apply.

Jones and Powles make the distinction between the need for precision in defining exactly what a crime entails in terms of requisite acts and mental states in domestic criminal law and the necessity to define international crimes broadly due to their composite nature, scale and the involvement of state actors.[305] With an increasing recognition of individual liability for the commission of international crimes, as evidenced, for example, in the jurisprudence and statutory provisions underpinning the evolution of the doctrine of command responsibility, has come increased emphasis on the need to stipulate the requisite elements of offences.

The common law has long accepted the need for coincidence between the act or omission and the relevant state of mind in establishing the crime. This point is made clear in the 1798 English decision of *Fowler v Padget* in which it was held that 'it is a principle of natural justice, and of

---

[302] Meloni (n 48) 31.

[303] Arnold and Triffterer (n 31) 798.

[304] Roger Clark, 'The Mental Element in International Criminal Law: the Rome Statute of the International Criminal Court and the Elements of Offences' (2001) 12(3) *Criminal Law Forum* 291, 317.

[305] John Jones and Steven Powles, *International Criminal Practice* (Oxford University Press, 3rd ed, 2003) 278.

our law, that actus non facit reum nisi sit mens rea. The intent and the act must both concur to constitute the crime'.[306] This fundamental common law requirement is exemplified in the context of murder, the proof of which demands 'an intention to kill or do grievous bodily harm'.[307] In light of the dualistic nature of Australia's incorporation of international law, the Rome Statute does not supplant the common law. The Rome Statute does, however, set new international legal standards for the elements required to establish international criminal guilt. The codification of elements, both generally and with specific reference to command responsibility, was the subject of 'intense debate'[308] between state actors.

The definitions of the physical and mental elements of the respective offences that were ultimately included in the Rome Statute were not initially considered necessary during the development of the statute. A 1994 draft of a treaty for an International Criminal Court was silent on the concepts of *mens rea* and *actus reus* – mental elements and physical elements.[309] As part of that drafting exercise it was determined that substantive details such as the elements of crimes would be a matter for the Court to establish using existing sources of international law, as was the process adopted by the ICTY and the ICTR in their respective statutes and subsequent jurisprudence.[310] The drafting of the Rome Statute was, for all intents and purposes, an exercise in comparative criminal law insofar as it required an analysis of national legal systems and, significantly, a balancing of competing concepts in civil law and the common law.[311]

---

[306] (1798) 101 ER 1103, 1106 (Kenyon L). '[T]he act itself does not constitute guilt unless done with a guilty intent': *Butterworths Australian Legal Dictionary* (1997) or '*Actus non facit reum nisi sit rea*'.

[307] *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 664 (Wilson, Dawson and Toohey JJ). See also Paul Fairall, *Homicide: The Laws of Australia* (Thomson Reuters, 2012) 85.

[308] Gideon Boas, James Bischoff and Natalie Reid, *International Criminal Law Practitioner Library: Volume 2 Elements of Crimes Under International Law* (Cambridge University Press, 2008) 7.

[309] See International Law Commission, *Draft Statute for an International Criminal Court*, 46th sess, UN Doc A/CN.4/L.491/Rev 2 (1994).

[310] Clark (n 304) 297.

[311] See, eg, Elisabetta Grande, 'Comparative Criminal Justice: A Long Neglected Discipline on the Rise' in Mauro Bussani and Ugo Mattei (eds), *The Cambridge Companion to Comparative Law* (Cambridge University Press, 2012) 191, 192–3.

This reconciliation of concepts derived from different legal systems into a general statement of international criminal law as codified in the statute was undoubtedly a challenge.[312] This challenge culminated in a negotiated synthesis of best practice in criminal law from the major legal systems[313] including, relevantly, general provisions such as the elements of crimes.

This chapter details that reconciliation of concepts into the general part of the statute regarding the elements of crimes generally and with specific reference to the doctrine of command responsibility as codified. Of significance to later chapters on the elements as provided in Australian law and any divergence in the application of such elements, this chapter analyses the definition of elements in the relevant articles of the Rome Statute and how such definition has been interpreted and applied in the jurisprudence of the ICC to date. In that light, this chapter discusses the interpretive rules and methodologies applicable to the elements of the crimes in the statute broadly and the elements of command responsibility specifically. That analysis includes the role of judicial precedent in interpreting the elements as well as the approach taken to defining the crimes using an 'elements analysis' model as opposed to a 'crime/offence analysis' approach, which is better known in common law jurisdictions.

Discussion on both the interpretive methodologies and the approach taken to defining the crimes in the statute is significant for the later comparative analysis of Australia's codification of the command responsibility provisions as derived from the Rome Statute. Similarly, this chapter defines the elements of command responsibility as derived from Article 28 and articulated in the jurisprudence of the ICC, as well as elements which did not make their way into Article 28 but require consideration in light of later comparative analysis with Australian law on point. As a continuation of the tidal flow analogy of the evolution of the doctrine of command responsibility, discussed in the preceding chapter, an introduction to the ICC Pre-Trial Chamber's analysis and elemental deconstruction of Article 28 in *Bemba*, as a precursor to further definitional analysis of the elements, is warranted at this juncture.

---

[312] Mahmoud Cherif Bassiouni and William A Schabas, 'The ICC's Nature, Functions, and Mechanisms' in Mahmoud Cherif Bassiouni (ed), *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text* (Transnational Publishers, 2005) vol 1, 132, 158.

[313] Boas, Bischoff and Reid, *Volume 2* (n 308) 8.

3.1.1 Bemba: the tidal flow of 'Rome Law'

In terms of the mental element applicable to the commission of offences by subordinates, Article 28(b) provides for both actual and constructive knowledge, the latter cast in the terms 'should have known that the forces were committing or about to commit such crimes'.[314] This has been described as a negligence standard which is stricter than the standard imposed in Article 86 of API and applied in ICTY jurisprudence 'in not requiring that there was specific information available to the commander but neglected by him'.[315] In the ICC's first judicial pronouncements on the doctrine as codified in Article 28, the Pre-Trial Chamber in *Bemba* held the more stringent 'should have known' standard requires the commander to 'have merely been negligent in failing to acquire knowledge of his subordinates' illegal conduct'.[316]

The Court went one step further, however, in applying the 'should have known' standard by imposing a positive or, as the Court described it, an 'active' duty on commanders to secure knowledge of the conduct of subordinates 'regardless of the availability of information at the time' of the offending conduct.[317] This is a significant move away from the jurisprudence of the ICTY/ICTR based on the stricter standard of knowledge with its use of the term 'should' as opposed to 'had reason to' and is arguably a return to the standard imposed in *Yamashita*. In light of the terminology employed in Australia's provisions implementing Article 28, this statement in *Bemba*, and the resultant extent of the duty imposed on commanders, is considered in later chapters of this thesis analysing the divergence between Article 28 and the provisions as implemented.

The Pre-Trial Chamber in *Bemba* confirmed the four constitutive elements of responsibility under Article 28 as follows:

(a) The suspect must be either a military commander or a person effectively acting as such;

---

[314] *Rome Statute* (n 22) art 28(a)(i).

[315] Thomas Weigend, 'Superior Responsibility: Complicity, Omission or Over-Extension of the Criminal Law?' in Christoph Burchard, Otto Triffterer and Joachim Vogel (eds), *The Review Conference and the Future of the International Criminal Court* (Wolters Kluwer, 2010) 67, 78.

[316] *Bemba Decision on the Confirmation of Charges* (n 237) [432].

[317] Ibid [433].

> (b) The suspect must have effective command and control, or effective authority and control over the forces (subordinates) who committed one or more of the crimes set out in articles 6 to 8 of the Statute;
>
> (c) The crimes committed by the forces (subordinates) resulted from the suspect's failure to exercise control properly over them;
>
> (d) The suspect either knew or, owing to the circumstances at the time, should have known that the forces (subordinates) were committing or about to commit one or more of the crimes …[318]

The Pre-Trial Chamber held the first element of 'military commander' was applied broadly to include all levels in the hierarchy of command[319] with no mention of proximity in terms of 'direct' command. This fact alone tends to support the validity of multiple or perpendicular command responsibility, discussed above. That contention is given greater weight when read with subsequent paragraphs of the *Bemba* pre-trial decision in which significant attention is given to the threshold test of 'effective control' in establishing the superior–subordinate relationship. *Bemba* also confirmed the requirement of temporal proximity or coincidence between the effective control and the criminal conduct, as accepted by the ad hoc tribunals and grounded in the wording of the chapeau of Article 28(a) in which the phrase 'failure to exercise control properly' was considered to suggest the commander was already in control before the commission of the crimes.[320]

3.2 Definitional analysis of elements under the Rome Statute

At its heart, this research is a comparative analysis of the respective provisions on command responsibility of the Rome Statute and the Commonwealth Criminal Code. In that light, the appropriate starting point is an analysis of the manner in which the terms of the Rome Statute generally are interpreted and defined. The interpretive techniques that are applied to the Rome Statute generally flow naturally into the manner in which the elements are interpreted specifically. Commencing the analysis in this way serves to provide a framework on which subsequent comparative analyses may be undertaken.

---

[318] Ibid [407].

[319] Ibid [408].

[320] Ibid [419].

3.2.1 Interpretive techniques applicable to the Rome Statute

As a general rule of interpretation, Article 31 of the *Vienna Convention on the Law of Treaties* provides that a treaty is to be interpreted in good faith by reference to the ordinary meaning of terms in their context and in light of the treaty's object and purpose.[321] The context includes the preamble and annexes in addition to any instrument made and accepted as relating to the treaty pursuant to paragraph 2 of Article 31.[322] In *Prosecutor v Al Bashir*, the ICC accepted, based on the agreement of the parties to the proceedings, that the Rome Statute should be interpreted in accordance with the principles of the *Vienna Convention* but applied a caveat that treaty provisions cannot be interpreted primarily based on their consistency with other international law rules.[323] In submissions to the Court in *Situation in the State of Palestine*, counsel from the United States appearing as amicus curiae relied on the 'widely-accepted principles of Article 31 of the Vienna Convention'[324] in defining a term that is the subject of debate in that matter.

It is thus clear that, as a starting proposition, the agreement by states parties to aspects of the Rome Statute including mechanisms of interpretation, as contemplated in Article 31(2), is significant. In its application to the elements of crimes in the Rome Statute, Article 31(2) is especially relevant insofar as the states parties to the Rome Statute agreed to adopt an instrument entitled *Elements of Crimes* as an aid to the Court in the interpretation and application of the war crimes, crime of aggression,[325] genocide and crimes against humanity

---

[321] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1) ('*Treaties Convention*').

[322] Ibid art 31(2).

[323] *Prosecutor v Al Bashir (Final Submissions of the Prosecution following the Appeal Hearing)* (International Criminal Court, Appeals Chamber, Case No ICC-02/05-01/09, 28 September 2018) [6].

[324] *Situation in the State of Palestine (Submission Pursuant to Rule 103 (Todd F Buchwald and Steven J Rapp))* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/18, 16 March 2020) 27.

[325] The crime of aggression (art 8 *bis* of the *Rome Statute*) is included for completeness, noting its inclusion in the *Elements of Crimes*; however the command responsibility provisions at art 28 are unlikely to have any practical relevance to the crime of aggression in light of the express limitation of the crime to a class of persons in senior leadership positions: see, eg, Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press, 2nd ed, 2021) 233–4.

provisions.[326] Both the statute and the instrument itself expressly provide that the instrument and the elements contained therein are an interpretive aid for the Court with the implication being they are not binding on the judges of the Court. The status of the *Elements of Crimes* was debated by the members of Pre-Trial Chamber I of the ICC in *Bashir* in the context of the contextual requirement for the crime of genocide.[327] The majority in that case held that the *Elements of Crimes* 'must be applied unless the competent Chamber finds an irreconcilable contradiction' with the statute, in which case 'the provisions contained in the statute must prevail'.[328] Article 9 of the statute confirms the elements must be 'consistent with this Statute',[329] with such consistency being determined, as a matter of logic, by the Court[330] itself as the arbiter of the statute. Article 9 is thus the *lex specialis* with respect to Article 21(1),[331] which articulates the applicable law to be applied by the Court in a hierarchy of application which places the statute and the *Elements of Crimes* as the primary sources in that order.

The sources of international law have long been derived from Article 38 of the *Statute of the International Court of Justice*. In accordance with Article 38(1), in deciding cases brought before it the International Court of Justice (ICJ) is to apply international conventions, international custom and general principles of law, and may be informed by judicial decisions and the teachings of highly qualified publicists.[332] The latter source is expressed as 'subsidiary means for the determination of rules of law',[333] which clearly establishes a hierarchy between that source and the others whilst leaving the other sources in an apparent state of interpretive equivalency.[334]

---

[326] *Rome Statute* (n 22) art 9(1); International Criminal Court, *Elements of Crimes*, Doc No ICC-PIDS-LT-03-002/11 (adopted 1 July 2002) art 1 ('*Elements of Crimes*').

[327] *Prosecutor v Al Bashir (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) [117]–[120] ('*Al Bashir Decision on Warrant of Arrest*').

[328] Ibid [128].

[329] *Rome Statute* (n 22) art 9(3).

[330] See Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press, 2002) 8.

[331] Ibid.

[332] *Statute of the International Court of Justice* art 38(1).

[333] Ibid art 38(1)(d).

[334] See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 53rd sess, UN Doc A/56/10 (2001) 139–41, which describes the relationships between rules of international

However, the Rome Statute takes a somewhat different approach in providing its own sources of applicable law in a clearly defined, 'three-tiered cascading'[335] hierarchy. The hierarchy of applicable law provided at Article 21(1) is as follows:

> The Court shall apply:
>
> (a) In the first place, this Statute, the Elements of Crimes and its Rules of Procedure and Evidence;
>
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.[336]

Notwithstanding the particular focus of Article 21 of the Rome Statute, the second collation of sources at sub-paragraph (b), in its use of the terms 'principles and rules of international law', suggests resort may be had to Article 38 of the ICJ Statute[337] in order of precedence after reference to the Rome Statute's constitutive documents.

The final source in the hierarchy, expressed as a fall-back source in the event all else has failed in the interpretive exercise, is general principles of law derived from national jurisdictions but, again, with a caveat affording primacy to the statute by requiring consistency with it.

---

law including coexistence of and deferral to sources. See also David Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 *American Journal of International Law* 857, 867 which disputes the International Law Commission study's validity as a source of law and contends it equates to the writings of highly qualified publicists in terms of authority, thus placing both sources below the other sources identified in the ICJ Statute.

[335] William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010) 385.

[336] *Rome Statute* (n 22) art 21(1).

[337] See Schabas, *The International Criminal Court* (n 335) 391.

This point becomes especially relevant in later analysis in this thesis of Australia's implementation of Article 28 and the implications of divergence in the application of the doctrine of command responsibility. The Rome Statute is silent as to the interpretive value of preparatory work including its *travaux préparatoires*. In that regard, reference may be made to Article 32 of the *Vienna Convention*, which provides for recourse to supplementary means of interpretation, including preparatory works of treaties, where ambiguity, obscurity or absurdity results from interpretation under the general principles provided in Article 31, or in order to confirm the meaning derived from the application of Article 31.[338] This is consistent with the implicit principle underlying the *Vienna Convention* that the intention of the parties is key to treaty interpretation but 'the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intention of the parties'.[339]

The hierarchy and resort to the sources listed in Article 21 paragraphs (a) and (b) was confirmed by Pre-Trial Chamber I in *Prosecutor v Al Bashir*, in which it was held that a lacuna must exist in the written law of the statute and that lacuna cannot be filled by the application of Articles 31 and 32 of the Vienna Convention and Article 21(3) of the statute before the sources in Article 21(1)(b) and (c) can be applied.[340] Interestingly, that decision relied on 'the consistent case law of the Chamber on the applicable law'[341] in confirming the hierarchy, thus explicitly applying jurisprudential precedent in its decision-making. Schabas states that care should be exercised in order to not take the statement in *Al Bashir* out of context, since all of the applicable sources provided in Article 21 will assist the Court in its interpretive role and Articles 21(1)(b) and (c) should not be 'totally disregarded simply because they present a different angle on legal questions'.[342] The statement by Schabas tends to confirm the broad interpretive approach taken by Pre-Trial Chamber I in its analysis of the sources of law and its reliance on earlier jurisprudence of the Court in interpreting the interpretive provisions of the statute.

---

[338] *Treaties Convention* (n 321) art 32.

[339] *United Nations Conference on the Law of Treaties, Official Records: Documents of the Conference*, UN Doc A/CONF.39/11/Add2 (26 March – 24 May 1968) 40, quoted in Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2010) 6.

[340] *Al Bashir Decision on Warrant of Arrest* (n 327) [44], [126].

[341] Ibid [44].

[342] Schabas, *The International Criminal Court* (n 335).

3.2.2 The role of judicial precedent in elemental analysis by the ICC

Case law has some precedential value, as the Rome Statute provides that '[t]he Court may apply principles and rules of law as interpreted in its previous decisions'.[343] This provision is couched in permissory rather than obligatory terms, suggesting that the precedential value of earlier decisions of the ICC is less than that afforded decisions in common law jurisdictions under the doctrine of *stare decisis*. As Greenwood states, 'international law knows no system of precedent comparable to that which exists in common law systems, so the ICC is not bound by its own previous decisions, let alone those of other courts and tribunals'.[344] This point is significant in the context of this thesis, noting this is a comparative analysis of the applicable Rome Statute and Australian provisions, the latter being a common law jurisdiction in which precedent plays a prominent part in the jurisprudence of the relevant courts. The distinction between the legal texts of the ICC and its non-binding jurisprudence is clearly made in the hierarchical demarcation between the texts, the secondary sources, and the fall-back national sources provided in Article 21(1) and the jurisprudence of the Court at Article 21(2). Such distinction places the non-binding jurisprudence of the Court below the primary, secondary and tertiary sources provided in Article 2(1) in what Bitti describes as a 'very delicate hierarchy'.[345]

Notwithstanding the discretionary nature of the use of earlier jurisprudence by the ICC, the Court, in practice, has a record of applying its own decisions as precedent in subsequent cases. This fact is relevant to the analysis underpinning this thesis in terms of the interpretation of the command responsibility provisions of the Rome Statute as implemented in Australian law. Judicial precedent plays a prominent role in Australian jurisprudence such that the work of the ICC chambers is likely to be referred to in Australian proceedings considering the command

---

[343] *Rome Statute* (n 22) art 21(2).

[344] Christopher Greenwood, 'What the ICC Can Learn from the Jurisprudence of Other Tribunals' (2017) 58 *Harvard International Law Journal* 71, 71.

[345] Gilbert Bitti, 'Article 21 of the Statute of the ICC and the treatment of sources of law in the jurisprudence of the ICC' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009) 281, 288.

responsibility provisions, if not by way of binding precedent certainly in terms of persuasive authority.[346]

In 2005, Pre-Trial Chamber II referred to an earlier decision of Pre-Trial Chamber I and, in 2006, Pre-Trial Chamber I elected to follow certain principles established earlier by Pre-Trial Chamber II.[347] In doing so, the Court expressly referred to Article 21(2), as follows:

> Article 21(2) of the Statute allows the Court to apply principles and rules of law as interpreted in its previous decisions. Accordingly, in the opinion of the Chamber, the principles set out in the Decision of Pre-Trial Chamber II should be applied here.[348]

Similarly, in the case of *Prosecutor v Katanga*, Pre-Trial Chamber I stated that parties to the proceedings should look to the Chamber's own jurisprudence in *Prosecutor v Lubanga* by declaring that 'the previous case law of the Chamber on this matter in the case of *The Prosecutor v Thomas Lubanga Dyilo* should be taken into consideration'.[349] Admittedly, the use of the term 'should' in this statement makes such requirement less than obligatory, thus reflecting the fact the statute, at Article 21(2), does not bind the Court to its earlier jurisprudence and, in that light, cannot bind parties to proceedings to such jurisprudence by way of precedent.[350] Whilst Article 21 does not create binding precedent from earlier decisions of the Court, the combination of the terms 'should' and 'previous case law', as used in *Katanga*, suggests the Court considers such precedent to be persuasive. Indeed, Article 21(2) does not use the term 'case law' but, rather, refers to 'principles and rules of law as interpreted in [the

---

[346] See, eg, *SS Pharmaceutical Co Ltd v Qantas Airways* [1991] 1 Lloyd's Rep 288, 294 (Kirby P); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331. See also Ivan Shearer, 'The Relationship Between International Law and Domestic Law' in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 34, 60–1.

[347] Bitti (n 345) 292.

[348] *Situation in the Democratic Republic of the Congo (Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-135-tEN, 31 March 2006) [18].

[349] *Prosecutor v Katanga (Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to 1/0337/07 and a/0001/08)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/07-357, 2 April 2008) 12.

[350] See Bitti (n 345) 293.

Court's] previous decisions'.[351] The concept of case law carries with it a connotation of precedence beyond a mere reference to prior decisions of the Court.

Whilst Article 21(2) expressly allows the use of earlier internal decisions, no express mention is made of the use of external decisions. Such external decisions may comprise decisions of other international criminal tribunals and courts as well as national judicial decisions. The term 'general principles of law derived by the Court from national laws of legal systems of the world' in Article 21(1)(c) is likely to encompass the latter. Reliance on national judicial decisions based on this interpretation of Article 21(1)(c) would invariably place such decisions ahead of the internal decisions of the Court itself in the clear hierarchy of sources established in Article 21. It is unlikely that outcome was intended in the drafting of the statute, particularly in the light of decisions of the ICC which have emphasised the non-binding nature of external decisions.[352] In addressing that conundrum from the perspective of international criminal tribunals and courts more broadly, Borda relies on the jurisprudence of the ICTY[353] in stating that 'national judicial decisions should only be used as a last resort'.[354] In the context of assisting the Court to fill lacunae in its developing body of law, McAuliffe deGuzman states that Article 21 'leaves a great deal of discretion to the judges in determining which national laws to consider in deriving "general principles"'.[355] The Court's ability to 'draw on principles of criminal law derived from national legal systems' helps address the problems associated with the fact that, 'as a developing body of law, international criminal law does not currently contain answers to every legal question likely to arise in a criminal trial'.[356] This broader reference to national legal systems encompasses the decisions of national courts within the

[351] *Rome Statute* (n 22) art 21(2).

[352] See, eg, *Prosecutor v Lubanga (Judgment)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) [603].

[353] See *Prosecutor v Erdemović (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-22-A, 7 October 1997) (Separate and Dissenting Opinion of Judge Cassese) [3].

[354] Aldo Borda, 'Precedent in International Criminal Courts and Tribunals' (2013) 2(2) *Cambridge Journal of International and Comparative Law* 287, 305.

[355] Margaret McAuliffe deGuzman, 'Applicable Law' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (CH Beck Hart Nomos, 2nd ed, 2008) 701, 710.

[356] Ibid 709–10.

ambit of Article 21(1). Similarly, Khan and Dixon consider the judicial decisions and practices of national courts can assist the ICC by 'provid[ing] evidence of established or developing international custom, [helping to] discern a general principle of law, or … inform[ing] a court's approach to an issue'.[357] It has, however, been suggested that resort to such national decisions as a source of law before the ICC requires greater caution than resort to the 'principles and rules of international law' as permitted by Article 21(1)(b) due to the greater variation in the former as to what constitutes general principles and who determines the content of the principles.[358] This point is especially relevant in the context of this thesis and its analysis of the implementation of the Rome Statute into domestic Australian law and the implications of divergence from the former.

In discussing the use of jurisprudence external to that of the ICC, Greenwood states:

> International law is a single legal system and the judgments of other courts and tribunals on more general matters are sources from which the ICC can and should draw. These obviously include the judgments of the ICTY and ICTR and other ad hoc courts and tribunals on the principles of international criminal justice.[359]

Similarly, a recommendation in the 2020 report of the Independent Expert Review of the International Criminal Court and the Rome Statute System stated that: 'Recognising the importance of legal certainty and consistency, the Court should depart from established practice or jurisprudence only where that is justified on grounds precisely articulated in the decision/judgment.'[360] The report identified that, prior to the *Bemba* appellate case, the ICC followed the jurisprudence of the ad hoc tribunals regarding certain procedural standards. This departure from that jurisprudence is described in the report as creating an 'undesirable void of uncertainty'.[361]

---

[357] Karim Khan and Rodney Dixon, *Archbold International Criminal Courts: Practice, Procedure & Evidence* (Thomson Reuters, 3rd ed, 2009) 16.

[358] Volker Nerlich, 'The Status of ICTY and ICTR Precedent in Proceedings Before the ICC' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009) 305, 314–15.

[359] Greenwood (n 344) 73.

[360] *Independent Expert Review of the International Criminal Court and the Rome Statute System*, ASP, 19th sess, ICC-ASP/19/16 (Final Report, 7–17 December 2020) annex XI, R217.

[361] Ibid [611].

Notwithstanding the discretionary nature of the use of both internal and external jurisprudence by the ICC, an analysis of the crimes that are the subject of the Rome Statute and their definition both in the *Elements of Crimes* and as provided in individual provisions such as Article 28 makes it clear 'the definitions of the crimes in the Rome Statute owe a lot to both the statutes of the ad hoc tribunals and to their jurisprudence'.[362] It is thus left open to the ICC to consider previous jurisprudence, including that of earlier international criminal tribunals and courts, in interpreting the elements of crimes on the proviso the constitutive documents are referred to at first instance pursuant to Article 21.

The doctrine of command responsibility, as articulated at Article 28, does not, however, appear in the *Elements of Crimes*. In that light, if the statute itself does not address an issue pertaining to the elements of the doctrine that the Court needs to interpret, or the issue is not adequately addressed in the *Elements of Crimes* more generally, reference to external jurisprudence or other extrinsic sources may be necessary.

Accordingly, the Court will be required to traverse inconsistencies between provisions of the statute and those of the *Elements of Crimes*[363] in interpreting the elements of the statutory crimes – the crimes defined in Articles 6 to 8 of the statute – and the elements of criminal responsibility within the general part of the statute.[364] This demarcation between the elements as specified in the *Elements of Crimes* document and the elements underpinning criminal responsibility, the latter including command responsibility, has the potential to introduce a lacuna in the law as mandated in *Al Bashir*, discussed above, as a precursory requirement to the application of sources external to the constitutive documents. Whilst Goy directly rejects the 'mechanical' transfer of the interpretation by the ICTY/ICTR of the modes of liability and

[362] Stuart Ford, 'The Impact of the Ad Hoc Tribunals on the International Criminal Court' in Milena Sterio and Michael Scharf (eds), *The Legacy of Ad Hoc Tribunals in International Criminal Law* (Cambridge University Press, 2019) 307, 313.

[363] Bassiouni and Schabas (n 312) 165.

[364] Ibid 153.

their elements into the ICC context,[365] a position confirmed by the ICC itself,[366] it is apparent the jurisprudence of the ad hoc tribunals may be referred to and, indeed, is likely to be referred to in the event clear and unambiguous definitions pertaining to the elements underpinning command responsibility cannot be determined.

The prosecution of Rome Statute crimes, including under the doctrine of command responsibility, in an Australian setting is likely to take place in Australian courts exercising federal jurisdiction[367] or, possibly, before military tribunals, in the exercise of the principle of complementarity.[368] In that light, some attention needs to be given to reliance on domestic jurisprudence in interpreting the provisions of the Rome Statute including the elements of the respective crimes in advance of later analysis in this thesis of the implications of divergence in the application of the doctrine of command responsibility. Grover states that interpretive work undertaken by judicial bodies in different contexts to that of the ICC demands scrutiny to determine the relevance of sources.[369] In *Čelebići*, the ICTY Trial Chamber noted the 'dangers of relying upon the reasoning and findings of a very different judicial body concerned with rather different circumstances'.[370]

In *Furundžija*, the ICTY Trial Chamber considered the case law of the British military courts conducting trials of war criminals in the aftermath of the Second World War to be 'less helpful in establishing rules of international law' due to the military courts' application of domestic rules of procedure.[371] Along similar lines, in *Kvočka*, the ICTY held that 'the influence of

---

[365] Barbara Goy, 'Individual Criminal Responsibility before the International Criminal Court: A Comparison with the *Ad Hoc* Tribunals' (2012) 12 *International Criminal Law Review* 1, 3.

[366] See, eg, *Al Bashir Decision on Warrant of Arrest* (n 327) [126]; *Prosecutor v Katanga (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/07-717, 30 September 2008) [508].

[367] See *Criminal Code* (n 23) div 268.

[368] Ibid s 268.1. See also *Rome Statute* (n 22) Preamble; Kleffner (n 17) 1.

[369] Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge University Press, 2015) 362.

[370] *Čelebići Trial Judgment* (n 130) [230].

[371] *Prosecutor v Furundžija (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [196], considered in Kriangsak Kittichaisaree, *International Criminal Law* (Oxford University Press, 2002) 50.

domestic criminal law practice on the work of the International Tribunal must take due account of the very real differences between a domestic criminal jurisdiction and the system administered by the International Tribunal'.[372]

Noting the differences between the jurisdiction of Australian criminal courts, including those exercising federal jurisdiction in the application of the war crimes provisions of the Commonwealth Criminal Code, and the fact that Australian military tribunals exercise a 'disciplinary' rather than a purely 'criminal' function,[373] these observations on interpretation cannot be discounted.

3.2.3 The element analysis approach and the default rule

In the *Bemba* confirmation of charges decision, Pre-Trial Chamber II gave an opinion that:

> [T]he Statute is constructed on the basis of an element analysis approach – as opposed to – a crime analysis approach, according to which different degrees of mental element are assigned to each of the material elements of the specific crime under consideration.[374]

Relevantly, from the perspective of the application of broader interpretive principles, the ICTY adopted an element analysis approach in much of its jurisprudence.[375] In practice, the element analysis approach to establishing criminal responsibility requires coincidence between the material elements – the common law *actus reus* – and the mental elements – the common law *mens rea*. This coincidence of elements, and statements of the requisite elements themselves, is generally expressed in domestic criminal or penal codes because such codes 'should be rational, clear, and internally consistent [in order to] give citizens fair warning of what will

---

[372] *Prosecutor v Kvočka (Decision on Defence Preliminary Motions on the Form of the Indictment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-30/1, 12 April 1999) [16], quoted in Grover (n 369) 363.

[373] See *Re Tracey; Ex Parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex Parte Young* (1991) 172 CLR 460; *Private R v Brigadier Michael Cowan* [2020] HCA 31.

[374] *Bemba Decision on the Confirmation of Charges* (n 237) [355].

[375] Geert-Jan Knoops, *Mens Rea at the International Criminal Court* (Brill Nijhoff, 2017) 36.

constitute a crime'.[376] Earlier common law criminal jurisdictions, including the criminal law of some Australian states, took a 'crime analysis' or 'offence analysis' approach which often defined offences as requiring only a single mental state regardless of the number of material (*actus reus*) elements.[377] Fellmeth and Crawford appear to take a 'crime/offence analysis' approach to their discussion of the 'reason to know' standard of fault through the prism of the Brereton Report in identifying 'a confusing vagueness about *the* mental element of *the* offence', with the term 'mental element' expressed in the singular.[378] As confirmed in *Bemba*, above, and as discussed below, the Rome Statute adopts an element analysis approach to the definition of crimes within its jurisdiction. As will be seen in later chapters, the Commonwealth Criminal Code, including the provisions analysed in this thesis, also adopts an element analysis approach in defining the respective crimes.[379]

The element analysis approach is articulated at Article 30(1) of the Rome Statute as follows: 'Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.'[380]

Article 30(1) refers to the material elements in broad terms and subsequently states the requisite mental elements of 'intent' and 'knowledge' without expressly referring to the concept of mental elements. On its face, this provision appears to ignore any definition of material elements whilst also limiting the available mental elements to those stated – intent and knowledge. The former dilemma is addressed at Articles 30(2) and 30(3), albeit not expressly. Article 30(2) provides:

---

[376] Paul Robinson and Jane Grall, 'Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond' (1983) 35 *Stanford Law Review* 681, 682.

[377] See, eg, Reg Bartley, *Crawford's Proof in Criminal Cases* (LBC Information Services, 5th ed, 1996) which states the proofs (elements) of all crimes in the *Crimes Act 1900* (NSW) at the date of publication.

[378] Aaron Fellmeth and Emily Crawford, '"Reason to Know" in the International Law of Command Responsibility' (2022) 104(919) *International Review of the Red Cross* 1223, 1225–6 (emphasis added).

[379] See, eg, Troy Anderson, *Commonwealth Criminal Law* (Federation Press, 2014); *R v Campbell* (2008) 73 NSWLR 272, [44] in which Spigelman CJ and Weinberg AJA held that the physical and fault elements of an offence under the Criminal Code must coincide in time.

[380] *Rome Statute* (n 22) art 30(1).

> For the purposes of this article, a person has intent where:
>
> (a) In relation to conduct, that person means to engage in the conduct;
>
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.[381]

Article 30(3) provides: 'For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.'[382]

Whilst a mental element is expressly an 'indispensable constituent element of all crimes within the subject-matter jurisdiction of the ICC [which is] therefore, essential for criminal liability under the Rome Statute',[383] paragraphs (2) and (3) implicitly provide the material elements to which such mental elements must attach in order to constitute a crime. The definitions of the mental elements of 'intent' and 'knowledge' in those paragraphs include what can only be conceived as further elements of a variety which is physical[384] and not mental in nature, the former referring to tangible external events and the latter going to the state of mind or fault of an accused person.[385] Gadirov states the drafting of Article 30 in this format provides for a reasonable inference that the definitional concepts form the basis of the requisite material elements – conduct elements, consequence elements and circumstance elements.[386]

Analysing the provisions in this way is consistent with the apparent intention of the statute that an elements analysis approach be adopted. To find otherwise would be to discard that approach in favour of a hybrid elements and crime analysis approach. Such a hybrid model would not

---

[381] Ibid art 30(2).

[382] Ibid art 30(3).

[383] Erkin Gadirov and Roger Clark, 'Elements of Crimes' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (CH Beck, Hart, Nomos, 2nd ed, 2008) 505, 511–12.

[384] The term 'physical' does not appear in the final text of the Rome Statute as describing a category of elements although this term is used in the Commonwealth Criminal Code in lieu of the term 'material'.

[385] Stephen Odgers, *Principles of Federal Criminal Law* (Thomson Reuters, 2nd ed, 2010) 11. See also Anderson (n 379) 21, which describes the codified elements of crimes as 'physical' – referring to external events – and 'fault' – referring to the state of mind of the accused.

[386] Gadirov and Clark (n 383) 513.

provide the certainty required of criminal offence provisions and would reject the opinion provided by Pre-Trial Chamber II in *Bemba*, above.

The latter dilemma arising from Article 30(1) – that of the apparent limitation of the available mental elements to intent and knowledge is addressed by the opening caveat to Article 30(1) – 'unless otherwise provided'. Article 30 provides a default rule, such that, where the *Elements of Crimes* is silent on which mental element goes with which material element, the default elements of intent and knowledge are applied. This is confirmed in the general introduction to the *Elements of Crimes*, as follows:

> Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, ie, intent, knowledge or both, set out in article 30 applies.[387]

The exceptional clause – 'unless otherwise provided' – is the means by which other mental elements beyond intention and knowledge may be introduced to specific crimes or modes of liability. Dörmann suggests that determining the extent of the application of this clause is problematic, including whether its scope is limited to other crimes under the statute or whether departure from the default standard is warranted as required by other sources of international law.[388] The central provision that is the subject of this thesis, Article 28, expresses an applicable mental element as it applies to one material element but is silent on the mental elements to be applied to the remaining material elements. However, a detailed analysis of the problems associated with the scope of application of the clause is both unnecessary and beyond the scope of this thesis. It is adequate to find that, where the particular provisions of a crime or mode of liability provide mental elements other than those expressed in Article 30, departure from the

[387] *Elements of Crimes* (n 326) art 2.

[388] Dörmann (n 330) 11.

default rule is warranted and consistent with the statute,[389] and where no mental element is specified the default rule applies.[390]

By way of example, and drawing from the statutory crimes as defined in the *Elements of Crimes*, Article 6(a) of the statute proscribes the crime of genocide by killing and Article 6(a) of the *Elements of Crimes* articulates the elements. Article 6(a) of the *Elements of Crimes*, at Element 1, states: '[t]he perpetrator killed one or more persons'.[391] Element 1 is a material element of conduct which does not specify its own mental element. In that instance the default rule applies pursuant to Article 30 of the statute and Article 2 of the *Elements of Crimes* such that the mental element of intent attaches to this material element. Element 2 is stated as: '[s]uch person or persons belonged to a particular national, ethnical, racial or religious group'.[392] This is a material element of circumstance with no stated mental element such that the default mental element of knowledge applies. It must be proven that the accused knew of the status of the victims within that group.[393] Element 3, '[t]he perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such',[394] provides its own mental element of intent as applying to the material element of the destruction of the group. Element 4, '[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction',[395] is, on its face, a material element of circumstance which, in the strict application of the default rule would attract a default mental element of knowledge.

Clark, however, refers to the general introduction to the *Elements of Crimes* which refers to 'contextual circumstances' and to Article 6 of the *Elements of Crimes*, in contending that no

---

[389] See, eg, *Prosecutor v Lubanga (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, 29 January 2007) [359] ('*Lubanga Decision on the Confirmation of Charges*') in which the Chamber confirmed that the 'should have known' mental element expressly provided for in the relevant offence provisions is an exception to the 'intent and knowledge' default mental elements required in Article 30.

[390] See, eg, *Lubanga Decision on the Confirmation of Charges* (n 389) [359]; Arnold and Triffterer (n 31) 822.

[391] *Elements of Crimes* (n 326) art 6(a).

[392] Ibid.

[393] See Clark (n 304) 326.

[394] *Elements of Crimes* (n 326) art 6(a).

[395] Ibid.

further mental element is required to attach to an element of 'contextual circumstance'.[396] This issue of attaching mental elements to what Clark further refers to as 'implied or manufactured contextual circumstances'[397] appears to have been unresolved, as implicitly demonstrated by Article 6 of the *Elements of Crimes*, which provides, inter alia, as follows:

> Notwithstanding the normal requirement for a mental element provided for in Article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding the circumstance will need to be addressed by the Court on a case-by-case basis.[398]

This point as to the requirement for a mental element to attach to a material element of 'contextual' circumstance becomes relevant in later analyses of the material element of 'crimes within the jurisdiction of the Court' in Article 28.

3.2.4 Applying the default mental elements of intent and knowledge

Before deconstructing Article 28(a) into its constituent elements, it is appropriate at this juncture to quote Article 28(a) in its entirety:

> A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
>
> i. That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
>
> ii. That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[399]

---

[396] Clark (n 304) 326.

[397] Ibid 327.

[398] *Elements of Crimes* (n 326) art 6.

[399] *Rome Statute* (n 22) art 28(a).

A tabulated deconstruction of the material and mental elements of Article 28(a) is provided at Table 1, below.

In light of the fact the Rome Statute takes an element analysis approach to articulating the requisite elements, such that a mental element is required to attach to each material element, material elements in Article 28 which do not specify mental elements will attract the default rule. By way of example, the material element of the 'failure to exercise control properly over … forces'[400] is silent on the applicable mental element. In that instance, and as is discussed further below, reference must be made to the definitions of intent and knowledge as they relate to the material elements of conduct, consequence or circumstance in Article 30. In this instance, the failure to exercise control is a material element of conduct which, according to paragraph 2(a) of Article 30, attracts the mental element of intent.[401] As Triffterer states:

> The requirement of 'strictly construed' elements [leading] to a more precise definition in article 28 Rome Statute … seems to be necessary and justified to include the additional element demanded there, namely an 'intentional failure to control properly' resulting in criminal activities of their subordinates.[402]

It is thus necessary to analyse the mental elements of both intent and knowledge, notwithstanding Article 28 only expressly provides the mental element of 'knew' or 'should have known' with respect to one of its material elements – the commission of crimes within the jurisdiction of the Court.[403] All other material elements of Article 28 are silent as to the requisite mental element, meaning that intent or knowledge apply by default.

Intent is defined at Article 30(2) in the context of two physical or material situations within a factual matrix – intent as it relates to conduct and intent as it relates to a consequence. Paragraph (2) provides that:

> For the purposes of this article, a person has intent where:
>
> (a) In relation to conduct, that person means to engage in the conduct;

---

[400] Ibid.

[401] Ibid art 30(1)(a).

[402] Arnold and Triffterer (n 31) 822.

[403] *Rome Statute* (n 22) art 28(a)(i).

> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.[404]

The definitional phrase 'means to engage in the conduct' suggests the conduct is the result of some degree of voluntary action by the accused.[405] This relationship between the mental element of intent and one of its two material elements, in this case conduct, is the conscious or volitional aspect of the act of committing a crime[406] but, as Piragoff and Robinson state, in the case of the definition in Article 30(2)(a), the phrase distinguishes between voluntary and involuntary conduct and, by necessity, includes a degree of knowledge.[407] This is entirely consistent with the Australian common law approach to the element of intent,[408] as will be seen in later chapters, and was confirmed by the ICC in the *Lubanga* confirmation of charges decision. In *Lubanga*, Pre-Trial Chamber I held that:

> The cumulative reference to 'intent' and 'knowledge' requires the existence of a volitional element on the part of the suspect. This volitional element encompasses, first and foremost, those situations in which the suspect (i) knows that his or her actions or omissions will bring about the objective [material] elements of the crime, and (ii) undertakes such actions or omissions with the concrete intent to bring about the objective [material] elements of the crime.[409]

The alternative to intent as it relates to conduct is intent as it relates to a consequence. The upshot of this aspect of intent is that an accused is considered to intend a particular consequence or result, even if he does not intend the consequence or result as particularised in the indictment, if he is 'aware that it will occur in the ordinary course of events'.[410] This is consistent with the

---

[404] Ibid art 30(2).

[405] Donald Piragoff and Darryl Robinson, 'Article 30 Mental Element' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (CH Beck, Hart, Nomos, 2nd ed, 2008) 849, 859.

[406] Mohamed Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (Hart Publishing, 2013) 388.

[407] Piragoff and Robinson (n 405).

[408] See, eg, *Saad v The Queen* [1987] 29 A Crim R 20, 21 (Mason CJ, Deane and Dawson JJ); *Ansari v The Queen* (2010) 241 CLR 299, 318 (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

[409] *Lubanga Decision on the Confirmation of Charges* (n 389) [351].

[410] *Rome Statute* (n 22) art 30(2)(b).

common law understanding of advertence to consequence in the deconstruction of intention[411] and, as is further explored in later chapters, is consistent with codified Australian law on point.

The trigger to a finding of intent as it relates to consequence – awareness that the specified consequence 'will occur in the ordinary course of events' – leaves certain questions of interpretation open. As Badar poses: 'Does it require that the perpetrator foresees the occurrence of the consequence as certain? Or whether mere awareness of the probable occurrence of the consequence is sufficient?'[412]

The answer appears to turn on the terminology 'will occur' in the article. Triffterer suggests the explicit use of the term 'will occur' as opposed to 'might occur' means it would be insufficient to merely prove the accused is aware of the probability of the consequence but, nevertheless, carries out the conduct resulting in the consequence grounding the offence.[413] If, as is suggested, the term 'might' equates broadly with 'probability', it is reasonable to find that the term 'will' equates broadly with 'certainty'. In that light, a degree of certainty in the foreseeability of the consequence of the conduct manifesting is thus required in order to satisfy the 'will occur' test of intent as it relates to consequence.

The term 'aware' is addressed directly in the provisions of Article 30 at paragraph (3) in the definition of 'knowledge', such that awareness in paragraph 2(b) equates to knowledge as it is defined in paragraph (3).

Knowledge is defined at Article 30(3) in the context of two physical or material situations within any given factual matrix: knowledge as it relates to a circumstance and knowledge as it relates to a consequence. Paragraph (3) provides that: 'For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.'[414]

---

[411] See Douglas Stroud, *Mens Rea or Imputability under the Law of England* (Alpha Editions, 2020), 6.

[412] Badar (n 406) 392.

[413] Otto Triffterer, 'The New International Criminal Law: Its General Principles Establishing Individual Criminal Responsibility' in Kalliopi Koufa (ed), *The New International Criminal Law* (Sakkoulas Publications, 2003) 639, 706, discussed in Badar (n 406) 392.

[414] *Rome Statute* (n 22) art 30(3).

In contrast to the conjunctive nature of the term 'intent and knowledge' as it applies to the element of intent, the element of knowledge can exist in any factual matrix without the element of intent. As Piragoff and Robinson state, 'one can know that a circumstance exists or that a consequence will occur even if even if one does not intend or wish that it exists or occurs'.[415]

No definition of knowledge is provided as it relates to conduct such that any material element comprising conduct is limited to a mental element of intent. This is relevant in deconstructing the elements of Article 28 where the identified material elements are silent as to the requisite mental elements. In the application of the default rule and the rules provided by Article 30(2), any material element comprising conduct which does not express a mental element must thus have a mental element of intent attached.

3.2.5 Establishing actual knowledge in Article 28

In considering the proof of actual knowledge, Pre-Trial Chamber II in *Bemba* relied on the ICTY decision in *Delić* in forming the view that such actual knowledge on the part of a commander cannot be presumed but rather 'must be obtained by way of direct or circumstantial evidence'.[416] Reliance on circumstantial evidence is consistent with the terms of paragraph (a)(i) of Article 28 that knowledge – actual or constructive – is formed 'owing to the circumstances at the time'.[417] The Chamber took both a broad and specific approach to proving actual knowledge on the basis of circumstantial evidence. The broad approach was drawn from the ICTY decision in *Hadžihasanović* that actual knowledge may be proven if '*a priori*, [a military commander] is part of an organised structure with established reporting and monitoring systems'.[418] Specific indicia considered by the Chamber to reach a conclusion on the existence of actual knowledge on the part of the superior included:

- the number of illegal acts;

---

[415] Piragoff and Robinson (n 405) 854.

[416] *Bemba Decision on the Confirmation of Charges* (n 237) [430].

[417] *Rome Statute* (n 22) art 28(a)(i).

[418] *Bemba Decision on the Confirmation of Charges* (n 237) [431], quoting *Prosecutor v Hadžihasanović (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-01-47-T, 15 March 2006) [94].

- their scope;
- whether their occurrence is widespread;
- the time during which the prohibited acts took place;
- the type and number of forces involved;
- the means of available communication;
- the modus operandi of similar acts;
- the scope and nature of the superior's position and responsibility in the hierarchal structure;
- the location of the commander at the time; and
- the geographical location of the acts.[419]

The indicium of the availability of communication is, it is contended, a significant aspect in determining both actual and constructive knowledge in contemporary military operations in the Australian context, as is considered in later chapters. Fenrick expands on this particular indicium, albeit in the context of the ICTY prosecutions, by expressing the need to secure evidence on 'the routine or extraordinary systems available to provide information to accused, effectiveness of systems and relevant information provided'.[420] Similarly, Triffterer adds the indicia of 'the tactical tempo of operations', 'the logistics involved', and 'the officers and staff involved'[421] which are, it is again contended, of particular relevance in ascertaining knowledge in contemporary operations. This expanded list of indicia is consistent with the non-exhaustive list of indicia identified by a Commission of Experts established pursuant to Security Council Resolution 780 of 1992 in response to ongoing violations of international humanitarian law in the former Yugoslavia.[422]

With proof of actual knowledge, the standard at international criminal law does not deviate from general principles of criminal law in national systems sufficiently to warrant concern.[423] However, the jurisprudence of courts and tribunals considering the concept of constructive

[419] Ibid.

[420] Fenrick (n 85) 125.

[421] Arnold and Triffterer (n 31) 823.

[422] SC Res 780, UN SCOR, UN Doc S/RES/780 (6 October 1992), cited in Boas, Bischoff and Reid, *Volume 1* (n 67) 204–5.

[423] Jenny Martinez, 'Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond' (2007) 5 *Journal of International Criminal Justice* 638, 642.

knowledge, which includes the 'should have known' standard, demonstrates the problems in articulating 'a clear, coherent standard of liability'.[424]

3.2.6 The lower 'should have known' standard

According to Clark, convicting military commanders under the command responsibility provisions upon establishing proof at a lower mental threshold than actual knowledge avoids 'an invitation to the commander to see and hear no evil'.[425] This colourful expression of the intent of the doctrine is manifest in the inclusion of the lower 'should have known' standard in Article 28. In *Lubanga*, the Pre-Trial Chamber determined the scope of the 'should have known' standard with respect to the charge of enlisting or conscripting children under the age of 15 years. The Chamber held that, in order to prove liability, the prosecutor need only establish that, where the accused did not know that the victims were under the age of 15 years at the relevant time, he or she 'lacked such knowledge because he or she did not act with due diligence in the relevant circumstances'.[426] Similarly, in *Bemba* the Pre-Trial Chamber held, in respect of the knowledge element:

> Article 28(a) of the Statute encompasses two standards of fault element. The first, which is encapsulated by the term 'knew', requires the existence of actual knowledge. The second, which is covered by the term 'should have known', is in fact a form of negligence.[427]

Further, the Chamber held that '[t]he "should have known" standard requires the superior to have merely been negligent in failing to acquire such knowledge'.[428] Both *Lubanga* and *Bemba* equate the 'should have known' standard with the concept of negligence, implicitly in the former and expressly in the latter. This correlation with negligence subsequently raises the issue of the existence and scope of a duty on the part of the commander. It is settled at law that

---

[424] Ibid.

[425] Roger Clark, 'Medina: An Essay on the Principles of Criminal Liability for Homicide' (1973) 5 *Rutgers-Camden Law Journal* 59, 78.

[426] *Lubanga Decision on the Confirmation of Charges* (n 389) [358].

[427] *Bemba Decision on the Confirmation of Charges* (n 237) [429].

[428] Ibid [432].

the doctrine of command responsibility centres on the failure of commanders to exercise a duty to effectively control forces under their command.[429]

Bemba subsequently quoted the ICTY Trial Chamber decision in *Blaškic* in stating that 'ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of [a commander's] duties'.[430] In considering whether a duty arises from the knowledge test in the context of the commission of crimes by subordinates, the Pre-Trial Chamber in *Bemba* held that the 'should have known' standard:

> Requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime.[431]

Martinez suggests the 'should have known' standard is in the nature of negligence-based liability which 'readily admits the possibility of a duty of knowledge'.[432] Arguably the *Bemba* statement, above, serves to elevate that possible duty to an express requirement. The question remains, however, as to the extent of that active duty of knowledge. A question was left by the ICTY Appeals Chamber in *Blaškić*: 'is it enough that information was available to the superior even if he did not look at it?'[433] The Pre-Trial Chamber in *Bemba* appears to answer that in the affirmative.

By majority decision, the Appeals Chamber dismissed the charges preferred under Article 28 and, with regard to the 'knew or should have known' standard, made the finding that '[a]n assessment of whether a commander took all "necessary and reasonable measures" must be based on considerations of what the commander knew or should have known about and at what point in time'.[434] It is in this regard that a separate opinion and the majority decision diverge. The onus placed on commanders by the Pre-Trial Chamber in *Bemba* would have been diminished if a separate opinion of two judges of the Appeals Chamber had been adopted by

---

[429] See, eg, *Abbaye Ardenne* case reported in United Nations War Crimes Commission (n 127) vol 4.

[430] *Bemba Decision on the Confirmation of Charges* (n 237) [432], quoting *Blaškic Trial Judgment* (n 90) [332].

[431] *Bemba Decision on the Confirmation of Charges* (n 237) [433].

[432] Martinez (n 423) 659.

[433] Ibid 658.

[434] *Bemba Appeal Judgment* (n 91) [6].

the majority. Judges Van den Wyngaert and Morrison maintained the duty to inquire under the 'should have known' standard, even if a commander has doubts about the accuracy of certain information, whilst potentially absolving a commander from command responsibility under the actual knowledge standard if genuine reasons exist to doubt the accuracy of information, even if the information is subsequently found to be accurate.[435]

The separate opinion distinguishes between the elemental concepts of 'knew' and 'should have known' such that it considers it impossible to ascertain what steps ('measures') a commander should have taken in the absence of actual knowledge of offending conduct on the part of subordinates at the time,[436] whilst the majority held that such a determination is available on either actual or constructive knowledge.[437]

The separate opinion goes further in rejecting the application of the 'should have known' standard to the 'necessary and reasonable measures' test by stating that the only basis on which any form of liability may attach to the commander is not specific measures but, rather, is 'for not monitoring his or her subordinates adequately'.[438] This is a clear reduction in the weight of the 'should have known' standard, at least insofar as the application of the 'necessary and reasonable measures' test goes but, of course, this is an opinion which is inconsistent with the majority decision of the Appeals Chamber. Any precedential value which may attach to the jurisprudence of the Court would undoubtedly attach to the majority decision.

As the law presently stands, the duty of knowledge is a strict one which imposes on a commander a duty to inquire in order to overcome the 'should have known' standard of Article 28 as it relates to the material element of the commission or pending commission of crimes by subordinates and, subsequently, as it transposes to the commander's duty to prevent or repress the crimes.

---

[435] *Prosecutor v Bemba (Separate Opinion of Judge Van den Wyngaert and Judge Morrison)* (International Criminal Court, Appeals Chamber, Case No ICC-01/05-01/08-A Anx 2, 8 June 2018) [43] ('*Bemba Separate Opinion*').

[436] Ibid [37]–[38].

[437] *Bemba Appeal Judgment* (n 91) [6].

[438] *Bemba Separate Opinion* (n 435) [38].

3.2.7 The banishment of recklessness from the statute

In a 1996 Rome Statute Preparatory Committee draft of the statute, in a section addressing the mental elements of crimes, Article H, entitled '*Mens rea* – Mental elements of crimes', the concept of recklessness was included along with the concepts of intent and knowledge. Paragraph 4 of draft Article H appeared in square parentheses whilst the remaining paragraphs regarding intent and knowledge and the definitions of those elements including the implicit statement of material elements, discussed above, appear as numbered paragraphs in the absence of parenthesis. This shows a clear intent on the part of the committee to bring attention to their concerns regarding the inclusion of recklessness as a mental element in the statute. Draft Article H paragraph [4] provided, as follows:

> For the purposes of this Statute and unless otherwise provided, where this Statute provides that a crime may be committed recklessly, a person is reckless with respect to a circumstance or a consequence if:
>
> (a) The person is aware of a risk that the circumstance exists or that the consequence will occur;
>
> (b) The person is aware that the risk is highly unreasonable to take; and
>
> (c) The person is indifferent to the possibility that the circumstance exists or that the consequence will occur.[439]

In the report to the United Nations General Assembly of its March–April and August 1996 sessions, the Preparatory Committee identified differing views regarding the inclusion of recklessness as a *mens rea* element, including the fact that doubts were expressed as to its inclusion in the statute at all.[440]

Significantly, in notes to draft Article H, the Preparatory Committee determined that further consideration of the concepts of recklessness and *dolus eventualis* was required 'in view of the

---

[439] Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court: Compilation of Proposals*, UN GAOR, 51st sess, Supp No 22, UN Doc A/51/22 (13 September 1996) vol 2, 92.

[440] Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court: Proceedings of the Preparatory Committee during March-April and August 1996*, UN GAOR, 51st sess, Supp No 22, UN Doc A/51/22 (13 September 1996) vol 1, [200].

seriousness of the crimes considered' such that the article 'would provide a definition of "recklessness", to be used only where the Statute explicitly provides that a specific crime or element may be committed recklessly'.[441] A reasonable inference exists that the concerns of the Preparatory Committee centred on the question whether recklessness was an appropriate or adequate mental element to be applied in the context of the crimes contained in the statute in light of their objective seriousness. Intent and knowledge were accepted as appropriate standards of fault, whilst questions remained regarding the standard of fault imposed by the concept of recklessness. Clark describes that the debate on the elements by the Preparatory Committee demonstrated a 'widespread disposition to avoid responsibility based on either negligence or recklessness', with some concessions that 'the occasions for recklessness and negligence liability would be sparse'.[442]

Reference to the *travaux* relating to the provisions on the responsibility of commanders and other superiors, eventually enumerated as Article 28, evidences the fact that recklessness never featured as an element of Article 28(a) and the responsibility of military commanders or persons acting as military commanders.[443] Rather, the 'should have known' standard was applied to military and military-like commanders in all iterations of the article. Similarly, the 'should have known' standard applied to all iterations in which military commanders and non-military superiors were treated interchangeably. It was not until the responsibility of military commanders was distinguished from 'other superiors', the 'bifurcated standard',[444] in the text which was transmitted by the Drafting Committee considering command responsibility to the Committee of the Whole, that the test of 'knew or consciously disregarded information which clearly indicated' was applied to superiors other than military or military-like commanders.[445] That test remains in Article 28(b) as it presently appears in the Rome Statute.

Notwithstanding this research is limited in its scope to an analysis of Article 28(a), this expressed distinction between the standard of fault to be applied to military and military-like

---

[441] Ibid n 92.

[442] Clark, 'The Mental Element' (n 304) 321.

[443] Mahmoud Cherif Bassiouni (ed), *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute* (Transnational Publishers, 2005) vol 2, 210–14.

[444] Boas, Bischoff and Reid, *Volume 1* (n 67) 253.

[445] Ibid 211–12.

commanders (Article 28(a)) and that to be applied to non-military (other) superiors (Article 28(b)) warrants some attention. It is clear the drafters of the provisions on command/superior responsibility – what would become Article 28 – never intended that recklessness would apply as the standard of fault to military or military-like commanders.

The fact that the 'should have known' standard remained even after the drafters demarcated between the two leadership constructs supports the conviction that the drafters had regarding the standard of fault applicable to military and military-like commanders. In introducing the proposal for a bifurcated standard of fault, the United States delegation to the Rome Statute drafting committees stated:

> An important feature in military command responsibility and one that was unique in a criminal context was the existence of *negligence* as a criterion of criminal responsibility. Thus, a military commander was expected to take responsibility if he knew or *should have known* that the forces under his command were going to commit a criminal act. That appeared to be justified by the fact that he was in charge of an inherently lethal force … the [civilian] superior must know that subordinates were committing a criminal act. The *negligence* standard was not appropriate in a civilian context.[446]

The 'knew or consciously disregarded information which clearly indicated' standard was clearly intended to impose a much higher standard of fault to incur liability on the part of civilian superiors than the standard to be imposed on military commanders. As the United States delegation stated, the former required a higher standard of fault – 'the superior must know',[447] whilst the latter demanded a lower standard of fault, akin to negligence, in light of the fact the military commander is 'in charge of an inherently lethal force'.[448] Again, the equation of the 'should have known' standard with negligence arose, in this instance in the United States' proposal regarding the provisions which would become Article 28.

Badar describes the notion of 'conscious disregard' as being the subjective element of recklessness, such that it is conscious disregard which 'differentiates a reckless actor from a

---

[446] Committee of the Whole, *Summary Record of the 1st Meeting,* UN Doc A/CONF.183/C.1/SR.1 (20 November 1998) 67–8, quoted in Boas, Bischoff and Reid, *Volume 1* (n 67) 256.

[447] Ibid.

[448] Ibid.

negligent one'.[449] The United States' proposal is silent on the concept of recklessness. Equating the test applicable to civilian superiors with knowledge, it is clear the alternative 'knew' in the 'knew or consciously disregarded' test is intended to provide for actual knowledge or, alternately, a conscious disregard of information such that to equate the latter with knowledge would be to render it redundant. It is this standard of fault in Article 28(b), which applies exclusively to civilian superiors, which is likely to have grounded the largely unexplained statement by Saland, discussed further below, that 'the concept of recklessness, though not the term itself, exists in the Rome Statute, ie, in Article 28'.[450]

Of course, conscious disregard is only one element of the standard of fault attributable to the civilian superior with respect to the commission of crimes by subordinates. The actual standard goes further in stating the superior 'consciously disregarded information which clearly indicated' the commission of crimes. The qualifier of 'clearly indicated' tends to elevate the standard above mere recklessness to a standard closer to knowledge but, to avoid the aforementioned risk of redundancy, not quite knowledge. Unique mental elements of this nature are, of course, permitted under the Rome Statute.[451]

It is thus contended that the banishment of recklessness from the Rome Statute is not jeopardised by the mental element attached to the material element of the commission of crimes by subordinates in Article 28(b). Indeed, the existence of a mental element in the nature of recklessness in Article 28(b) pertaining exclusively to civilian superiors serves to amplify the fact that recklessness does not apply to any of the material elements of Article 28(a) – the responsibility of military and military-like commanders – and that was clearly the intention of the drafters in bifurcating the standard of fault between military commanders and civilian superiors.

At this juncture, some consideration of the concepts of recklessness and *dolus eventualis* as considered by the Preparatory Committee is warranted. The broad concept of *dolus*, a Latin

---

[449] Badar (n 406) 113.

[450] Per Saland, 'International Criminal Law Principles' in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (Kluwer Law International, 1999) 189, 206.

[451] See *Rome Statute* (n 22) art 30(1) in which the clause 'unless otherwise provided' allows for the expressed inclusion of mental elements other than intent and knowledge.

term in Roman law constituting a deliberate wrongdoing or an intention to commit an unlawful act,[452] was adopted from continental legal doctrine by the ICC judges to describe the volitional and cognitive elements of intent and knowledge respectively.[453] The Court described what it considered to be three relevant forms of *dolus*: '*dolus directus* in the first degree or direct intent; *dolus directus* in the second degree also known as oblique intention; and *dolus eventualis* commonly referred to as subjective or advertent recklessness'.[454]

It is the third of these forms which is analysed in this thesis. Notably, *dolus eventualis* has been described by Clark as the 'civil law (near) counterpart' of recklessness[455] and recklessness as the 'common law cousin' of *dolus eventualis*.[456] In *Lubanga*, the ICC Pre-Trial Chamber discerned a fine conceptual difference between civil law *dolus eventualis* and common law recklessness, as follows:

> The concept of recklessness requires only that the perpetrator be aware of the existence of a risk that the objective elements of the crime may result from his or her actions or omissions, but does not require that he or she reconcile himself or herself with the result.[457]

As will be seen, the distinction between *dolus eventualis* and recklessness becomes largely technical in the application of the concepts to the doctrine of command responsibility. What is apparent in the interpretation of both concepts by the Pre-Trial Chamber in *Lubanga* is that if *dolus eventualis* is found to set a low threshold on the spectrum of *mens rea* then recklessness must set a lower threshold in light of the additional requirement for reconciliation with the result in *dolus eventualis*.

In the Preparatory Committee's 1998 report, which included draft Article 29, entitled '*Mens rea* (mental element)', recklessness was included in identical terms to those in the 1996 report

---

[452] *Butterworths Australian Legal Dictionary* (1997) 'dolus'.

[453] Schabas, *The International Criminal Court* (n 335) 475.

[454] *Bemba Decision on the Confirmation of Charges* (n 237) [357].

[455] Roger Clark, 'Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations of the Rome Statute of the International Criminal Court and by the Court's First Substantive Law Discussion in the Lubanga Dyilo Confirmation Proceedings' (2008) 19 *Criminal Law Forum* 519, 525.

[456] Ibid 529.

[457] *Lubanga Decision on the Confirmation of Charges* (n 389) n 438.

and draft provisions, again, in square parenthesis. In this report a note was annexed stating '[t]he inclusion of recklessness should be re-examined in view of the definition of crimes'.[458] This again reflects the concerns of some delegations to the committee that other states of mental culpability should not be included in Article 30 since their inclusion 'might send the wrong signal that these forms of culpability were sufficient for criminal liability as a general rule'.[459]

It appears that consensus was not reached on the inclusion of recklessness or its civil law equivalent, *dolus eventualis*, in general application in the Rome Statute and 'it was decided to leave the incorporation of such mental states of culpability in individual articles that defined specific crimes or modes of responsibility'.[460] That decision, of course, meant that recklessness could be considered by the committee in its deliberation on the elements of the mode of responsibility of command responsibility in Article 28. As will be discussed in later paragraphs, the mental element of recklessness was not subsequently expressly included as an element of command responsibility. Recalling his participation in the drafting of the general part of the Rome Statute, Clark states:

> *Dolus eventualis* fell out of the written discourse before Rome. Recklessness, in the sense of subjectively taking a risk to which the actor's mind has been directed, was ultimately to vanish also from the Statute at Rome, with again only an implicit decision as to whether it was appropriate for assessing responsibility.[461]

At the 1998 Diplomatic Conference in Rome, which adopted the Rome Statute of the ICC, Clark states in no uncertain terms that '*dolus eventualis* and its common law cousin, recklessness, suffered banishment by consensus. If it is to be read into the Statute, it is in the teeth of the language and history'.[462] This was confirmed in *Bemba* in which Pre-Trial Chamber II examined the *travaux préparatoires* of Article 30 and concluded that *dolus eventualis* was 'abandoned at an early stage of the negotiations'[463] of the statute. Since *dolus eventualis* formed

---

[458] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN Doc A/CONF.183/2/Add.1 (14 April 1998) 56.

[459] Piragoff and Robinson (n 405) 850.

[460] Ibid.

[461] Clark, 'The Mental Element' (n 304) 301.

[462] Clark, 'Drafting a General Part' (n 455) 529.

[463] *Bemba Decision on the Confirmation of Charges* (n 237) [366].

part of the Preparatory Committee's discussion on recklessness, Pre-Trial Chamber II concluded that the deletion of the draft provision at the Rome Diplomatic Conference 'makes it even more obvious that both concepts were not meant to be captured by Article 30'.[464]

It is thus abundantly clear that recklessness was 'banished'[465] from Article 30, such that it has no application to the statutory crimes appearing in the general part of the Rome Statute. Analysis of the application of recklessness in the context of the doctrine of command responsibility is warranted in light of Clark's observation that the disappearance of recklessness from the general part of the statute caried with it only an 'implicit decision' regarding the appropriateness of this mental element in the criminal responsibility provisions.[466] An available inference to be drawn from this analysis by Clark, a participant in the drafting of the general part of the statute, when read with his conclusion that reading recklessness into the statute as a whole is limited to historical analyses of the passage[467] of the provisions, is that recklessness does not apply to modes of responsibility.

Saland, however, states that 'the concept of recklessness, though not the term itself, exists in … Article 28, which was negotiated after Article 30'.[468] Saland provides no further explanation of that conclusion and the basis on which it is drawn. It is thus necessary to turn to the terms of Article 28 and, significantly, jurisprudence on those provisions in order to ascertain whether the concept of recklessness exists within the article by implication or by some mechanism other than the express inclusion of the term. The ICC provided some guidance in its first decision considering the elements of crimes – *Prosecutor v Lubanga*. In *Lubanga*, the Pre-Trial Chamber referred to the ICTY decision in *Stakić* in defining *dolus eventualis* as:

> Situations in which the suspect:
>
> (a) Is aware of the risk that the objective elements of the crime may result from his or her actions or omissions; and

[464] Ibid 367.

[465] Clark, 'Drafting a General Part' (n 455) 529.

[466] Clark, 'The Mental Element' (n 304) 301.

[467] 'If it is to be read into the Statute, it is to be in the teeth of the language and history': Clark, 'Drafting a General Part' (n 455) 529.

[468] Saland (n 450).

> (b) Accepts such an outcome by reconciling himself or herself with it or consenting to it.[469]

The reference in *Lubanga* to the decision in *Stakić* centred on the notion of 'manifest indifference to the value of human life' on the part of the accused and, in the context of the murder indictments in *Stakić*, on the continental definition of recklessness in which the accused 'reconciles himself or makes peace with the likelihood of death'.[470] The ICTY Trial Chamber went to some lengths to emphasise the fact that 'the concept of *dolus eventualis* does not include a standard of negligence or gross negligence'.[471] The terminology employed in these decisions of the ICC and ICTY respectively is especially relevant to the comparative analysis between Article 28 of the Rome Statute and the Commonwealth Criminal Code section 268.115 in later chapters.

In drawing on the conceptual differences between the civil law concept of *dolus eventualis* and common law recklessness, the Pre-Trial Chamber in *Lubanga* expressly ruled out the latter as falling short of the *mens rea* threshold established in Article 30. Of course, this reference is to the elements contained within the general part of the statute and not directly to the elements pertaining to modes of responsibility such as command responsibility in Article 28. *Lubanga* is, again, of assistance in this regard in its analysis of the war crime of conscripting or enlisting children under the age of 15 years to participate in hostilities[472] and the third element of that offence, as listed in the *Elements of Crimes*, '[t]he perpetrator knew or should have known that such person or persons were under the age of 15 years'.[473]

The Pre-Trial Chamber held that the 'should have known' element of the offence, as stated in the *Elements of Crimes*, is an exception to the default elements requirements which fits the fault concept of negligence on the following basis:

> [I]t is met when the suspect:

---

[469] *Lubanga Decision on the Confirmation of Charges* (n 389) [352].

[470] *Prosecutor v Stakić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-24-T, 31 July 2003) [587].

[471] Ibid.

[472] *Rome Statute* (n 22) art 8(2)(b)(xxvi).

[473] *Elements of Crimes* (n 326) art 8(2)(b)(xxvi).

i. did not know that the victims were under the age of fifteen years at the time they were enlisted, conscripted or used to participate actively in hostilities; and

ii. lacked such knowledge because he or she did not act with due diligence in the relevant circumstances (one can only say that the suspect 'should have known' if his or her lack of knowledge results from his or her failure to comply with his or her duty to act with due diligence).[474]

The Court in *Lubanga* rejected the application of recklessness to this particular offence on the basis that the mental element attaching to the material element of the age of the persons being under 15 years is 'should have known' and that element – should have known – 'falls within the concept of negligence'.[475] The jurisprudence of the ICC and the ICTY, as accepted by the ICC in *Lubanga*, rejects the inclusion of both *dolus eventualis* and recklessness in the ambit of the default rule and its stated elements of intent and knowledge embodied in Article 30. The Pre-Trial Chamber went on to confirm the element of 'should have known', as it attaches to the stated material element, is an exception to the requirement of intent and knowledge stipulated in Article 30 by virtue of the 'unless otherwise provided' clause of that article.[476] The Chamber further confirmed that the default elements of intent and knowledge will apply to other material elements of that particular offence.[477]

Of course, the 'unless otherwise provided' clause would apply in attaching other mental elements to other material elements of offences when such other mental elements are expressed in the offence provisions. The jurisprudence on point in *Lubanga*, admittedly, refers to statutory crimes within the general part of the statute. Some analysis of the application of the default rule to the mode of responsibility articulated in Article 28 is warranted.

3.2.8 The application of the Elements of Crimes to Article 28

As discussed above, the *Elements of Crimes* document applies expressly to the elements of the statutory offence provisions in Articles 6, 7 and 8 of the statute.[478] On its face, this appears to limit the interpretation of such elements to the context of the statutory crimes in those articles,

[474] *Lubanga Decision on the Confirmation of Charges* (n 389) [358].

[475] Ibid.

[476] *Rome Statute* (n 22) art 30(1).

[477] *Lubanga Decision on the Confirmation of Charges* (n 389) [359].

[478] *Elements of Crimes* (n 326) art 1.

thus excluding the application of the elements to the mode of responsibility provisions, which, of course, includes Article 28. Article 8 of the *Elements of Crimes* provides some guidance in this regard, as follows: 'The elements, including the appropriate mental elements, apply *mutatis mutandis*, to all those whose criminal responsibility may fall under articles 25 and 28 of the Statute.'[479]

The mental elements in the *Elements of Crimes* thus undoubtedly apply to command responsibility except where specific elements are provided in Article 28. This is consistent with the 'default rule' and its caveat of 'unless otherwise provided', reading together Article 8 of the *Elements of Crimes* and Article 30 of the statute. As Badar states, the default rule is applied 'to all crimes and modes of participation in criminal conduct, as long as there are no specific rules on the mental element expressly stated in these provisions and hence paving the road to the application of the *lex specialis* principle'.[480]

Article 8 of the *Elements of Crimes* refers to the elements broadly as including the mental elements, such that the material elements implicitly provided in the definitional provisions of Article 30 paragraphs (2) and (3) apply to command responsibility under Article 28. The question whether other material elements exist with respect to mental elements other than the default mental elements of 'intent' and 'knowledge' is, according to Dörmann, left unanswered by the statute and the *Elements of Crimes*.[481] At least insofar as Article 28 is concerned, this is a question which is left to the Court to answer in its articulation of the elements of the doctrine. In that respect, the ICC in *Bemba* provided a precise statement of the elements including the application of the element analysis approach in attaching mental to material elements.

3.2.9 The relationship between mental and material elements in Article 28

Notwithstanding the statute requires contemporaneity between the mental and material elements of offences in order to afford criminal liability and implicitly provides the requisite material elements, the statute and the *Elements of Crimes* are silent on the substantive content of the material elements of conduct, consequence and circumstance. Piragoff and Robinson

[479] Ibid art 8.

[480] Badar (n 406) 401–2.

[481] Dörmann (n 330) 12.

state that the term 'material elements' 'refers to the conduct or action described in the definition [of the crime], any consequence that may be specified in addition to the conduct, and any factual circumstances that qualify the definition'.[482]

As discussed in some detail in preceding paragraphs, the doctrine of command responsibility, and thus Article 28 in codifying the doctrine, provides a form of criminal liability grounded on a legal obligation to act, which is based, in Article 28, on 'very specific elements'.[483] The specificity of these elements will be apparent in later comparative analysis with Australian provisions on point. Further, the mode of liability is part of the general part of the statute and therefore it is not expressly described in the *Elements of Crimes*. As will be seen, the terms of Article 28 incorporate mental elements which are exceptions to the default rule at Article 30 as well as what Piragoff and Robinson describe as 'special types of material elements'[484] of a legal character. Contrary to the view that material elements other than conduct, consequence or circumstance may be available to modes of liability in the general part of the statute, that is, to offences beyond the crimes described in the *Elements of Crimes*, Clark states that the three material elements contemplated by implication in Article 30 'seem to cover the whole field of material elements'.[485] This disparity of views appears to arise as a result of definitional discrepancies surrounding the three concepts which appear to be resolved in favour of the former by the Trial Chamber's analysis of each of the elements in *Bemba*, discussed below.

In order to establish liability under the doctrine as codified it is necessary to prove all of the elements provided in Article 28. At this juncture it is appropriate to break the provisions of Article 28 into their constituent elements. Article 28(a) – Responsibility of Commanders – provides, as follows:

> A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

---

[482] Piragoff and Robinson (n 405) 851–2.

[483] Meloni (n 48) 147.

[484] Piragoff and Robinson (n 405) 852.

[485] Clark, 'The Mental Element' (n 304) 306.

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission, or to submit the matter to the competent authorities for investigation and prosecution.[486]

In *Bemba*, Pre-Trial Chamber II stated five requisite elements in proving criminal liability under Article 28(a), as follows:

a. The suspect must be either a military commander or a person effectively acting as such;

b. The suspect must have effective command and control, or effective authority and control over the forces (subordinates) who committed one or more of the crimes set out in articles 6 to 8 of the Statute;

c. The crimes committed by the forces (subordinates) resulted from the suspect's failure to exercise control properly over them;

d. The suspect either knew or, owing to the circumstances at the time, should have known that the forces (subordinates) were committing or about to commit one or more of the crimes set out in articles 6 to 8 of the Statute; and

e. The suspect failed to take the necessary and reasonable measures within his or her power to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution.[487]

Trial Chamber III subsequently modified the requisite elements, as follows:

a. Crimes within the jurisdiction of the Court must have been committed by forces;

b. The accused must have been either a military commander or a person acting effectively as a military commander;

c. The accused must have had effective command and control, or effective authority and control, over the forces that committed the crimes;

d. The accused either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes;

e. The accused must have failed to take all necessary and reasonable measures within his power to prevent or repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution; and

[486] *Rome Statute* (n 22) art 28(a).

[487] *Bemba Decision on the Confirmation of Charges* (n 237) [407].

f. The crimes committed by the forces must have been a result of the failure of the accused to exercise control properly over them.[488]

The differences in articulation of the requisite elements between the two Chambers are largely inconsequential insofar as element (a), as stated by the Trial Chamber, is merely a restatement of the second limb of element (b), as stated by the Pre-Trial Chamber. The order of the elements in the Trial Chamber's articulation is, it is suggested, a more temporally logical statement of the elements which separates them into paragraphs and tends to flow in the order the material elements present. This is consistent with the methodology which is employed in extrapolating the elements from the statutory provisions of command responsibility in the Commonwealth Criminal Code[489] and is thus a more appropriate vehicle for a comparative analysis of the respective provisions and their constituent elements.

3.3 Attaching mental elements to the material elements of Article 28

As discussed, the only mental element expressly provided in Article 28 is that of 'knew or should have known' as it relates to the material element of the commission of crimes by subordinates. This element exists as a result of the exceptional clause in Article 30(1). The remaining mental elements need to be deconstructed from the conduct, consequence and circumstance material elements pursuant to the default rule in Article 30(1). Trial Chamber III in *Bemba* specified six requisite elements in establishing command responsibility under Article 28. This section analyses each of the material elements whilst concurrently deconstructing the applicable mental elements, where they are not 'otherwise provided', and considers jurisprudence and commentary, including analysis derived from the *travaux*, on concepts within each element. At this point in the thesis, the material elements have been described as they relate to and define the default mental elements. The term 'material elements' refers to 'the conduct or action described in the definition [of the crime or mode of liability in this case], any consequence that may be specified in addition to the conduct, and any factual circumstances that qualify the definition'.[490]

---

[488] *Bemba Trial Judgment* (n 91) [170].

[489] See Australian Government, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (February 2004) 18–19.

[490] Piragoff and Robinson (n 405) 851–2.

3.3.1 The principal crime

The first material element, 'crimes within the jurisdiction of the Court must have been committed by forces', refers to the underlying offence or principal crime[491] for which the commander is held liable on the basis of command responsibility. On its face, this is an element of circumstance which attracts the default mental element of knowledge. Noting a further specific element (Element (d)) refers to the commission of 'such' crimes, which itself attracts its own specified mental element, the mental element of knowledge, in this instance, attaches to the circumstance of 'crimes within the jurisdiction of the Court'. As discussed previously, this jurisdictional element may be considered an element of contextual circumstance to which the default rule does not apply because it relates 'not to the conduct of the accused but rather to the broader "context" that renders the crime an international crime'.[492] Whether the default mental element of knowledge is held by the Court to be requisite or the element is considered to be a contextual element such that no mental element applies is likely to be a matter for the Court to consider on a case-by-case basis in accordance with the guidance provided in the *Elements of Crimes*.[493]

The notion of contextual elements does not arise in the Australian context, meaning this argument is moot and, as will be seen in later analyses, a mental (fault) element must attach to the equivalent material (physical) element – 'offences under this Division [of the Criminal Code]'.[494] For completeness, however, Australian jurisprudence has been critical of the distinction between what has been described as merely 'definitional' or 'referential' aspects of a physical element and the more 'substantive' characteristics of the physical element.[495]

3.3.2 The superior–subordinate relationship

As confirmed throughout earlier chapters, the superior–subordinate relationship is fundamental to the triggering of the doctrine of command responsibility. The second element of Article 28

---

[491] Centre for International Law Research and Policy, *Command Responsibility* (Guidelines, 2nd ed, November 2016) 45.

[492] Piragoff and Robinson (n 405) 853.

[493] *Elements of Crimes* (n 326) art 1.

[494] *Criminal Code* (n 23) s 268.115(2).

[495] Odgers (n 385) 36, citing *R v JS* (2007) 230 FLR 276, 127 (Spigelman J).

is thus 'the accused must have been either a military commander or a person acting effectively as a military commander'. This is a material element of circumstance which has a default mental element of knowledge attached. The relevant factual circumstance is not the rank of the accused[496] but rather the existence of the superior–subordinate relationship.[497] This element is, of course, framed in the alternative in recognition of the fact that both de jure and de facto commanders are captured by the provisions of the article. The former is clearly defined by the ICTY in *Kordić* in terms of military positions, which are usually strictly defined by a clear chain of command based on a strict hierarchy, which is easy to demonstrate.[498] This hierarchy, inclusive of its defined chain of command, allows for a prima facie inference of the existence of the superior–subordinate relationship 'which aims at the disciplined execution of orders by the subordinates and the facilitated control thereof by the superior'.[499] As to the de facto exercise of military command, Pre-Trial Chamber II in *Bemba* drew on the jurisprudence of the ICTY and ICTR in extending the application of the provisions to 'those who are not elected by law to carry out a military commander's role, yet they perform it *de facto* by exercising effective control over a group of persons through a chain of command'.[500]

Whilst this statement tends to overlap with the subsequent element of 'effective command/authority and control', the overlap is, it is contended, unavoidable since the current element is grounded on the relationship between the superior and the subordinate rather than merely the factual circumstance of rank or position. Whilst being part of a chain of command is a prima facie factor in establishing the relationship, belonging to a chain of command is not, of itself, finally determinative of the command relationship. As held in *Čelebići*, command responsibility 'is ultimately predicated upon the power of the superior to control the acts of his subordinates',[501] and as emphasised in *Kordić*, 'command responsibility does not hold a superior responsible merely because he is in a position of authority … [it] is a type of imputed

[496] Arnold and Triffterer (n 31) 824.

[497] See *Čelebići Trial Judgment* (n 130) [346], discussed in detail above and cited with approval by ICC Pre-Trial Chamber II in *Bemba Decision on the Confirmation of Charges* (n 237).

[498] *Kordić Trial Judgment* (n 252).

[499] Arnold and Triffterer (n 31).

[500] *Bemba Decision on the Confirmation of Charges* (n 237) [409].

[501] *Čelebići Trial Judgment* (n 130) [377] and endorsed by the Appeals Chamber in *Čelebići Appeal Judgment* (n 226) [197].

authority [which] is therefore not a form of strict liability'.[502] Whilst the concept of strict liability, as it is known to the common law, does not strictly apply to the circumstance in which a commander is held liable merely because of the superior position by rank or appointment, this notion grounded a critique of the *Yamashita* decision, discussed in detail above. The application of the concept of strict liability to command responsibility in this manner, 'that any person of higher rank than the perpetrator is automatically responsible for the perpetrator's crimes',[503] was expressly rejected by the prosecution in *Čelebići* – a position which was implicitly accepted by the Trial Chamber in that case.

Arnold states that relying on a test of strict liability which, it is widely contended, was adopted in *Yamashita*,

> is unfair … since a commander may incur liability for the mere fact of holding a high rank, whereas he/she should only be liable where he/she failed to prevent the occurrence of crimes notwithstanding the effective possibility to control his/her subordinates and to intervene.[504]

This position clearly pre-empts the third element of Article 28 on the need for 'effective' command/authority and control in order to incur liability. The determinative factor in establishing the existence of the relationship grounding command responsibility 'is a person's effective exercise of command, not the fact that he or she holds a particular rank'.[505]

3.3.3 Effective command/authority and control

The third material element, as articulated in *Bemba*, is that 'the accused must have had effective command and control, or effective authority and control, over the forces that committed the crimes'. This is a material element of circumstance to which a default mental element of knowledge attaches such that the accused is aware that he/she has effective command/authority and control over the forces 'in the ordinary course of events'.[506] In *Kordić*, the ICTY Trial

[502] *Kordić Trial Judgment* (n 252) [369].

[503] *Čelebići Trial Judgment* (n 130) [353].

[504] Arnold and Triffterer (n 31) 825.

[505] Ibid 830.

[506] *Rome Statute* (n 22) art 30(3).

Chamber confirmed that the test of being 'effectively' in command assists in the extension of the doctrine of command responsibility beyond formal command structures to those actually exercising control or authority in the absence of formal appointments.[507] From a practical perspective, the Trial Chamber in *Kordić* considered that the capacity to issue and sign orders was persuasive in terms of command responsibility but held it is 'necessary to look to the substance of the documents signed and whether there is evidence of them being acted upon' in order to be determinative.[508] This matter of the issuing and signing of orders becomes particularly relevant in later analyses of the concept of the 'remote commander', which appeared in the defence case in *Yamashita* and was subsequently central to the appellate case in *Bemba*.

Along similar lines to the remote commander issue is the distinction between the duties of what the ICTY in *Čelebići* referred to as 'executive commanders' and tactical commanders – the former not being in charge of troops but rather of territory. The Trial Chamber relied on the post-Second World War *Hostage* and *High Command* trials in accepting that commanders in charge of occupied territory in which war crimes are being committed by troops not under their command may be held responsible.[509] This issue is discussed in the context of the *Hostage Case*, above, and becomes especially relevant in later analysis of Australia's hierarchical structures in Joint Task Force constructs. The divergence from tactical to 'executive' or theatre command is catered to in Article 28 by the alternative material element of 'effective authority and control'.

The Trial Chamber in *Čelebići* again referred to the *Hostage Case* in finding that the higher commander's 'responsibility is general and not limited to a control of units directly under his command'.[510] This notion of 'general responsibility', however, raises evidentiary issues as to the role and function of the higher commander, particularly where the command status of the commander is not expressly detailed in an appointment or deployment order or where such orders were provided orally. The problem is articulated by Mettraux as follows:

---

[507] *Kordić Trial Judgment* (n 252) [421].

[508] Ibid.

[509] *Čelebići Trial Judgment* (n 130) [327].

[510] Ibid.

> The forms and procedure by which appointment to a commanding position or a *de jure* position of authority is made will vary a great deal between different national armies … [i]nternational law does not provide for any condition of form or procedure in relation to this matter … *de jure* command may indeed be established circumstantially. But an inference that the accused has been appointed to a particular function will not be drawn lightly and the inability of prosecuting authorities to produce an order of appointment might weigh heavily against a finding of *de jure* command. This is particularly true in more formalized settings such as a military hierarchy.[511]

On its face, a tension arises between the *Čelebići*/*Hostage* concept of 'general responsibility' and the evidentiary onus of proving command/authority, especially in the case of formalised military hierarchies. This is likely to be resolved by reference to appointment and operational deployment instruments and broader doctrinal writings, as discussed later, but it is also likely to require reference to the prevailing circumstances and, as held in *Kordić*,[512] related circumstantial evidence. An analysis of the circumstances surrounding the exercise of command or authority is equally applicable to the component of 'control' in Element (c) of Article 28.

Whilst clearly a component of the material element overall, the ICTY provides a substantial line of jurisprudence on the issue of control almost as a stand-alone concept. This is significant, arguably since the broader intent of the doctrine is to discourage or deter breaches of international humanitarian law by the control of subordinates' actions by superiors in the exercise of the function of command. In *Čelebići*, the ICTY Appeals Chamber described the concept of effective control as the 'threshold' test in establishing the superior–subordinate relationship.[513] As will be seen, the notion of control also goes to the tangible or material ability of commanders to prevent or repress the commission of crimes which, again, goes to the deterrent value of the command role. At a foundational level, the ICTY in *Aleksovski* stated: 'The decisive criteria in determining who is a superior … is not only the accused's formal legal status but also his ability, as demonstrated by his duties and competence, to exercise control.'[514]

---

[511] Mettraux, *The Law of Command Responsibility* (n 21) 140.

[512] *Kordić Trial Judgment* (n 252) [424].

[513] *Čelebići Appeal Judgment* (n 226) [256].

[514] *Prosecutor v Aleksovski (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/1-T, 25 June 1999) [76].

The ability to control exercised through a commander's duties is a logical criterion on which to assess the status of a superior. The concept of competence, on the other hand, is somewhat ambiguous. The question, in that regard, is whether the Trial Chamber is referring to technical or legal competence. If the former, it would be a disappointing outcome if a commander were to evade liability merely because of subjective incompetence in the exercise of command roles. If the Trial Chamber was referring to legal competence in the form of legal authority to command, the statement is redundant since reference is already made at the outset to the formal legal status of command. In that light, the reference to the commander's ability to exercise control as demonstrated by competence is most likely to be a reference to technical which, as suggested, poses an unfortunate dilemma in terms of liability or mitigation. Perhaps a more decisive definitional statement is provided in *Aleksovski* in terms that 'the commander is in the formal and actual position of having the authority over the subordinate persons'.[515]

The dual notions of 'formal' and 'actual' authority are, it is argued, persuasive in ascertaining control in the command setting. In *Blaškić*, the ICTY Trial Chamber emphasised the 'actual ability' criterion of a control test – described as 'material ability' – whilst tending to reject the need for any legal authority to prevent or punish subordinate offenders.[516] The requirement of the 'material ability to prevent and punish' was adopted by the Pre-Trial Chamber in *Bemba*, which extended the requirement to the material ability to submit matters to authorities for investigation or prosecution.[517] *Bemba*, however, went one step further in attaching a standard of control to the test of control, as follows: 'This notion does not seem to accommodate any lower standard of control such as the simple ability to exercise influence over forces or subordinates, even if such influence turned out to be substantial.'[518]

Whilst the standard of control is further addressed later in this thesis, in the context of the Australian military hierarchical structure and the doctrine of Mission Command, this statement in *Bemba* does, for the moment, open up analysis to proving both the ability and quantum of control. Thus, returning to the need for an evidentiary basis on which to ground the appointment

[515] Ibid [74].

[516] *Blaškić Trial Judgment* (n 90) [78].

[517] *Bemba Decision on the Confirmation of Charges* (n 237) [415].

[518] Ibid.

to command broadly and the exercise of command and control specifically, the Appeals Chamber in *Blaškić* held:

> The indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate.[519]

In accepting the need to provide evidence of effective control and the correlation between the superior's position of authority and the exercise of control, the Pre-Trial Chamber in *Bemba* listed the following indicia:

> (i) the official position of the suspect;
>
> (ii) his power to issue or give orders;
>
> (iii) the capacity to ensure compliance with the orders issued (ie, ensure that they would be executed);
>
> (iv) his position within the military structure and the actual tasks that he carried out;
>
> (v) the capacity to order forces or units under his command, whether under his immediate command or at lower levels, to engage in hostilities;
>
> (vi) the capacity to re-subordinate units or make changes to command structures;
>
> (vii) the power to promote, replace, remove or discipline any member of the forces;
>
> (viii) the authority to send forces where hostilities take place and withdraw them at any given moment.[520]

In *Perišić,* the ICTY Trial Chamber added 'the availability of material and human resources' and 'the capacity to intimidate subordinates into compliance'[521] to the indicia stated in *Bemba* in what, it is suggested, is a realistic appraisal of contemporary command activity.

Similarly, in addressing the contextual setting of the offending behaviour that is the subject of the trial, the ICC Trial Chamber in *Bemba* added indicia to those articulated by the Pre-Trial Chamber, as follows:

---

[519] *Blaškič Appeal Judgment* (n 238) [68]–[69].

[520] *Bemba Decision on the Confirmation of Charges* (n 237) [417].

[521] *Prosecutor v Perišić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-04-81-T, 6 September 2011) [148] ('*Perišić Trial Judgment*').

(ix) his independent access to, and control over, the means to wage war, such as communications equipment and weapons;

(x) his control over finances;

(xi) the capacity to represent the forces in negotiations or interact with external bodies or individuals on behalf of the group; and

(xii) whether he represents the ideology of the movement to which the subordinates adhere and has a certain level of profile, manifested through public appearances and statements.[522]

3.3.4 Forces were committing or about to commit crimes

The fourth material element of Article 28 commences with a statement of the mental element that is expressed to apply to this material element – 'knew or, owing to the circumstances at the time, should have known', as discussed above. The material element is 'that the forces were committing or about to commit such crimes'. Of course, the term 'such crimes' refers to 'crimes within the jurisdiction of the Court' per the first element. Some tension arises between the terminology 'committed' and 'were committing or about to commit' employed in the article and deconstructed to form material elements (a) and (d) respectively. Arnold suggests the term 'committed' means the underlying crimes were 'successfully brought to an end'.[523]

Applying a common law approach to the interpretation of this provision, the 'ordinary meaning' of the term is consistent with Arnold's statement but a purposive interpretation suggests otherwise.[524] In light of the clear intention of the doctrine and its codified variant in Article 28, to prevent or repress the commission of crimes, as well as the subsequent terms of the article and the elements, limiting the occurrence of the subject crimes temporally in this way is illogical. This issue did, however, surface in the context of the terms in the ICTY Statute. The ICTY Trial Chamber in *Orić* provided an extensive interpretation of the term 'committed' in the context of its applicability to command responsibility such that the term would

[522] *Bemba Trial Judgment* (n 91) [188].

[523] Arnold and Triffterer (n 31) 827.

[524] See, eg, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 (McHugh, Gummow, Kirby and Hayne JJ).

encompass all modes of participation.[525] This decision should not, however, diminish the significance of the issues arising from the interpretation provided by Arnold, who further states:

> Under the ICC Statute, mere failure by a commander to exercise proper control over his/her subordinates is not criminally relevant, if such failure did not allow the commission of one of the crimes enlisted under Article 5. The same may not be true under domestic military criminal law, which may trigger at least disciplinary measures against a commander failing to exercise properly his duty.[526]

This fine distinction is relevant in the context of Australian military law with the passage of military disciplinary offences in the nature of a failure to perform duty[527] in the aftermath of the handing down of the Brereton Inquiry report. It is not beyond contemplation that an Australian military commander could avoid criminal liability under section 268.115 of the Criminal Code, which implements Article 28, on the basis that disciplinary proceedings for a failure to perform duty were concluded in the situation in which subordinates had not committed the subject offending to its conclusion.

Whilst this point is analysed further in later chapters addressing any divergence in the application of the respective law, it is pertinent to consider such interpretive discrepancies in this elemental analysis. For the present purposes, however, it is sufficient to rely on Arnold's subsequent statement, in applying the issue to the factual and legal circumstances of the crime of genocide, that 'the term committed must always be interpreted in the light of the elements of the single crimes falling within the Court's jurisdiction'.[528]

3.3.5 Failure to prevent, repress or submit

The fifth material element – 'the accused must have failed to take all necessary and reasonable measures within his power to prevent or repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution' – is a material element of conduct (by omission) which attracts a default mental element of intent. The accused must thus have intended the failure to prevent or repress or submit in order to be held

[525] *Orić Trial Judgment* (n 219) [301].

[526] Arnold and Triffterer (n 31) 827.

[527] See *Defence Legislation Amendment (Discipline Reform) Act 2021* (Cth) s 35A(1).

[528] Arnold and Triffterer (n 31) 827.

liable under Article 28. This failure is in the nature of a breach of a fundamental duty on the part of commanders, which is recognised as forming part of customary international humanitarian law.[529]

The ICRC's commentary on Additional Protocol I states the term 'measures necessary' in the Additional Protocol 'requires both preventive and repressive action [but] it reasonably restricts the obligation upon superiors to "feasible" measures, since it is not always possible to prevent a breach or punish the perpetrators'.[530] In *Čelebići*, the ICTY Trial Chamber concluded that 'a superior should be held responsible for failing to take such measures that are within his material possibility'[531] but also included the finding that 'the lack of formal legal competence to take the necessary measures to prevent or repress the crime in question does not necessarily preclude the criminal responsibility of the superior'.[532] The test thus appears to be that a commander is only obliged to take measures which are materially possible but the absence of any legal power or authority to take such measures is not determinative of liability.

In practical application at the operational level of command, Arnold lists the following requirements of a commander in exercising the duty:

- ensures [sic] that forces are adequately trained in International Humanitarian Law
- ensure that due regard is paid to International Humanitarian Law in operational decision making
- ensure an effective reporting system is established so that he/she is informed of incidents when violations of International Humanitarian Law might have occurred
- monitor the reporting system to ensure it is effective.[533]

Whilst Arnold considers that these measures apply to commanders at the operational level, later analyses of command responsibility in the Australian context will consider Australian military doctrine in determining the extent of their application in the hierarchy. These measures are very proactive in their nature such that adherence or otherwise would likely form part of an

[529] *Additional Protocol I* (n 271) art 87.

[530] International Committee of the Red Cross (n 272) [3548].

[531] *Čelebići Trial Judgment* (n 130) [395].

[532] Ibid.

[533] Arnold and Triffterer (n 31) 833.

evidentiary basis on which to consider whether the duty to prevent, repress or submit had been exercised by the applicable commanders. The reporting systems to identify incidents which might have occurred is a low threshold compared to the reporting of confirmed incidents, such that, it is suggested, this factor is likely to feature prominently in any analysis of whether this material element has been satisfied.

3.3.6 Result of the failure to exercise proper control

The final material element – 'the crimes committed by the forces must have been a result of the failure of the accused to exercise control properly over them' – is a material element of conduct (by omission) which attracts the default mental element of intent.[534] Proof would thus be required that the accused meant to omit to exercise control properly over the subordinates and that intentional omission resulted in the subject crimes. In establishing this element, it is sufficient that, 'because of the failure to control or intervene, crimes are committed which most probably would not have been committed otherwise'.[535] The terminology 'as a result of' implies a degree of causation attaches to the failure or, indeed, passivity, of the commander with respect to the criminal outcome.

A requisite causal link between the failure on the part of the commander to prevent crimes and the occurrence of the crimes was rejected by the Special Court for Sierra Leone in *Fofana*[536] and by the ICTY Appeals Chamber in *Hadžihasanović.*[537] In contrast, and of greater relevance to this analysis, the ICC Pre-Trial Chamber in *Bemba* considered that: 'The chapeau of Article 28(a) of the Statute includes an element of causality between a superior's dereliction of duty and the underlying crimes … consistent with the principle of strict construction mirrored in Article 22(2).'[538] The Pre-Trial Chamber, however, considered the scope of the requirement of

---

[534] *Rome Statute* (n 22) art 30(2)(a). See, eg, Arnold and Triffterer (n 31) 834, in which the authors describe command responsibility as being 'primarily constructed on omission of intervention'. See also *Bagilishema Appeal Judgment* (n 231) [36].

[535] Arnold and Triffterer (n 31) 834.

[536] *Prosecutor v Fofana (Judgment)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-04-14-A, 28 May 2008) [251].

[537] *Prosecutor v Hadžihasanović (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-01-48-A, 22 April 2008) [41].

[538] *Bemba Decision on the Confirmation of Charges* (n 237) [423].

causality warranted clarification in light of the existence of three distinct duties under Article 28(a)(ii) – 'the duty to prevent crimes, repress crimes, or submit the matter to the competent authorities for investigation and prosecution'.[539] The Chamber held that:

> A failure to comply with the duties to repress or submit … arise during or after the commission of crimes. Thus, it is illogical to conclude that a failure relating to those two duties can retroactively cause the crimes to be committed … the element of causality only relates to the commander's duty to prevent the commission of future crimes.[540]

This statement appears to impose an affirmative obligation on the prosecution to prove causation as a discrete element arising from the terminology 'a result of' in the final element as described. The Pre-Trial Chamber, however, adopted a 'but for' test in considering the commander's failure and the outcome and, in so doing, held that 'the effect of an omission cannot be empirically determined with certainty [such that] [t]here is no direct causal link that needs to be established between the superior's omission and the crime committed by his subordinates'.[541] Whilst this finding appears to negate the requirement to prove causation, the Pre-Trial Chamber, in the same case, threw an element of confusion into the mix by considering 'it is only necessary to prove that the commander's omission increased the risk of the commission of the crimes charged in order to hold him criminally responsible'.[542]

Considering it was the same Chamber constituted in the same case which articulated the requisite elements analysed here, it is suggested little turns on the discussion surrounding causation. This is supported by the Trial Chamber in *Bemba*, which held that 'such a standard is … higher than that required by law'.[543]

Table 1, below, is a deconstruction of the material and mental elements of Article 28.

---

[539] Ibid [424].

[540] Ibid.

[541] Ibid [425].

[542] Ibid.

[543] *Bemba Trial Judgment* (n 91) [213].

Table 1: Element analysis of Article 28

Material element	Mental element
Crimes within the jurisdiction of the Court	Circumstance ∴ knowledge
Superior–subordinate relationship	Circumstance ∴ knowledge
Effective command/authority and control	Circumstance ∴ knowledge
Forces were committing/about to commit crimes	Knew or should have known
Failure to prevent/repress/submit to authorities	Conduct ∴ intent
Crimes were a result of the failure to exercise control properly	Conduct (omission) ∴ intent

Table 2, below, is an elaboration on the material and mental elements of Article 28(a) including commentary on establishing the elements.

Table 2: Elaboration of element analysis of Article 28

Art 28(a) material element	Art 28(a) mental element	Elaboration
Crimes within the jurisdiction of the Court	Knowledge	• The crimes of genocide, crimes against humanity and war crimes, as set out in Arts 6 to 8[544]
Superior–subordinate relationship	Knowledge	• The relevant factual circumstance is not the rank of the accused but rather the existence of the superior–subordinate relationship.[545] • Both de jure and de facto commanders are captured. • De jure command is demonstrated prima facie by a clear chain of command 'which aims at the disciplined execution of orders by the subordinates and the facilitated control thereof by the superior'.[546] • De facto command applies to 'those who are not elected by law to carry out a military commander's role, yet they perform it de

[544] Affirmed in *Bemba Decision on the Confirmation of Charges* (n 237) [407].

[545] *Čelebići Trial Judgment* (n 130) [346].

[546] Arnold and Triffterer (n 31).

		facto by exercising effective control over a group of persons through a chain of command'.[547]
Effective command/authority and control	Knowledge	• This extends to those actually exercising control or authority in the absence of formal appointments.[548] • The capacity to issue and sign orders is persuasive but it is 'necessary to look to the substance of the documents signed and whether there is evidence of them being acted upon'.[549] • Commanders in charge of occupied territory in which war crimes are being committed by troops not under their command may be held responsible.[550] • 'the commander is in the formal and actual position of having the authority over the subordinate persons'[551] • Requires 'material ability to prevent and punish' beyond 'simple ability to exercise influence over forces or subordinates, even if such influence turned out to be substantial'.[552] • Indicia: ○ official position of the suspect ○ power to issue or give orders ○ capacity to ensure compliance with the orders issued ○ position within the military structure and the actual tasks that he carried out ○ capacity to order forces or units under his command, whether under his immediate command or at lower levels, to engage in hostilities ○ capacity to re-subordinate units or make changes to command structures ○ power to promote, replace, remove or discipline any member of the forces ○ authority to send forces where hostilities take place and withdraw them at any given moment[553] ○ independent access to, and control over, the means to wage war, such as

[547] *Bemba Decision on the Confirmation of Charges* (n 237) [409].

[548] *Kordić Trial Judgment* (n 252) [421].

[549] Ibid.

[550] *Čelebići Trial Judgment* (n 130) [327].

[551] Ibid [74].

[552] *Bemba Decision on the Confirmation of Charges* (n 237) [415].

[553] Ibid [417].

		communications equipment and weapons ○ control over finances ○ capacity to represent the forces in negotiations or interact with external bodies or individuals on behalf of the group ○ representation of the ideology of the movement to which the subordinates adhere and level of profile manifested through public appearances and statements.[554]
Forces were committing/about to commit crimes	Knew or should have known	• 'the term committed must always be interpreted in the light of the elements of the single crimes falling within the Court's jurisdiction'[555]
Failure to prevent/repress/submit to authorities	Intention	• The failure is in the nature of a breach of a fundamental duty on the part of commanders, which is recognised as forming part of customary international humanitarian law. • A commander is only obliged to take measures which are materially possible but the absence of any legal power or authority is irrelevant to liability. • Requirements: ○ ensure that forces are adequately trained in international humanitarian law ○ ensure that due regard is paid to international humanitarian law in operational decision making ○ ensure an effective reporting system is established so that he/she is informed of incidents when violations of international humanitarian law might have occurred ○ monitor the reporting system to ensure it is effective.[556]
Crimes were a result of the failure to exercise control properly	Intention	• It is sufficient that, 'because of the failure to control or intervene, crimes are committed which most probably would not have been committed otherwise'.[557] • 'includes an element of causality between a superior's dereliction of duty and the

[554] *Bemba Trial Judgment* (n 91) [188].

[555] Arnold and Triffterer (n 31) 827.

[556] Ibid 833.

[557] Ibid 834.

		underlying crimes[558] [but] the element of causality only relates to the commander's duty to prevent the commission of future crimes'[559] • 'it is only necessary to prove that the commander's omission increased the risk of the commission of the crimes charged in order to hold him criminally responsible'[560]

3.4 Conclusion

As international law has increasingly recognised individual liability for the commission of international crimes, an emphasis on the need to stipulate the requisite elements grounding such crimes has increased. Notwithstanding early drafts of the Rome Statute evidenced the view that substantive details such as the elements of crimes would be for the Court to determine in the application of existing sources of international law, the reconciliation of competing concepts in the civil and common law systems saw the introduction of defined mental elements of crimes and modes of liability.

This also saw the introduction of an elements analysis model which requires the attachment of a mental element to each material element of an offence and a default rule applying intent or knowledge in the event the respective statutory provisions proscribing crimes are silent on the requisite mental element. This point is especially pertinent to Article 28 in which a mental element outside the default rule is expressed to apply to one material element but it is silent on the mental elements applicable to the remaining material elements.

With respect to the interpretation of the elements, the statute provides its own hierarchy of applicable sources of law, with the statute itself and the instrument stating the elements of individual crimes, entitled *Elements of Crimes*, as the primary sources. The cascading hierarchy subsequently allows for the application of principles and rules of international law, including the rules stated in the *Vienna Convention on the Law of Treaties*, and principles derived from national legal systems. The ICC, however, enforced a caveat on the application of these

[558] *Bemba Decision on the Confirmation of Charges* (n 237) [423].

[559] Ibid [424].

[560] Ibid [425].

subsidiary sources that a lacuna must exist in the written law of the statute that cannot be filled by the interpretive provisions of the Vienna Convention and the statute before such sources can be applied. This decision indicated a cautionary approach is to be taken to the application of sources external to the statute and its constituent instruments to the interpretation of the provisions of the statute including, relevantly, the elements of offences and the elements of modes of liability such as command responsibility.

The statute allows for the application of earlier decisions of the Court on a permissory rather than obligatory basis but, in practice, the Court has a record of applying its own decisions as precedent. Similarly, and particularly in respect of the interpretation of elements of crimes, the Court has considered the jurisprudence of its various Chambers and, indeed, that of the ICTY/ICTR, as highly persuasive in terms of precedential value. Noting that the *Elements of Crimes* instrument does not expressly articulate the elements of modes of liability, it is clear on the jurisprudence of the Court itself that reference to the ad hoc tribunals is both allowed and likely in the event that clear and unambiguous definitions of the elements constituting command responsibility cannot be determined on the statute alone. While any Australian judicial proceedings considering Australia's legislative provisions implementing Article 28 will likely look to the work of the ICC Chambers in any interpretative role, the reverse position of the ICC looking to national judicial decisions has been considered to be an option of last resort and subject to scrutiny as to its relevance.

Whilst the statute does not expressly list the requisite material elements as such, the statutory definitions of the default mental elements of intent and knowledge refer to these elements as they relate to conduct, consequence and circumstance. The unavoidable inference is thus that the statute intends for conduct elements, consequence elements and circumstance elements to constitute the material elements to which the mental elements, either express or by default, are to apply. In the application of the element analysis approach and the default rule, in the absence of an express mental element, any material element of conduct attracts a mental element of intent, any material element of circumstance attracts a mental element of knowledge, and any material element of consequence attracts a mental element of knowledge or intent.

The reference to knowledge is, of course, to actual knowledge as compared to constructive knowledge, as it appears in Article 28 in the terms 'should have known', which expressly applies to the material circumstantial element of the commission of crimes by subordinate

forces. Both actual and constructive knowledge may be proven by circumstantial evidence, as confirmed by the use of the terms 'owing to the circumstances at the time' in Article 28, and the Court has articulated specific indicia allowing for a conclusion of actual knowledge on the part of a commander to be drawn.

The lower 'should have known' standard has been equated by the Court to the concept of negligence, which is consistent with the central tenet of the doctrine of command responsibility of the failure of the commander to exercise a duty of effective control. It follows that a duty to inquire or, to put it differently, an active duty of knowledge exists on the part of the commander. The law, as it presently stands, places this strict duty of knowledge on a commander in order to overcome the 'should have known' standard as it relates to the commission or pending commission of crimes by subordinates and as it transposes to the duty to prevent or repress the crimes.

Significantly, and as will be illuminated in later chapters, the mental element of recklessness was abandoned from debate on the passage of the general part of the Rome Statute and thus does not appear in the statute or the *Elements of Crimes*. It thus has no application to the statutory crimes and, by implication, to the modes of responsibility. The Court considered the common law concept of recklessness and its civil law near relative, *dolus eventualis*, and rejected the application of both on the basis the 'should have known' standard of fault falls within the mental concept of negligence. It follows that, on a deconstruction of the command responsibility mode of liability into its constituent elements, the element of recklessness does not exist.

Article 28 has been broken down by the ICC into six material elements, one of which incorporates its own mental element – 'knew or should have known'. The remainder require the application of the default rule in attaching the obligatory mental element to the respective material elements. The material elements are demarcated along the lines of their respective conduct, consequence or circumstance such that they describe: (1) the circumstance of the subject matter crimes; (2) the circumstance of command or, more precisely, the superior–subordinate relationship; (3) the circumstance of effective command/authority and control; (4) the circumstance of the commission of crimes to which the expressed 'knew or should have known' standard of fault applies; (5) the conduct by omission of the failure to prevent, repress

or submit the crimes; and (6) the conduct by omission of the failure on the part of the commander to exercise proper control resulting in the commission of the crimes.

As deconstructed in Table 1, above, the applicable mental elements are thus: (1) knowledge that the crimes are within the jurisdiction of the Court; (2) knowledge that the accused was a military commander or person acting effectively as a military commander; (3) knowledge such that the accused is aware that he/she has such command/authority and control; (4) knew or, owing to the circumstances at the time, should have known that forces were committing or about to commit crimes; (5) intended the failure to prevent or repress or submit for investigation or prosecution; and (6) intent such that the accused meant to omit to exercise control properly and that intentional omission resulted in the crimes that are the subject of the Court's jurisdiction.

CHAPTER 4

THE PASSAGE OF THE DOCTRINE INTO AUSTRALIAN CRIMINAL LAW

> I come back to the issue of the jurisdiction of the court being activated only in circumstances where the domestic state is incapable or unable to prosecute and try people … for offences that they commit. The military points out that, if there were any transgression of these international principles of decency by Australian troops, then inevitably they would be tried under Australian law and, quite frankly, the existence of the International Criminal Court would be irrelevant to that process.[561]

4.1 Introduction

In its lobbying efforts and public statements, Australia played a leadership role in the processes of negotiating and ratifying the Rome Statute of the International Criminal Court. Australia's Foreign Minister during key periods in the evolution of the statute, Alexander Downer, was considered a long-term supporter of the Court[562] who 'travell[ed] the world for years urging countries to sign up to the International Criminal Court'.[563] As Brady states:

> Australia … played a leading role in the final outcomes on the ICC Statute, the Rules of Procedure and Evidence and the Elements of Crimes paper. Australian principles and ideals on due process and justice are directly incorporated in those documents. In addition Australia chairs the Like Minded Group of countries … advocating for a strong and effective International Criminal Court.[564]

In the Second Reading speech on the introduction of the legislation implementing the statute into Australian domestic law, the Attorney-General, Daryl Williams, stated: 'The court's

---

[561] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2002, 4338 (Robert McClelland, Shadow Minister for Defence).

[562] 'Downer Urges Deal on World Court', *The Age* (online, 14 June 2002) <http://www.theage.com.au/national/downer-urges-deal-on-world-court-20020614-gduasu.html>.

[563] 'Downer Speaks on the ICC Decision', *ABC Radio National PM* (Interview with Alexandra Kirk, 20 June 2002).

[564] Helen Brady, Submission No 7 to Joint Standing Committee on Treaties, Parliament of Australia, *Australia's Ratification of the International Criminal Court Statute* (2001) 8.

establishment has been one of the government's prime human rights objectives'.[565] Australia's ratification of the statute, however, appeared to stall in the government's party room, and purportedly in the Cabinet, until certain concessions were made to a domestic political audience in the form of declarations by Australia on this country's understanding of the terms of the statute. This process of political negotiation saw delays to the point that Australia's efforts in championing the statute and the Court were reduced to an '11th-hour'[566] ratification on the day of the statute's entry into force.

This chapter considers Australia's ratification of the Rome Statute through the dual lens of the constitutional basis underpinning such ratification and the processes involved in the implementation of treaties into Australian domestic law. Constitutional challenges to the validity of Australian military and war crimes laws as well as various domestic legislation implementing treaties have been a recurring theme since Federation.[567] Indeed, the power to legislate with respect to subject matter addressed under international law has been described as potentially proving to be 'a great constitutional battle-ground'.[568] Analysis of the relationship between the provisions of the domestic implementing legislation and the relevant terms of the treaty is thus essential in order to establish a baseline from which to further explore the relevant terms and, in later chapters, the potential implications of any divergence in terms including, significantly, terms that define elements of the mode of liability of command responsibility.

Attention is given to the nature and effect of Australia's declarations in light of the fact that a central focus of this thesis is the impact of any divergence in Australia's implementing legislation at section 268.115 of the Criminal Code from Article 28 of the Rome Statute. This is a key and necessary exercise in light of the impact reservations or declarations may have on

---

[565] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2002, 4319 (Daryl Williams, Attorney-General).

[566] Gillian Triggs, 'Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law' (2003) 25(4) *Sydney Law Review* 507, 509.

[567] See, eg, *Polyukhovich v Commonwealth* (1991) 172 CLR 501 ('*Polyukhovich*').

[568] John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 631, quoted in Donald Rothwell, 'International Law and Legislative Power' in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 104, 104.

the ratification and domestic implementation of treaties generally and any prohibitions on such domestic action specifically provided in the Rome Statute.

Parliamentary debate and analysis undertaken during the passage of the implementing legislation is considered in the context of Australia's obligations under the statute and constitutional requirements regarding the ratification of multilateral treaties. That analysis leads naturally to an analysis of the provisions of section 268.115 including, significantly, the elements of the mode of liability articulated in that section. Consistent with the approach taken throughout the Criminal Code, the drafters of Division 268 stated the physical elements of each offence and mode of liability, including command responsibility, along similar lines to the approach taken in the *Elements of Crimes* instrument of the Rome Statute.

In that light, the use of existing elements of criminal responsibility as codified to overlay the offence provisions of Division 268 is introduced with a view to enhancing the analysis of the codification process and jurisprudence on the elements in subsequent chapters.

4.2 The Constitution, parliamentary processes and the Rome Statute

The Commonwealth Parliament has the ability to legislate in order to give domestic effect to treaties to which Australia is a state party under section 51(xxix) of the *Commonwealth Constitution*, namely the external affairs power.[569] The High Court, in the *Tasmanian Dam Case*, considered the scope of the external affairs power in terms of the implementation of treaties and held that obligations imposed on Australia by its entry into a treaty evidence the 'international character' or 'international concern' of the topic such that legislation may be enacted in reliance on section 51(xxix).[570] The majority in that case drew significantly on the earlier decision of the High Court in *Koowarta*, in which Mason J expressed the opinion that '[a]greement by nations to take common action in pursuit of a common objective evidences the existence of international concern and gives the subject-matter of the treaty a character which is international'.[571]

---

[569] *Australian Constitution* s 51(xxix).

[570] *Commonwealth v Tasmania* (1983) 158 CLR 1, 485–6 (Mason J), 506–9 (Murphy J), 527 (Brennan J), 544–6 (Deane J) ('*Tasmanian Dam Case*').

[571] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 231 (Mason J) ('*Koowarta*').

In *Koowarta,* Mason J had gone further in stating the external affairs power extends to 'the making of laws implementing a bona fide treaty … regardless of whether the subject matter of the treaty concerns Australia's internal affairs or whether the Commonwealth would otherwise have a constitutional head of power to implement it'.[572] Mason J, with whom Murphy J and Brennan J took a similar approach, further considered that any matter which has 'become the topic of international debate, discussion and negotiation constitutes an external affair before Australia enters a treaty relating to it'.[573]

In recommending that the government expeditiously ratify the Rome Statute, the Parliamentary Joint Standing Committee on Treaties (JSCOT) determined, in respect of the constitutionality of the proposed implementing legislation, that 'the risk that the domestic implementing legislation would be judged to be unconstitutional is minimal'.[574] Despite this assessment, the High Court has, however, emphasised the need for caution in terms of the relationship between the subject matter of the treaty and the content of the implementing legislation. In *Victoria v Commonwealth*, the Court held that the legislation must be 'appropriate and adapted' to the terms of the treaty insofar as 'the law must prescribe a regime that the treaty has itself defined with sufficient specificity'.[575]

The foundational test adopted by the Court in determining the relationship between the provisions of the domestic legislation and the terms of the treaty is that the former must be 'appropriate and adapted' to the latter.[576] This relationship is central to any analysis of the validity of individual provisions of domestic implementing legislation including, in this instance, the provisions of section 268.115 of the Criminal Code as they relate to the terms of

---

[572] Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (Report, November 1995) [5.26], quoting *Koowarta* (n 571) 234 (Mason J), 241–2 (Murphy J).

[573] *Koowarta* (n 571) 234 (Mason J).

[574] Joint Standing Committee on Treaties, Parliament of Australia, *Inquiry into the Statute of the International Criminal Court* (Report No 45, May 2002) [3.3] ('*JSCOT Report 45*').

[575] (1996) 187 CLR 416, 33 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Industrial Relations Act Case*').

[576] *Airlines of New South Wales Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54, 87 (Barwick CJ).

Article 28 of the Rome Statute.[577] Flowing from the stated need for an appropriate relationship between the domestic legislation and the treaty is the question whether the Commonwealth Parliament, in enacting domestic legislation as part of the ratification process, is obliged to implement the provisions of the treaty in their entirety.[578] In *R v Burgess; Ex parte Henry*, the High Court took a strict view of the need to implement the terms of treaties precisely, as follows:

> It is a necessary corollary … of the constitutional power of Parliament to secure the performance of an international convention that the particular laws or regulations which are passed by the Commonwealth should be in conformity with the convention which they profess to be executing … [i]t must be possible to assert of any law which is, *ex hypothesi*, passed solely in pursuance of this head of the 'external affairs' power, that it represents the fulfillment, so far as that is possible in the case of laws operating locally, of all the obligations assumed under the convention. Any departure from such a requirement would be completely destructive of the general scheme of the Commonwealth Constitution for … it is only because … the Commonwealth statute or regulations represent the carrying into local operation of the relevant portion of the international convention, that the Commonwealth Parliament or Executive can deal at all with the subject matter of the convention.[579]

Whilst this strict interpretation clearly imposes limitations on the legislature's ability to select the measures stipulated in a treaty which it considers are most 'appropriate',[580] based on the impact any divergence is likely to have on the proper exercise of the powers conferred under s51(xxix), concessions were made that '[e]verything must depend upon the terms of the convention, and upon the rights and duties it confers and imposes'.[581] In stark contrast, Dixon J, in that case, rejected a strict interpretation of the external affairs power in favour of a 'faithful pursuit of the purpose'[582] test, as follows:

> It is apparent that the nature of this power necessitates a faithful pursuit of the purpose, namely, a carrying out of the external obligation, before it can support the imposition

[577] The external affairs power under s 51(xxiv) of the Constitution is considered here as the basis for the validity of the provisions. The subject legislation might also derive validity under the defence power at s 51(vi).

[578] Rothwell (n 568) 113.

[579] (1936) 55 CLR 608, 687–8 (Evatt and McTiernan JJ).

[580] Rothwell (n 568) 114.

[581] *R v Burgess; Ex parte Henry* (n 565) 688.

[582] Ibid 674 (Dixon J).

> upon citizens of duties and disabilities which otherwise would be outside the power of the Commonwealth.[583]

In the subsequent decision of the High Court in *R v Poole; Ex parte Henry*,[584] the Court considered the question was whether the treaty had been properly implemented and not whether the implementing legislation expressly adopted every term of the treaty.[585] In that case it was held that the power under s 51(xxix) 'must be construed liberally and much must be left to the discretion of the contracting States in framing legislation or otherwise giving effect to the Convention'[586] but any discretionary tempering of strict adherence to the treaty is subject to the language of the treaty itself.[587] In a more contemporary analysis, in the *Industrial Relations Act Case*, the High Court held that:

> The law must be reasonably capable of being considered appropriate and adapted to implementing the treaty. Thus, it is for the legislature to choose the means by which it carries into or gives effect to the treaty provided that the means chosen are reasonably capable of being considered appropriate and adapted to that end. But that is not to say that an obligation imposed by treaty provides the outer limits of a law enacted to implement it. The term '*purpose*' has been used to identify the object for the advancement or attainment of which a law was enacted … [i]t has been said that a law will not be capable of being seen as appropriate and adapted in the necessary sense unless it appears that there is '*reasonable proportionality*' *between that purpose or object and the means adapted by the law to pursue it*.[588]

The clear upshot of this line of authority is that, in determining the validity of provisions of legislation implemented under the external affairs power vis-à-vis the terms of the applicable treaty, the test is whether the implementing legislation is reasonably capable of being considered appropriate and adapted to implementing the treaty. This leaves a considerable degree of discretion to the Australian Parliament as to how, and to what extent, it chooses to implement a treaty.

---

[583] Ibid.

[584] *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634.

[585] Rothwell (n 568) 114.

[586] *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634, 647 (Starke J).

[587] Ibid 644 (Rich J).

[588] *Industrial Relations Act Case* (n 575) [34]–[35] (emphasis added).

The issue of whether the discretion can be fettered by express terms in a treaty becomes particularly relevant in the context of the Rome Statute's prohibition on reservations to the statute, discussed below. The more recent jurisprudence, considered above, has confirmed the test, rephrasing it to a 'reasonably appropriate and adapted to give effect to the treaty purpose' test.[589] The inclusion of a 'purposive aspect'[590] to the validity of implementing legislation is relevant to later analyses of the overall purpose of the Rome Statute to combat impunity for international crimes and the extent to which impunity is addressed by way of the command responsibility provisions of the Rome Statute. This precedential position in Australian law is an appropriate segue to a constitutional consideration of the elements of offences in Australian war crimes legislation generally.

4.2.1 Implementing legislation and elements of war crimes

On 14 August 1991 Australia's 1945 *War Crimes Act* 'survived the High Court … endorsed by four judges and rejected as invalid by three'.[591] In that case, *Polyukhovich v Commonwealth*, one of the grounds of appeal before the High Court was that the legislation was not a valid exercise of the external affairs power under section 51(xxix) or the defence power under section 51(vi) of the *Constitution*.[592] Brennan J, dissenting on the issue of the constitutional validity of the legislation under the external affairs power, was nonetheless critical of the fact the legislation 'rejects international law as the legal system by reference to which the elements of a war crime may be ascertained [in that] it is impossible to read [the sections] as though they impliedly imported international law to provide a definition of, or an element in the definition of, a "war crime"'.[593]

Triggs suggests the reason the legislation preferred municipal law above international law was 'to enable an Australian judge to apply known and clear criminal law concepts, and thereby to

---

[589] See *Richardson v Forestry Commission* (1988) 164 CLR 261, 18 (Mason CJ and Brennan J), citing *Tasmanian Dam Case* (n 570) 130–1 (Mason J), 172 (Murphy J), 232 (Brennan J), 259 (Deane J); *Industrial Relations Act Case* (n 575) [34]–[35].

[590] *Cunliffe v Commonwealth* (1994) 182 CLR 272, 322 (Brennan J).

[591] David Bevan, *A Case to Answer: The Story of Australia's First European War Crimes Prosecution* (Wakefield Press, 1994) 70.

[592] *Polyukhovich* (n 567).

[593] Ibid 572.

avoid reference to international rules which can be difficult to prove and substantively vague'.[594] This view is supported by Higgins who considers the difficulty in persuading national courts to apply international law rather than domestic law, particularly in dualist countries[595] such as Australia in which domestic implementation of international treaties is required in order to properly ratify the treaties.

Taking a strictly domestic law approach to the interpretation of legislation implementing international treaties carries with it a risk of non-compliance with obligations under the treaty. In *Povey*, the High Court held that Australia cannot take an insular approach to the construction of the relevant article of the treaty, in its application to domestic legislation, and must be guided by international jurisprudence.[596] In *Applicant A*, Brennan CJ held that:

> If a statute transposes the text of a treaty or a provisions of a treaty into the statute so as to enact it as part of domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty … the rules applicable to the interpretation of treaties must be applied to the transposed text and the rules generally applicable to the interpretation of domestic statutes give way.[597]

McHugh J, whilst espousing the position adopted by Brennan CJ, included the reasoning that 'international treaties often fail to exhibit the precision of domestic legislation. This is the sometimes necessary price paid for multinational political comity'.[598] In the more recent case of *Maloney*, the High Court reaffirmed the necessity to refer to interpretative principles of international law generally, and the subject treaty specifically, in interpreting the domestic legislation.[599]

---

[594] Gillian Triggs, 'Australia's War Crimes Trials: All Pity Choked' in Timothy McCormack and Gerry Simpson (eds), *The Law of War Crimes: National and International Approaches* (Kluwer Law International, 1997) 123, 135–6.

[595] Rosalyn Higgins, *Problems & Process: International Law and How We Use It* (Clarendon Press, 2003) 206.

[596] *Povey v Qantas Airways Ltd* (2005) 223 CLR 189, discussed in Bruno Zeller, 'Case Law Summaries – Maritime Law/Air Law: *Povey v Qantas Airways Ltd* (2005)' (2005) 10(3) *Uniform Law Review* 602, 604.

[597] *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230–1 (Brennan CJ).

[598] Ibid [85] (McHugh J).

[599] *Maloney v The Queen* (2013) 252 CLR 168.

The risk of non-compliance with treaty obligations is no more apparent than in the interpretation of elements of offences including, significantly, offences or modes of liability which are in the nature of war crimes. That much is clear from the statements of Brennan J in *Polyukhovich* in which the subject legislation was criticised for its exclusively domestic focus in the definition of the elements of war crimes. Whilst Brennan J was in dissent regarding the majority decision that the subject legislative provisions were supported by the external affairs power, his critique of the vesting in a domestic court the jurisdiction to administer international law adopted domestically when the domestic law does not correspond with the international law is persuasive. Brennan J stated:

> The real objection to the validity of the Act is that the Act rejects international law as the governing law for the trial of persons allegedly guilty of war crimes and adopts a municipal definition which … denies to the Act the capacity to satisfy an international obligation or to meet an international concern or to confer a universal jurisdiction recognised by international law.[600]

The legislation that was challenged in that case introduced the offence of committing a war crime and the term 'war crime' was given a statutory meaning by reference to the term 'serious crime'.[601] That term was subsequently defined with reference to purely domestic criminal law concepts. The legislation then provides a nexus between the domestic criminal law definitional concepts and the term 'war crime' by introducing a requirement that the conduct constituting serious crime is committed in the context of hostilities in war or occupation.[602] The Commonwealth submitted that the nexus-creating provisions implicitly import the requirement that the proscribed conduct be a war crime or a crime against humanity under international law. This submission was rejected by Brennan J on the basis that no legislative intention to that effect was present and certain limitations on the conduct of belligerents, imposed under the laws and customs of war, were not imported into the definitional sections of the Act.[603]

The problems encountered by Brennan J in this regard are restated concisely by Triggs, as follows: 'To adopt domestic law concepts rather than those of international law, especially

---

[600] *Polyukhovich* (n 567) 572 (Brennan J).

[601] *War Crimes Act 1945* (Cth) s 6.

[602] Ibid ss 7(1), 7(3).

[603] *Polyukhovich* (n 567) 572 (Brennan J).

where the legislation should conform reasonably with the relevant international law, is especially liable to obfuscation.'[604] It is precisely this risk of obfuscation, and resultant non-compliance with international obligations, arising from the introduction of domestic legal concepts into legislation implementing the provisions of the Rome Statute, including Article 28, which forms the basis of analysis in later chapters addressing the consequences of disparities between domestic legislation and corresponding international law.

4.2.2 Debate on ratification and implementation

As noted above, Australia was an enthusiastic supporter of and advocate for a permanent international court which would prosecute 'senior leaders and military figures who had, until this time, largely acted with impunity',[605] except, as Charlesworth et al cynically suggest, 'where those individuals were Australian'.[606] This critique underscores the politicised process which was Australia's ratification of the Rome Statute and which became apparent in debate on the implementing legislation. As Charlesworth et al state: 'The clash between the desire to support international enforcement of human rights, and reluctance to subject the conduct of Australians to international scrutiny, marked Australian debates about the court.'[607]

Noting that the motivation behind Australia's support for the establishment of the International Criminal Court appears to have been grounded on the need to prosecute senior political and military leaders,[608] the extent of the debate and subsequent compromise on the legislation is significant to this analysis of command responsibility in the Australian context. Indeed, it is the extent of domestic compromise and potential deviation from the express terms of the Rome Statute which exposes the implementing legislation to risk, including the risk of non-compliance with Australia's obligations under the treaty.

---

[604] Triggs, 'Implementation of the Rome Statute' (n 566) 137.

[605] Pauline Collins, 'What is Good for the Goose is Good for the Gander: The Operation of the Rome Statute in the Australian Context' (2009) 32(1) *University of New South Wales Law Journal* 106, 106.

[606] Hillary Charlesworth et al, *No Country is an Island: Australia and International Law* (UNSW Press, 2006) 71.

[607] Ibid 72.

[608] See, eg, *Parliamentary Debates* (n 565) 4318–9 (Daryl Williams, Attorney-General).

The implementing legislation was introduced and adopted in the House of Representatives on the same day, leaving little time for debate and prompting criticism from Opposition Members of Parliament on the basis of a lack of accountability in the treaty-making process.[609] Nonetheless, the debate on the Bills emphasised what can only be described as domestic safeguards in the ratification of the Rome Statute. One purported safeguard appears to relate to the definition of Rome Statute crimes under Commonwealth criminal law. The Attorney-General stated:

> While these crimes cover the same acts as the International Criminal Court statute, they are part of Australia's criminal law and they have been defined according to the same principles, and with the same precision, as other Commonwealth criminal laws.[610]

The implicit intent of this statement, it is suggested, was to reiterate the primacy of Australian law and, especially, existing principles of Commonwealth criminal law, in the implementation of the offence provisions of the Rome Statute. That is consistent with the overall tenor of debate on this legislation that the preservation of Australia's sovereign interests was not somehow being unwittingly surrendered. It is this retention of sovereignty, in this case purportedly by the application of existing principles of Commonwealth criminal law to the definition of crimes, including the articulation of the elements of such crimes, which introduces differences or a divergence in the elements of crimes, as analysed later in this thesis.

In introducing the suite of implementing legislation in the House of Representatives, the Commonwealth Attorney-General made a point of emphasising the Rome Statute had been 'the subject of detailed scrutiny by the Joint Standing Committee on Treaties' and that committee, relevantly, had recommended the review of certain definitions of crimes in the Rome Statute as part of the implementation process.[611]

4.2.3 The Joint Standing Committee on Treaties and the Rome Statute

The Rome Statute was referred to the Joint Standing Committee on Treaties (JSCOT) by the Commonwealth Parliament following the presentation by the government of the text of the

[609] Ibid 4324 (Wayne Swan).

[610] Ibid 4326 (Daryl Williams, Attorney-General).

[611] Ibid 4319 (Daryl Williams, Attorney-General).

Rome Statute to the Parliament on 10 October 2002. The JSCOT reviewed the text in the course of its inquiry into Australia's proposed ratification and subsequently made a series of recommendations in its report to the Parliament of May 2002. Recommendation 4 of the JSCOT report stated, inter alia, that:

> The Committee … recommends that, in noting the provisions of the Statute of the International Criminal Court, the Australian Government should declare that:
>
> - it is Australia's right to exercise its jurisdictional primacy with respect to crimes within the jurisdiction of the ICC, and
> - Australia further declares that it interprets the crimes listed in Articles 6 to 8 of the Statute of the International Criminal Court strictly as defined in the *International Criminal Court (Consequential Amendments) Bill.*[612]

The Rome Statute, at Article 120, prohibits reservations to the treaty but contains a transitional clause allowing a state to make certain declarations regarding jurisdiction for a period of seven years after entry into force of the statute.[613] Triggs is of the view that Australia's declarations have no legal effect at international law and are likely to be considered interpretive declarations for the sole purpose of assuaging the concerns of a domestic audience about the local impact of the Rome Statute.[614] Triggs further considers that these declarations 'add nothing to the nature and extent of Australia's legal commitment to the obligations set out in the Rome Statute'.[615]

The reference to the strict definition of crimes in the Bill applies expressly to the interpretation of the crimes in Articles 6 to 8 of the Rome Statute. This recommendation did not contemplate the definition of command responsibility in Article 28 vis-à-vis its definition in the Bill. This clearly restated Australia's desire to retain primacy over the crimes in the Rome Statute. The JSCOT did not, however, consider or report upon the definition of command responsibility in the Rome Statute and its subsequent articulation in the Bill. Thus, no recommendation was made to the Parliament that Australia lodge a declaration regarding its interpretation of

---

[612] *JSCOT Report 45* (n 574) rec 4.

[613] *Rome Statute* (n 22) art 120.

[614] Triggs, 'Implementation of the Rome Statute' (n 566) 510–14.

[615] Ibid 514.

command responsibility along similar lines to the recommended declaration as to Australia's interpretation of the crimes in Article 6 to 8.

The intention of the Parliament regarding its implementation of Article 28 into Australian law was expressly stated in the Explanatory Memorandum as 'implement[ing] the principles of command responsibility established in Article 28 of the Statute'[616] and no recommendation was made that Australia should declare its interpretation of command responsibility 'strictly' as defined in the Bill. Indeed, the JSCOT expressly confirmed an intention to not deviate from the terms of the Rome Statute more broadly in its statement confirming 'Australia's intent as a sovereign nation to apply its own laws, laws which mirror those of the ICC Statute, and apply them to any person residing in Australia who has been accused of committing genocide, crimes against humanity, or war crimes'.[617] The term 'mirror', as applied to the respective laws, is an interesting reflection of the approach taken by the JSCOT to its inquiry and findings. Whilst not decisive in terms of the legislative drafting exercise eventually undertaken, this terminology is indicative of an approach akin to 'direct' implementation of the terms of the Rome Statute.

At this stage of the process of ratification and implementation it is apparent neither the Parliament nor its committee tasked with reviewing the Rome Statute deemed it necessary to deviate from the terms of Article 28 in implementing command responsibility into Australian law. As discussed below, however, the Explanatory Memorandum and the Bill did deviate in their definition of command responsibility through its elemental deconstruction.

4.3 The implementing legislation

The International Criminal Court Bill 2002 (Cth) and the International Criminal Court (Consequential Amendments) Bill 2002 (Cth) were introduced into the House of Representatives on 25 June 2002 and into the Senate on 27 June 2002. The Explanatory Memorandum to the International Criminal Court Bill, in its preliminary outline, again emphasised the protection of Australia's sovereignty, affirmed the primacy of Australian law and mentioned the declaration Australia submitted along with its ratification instrument to the

[616] Explanatory Memorandum, International Criminal Court (Consequential Amendments) Bill 2002 (Cth) 14.

[617] *JSCOT Report 45* (n 574) rec 3, [3.35].

United Nations.[618] The remainder of the Explanatory Memorandum and the Bill itself addressed mechanisms by which Australia was to exercise its obligations under the Rome Statute including, predominantly, mechanisms by which Australian authorities were to cooperate with the ICC in its investigation and prosecution of war crimes.[619]

The International Criminal Court (Consequential Amendments) Bill 2002 (Cth) detailed the amendments to be made to the Criminal Code to implement the Rome Statute. The purposive statement to the Explanatory Memorandum stated:

> This Bill amends the *Criminal Code Act 1995* (Criminal Code) to:
>
> - create offences in Australia that are the equivalent of the crimes of genocide, crimes against humanity and war crimes in the International Criminal Court Statute, so that Australia retains the right and power to prosecute any person accused of a crime under the Statute in Australia rather than surrender that person for trial in the International Criminal Court; …
> - establish various legal principles to be applied in prosecuting these offences, such as command responsibility, the defence of superior orders, jurisdiction and Parliament's intention that the jurisdiction of the International Criminal Court is to be complementary to Australia's.[620]

This statement, again, emphasised the retention of jurisdiction by Australia under the principle of complementarity on no less than two occasions in the three paragraphs of the outlined statement of purpose. Significantly, the first point in the outline refers to the creation of offences within the code which are the equivalent of the crimes in the Rome Statute. No such mention is made of equivalency in the establishment of legal principles including, relevantly, command responsibility.

When read with the portfolio Minister's second reading speech on the introduction of the Bill to the Parliament, a clear inference exists that the specific crimes in the general part of the Rome Statute were to be enacted within the Criminal Code in compliance with the mechanisms by which the Commonwealth enacts offences, including its elements analysis approach to defining crimes. In contrast, and noting the second reading speech does not expressly mention

---

[618] Explanatory Memorandum, International Criminal Court Bill 2002 (Cth) 1.

[619] Ibid.

[620] Explanatory Memorandum, International Criminal Court (Consequential Amendments) Bill 2002 (Cth) 1.

modes of liability but, rather, is limited to offence categories over which the ICC has jurisdiction – genocide, crimes against humanity and war crimes – no such inference is immediately available for the modes of liability including command responsibility. The purposive statement in the Explanatory Memorandum chose to distinguish between the crimes in the general part of the Rome Statute and the legal principles, such as command responsibility, in separate points. In so doing, the drafters have recognised that the offences in the general part of the Rome Statute and the modes of liability are distinct provisions requiring discrete attention in the legislative drafting exercise. The statement that the Bill amends the Criminal Code to 'establish various legal principles … such as command responsibility'[621] suggests such principles, including the elemental definitions of such, were being developed ab initio and not 'according to the same principles, and with the same precision'[622] as was being applied to the creation of the statute offences in Commonwealth criminal law.

The upshot of this analysis is that an opportunity existed in the drafting of the command responsibility provisions of the Criminal Code to establish the mode of liability inclusive of its constituent elements in strict compliance with the terms of Article 28 and not with any recourse by default to existing principles of criminal responsibility in the code. As is discussed in greater detail later, this did not happen and the elements of command responsibility under Article 28 differ from those under section 268.115 of the Criminal Code. Admittedly, codification of the criminal law including, relevantly, the general principles of criminal responsibility was intended to provide a systematic and coherent set of principles 'to promote coherence in the criminal law'.[623] But, as Bronitt and McSherry state, 'principles possess rivals that inevitably clash, and even those principles deemed to be "fundamental" may be outweighed for countervailing policy considerations'.[624]

Such policy considerations may, it is contended, include Australia's obligation to comply with international treaties to which Australia is a party. The reference to Australia's obligation, in this context, is not a contention that a blunt obligation is imposed on Australia to implement the Rome Statute but, rather, is posing a more nuanced argument that a failure by Australia to

[621] Ibid.

[622] *Parliamentary Debates* (n 565) 4326 (Daryl Williams, Attorney-General).

[623] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 3rd ed, 2010) 86.

[624] Ibid.

faithfully implement command responsibility can trigger the jurisdiction of the ICC over Australian commanders by preventing Australia from successfully invoking the principle of complementarity. That point is discussed in greater detail later in this thesis.

Where the legislature deviated from the general principles of criminal responsibility in other enactments of Commonwealth criminal law, policy considerations regarding the subject matter of the offence-creating mechanisms inevitably came into play. Again, Bronitt and McSherry are of assistance in this analysis in their argument that '[c]rimes that derogate from general principles are "exceptional", governed by their own special rules and doctrines'.[625] The doctrine of command responsibility specifically, and the species of crimes within the Criminal Code encompassing the genus 'war crimes', are exceptional in the realm of domestic criminal law and are subject to their own doctrinal evolution.

4.3.1 Incorporating existing fault elements from the code into command responsibility

With respect to proposed section 268.115 of the Criminal Code (Responsibility of Commanders and other Superiors), the Explanatory Memorandum to the International Criminal Court (Consequential Amendments) Bill 2002 stated, inter alia:

> This proposed section sets out the principles by which people in command of the perpetrators of offences can be held criminally responsible for the acts of their subordinates. It is important to ensure that the persons ultimately responsible for the commission of the crimes under the Statute and this Division do not escape punishment because they did not directly commit the offences. It is also important to ensure that a commander whose subordinates have committed, or are suspected of having committed, such crimes takes steps to have those crimes investigated and the perpetrators punished. The proposed section implements the principals [sic] of command responsibility established in Article 28 of the Statute. The proposed section states that a military commander is criminally responsible for genocide, crimes against humanity or war crimes that are committed by people under their control where the commander:
>
> - knew, or should have known, that their forces were committing or about to commit the crimes; and
> - did not take all reasonable and necessary steps to prevent the crimes being committed or hand the matter to the proper authorities for investigation and prosecution of the offenders.[626]

[625] Ibid 90.

[626] Explanatory Memorandum, International Criminal Court (Consequential Amendments) Bill 2002 (Cth) 14.

The section as proposed in the Explanatory Memorandum to the Bill, which was tabled by the Attorney-General at the time he introduced the Bill into the House of Representatives on 25 June 2002, was in almost identical terms to those of Article 28 of the Rome Statute. Significantly, the fault element of 'knew or should have known' was expressly applied to the physical element of the commission of the offences in the same way in which it was applied in Article 28. Reference to the actual Bill, which was introduced along with the Explanatory Memorandum, however, reveals the terminology of this fault element was: 'the military commander … either knew or, owing to the circumstances at the time, was reckless as to whether the forces were committing or about to commit such offences'.[627] Subsequently, section 268.115 of the *International Criminal Court (Consequential Amendments) Act 2002*, which received royal assent two days later on 27 June 2002, shows the fault element as articulated in the Bill and not as stated in the Explanatory Memorandum.[628] The constructive 'should have known' was replaced with the fault element of recklessness and no explanation was provided in the second reading speeches or other debate in the expedited passage of the Bill into legislation.

4.3.2 The availability of other fault elements to command responsibility

The change in fault element construction is not surprising as a matter of the application of general principles of criminal responsibility in the code. It is surprising, however, that the Explanatory Memorandum would expressly refer to a fault element derived from the Rome Statute in identical terms to that of the statute but to then not reflect that fault element in such terms in the Bill and subsequent Act. The Explanatory Memorandum does, however, explain why Commonwealth criminal law policy was applied to the ICC crimes as defined in the *Elements of Crimes* instrument, as follows:

> The crimes in this schedule are based closely on the way the ICC crimes are defined in the draft text of the Elements of Crimes. These crimes have been formulated consistent with Commonwealth criminal law policy, with a focus on detailing the precise conduct which is prohibited in express terms, and the mental elements that are required.[629]

[627] International Criminal Court (Consequential Amendments) Bill 2002 (Cth) cl 268.115(2)(a).

[628] *International Criminal Court (Consequential Amendments) Act 2002* (Cth) s 268.115(2)(a).

[629] Explanatory Memorandum, International Criminal Court (Consequential Amendments) Bill 2002 (Cth) 3.

No such explanation is provided regarding the definition of the modes of liability which are defined outside the *Elements of Crimes* instrument but, rather, are defined in the Rome Statute itself. Notwithstanding this lack of explanation, deference to existing principles of Commonwealth criminal law is, as stated, unsurprising considering the Criminal Code tends to demand such deference. Section 2.1 of the Criminal Code, in stating the purpose of Chapter 2 regarding the general principles of criminal responsibility, provides:

> The purpose of this Chapter is to codify the general principles of criminal responsibility under laws of the Commonwealth. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created.

The caveat that the general principles apply to any offence regardless of the mechanism by which the offence is created is, however, not a constitutionally enshrined barrier to the Commonwealth Parliament creating new offences with fault elements other than those stated under the general principles provisions.[630] Section 5.1(1) of the Criminal Code provides that '[a] fault element for a particular physical element may be intention, knowledge, recklessness or negligence'.[631] Section 5.1(2) allows for an exception to the rule in subsection (1) in that '[s]ubsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence'.[632]

Hence, the Parliament, in implementing Article 28 of the Rome Statute into Australian law, faced no constitutional or legislative obstacle to superimposing the statute's mental element of 'should have known' over the code's definition of command responsibility in respect of the physical element of the commission of the crimes. Section 5.1(2) expressly allowed for that possibility but it was not adopted.

In its report to the Standing Committee of Attorneys-General on the establishment of a model criminal code, the Criminal Law Officers Committee stated:

---

[630] Odgers (n 385) 10.

[631] *Criminal Code* (n 23) s 5.1(1).

[632] Ibid s 5.1(2).

> Like other statutes, Parliament can override the provisions in this chapter of the Code, either elsewhere in the Code or in other legislation. Because of the fundamental nature of the principles of criminal responsibility, we would not expect this to be done lightly.[633]

Arguably, the expressed and unambiguous implementation into Australian law of the provisions of an international treaty to which Australia is a state party is a matter which the Parliament would not take lightly. As such, the Parliament could have included a fault element in its articulation of section 268.115 outside those specified in the general principles without offending the guidance provided by the committee in its report on codification. Similarly, Odgers suggests that, in light of the fact the purpose of Chapter 2 is expressly stated as the codification of the general principles of criminal responsibility under Commonwealth law, 'it may be anticipated that the courts will require clear and unambiguous statutory language before concluding that the general principles are intended to be overridden'.[634]

In *R v Lee*,[635] the New South Wales Court of Criminal Appeal, exercising Commonwealth jurisdiction, analysed the requisite elements in proving a certain Commonwealth offence. The Court considered the requisite physical elements and then held that the legislation under consideration was an example of the proper application of s 51(2) of the code such that a fault element other than intention, knowledge, recklessness or negligence may exist.[636] Clearly the full bench of the Court of Criminal Appeal considered an intention existed in the statutory language that the general principles were to be overridden in favour of a specific fault element of relevance to the applicable physical element.

Whilst the Explanatory Memorandum to the International Criminal Court (Consequential Amendments) Bill 2002 included a clear and unambiguous statement of an intention to define command responsibility in identical elemental terms to those of Article 28, the Bill itself and the subsequent Act as passed did not. It is thus clear that, whilst the Parliament faced no

---

[633] Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapters 1 and 2 General Principles of Criminal Responsibility* (Report, December 1992) 5 ('*MCCOC Report*').

[634] Odgers (n 385) 10.

[635] (2007) 71 NSWLR 120.

[636] Ibid [16], discussed in Anderson (n 379) 25.

impediment to enacting provisions in identical terms to those of Article 28 including, significantly, the fault element attaching to the physical element of the commission of crimes, it elected not to do so for reasons which are not expressly stated in any of the interpretative material of relevance to the legislation. Since the entry into force of the Criminal Code provisions implementing the Rome Statute, Commonwealth guidelines appear to enforce the application of the general principles of criminal responsibility to the framing of Commonwealth offences. A 2004 guide issued by the Minister for Justice and Customs states the following two principles:

> Principle: The fault elements used in an offence, and alternatives to requiring proof of fault, should be drawn from the Criminal Code.
>
> Principle: The fault elements supplied by the Criminal Code subject to contrary provision should apply unless there is reason to depart from these.[637]

Use of the term 'should' imposes a degree of discretion, albeit it suggests the default position is to be adhered to in the absence of justifiable reasons for a departure from the default position. This guide provides some reasoning behind this legislative drafting policy which is of relevance to this analysis. The Criminal Code elements were, the guide states, 'designed to remove ambiguities that had been present in much of the alternative terminology' in earlier Commonwealth criminal law which included a much broader range of fault terminology.[638] This narrowing of the available fault elements is notwithstanding the 'significant widening of the range of Commonwealth offences'[639] prosecutable under the Criminal Code.

The removal of fault elements other than intention, knowledge, recklessness and negligence from the code was part of what has been described as a process of legal simplification intended to be introduced by the Criminal Code.[640] The Commonwealth's guide to offence framing takes a rigid approach to any deviation from the fault element options provided in the Code, as follows:

---

[637] Australian Government (n 489) 20, 22.

[638] Ibid 21.

[639] Geoffrey Bellew, 'Foreword' in Troy Anderson, *Commonwealth Criminal Law* (Federation Press, 2014) v, v.

[640] *R v LK and RK* (2010) 241 CLR 177, 138.

> Departure from the Criminal Code options would normally only be considered appropriate where it was not possible to achieve the Government's objectives through one or more of the Code fault elements or alternatives to fault, taking into account the dangers in using alternative formulations.

The question again arises whether the government's objectives in faithfully implementing the provisions of the Rome Statute and, in this instance, Article 28, warranted such a departure from the options provided in the code. Fellmeth and Crawford critically state that '[t]he idea that the *mens rea* of command responsibility must conform to municipal criminal law concepts is indeed based on a basic misconception about international law itself'.[641] As discussed in later chapters, the further question arises whether the non-departure from the options, which was in itself a departure from the terms of Article 28, posed other dangers.

The dangers contemplated in the guide include, relevantly, the use of fault terminology such as 'ought reasonably to know' which, according to the guide, are 'an attempted compromise between requiring proof of fault and imposing strict liability but are uncertain in their application in a criminal offence'.[642] As discussed previously, the post-World War II military tribunals, the ad hoc tribunals and the ICC have not considered that this terminology, or constructive knowledge fault terminology of this nature, imposes strict liability or is uncertain in its application to the mode of liability of command responsibility.

Indeed, and without labouring the point, the Explanatory Memorandum to the International Criminal Court (Consequential Amendments) Bill 2002 did not consider a fault element of constructive knowledge of this nature to be uncertain in its application to the criminal law of the Commonwealth. Admittedly, in the application of the interpretive principle that 'the first loyalty is to the code',[643] the Explanatory Memorandum serves little purpose beyond an aid to interpretation of the related Bill[644] and, as discussed, the Bill rejected the fault element of 'should have known' in favour of recklessness.

---

[641] Fellmeth and Crawford (n 378) 1245. It should be noted, however, that these authors conduct their entire analysis through the lens of a 'reason to know' standard of fault which is, itself, inconsistent with the mental elements deconstructed from the provisions of Section 268.115 of the Criminal Code.

[642] Australian Government (n 489) 21.

[643] *R v Barlow* (1997) 188 CLR 1, 32, citing *Jervis v The Queen* [1993] 1 Qd R 643, 647.

[644] See, eg, *Re Australian Federation of Construction Contractors; Ex parte Billing* (1986) 68 ALR 416, 420.

A further danger considered by the authors of the guide to be applicable to the use of fault terminology such as 'ought reasonably to know' is that, '[d]epending on the context, a court may read in a requirement for the prosecution to prove something akin to recklessness'.[645] No explanation or, indeed, precedential authority or judicial statement, is provided in the guide in support of this purported danger. In the context of the doctrine of command responsibility as applied on the international stage and discussed in earlier chapters, the fault concept of 'should have known' is more akin to negligence. This is supported by the fact the doctrine, at its heart, proscribes breaches of the duties of command invoking the nexus between a duty owed and negligence in its performance. The Scrutiny of Legislation Committee of the Queensland Parliament, in reviewing certain draft legislation proposed under that State's codified criminal legislation system, determined that an offence comprising a mental element of 'ought reasonably to know' attached to a particular action or lack of action could be committed 'simply by acting negligently'.[646] Australian jurisprudence in the context of the law of insolvency has considered the fault element of 'ought reasonably to know' to equate to a form of negligence in light of the duty owed by company directors when insolvency is imminent or unavoidable.[647] Similarly, the Corporations Law in Australia distinguishes between the elemental concepts of 'ought reasonably to know' and an absence of care equating to recklessness in the context of making false or misleading statements regarding financial products,[648] the inference being that the former is not akin to recklessness.

4.4 Conclusion

Australia's leadership in lobbying on the world stage for the broad ratification of the Rome Statute appears to have been stifled once domestic issues and legislative processes came into play in its own ratification of the statute. Debate in the government's own party room appeared to centre on concerns surrounding jurisdiction and the surrender of Australian citizens to the ICC for prosecution. An inference is available that the government's fixation on Australia's

[645] Australian Government (n 489) 21.

[646] Office of the Queensland Parliamentary Counsel, 'Principles of Good Legislation: OQPC Guide to FLPs' (Guidance Paper, 19 June 2013) [23].

[647] See, eg, *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722.

[648] *Corporations Act 2001* (Cth) s 1041E(1)(c).

retention of jurisdiction and the primacy of Australia's law, as demonstrated at all stages of the ratification and domestic implementation processes, contributed to a decision to strictly apply the general principles of criminal responsibility to the definition of command responsibility in the code and not adopt some purported international law aberration of the fault concept of constructive knowledge.

The Commonwealth Parliament, in the exercise of the external affairs power, legislated to give domestic effect to the Rome Statute. Submissions to the Parliament's Joint Standing Committee on Treaties (JSCOT) contended this was an abuse of the external affairs power but these contentions were rejected by the JSCOT in its report to the Parliament. A line of High Court authority on the issue of the implementation of treaties into Australian law has provided the test as to whether the implementing legislation is reasonably capable of being considered appropriate and adapted to implementing the treaty. The question to be asked is whether the legislation is reasonably appropriate and adapted to give effect to the treaty purpose.

Australia's history of war crimes legislation evidences a deference to domestic legal principles over international law. This deference has created problems regarding legislative validity in the High Court[649] and has been explained on the basis that Australian judges are enabled to apply known concepts of criminal law rather than the purported vagaries of international rules. The risk of applying strictly domestic law principles to implementing legislation is, of course, non-compliance with international obligations under the treaty and that risk is no more apparent than in the interpretation of elements of offences.

The legislation implementing the Rome Statute was introduced and adopted in an expedited timeframe in order for Australia to meet the deadline for ratification. Arguably, this rush to ratify following protracted delays in the drafting of legislation which was considered acceptable to the government and the Parliament led to discrepancies in the Bills as introduced and their supporting extrinsic material. Relevantly, the Explanatory Memorandum to the Bill amending the Criminal Code expressly stated the intention of proposed section 268.115 was to 'implement the principals [sic] of command responsibility established in Article 28 of the Statute'[650] and, subsequently, went on to state the principles verbatim from Article 28 including

[649] See *Polyukhovich* (n 567) 572 (Brennan J).

[650] Explanatory Memorandum, International Criminal Court (Consequential Amendments) Bill 2002 (Cth) 14.

the fault element of ‘knew or should have known’. The Bill, however, replaced the constructive knowledge fault element with the fault element of recklessness in apparent deference to existing general principles of Commonwealth criminal law.

There was, however, no constitutional or legislative barrier to the legislature applying a fault element other than recklessness or, indeed, the other elements stated in the codified principles of criminal responsibility, to command responsibility in section 268.115. The element of ‘should have known’ could have been included without offending any legislative drafting rules other than, perhaps, policy guidelines which of course do not displace constitutional or legislative provisions. This leaves the questions open whether the Australian Government’s objectives in faithfully implementing Article 28 warranted a departure from the fault element options in the Criminal Code and whether the non-departure from those options resulting in a departure from the terms of Article 28 posed other dangers.

CHAPTER 5
PROVING COMMAND RESPONSIBILITY UNDER AUSTRALIAN LAW

> While a high level of responsibility may arise from the alleged level of participation in the commission of crimes alleged in the indictment, a person holding a high rank may ultimately bear a higher responsibility by virtue of that high position.[651]

5.1 Introduction

Having analysed the mechanisms by which Australia implemented Article 28 of the Rome Statute into domestic Australian law by way of its incorporation into the Commonwealth Criminal Code, analysis of the means by which command responsibility is proven is now warranted. As discussed in Chapter 4, the material elements of Article 28, known as physical elements in the Criminal Code, are articulated in the provisions of section 268.115 of the code in identical terms to those of Article 28. The mental elements of Article 28, known as fault elements in the code, are, however, provided in section 268.115 as a reflection of existing general principles of criminal law in the code. In that light, this chapter analyses how the physical elements of codified command responsibility may be proved.

Since section 268.115 creates a mode of liability which is unique in Australian law, and implements the Rome Statute in Australian law, proof of the physical elements, by necessity, draws on the jurisprudence of the ICC and, where relevant, earlier jurisprudence of the ad hoc tribunals or other international criminal law proceedings. In contrast, proving the fault elements draws on Australian jurisprudence, in light of the fact the fault elements are well established in Commonwealth criminal law, with international jurisprudence likely to be relevant but somewhat less important than Australian jurisprudence on the fault elements.

---

[651] *Prosecutor v Delić (Decision on Motion for Referral of Case Pursuant to Rule 11 BIS)* (International Criminal Tribunal for the Former Yugoslavia, Referral Bench, Case No IT-04-83-PT, 9 July 2007) [23]. Note that the defendant, *Delić*, was the commander of the Main Staff of the Army of Bosnia and Herzegovina (ABiH) and was 'said to have exercised military command and control over all regular ABiH forces in Bosnia and Herzegovina' [11].

5.2 The elements of command responsibility in the Criminal Code

Subsection 268.115(2) of the Criminal Code provides for the criminal responsibility of commanders or persons effectively acting as military commanders for offences of genocide, crimes against humanity or war crimes committed by subordinates, as follows:

> A military commander or person effectively acting as a military commander is criminally responsible for offences under this Division committed by forces under his or her effective command and control, or effective authority and control, as the case may be, as a result of his or her failure to exercise control properly over those forces, where:
>
> (a) the military commander or person either knew or, owing to the circumstances at the time, was reckless as to whether the forces were committing or about to commit such offences; and
>
> (b) the military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[652]

In order to deconstruct the mode of responsibility into its constituent elements, it is necessary to apply an elements analysis approach, as specified in section 3.2 of the Criminal Code, as opposed to a crime analysis or offence analysis approach. The applicable approach, in essence, is premised on the notion that 'offences are constituted by their elements'.[653] The distinction between the two approaches was discussed in Chapter 3 Section 3.2.3, above, in its application to the Rome Statute. Section 3.2 of the Criminal Code provides:

> In order for a person to be found guilty of committing an offence the following must be proved:
>
> (a) the existence of such physical elements as are, under the law, creating the offence, relevant to establish guilt;
>
> (b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element.[654]

---

[652] *Criminal Code* (n 23) s 268.115(2).

[653] Ian Leader-Elliott, 'Elements of Liability in the Commonwealth Criminal Code' (2002) 26 *Criminal Law Journal* 28, 32.

[654] *Criminal Code* (n 23) s 3.2.

The upshot of this provision is that the mode of liability assigned in subsection 268.115(2) requires proof of each of the physical elements stated in the subsection and a corresponding fault element. The terminology 'one of the fault elements' indicates that one fault element applies to each physical element and such available fault elements are limited to those provided in the Criminal Code.[655] As Odgers states, '[r]ead literally, if there are two (or more) fault elements "for [a] physical element", only one must be proved'.[656] As is discussed below, however, offence-creating provisions may specify fault elements other than those articulated in the code at section 5.1[657] and 'may provide different fault elements for different physical elements'.[658]

Table 3, below, is a deconstruction of the physical and fault elements of subsection 268.115(2) as a precursor to further analysis of how to prove the elements. In light of the fact that only the physical element of the commission or pending commission of offences by subordinates specifies its own fault element of knowledge or recklessness, the default fault elements of recklessness or intention apply to the remaining physical elements.[659]

Table 3: Element analysis of subsection 268.115(2)

Physical elements	Fault elements
Offences under Division 268	Circumstance ∴ recklessness
Superior–subordinate relationship	Circumstance ∴ recklessness
Effective command/authority and control	Circumstance ∴ recklessness
Forces were committing/about to commit crimes	(Circumstance) knowledge or recklessness
Failure to prevent/repress/submit to authorities	Conduct (omission) ∴ intention
Crimes were a result of the failure to exercise control properly	Result of conduct ∴ recklessness

[655] See, eg, *R v Tang* (2008) 237 CLR 1, 46.

[656] Odgers (n 385) 15.

[657] *Criminal Code* (n 23) s 5.1(2).

[658] Ibid s 3.1(3).

[659] See *Criminal Code* (n 23) s 5.6 which provides for a fault element of intention for a physical element of conduct where no fault element is specified and a fault element of recklessness for a physical element of circumstance or result where no fault element is specified.

5.2.1 Physical elements of command responsibility

Subsection 4.1(1) of the Criminal Code provides:

> A physical element of an offence may be:
> (a) conduct, or
> (b) a result of conduct; or
> (c) a circumstance in which conduct, or a result of conduct, occurs.[660]

The physical element of conduct is defined as 'an act, an omission to perform an act or a state of affairs'.[661] Relevantly, in light of the material elements of Article 28 which include the element of consequence, discussed above, the physical elemental concept of result of conduct is 'sometimes referred to as [a] consequence [such that] it is common for a crime to be complete only if the conduct of the accused has a result'.[662] The 1992 report of the Model Criminal Code Officers Committee (MCCOC) stated that conduct 'may be comprised of acts, omissions to act, or a state of affairs – or a combination'[663] such that the use of the term 'or' in subsection 4.1.(1) is largely redundant since an expressed intention in the drafting of the provisions was that any combination of the definitional alternatives of the term conduct is applicable. It follows that, in practice, a particular offence may have two physical elements of conduct such as an 'act' physical element and a 'state of affairs' physical element.[664] The state of affairs conduct element relates to being something such that 'the conduct element of some crimes lies in being something',[665] as compared to doing or not doing something.

Whilst an offence may thus include a combination of modes of conduct physical elements – act, omission or state of affairs – guidance on the drafting of Commonwealth offences states that 'each physical element of the offence [is] to be clearly distinguished (either expressly or

---

[660] Ibid s 4.1(1).

[661] Ibid s 4.1(2).

[662] Matthew Goode, 'The Model Criminal Code Project' (1997) 5(4) *Australian Law Librarian* 265, 268.

[663] *MCCOC Report* (n 633) 7.

[664] Odgers (n 385) 20. See also Goode (n 662) 268.

[665] Goode (n 662) 268.

by construction) … the elements of conduct, circumstances and results constituting the offence should be distinguishable from each other'.[666] Odgers states:

> [W]here … a Commonwealth offence is defined in a way that a discrete paragraph refers to something that could be characterised as conduct alone or conduct and a circumstance, it should usually be assumed that it was intended to be characterised as the former, given the principle that offences should be drafted so that each physical element of the offence is in a separate paragraph.[667]

Turning to the physical elements of command responsibility in the Criminal Code, the final physical element – that the crimes were a result of the failure of the commander to exercise control properly over the subordinates – could constitute a physical element of conduct by omission to exercise control properly or a physical element of a result of conduct. In applying the drafting guidance, only one such element should apply and the express use of the term 'result of' in subsection 268.115(2) allows for a reasonable inference that the applicable physical element is the result of conduct. Noting the legislation does not express a fault element for this physical element, the default fault element is recklessness. This conclusion is supported by the fact the exercise of effective command/authority and control is addressed in a preceding physical element of circumstance.

On its face, this deconstruction appears to be inconsistent with the High Court's decision in *Li v Chief of Army*, in which it was held that the terms 'creates a disturbance' in the applicable offence provisions created two physical elements of conduct and the result of conduct.[668] This decision tends to overturn the drafting guidance insofar as two physical elements fall out of the one discrete paragraph of the offence provisions. The explanation given for this outcome in *Li* is as follows:

> In the context of the overall reference in s33(b) of the DFDA to a person who 'creates a disturbance or takes part in creating or continuing a disturbance', it is apparent that the disturbance … is something which extends beyond the mere bodily action of the person who commits the offence. The words 'creates a disturbance' are naturally read as referring to the doing of an act which results in a disturbance. To create is to bring something new into existence. To create a disturbance – an interruption of order – is to

[666] Australian Government (n 489) 18.

[667] Odgers (n 385) 24.

[668] (2013) 250 CLR 328, [27]–[28] (French CJ, Crennan, Kiefel, Bell and Gageler JJ).

> do an act which results in an interruption of order. The service offence created by s33(b) of the DFDA is therefore best construed as relevantly having two physical elements, to each of which the Criminal Code attaches a distinct fault element.[669]

The 2018 Australian Capital Territory Magistrates' Court decision of *Bluett v Popplewell* succinctly articulates the authoritative position of this aspect of the *Li* decision, as follows:

> The decision is authority that when considering the application of the default fault elements, as provided by s5.6 of the *Criminal Code* (Cth), the physical elements are considered individually and default fault elements are applied discretely to individual physical elements. It is also authority that legislative expressions, even very short expressions, may contain more than one physical element.[670]

In applying the logic of *Li* to the terms of subsection 268.115(2), the 'result of his or her failure to exercise control properly' may naturally be read as involving an omission to do an act which results in the commission of offences, thus comprising two physical elements requiring the attachment of two distinct fault elements. The alternative deconstruction of the physical and fault elements of subsection 268.115(2) is detailed in Table 4, below.

Table 4: Alternative element analysis of subsection 268.115(2)

Physical elements	Fault elements
Offences under Division 268	Circumstance ∴ recklessness
Superior–subordinate relationship	Circumstance ∴ recklessness
Effective command/authority and control	Circumstance ∴ recklessness
Forces were committing/about to commit crimes	(Circumstance) knowledge or recklessness
Failure to prevent/repress/submit to authorities	Conduct (omission) ∴ intention
Failure to exercise control properly	Conduct (omission) ∴ intention
Failure to exercise control properly resulted in the commission of the crimes	Result of conduct ∴ recklessness

[669] Ibid.

[670] [2018] ACTMC 2 (Magistrate Theakston).

The significance of this addition of a further physical element and attached fault element lies in the proof of the offence and, indeed, the onus of proof on the prosecution to prove each element to the requisite standard. If this deconstruction is accepted, proof of the intentional failure to exercise control properly is required along with proof that such conduct by omission resulted in the commission of the crimes.

5.2.2 Omission to act

Noting that section 268.115 proscribes the failure of a commander to exercise control properly over subordinates and the failure to take all necessary and reasonable measures to prevent/repress or submit the offending behaviour for investigation/prosecution, the physical conduct element of omission to act is clearly central to the mode of liability. This is reflected in the fact that one or two physical elements are constituted by a failure to act, depending on which deconstruction is accepted per Tables 3 and 4, above. In *Director of Public Prosecutions (Cth) v Poniatowska*, the High Court held that a law creating an offence may impliedly provide that an omission to perform an act, which there is a duty to perform under the law, is a physical element of the offence but criminal liability does not attach to an omission unless the omission is to perform a legal obligation.[671] In that light, it is necessary to afford the concept of omission to perform an act in the context of section 268.115 some attention in this analysis.

As a starting point, subsection 4.2(1) of the Criminal Code provides that the physical element of conduct 'can only be a physical element if it is voluntary'[672] and subsection 4.2(4) provides that '[a]n omission to perform an act is only voluntary if the act omitted is one which the person is capable of performing'.[673] In its application to the command responsibility provisions, this corollary of legislative requirements regarding 'conduct' and 'omission' is expressed in the requirement that subordinates committing or about to commit offences are under the effective command and control or effective authority and control of the commander. Effective command/authority and control is, of course, a physical element of the mode of liability in section 268.115.

---

[671] (2011) 244 CLR 408, [29], [34].

[672] *Criminal Code* (n 23) s 4.2(1).

[673] Ibid s 4.2(4).

The requirement of 'effective' command/authority and control carries with it an unavoidable inference that, in the absence of such effective command/authority and control, a commander is not, as a matter of factual logic, capable of performing the acts in question.

In terms of the legal duty to perform an act, subsection 268.115(2) proscribes the failure to exercise control properly over subordinate forces and the failure to take measures to prevent/repress crimes or to submit such crimes for investigation/prosecution. The equation of the elemental requirement that the forces are under the commander's effective command/authority and control with the proscribed failures establishes the duty, on the part of the commander, to take those actions subject of the failures. Subsection 268.115 thus provides for the duty of the commander and, it follows, the physical elements comprising omissions to act. The context and terms of the legislative provisions and the extrinsic materials referred to in the passage of the provisions through the Parliament, discussed above, allow for no other outcome.[674] Crawford and Fellmeth, however, state that 'nowhere in s258.115 [sic] is there explicit reference to a commander's duty of investigation'.[675] This statement evidences a fundamental misinterpretation and misapplication of Commonwealth criminal law broadly and the Australian law of command responsibility specifically. The elemental deconstructions at Tables 3 and 4, above, and the related discussions evidence the clear existence of such duty as expressly extracted from the provisions of subsection 268.115(2).

Odgers describes the difficulty in distinguishing between the conduct physical element of an omission to perform an act and another possible physical element of 'a circumstance in which conduct or a result of conduct occurs'.[676] This distinction in elemental deconstruction is apparent in the 'failure' physical elements of section 268.115. The question is whether the failure to prevent/repress/submit and the failure to exercise control properly are physical

[674] See, eg, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27, 46–7; *Herbert v Chief of Air Force* [2018] ADFDAT 1 (27 April 2018) 31–7, which confirm the principle of statutory interpretation that the context and terms of the legislative provisions as well as the legislative purpose will help define the meaning of the text.

[675] Emily Crawford and Aaron Fellmeth, 'Command Responsibility in the Brereton Report: Fissures in the Understanding and Interpretation of the "Knowledge" Element in Australian Law' (2022) 23(1) *Melbourne Journal of International Law* 164, 186.

[676] Odgers (n 385) 29.

elements of conduct by omission to act or physical elements of circumstance in which conduct/result occurs.

Table 3 and Table 4 in the alternative both constitute the failures as conduct by omission rather than as circumstances in which conduct occurs. This is consistent with the analysis of these codified physical elements by the Supreme Court of Queensland in *R v Navarolli*, which held that a failure to inform a credit provider of a bankruptcy constituted conduct by omission.[677] The logic of that decision, as Odgers describes, appears to be that the verb 'informing' in the offence terminology 'without informing' clearly related to the conduct of the undischarged bankrupt defendant.[678] Along identical lines, the verbs 'prevent', 'repress', 'submit' and 'exercise' in section 268.115 clearly relate to the conduct of the commander such that a failure to perform the actions giving effect to these verbs constitutes conduct by omission to act. It is the personal nature of these verbs insofar as they require action by the commander personally and not by some unspecified other person which thus requires proof of conduct, in this case by omission to act.[679] Again, the relevance of this distinction in deconstruction goes to the applicable fault elements to be attached to each physical element.

5.2.3 Fault elements of command responsibility

Section 5.1 of the Criminal Code provides:

> (1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.
>
> (2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.[680]

The defined fault elements at subsection 5.1(1) represent 'a descending ladder or staircase of culpability [in which] intentional wrongdoing is the highest and most blameworthy form of fault'.[681] This hierarchical order of culpability is addressed further in subsequent chapters

[677] [2010] 1 Qd R 27, 70, 166.

[678] Odgers (n 385) 29.

[679] See *Christian v Sawka* (2012) 268 FLR 361, [43].

[680] *Criminal Code* (n 23) s 5.1.

[681] Leader-Elliott (n 653) 36. See also *MCCOC Report* (n 633) 23.

which investigate whether there is any divergence between the Rome Statute and Criminal Code command responsibility provisions, particularly in respect of the elements of recklessness and negligence. As considered in the preceding chapter, the list of defined fault elements in subsection 5.1(2) is not exhaustive such that 'different and more specialised fault elements than those listed … are occasionally used in the definition of federal offences'.[682] As discussed, however, the legislature elected not to depart from the fault elements at subsection 5.1(1) in its enactment of section 268.115. In that light, this analysis of the elemental requirements to prove command responsibility under the Criminal Code provisions is limited to the relevant fault elements arising from the legislative provisions of section 268.115.

Subsection 268.115(2), which applies to military commanders, expressly defines the fault elements in the alternative of 'knew or owing to the circumstances at the time was reckless' as attaching to the physical element of the commission of offences by subordinate forces. This is the only expressly defined fault element in these provisions, implying that the remaining physical elements require fault elements to be attached by default, as discussed earlier and laid out in Tables 3 and 4, above.

5.2.4 Intention in command responsibility

Section 5.2 of the Criminal Code provides that:

> (1) A person has intention with respect to *conduct* if he or she means to engage in that conduct.
>
> (2) A person has intention with respect to a *circumstance* if he or she believes that it exists or will exist.
>
> (3) A person has intention with respect to a *result* if he or she means to bring it about or is aware that it will occur in the ordinary course of events.[683]

As deconstructed in Tables 3 and 4, above, the fault element of intention applies to the physical element of conduct by omission of the failure to prevent/repress/submit to authorities such that proof would be required that the commander meant to engage in that omissive conduct, that is,

---

[682] Ian Leader-Elliott, 'The Commonwealth Criminal Code: A Guide for Practitioners' (Guidance Paper, Commonwealth Attorney-General's Department, March 2002) 49.

[683] *Criminal Code* (n 23) s 5.2 (emphasis added).

the commander meant to not perform the act[684] of preventing or repressing the crimes or meant to omit to submit the crimes to the competent authorities. Intention to omit to perform an act may be inferred 'on the basis of all the facts and circumstances of the case'.[685] On the prevailing facts and circumstances, an inference may be drawn from evidence of an awareness of risk,[686] on the part of the commander, that a duty existed to perform the act. As Odgers states, this is 'recognition that evidence proving one state of mind might support an inference of another state of mind'.[687] This analysis applies equally to the conduct by omission of the failure to exercise control properly, in the event the alternative deconstruction shown in Table 4, above, is adopted.

The elements deconstruction at Table 3 applies the fault element of intention to the physical elements of conduct by omission, that is, that the commander failed to prevent/repress/submit (Table 3) or the crimes were a result of the commander's failure to exercise control properly and the commander failed to prevent/repress/submit (Table 4 in the alternative). Since the law creating the offence – subsection 268.115(2) – impliedly provides that the offence is committed by a certain failure or failures to act, that aspect of the offence is established on the face of the legislative provisions. As discussed previously, proof that the omission/s on the part of the commander are voluntary is satisfied where effective command/authority and control is established. Proof would be required that the commander meant to omit to perform the act or acts constituting the failure or failures. The resultant crimes may be intended from the commander's conduct by omission even if such result is not the purpose or goal of the conduct.[688]

5.2.5 Knowledge in command responsibility

Section 5.3 of the Criminal Code provides that a 'person has knowledge of a circumstance or result if he or she is aware that it exists or will exist in the ordinary course of events'.[689] The requirement of awareness has been described as critical because awareness indicates that 'the

[684] Odgers (n 385) 63.

[685] *Smith v The Queen* (2017) 259 CLR 291, 320.

[686] Odgers (n 385) 64; *Smith v The Queen* (2017) 259 CLR 291, 321.

[687] Odgers (n 385) 64.

[688] Ibid 67.

[689] *Criminal Code* (n 23) s 5.3.

accused must be conscious of the particular fact that is being alleged'.[690] This stands in contrast with a view that possession of the information, in that it could be recalled at some point as opposed to being recalled at the critical point, is sufficient.[691] With specific reference to command responsibility, the only physical element in section 268.115 to which knowledge attaches is that the forces were committing or about to commit crimes. On the competing approaches of the application of section 5.3, this means that, in order for culpability to attach to the commander, he or she was either: (1) consciously aware that the forces were committing or about to commit crimes at the time of the proscribed failures to exercise control properly and to prevent/repress/submit; or (2) was aware that the forces were committing or about to commit crimes at some point in time but not necessarily at the time of the proscribed failures on the part of the commander.

Significantly, and as discussed below in the analysis of the fault element of recklessness, the definition of knowledge as provided in section 5.3 'is clearly intended to deny recourse to the discredited common law concept of "wilful blindness"',[692] that is, 'awareness of a risk but deliberately avoiding inquiry so as to avoid knowledge'.[693] This deliberate definitional demarcation between actual knowledge and wilful blindness is relevant to any consideration of fault elements of lesser culpability than knowledge, such as recklessness, especially in the context of this thesis and its underlying review of the inclusion of recklessness in section 268.115 as opposed to the 'should have known' standard defined in the Rome Statute. Odgers considers that a state of mind of wilful blindness 'is likely to fall within the scope of recklessness'[694] but, as stated, wilful blindness has no place in the definition of knowledge in the code. The question remains whether the concept of wilful blindness has any application to codified command responsibility in light of the code's inclusion of recklessness as an express fault element and, subsequently, whether wilful blindness would be excluded from any application to command responsibility if a fault element other than recklessness was expressed in the provisions.

---

[690] Anderson (n 379) 27.

[691] Odgers (n 385) 69.

[692] Leader-Elliott, 'Elements of Liability' (n 653) 65.

[693] Odgers (n 385) 69.

[694] Ibid.

In any event, what is not in doubt is the fact that knowledge sets a demanding standard for the prosecution to meet in order to secure a conviction[695] and proving knowledge is a more difficult task than proving either recklessness or negligence.[696] The only physical element of subsection 268.115(2) which has knowledge as a fault element also expressly has recklessness in the alternative such that the outcome of this analysis is not overly critical. As will be seen, the critical comparison arises in the application of constructive knowledge in Article 28 as compared to recklessness in subsection 268.115(2).

5.2.6 Recklessness in command responsibility

Section 5.4 of the Criminal Code provides that:

> (1) A person is reckless with respect to a *circumstance* if:
>
> (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
>
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
>
> (2) A person is reckless with respect to a *result* if:
>
> (a) he or she is aware of a substantial risk that the result will occur; and
>
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
>
> (3) The question of whether taking a risk is unjustifiable is one of fact.
>
> (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.[697]

Leader-Elliott describes section 5.4 as imposing a 'presumption that recklessness marks the threshold of liability for incriminating circumstances or results'.[698] The threshold liability standard of recklessness is thus attached to the circumstantial physical elements of subsection 268.115(2) either by default or by express definition, the latter relating to the commission of crimes by subordinates. It also attaches to the result of conduct physical element of the failure

---

[695] Leader-Elliott, 'Elements of Liability' (n 653) 65.

[696] Anderson (n 379) 27.

[697] *Criminal Code* (n 23) s 5.4 (emphasis added).

[698] Leader-Elliott, 'Elements of Liability' (n 653) 37.

to exercise control resulting in the commission of the crimes, according to the deconstruction at Table 4, above, and discussed further below.

In *Hann v Commonwealth*, the South Australian Supreme Court articulated the application of codified recklessness, as follows: 'In order to establish recklessness … it must be shown that the defendant was aware of the substantial risk. Conscious awareness of risk is required; it is not enough to show that the risk was obvious or well known.'[699]

In applying this test to the applicable elements as deconstructed in both Table 3 and Table 4, to prove a commander was reckless it would be necessary for the prosecution to establish beyond reasonable doubt that:

(1) The commander was aware of the substantial risk that the offences committed or about to be committed by subordinate forces were offences under Division 268 of the Criminal Code;
(2) The commander was aware of the substantial risk that a superior–subordinate relationship existed at the time of the offending conduct by subordinates;
(3) The commander was aware of the substantial risk that he or she had effective command/authority and control over the subordinates;
(4) The commander was aware of the substantial risk that the subordinate forces were committing or about to commit the crimes;
(5) The commander was aware of a substantial risk that his or her failure to exercise control properly over the subordinate forces would result in the commission of the crimes;

and it was unjustifiable to take those risks.

As confirmed in *Hann*, it is necessary to show that the commander was consciously aware of the risks and not merely that the risks were obvious or well known. It is unlikely the requisite substantial risk of any of these physical elements exists if there was only a remote possibility that these circumstances or result existed or would exist.[700] As considered in *Hann* and paraphrased by Odgers, however, 'the more obvious or well known the risk was, the more

[699] (2004) 88 SASR 99, 107.

[700] Odgers (n 385) 71.

likely that a tribunal of fact will infer … that the defendant was aware of it and aware that it was a substantial risk'.[701]

As a general rule, the result mentioned in the second limb of codified recklessness is confined to the result or results of the conduct of the offender[702] such that, on one interpretation, recklessness could not be applied by default to the element of the failure to exercise control properly resulting in the commission of the crimes (per the Table 3 deconstruction) since the resultant conduct is that of subordinates and not the commander. However, as Leader-Elliott identifies, 'some offences impose liability on offenders whose conduct creates a risk of criminal activity by others [insofar as] recklessness, manifest in the offender's conduct, attaches to the *risk* that the other person will cause harm [and] creation of that risk can be considered to be a *result* of the offender's conduct'.[703] If this interpretation of that element of subsection 268.115(2) is accepted, it is the legislative provisions themselves which impose liability on the commander whose conduct creates a risk of the commission of crimes by subordinates. That interpretation is entirely consistent with the intent of the doctrine of command responsibility broadly.

Crawford and Fellmeth state that, '[e]ven if the meaning of 'recklessness' were much clearer than it is, there remains the problem that the *Australian Criminal Code* focuses on the mental state of the commander and does not clearly invoke the commander's duty to investigate'.[704] The basis upon which the authors criticise the fault element of recklessness in the Code for want of clarity is not further stated. Section 5.4 of the Code defines the fault element as it applies to the physical elements of circumstance and result and there is ample jurisprudence on that provision to provide clarity. In any event, the deconstructions of subsection 268.115(2) in Tables 3 and 4 of this thesis provide a detailed analysis of the application of recklessness to the relevant physical elements of command responsibility as codified. The subsequent statement that the Code focuses on the commander's mental state without clearly invoking the commander's duty to investigate fails to recognise the fact that, in applying the requisite element analysis approach to the deconstruction of the elements of the offence, recklessness

[701] Ibid 72, discussing *Hann v Commonwealth* (2004) 88 SASR 99.

[702] Leader-Elliott, 'Elements of Liability' (n 653) 81.

[703] Ibid (emphasis in original).

[704] Crawford and Fellmeth (n 675) 178.

only applies to the fault elements of circumstance and result of conduct, with intention applying to fault elements of conduct by omission. On any reading of the article by Crawford and Fellmeth and, indeed, as expressly stated in a similar article by Fellmeth and Crawford, considered earlier in this thesis, the authors are applying the mental element of 'should have known' as the sole alternate mental element of command responsibility in Article 28 and 'recklessness' as the sole alternate fault element of command responsibility in subsection 268.115(2), such application being one of a crime analysis or offence analysis approach to elemental deconstruction and not one of element analysis as is required under both the Rome Statute and the Criminal Code. In stark contrast, Gray applies the requisite elements analysis approach to his consideration of command responsibility in the Australian context and, significantly, refers to case law defining and thus providing clarity to the fault element of recklessness.[705]

5.2.7 Recklessness and the alternative elements deconstruction

At this juncture, a return to the alternative deconstructions of the elements at Tables 3 and 4 is warranted. Table 3 defines a physical element that the crimes were a result of the failure to exercise control properly, being a physical element of the result of conduct with the attached default fault element of recklessness. Table 4, however, deconstructs that part of the offence-creating provisions into two discrete elemental combinations: the failure to exercise control properly, being a physical element of conduct by omission with the attached default fault element of intention; and that the failure to exercise control properly resulted in the commission of the crimes, being a physical element of the result of conduct with the attached default fault element of recklessness.

In addressing the quandary as to the most appropriate deconstruction, it is appropriate to refer to analyses of the default fault element presumptions provided in section 5.6 of the code. Leader-Elliott describes recklessness, in its attachment by default to physical elements consisting of a circumstance or result, as 'the more important presumption of the two presumptions [since] it requires proof that the defendant was reckless, at the least, with respect

[705] Anthony Gray, 'The Doctrine of Command Responsibility in Australian Military Law' (2022) 45(3) *University of New South Wales Law Journal* 1251, 1268.

to *incriminating* circumstances or results of conduct'.[706] The concept of incriminating circumstances or results is significant. Leader-Elliott uses the example of cybercrime provisions in the Criminal Code, in which the offence of 'cause any unauthorised impairment of electronic communications to or from a computer' specifies that knowledge that impairment is unauthorised is an element, in concluding that: 'Since impairment is an incriminating *result* the presumption applies and s5.6(2) requires the prosecution to prove the additional fault element of recklessness with respect to a substantial risk that impairment would result from the offender's conduct.'[707]

Applying this analysis to the command responsibility provisions, subsection 268.115(2)(a) expresses that knowledge or recklessness are the fault elements attached to the physical element of the commission or pending commission of crimes. In this case, the commission of crimes by subordinates is the incriminating result such that, according to Leader-Elliott, the presumption of recklessness would apply. In that case, the prosecution would be required to prove the additional fault element of recklessness with respect to a substantial risk that the commission of crimes would result from the commander's conduct by omission, that is, the failure to exercise control properly. Leader-Elliott makes a compelling case for the attachment of recklessness to an additional physical element as deconstructed in Table 4.

This interpretation, of course, derives from the manner in which the legislature enacted command responsibility into the Criminal Code and, thus, defined the mode of liability in an Australian context. It follows that acceptance of the deconstruction at Table 4, which applies Leader-Elliott's analysis, places an additional burden on the prosecution in terms of proving command responsibility because proof would be required of both the failure to exercise control properly and its attached fault element of intention as well as that the failure to exercise control properly resulted in the crimes with its attached fault element of recklessness.

5.2.8 Negligence in the code (but not in command responsibility)

Notwithstanding that negligence is not a fault element applicable to command responsibility as codified in subsection 268.115(2), the fact that international jurisprudence on the doctrine

[706] Leader-Elliott, 'Elements of Liability' (n 653) 36 (emphasis added).

[707] Ibid 37 (emphasis in original).

of command responsibility has equated the element of 'should have known' with negligence[708] warrants some critical attention in this analysis. On that basis, section 5.5 of the Criminal Code provides that:

> A person is negligent with respect to a physical element of an offence if his or her conduct involves:
>
> (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
>
> (b) such a high risk that the physical element exists or will exist;
>
> that the conduct merits criminal punishment for the offence.[709]

The MCCOC report concluded that 'the degree of negligence required for conviction is related to the nature of the offence',[710] as evidenced by the terms 'for the offence' in the definition. This conclusion is based on the variability of the standard of care exercised by a reasonable person in the circumstances in which the conduct occurs.[711] The definition of negligence draws on the common law of manslaughter to the extent that the codified definition comprises a 'complex composite test'[712] requiring a 'gross deviation from acceptable standards of conduct'.[713]

The lead case on negligence, *Nydam*,[714] from which the codified definition was drawn, was concerned with making a clear distinction between reckless murder and manslaughter by gross negligence. The Court in that case identified the potential for confusion in cases where verdicts sustaining murder by recklessness and manslaughter by criminal negligence are both open on the facts.[715] It was held that the test for reckless murder is a subjective one in which the act causing the death was done knowing that it would more than likely kill.[716] Conversely, the test

---

[708] See, eg, *Bemba Decision on the Confirmation of Charges* (n 237) [429]; *Lubanga Decision on the Confirmation of Charges* (n 389) [358].

[709] *Criminal Code* (n 23) s 5.5.

[710] *MCCOC Report* (n 633) 29.

[711] Odgers (n 385) 77.

[712] Leader-Elliott, 'Elements of Liability' (n 653) 83.

[713] *MCCOC Report* (n 633) 29; Leader-Elliott, 'Elements of Liability' (n 653) 39.

[714] *Nydam v R* [1977] VR 430.

[715] Ibid 439 (Young CJ, McInerney and Crockett JJ).

[716] Ibid 440.

for manslaughter by criminal (gross) negligence is an objective one in which the accused was 'grossly negligent in failing to foresee or avoid a risk of causing death'.[717]

According to Leader-Elliott, '[t]he same concern over the need to distinguish between recklessness and negligence is evident in the commentary on negligence in [the MCCOC report]'.[718] The distinction between recklessness and negligence, in the context of homicide specifically and in the Criminal Code generally, is discussed merely to demonstrate the risks posed by conflating the concepts or, indeed, using them alternately. This demonstration is significant since negligence, as discussed, does not appear in subsection 268.115(2) but does appear in Article 28(a) in its equation with the mental element of 'should have known'.

Gray, however, contends that a commander may be subject to criminal liability 'based on a combination of proven recklessness plus negligence'.[719] This contention is apparently grounded on his factual assertion that subsection 268.115(2)(b) of the Code - the failure to prevent/repress or submit matters for investigation/prosecution – 'applies a negligence standard'.[720] Subsection (b) is a physical element of conduct by omission, as discussed, above, in Tables 3 and 4, and in related commentary on those tables in this chapter. As discussed in detail, above, the default fault element for a physical element comprising conduct, in this case, conduct by omission, is intention. Gray himself accepts that subsection (b) articulates a physical element of conduct by omission and a fault element of negligence should not be applied to a physical element of conduct.[721] Indeed, and as deconstructed in Tables 3 and 4, above, negligence is not a fault element of any physical elements in subsection 268.115(2) but is akin to the mental element attached to the material element of the commission of crimes by subordinates in Article 28, as deconstructed in Tables 1 and 2, above. If negligence was considered to apply to the physical element comprising a failure on the part of the commander on the basis that such physical element imposes a duty on the commander, that would be an erroneous interpretation and application of the definition of negligence in Commonwealth criminal law. There is no doubt that subsection 268.115(2)(b) imposes a duty on commanders

[717] Fairall (n 307) 22, citing *Nydam v R* (n 695) 445.

[718] Leader-Elliott, 'Elements of Liability' (n 653) 83.

[719] Gray (n 705) 1269.

[720] Ibid 1268.

[721] Ibid.

as arising from the physical element of the superior-subordinate relationship and the subsequent use of the terminology 'failure' in respect of the performance of requisite functions, but the failure to exercise that duty does not require and, indeed, cannot require, the imposition of a negligence standard of fault. Further, in order to prove that particular fault element and the other 'failure' fault element in the alternative deconstruction at Table 4, there is no requirement to establish the existence of a duty. It is adequate to prove that the commander failed to perform the tasks subject of the applicable physical element/s and that the commander intended to do so. A proper deconstruction of subsection 268.115(2) can thus be stated as imposing liability on a commander based on a combination of proven recklessness and intention or proven recklessness, knowledge and intention.

5.2.9 Recklessness and negligence distinguished

In implementing Article 28 of the Rome Statute into the Commonwealth Criminal Code, the Parliament elected to apply the fault element of recklessness to the physical element of the commission of crimes by subordinates rather than the mental element of 'should have known' found in Article 28, the latter having been equated with the mental element of negligence. In that light, analysis of the differences between the two fault elements is necessary and, indeed, a precursor to the comparative analysis of Code and Rome Statute command responsibility elements in a later chapter.

Chapter 2 of the Criminal Code, which articulates the general principles of responsibility, makes a clear distinction between recklessness and negligence in their respective definitions. Commentary on the general principles in the code is emphatic in making that fundamental distinction, whilst concurrently placing the two fault elements within the hierarchy of culpability, as follows:

> The idea that recklessness is a more culpable state of mind than criminal negligence is put to the test when one defines criminal negligence as requiring a judgment that the falling short of community standards be so great as to warrant criminal punishment whereas recklessness is found by a mere decision to take a substantial and unjustifiable risk.[722]

[722] *MCCOC Report* (n 633) 29.

Leader-Elliott describes awareness of risk as being the only real distinction between the two standards of fault, such that the differences are 'both contentious and subtle'.[723] This view is based on a definitional demarcation between 'a person who was actually aware of a risk and another who ought to have been aware'.[724] The High Court lends some support to this view in *Simpson v The Queen* which turned on the subjective state of mind of the accused, in terms of risks known to him or her, as compared to an objective assessment of risks of which the accused ought to have known.[725] The requirement in recklessness of awareness of a substantial risk clearly places that aspect of that fault element in the subjective arena. Terminology in the nature of 'ought to have known', as discussed in *Simpson*,[726] requires an objective test. The objective nature of that fault element is caught by the objective reasonable person component of the definition of negligence. As confirmed in *Nydam*, manslaughter by gross negligence requires 'an objective comparison to be made between the conduct of the accused and the conduct to be expected of the reasonable person'.[727]

In the context of the Article 28(a)/subsection 268.115(2) comparative analysis, the distinction is, it is contended, not as subtle as Leader-Elliott suggests in general application. In any event, the fact of the distinction between recklessness and negligence in the code remains, as do the different degrees of culpability afforded to each. As Menzies J stated in *Pemble v The Queen*:

> The use of the words 'recklessness' or 'reckless indifference' of itself would not bring home to the jury that it is only a recklessness that involves actual foresight of the probability of causing death … and indifference to that risk which does constitute the mental element that must be found to support a conviction for murder. The difference between murder and manslaughter is not to be found in the degree of carelessness exhibited; the critical difference relates to the state of mind with which the fatal act is done.[728]

The distinction between the fault elements of recklessness and negligence is thus clear and expressed in the code as a reflection of legislative intent, and the hierarchy of culpability places

---

[723] Leader-Elliott, 'Elements of Liability' (n 653) 39.

[724] Ibid.

[725] (1998) 194 CLR 228.

[726] Ibid.

[727] *Nydam v R* (n 695) 445.

[728] (1971) 124 CLR 107, 135 (Menzies J).

recklessness above negligence. In terms of a comparative analysis between Article 28 and Section 268.115, Fellmeth and Crawford describe the latter, in its application of recklessness to the commission of crimes by subordinates, as 'us[ing] a much more forgiving standard'.[729] These are unavoidable facts arising from the codification of fault elements and the manner in which each such element is defined in Chapter 2 of the Code.

5.3 Conclusion

Australia's commitment to the faithful implementation of Article 28 of the Rome Statute into domestic criminal law via section 268.115 of the Commonwealth Criminal Code is largely reflected in the physical elements as deconstructed from those provisions. Physical elements in the code equate to material elements in the Rome Statute and fault elements in the code equate to mental elements in the Rome Statute, both of which replace the common law terminology of *actus reus* and *mens rea* in establishing offences. The fault elements, however, deviate somewhat from those of the Rome Statute insofar as existing principles of criminal responsibility from the Criminal Code are superimposed over the terms of Article 28 to bring command responsibility in line with the general approach of Commonwealth criminal law.

Noting this thesis is limited to an analysis of the responsibility of military or military-like commanders, as opposed to non-military superiors, the elements discussed are drawn from subsection 268.115(2), as implementing Article 28(a). As is the case in the Rome Statute, Commonwealth criminal law has adopted an elements analysis approach to defining criminal responsibility such that a fault element is required to be attached to each physical element.

The deconstruction of the requisite elements from the terms of a legislative provision often requires an analysis of jurisprudence of relevance to the offence provisions themselves as well as judicial statements on the interpretation of the elements. In that light, this thesis provides two alternative deconstructions of the physical and fault elements applicable to section 268.115, due largely to the fact that command responsibility as a mode of criminal liability is unique to Australian law and, as such, is yet to be tested in Australian courts exercising federal jurisdiction. The first of these alternatives, at Table 3 above, provides six physical elements which directly reflect the material elements articulated by the ICC in *Bemba*. The fault elements

[729] Fellmeth and Crawford (n 378) 1239.

attached to these physical elements are the threshold fault element of recklessness attached by default to physical elements comprising circumstances, knowledge or recklessness expressly attached to a physical element comprising a circumstance, a fault element of intention attaching by default to a physical element of conduct by omission, and a fault element of recklessness attaching by default to a physical element comprising the result of conduct. As stated, this deconstruction more directly reflects the deconstruction of Article 28(a), notwithstanding the express fault elements of knowledge or recklessness in the former are replaced with the express mental elements of 'knew or should have known' in the latter.

The alternative deconstruction, at Table 4 above, splits the final physical element into two discrete elemental combinations such that seven elemental combinations are provided. The physical element in the Table 3 deconstruction, that the 'crimes were a result of the failure to exercise control properly', being a physical element of the result of conduct with the default fault element of recklessness attached, is split in the Table 4 deconstruction to involve: (1) the physical element of 'the failure to exercise control properly', being a physical element of conduct by omission carrying a default fault element of intention; and (2) the physical element of '[the failure to exercise control properly] resulted in the commission of the crimes', being a physical element of the result of conduct carrying with it a default fault element of recklessness. This expansive deconstruction derives from the significance accorded in the code to incriminating results of conduct which, in short, is reflected in existing criminal legislation. The upshot is that acceptance of the expanded deconstruction at Table 4 would require the prosecution to prove an additional physical element and attached fault element.

Intention, as it applies to the conduct of a commander by omission to act, may be inferred from evidence of an awareness of risk on the commander's part that a duty to perform the act existed. Proof of intention, as it applies to the result of the commander's conduct by omission to perform the duty, would require that the commander either meant to bring about the result or was aware the resultant crimes would occur in the ordinary course of events. The resultant crimes of the subordinates, however, may be intended from the conduct by omission of the commander even if that result was not the purpose or goal of the conduct by omission to act. Knowledge on the part of the commander, as it expressly applies to the commission of crimes by subordinates, is a demanding standard to meet. On two competing views of the application of the fault element, culpability requires either: (1) conscious awareness that the forces were committing or about

to commit crimes at the time of the failure to exercise control properly; or (2) awareness that the forces were committing or about to commit crimes at some point in time.

Significantly, the definition of knowledge denies recourse by the commander to 'wilful blindness', that is, awareness of risk but avoiding inquiry in a bid to avoid knowledge. The definitional demarcation in the Criminal Code between knowledge and wilful blindness is relevant in this analysis of command responsibility insofar as wilful blindness equates more closely with recklessness, a fault element of lesser culpability than knowledge. Noting recklessness is the predominant fault element throughout subsection 268.115(2), both by default and expressly, the question remains whether wilful blindness has any application to codified command responsibility. Clearly, if recklessness were replaced by fault elements of higher culpability such as knowledge, recourse to wilful blindness would be denied.

The threshold liability standard of recklessness attaches to the circumstantial physical elements by default or expressly and to the result of conduct physical element in the deconstruction in Table 4. In order for culpability to attach to a commander, conscious awareness of the risks existing is required and not merely that it is obvious or well known that the circumstances or result exists or will exist. However, an inference of knowledge is more likely the more obvious or well known the risk was.

Negligence is not an element of command responsibility under the codified provisions, but the Rome Statute includes the 'should have known' elemental standard, which is akin to negligence, in contrast to the standard of recklessness in the Code. Australian jurisprudence on both concepts and, indeed, the code and commentary thereon emphatically distinguish between the two such that, in practice, there can be no doubt that recklessness is a more culpable standard than criminal negligence in the culpability hierarchy. This placement in the hierarchy affects the difficulty of proving the offence insofar as recklessness requires a subjective awareness of risk on the part of a commander whereas terminology employed in offences involving negligence, such as 'ought to have known' or 'should have known', requires an objective test which is caught in the reasonable person component of negligence. It is thus likely the prosecution would have a more demanding task in proving a reckless state of mind on the part of the commander than it would in establishing the objective test as it relates to the commander in a case in which negligence was an element.

CHAPTER 6
AUSTRALIAN COMMAND DOCTRINE AND COMMAND RESPONSIBILITY

In situations like this you don't call in the tough guys; you call in the lawyers.[730]

6.1 Introduction

In light of the influence of the Brereton Inquiry report on this thesis, as well as commentary on the findings of the inquiry regarding the extent of responsibility up the chain of command, this chapter considers Australian military doctrine through the lens of the doctrine of command responsibility broadly and the elements of command responsibility specifically. The military doctrine analysed here includes command and control as described doctrinally and applied in practice and the states of command authority.

The higher command arrangements pertaining to Australian forces in Afghanistan are analysed by way of example, particularly considering the Brereton findings on command responsibility relate exclusively to Australian operations in that operational theatre. Mission command, as both a doctrinal concept and a leadership philosophy, is considered in the context of the applicable elements of codified command responsibility. This is, again, reflective of the grounds on which certain findings were made in the Brereton Inquiry and subsequent commentary on the extent of criminal liability up the chain of command as considered in that inquiry. It is important to emphasise that the threshold to be met by the argument posed is not to prove actual knowledge of a particular war crime but merely that there is a question worthy of proper investigation as to the state of knowledge of commanders at the relevant times.

Both the hierarchical structure of the degrees of command responsibility and the concept of mission command in Australian application have been subject to contentions that they are grounds to exculpate commanders from liability under the legal doctrine of command responsibility. As such, both are analysed and the weight to be afforded such contentions is considered in the light of the relevant elements of command responsibility under Australian

[730] George Tenet, *At the Center of the Storm* (Harper Collins, 2007) 232, quoted in Philippe Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (Allen Lane, 2008).

law specifically and international law more broadly. This analysis is significant as an adjunct to the previous analysis of proving command responsibility under Australian law insofar as any arguments that these military constructs rebut liability under command responsibility must, as a matter of law, be grounded on disproving the elements of the mode of liability or injecting a defence which is known at law.

Further, and in light of the decision of the ICC Appeals Chamber in *Bemba*, this chapter considers the application of the concept of 'remote commander' to the Australian operational hierarchical structure, especially in Afghanistan during the period of Australian operations in that conflict. That analysis is, again, relevant to proving elements of command responsibility including the requirement of 'effective command'.

6.2 Application of degrees of authority in the Australian command structure

> We were left in the hands of our own fate, something that frequently obliged us to act outside the law, due to the lack of precise orders and the absence of operational control from the generals.[731]

An analysis of the doctrine of command responsibility cannot be properly undertaken without a concurrent analysis of the environment in which military commanders operate and that environmental application of the doctrine cannot adequately be assessed through legal sources alone.[732] In establishing the circumstantial element of the superior–subordinate relationship, the consequence element of effective command/authority and control, and the conduct element of the power to take measures to prevent or repress the crimes or submit the matter for investigation and prosecution, an analysis of the degrees of authority in the Australian military command structure is warranted. This is especially relevant in light of commentary in the aftermath of the release of the public version of the Brereton Inquiry report justifying the inquiry's exculpation of the higher chain of command from legal responsibility on the basis of the command structure. As Shanahan states:

---

[731] Silvio Waisbord, 'Politics and Identity in the Argentine Army' (1991) 26(2) *Latin American Research Review* 157, 165 n 24 (Interview with an anonymous major, 2 September 1988, Buenos Aires).

[732] Nybondas (n 51) 8.

> In order to understand how the Brereton report came to this conclusion, it is important to understand ADF [Australian Defence Force] command and control terminology and responsibility. Terms such as 'national command', 'operational command' and the like delineate responsibilities, and although they are rarely understood by either politicians or journalists, they are the means by which the Australian Defence Force organises itself on operations. The Brereton inquiry understood this and made his findings accordingly.[733]

Whilst Shanahan does not contemplate these concepts of the command and control structure through a legal lens, command responsibility is, of course, a legal doctrine which is codified in Australian criminal law. In that light it is imperative that such concepts are analysed with the elements of command responsibility, as deconstructed from section 268.115, firmly in mind. This delineation of responsibilities, and the relevant terminology of the command and control structure, is thus discussed and analysed in the context of the application of the doctrine of command responsibility and the elements of the mode of liability in the following paragraphs.

6.2.1 Command and control

Australian Army doctrine defines command and control as follows:

> The terms command and control are complementary, but not equal. Command is the authority invested in an individual, a uniquely human activity; whereas control encompasses the protocols, processes and equipment (ways and means) that a commander uses to exercise that authority. Control is the means initiated through command that may be altered to match the changing needs and priorities of a particular mission.[734]

The broader concept of command and control is described in joint ADF doctrine under its acronym C2, albeit not in definitional terms, as 'the system empowering designated personnel to exercise lawful authority and direction over assigned forces'.[735] In deconstructing the concept of command and control, the ADF adopts the North Atlantic Treaty Organization

---

[733] Rodger Shanahan, 'The Afghan Inquiry and the Question of Responsibility', *The Interpreter, The Lowy Institute* (Web Page, 7 December 2020), <https://www.lowyinstitute.org/the-interpreter/afghan-inquiry-and-question-responsibility>.

[734] Land Warfare Development Centre (n 40) 2-2.

[735] Australian Defence Force Warfare Centre, *Command and Control* (Australian Defence Doctrine Publication, ADDP 00.1, 27 May 2009) [1-1].

(NATO) definition of both components 'in the interests of commonality and interoperability'.[736] This commonality of concepts and terminology across national militaries is relevant in any definitional analysis of terms that appear in both Article 28 and section 268.115. Whilst not necessarily elevated to the level of evidence of state practice, the common use of concepts and terms across international borders is likely to be a relevant factor in any judicial consideration of the doctrine of command responsibility in a domestic setting. Command is defined as:

> The authority that a commander in the military Service lawfully exercises over subordinates by virtue of rank or assignment. Command includes the authority and responsibility for effectively using available resources and for planning the employment of, organising, directing, coordinating and controlling military forces for the accomplishment of assigned missions. It also includes responsibility for health, welfare, morale and discipline of assigned personnel.[737]

The lawful exercise of authority over subordinates, as a requirement of the designation of command, is consistent with the decision of the ICC Pre-Trial Chamber in *Bemba*, in which the Chamber held that the term military commander 'refers to a category of persons who are formally or legally appointed to carry out a military commanding function'.[738] The inclusive list of indicia of command in the definition is consistent with the indicia of a commander's position of authority articulated by the Pre-Trial Chamber in *Bemba*:

- the power to issue or give orders;
- the capacity to ensure compliance with the orders issued;
- the capacity to re-subordinate units or make changes to command structures;
- the power to promote, replace, remove or discipline any member of the forces;
- the authority to send forces where hostilities take place and withdraw them at any given moment.[739]

The Trial Chamber in *Bemba* added some factors to those endorsed by the Pre-Trial Chamber, as follows:

---

[736] Land Warfare Development Centre (n 40) 2-3.

[737] Australian Defence Force Warfare Centre (n 735) [1-2].

[738] *Bemba Decision on the Confirmation of Charges* (n 237) [408].

[739] Ibid [418].

- independent access to, and control over, the means to wage war, such as communication equipment and weapons;
- control over finances;
- the capacity to represent the forces in negotiations or interact with external bodies or individuals on behalf of the group;
- whether the commander represents the ideology of the movement to which the subordinates adhere and has a certain level of profile, manifested through public appearances and statements.[740]

It is clear, on a comparative analysis of ADF doctrine, as adopted from or reflective of NATO and other international definitions, and the jurisprudence of the ICC that the ADF doctrinally approaches command consistently with how the ICC has applied the relevant provisions of Article 28. That is a significant consideration in subsequently overlaying Article 28(a) on Australia's command and control structures in Afghanistan broadly and with respect to special operations specifically.

6.2.2 Command and control: the Afghanistan example

Notwithstanding that Australian Defence Force command arrangements in Afghanistan have been described as 'complex and opaque, and involv[ing] multiple regional and national elements, changing over time',[741] it is possible to use such command arrangements as a model by which to assess the application of the indicia articulated in *Bemba*, above. The role of Australia's primary regional command, designated Headquarters Joint Task Force 633 (HQ JTF 633), was described in publicly released Department of Defence material as:

> Headquarters Joint Task Force 633 provides the in-theatre command and control of all ADF elements deployed throughout the Middle East Area of Operations (MEAO) on operations SLIPPER and KRUGER. JTF633 is commanded by Major General John Cantwell, AO. HQ JTF 633 (Australian National Headquarters and supporting

[740] *Bemba Trial Judgment* (n 91) [188].

[741] Nautilus Institute for Security and Sustainability, *Australia in Afghanistan Briefing Book* (Nautilus Institute for Security and Sustainability, 2010). See also David Horner, *Strategy and Command: Issues in Australia's Twentieth-Century Wars* (Cambridge University Press, 2022) 282, in which the author describes the Middle East JTF command structure in Operation Catalyst as 'extremely complex'.

> elements) is located in the United Arab Emirates and provides enabling support and assistance to Australia's military presence in the Middle East.[742]

The terminology 'provides the in-theatre command and control of all ADF elements deployed throughout the Middle East Area of Operations' is significant. Whilst the location of the headquarters and, therefore, the commander in the United Arab Emirates is geographically remote from Australia's area of operations in Afghanistan, this statement recognises the headquarters is 'in-theatre'. That recognition, when read with the statement that the command arrangements apply to 'all ADF elements deployed throughout the Middle East Area of Operations' (MEAO), tends to give the headquarters and its staff a degree of controlling proximity to the area of operations in Afghanistan as arguably compared to, for example, a headquarters and command structure in Australia.[743] This aspect is considered further below, in its application to the *Bemba* appellate decision and the concept of the remote commander.

The term 'command and control' in this statement may be interpreted by reference to ADF doctrine such that the Commander JTF 633 would be expected to exercise 'lawful authority and direction over assigned forces',[744] such assigned forces being 'all ADF elements deployed throughout the Middle East Area of Operations'. Further, as discussed above, NATO and ADF doctrine defines 'command' as including:

> The authority and responsibility for effectively using available resources and for planning the employment of, organising, directing, coordinating and controlling military forces for the accomplishment of assigned missions [and] responsibility for health, welfare, morale and discipline of assigned personnel.[745]

---

[742] Department of Defence, HQ JTF633, 'Force Elements Currently Deployed as part of JTF633', *Australian Operations in Afghanistan* (Fact Sheet, 03 February 2010), quoted in Nautilus Institute for Security and Sustainability (n 741). This structure covers the period 2003 to 2014. CJTF633 elevated from Brigadier in 2007.

[743] This point goes to the issue of 'effective control'. The availability of reporting and communications mechanisms to modern militaries tends to support a counter argument that there is little difference between a headquarters which is 1300 km from the tactical forces and one which is 13000 km from such forces. See, eg, Ministry of Defence, *The Manual of the Law of Armed Conflict* (n 159) 439–40. See also William Fenrick, 'The Prosecution of International Crimes in Relation to the Conduct of Military Operations' in Terry Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2nd ed, 2015) 501, 555 for a discussion of monitoring mechanisms by higher headquarters.

[744] Australian Defence Force Warfare Centre (n 735).

[745] Ibid [1-2].

This definition adopts terms and concepts which are consistent with those listed by the Pre-Trial Chamber in *Bemba*.

On its face, the terminology 'provides enabling support and assistance to Australia's military presence in the Middle East' appears to describe a lesser role than that satisfying the definitions of command and control. However, the express use of the terms 'provides in-theatre command and control' in the opening purposive sentence of the statement describing HQ JTF 633 and the assignment of a Major General (Brigadier until 2007) to 'command' JTF 633 in totality as opposed to merely commanding the headquarters tends to satisfy the definitions of command and control adopted by the ADF. The reference to the provision of 'enabling support and assistance' is likely to be a reference to the 'supporting elements' referred to in the statement as discrete components of HQ JTF 633 separate from the Australian National Headquarters.

The Department of Defence material describing the Headquarters JTF 633 role goes on to describe a further command element which is apparently subordinate to HQ JTF 633, Headquarters Joint Task Force 633 – Afghanistan (HQ JTF 633-A), as follows:

> Headquarters Joint Task Force 633 – Afghanistan (HQ JTF 633-A) – based in the Afghan capital Kabul, HQ JTF 633-A provides specific command and control of all ADF elements deployed within the territorial borders of Afghanistan on behalf of the Commander Joint Task Force 633 (CJTF 633), as well as coordinating JTF 633's interface with the [International Security Assistance Force] Headquarters.[746]

The reference to 'specific' command and control might be merely intended to demarcate between ADF elements deployed in Afghanistan and elements deployed elsewhere in the MEAO. It is clear the overall command and control of all ADF elements deployed throughout the MEAO rests with the Commander JTF 633. The terminology 'on behalf of the Commander Joint Task Force 633' clearly subordinates JTF 633-A to JTF 633 and this fact is reflected in the assignment of a senior officer of the rank of Brigadier to command JTF 633-A with such appointment being referred to as a Deputy Commander JTF 633.[747]

---

[746] Department of Defence (n 742).

[747] Brendan Nelson, 'Enhanced Command and Control Arrangements in the Middle East' (Media Release 57/07, Department of Defence, 18 June 2007).

The terminology ‘on behalf of’ also allows for an unavoidable inference that command and control activities undertaken by the subordinate commander in Afghanistan have, at the very least, some degree of oversight by the higher commander at HQ JTF 633. This inference is supported by the public statement as to the intention of this command arrangement to ‘enable a wider, more balanced and flexible approach to command and control for ADF operations throughout the Middle East’.[748]

The scope of the command and control exercised by the Commander JTF 633 over subordinate force elements is described by Major General John Cantwell AO, the commander named in the departmental fact sheet describing the role of JTF 633 above. In his 2012 book, Major General Cantwell, in discussing his responsibilities regarding the Australian Special Operations Task Group in Afghanistan at that time, stated: ‘The group conducts sophisticated operations attacking insurgent networks and other classified missions … [a]s the national commander I have a say in the approval process of many of their operations, particularly when sensitive missions are undertaken.’[749]

The extent of control Cantwell exercised over Australia’s special operations forces in Afghanistan, in his role as CJTF 633, is described in more detail by McKelvey in his 2022 book:

> For Force Element Alpha [Special Air Service Regiment element], it was established way back on rotation three [June–October 2006] that one way to get the use of American helicopters and ISR [intelligence, surveillance and reconnaissance assets] was by prosecuting national-level or regional-level JPEL [Joint Prioritised Effects List] targets. Many of these were outside Uruzgan, however. With the *flick of a pen or a word over the phone*, Major General Cantwell could *approve missions beyond Australia’s defined operational areas, and he did so regularly*. The insurgents were not beholden to geographic boundaries, so it made no sense to him that the men hunting them should be.[750]

[748] Ibid.

[749] John Cantwell, *Exit Wounds: One Australian’s War on Terror* (Melbourne University Press, 2012) 254.

[750] Ben McKelvey, *Find, Fix, Finish. From Tampa to Afghanistan: How Australia’s Special Forces Became Enmeshed in the US Kill/Capture Program* (Harper Collins Publishers, 2022) 271–2 (emphasis added).

The statement by Cantwell, including his awareness of the sensitivity and sophisticated nature of the Special Operations Task Group (SOTG) operations and the fact that he has 'a say in the approval process of many of their operations', is entirely consistent with the indicia of command provided by the Pre-Trial and Trial Chambers in *Bemba*. McKelvey's expansion on the role of CJTF 633 in that period and, indeed, in the period from June to October 2006, confirms the extent of the JTF commander's control including assisting in securing resources and the 'regular' approval of sensitive targeting missions. Cantwell's reference to the approval process regarding operations is reflective of the doctrinal approach to operational planning and command decision-making encompassed in the military appreciation process (MAP) employed by the ADF in its concept of operations (CONOPS) planning.[751] In approving such operations at this level, it is likely, although not expressed, that CJTF 633 received decision briefings/operational plan briefings consistent with the MAP.[752]

In terms of the 'responsibility for the effective use of resources' indicium of command and control, as enunciated in NATO and ADF doctrine, Cantwell describes his frequent visits to coalition headquarters in Kandahar, Afghanistan, 'in a bid to ensure vital resources are not bled away from our own area of responsibility'.[753] McKelvey confirms the lengths to which JTF 633 commanders would go in order to secure the necessary intelligence, surveillance and reconnaissance resources, including approving the prosecution of 'national-level or regional-level JPEL targets'.[754] For completeness, Joint Prioritised Effects List (JPEL) targets are individuals who are prioritised by higher headquarters to be captured or killed as part of targeting operations.[755] The point made by McKelvey, above, is again entirely consistent with the *Bemba* 'resources' indicium. Describing the broader responsibilities of command of the commander of JTF 633, Cantwell states: 'I will formally take command of the Australian Joint Task Force with responsibility for all our forces in Afghanistan and the Middle East [and] I'll be travelling extensively around the region to keep tabs on our various units'.[756]

---

[751] Land Warfare Development Centre, *The Military Appreciation Process* (Land Warfare Doctrine, LWD 5-1-4, 16 October 2007) [1.1]–[1.5].

[752] Ibid ch 7.

[753] Cantwell (n 749) 256.

[754] McKelvey (n 750) 271.

[755] See, eg, Nic Stuart, 'Afghanistan – Can We Ever Discover the Truth?' (2021) 47(5) *Asia-Pacific Defence Reporter: Australian Defence in a Global Context* 20, 20–1.

[756] Cantwell (n 749) 256.

It is clear that Major General Cantwell considered his command and control responsibilities in the role of Commander JTF 633 to be direct and inclusive of the approval of the tactical operations of force elements in Afghanistan as well as entailing some degree of oversight in the course of 'keep[ing] tabs on [his] units'.[757] In response to an incident involving a soldier in a tactical force element, Cantwell describes the Chief of the Australian Defence Force directing him to 'personally take charge of sorting this out' such that Cantwell did 'what commanders do when there has been a cock-up: getting the facts, closing loopholes, revising policy, issuing orders and kicking backsides'.[758] Cantwell further describes receiving constant updates throughout the afternoon of 11 June 2010 on a battle involving Australian special operations force elements in Afghanistan 'on a mission [he] had recently approved' and had 'been briefed on and endorsed'.[759]

These notions of issuing orders with an expectation that they will be carried out, approving tactical operations and overseeing the conduct of units under command, remaining constantly appraised of the conduct of tactical operations, and taking disciplinary action are entirely consistent with the indicia of command and control described by the Pre-Trial Chamber in *Bemba*. On this description, it is clear the role of Commander JTF 633 was not limited to non-operational activities but, rather, was intimately involved in the conduct of tactical operations, albeit at a higher headquarters level. As Arnold states:

> It is always important to assess, in each single case, what the real responsibilities of a high ranking officer were, whether he/she fulfilled a role as tactical commander in charge of military operations or whether he/she simply had a role in non-operational activities such as logistics, before assessing responsibility under this doctrine. This holds true in particular for high ranking officers like generals, upon whom there is a tendency to attach responsibility for whatever crimes committed by the lower ranking members of the military.[760]

[757] Ibid.

[758] Ibid 281.

[759] Ibid 293, 295. The fact that Cantwell had been 'briefed on and endorsed' the mission infers the application of the MAP in the CONOPS process, which further supports the extent of command and control of these special forces by CJTF 633.

[760] Arnold and Triffterer (n 31) 826.

Noting a degree of formality is required in establishing the superior–subordinate relationship, insofar as formal authority over the units subject of allegations of criminal conduct is requisite, before then assessing the degree of control exercised over such units, analysis of the formal levels of command authority is warranted.

Major General Michael Crane states that earlier iterations in 2001 of the role of Australian national commander in the Middle East Area of Operations, whilst not deployed under a JTF headquarters structure, did not 'exercise much control over the deployed Australian forces [with] the commanders of the tactical elements report[ing] directly to their respective Australian Theatre component commanders – that is, to the maritime, special forces and air component commanders'.[761] Similarly, Horner confirms the Australian national commanders at this time 'exercised little control over the deployed forces'.[762] The commanders of the tactical elements 'worked under the operational control of their respective US component commanders'.[763]

The concept of operational control (OPCON) is discussed further below, but for present purposes it is significant to note Crane's description of the limited 'control' over Australian forces exercised by the Australian national commander in theatre in 2001, with operational control apparently formally vested in United States maritime, special forces and air component commanders. Following the 2003 invasion of Iraq, the command arrangements in the MEAO changed with the establishment of a Joint Task Force (JTF 633) under the command of an officer of the rank of Brigadier (equivalent) and designated Commander JTF 633 with 'operational control of all Australian elements, which he in turn delegated to coalition commanders [whilst] retaining a direct link to the Chief of Defence Force'.[764] This arrangement is confirmed by Horner in that he describes the one-star officer commanding JTF 633 as having 'operational control of all the Australian components'.[765]

---

[761] Michael Crane, 'Command and Control' in John Blaxland, Marcus Fielding and Thea Gellerfy (eds), *Niche Wars: Australia in Afghanistan and Iraq, 2001–2014* (Australian National University Press, 2020) 155, 156–7.

[762] Horner (n 741) 281.

[763] Crane (n 761) 157.

[764] Ibid.

[765] Horner (n 741) 282.

This power of delegation, rather than being an absolution of command responsibility, is consistent with the indicia of command articulated in *Bemba*.[766] Further, and as Ambos concisely states, delegation imposes new duties 'of proper selection, instruction and follow-up control'.[767] The duty of follow-up control, arising from the exercise of the power of delegation by a commander, goes to the heart of the effective command and control and the failure to exercise control properly elements of the command responsibility doctrine under both the Rome Statute and section 268.115 of the Criminal Code.

Describing the changing dynamics of the command structure over the course of the protracted mission in Afghanistan and the broader MEAO, Crane states:

> At the JTF 633 level … the basic command and control construct remained remarkably stable for more than a decade. Commander JTF 633 exercised operational control over a number of task groups dispersed across the MEAO, most of which were then delegated under the operational control of coalition commanders. Commander JTF 633 also commanded a significant national logistic element, which was designed to reduce our impost on US resources.[768]

This statement confirms that the command authority accorded to the commanders of JTF 633 over the period commencing in 2003 was one of operational control over the various task groups and, significantly, confirms that the role of CJTF 633 was not limited to logistical command. Along with an elevation of the rank of CJTF 633 from Brigadier (equivalent) to Major General (equivalent) in 2007, the level of command authority was changed from operational control in 2011 such that units were assigned to CJTF 633 under operational command.[769]

---

[766] *Bemba Decision on the Confirmation of Charges* (n 237) [418].

[767] Kai Ambos, *Treatise on International Criminal Law: Volume 1 Foundations and General Part* (Oxford University Press, 2021) 296, quoted in Douglas Guilfoyle, Joanna Kyriakakis and Melanie O'Brien, 'Command Responsibility, Australian War Crimes in Afghanistan, and the Brereton Report' (2022) 99 *International Law Studies* 220, 232.

[768] Crane (n 761) 158.

[769] Ibid 158–9.

In a somewhat scathing assessment of the extent to which commanders of JTF 633 exercised control of tactical forces in Afghanistan and the broader MEAO, a 2013 scoping study commissioned for the Head of the ADF Joint Capability Coordination Division identified that:

> In combination with a greatly improved capacity for command and control [the misunderstanding of risk] leads senior leaders in Canberra or the Gulf to exercise almost minute to minute control over the daily operations of tactical forces. This was a widely held observation. Specific examples were cited in which JTF633 required that it approve each patrol or activity by the [Reconstruction Task Force] in Oruzgan 'outside the wire'.[770]

This statement gives rise to a number of issues of direct relevance to the element of effective control in command responsibility as well as the concepts of mission command and remoteness of command in the context of command responsibility, as is discussed in later paragraphs. The 'greatly improved capacity for command and control' goes to the heart of the ability of a commander to directly influence the activities of subordinates, per the *Bemba* indicia, and tends to diminish the potential for reliance on remoteness of command as a mitigating or exculpating factor. As van der Wilt and Nybondas state:

> Ultimately [the commander] would be judged by the concrete actions that he had taken on the ground to avert the risk of his subordinates engaging in war crimes. Specific circumstances could inform the feasibility of measures and geographic remoteness, hampering contact between the commander and his subordinate, is one factor that can be taken into account.[771]

This reflects the nexus between effective control and the requirement to take reasonable and necessary measures to prevent or repress war crimes and/or report their occurrence to the proper authorities.[772] In light of the jurisprudential determination that effective control can be inferred from factors that are a matter of evidence rather than of substantive law,[773] the sheer

---

[770] Justin Kelly and JP Smith, *Strategic Command and Control Lessons – Scoping Study* (Final Report, Noetic Solutions, July 2013) 11–12.

[771] Harmen van der Wilt and Maria Nybondas, 'The Control Requirement of Command Responsibility: New Insights and Lingering Questions Offered by the Bemba Appeals Chamber Case' in Rogier Bartels et al (eds), *Military Operations and the Notion of Control Under International Law* (TMC Asser Press, 2021) 329, 335.

[772] See *Čelebići Trial Judgment* (n 130) [378].

[773] *Bemba Trial Judgment* (n 91) [188].

quantum of control identified in the scoping study allows for a reasonable inference that the element of effective control is satisfied. The identified ability to 'exercise almost minute to minute control over the daily operations of tactical forces' is similarly an indicium of effective control insofar as such minute to minute control allows for the implementation and enforcement of necessary and reasonable measures to prevent/repress war crimes or report their occurrence.

6.2.3 The Brereton 'blanket exemption' from command responsibility

In the Brereton Report, a so-called 'blanket exemption'[774] from command responsibility was given to higher commanders at the JTF 633 level on the basis that they 'did not have effective oversight of or influence on day-to-day SOTG planning and operations'.[775] The report states:

> SOTG, though under the 'theatre command' of HQ JTF 633, was assigned under the operational command of ISAF Special Operations Forces (SOF). The practical effect of this was that SOTG responded to the operational tasking and requirements of ISAF SOF. While, via Headquarters Joint Operations Command (JOC), HQ JTF 633 and HQ JTF 633-A, Australia sought to exercise 'national command' over SOTG, Headquarters JTF 633 and JTF 633-A sat outside the operational command chain, and did not have effective oversight of or influence on day-to-day SOTG planning and operations.[776]

Putting aside the fact the test apparently applied to the assignment of command responsibility appears to be 'effective oversight', which is not an element of command responsibility in international or domestic law, this statement itself satisfies, rather than refutes, the application of command authority to HQ JTF 633. As outlined in Chapter 3, in *Čelebići*, the ICTY Trial Chamber drew on the earlier *Hostage Case* in confirming the higher commander's 'responsibility is general and not limited to a control of units directly under his command'.[777] As further discussed in Chapter 3, that general responsibility 'is ultimately predicated upon the power of the superior to control the acts of his subordinates'.[778]

---

[774] Afghanistan Inquiry Implementation Oversight Panel, *Quarterly Report to the Minister for Defence* (Report No 2, 26 February 2021) 5.

[775] IGADF (n 1) 333 [20].

[776] Ibid.

[777] *Čelebići Trial Judgment* (n 130) [327].

[778] Ibid [377] and endorsed by the Appeals Chamber in *Čelebići Appeal Judgment* (n 226) [197].

The qualification regarding the power to control the acts of subordinates does not detract from the earlier point in *Čelebići* as to the general responsibility of the higher commander. A purported lack of oversight does not diminish the power of a commander to control the acts of subordinates. Any apparent tension between the *Čelebići/Hostage* concept of 'general responsibility' and the predication of that responsibility upon the power to control was relieved by the formal appointment of CJTF 633 to exercise 'theatre command' and 'national command' over SOTG. This is the evidentiary basis upon which the power to control the acts of subordinates in SOTG is established. Returning to the indicia of effective command/authority and control, as detailed in Chapter 3, the ICTY Appeals Chamber in *Blaškić* held:

> The indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate.[779]

Due to the fact that command responsibility is intended to deter the commission of international crimes, the fact that the ICTY limited the indicia of effective control to matters of prevention, punishment or prosecution is both significant and highly relevant to the exculpatory statement in the Brereton Inquiry report, above. The stated contentions that SOTG 'responded to the operational tasking and requirements of ISAF SOF [and Headquarters JTF 633 and JTF 633-A] did not have effective oversight or influence on day-to-day SOTG planning and operations'[780] are irrelevant to any consideration of effective control. What is relevant is the fact that these higher commanders, by virtue of their exercising 'theatre command' and 'national command', always retained disciplinary powers over Australian forces in satisfaction of the test in *Blaškić*.[781] The power to discipline subordinates is discussed in greater detail in later sections of this chapter.

As discussed previously, *Čelebići* expressly distinguished between tactical commanders, in charge of troops, and 'executive' or theatre commanders, with the latter being potentially held

---

[779] *Blaškić Appeal Judgment* (n 238) [68]–[69], accepted by the ICC Pre-Trial Chamber II in *Bemba Decision on the Confirmation of Charges* (n 237) [415]–[416].

[780] IGADF (n 1) 333 [20].

[781] See Response to Question on Notice No 2791 to Department of Defence, Canberra, *Terms of Delegation of Authority*, 27 January 2021.

responsible for war crimes committed by troops not under their command.[782] Article 28 of the Rome Statute and, subsequently, section 268.115(2) expressly cater to the distinction between tactical and 'executive' or theatre command in their application of the alternative material element of effective *authority* and control to the latter. The statement assigning 'theatre command' of SOTG to HQ JTF 633 serves to confirm the prima facie application of command responsibility to HQ JTF 633 and, by extension, to CJTF 633.

As the ICTY stated in *Kordić*,[783] a determination whether certain command arrangements satisfy the requisite elements of command responsibility is a matter of evidence rather than being a purely legal determination. Reference to deployment instruments and doctrinal writings are relevant but satisfaction of the requisite elements is likely to require reference to the prevailing circumstances and related circumstantial evidence.[784] In the Brereton Report, a purely legal determination was clearly made on the command authorities themselves with little or no reference to any evidence as to the elements of command responsibility.

The little evidence that was presented in the Brereton Report under the heading of command and control tends to support an inference that the higher authority exercising national command did, in fact, have a degree of oversight over Australian special operations forces equating to effective command/authority and control. The report refers to a taped record of interview from a Chief of Joint Operations – the higher commander in Headquarters Joint Operations Command – stating:

> One of the [SOTG] commanding officers *caused me some issues* because I think ISAF SOF guys, *because they're in that chain of command*, were the third-largest SOTG in theatre, they were taking *a fair bit of direction* from them in prosecuting the special operations part of the campaign.[785]

The fact that a national commander had 'some issues' with an SOTG commanding officer (CO), and those issues are directly correlated to the fact SOTG is in the ISAF SOF chain of

[782] Ibid.

[783] *Kordić Trial Judgment* (n 252).

[784] Ibid [424].

[785] IGADF (n 1) 333 [21] (emphasis added).

command from whom the Australian SOTG was taking 'a fair bit of direction'[786] demonstrates practical oversight. The national commander was clearly aware of the activities of the SOTG CO to the extent the CO had caused him/her some issues. Whether these issues were of a disciplinary or administrative nature is unknown, but the distinction is largely irrelevant since an unavoidable inference is that the national commander was exercising a disciplinary or administrative function with respect to the CO. As discussed below, in the analyses of the command authorities of operational command and operational control, and above in the *Bemba* indicia of command and control, the power to take disciplinary or administrative action is relevant to the evidentiary determination of effective command and control or effective authority and control. Again, effective oversight, as described in the Brereton Report, is not an element of command responsibility such that the element of effective command/authority and control has been substituted in this analysis.

Similarly, the ability to exercise influence over subordinates is not an element of command responsibility. The concept of influence as a standard of control attached to the test of control was, however, raised by the ICC Pre-Trial Chamber II in *Bemba*[787] but, in light of the irrelevance of the purported lack of influence to the test of control, discussed above, this point in *Bemba* as to a standard of control does not apply. The existence of effective control must first be established before any consideration is given to the standard of such control[788] and, as stated in *Blaškić* and confirmed in *Bemba*, the indicators of effective control are limited to disciplinary powers, be they preventive or punitive.[789]

As discussed in detail earlier, the evidence of former commanders of JTF 633 as to the scope of their role and functions, in practice, is persuasive in making a determination as to the satisfaction of the effective command/authority and control element. Studies commissioned by defence organisations and public commentary from the ADF are similarly persuasive. The common theme throughout the earlier analysis is evidence of the effective command or

[786] Ibid.

[787] *Bemba Decision on the Confirmation of Charges* (n 237) [415].

[788] Ibid.

[789] *Blaškić Appeal Judgment* (n 238) [68]–[69], accepted by the ICC Pre-Trial Chamber II in *Bemba Decision on the Confirmation of Charges* (n 237) [415]–[416].

authority and control exercised by CJTF 633 over all Australian task groups including, expressly on occasion and otherwise by implication, Task Force 66 (SOTG).

The Brereton Report again relies on the concept of oversight in exculpating the higher commanders from command responsibility in an apparent critique of the multinational command arrangements. The report states:

> The devolution of operational command to the extent that *the national command has no real oversight* of the conduct of Special Forces operations not only has the potential to result in the national interest and mission being overlooked or subordinated, but *deprives national command of oversight* of those operations.[790]

As discussed, the report itself contains evidence of oversight or, more appropriately, effective authority and control, on the part of national command in the form of the disciplinary or administrative authority held and, on the evidence, employed. The critique that 'the national command has no real oversight' but also 'deprives national command of oversight'[791] is, respectfully, illogical and, in the absence of evidence, adds nothing to the finding that the higher command is not liable under command responsibility. Command responsibility is a legal mode of liability under international and domestic law which comprises material/physical and mental/fault elements and these elements are not addressed in the Brereton Report in its 'blanket' exculpation of commanders above patrol commander.

6.2.4 National command

> A commanding general has an awesome responsibility: he or she is still the only single person who can actually lose a war for a country … we stand for the rule of law or we stand for nothing, and generals must be accountable.[792]

[790] IGADF (n 1) 335 [30] (emphasis added).

[791] Ibid.

[792] Jim Molan, *Running the War in Iraq: An Australian general, 300 000 Troops, the Bloodiest Conflict of Our Time* (Harper Collins Publishers, 2008) 70–1.

The Australian Defence Force has adopted the NATO definition of national command (NATCOMD), again, for reasons of interoperability,[793] as follows: 'A command that is organised by, and functions under the authority of a specific nation.'[794]

Australian defence doctrine elaborates on this vague definition in terms of the extent of designated command authority, as follows:

> NATCOMD is a standing command authority conferred upon a national appointee to safeguard Australian national interests in combined or coalition operations. NATCOMD does not in itself include any operational command authorities. Operational command authorities must be specified if a commander is to exercise both NATCOMD and a command authority such as OPCOMD.[795]

Early NATCOMD functions in the MEAO appear to have adhered to this doctrinal model. In discussing the national command role as it related to Australia's Special Operations Task Force (SOTF) in Afghanistan in 2001, McDaniel describes a textbook application of doctrine insofar as:

> The national command function was not designed to command or control the commanding officer; rather its mandate was to allow him the freedom to make rapid decisions within Australia's strategic intent and, in so doing, exploit fleeting opportunities without reference to higher mission command.[796]

On its face, this description of the command relationship between the National Commander and the Commanding Officer of the SOTF is consistent with a finding of a 2002 report to the Australian Parliament on Australian forces deployed to the Middle East as part of the International Coalition Against Terrorism more broadly, which stated: 'as the national Commander neither commands nor controls the deployed Australian forces, his capacity to

[793] Australian Defence Force Warfare Centre (n 735) [3-5] n 2.

[794] Ibid [3.18].

[795] Ibid [3.19].

[796] Dan McDaniel, 'Australia's Intervention in Afghanistan 2001–02' in John Blaxland, Marcus Fielding and Thea Gellerfy (eds), *Niche Wars: Australia in Afghanistan and Iraq, 2001–2014* (Australian National University Press, 2020) 65, 74.

make operational decisions is limited'.[797] On a strict application of the doctrinal statement of the command authority of the function of NATCOMD and, indeed, the appointed national commander, it is difficult to see how such commander could have effective command and control or effective authority and control over Australian forces.

McDaniel's statement as to the function of NATCOMD, in practice, in Afghanistan in 2001 lends weight to that contention. Indeed, McDaniel refers to guidance provided by the Chief of the Defence Force at the time, Admiral Chris Barrie, to the commanding officer of the SOTF that the national command function was limited to providing 'a backstop and support should [the commanding officer] face tasking that was outside the national interest and … for Australia to exert influence at senior levels in the coalition'.[798] McDaniel's observation and Barrie's guidance reflect the express statement in the 2002 parliamentary report that the National Commander did not have command and control over deployed Australian forces at that time.

This situation, however, appears to have changed over the course of the conflict in Afghanistan and, indeed, in the broader Middle East Area of Operations such that the nexus between the role and function of national commander can be seen to be providing effective command/authority and control over subordinate forces. That may be as a result of national commanders being specifically empowered to exercise both NATCOMD and operational command (OPCOMD) in accordance with doctrine,[799] as appears to be the case on the available open-source material. McDaniel states that the national command headquarters and, therefore, the national commander 'seemed to assume a greater level of almost operational command of Australian task groups'.[800]

This view is supported by Cantwell in his unequivocal recollection that, in his role as national commander, he had 'a say in the approval process of [Special Operations Task Group] operations'.[801] McDaniel's observation carries weight in that he further observes the existence

---

[797] Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Visit to Australian Forces Deployed to the International Coalition Against Terrorism* (Report, October 2002) [7.19].

[798] Ibid.

[799] Australian Defence Force Warfare Centre (n 735) [3.19].

[800] McDaniel (n 796) 75.

[801] Cantwell (n 749) 254.

of 'pressure on the national commander and his staff to be more actively involved in managing priorities and directing the Task Force and its actions [due to] anxiety at senior levels within Defence' regarding Australia being drawn into a protracted commitment to Afghanistan.[802] Managing the priorities of and directing tactical forces and their actions is entirely consistent with the test of effective command/authority and control articulated in *Bemba*.

Whilst an unavoidable inference is available that Australian national commanders assumed operational command over subordinate forces, at least after 2001, Crane takes the degree of command authority one step further in expressly stating that the first Commander JTF 633 'was given operational control of all Australian elements'.[803] At this juncture it is necessary to define the remaining degrees of command authority and equate them to the element of effective command and control or authority and control in command responsibility.

6.2.5 Operational command authorities generally

Australian defence doctrine defines operational command authorities as 'empower[ing] a commander to employ the operational capability of forces to achieve missions [and] the delegated authority may be command itself, or degrees of command or [command and control] with certain qualifications'.[804] The power to employ the operational capability of forces to achieve missions equates, in broad terms, to the indicium of the 'authority to send forces where hostilities take place and withdraw them at any given moment'[805] as stated in *Bemba*.

Table 5, below, extracted from Australian defence doctrine, lists the ADF states of command authority and relevant functional roles and limitations:

[802] McDaniel (n 796) 74.

[803] Crane (n 761) 157.

[804] Australian Defence Force Warfare Centre (n 735) [3.22].

[805] *Bemba Decision on the Confirmation of Charges* (n 237) [418].

Table 5: ADF states of command authority and functional roles and limitations

Function	Operational Command	Tactical Command	Operational Control	Tactical Control
Specify missions	Yes	Yes	No	No
Specify tasks	Yes	Yes	No	No
Direct forces for specified mission/task	Yes	Yes	Yes	Yes (local direction)
Deploy units	Yes	Yes	Yes	Yes
Reassign forces	Yes	No	No	No
Allocate separate employment of units	Yes	Yes	No	No
Admin responsibility	If specified	If specified	If specified	If specified

The specificity of functional roles in this doctrinal table allows for a more accurate comparative analysis with the indicia of effective command stated in *Bemba*. The authority to deploy units, which is given to all states of command, is clearly analogous with 'the authority to send forces where hostilities take place and withdraw them at any given moment'[806] in *Bemba*. The authority to reassign forces, which is given to the OPCOMD state of command, equates to the indicium of 'the capacity to re-subordinate units'[807] in *Bemba*. Similarly, the authority to allocate separate employment of units, which is given to the OPCOMD and tactical command (TACOMD) states of command, equates to 'the capacity to re-subordinate units'[808] indicium.

The authority to direct forces for a specified mission/task, which applies to all states of command, is a broader command authority which implicitly indicates effective command/authority and control on the part of the commander afforded such states of command.[809] As the Trial Chamber in *Bemba* held, the factors from which the existence of effective control on the part of the commander may be inferred 'have been properly considered

[806] Ibid.

[807] Ibid.

[808] Ibid.

[809] See Arnold and Triffterer (n 31) 832; van der Wilt and Nybondas (n 771) 341.

as more a matter of evidence than of substantive law'.[810] Nonetheless, the power to issue orders deriving from the commander's position in the military hierarchy, which 'may be transmitted directly or through intermediate subordinate commanders',[811] is a crucial element of effective control.[812]

6.2.6 Operational command (OPCOMD)

Operational command (OPCOMD) is defined as:

> The authority granted to a commander to specify missions or tasks to subordinate commanders, to deploy units, to re-assign forces and to retain or delegate OPCON, TACOMD and/or TACON as may be deemed necessary. It does not of itself include responsibility for administration or logistics.[813]

Notwithstanding this definition tends to exclude administrative or logistical responsibilities, doctrine further states that 'commanders holding OPCOMD clearly require and invariably hold a level of authority and a level of responsibility for both administrative and logistic support, and other aspects of operational importance'.[814] This caveat is significant insofar as administrative or logistical responsibilities are further indicia of effective command, as articulated by the *Bemba* Trial Chamber,[815] and it is express recognition of the operational nature of the role of commanders appointed to OPCOMD. It is this doctrinal recognition which lends weight to Crane's description of his role as Commander JTF 633 and his critique of the function of that Joint Task Force headquarters, discussed above in the context of Australian operations in Afghanistan.

That critique, interestingly, provides significant insight into the extent to which commanders of JTF 633 exercised effective command and control in that Crane draws on the 2013 report of Kelly and Smith in describing JTF 633 as being 'overly controlling, risk averse, disruptive and

---

[810] *Bemba Trial Judgment* (n 91) [188].

[811] Arnold and Triffterer (n 31) 832.

[812] *Kordić Trial Judgment* (n 252) [421].

[813] Australian Defence Force Warfare Centre (n 735) [3.29].

[814] Ibid [3.33].

[815] *Bemba Decision on the Confirmation of Charges* (n 237) [418].

interfering'.[816] That report is useful in removing some of the complexity and opacity[817] surrounding the ADF command structure in Afghanistan, as follows:

> JTF 633 was established to command ADF activities in the Middle East. As well as its command and control function the JTF had important roles in the logistic support of deployed forces and in managing the details of force rotations … [a]rguably, the JTF construct was simply the only item in the [Australian Defence Organisation] command and control repertoire and there was no perceived need to explore other options.[818]

The command and control 'repertoire' purportedly relied upon in the establishment of JTF 633 is undoubtedly extant ADF doctrine on command and control. The report, which was prepared for the Head of the ADF Joint Capability Coordination Division,[819] goes on to provide a practical definition of command and control as deriving from ADF doctrine, as follows:

> In reality the 'control' in command and control refers to the system of measures put in place to aid supervision, synchronisation, de-confliction and the monitoring of progress. Control is about the support provided to enable a commander to exercise their command – that is, to ensure that the force remains 'under control'. Put simply, command is an individual cognitive function exercised vertically through a hierarchy and is primarily about formulating and communicating intent. Control is a function distributed across a large number of actors and agencies and supports the implementation of the commander's intent.[820]

The relevance of the use of the terminology 'system of measures' in defining the control element of command and control to the effective command/authority and control element of command responsibility cannot be overstated. As van der Wilt and Nybondas succinctly state, '[t]he failure to take reasonable and necessary measures … is crucial for the understanding of the notion of "effective control" for the two are inextricably entwined'.[821] The ICTY Trial Chamber in the *Čelebići* case held that, for command responsibility to apply, 'it is necessary that the superior have effective control over the persons committing the underlying violations

---

[816] Crane (n 761) 161, quoting Kelly and Smith (n 770) 15.

[817] Nautilus Institute for Security and Sustainability (n 741).

[818] Kelly and Smith (n 770) 15.

[819] Ibid 2.

[820] Ibid 5.

[821] van der Wilt and Nybondas (n 771) 331.

of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences'.[822]

The reference to 'reasonable and necessary measures' is, of course, a reference to measures to prevent or repress the crimes or report such crimes to authorities for investigation and prosecution, the failure to do so being a material element of command responsibility. The system of measures referred to in the report in defining the control aspect of command and control is, it is contended, broad enough to encompass the measures contemplated in the material element of command responsibility. At the very least, the term 'supervision', when read with the requirement of ensuring that the force remains 'under control' equates very readily to the 'prevention/repression/reporting' aspect of command responsibility. An unavoidable inference is thus that the command and control duties of a national commander exercising OPCOMD in a Joint Task Force construct, in this instance, JTF 633, satisfy the elemental requirement of 'effective command/authority and control' under command responsibility.

6.2.7 Tactical command (TACOMD)

Tactical command (TACOMD) is defined as: 'The authority delegated to a commander to specify missions and tasks to forces under his command for the accomplishment of the mission specified by higher authority.'[823] The operational authority of TACOMD provides a commander with freedom of action 'to task forces to achieve an assigned mission, and to group and regroup forces as required within his assigned force structure'.[824] This definition is consistent with the *Bemba* indica of the re-subordination of units and the authority to change command structures as well as the indicium of the authority to deploy forces to where hostilities are taking place and to withdraw them.[825]

6.2.8 Operational control (OPCON)

Operational control (OPCON) is defined as:

---

[822] *Čelebići Trial Judgment* (n 130) [378].

[823] Australian Defence Force Warfare Centre (n 735) [3.35].

[824] Ibid [3.38].

[825] *Bemba Decision on the Confirmation of Charges* (n 237) [418].

> The authority delegated to a commander to direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time or location; deploy units concerned and retain or delegate TACON of those units. It does not include authority to allocate separate employment of components of the units concerned. Neither does it, of itself, include administrative or logistic control.[826]

The power to direct missions or tasks and deploy units equates to the *Bemba* indicium of 'the authority to send forces where hostilities take place and withdraw them at any given moment'[827] such that effective control may be inferred from this state of command authority. Again, drawing on *Bemba*, the inference as to the existence of effective control may be drawn from evidence,[828] such as doctrinal pronouncements of command authority and approvals as well as instruments appointing commanders to such states of authority over forces.

The degree of command is thus undoubtedly a relevant consideration in determining liability. In terms of the liability of commanders in the factual circumstances of a multinational force, a scenario which is prevalent in contemporary Australian military operations, Fenrick suggests a commander exercising OPCOMD or OPCON over forces of a partner nation would not have a legal basis for exercising disciplinary authority and, thus, could not be held liable under the doctrine of command responsibility.[829] It follows that a commander exercising OPCOMD or OPCON over the commander's own forces would be likely to have a legal basis for exercising disciplinary authority over those forces such that a key indicium of effective control is established.

The natural corollary of these facts is that no legal basis exists for the exercise of a disciplinary function by a multinational force over Australian forces assigned OPCOMD or OPCON to that multinational force such that, in the absence of an Australian OPCOMD or OPCON authority, a higher command authority must exercise discipline as an administrative function. In applying the MEAO/JTF model, the higher command authority would be the headquarters element exercising theatre command or national command.

---

[826] Australian Defence Force Warfare Centre (n 735) [3.39].

[827] *Bemba Decision on the Confirmation of Charges* (n 237) [418].

[828] *Bemba Trial Judgment* (n 91) [188].

[829] Fenrick, 'The Prosecution of International Crimes' (n 743) 554.

Notwithstanding discipline is considered a local administrative function under the administrative authority of administrative control,[830] the reality of the ADF disciplinary system is that higher commanders invariably play a role in the administration of discipline. In any event, as discussed above, commanders holding OPCOMD and, it is contended, OPCON, require and hold degrees of responsibility and authority for administration, with such administration including the exercise of disciplinary authority at certain levels including, but not limited to, the level of review of disciplinary actions.

Further, the authority to exercise disciplinary powers extends to the authority to initiate 'other adverse administrative proceedings against the perpetrators'.[831] This is relevant insofar as instruments appointing ADF commanders to positions in which they hold OPCOMD or OPCON, whilst not always expressly addressing the issue of the discipline of subordinate forces, may, nonetheless empower such commanders to initiate adverse administrative actions against subordinates or impose administrative sanctions on subordinates.[832] On that evidentiary basis, the element of effective control is likely to be satisfied.

The exercise of disciplinary authority by commanders of JTF 633 during the period 2008 to 2016 was expressly included in a response from the Department of Defence to an Australian Senate question on the notice paper by Senator Jacqui Lambie, as follows: 'Command directives outline delegations and authorities and provide direction to Commanders including but not limited to, strategic intent, discipline, Rules of Engagement, Law of Armed Conflict, incident reporting, and Commanders Critical Information Requirements.'[833]

Whilst the response was broad in its application, the fact it was a response to a direct question regarding the terms of the delegations of authority and/or instruments of command pertaining to commanders of JTF 633 allows for a reasonable inference that discipline of subordinate

---

[830] Australian Defence Force Warfare Centre (n 735) [3.52]–[3.55].

[831] *Strugar Trial Judgment* (n 240) [392].

[832] See, eg, Department of Defence, *Guide to Administrative Decision-Making* (Australian Defence Force Publication, ADFP 06.1.3, August 2003) [3.5]–[3.11].

[833] Response to Question on Notice No 2791 to Department of Defence, Canberra, *Terms of Delegation of Authority*, 27 January 2021.

forces was within the mandate of CJTF 633 during that period of 2008 to 2016 which, as previously determined, was either under OPCON or, after 2011, OPCOMD. The power to discipline any member of the forces is, of course, one of the *Bemba* indicia of effective control. The reference to the power applying to 'any' member of the force is, on its face, a broad power such that disciplinary power to any extent is likely to qualify.[834] Reading the indicia in that way is, it is contended, consistent with the broad intent of the doctrine of command responsibility to ensure commanders at all levels are accountable such that the deterrence effect of the doctrine applies up and down the chain of command. In that light, regardless of any limitations imposed in the instrument of command regarding the discipline of forces, a power to discipline provided to commanders acting under OPCOMD or OPCON states of command authority is likely to satisfy the *Bemba* criterion.

Even in the absence of any express legal authority to take disciplinary action against subordinates, however, this aspect of the test of effective control turns on the material ability of the superior to prevent or punish acts of subordinates. As held in the ICTY case of *Blaškić*: 'What counts is his material ability, which instead of issuing orders or taking disciplinary action may entail, for instance, submitting reports to the competent authorities in order for proper measures to be taken.'[835]

Further, the ICTY has held that the power to report crimes to appropriate authorities[836] and, significantly, the existence of reporting mechanisms to the higher commander by members of the unit or force element involved in the commission of the crimes constitute factors bearing evidential relevance and weight[837] in establishing effective control.

---

[834] See, eg, *Kordić Trial Judgment* (n 252) [416] in which the ICTY articulated a nexus between a clear chain of command and the power to punish subordinates and *Halilović Trial Judgment* (n 134) [63] in which the ICTY confirmed a subordinate may be answerable to a superior immediately or more remotely. See also *Orić Trial Judgment* (n 219) [310]–[311] in which the Trial Chamber held that '[w]hether this sort of control is directly exerted upon a subordinate or mediated by other sub-superiors or subordinates is immaterial'.

[835] *Blaškić Trial Judgment* (n 90) [302].

[836] *Blaškić Appeal Judgment* (n 238) [499].

[837] Mettraux, *The Law of Command Responsibility* (n 21) 164.

6.2.9 Tactical control (TACON)

Tactical control (TACON) is defined as '[t]he detailed and, usually, local direction and control of movements or manoeuvres necessary to accomplish missions or tasks assigned'.[838] On this definition alone, there can be little doubt a commander assigned TACON would be held to, prima facie, be exercising effective command/authority and control over assigned forces. Whilst a commander assigned TACON is not empowered to re-assign missions or tasks, this level of command authority allows for the 'immediate conduct of tactical activity'[839] such that effective control can be inferred from the authority alone. TACON is described in doctrine as being 'intended as short-term authority to be delegated by a local tactical commander'.[840] This temporary assignment of command authority does not absolve commanders assigned TACON from liability under command responsibility since the test is whether the commander had effective control over the subordinates at the time when the war crimes were committed.[841]

6.3 The impact of mission command on the law of command responsibility

> [A high commander] has the right to assume that details entrusted to responsible subordinates will be legally executed.[842]

At this juncture, and before interpreting and analysing the concept of mission command, it is relevant to again refer to the findings of the Brereton Inquiry in its exculpation of commanders above patrol commander level and, particularly, higher commanders including at the Joint Task Force level. The report states:

> The detailed superintendence and control of subordinates is inconsistent with the theory of mission command espoused by the Australian Army, whereby subordinates are empowered to implement, in their own way, their superior commander's intent. That is all the more so in a Special Forces context where high levels of responsibility and

[838] Australian Defence Force Warfare Centre (n 735) [3.41].

[839] Ibid [3.43]–[3.44].

[840] Ibid [3.43].

[841] *Bemba Decision on the Confirmation of Charges* (n 237) [418]–[419]; *Blaškić Trial Judgment* (n 90) [301]; *Perišić Trial Judgment* (n 521) [138].

[842] United Nations War Crimes Commission (n 127) vol 12, 76.

> independence are entrusted at relatively low levels, in particular to patrol commanders.[843]

This statement, whilst conceptual and implicitly beholden to the 'theory' of mission command, fails to reflect upon the reality of the friction between what is more precisely described as a leadership philosophy/doctrine than a theory[844] and the obligations imposed under the legal doctrine of command responsibility. O'Neill states:

> As leaders we are encouraged to execute Mission Command, delegating authority and decision making to subordinates at all levels. This promotes freedom and speed of action against a clearly defined intent. It is an ideal that we should all aspire to, promoting mutual trust throughout the chain of command. But what about when events go catastrophically wrong and British Forces are accused of war crimes? Who or what is to blame? Is it the soldier, the commander, the situation, their training, or a combination of all these factors? In these circumstances, frictions arise between Mission Command and legal obligations under Command Responsibility.[845]

O'Neill considers the role that ethics should play in the execution of mission command along similar lines to those espoused by Langford, who states: 'Special forces mission command requires leaders with strong value systems … [t]he role that ethics play in military decision making and the execution of orders is more significant today than ever before.'[846] Equating ethics with legal compliance, O'Neil expressly and Langford by implication both recognise that command responsibility necessarily exists within the mission command construct, albeit with a degree of friction in the concurrent application of both.

Australian military doctrine does not provide a precise definition of mission command but, rather, describes it in a functional way as a command philosophy in which 'the superior directs what is to be achieved but leaves the subordinate free to decide how assigned tasks will be

---

[843] IGADF (n 1) 31.

[844] See Australian Defence Force Warfare Centre (n 735) [2.22].

[845] JR O'Neill, 'Mission Command and Command Responsibility: It Is Time to Talk Ethics' (2021) 22 *Centre for Army Leadership – Leadership Insight* 1.

[846] Ian Langford, 'The Australian Special Forces Approach to Mission Command' in Russell Glenn (ed), *Trust and Leadership: The Australian Army Approach to Mission Command* (University of North Georgia University Press, 2020) 300, 304. See also Ian Langford, 'Ethics in Special Operations' in Tom Frame and Albert Palazzo (eds), *Ethics Under Fire: Challenges for the Australian Army* (UNSW Press, 2017) 104, 116.

achieved'.[847] Single-service army doctrine provides a more detailed description of mission command, which is of assistance in analysing the concept within the command responsibility construct, as follows:

> Mission command is a philosophy of command and a system for conducting operations in which subordinate commanders are given clear direction of a superior's intent. That is; the clear articulation of the result required, the tasks to be undertaken and any constraints. It also requires that the resources to achieve tasks be provided.[848]

This doctrinal statement clearly recognises that the superior–subordinate relationship – an element of command responsibility – requires the higher commander to detail tasks and constraints on the execution of those tasks. By implication, this suggests the higher commander would reinforce to the subordinate commander any limitations on action such as the requirements of the law of armed conflict and, more immediately, the rules of engagement applicable to the particular operation. It follows that, far from abrogating responsibility for compliance with such constraining factors, the higher commander is reinforcing the need for compliance. This point is confirmed to an extent in army doctrine in its articulation of the prerequisites for success in the execution of mission command. Under the prerequisite of 'trust', doctrine states that '[t]rust must also include the courage to share responsibility for errors'.[849]

It is this shared responsibility which meshes mission command with command responsibility since command responsibility is a multi-level mode of liability in which multiple commanders in the chain of command may be held liable for the conduct of subordinates.[850] As the ICTY Appeals Chamber in *Orić* held, 'whether the effective control descends from the superior to the subordinate culpable of the crime through intermediary subordinates is immaterial as a matter of law'.[851]

---

[847] Australian Defence Force Warfare Centre (n 735) [2.19].

[848] Land Warfare Development Centre, *Command, Leadership* (n 40) 2-4.

[849] Ibid 2-5.

[850] See, eg, *Blaškić Trial Judgment* (n 90) [303].

[851] *Orić Appeal Judgment* (n 259) [39].

At the tactical level of command, and in the context of Australia's operations in Somalia in 1993, Hurley recognises the requirement of command responsibility to continually monitor compliance by subordinates with the rules of engagement and, by extension, the broader law of armed conflict, as follows:

> A reminder of command responsibility was quickly received from the International Committee of the Red Cross, a non-military source. The Committee placed great stress on the responsibility of governments and military commanders to ensure their forces are adequately trained in the application of the laws of armed conflict … [a] critical consequence of the application of [rules of engagement] which I had not fully anticipated was the adverse reaction of subordinate commanders and soldiers to the very necessary detailed analysis of their actions in situations where the application of [rules of engagement] was under question.[852]

The fact that an international body such as the International Committee of the Red Cross (ICRC) felt the need to remind Australian force elements of the need for commanders to exercise their command responsibility, coupled with the identification by Hurley of 'adverse reactions' on the part of subordinates to the monitoring of their application of the rules of engagement, serves to reinforce the need for constant monitoring of compliance regardless of the execution of mission command. This is reinforced by the fact that Hurley, as the commander of tactical forces at the battalion battle group level, had not anticipated such a reaction on the part of subordinate commanders and soldiers to the monitoring or, indeed, questioning of their compliance with the rules of engagement.

6.3.1 Mission command: leadership philosophy versus dogma

Notwithstanding mission command appears in the Australian Defence Doctrine Publication entitled *Command and Control*, that doctrinal publication itself describes mission command as a 'command philosophy'.[853] Nonetheless, doctrine states that mission command should be supported by doctrine in that doctrinal guidance allows for the intelligent application of the philosophy rather than providing dogma demanding an automatic response.[854] This point is

---

[852] David Hurley, 'An Application of the Laws of Armed Conflict: Operation Solace' in Hugh Smith (ed), *The Force of Law: International Law and the Land Commander* (Australian Defence Studies Centre, 1994) 179, 183, 187.

[853] Australian Defence Force Warfare Centre (n 735) [2.18].

[854] Ibid [2.21].

significant when considering any reliance on the execution of mission command as an exculpatory or mitigatory factor in matters involving command responsibility for war crimes. The very fact that doctrine precludes dogmatic reliance on mission command to the exclusion of individual judgment tends to rebut mission command as a 'defence' to a charge under command responsibility provisions, that is, as displacing the element of effective command/authority and control on the part of the higher commander. This point is given weight by Glenn who describes the 'conditional nature of a commander's applying mission command in light of subordinates' abilities'.[855]

This conditional use of mission command, it is contended, goes beyond merely the abilities of the commander's subordinates to include all of the functions of command including compliance with the commander's obligations under international humanitarian law. That is, such compliance warrants the commander's oversight of the activities of the subordinate in the exercise of effective command/authority and control. Mission command is not so doctrinal or, indeed, dogmatic as to warrant an abrogation of command responsibility. As Smith succinctly states, '[m]ission command is not "fire and forget"; it is dynamic. One must constantly evaluate the character of the mission command practiced [sic] with the passage of time, taking [trust in the reliability of subordinates] into account.'[856]

This non-abrogation of the commander's obligations of command and control over subordinates is supported by Holder, who states:

> Applying Mission Command emphatically does *not* mean delegating all authority to the lowest levels of command or refraining from intervening in operations as they progress … [a]pplying necessary control and issuing essential detailed directives … remains part of the commander's duty.[857]

---

[855] Russell Glenn, 'Mission Command Overview' in Russell Glenn (ed), *Trust and Leadership: The Australian Army Approach to Mission Command* (University of North Georgia University Press, 2020) 1, 18.

[856] Chris Smith, 'Mission Command and the 2RAR Battle Group in Afghanistan: A Case Study in the Relationship Between Mission Command and Responsibility' in Russell Glenn (ed), *Trust and Leadership: The Australian Army Approach to Mission Command* (University of North Georgia University Press, 2020) 271, 284.

[857] Leonard Holder, 'Foreword' in Russell Glenn (ed), *Trust and Leadership: The Australian Army Approach to Mission Command* (University of North Georgia University Press, 2020) xv, xvi (emphasis in original).

This simple yet emphatic statement as to the limitations of mission command is significant in terms of the application of the leadership philosophy in the context of the doctrine of command responsibility. The point about commanders not refraining from intervening in operations 'as they progress' leads to an unavoidable inference that commanders must maintain an extent of oversight or supervision of the conduct of the operations such that they are able to intervene. This point goes to the heart of the object of command responsibility in its effective command and control element insofar as, in executing mission command, the commander must remain in a position to be able to control the activities of subordinates. Such control, of course, extends to applying necessary measures to prevent or repress the commission of crimes or to report such crimes for investigation and prosecution. Holder goes as far as to expressly confirm the duty of the commander to apply 'necessary control' notwithstanding the execution of mission command.

6.3.2 Mission command: recognition in international law

The concept of mission command was, to some extent, recognised at international law before it became 'fashionable' as a leadership philosophy or, indeed, a doctrinal default position or 'culture'[858] in the prosecution of operations by Western militaries. Article 87 of Additional Protocol I – entitled 'Duty of Commanders' – requires commanders to prevent, repress and report beaches of the Geneva Conventions and Protocol I by 'members of the armed forces under their command and other persons under their control'[859] and to 'initiate disciplinary or penal action against violators' in the event of breaches.[860]

On their face, these provisions appear to impose strict obligations on commanders in disregard of the powers of delegation available to them. Commentary on Article 87, however, states that: 'Although it is true that every military commander is responsible for everything that takes place in his sector, this does not mean that he must do everything himself.'[861]

---

[858] Peter Vangjel, 'Mission Command: A Clarification' in Donald Vandergriff and Stephen Webber (eds), *Mission Command: The Who, What, Where, When and Why* (CreateSpace, 2018) 3, 10. See also Donald Vandergriff, *Adopting Mission Command: Developing Leaders for a Superior Command Culture* (Naval Institute Press, 2019) 1.

[859] *Additional Protocol I* (n 271) art 87(1).

[860] Ibid art 87(3).

[861] International Committee of the Red Cross (n 272) [3563].

In essence, the ICRC specifically, and international law more broadly, acknowledges the 'demands and difficulties of a commanding function'[862] which, in turn, recognises the clear need for a commander to delegate certain tasks, in the Australian context within the powers of delegation afforded under the states of command authority, discussed above. This is, however, a qualified recognition of the concept of mission command. The delegation to which the commentary and jurisprudence refers is the delegation of the powers to implement mechanisms of prevention and punishment. As discussed above, delegation imposes on the higher commander a whole new range of responsibilities and duties 'of proper selection, instruction and follow-up control'.[863] The requirement of follow-up control is confirmation that control of subordinate forces is not abrogated as a result of the delegation of functions associated with the prevention and punishment of crimes.

Whilst mission command is not merely a matter of delegation of tasks and duties, the requirement of follow-up control or, at the very least, oversight of the execution of the commander's intent by subordinates is, as discussed, an ongoing part of the commander's duty.[864] It is this requirement to follow up which draws mission command squarely into the remit of the effective control element of command responsibility.

6.3.3 Mission command: the Australian way

Australian defence doctrine itself recognises that mission command is a general rule which 'should not preclude the very necessary element of active control'.[865] This deference to active control on the part of commanders tends to rebut, in doctrinal theory at least, any reliance on the doctrine of mission command to automatically avoid command responsibility in the Australian setting. The notion of active control equates with the element of effective control in command responsibility or, indeed, places a stricter onus on the commander than that stipulated in the element of effective control. As the ICTY Trial Chamber held in *Strugar*, 'a superior's

[862] Mettraux, *The Law of Command Responsibility* (n 21) 66.

[863] Ambos (n 767) 232.

[864] See Holder (n 857).

[865] Australian Defence Force Warfare Centre (n 735) [2.27].

duty may not be discharged by the issuance of routine orders and that more active steps may be required'.[866]

In practice, the application of mission command in the ADF setting is unlikely to have any bearing on proof of command responsibility in terms of establishing the requisite element of effective command/authority and control. As discussed previously, proving this element is a matter of evidence rather than law and the evidence does not support the contention that mission command can be exculpatory or even mitigatory in any tangible way. Kelly and Smith, in their 2013 study, observe that an abundance of communication resources available to commanders is problematic in the application of mission command such that 'it is clear that mission command is not being applied by the ADF'.[867] That study draws on ADF operational doctrine in support of their conclusions, as follows: 'The challenge is to balance over-reliance on communications, which undermines the longer term ability of subordinates to take risks, with micro-management of operations at lower levels by higher command because those communications necessarily exist.'[868]

This availability of communication modes between higher commanders and their subordinate commanders and the suggested over-reliance on such communications tends to diminish the decentralised nature of mission command. In that light, the application of centralised control by ADF higher commanders rebuts any suggestion that mission command has displaced command responsibility. There can be no doubt that centralised control is a manifestation of effective command/authority and control in its purest *Bemba* incarnation. Even single-service army doctrine confirms that mission command is not to be adhered to in any dogmatic way but, rather, 'is a decentralised philosophy that provides commanders with the flexibility to apply centralised control when appropriate'.[869]

---

[866] *Strugar Trial Judgment* (n 240) [374].

[867] Kelly and Smith (n 770) 12.

[868] Australian Defence Force Warfare Centre, *Operations* (Australian Defence Doctrine Publication, ADDP 3.0, 2011), quoted in Kelly and Smith (n 770) 12.

[869] Land Warfare Development Centre, *Operations (Developing Doctrine)* (Land Warfare Doctrine, LWD 3-0, 19 September 2008) 4-4.

The critique that higher commanders are tempted to defer to centralised control due, in some part, to the availability of communication modes such that mission command does not, in practice, displace the effective control element of command responsibility is not limited to the ADF. Vandergriff provides a similar critique of mission command in the United States Army, as follows: 'The reality is that it is going to be hard to achieve [mission command as a culture] by changing cultures founded and stuck in the Industrial Age, while enhanced with the latest communication technology.'[870]

From a policy perspective it is also important that culpability cannot be avoided on the basis of mission command due to ambiguity in the passage of orders from the higher commander. Knowledge that command responsibility applies in the event of war crimes being committed by subordinates precludes commanders from avoiding liability on the basis of ambiguity in orders issued by the commander.[871] Caligari states:

> There is sometimes a misconception that a commander's intent statement in a mission order is all that is required to ensure subordinate actions will be in alignment. The complexity of contemporary operations ensures that is never the case. The greater a subordinate's understanding of his commander's beliefs and values, the more likely that subordinate will act as desired.[872]

This observation contains a number of points of direct relevance to the nexus between mission command and command responsibility and tends to rebut any contention that ambiguous orders exculpate or mitigate the culpability of commanders at all levels. The fact that there might be a misconception as to the execution of the commander's intent based entirely on an intent statement in formal orders is, itself, evidence that higher commanders are cognisant of the need for clarity in order for them to be able to rely on subordinate commanders to execute their intent. It follows that higher commanders, in issuing unambiguous orders, are ensuring a degree

---

[870] Vandergriff (n 858) 264.

[871] Mark Osiel, *Obeying Orders: Atrocity, Military Discipline & the Law of War* (Transaction Publishers, 2009) 305.

[872] John Caligari, 'The Application of Mission Command by the 1st Battalion, The Royal Australian Regiment (1 RAR) Group on Operation Solace in Somalia in 1993' in Russell Glenn (ed), *Trust and Leadership: The Australian Army Approach to Mission Command* (University of North Georgia University Press, 2020) 156, 176.

of oversight from the outset such that subordinates 'will act as desired'.[873] It is clear that Caligari contemplated the ongoing responsibilities of commanders including, by implication, the oversight of the ethical and legal conduct of subordinates, as confirmed by his reference to the values and beliefs of higher commanders.

6.4 Command responsibility of the 'remote commander'

> Great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote.[874]

The ICC Appeals Chamber in *Bemba*, in a majority decision, overturned a conviction recorded by the Trial Chamber on the question whether Bemba had taken reasonable and necessary measures to prevent, repress or punish his subordinates, such measures going to the material element of the failure to prevent/repress/submit for investigation/prosecution. As the Appeals Chamber stated in its reasons for judgment:

> The scope of the duty to take 'all necessary and reasonable measures' is intrinsically connected to the extent of a commander's material ability to prevent or repress the commission of crimes or to submit the matter to the competent authorities for investigation and prosecution. Indeed, a commander cannot be blamed for not having done something he or she had no power to do.[875]

In consideration of Bemba's material ability to take such measures, the Appeals Chamber held that: 'The Trial Chamber erred by failing to properly appreciate the limitations that Mr Bemba would have faced in investigating and prosecuting crimes as a remote commander sending troops to a foreign country.'[876]

The decision at this point referenced the Appeal Brief submitted on behalf of Bemba which brought the appellate judges to the concept of the remote commander on which the decision was subsequently made. That brief stated:

---

[873] Ibid.

[874] *Čelebići Trial Judgment* (n 130) [377].

[875] *Bemba Appeal Judgment* (n 91) [5].

[876] Ibid [189].

> Removed from the troops, miles from the crime scenes, with no suggestion that he ordered, or was present at, or participated in the crimes with which he was charged, Mr Bemba is the first commander in history to have been convicted for the actions of troops engaged in a foreign conflict, across a national border.[877]

The fact Bemba was geographically removed from the troops who committed the crimes was central to this aspect of the defence argument on appeal. In submitting that the element of effective control was not satisfied in the prosecution case at trial, the defence submitted that 'effective control must have some meaning … absent Mr Bemba giving operational orders, the remaining alleged *indicia* of command responsibility are insufficient'.[878]

Significantly, the Appeal Brief on which the Appeals Chamber relied in overturning the conviction spoke about non-linear forces comprising a composite of state forces and militia as compared to hierarchical state forces.[879] This distinction between the composite forces commanded by Bemba and the type of forces commanded in a hierarchical military force of a state went to the test of effective control as articulated by the Bemba Pre-Trial and Trial Chambers. The Appeal Brief submitted that:

> Criminal responsibility flowing from a judicial finding of 'effective control' derives from the commander's ability to control the troops in question, and ensure compliance with the laws of war … the existence of 'effective control' was assumed [by the Trial Chamber] based on an incomplete checklist normally applied to hierarchical state forces, rather than non-linear actors operating across international boundaries, in a composite contingent composed of state forces and militia.[880]

The difficulty of controlling this composite contingent of state forces and militia was clearly one of the limitations relied upon by defence counsel in submitting that Bemba did not have effective control such that he had no material ability to prevent or repress the commission of crimes. This structural limitation was, it is contended, designed to build upon the geographical limitation of being removed from his troops such that the 'remote commander' concept, in

---

[877] *Prosecutor v Bemba (Appeal Brief)* (International Criminal Court, Appeals Chamber, Case No ICC-01/05-01/08 A, 28 September 2016) [173] ('*Bemba Appeal Brief*').

[878] Ibid [174] (emphasis in original).

[879] Ibid [130].

[880] Ibid.

totality, was put to the Appeals Chamber as the basis on which command responsibility could not be supported.

In its decision, the Appeals Chamber appeared to accept that the circumstance of 'non-linear command' did pose a limitation on Bemba's ability to exercise effective control, whilst expressly accepting the argument that the troops 'were operating in a foreign country with the attendant difficulties on Mr Bemba's ability, as a remote commander, to take measures'.[881]

In criticising this decision on the basis of the 'remote commander' limitation, Amann states:

> At odds with the doctrine that holds wilful blindness is no defence to a charge of command responsibility, the statement [as to the limitations of a remote commander] goes far to excuse a commander for absenting himself, figuratively and literally, from the field.[882]

In a dissenting opinion from the majority decision of the Appeals Chamber in *Bemba*, Judges Monageng and Hofmański rejected the majority findings regarding the appellate ground of Bemba's liability as a superior due to the purported limitations of a remote commander in the circumstances of that case. Significantly, that dissenting opinion stated:

> In faulting the Trial Chamber for failing to make findings as to whether the shortcomings in the measures that Mr Bemba took could be attributed to him and whether he purposively limited the mandates of the commissions and inquiries that he set up, the Majority seems to lose sight of the focus of article 28 of the Statute, namely holding a commander responsible for his failures and not for his actions.[883]

This statement clearly returns the doctrine to its purest form – that of a mode of liability based on an omission to perform a duty.[884] The failure referred to is the failure to 'take all necessary

---

[881] *Bemba Appeal Judgment* (n 91) [171].

[882] Dianne Marie Amann, 'In *Bemba*, Command Responsibility Doctrine Ordered to Stand Down', *ICC Forum* (Blog Post, 27 May 2019) <https://iccforum.com/responsibility>.

[883] *Prosecutor v Bemba (Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański)* (International Criminal Court, Appeals Chamber, Case No ICC-01/05-01/08 A, 8 June 2018) [45].

[884] See, eg, Dinstein (n 45) 238: 'It must be accentuated that command responsibility is all about dereliction of duty. The commander is held accountable for his own act (of omission), rather than incurring "vicarious liability" for the acts (of commission) of the subordinates'.

and reasonable measures within his or her power to prevent or repress [the crimes'] commission or to submit the matter to the competent authorities for investigation and prosecution'.[885] This is, of course, both the final sub-paragraph of Article 28(a) and Article 28(b), pertaining to military commanders and non-military superiors respectively, and is a material element of the mode of liability of command responsibility.

Criticism of the decision of the Appeals Chamber has centred on what has been considered to be a lowering of the standard of command responsibility in circumstances in which a commander is geographically remote from subordinates. As Amann states, '[t]he words "all" and "necessary" militate in favour of setting high expectations on what it is reasonable to expect of a commander. But the appellate majority placed the bar quite low'.[886] Guilfoyle, Kyriakakis and O'Brien tend to reject this criticism, stating:

> To the extent the case stands for any generalizable proposition it is likely only that 'the remoteness of a commander may be a relevant fact rather than the basis of a legal distinction' in assessing the measures practically open to a military commander charged with the suppression of crimes by subordinates.[887]

Affording remoteness of command the weight of one relevant fact in the determination of the test of effective control as manifest in the ability to take the requisite measures to prevent/suppress/report, rather than making remoteness the key determinant, is significant in the context of military commanders operating in a hierarchical structure under degrees of command authority. It is that command structure which distinguishes the military commander from the non-military superior and which, it is argued, allows for a greater evidentiary basis on which to find effective control by the remote military commander.

Further, the appellate decision in *Bemba* does not turn the doctrine of command responsibility on its face by exculpating military higher commanders from all responsibility for the actions of subordinates, regardless of proximity. As Judges Wyngaert and Morrison stated in their separate opinion as part of the majority decision:

---

[885] *Rome Statute* (n 22) arts 28(a)(ii), 28(b)(iii).

[886] Amann (n 882).

[887] Guilfoyle, Kyriakakis and O'Brien (n 767) 247, quoting Miles Jackson, 'Geographical Remoteness in Bemba', *EJIL Talk!* (Blog Post, 30 July 2018) <https://www.ejiltalk.org/geographical-remoteness-in-bemba/>.

> The *main responsibility* of the higher-level commander is to make sure that the unit commanders are up to the task of controlling their troops. It is not the task of the higher-level commander to micro-manage all lower level commanders or to do their jobs for them. The duty of higher-level commanders is to ensure that those immediately under them comply with their obligations.[888]

Whilst the reference to ensuring compliance by immediate subordinates is, on its face, inconsistent with the multi-layered nature of command responsibility as confirmed by the ICTY,[889] this statement is entirely consistent with the mission command philosophy which, as discussed above, does not displace command responsibility. Further, it is supported by the first-hand observations of Holder[890] and Smith,[891] discussed above, in their analyses of higher command responsibilities in the context of mission command and their collective conclusion that delegation of tasks does not mean command responsibility is abrogated such that monitoring and, if necessary, intervention is not warranted.

As Guilfoyle, Kyriakakis and O'Brien succinctly state, 'the phrase "main responsibility" should not necessarily be taken to exonerate commanders at a higher-level from all responsibility as regards crimes committed at the front line … [r]ather, the case may turn on its own facts'.[892] It is thus likely any analysis of the command responsibility of higher ADF commanders will turn on the facts of individual cases including consideration of the extent of effective control regardless of geographic remoteness.

By way of a segue to the application of the *Bemba* remote commander appellate decision to Australian military operations, it is contended it is important to distinguish between the factual command relationships in *Bemba* and those of ADF operations. Bemba was described by the Appeals Chamber as the 'President of the [Movement for the Liberation of the Congo], a political party founded by him and based in the northwest of the [Democratic Republic of the Congo], and Commander-in-Chief of its military branch, the [Army for the Liberation of the

---

[888] *Bemba Separate Opinion* (n 435) [34]–[35] (emphasis added).

[889] See *Čelebići Appeal Judgment* (n 226) [226]; *Blaškić Trial Judgment* (n 90) [303].

[890] Holder (n 857) xvi.

[891] Smith (n 856) 284.

[892] Guilfoyle, Kyriakakis and O'Brien (n 767) 248–9.

Congo]'.[893] Notwithstanding the fact that Bemba was tried as a military commander rather than as a non-military superior, the reference to his status as Commander-in-Chief of the military branch of the political party which he founded is significant. The appointment of heads of state or senior politicians acting in the capacity of heads of state as commanders-in-chief of militaries is not unusual,[894] but this fact does not alter the reality that such an appointment does not necessarily, in practice, render the commander-in-chief a military commander as opposed to a non-military superior.

Regardless, Bemba was charged under Article 28(a) as a military or military-like commander on the factual circumstances of that case. In supporting the decision of the Appeals Chamber, Petkovich describes the Chamber's interpretation of what constitutes a 'necessary and reasonable measure' as a 'meaningful mechanism to contextualise the unique logistical challenges faced by remote African commanders'.[895] In forming that view, Petkovich relies on the almost exclusive focus of the Chamber on 'how a commander's individualized circumstances may color what constitutes a "necessary and reasonable measure" under Article 28(a)(ii)'.[896]

The distinction between military commanders and non-military superiors is relevant insofar as some of the elements of the two categories differ in substantive ways, and the evidence required to establish the elements of command responsibility is likely to differ between the two categories. Whilst the element that was subject to the greatest analysis in the appellate decision of *Bemba*, the failure to take all necessary and reasonable measures, is common to both, the applicable evidence and weight to be given to such evidence is likely to be markedly different. This is due to the second limb of that element – 'within his or her power'.[897]

It follows that, in considering the application of the *Bemba* appellate decision to the factual circumstances of ADF command and control structures and, relevantly, the elements of

---

[893] *Bemba Appeal Judgment* (n 91) [13].

[894] See, eg, *United States Constitution* art II, § 2 entitled the 'Commander-in-Chief Clause'.

[895] Faust Petkovich, 'The ICC Appeals Chamber's *Bemba* Judgment – A Necessary Contextualization of Article 28's *Actus Reus* Element', *ICC Forum* (Blog Post, 25 May 2019) <https://iccforum.com/forum/responsibility>.

[896] Ibid.

[897] *Rome Statute* (n 22) arts 28(a)(ii), 28(b)(iii).

command responsibility as it applies to military commanders, the factual circumstances of the command structure, including the existence of any limitations on the exercise of effective control including the power to take the requisite measures, should properly be taken into account. Similarly, the factual circumstances surrounding the individual commander, including whether the commander is within a formal hierarchical structure or, rather, is a military-like commander confronted with the challenges of command and control identified in *Bemba*, is likely to be considered in any determination of effective control.

6.4.1 Remoteness of command and Australian operational deployments

With respect to the command and control expectations of Commander JTF 633 whilst geographically located outside Afghanistan, the following question was asked of the Department of Defence by Australian Senator Jacqui Lambie:

> In locating Commander Joint Task Force 633 outside Afghanistan, what were the expectations of the Australian Government in terms of the extent of command and control or authority and control to be exercised by Commanders, Joint Task Force 633 over Australian force elements in Afghanistan?[898]

The Department of Defence responded as follows:

> Commander Joint Task Force 633 maintains command and control or control and authority over multiple Force Elements and Task Units within the wider Middle East Region.
>
> Specific delegations and Command and Control chains supporting operations are published in Command Delegations, Operations Orders, and Instructions.[899]

Whilst the second paragraph of the response is vague, it does serve to confirm the fact that the specifics of the functions of higher commanders were published, albeit internally and under security caveats, whilst the broader expectation was that CJTF 633 would exercise command and control over the force elements and task units in Afghanistan. Presumably, the reference

[898] Question on Notice No 2793 to Department of Defence, Canberra, *Australian Government Expectations of Command and Control*, 27 January 2021.

[899] Response to Question on Notice No 2793 to Department of Defence, Canberra, *Australian Government Expectations of Command and Control*, 27 January 2021.

to the maintenance of ‘command and control or control and authority’ was intended to be ‘command and control or authority and control’, as stated in the question. The upshot of this response is that the geographic remoteness of command was not considered by the Australian Government to be a limiting factor in the exercise of command/authority and control by commanders of JTF 633 over forces in Afghanistan. This conclusion is supported by the descriptions of the exercise of OPCOMD or OPCON by former commanders of JTF 633, discussed above, in the course of their respective deployments in that role. In that light, on the facts of the individual cases analysed in this thesis, it is unlikely that remoteness of command would be considered a limiting factor in the exercise of effective control and the ability to take the requisite measures to prevent/repress/submit on the part of higher ADF commanders given control of ADF force elements in Afghanistan.

6.5 Conclusion

Degrees of authority within the Australian command structure delineate responsibilities but such constructs have been relied upon in exculpating or, at the very least, mitigating the chain of command from command responsibility. This hierarchical structure shares commonality with other militaries and expressly adopts NATO terminology and definitions. This commonality across international borders is relevant to any consideration of the relationship between such degrees of authority and command responsibility as a doctrine of international application. Definitions of command and control in Australian doctrine are consistent with the indicia articulated by the ICC in *Bemba*. Seeing through the complexity and opacity of Australia’s command arrangements in Afghanistan, for example, provides for a clear assessment that the chain of command had significant capacity for effective command and control and, indeed, exercised such capacity, at least in later iterations of the command arrangements in that theatre of operations from 2003. Effective control, of course, is a key element in proving command responsibility under both the Rome Statute and the Criminal Code.

The adoption of deployed Joint Task Force command arrangements, prima facie, places such arrangements squarely within the ambit of the elements of command responsibility, although such a determination is a matter of evidence rather than being a purely legal determination. To date, the evidence of former higher commanders, internal defence reviews, and ADF doctrine supports a conclusion of effective control such that the structural degrees of authority do not,

of themselves, exculpate commanders up the chain from command responsibility. Former commanders of JTF 633 did publicly state their knowledge and extensive command and control of ADF forces at the relevant times. As emphasised in the introduction to this chapter, however, the threshold to be met by this argument is not to prove actual knowledge of a particular war crime but merely that there is a question worthy of proper investigation as to the state of knowledge of commanders at the relevant times addressed in the Brereton Report. To apply this analysis to the research question regarding the trust placed in commanders by the Australian public, Frame states, in the context of the Brereton Inquiry:

> The public were entitled to answers about … whether those in command and leadership positions were aware of or suspected misconduct, and if those in positions of responsibility were incompetent or negligent in failing to exercise sufficient control over their subordinates.[900]

Along similar lines to the degrees of command authority is the leadership philosophy of mission command, which has been adopted widely in the ADF albeit not quite to the level of doctrine. Mission command has been relied upon as a mechanism by which to exculpate higher commanders from liability under command responsibility to a similar extent to that of the command authority structure. A more detailed analysis of the nexus between mission command and command responsibility, however, reveals exculpation on this basis to be flawed both as a matter of the application of the elements of command responsibility to the practice of mission command and as a matter of the tangible practice of mission command in the Australian operational setting. Using ADF doctrine as a starting point, it expressly recognises that mission command does not displace the necessity for 'active control'. The notion of active control is supported in international jurisprudence on command responsibility as equating to effective control and the proper discharge of a commander's duty.

The notion of delegation, which is at the heart of mission command, rather than allowing for the abrogation of responsibility injects a new range of responsibilities and duties into a commander's repertoire. Such new responsibilities include the proper selection of subordinate commanders, instruction and follow-up control, the latter, again, being a corollary of the effective control element of command responsibility. Both doctrine and post-operational

[900] Frame (n 12) 412.

studies have revealed an over-reliance on communications by commanders up the chain with the resultant diminution of the decentralised nature of mission command. This return to a centralised manner of control, of itself, tends to rebut any suggestion that mission command has displaced command responsibility. Single-service army doctrine similarly confirms that mission command allows for the application of centralised control whenever appropriate. The fact that mission command has been described by former ADF commanders as not being a matter of 'set and forget', particularly in the context of oversight and discipline, suggests that the monitoring of the conduct of subordinate forces is an occasion on which more centralised control is warranted. This is further supported in the context of Australia's operations in Afghanistan during which commanders had to be reminded of the requirements of command responsibility and subordinate commanders and soldiers had adverse reactions to analyses of their actions where adherence to the rules of engagement was in question.

The ICC Appeals Chamber, in *Bemba*, introduced a further basis on which the culpability of higher commanders may be diminished, that of remoteness of command. This appellate decision turned on the ability of a commander to take all necessary and reasonable measures within his or her power to prevent/suppress/report crimes and, significantly, limitations on such ability arising from geographical remoteness from subordinate forces. At the outset, it is important to distinguish between the factual circumstances of Bemba, as a civilian politician and self-imposed commander-in-chief of his forces which comprised composite state forces and militias, and the strict hierarchical nature of professional ADF military command. The former, whilst charged as a military or military-like commander, operated within a loose command structure inclusive of reduced means of communication with forces whilst the latter are military commanders within a tight structure inclusive of readily available means of communication. The evidence regarding the ability to take the necessary and reasonable measures is likely to be markedly different for the two structures such that the test of 'within his or her power' is likely to be more readily satisfied with respect to the latter.

The Appeals Chamber in *Bemba* focused on the individualised circumstances of command in considering the satisfaction of the necessary and reasonable measures test and the individual circumstances of ADF command are inevitably going to be vastly different to those of a

military-like commander in the position of a 'remote African commander'[901] or, as described in the *Bemba* defence appellate brief, a 'non-linear actor'[902] such as Bemba. It is likely, in any event, that remoteness of command will be considered to be merely one relevant fact in determining the test of effective control rather than the key determinant.

Military commanders operating in a hierarchical structure under degrees of command authority allow for a greater evidentiary basis on which to find the existence of effective control in circumstances involving the remote military commander. In applying the *Bemba* appellate decision to Australia's JTF command structure in the MEAO, the geographic remoteness of the higher commanders from the force elements in Afghanistan was never considered to be a limiting factor in the exercise of command/authority and control by JTF commanders over tactical forces. This point is supported both by Department of Defence political correspondence to that effect and by the first-hand accounts of former commanders of JTF 633 in their descriptions of the exercise of operational command (OPCOMD) or operational control (OPCON) in the course of their deployments.

[901] Petkovich (n 895).

[902] *Bemba Appeal Brief* (n 877) [173].

CHAPTER 7
IMPLICATIONS OF DIVERGENCE IN THE APPLICATION OF THE DOCTRINE

> An absence of information on the construction and application of the [mode of criminal liability] by national authorities may also limit accountability efforts against those most responsible persons who hold positions of authority.[903]

> The Brereton Report, with its disjunction between the suspicious behaviour of subordinates who committed war crimes and the exoneration of commanders reluctant to investigate the evidence … illustrates how national military organizations are often quick to excuse commanders who indirectly contribute to war crimes by subordinates, and how a consequential gap in the law of command responsibility can be used to justify that exoneration.[904]

7.1 Introduction

The doctrine of command responsibility is, at its core, about affording a mode of liability to those in positions of command in order to deter the commission of war crimes by subordinates. Hence the statements above reinforce the need for the proper construction and application of national legislation implementing the doctrine. In the absence of proper legislative construction and resultant application of the law, the liability of those in a position to influence the behaviour of subordinates is diminished and thus the deterrent value of such laws is similarly reduced. As Amann states, 'few acts carry a weightier burden than the acceptance of authority over persons permitted to kill'.[905] It follows that such a burden must be shared by national legislatures in properly empowering those in authority to constrain the permission to use lethal force against others in compliance with norms of conduct in warfare. Such empowerment must be balanced with the threat of sanction in the event constraint is not adequately applied. Dereliction of the duty on the part of commanders to prevent or punish, which is at the core of the conduct giving rise to the liability, offends against the national legislature which imposed the obligation at first instance.[906]

---

[903] Centre for International Law Research and Policy (n 491) 8.

[904] Fellmeth and Crawford (n 378) 1261.

[905] Amann (n 882).

[906] Sepinwall (n 11) 295.

If command responsibility is to properly apply as a means of enforcing compliance with international humanitarian law and broader norms of humanitarian conduct in conflict, the onus is on states parties to the Rome Statute to faithfully apply the doctrine domestically. As previously discussed, Australia elected to incorporate the Rome Statute into domestic Australian criminal law via amendments to the Commonwealth Criminal Code. In doing so, and as Bronitt and McSherry eloquently articulate, 'bits and pieces were taken from the ICC Statute and the Elements of Crimes but the additions that have been made do not easily fit within the framework of the existing Criminal Code'.[907] As discussed in earlier chapters, the general principles of criminal responsibility which existed in the Criminal Code prior to ratification of the Rome Statute were overlaid upon the Rome Statute implementing legislation including, of course, section 268.115 which incorporates command responsibility into the code. This overlay included the pre-existing fault elements such that implementation in this manner led to the 'possibility that the interpretation of the Australian international crimes will diverge from the general doctrines of extended responsibility developed by the ICC under the Rome Statute'.[908] These general doctrines of extended responsibility include the doctrine of command responsibility.

This chapter examines variances between the terms of Article 28(a) of the Rome Statute and subsection 268.115(2) with a view to disclosing any divergence in Australia's application of the doctrine of command responsibility. The chapter subsequently flows to an analysis of the implications of any such divergence with a view to ascertaining whether Australia has imported the correct legal standard regarding command responsibility into domestic Australian law. This goes to the issue of complementarity and thus to the validity of Australia's implementation of Article 28 into domestic law. The risk in that regard is whether the complementarity provisions of the Rome Statute could be triggered in the event Australia's laws are found to be 'flawed as regards the definitions of the crimes or the general principles governing matters such as modes of liability',[909] such that the ICC could assume jurisdiction. A further risk considered in this analysis is the reputational damage to Australia on the international stage in the event prosecutions under section 268.115(2) could not be sustained due to the manner in which

[907] Bronitt and McSherry (n 623) 957.

[908] Ibid 958.

[909] Kleffner (n 17) 2.

Australia implemented the provisions of Article 28(1) and any resultant divergence in the application of these provisions.

As a precursor to this analysis, Table 6, below, provides a comparison of the respective elements of Article 28(a) and subsection 268.115(2). Table 7, below, applies the alternative deconstruction of subsection 268.115(2).

Table 6: Comparative element analysis of Article 28(a) and subsection 268.115(2)

Art 28(a) material element	Art 28(a) mental element	Subsection 268.115(2) physical element	Subsection 268.115(2) fault element
Crimes within the jurisdiction of the Court	Knowledge	Offences under Division 268	Recklessness
Superior–subordinate relationship	Knowledge	Superior–subordinate relationship	Recklessness
Effective command/authority and control	Knowledge	Effective command/authority and control	Recklessness
Forces were committing/about to commit crimes	Knew or should have known	Forces were committing/about to commit crimes	Knowledge or recklessness
Failure to prevent/repress/submit to authorities	Intention	Failure to prevent/repress/submit to authorities	Intention
Crimes were a result of the failure to exercise control properly	Intention	Crimes were a result of the failure to exercise control properly	Recklessness

Table 7: Comparative element analysis (alternative subsection 268.115(2) deconstruction)

Art 28(a) material element	Art 28(a) mental element	Subsection 268.115(2) physical element	Subsection 268.115(2) fault element
Crimes within the jurisdiction of the Court	Knowledge	Offences under Division 268	Recklessness
Superior–subordinate relationship	Knowledge	Superior–subordinate relationship	Recklessness
Effective command/authority and control	Knowledge	Effective command/authority and control	Recklessness
Forces were committing/about to commit crimes	Knew or should have known	Forces were committing/about to commit crimes	Knowledge or recklessness
Failure to prevent/repress/submit to authorities	Intention	Failure to prevent/repress/submit to authorities	Intention
Crimes were a result of the failure to exercise control properly	Intention	Failure to exercise control properly	Intention
		Failure to exercise control properly resulted in the commission of the crimes	Recklessness

7.2 Legislation to 'facilitate compliance' with Australia's obligations

The descriptive Long Title of the *International Criminal Court Act 2002* states: 'An Act to facilitate compliance by Australia with obligations under the Rome Statute of the International Criminal Court, and for related purposes.'[910] Consistent with norms of legislative drafting and statutory interpretation, the Long Title describes the purpose of the *ICC Act* in a general

[910] *Criminal Code* (n 23) Long Title.

sense[911] such that its interpretative value lies in ascertaining the purpose and object of the legislation. In that regard, the purpose to facilitate compliance with obligations requires reference to the treaty itself including, significantly, any reservations or declarations made by Australia in the ratification process. This aspect was analysed in detail in preceding chapters such that, for the present purposes, the notion of obligations and the impact of a breach of any such obligations is considered. As is discussed below in the context of any duty imposed in terms of the implementation of the Rome Statute, the term 'obligations' is used in a general sense in the Long Title.

The Explanatory Memorandum to the International Criminal Court (Consequential Amendments) Bill 2002, which amended the Criminal Code to include offences in the Rome Statute in Australian law, stated:

> By ensuring that the crimes in the Statute are crimes against Australian law, Australia ensures that it will always be in a position to investigate and, if appropriate, prosecute a person who is accused of a crime under the Statute – we will never be 'unable' to.[912]

The question begs asking, however, whether the manner in which Australia implemented the crimes in the statute, in this instance, the provisions regarding command responsibility, into Australian law does, in fact, mean 'we will never be "unable" to investigate and, if appropriate prosecute'[913] a matter under those provisions. This question turns on two interrelated issues: firstly, whether the threshold tests of culpability established by the fault elements deriving from the legislative provisions enable or, indeed, disable effective investigations and prosecutions and, secondly, whether the test of admissibility before the ICC which triggers the jurisdiction of the Court is satisfied in light of the extent to which the provisions enable domestic prosecutions. Potential barriers to effective prosecutions and the notion of Australia's inability to investigate and prosecute command responsibility modes of liability, in the context of the test of admissibility of matters before the ICC, is considered below.

---

[911] Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011) 21.

[912] Explanatory Memorandum, International Criminal Court (Consequential Amendments) Bill 2002 (Cth) 3.

[913] Ibid.

7.2.1 Unfairness: ambiguity between the Rome Statute and Criminal Code terms

The need for specificity in the drafting of the elements of crimes, both of the statutory variety as articulated in Articles 6 to 8 and of those defining criminal responsibility, was recognised by the 1996 Preparatory Committee, which considered that 'vague terms can cause ambiguity which, in turn, makes us unable to ensure full respect for the rights of the accused'.[914] As discussed below, the rights of the accused are undoubtedly and necessarily likely to be a key issue in any prosecution involving the command responsibility mode of liability under Australian law. It follows that any contention that such rights have been denied to an accused due to ambiguity between the terms of Article 28(a) and subsection 268.115(2), particularly terms related to elements including standards of fault, may impact the success of a prosecution, potentially at an interlocutory stage before evidence has been presented and tested.[915] The failure of domestic criminal proceedings at a preliminary stage in the absence of the hearing of evidence is likely to have an adverse effect on the deterrent function of the doctrine of command responsibility in international law, as well as breaching the obligations owed by Australia[916] and, indeed, the determination of states parties to end impunity and contribute to the prevention of international crimes.[917] This almost certainly would undermine the reputation of Australia as a state party to the Rome Statute.

A domestic Australian court hearing a case of command responsibility charged under the Commonwealth Criminal Code is likely to rely on domestic jurisprudence in interpreting the elements of the doctrine. Whilst this activity is undoubtedly one of statutory interpretation of domestic legal principles, it must, as a matter of the faithful implementation of treaty provisions into domestic law, carry with it a degree of interpretation of international law in the form of the Rome Statute provisions. In that regard Borda states:

---

[914] Gadirov and Clark (n 383) 507.

[915] See, eg, *Re Civilian Casualty Court Martial* (n 3), in which the prosecution failed at an interlocutory stage of proceedings based on an argument as to the existence of a particular fault element in the context of armed conflict.

[916] The reference to obligations in this regard is to the faithful implementation of command responsibility including achieving the broad objectives of ending impunity and preventing international crimes rather than arguing that a blunt obligation is imposed on Australia to implement the Rome Statute.

[917] *Rome Statute* (n 22) Preamble.

> The dangers of a mechanical reliance on national judicial decisions may be especially pronounced with respect to decisions that appear to be interpreting international law but that, in reality, are solely based on particular interpretations of national law and that could be misleading ('red herring' decisions).[918]

Smidt contends that the incorporation of the international *Yamashita* standard into domestic law is appropriate as a matter of international standing and equity in order to avoid an appearance that commanders from one state have greater immunity in military operations than those from other states.[919] Whilst Smidt's commentary in this regard focuses specifically on the United States' application of the doctrine of command responsibility, the discourse therein is equally applicable in the Australian context. Significantly, he argues that:

> If we are to hold ourselves out as an armed force that supports the rule of law, the internationally accepted 'knew or should have known' standard of command responsibility should be followed domestically. But most importantly, the international standard … is more likely to prevent war crimes because it places a greater burden on commanders to pay attention to the acts of subordinates, an affirmative duty to stay informed.[920]

The principles of consistency and equity in the implementation and application of the rule of law return the analysis to the unfairness aspect of inconsistency between the terms of the Rome Statute and the Criminal Code. Australia cannot, on one hand, hold itself out as a pillar of the international community in its application of and advocacy for the rule of law[921] whilst concurrently implementing and applying laws which are inconsistent with, and apply a lesser standard to, the terms of international treaties to which Australia is a state party. That contention, of course, leads to an analysis of the notions of the freedom of implementation of treaties and the requirements pertaining to the performance of treaty obligations.

---

[918] Borda (n 354).

[919] Smidt (n 146) 211–12.

[920] Ibid 212.

[921] See, eg, Attorney-General's Department, 'Rule of Law' (Information Sheet, 2022) <https://www.ag.gov.au/about-us/what-we-do/rule-law>.

7.2.2 Freedom of implementation vs good faith performance of treaty obligations

International law provides states with a general freedom to implement and satisfy their international obligations under treaties as they see fit.[922] The International Court of Justice, in the *LaGrand Case*, confirmed the extent of discretion the Court gives states in the means by which they implement their international obligations.[923] More specifically, states parties to the Rome Statute are afforded a degree of discretion regarding the implementation of crimes within the statute into domestic law.[924] This discretion exists notwithstanding the terms of the sixth paragraph of the Preamble to the Rome Statute, in which states parties recall that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.[925] As confirmed in the *Oil Platforms Case*,[926] preambles to treaties are relevant to their interpretation in the context of the treaty terms and in light of their object and purpose, as stated in Article 31 of the *Vienna Convention on the Law of Treaties*,[927] but cannot be read in isolation such that they displace the need for reference to the substantive text in defining the substance of the treaty.[928]

The Rome Statute does not specify how its provisions are to be implemented into domestic law and the sixth paragraph of the Preamble, rather than imposing any particular legal duty on states as to the manner in which they implement the Rome Statute, merely serves as a reminder to states parties to incorporate Rome Statute crimes 'at the domestic level in order to enable … primary jurisdiction effectively'.[929] As Judge Fernández de Gurmendi, a former President of the ICC, notes, the introduction of the crimes that are formulated in the Rome Statute 'is strictly speaking not an obligation that emanates from the Rome Statute – rather, the Rome Statute is

---

[922] Ward Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (TMC Asser Press, 2005) 132.

[923] *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466, [125], cited in Ferdinandusse (n 922) 132.

[924] Patricia Hobbs, 'The Catalysing Effect of the Rome Statute in Africa: Positive Complementarity and Self-Referrals' (2020) 31 *Criminal Law Forum* 345, 351.

[925] *Rome Statute* (n 22) Preamble.

[926] *Oil Platforms (Islamic Republic of Iran v United States of America) (Preliminary Objection)* [1996] ICJ Rep 803 ('*Oil Platforms Case*').

[927] *Treaties Convention* (n 321) art 31.

[928] *Oil Platforms Case* (n 926) 23, 31.

[929] Hobbs (n 924).

based on the understanding that it is a pre-existing obligation of each State to exercise its criminal jurisdiction over those responsible for international crimes'.[930]

This point was supported by implication by the ICC Office of the Prosecutor (OTP) when that office referred to the sixth paragraph of the Preamble as emphasising a principle that states are accountable for investigating and prosecuting crimes committed under their respective jurisdictions.[931] The exercise of national jurisdiction is considered by the OTP to be both a right and a duty[932] but that office does not suggest that any duty is imposed on states parties as to the implementation of the Rome Statute provisions.

Whilst the presumptive freedom of implementation of treaty obligations is not, on its face, controversial, principles of equity and equality in the application of norms of international law as well as the broader principle of the interpretation of national law consistently with international legal obligations[933] create 'a more intrusive framework of implementation … by imposing the same standards on all States'.[934] The fettering of the discretion given to states parties to the Rome Statute, in terms of the implementation of obligations imposed therein, is also likely to prima facie satisfy the good faith performance requirement of the treaty. That is particularly the case in circumstances in which the national courts of a state party are hesitant, in light of the terms of the domestic legislation, to impose constraints on other branches or agencies of the national government which are not similarly imposed on foreign counterparts.[935]

[930] Silvia Fernández de Gurmendi, 'From Ratification to Action: The Importance of Full Implementation of the Rome Statute' (Keynote Speech, Hague Institute for Global Justice Seminar, 16 September 2015) 2.

[931] International Criminal Court Office of the Prosecutor, 'Paper on Some Policy Issues Before the Office of the Prosecutor' (Policy Paper, September 2003) 5.

[932] Ibid.

[933] See, eg, *Polites v Commonwealth* (1945) 70 CLR 60, 77 in which Dixon J affirmed the general 'rule of construction that, unless a contrary intention appears, general words occurring in a statute are to be read subject to the established rules of international law'.

[934] Ferdinandusse (n 922) 133.

[935] Ibid.

Article 26 of the Vienna Convention provides for the *pacta sunt servanda*[936] rule, as follows: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'[937] The good faith performance of treaties or, as Gardiner describes it, the requirement that 'no party has … their fingers crossed behind their back',[938] has been held to include the 'autonomous interpretation' of treaty terms, which requires stepping 'outside any particular national legal culture'.[939] As Lord Steyn stated in the United Kingdom case of *Ex parte Adan*:

> In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning.[940]

In the context of Australia's implementation of Article 28(a) into domestic law, this statement could be interpreted as requiring disregard of the national legal culture associated with the general principles of criminal law which pre-dated and were superimposed over subsection 268.115(2) of the code towards the express and unambiguous terms of Article 28(a). That would be an oversimplification of the good faith requirement and would likely convolute the presumptive freedom of implementation.

An Australian court could not interpret the fault element of recklessness consistently with the mental element of should have known – the two are diametrically opposed as standards of fault with the latter broadly equating to negligence. Having said that, there is some value in Lord Steyn's articulation of the good faith principle through the lens of the enactment of laws at first instance rather than their interpretation in subsequent proceedings. An argument is available that the Australian legislature has not performed the treaty in good faith due to the manner in which the terms of Article 28(a) were incorporated into domestic Australian law. It follows that, in enacting subsection 268.115(2), the legislature should have stepped outside Australia's national legal culture, that is, the pre-existing general principles of criminal responsibility, and

---

[936] Translation of the Latin: 'agreements must be kept'.

[937] *Treaties Convention* (n 321) art 26.

[938] Gardiner (n 339) 29.

[939] Ibid 31, citing *R v Secretary of State for the Home Department; Ex parte Adan* [2001] 2 AC 477, 515–17 (Lord Steyn).

[940] *R v Secretary of State for the Home Department; Ex parte Adan* [2001] 2 AC 477, 515–17.

incorporated the terms of Article 28(a) precisely in order to be considered to be performing the treaty in good faith. Noting the fact that Article 28 of the Rome Statute introduced a novel concept of liability into domestic Australian law, performance of the treaty in good faith warranted the accommodation of the concept in identical terms to those of Article 28(a) precisely because the concept of command responsibility was new to Australian law.

In short, there are some constraints on Australia defaulting back to the presumption of the freedom of implementation of the Rome Statute in order to overcome the requirement of the good faith performance of treaties. As with any presumption at law, the presumptive freedom of implementation is 'a *provisional* truth that can be displaced by evidence disproving its validity in a particular case'.[941] The question is thus whether Australia's reliance on the presumptive freedom of implementation can or should stand in the face of any evidence displacing the validity of such reliance. Australia, arguably, cannot say it has faithfully implemented the terms of the Rome Statute with its national fingers crossed behind its back all the while incorporating elemental constructs which are inconsistent with the terms of the Rome Statute.

7.3 'Recklessness' versus 'intent', 'knowledge' and 'should have known'

As discussed previously, the fault element of recklessness and its civil law equivalent, *dolus eventualis*, were expressly excised from drafts of the Rome Statute so that the default mental elements of intent and knowledge remain alongside any mental elements expressed in respective provisions. Pre-Trial Chamber II in *Bemba* and both Trial Chamber I and the Appeals Chamber in *Lubanga* have accepted that *dolus eventualis* and, expressly or by implication, recklessness, are not incorporated into the Rome Statute.[942] Stamp logically considers that the consequence of this line of judicial authority that *dolus eventualis* and recklessness are excluded from the statute is that

---

[941] Nicholas Rescher, *Presumption and the Practices of Tentative Cognition* (Cambridge University Press, 2006) 1, quoted in Grover (n 369) 351 (emphasis in original).

[942] See *Bemba Decision on the Confirmation of Charges* (n 237); *Prosecutor v Lubanga (Judgment Pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012); *Prosecutor v Lubanga (Judgment on the Appeal of Mr Thomas Dyilo Lubanga against his conviction)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06A5, 1 December 2014) ('*Lubanga Appeal Judgment*').

> there may be divergence between the ICC and national legal systems in relation to the scope of conduct that establishes criminal responsibility [such that] this divergence, if indeed it is occurring, could weaken the system of complementarity that is viewed as so integral to the ICC.[943]

Article 28(a) thus applies intent and knowledge by default to all elements other than the commission of crimes by subordinates to which the express mental element of 'knew or should have known' applies. The 'should have known' standard of fault has been described in both international and domestic Australian jurisprudence as akin to negligence. In stark contrast, section 268.115(2) of the Criminal Code applies recklessness as the presumptive fault element to the majority of the physical elements alongside intention by default and knowledge or recklessness expressly to the physical element of the commission of crimes by subordinates. This clear distinction in elemental deconstruction between the Rome Statute and Criminal Code command responsibility provisions begs the question whether such disparity has any practical implications in terms of differing standards of fault and what, if any, impact such disparity has on the application of command responsibility under Australian law as compared with the Rome Statute.

7.3.1 A lower threshold: acquittal due to unfairness to the accused

Olásolo contemplates the situation in which national proceedings have been manipulated, incidentally or by design, such that the fundamental rights of an accused have been violated resulting in the acquittal of the accused or, at the investigative stage, release without charge.[944] The ICTY contemplated the unfairness to an accused of imposing a standard of fault outside those specified in the applicable statute. In *Bagilishema*, the Appeals Chamber of the ICTR, in rejecting a standard of gross criminal negligence in imposing liability under the statute of that Tribunal, held as follows:

---

[943] Helen Stamp, 'Divergence in a System of Complementarity? The Incorporation of *Dolus Eventualis* in the Interpretation of Criminal Intent for Serious Crimes of International Concern: A Comparison of the International Criminal Court and the National Legal System of Canada' (Honours Dissertation, Curtin University, 2017) 5.

[944] Héctor Olásolo, *The Triggering Procedure of the International Criminal Court* (Martinus Nijhoff Publishers, 2005) 152.

> The Statute does not provide for criminal liability other than for those forms of participation stated therein, expressly or implicitly. In particular, it would be both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not clearly been defined in international criminal law.[945]

In the event the fault elements attached to command responsibility in an Australian prosecution under subsection 268.115(2) were considered to impose a lower threshold standard of fault than that dictated in Article 28(a), it is not beyond contemplation that an argument could be made that an accused has been denied fundamental rights due to the variance between the standards of the 'parent' provisions and those of the Australian implementing legislation.[946]

Noting recklessness does not exist in Article 28(a) but is prevalent as the default fault element in subsection 268.115(2), and the higher threshold standards of intent and knowledge apply to the material elements of Article 28(a) other than the commission of crimes by subordinates, to which knowledge or, in the alternative, the 'should have known' (akin to negligence) mental elements apply, it is clear that Australian law imposes a lower threshold test of fault on an accused than Article 28(a) with respect to the physical elements other than the commission of crimes by subordinates. This, in turn, places those elements of subsection 268.115(2) at a lower level of culpability, thus making them easier for the prosecution to prove as compared to a prosecution under Article 28(a).

The general provisions of the Criminal Code make it clear that proving intention and knowledge is a more demanding task than proving recklessness, hence the latter's placement at the lower end of the culpability spectrum and its assignment as the presumptive or default fault element.[947] It is this disparity which, it is contended, allows for the argument that the fundamental rights of the accused have been incidentally manipulated by the manner in which the Rome Statute provisions were incorporated into domestic Australian law. Badar implicitly supports this contention in the following analysis:

---

[945] *Bagilishema Appeal Judgment* (n 231) [34].

[946] See, eg, *Re Civilian Casualty Court Martial* (n 3), in which the prosecution failed at an interlocutory stage of proceedings based on an argument as to the existence of a particular fault element in the context of armed conflict.

[947] Leader-Elliot, 'Elements of Liability' (n 637) 36, 40.

> This will lead to a dual system of criminality under international criminal law. The perpetrators who commit their crimes while possessing the mental state of *dolus eventualis* will be acquitted by the International Criminal Court; whereas if they commit the same crime having the same mental state, they will be convicted by … national courts. Whether we should accept these differences as inevitable forms of fragmentation or still strive for some uniformity which would render the project of international criminal justice a more credible, legitimate and coherent one is a question yet to be answered by the coming jurisprudence of the International Criminal Court.[948]

Badar's final statement regarding the issue being addressed before the ICC predates the jurisprudence of the Court confirming the excision of *dolus eventualis* and recklessness from the statute. Therefore that question has now been answered by the Court.[949] Recklessness has been banished and shall remain so in the absence of a seismic shift in the approach of the ICC. Considering the three chambers of the Court have spoken and accepted the clear black-letter law and *chapeau* of the statute, such a seismic shift is, it is suggested, unlikely. In order for international criminal justice to achieve Badar's 'credible, legitimate and coherent' state, it is thus incumbent on national jurisdictions to implement or modify existing provisions consistently with those of the Rome Statute.

Far from being a fettering of the discretion afforded states parties in the means by which the Rome Statute is implemented, this contention reflects the duty to fight against impunity, which is central to the Rome Statute and, according to Bellelli, the duty under customary international law to suppress international criminal conduct.[950]

In order to determine whether states have complied with the duty of suppression in this context, Bellelli has posited the following assessment:

> To assess whether there has or has not been suppression of criminal conducts … in the fight against impunity … as required by the principle of complementarity, it is relevant to ascertain whether investigation, prosecution, trial and eventually punishment at the national level has or has not taken place by enforcing criminal law provisions which

---

[948] Mohamed Elewa Badar, 'The Mens Rea Enigma in the Jurisprudence of the International Criminal Court' in Carsten Stahn, Larissa van den Herik and Nico Schrijver (eds), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff Publishers, 2012) 503, 534.

[949] *Lubanga Appeal Judgment* (n 942) [527].

[950] Roberto Bellelli, 'Obligation to Cooperate and Duty to Implement' in Roberto Bellelli (ed), *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (Ashgate Publishing, 2010) 211, 215.

> reflect the *identical scope of criminality* of the provisions penalizing conduct at the international level. That is, that substantive criminal law provisions applied before domestic jurisdictions need to incorporate *all the constitutive acts and elements* of the international crimes as retained in the Statute.[951]

The dual system of criminality contemplated by Badar and, it is argued, reflected in a comparative analysis of Article 28(a) of the statute and subsection 268.115(2) of the code, clearly does not provide an identical scope of criminality in light of the different threshold tests applicable to the standard of fault in command responsibility. This analysis is considered further, below, with a focus on the introduction of more restrictive elements into domestic law.

The more immediate problem is, of course, whether this divergence or, as Badar describes it, 'dual system of criminality', will set the scene for interlocutory or appellate arguments in Australian proceedings that such divergence poses unfairness to an accused due to the differing threshold standards between Australian law and that of the Rome Statute. The argument posited in this thesis is in the affirmative. Further noting the ICC has made up its mind on this issue, and the fact that, as discussed previously, there are no prohibitions on the Australian legislature incorporating the 'knew or should have known' standard into subsection 268.115(2), this problematic divergence could readily be rectified by amendments to the Australian legislation. This would provide the added benefit of making Australia's command responsibility provisions more 'credible, legitimate and coherent' vis-à-vis the international system of criminal justice.

7.3.2 A higher threshold: inability to meet the burden of proof

The express fault elements of knowledge or recklessness, as they apply to the physical element of the commission of crimes by subordinates, clearly diverge from the 'parent' provisions of the Rome Statute insofar as recklessness sets a higher threshold standard of fault than the 'should have known' standard in Article 28(a). As discussed previously, 'should have known' equates to negligence which is lower on Leader-Elliot's aptly titled 'ladder or staircase of culpability' in the code.[952] Thus, the codified provisions are drafted more restrictively than those of the statute with respect to the physical element of the commission of crimes by subordinates. According to Bellelli, this has implications with respect to the willingness of a

[951] Ibid (emphasis added).

[952] Leader-Elliot, 'Elements of Liability' (n 637) 36.

state to perform its parallel duties to suppress international crimes and to fight impunity and the related admissibility of a case before the ICC. Bellelli states that:

> While utilizing national criminal provisions originally intended to protect different interests … to satisfy the (in)admissibility criteria it is not sufficient that implementing criminal law provisions are actually introduced under domestic law; should such provisions be drafted more restrictively than in the international corresponding provisions – by penalizing a reduced scope, as to the protected interests – a substantial impunity would be granted for acts falling within the jurisdiction of the Court … [i]n all such instances, the result would be a conflict between national provisions and the purpose itself of the Statute – that is the fight against impunity for the crimes under the ICC jurisdiction – and, thus, such reduced implementation would amount to a breach of international obligations.[953]

This analysis could be overlaid on the Australian legislative situation regarding command responsibility in national criminal provisions. In this case, the general principles of criminal responsibility were obviously drafted without any contemplation of some future international criminal law treaty. Conversely, the provisions incorporating the Rome Statute were enacted with little consideration of their interaction with the pre-existing provisions of the code regarding the general principles of criminal responsibility.[954] Whilst Australia expressly stated it was enacting 'equivalent' offences to those of the Rome Statute,[955] equivalent does not mean identical, as previously stipulated by Bellelli and, indeed, such equivalent provisions may well impose a higher threshold standard of fault and thus place Australia in the unenviable position of being unable to satisfy the burden of proof regarding particular crimes or modes of liability as anticipated in the Rome Statute.

Bellelli is not alone in critiquing domestic laws which foster impunity as a result of the enactment of provisions reducing the scope of the related international provisions. The Office of the ICC Prosecutor, in its November 2013 'Policy Paper on Preliminary Examinations',

---

[953] Bellelli (n 950) 219.

[954] Guilfoyle, Kyriakakis and O'Brien (n 767) 257. See also Timothy McCormack, 'Australia's Legislation for the Implementation of the Rome Statute' in Matthias Neuner (ed), *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries* (Berliner Wissenschafts-Verlag GmbH, 2003) 65, 79 in which the author points out the fact that command responsibility is an unfamiliar concept in Australian criminal law and therefore that it is important for the legislation to detail the test for command responsibility.

[955] Explanatory Memorandum, International Criminal Court (Consequential Amendments) Bill 2002 (Cth) 1.

considered the issue through the dual lenses of the inactivity trigger of complementarity, discussed in detail below, and the deliberate focus of domestic proceedings on low-level perpetrators to the exclusion of higher commanders. That paper states:

> Inactivity in relation to a particular case may result from numerous factors, including the *absence of an adequate legislative framework*; the existence of *laws that serve as a bar to domestic proceedings* … the deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more responsible; or other, more general issues related to the lack of political will or judicial capacity.[956]

As a matter of prosecutorial discretion in terms of case selection, the Office of the Prosecutor considers the 'deterrent and expressive effects' that the prosecution of commanders under command responsibility entails in ending impunity and ensuring the principle of responsible command.[957] By adopting this expressed policy, the ICC encourages states parties to direct its investigations towards those most responsible for the identified crimes.[958]

By way of a segue from the policy statements of the Office of the Prosecutor, Article 19 of the Rome Statute gives the ICC the sole power to determine whether national proceedings warrant the exercise of jurisdiction by the ICC[959] for the reasons discussed below. Maogoto argues that the application of Article 19 places the ICC in a position of de facto judicial review of the decisions of national courts in matters of relevance to the ICC.[960] Whilst Article 19, in its application to admissibility under Article 17, undoubtedly places an onus on states parties and concurrently empowers the ICC in terms of challenges to admissibility, to elevate that power to one of judicial review of national decisions is inconsistent with the deference afforded to national jurisdiction under the principle of complementarity. As stated by Bernard,

---

[956] International Criminal Court Office of the Prosecutor, 'Policy Paper on Preliminary Examinations' (Policy Paper, November 2013) 12–13 (emphasis added).

[957] International Criminal Court Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation' (Policy Paper, 15 September 2016) 15.

[958] Ibid 14. See also International Criminal Court Office of the Prosecutor, 'Strategic Plan 2019-2021' (Policy Paper, 17 July 2019) 19-20.

[959] *Rome Statute* (n 22) art 19.

[960] Jackson Maogoto, *State Sovereignty and International Criminal Law: Versailles to Rome* (Transnational Publishers, 2003) 249.

complementarity 'does not result in a hierarchal structure which subdues States to the power of the ICC'.[961]

This situation has a bearing on the validity of the provisions of the Criminal Code including, relevantly, the command responsibility provisions.

7.4 Stratified concurrent jurisdiction

Notwithstanding the rebuttable presumption of the freedom of implementation, discussed above, and the broader undertones of the principle of complementarity, the issue remains that the principle of complementarity might not apply in case of disparity, such that the ICC might take jurisdiction over Australian military commanders if it viewed the Australian implementation as insufficient. The Rome Statute itself addresses issues of conflict impacting the ability of states to investigate and prosecute crimes set out in the statute in its complementarity mechanism. The triggering of that mechanism may, however, be considered an extreme response on the part of the ICC in light of its focus on state primacy. Even where a finding rendering the command responsibility provisions of the Criminal Code inapplicable is not feasible, mechanisms are available by which the ICC can assume jurisdiction over some cases arising from a situation within its competence, and leave other cases arising from the same situation to national jurisdictions. This notion of shared or concurrent jurisdiction may mitigate any legislative disparities between the terms of the statute and those of the code.

7.4.1 Command responsibility in a framework of 'stratified concurrent jurisdiction'

If, as Triggs suggests, Australia's adoption of the 1995 *International War Crimes Tribunals Act* 'represent[ed] a growing willingness to surrender national jurisdiction to international tribunals for the prosecution of war crimes',[962] the passage of the *International Criminal Court Act* in 2002 represented a contrary stance. Indeed, the legislation represented the manifestation of the principle of complementarity in practice. If Australia's command responsibility provisions were considered to be problematic in terms of their compliance with the broader

[961] Diane Bernard, 'Beyond Hierarchy: Standard of Review and the Complementarity of the International Criminal Court' in Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (Oxford University Press, 2014) 371, 371.

[962] Triggs, 'Implementation of the Rome Statute' (n 566) 149.

objectives of the Rome Statute, including the denial of impunity for international crimes, the question that must be asked is whether this limits the application of the principle of complementarity such that Australian commanders may be liable to trial before the ICC. Indeed, this possibility has been contemplated in the literature. Malaguti describes a system of 'stratified-concurrent jurisdiction' in which only top-level leaders are left to the jurisdiction of international courts whilst all other defendants are prosecuted before domestic courts.[963]

This notion of shared jurisdiction or, as Burke-White describes it, 'shared competence'[964] regarding the investigation and prosecution of crimes, has apparently been contemplated by the ICC Office of the Prosecutor (OTP). In a 2003 policy paper focusing on combating impunity, the OTP stated:

> The Office will function with a two-tiered approach to combat impunity. On the one hand it will initiate prosecutions of the leaders who bear most responsibility for the crimes. On the other hand it will encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some means.[965]

An arrangement of this nature is not entirely unprecedented nor is it unfeasible or unworkable. The ad hoc tribunals identified the fact they lacked capacity to investigate and prosecute every case over which they had jurisdiction which resulted, eventually, in a division of labour between the tribunals and states, with the former picking and choosing its cases.[966] Indeed, the referral of intermediate and lower-level defendants to national courts for prosecution was integral to the ad hoc tribunals' mechanisms for completion of their mandate.[967] The concern of the ICTY was, however, that the characterisation and confirmation of the charges in the

---

[963] Maria Chiara Malaguti, 'Can the Nuremberg Legacy Serve any Purpose in Understanding the Modern Concept of Complementarity?' in Mauro Politi and Federica Gioia (eds), *The International Criminal Court and National Jurisdictions* (Ashgate Publishing, 2008) 114, 121.

[964] William Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice' (2008) 19 *Criminal Law Forum* 59, 61.

[965] International Criminal Court Office of the Prosecutor, 'Paper on Some Policy Issues' (n 931) 3.

[966] Ford (n 362) 322.

[967] Fidelma Donlon, 'The Judicial Role in the Definition and Implementation of the Completion Strategies of the International Criminal Tribunals' in Shane Darcy and Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press, 2010) 353, 362.

international indictments were not being reflected in the national indictments including being characterised as ordinary domestic crimes in national indictments.[968]

In the context of a potential stratified concurrent arrangement between Australia and the ICC, this concern of the ICTY would likely be alleviated by the ICC assuming jurisdiction over command responsibility cases, and thus applying the provisions of Article 28(a), and Australian authorities prosecuting lower-level defendants charged with substantive offences as principal offenders, and thus applying the relevant provisions of Division 268 of the Criminal Code. A resolution of this nature would alleviate any concerns surrounding Australia's implementation of the relevant provisions of the Rome Statute. In the event the recklessness disparity arose in the stratified arrangement, offences subject to such disparity would remain the domain of the ICC whilst offences in which intent or knowledge are common to both the statute and the code would be subject to national jurisdiction.

7.5 Complementarity: codified command responsibility and the 'impunity gap'

> The fight against impunity will not be won at the international level alone. It must be fought and won inside States, with the political will of the Governments and in the hearts and minds of the citizens.[969]

The Preamble to the Rome Statute affirms that states parties were '[d]etermined to put an end to impunity for the perpetrators of [the crimes covered by the Statute] and thus to contribute to the prevention of such crimes'.[970] It is the prevention of such crimes which goes to the heart of the command responsibility doctrine in the deterrent effect the threat of prosecution has on higher commanders' propensity to ensure compliance with norms of international humanitarian law by their subordinates. This determination to address impunity from prosecution, particularly on the part of military and civilian superiors, is balanced against the Court's statutory obligation to afford primacy to national jurisdictions in investigating and prosecuting crimes and modes of liability in the Rome Statute under the auspices of the complementarity

[968] Ibid 365–6.

[969] Patricia O'Brien, 'Supporting Complementarity at the National Level: An Integrated Approach to the Rule of Law' (Speech, International Center for Transitional Justice/United Nations Development Programme Greentree Retreat, 7 December 2011) 2.

[970] *Rome Statute* (n 22) Preamble.

provisions. Complementarity is not, however, an absolute power afforded to national jurisdictions but, rather, is a procedural bar to the jurisdiction of the ICC.[971]

The Office of the Prosecutor of the ICC, in its 2003 policy paper, considered a greater role on the part of the ICC in bringing perpetrators to justice up and down the chain of military command in order to avoid leaving an 'impunity gap' in national prosecutions due to strategies focusing on 'those who bear the greatest responsibility for the crimes'.[972] This policy statement evidences a very subtle criticism of strategies undertaken by states which, incidentally or by design, introduce the aptly described impunity gap between offenders at various levels of the military hierarchy. Such strategies include the manner in which states parties implemented the Rome Statute broadly and Article 28 specifically into domestic law and the manner in which such law is considered in judicial and quasi-judicial settings. As Greppi states, a state 'should conform its legal system to the requirements of the Rome Statute in a correct approach to the principle of complementarity'.[973]

In critiquing the concept of complementarity in the statute, in terms of its ability to achieve the stated aims of states parties, Nouwen considers that 'the absolute war on impunity succeeds in achieving some justice, but also produces, shapes and legitimates injustices'.[974] In the context of command responsibility, the legitimating of injustices is achieved, inter alia, by the manner in which command responsibility is applied in domestic legal settings. Sherman provides a more direct and cynical view of the perpetuation of impunity by the manner in which states adopt and apply command responsibility standards, as follows:

> The differing standards employed for various iterations of command responsibility prosecutions could be tied to one variable in particular: how concerned were those creating a given standard with it potentially being used against themselves? If the answer was "not at all", or "not very", then a pro-prosecution rule was likely to be deployed. The greater the risk of the standard being applied more broadly, especially on those who created it, the

[971] Dire Tladi, 'A Horizontal Treaty on Cooperation in International Criminal Matters: The Next Step for the Evolution of a Comprehensive International Criminal Justice System?' (2014) 29 *South African Public Law* 368, 372.

[972] International Criminal Court Office of the Prosecutor, 'Paper on Some Policy Issues' (n 931) 3.

[973] Edoardo Greppi, 'Inability to Investigate and Prosecute under Article 17' in Mauro Politi and Federica Gioia (eds), *The International Criminal Court and National Jurisdictions* (Ashgate Publishing, 2008) 65, 69.

[974] Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press, 2013) 414.

> higher the requirements that would be needed to prosecute command responsibility cases.[975]

Similarly, Triffterer focuses on the elements of the Rome Statute crimes through the lens of the fight against impunity, as follows:

> 'Elements' which deviate from the wording of the Statute should … be analysed with special care, in particular if or when the proposals tend to narrow responsibility. Such 'narrowing elements' may be desirable in the interests of the rule of law to limit unjustified investigation, prosecution and sentencing. But they may, at the same time, support impunity for crimes within the jurisdiction of the Court. This is not (always) 'in the interests of justice' because the Elements do not to [sic] contribute to the prevention of crimes within the jurisdiction of the Court in this way, but rather disguise their existence and appearance.[976]

The reference to proposals is clearly a critique of the mechanisms by which states parties proposed to implement the Rome Statute crimes into domestic law and, particularly, the incorporation of elements of crimes which deviate in some respect from the terms of the Rome Statute. This point is significant in respect of the command responsibility provisions of Article 28(a) vis-à-vis section 268.115(2) in which the express terms of a key mental element of the former deviate from the corresponding terms of the latter. It is clear, on the analysis of the threshold standards, above, that the codified provisions tend to narrow responsibility in light of the culpability hierarchy established in the general principles of criminal responsibility in the code. This fact begs the question whether such narrowing of responsibility and, indeed, whether the divergent fault elements giving rise to the possibility of failed prosecutions, discussed above, are sufficient to trigger the jurisdiction of the ICC in matters of command responsibility.

7.5.1 Inadmissibility before the ICC: 'inactive' versus 'unable or unwilling'

Article 17 of the Rome Statute commences with the question of whether a case is inadmissible before the Court rather than whether such a case is admissible. This establishes the focus of

---

[975] Sherman (n 292) 341.

[976] Otto Triffterer, 'Can the "Elements of Crimes" Narrow or Broaden Responsibility for Criminal Behaviour Defined in the Rome Statute?' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009) 381, 388.

any challenge to admissibility at the outset.[977] Article 17(1) provides that the Court shall determine that a case is inadmissible where:

> a. The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
> b. The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
> c. The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
> d. The case is not of sufficient gravity to justify further action by the Court.[978]

These provisions are structured to address three distinct factual scenarios: (1) there are ongoing proceedings on the part of the state in relation to the same case; (2) the state has investigated the same case as the ICC and determined not to prosecute; and (3) the same case has been prosecuted by the state at the national level.[979]

The following analysis relates to paragraphs (a) and (b) of Article 17(1) but, for completeness, paragraph (c) refers to Article 20 paragraph 3 which precludes the prosecution of a person by the ICC for conduct under the substantive crimes provisions of the Rome Statute if the person has been tried by another court for the same conduct. The exceptions to this preclusion are circumstances in which the prosecution was conducted for the purpose of shielding the person from criminal responsibility or was otherwise not conducted independently or impartially or was inconsistent with an intent to bring the person to justice.[980] Guariglia et al describe the exceptional status of unwillingness and inability, in the broad context of the Court's fight against impunity:

> The concepts of unwillingness and inability are exceptions to be applied where a State appears to be actively pursuing a case, but the Court nevertheless claims jurisdiction,

[977] Paul Seils, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes* (International Center for Transitional Justice, 2016) 37.

[978] *Rome Statute* (n 22) art 17(1).

[979] Seils (n 977) 38.

[980] *Rome Statute* (n 22) art 20(3).

> and are thus directed towards situations in which those apparent national proceedings are not genuine but are rather an attempt to 'enable the suspect to evade justice'.[981]

Following some misinterpretations of Article 17(1), including the application of what Robinson refers to as 'the slogan version of complementarity'[982] – that the ICC will only assume jurisdiction if the state with jurisdiction is unwilling or unable to do so – the ICC Appeals Chamber in *Katanga* provided the definitive test of inadmissibility. The Appeals Chamber held that:

> [I]n considering whether a case is inadmissible under Article 17(1)(a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answer to these questions is in the affirmative that one has to look at … the questions of unwillingness and inability. To do otherwise would be to put the cart before the horse.[983]

The Appeals Chamber went on to consider the inactivity of the Democratic Republic of Congo in investigating and prosecuting Katanga as key to the issue of admissibility as opposed to that state's unwillingness. The Court held that:

> It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17(1)(d) of the Statute.[984]

---

[981] Fabricio Guariglia et al, *The Appeals Chamber of the International Criminal Court: Commentary and Digest of Jurisprudence* (Cambridge University Press, 2018) 79, quoting *Prosecutor v Al-Senussi (Judgment on the Appeal of Mr Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 Entitled 'Decision on the Admissibility of the Case against Abdullah Al-Senussi')* (International Criminal Court, Appeals Chamber, Case No ICC-01/11-01/11 OA 6, 24 July 2014) [221] ('*Al-Senussi Admissibility Appeal Judgment*').

[982] Darryl Robinson, 'The Mysterious Mysteriousness of Complementarity' (2010) 21 *Criminal Law Forum* 67, 68.

[983] *Prosecutor v Katanga (Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/07 OA8, 25 September 2009) [78] ('*Katanga Admissibility Appeal Judgment*').

[984] Ibid.

Article 17(1)(d), which goes to the gravity of the case as a prerequisite to admissibility, provides for an assumption that, if the Court confirms the case is of sufficient gravity, admissibility before the ICC follows 'because the state is inactive'.[985] The Trial Chamber in *Katanga* clearly confused the prerequisites of admissibility by equating inaction on the part of the state with an unwillingness to genuinely investigate and prosecute.[986] This defective interpretation was rectified by the Appeals Chamber in that case. In stark contrast to the Trial Chamber in *Katanga,* the Pre-Trial Chamber in *Lubanga* distinguished between inaction and unwillingness or inability in holding that 'no State with jurisdiction over the case … is acting, or has acted … [a]ccordingly, in the absence of any acting State, the Chamber need not make any analysis of unwillingness or inability'.[987] This was a correct interpretation of the test of admissibility, as later confirmed by the Appeals Chamber in *Katanga*.

Similarly, in *Muthaura*, the Appeals Chamber placed an emphasis on the need to distinguish between the existence of an investigation and the issue of unwillingness or inability, as follows:

> Determining the existence of an investigation must be distinguished from assessing whether the State is 'unwilling or unable genuinely to carry out the investigation or prosecution', which is the second question to consider when determining the admissibility of a case. For assessing whether the State is indeed investigating, the genuineness of the investigation is not at issue; what is at issue is whether there are investigative steps.[988]

Guariglia et al describe the evolution of litigation leading to this definitive statement of the law on admissibility in which the first generation of such litigation, up to September 2009, did not involve challenges to admissibility such that the interpretation of Article 17(1)(d) beyond the

---

[985] Karolina Wierczyńska, 'Admissibility of a Case Before the International Criminal Court: Summary' (Research Paper, Polish Academy of Sciences, 30 October 2019) 285, 289.

[986] *Prosecutor v Katanga (Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 16 June 2009) [77].

[987] *Prosecutor v Lubanga (Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, 10 February 2006) [40] ('*Lubanga Warrant of Arrest*').

[988] *Prosecutor v Muthaura (Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute')* (International Criminal Court, Appeals Chamber, Case No ICC-01/09-02/11 OA, 30 August 2011) [40] ('*Muthaura Admissibility Appeal*').

'sufficient gravity' test was not central to the issues before the Court.[989] That tends to explain the apparent confusion of the Trial Chamber in *Katanga*, in which the prerequisites of admissibility were misstated, as discussed above. That was rectified by the Appeals Chamber in *Katanga* and in subsequent cases on point before the Court from September 2009 through 2010, in which 'the basic architecture of the admissibility regime' was clarified.[990] These second-generation cases, it has been suggested, 'present a final blow to the perception that … complementarity means that the ICC can only step in if a state with jurisdiction is unwilling or unable to investigate and prosecute the crime itself'.[991]

The inaction of the subject states has been described as 'the first and foremost hypothesis of admissibility'[992] but the concept of inaction is further described in temporal terms. Olásolo distinguishes between *a priori* inaction and *a posteriori* inaction, with the former existing when the state has not taken any action whatsoever and the latter applying when national proceedings are halted for reasons other than those provided for in the criminal procedure laws of the subject state.[993] As discussed below, in the context of the findings of and referrals for criminal investigations arising from the Brereton Inquiry, a failure to undertake criminal investigations regarding the higher command under command responsibility provisions as a direct result of recommendations not to do so arising from an inquiry is likely to qualify as *a posteriori* inaction. Inaction as a result of findings and recommendations in an internal defence administrative inquiry is certainly not a reason to halt national proceedings as defined in any criminal procedure laws in Australian civil jurisdictions.

This analysis goes to the immediate problem with applying the jurisdictionally limiting 'slogan' version of complementarity, from the viewpoint of the fight against impunity in international criminal justice, in that the ICC would be restrained from exercising its jurisdiction as long as the subject state is theoretically willing and able to investigate and prosecute, notwithstanding its inaction, which is demonstrative of an intention not to

[989] Guariglia et al (n 981) 72.

[990] Ibid 73.

[991] Thomas Hansen, 'Case Note: A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity' (2012) 13 *Melbourne Journal of International Law* 1, 2.

[992] Olásolo, *The Triggering Procedure* (n 944) 149.

[993] Ibid.

investigate and prosecute.[994] In that respect, the *Katanga* trigger of admissibility is entirely consistent with the express intent of the Rome Statute to end impunity for the perpetrators of international crimes covered by the statute.[995]

The slogan version of complementarity appears to have been adopted in Australia in the Rome Statute ratification and implementation processes and, subsequently, by some commentators in Australia. In its 2002 report examining the Australian Government's proposal to ratify the Rome Statute, the Joint Standing Committee on Treaties focused exclusively on the 'unwilling or unable' limb of the test of ICC admissibility to the complete exclusion of the first limb of 'inactivity'.[996] That is notwithstanding the report cited Article 17(1) verbatim, albeit with the terms 'unwilling or unable' in italics for emphasis.[997] Reliance on the slogan version was more recently apparent in a 2022 speech by Major General Justice Brereton in which he made the following statement:

> The International Criminal Court can exercise jurisdiction in respect of a particular case *only* if the State with jurisdiction fails genuinely to investigate and prosecute it. That's the principle of complementarity which is *fundamental* to the Rome Statute and to Australia's ratification of it.[998]

Robinson critiques this 'well-entrenched' yet defective view of the complementarity test by citing academic commentary which, admittedly, predates the appellate decision in *Katanga*, as follows:

> This description of the test is so commonplace and well-entrenched that even the most careful and knowledgeable scholars recite it … the slogan version of the test is so ubiquitous that William Schabas is in some sense correct when he asserts that 'the two

---

[994] Ibid [79].

[995] See Ben Batros, 'The Judgment on the Katanga Admissibility Appeal: Judicial Restraint at the ICC' (2010) 23(2) *Leiden Journal of International Law* 343, 355–6. See also *Katanga Admissibility Appeal Judgment* (n 983) [79].

[996] *JSCOT Report 45* (n 574) 7–8.

[997] Ibid.

[998] Paul Brereton, 'War Crimes in Australian History: From Boer War to Vietnam War' (Speech, Military History Society of NSW, 15 June 2022) <https://www.youtube.com/watch?v=ESkyAUSPbk> (emphasis added).

> prongs of the complementarity test are well known, even to non-specialists: the state must be "unwilling or unable genuinely" to investigate or prosecute'.[999]

In accordance with the logical and definitive statement as to the admissibility trigger by the Appeals Chamber in *Katanga*, if Australia were to adopt this fundamental aspect of the Rome Statute in the manner articulated in the report and the subsequent speech, above, impunity would potentially prevail and the intent of the Rome Statute would be denied. This was the potential outcome of amnesties and other largely exculpatory initiatives considered as part of peace deals in Colombia had the ICC not engaged with Colombian authorities in the course of the Court's preliminary examination of the situation in that country. The Court considered the question whether amnesties offered as part of transitional or restorative justice arrangements amounted to impunity, thus defeating the intent of the Rome Statute.[1000] The ICC subsequently afforded Colombia a great deal of discretion in designing and implementing accountability mechanisms whilst ensuring such mechanisms did not amount to inaction thus triggering the jurisdiction of the Court.[1001]

In deciding that no reasonable basis existed for concluding that the Colombian cases were admissible before the ICC, the Office of the Prosecutor stated that, 'based on an assessment of the facts as they presently exist, the national authorities of Colombia could not be characterised as being inactive, nor unwilling or unable to genuinely investigate and prosecute relevant Rome Statute crimes'.[1002]

Notably, the OTP phrased this response, of 28 October 2021, in terms which expressly reflect the two-stage test of admissibility with inaction as the trigger and unwillingness or inability as follow-up considerations only in the event inactivity is found to not exist. There can be no

---

[999] Robinson, 'The Mysterious Mysteriousness' (n 982) 73, quoting William Schabas, 'Prosecutorial Discretion v Judicial Activism at the International Criminal Court' (2008) 6 *Journal of International Criminal Justice* 731, 757.

[1000] See Marina Aksenova, 'The ICC Involvement in Colombia: Walking the Fine Line Between Peace and Justice' in Morten Bergsmo and Carsten Stahn (eds), *Quality Control in Preliminary Examinations: Volume 1* (Torkel Opsahl Academic EPublisher, 2018) 257 <https://www.legal-tools.org/doc/5b3704/pdf/>.

[1001] Ibid 257.

[1002] International Criminal Court Office of the Prosecutor, *Preliminary Examination Colombia – Decision Not to Prosecute* (Report, 28 October 2021).

doubt the ICC has accepted this approach as the correct application of Article 17 and its admissibility trigger. As Brereton further stated, 'fundamentally, laws are pointless if they're not enforced and the law which is not enforced soon becomes a dead letter'.[1003] The questions beg asking whether the law of command responsibility, if not enforced by Australia, will become a dead letter and whether the dead letter of Australian command responsibility law is likely to ground admissibility before the ICC. As Shereshevsky confirms, 'the [Office of the Prosecutor] has explicitly mentioned that focus on low-level officials will not be sufficient to fulfil the requirements of complementarity'.[1004]

7.5.2 Exculpation in Brereton and the Katanga trigger of ICC admissibility

Noting the Brereton Report exculpates the chain of command above the tactical patrol commander level from criminal responsibility, some analysis of the *Katanga* decision in the context of the admissibility before the ICC of a case arising from the publicly released facts in the Brereton Report is warranted. The starting point of this analysis is the fact the Appeals Chamber in *Katanga* focused on the objective facts of that case, that is, on the action or inaction of the state to the exclusion of any subjective reasons why the state had not been acting.[1005] Provided Article 17(1)(b) of the Rome Statute has not been given effect, that is, that the state investigated the case and decided not to prosecute,[1006] any other motives for the state to close the investigation or otherwise to decline to exercise its jurisdiction are irrelevant to the admissibility of a case before the ICC.[1007] As discussed in detail below, it is unlikely Australian civil investigative authorities will investigate the higher chain of command under the command

---

[1003] Brereton (n 998).

[1004] Yahli Shereshevsky, 'The Unintended Negative Effect of Positive Complementarity' (2020) 18 *Journal of International Criminal Justice* 1017, 1039, quoting International Criminal Court Office of the Prosecutor, 'Paper on Some Policy Issues' (n 931) 12–13. Note that the key question for this thesis is whether legally the ICC Office of the Prosecutor *could* commence an investigation, not whether practically it is *likely* to do so in any given case – see, eg, the OTP's decision not to investigate on the basis of 'insufficient gravity' in the situation regarding the Mavi Marmara, the OTP's closure of its preliminary examination into the situation in Iraq/UK without proceeding to an investigation on the basis that UK authorities had remained inactive, and the statement by the ICC President at the 2020 Assembly of States Parties crediting Australia with being a potential exemplar regarding its inquiry into the Afghanistan war crimes allegations.

[1005] Guariglia et al (n 981) 343, 354.

[1006] *Rome Statute* (n 22) art 17(1)(b).

[1007] *Katanga Admissibility Appeal Judgment* (n 983) [82]–[83].

responsibility provisions in light of the cumulative facts that the Brereton Report exculpated commanders above patrol commander level and thus did not recommend the referral of the higher chain of command to such authorities and the ADF higher command only referred subjects of the Brereton Inquiry recommendations for civil criminal investigation.

Article 17(1)(b) has no relevance to this decision not to investigate. It does, however, have a bearing on any subsequent decision not to prosecute higher commanders under command responsibility since a prerequisite investigation will not have taken place which could lead to a prosecution. Since no decision not to prosecute could possibly be made in these circumstances, the reasoning underpinning the exculpation of the higher chain of command in the Brereton Report is irrelevant to the issue of admissibility before the ICC and thus poses no barrier to admissibility. As Robinson states succinctly and sharply, '[w]here there has been no investigation or trial in relation to the case, then *none* of these conditions for admissibility [in Article 17(1)] can be met, so the case remains admissible before the Court'.[1008]

The next question to be addressed is that asked by Guariglia et al which goes to the text of Article 17(1)(a): 'what is required for a case to be "investigated" or "prosecuted" for the purposes of paragraph (a), especially in the context of traditional or alternative justice mechanisms'?[1009]

7.5.3 Exculpation in Brereton and the proper investigation of command responsibility

On 24 May 2021 the Brereton Report was provided to a newly established Office of the Special Investigator (OSI) in purported satisfaction of certain recommendations in the report related to referral for criminal investigation.[1010] Twelve such recommendations expressly referred to command responsibility in the alternative to substantive war crimes charges or ancillary charges to substantive war crimes charges.[1011] In light of the inquiry's express exculpation of the chain of command above the tactical level of patrol commander,[1012] the only inference

[1008] Robinson, 'The Mysterious Mysteriousness' (n 982) 71.

[1009] Guariglia et al (n 981) 353.

[1010] Department of Defence, *Afghanistan Inquiry Reform Plan: Delivering the Defence Response to the IGADF Afghanistan Inquiry* (Report, 30 July 2021) 18.

[1011] IGADF (n 1) 71, 74, 80, 84, 87, 92, 96, 97, 99, 102, 104, 105.

[1012] Ibid 103.

available is that these recommendations regarding command responsibility relate to that level of command. It is highly likely that only individuals whom the report recommends should be referred for criminal investigation will be so referred, such that the finding exculpating the chain of command above the patrol commander level will be adopted and no commanders above that level will be referred. In that event, a lingering question remains whether a proper or genuine investigation under the command responsibility provisions has been undertaken. A further question then arises whether admissibility before the ICC is triggered regarding cases relating to the exculpated higher commanders.

The action of a state in investigating Rome Statute crimes must be 'genuine, concrete, effective, and significant'[1013] in order to avoid admissibility before the ICC if the same persons are being investigated by the state for substantially the same conduct being considered by the ICC.[1014] This same person/same conduct test has been described as the threshold test for ascertaining whether investigative or prosecutorial activity by the state exists.[1015] Further, the investigative actions undertaken by the state must meet a certain degree of quality in terms of evidentiary collection and analysis and bona fide matters of process and procedure to be considered genuine.[1016]

As Newton states, '[q]ualitative assessment of domestic processes may warrant an inference of unreasonableness or bad faith in certain circumstances'.[1017] In *Lubanga*, Pre-Trial Chamber I held that the Democratic Republic of Congo (DRC) could not be considered to be acting in relation to the specific case before the ICC involving Lubanga because the warrants of arrest issued by the DRC contained no reference to his alleged criminal responsibility for the crimes charged in the ICC Prosecutor's application for the exercise of jurisdiction based on admissibility.[1018] The inactivity on the part of the state was thus evidenced by its national criminal proceedings not encompassing both the person and the conduct that were the subject

[1013] Wierczyńska (n 985) 290.

[1014] The 'same person/same conduct' test was first established by Pre-Trial Chamber I in *Lubanga Warrant of Arrest* (n 987) [31].

[1015] Hansen (n 991) 7.

[1016] Wierczyńska (n 985) 290.

[1017] Michael Newton, 'Absolutist Admissibility at the ICC: Revalidating Authentic Domestic Investigations' (2021) 54(2) *Israel Law Review* 143, 146.

[1018] *Lubanga Warrant of Arrest* (n 987) [38]–[39].

of the case before the ICC, that is, the same person/same conduct test was not satisfied by the DRC in its bid to avoid admissibility of the case before the ICC.

The ICC Appeals Chamber in *Muthaura* considered the sufficiency of national investigations to overcome the 'inactivity' trigger of admissibility before the ICC. The Chamber held:

> When the Court has issued a warrant of arrest or a summons to appear, for a case to be admissible … national investigations must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court. The words 'is being investigated' in this context signify the taking of steps directed at ascertaining *whether this individual is responsible* for that conduct … [i]f a State challenges the admissibility of a case, it must provide the Court with evidence with a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing.[1019]

Significantly, the Court in *Muthaura* rejected Kenya's argument that, instead of the same person/same conduct test of inactivity and thus admissibility, the test applied to the admissibility challenge should be that the national proceedings must

> cover the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC [and] any argument that there *must* be identity of *individuals* as well as of *subject matter* being investigated by a State and by the Prosecutor of the ICC is necessarily false as the State may simply not have evidence available to the Prosecutor of the ICC or may even be deprived of such evidence.[1020]

The Court held that

> the defining elements of a concrete case before the Court are the individual and the alleged conduct [such that] for such a case to be inadmissible under article 17(1)(a) … the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the [ICC].[1021]

The logical next step in this analysis is to consider whether inactivity triggers admissibility because 'investigative steps' are not being taken by the state in relation to persons who are

[1019] *Muthaura Admissibility Appeal* (n 988) [1]–[2] (emphasis added).

[1020] Ibid [27] (emphasis in original).

[1021] Ibid [39].

subject of proceedings before the ICC. In that event, 'it cannot be said that the same case is (currently) under investigation by the Court and by a national jurisdiction … there is therefore no conflict of jurisdictions'[1022] and admissibility is satisfied.

The Brereton Report expressly did not recommend the referral of commanders above the level of patrol commander for criminal investigation and, as determined above, no commanders above that level were subsequently referred for such criminal investigation by the Chief of the Defence Force in response to the Brereton Report. In the event the Prosecutor of the ICC determines to open an investigation into the command responsibility of higher commanders for the crimes identified in the Brereton Report, Australia could not argue the same case is under investigation by the ICC and by Australia. Therefore admissibility could be triggered by Australia's inaction in terms of not taking investigative steps regarding those commanders. As stated in *Muthaura*, '[f]or assessing whether the State is indeed investigating, the genuineness of the investigation is not at issue; what is at issue is whether there are investigative steps'.[1023] The non-referral of individual commanders above patrol commander and the unavoidable inference that such individual commanders are not being investigated by criminal investigative authorities is clear evidence that investigative steps are not being undertaken.

Newton contends that '[p]rocedural differences between normal domestic criminal investigations and those conducted in the context of and associated with alleged atrocity crimes are to be expected' but goes on to qualify this statement insofar as genuine investigations consistent with the intent of the Rome Statute are 'designed to administer justice and initiate criminal proceedings when warranted and feasible'.[1024] Internal defence administrative inquiries are expressly designed not to be part of the military disciplinary or civil criminal systems[1025] and, indeed, as a matter of stated policy 'are not to be used for the purpose of investigating civilian criminal offences or offences under the *Defence Force Discipline Act 1982*'.[1026] Such inquiries are thus not designed to administer justice or initiate criminal

[1022] Ibid [40].

[1023] Ibid.

[1024] Newton (n 1017) 145–6.

[1025] Department of Defence, *Administrative Inquiries Manual* (Australian Defence Force Publication, ADFP 06.1.4, June 2006) [1.16].

[1026] Ibid [6.4].

proceedings and any argument that administrative inquiries at any level are investigations for the purposes of complementarity are problematic. This is particularly the case with the Brereton Inquiry in light of the fact that many of the recommendations of that inquiry involved referring certain persons for criminal investigation by competent civil authorities, such referrals being implicit acceptance that the inquiry could not initiate criminal proceedings.

Even if Australia considers that the internal defence administrative Brereton Inquiry was an investigation for the purposes of the complementarity provisions, Australia could not argue that the Brereton Inquiry itself constituted 'investigative steps' since individual higher commanders were not subject of the inquiry, such that the jurisprudence of the ICC Appeals Chamber in *Muthaura*, discussed above, applies. Any inquiry in the course of the Brereton Inquiry into the command responsibility of higher commanders, particularly at the Joint Task Force level, was clearly undertaken in respect of persons collectively at those levels of the hierarchy, hence the broad finding of

> no evidence that there was knowledge of, or reckless indifference to, the commission of war crimes, on the part of commanders at troop/platoon, squadron/company or Task Group Headquarters level, *let alone at higher levels such as Commander Joint Task Force 633*.[1027]

A broad collective inquiry of this nature, encompassing all levels of command above patrol commander, cannot possibly qualify as investigative steps regarding the culpability of individual commanders as contemplated in *Muthaura*. The dismissive statement 'let alone at higher levels …' lends weight to this contention that appropriate investigative steps were not undertaken.

In any event, as the Appeals Chamber in *Muthaura* held, the state is required to submit tangible evidence pointing to specific investigative steps such as police reports attesting to the time and location of crime scene visits and documents evidencing witnesses and suspects who are the subject of the ICC investigation having been interviewed by state investigative authorities.[1028]

[1027] IGADF (n 1) 31 (emphasis added).

[1028] *Muthaura Admissibility Appeal* (n 988) [68].

7.5.4 The Office of the Special Investigator and ICC admissibility

Because the OSI is investigating aspects of the Brereton Report, as referred by the Chief of the Australian Defence Force, but not the potential culpability of the higher commanders, an admissibility challenge by Australia is unlikely to succeed on the basis of the 'same case' test. As Guariglia et al succinctly state, 'if the domestic authorities are only investigating a few discrete aspects of a more substantial or systemic case before the ICC, it is unlikely this would be considered "the same case"'.[1029] It is, of course, open to the OSI to conduct an investigation into the conduct of the higher chain of command from the perspective of the command responsibility mode of liability. Indeed, some commentators may speculate that such a course is likely, despite the absence of any public indication that the OSI is even considering such action. In the event that the OSI did open such investigation into the higher chain of command, any consideration by the ICC of the admissibility of the case requires a determination based on the 'status and scope'[1030] of Australia's investigative and prosecutorial activities at the time of any challenge by Australia to admissibility before the ICC.[1031] This recognises the reality that these activities on the part of a state may change over time, but in challenging admissibility the state cannot rely on an intention to undertake such activities in the future.[1032]

In the event the OSI was to investigate the higher chain of command under the umbrella of command responsibility, regardless of the findings and recommendations in the Brereton Report, and determined to recommend that lesser charges of a military disciplinary nature such as a breach of duty be preferred against certain identified commanders, problems arise for Australia from the perspective of admissibility before the ICC. The Appeals Chamber in *Gbagbo* held that the Court, in determining admissibility, may consider 'the conduct covered by the purported domestic proceedings … [and] their legal characterisation as an added

---

[1029] Guariglia et al (n 981) 77, discussing *Prosecutor v Gaddafi (Judgment on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 Entitled 'Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi')* (International Criminal Court, Appeals Chamber, Case No ICC-01/11-01/11 OA 4, 21 May 2014) [71]–[77].

[1030] Guariglia et al (n 981) 82.

[1031] *Katanga Admissibility Appeal Judgment* (n 983) [56].

[1032] Ibid.

indicator of the actual subject matter of the domestic proceedings'.[1033] This is entirely consistent with the Appeals Chamber's earlier insistence, in *Al-Senussi*, that a determination on an admissibility challenge demands 'an analysis of all the circumstances of a case, including the context of the crimes'.[1034] As Guariglia et al state:

> One could thus imagine a situation in which the international dimension of the crimes … was omitted to minimise the seriousness of the conduct. In such a case, the legal characterisation may well matter as it does shed light on *the true nature of the domestic case*, consistent with the Appeals Chamber's [statement in *Al-Senussi*].[1035]

It would be politically embarrassing, at the very least, if Australia were to lose an admissibility challenge on the basis that any charges laid against higher commanders in domestic proceedings omitted the international dimension of the crimes, and thus minimised the seriousness of the conduct. It is contended that, in the presently unlikely event any charges are preferred against higher commanders arising from the Brereton Report, any such charges, which are in the nature of a breach of duty and are thus exclusively the domain of the Australian military disciplinary system, would minimise the seriousness of conduct that would otherwise give rise to charges under the command responsibility provisions.

As emphasised throughout this thesis, and as reflected in the jurisprudence of the ICC and earlier international tribunals, command responsibility is a serious mode of liability, the existence of which is intended to combat impunity for international crimes and serve as a deterrent to the commission of such crimes by subordinates.

The legal characterisation of charges under the command responsibility mode of liability clearly reflects the seriousness of the conduct and the international dimension of conduct giving rise to these charges. Charges of an objectively less serious nature, especially those residing entirely within the internal military justice system, would undoubtedly allow for an inference

---

[1033] *Prosecutor v Gbagbo (Judgment on the Appeal of Côte d'Ivoire against the Decision of Pre-Trial Chamber I of 11 December 2014 Entitled 'Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case against Simone Gbagbo')* (International Criminal Court, Appeals Chamber, Case No ICC-02/11-01/12 OA, 27 May 2015) [71].

[1034] *Al-Senussi Admissibility Appeal Judgment* (n 981) [99].

[1035] Guariglia et al (n 981) 77 (emphasis added).

that the 'true nature of the domestic case'[1036] was to minimise the culpability and appearance of the seriousness of the conduct of the higher commanders. It would thus leave open the possibility of the ICC ruling against Australia in any admissibility challenge.

On the basis of the preceding analysis regarding the implications of divergence, however, even if charges were subsequently preferred which rely on the command responsibility mode of participation defined in subsection 268.115(2) of the Commonwealth Criminal Code, the problems associated with the divergence of these provisions from the terms and requisite elements of Article 28(a) of the Rome Statute remain.

7.6 Conclusion

The proper construction and application of national legislation implementing the doctrine of command responsibility will contribute to the deterrent effect of the doctrine on the commission of crimes by subordinates. The onus is thus on states parties to the Rome Statute to faithfully apply the doctrine in domestic settings and, in so doing, help in the fight against impunity which is at the heart of the Rome Statute. In implementing the Rome Statute, including Article 28(a), into Australian law, the legislature emphasised the need to comply with Australia's obligations[1037] under the statute and, indeed, expressly stated Australia will never be in a position of inability to investigate and prosecute subject crimes – being a reference to the trigger for the complementarity concept and thus the admissibility of matters before the ICC.

Inability is, however, just one limb of the test of admissibility which is only considered in the event Australia is found to not be inactive in such investigation and prosecution. Inactivity is the first limb which renders the subsequent test of inability or unwillingness irrelevant in the event Australia is found to be inactive in its obligation to investigate and prosecute. The incorporation of pre-existing fault elements into subsection 268.115(2) which are inconsistent

[1036] Ibid.

[1037] The reference to obligations in this regard is not an argument that a blunt obligation is imposed on Australia to implement the Rome Statute but, rather, is making a more nuanced argument that the faithful implementation of command responsibility is required, in this instance, in order to avoid the trigger for the principle of complementarity and thus the admissibility of matters involving Australian commanders before the ICC.

with and apply a different standard of fault and thus culpability than that applied under Article 28(a) may lead to failed investigations or prosecutions or, indeed, interlocutory or appellate arguments that such inconsistency poses unfairness to an accused, rendering the case untenable. Similarly, the more restrictive standard of fault applied in the code will undoubtedly make proving the case more difficult. This has implications in terms of Australia's inactivity, being the first limb of the admissibility test, or its unwillingness or inability, being the second limb, thus placing Australia in the unenviable position of being unable to suppress international crimes and fight impunity – the central tenets of the Rome Statute.

The Rome Statute does not specify how its provisions are to be incorporated into domestic law, and international law more broadly provides states with a general freedom of implementation of treaties to which they are parties. The requirement of the good faith performance of treaties, and principles of equity and equality in the application of norms of international law, are, however, likely to fetter the discretion given to states parties to the Rome Statute in implementing the obligations imposed in the statute. There are, it is contended, constraints on Australia deferring to the presumptive freedom of implementation of treaties in order to overcome the good faith requirement. The incorporation of key elements of command responsibility inconsistently with that of the Rome Statute, and the resultant impact on the ability to prosecute cases under command responsibility, is likely to be a factor which displaces the presumption of the freedom of implementation.

The clear divergence between the elemental constructs of command responsibility in the statute and those in the Criminal Code directly go to the scope of conduct that establishes criminal responsibility. This divergence establishes a different scope of criminality between the statute and the code such that a dual system of criminality is established – an outcome which flies in the face of the need for coherence and thus credibility and legitimacy vis-à-vis the system of international criminal justice. Divergence of this nature could prejudice the system of complementarity which is central to the ICC and the system of international criminal justice as it presently stands.

The exercise of the complementarity mechanism by the ICC may be considered an extreme response to any divergence of this nature, particularly considering the focus of the Court on state primacy. The exercise of shared or concurrent jurisdiction, however, is not beyond contemplation as a means by which the Court could address the problems associated with and

arising from Australia's implementing legislation and the practical application thereof. Such concurrent jurisdiction, which has precedent both at the ICC and before the ad hoc tribunals, is likely to be in the nature of a stratified construct in which the ICC assumes jurisdiction over top-level leaders whilst all other defendants are dealt with by Australian courts.

In the event Australia's command responsibility provisions were determined to be problematic insofar as they do not satisfy the broader objectives of the Rome Statute, including the denial of impunity, these provisions could properly be excised from the overarching principle of complementarity such that Australia retains primacy over some aspects of a case whilst the ICC ensures those most responsible are brought to justice. This latter point ensures the descriptive 'impunity gap' is filled whilst concurrently injecting the deterrent effect which the threat of prosecution has on higher commanders' propensity to ensure compliance with the laws of war by their subordinates.

Viewed through the practical lens of a case study, the Brereton Inquiry report, which exculpates the chain of command above the tactical patrol commander level, is likely to result in Australia not taking any criminal investigative or prosecutorial action against such higher commanders. This outcome would be a clear case of inaction on Australia's part, thus triggering the admissibility of the ICC without any need to consider Australia's ability or willingness to investigate or prosecute. Higher commanders were not recommended for referral to investigative authorities, were thus not so referred, and there is no publicly available information to suggest the OSI is investigating any such matter. Therefore, as a matter of factual logic no decision not to prosecute could possibly be made such that the reasoning underpinning the exculpation of the higher chain of command in the Brereton Inquiry is irrelevant to the issue of admissibility before the ICC. Further, the sufficiency of national investigations from a qualitative perspective has been considered relevant to the determination of inactivity in triggering the jurisdiction of the ICC.

A state must take investigative steps with a certain degree of quality in terms of evidentiary collection and analysis and bona fide matters of process and procedure to be considered genuine in order to avoid admissibility and thus jurisdiction before the ICC. Genuine investigations which are consistent with the intent of the Rome Statute have been considered to be designed to administer justice and initiate criminal proceedings. Internal Australian Defence Force administrative inquiries are not designed to achieve either of these objectives

such that it would be difficult for Australia to argue that administrative inquiries at any level, including at the level of the Brereton Inquiry, are investigations for the purposes of complementarity. In the event the ICC Prosecutor opened a case regarding the higher commanders who had sufficient command and control regarding the incidents described in the Brereton Report, and noting Australia could not argue the same case is being investigated by the ICC and by Australia, admissibility before the ICC could be triggered by Australia's inaction in not taking investigative steps regarding those commanders.

CHAPTER 8
SYNTHESIS

> Soldiers of an army invariably reflect the attitude of their general. The leader is the essence … resultant liability is commensurate with resultant crime. To hold otherwise would be to prevaricate the fundamental nature of the command function … [a commander] still remains responsible before the bar of universal justice.[1038]

8.1 Introduction

As emphasised intermittently throughout this thesis, the deterrent effect of the doctrine of command responsibility is only realised if the law of command responsibility at the national level imposes a clear and unambiguous standard of conduct on commanders including consistency in the construction and application of the provisions enshrining the doctrine. At the heart of this thesis is the manner in which Australia has implemented the command responsibility provisions of the Rome Statute into domestic Australian law and resultant issues arising in the application of such legislative provisions. This study therefore has followed the doctrine from its early iterations to the shadow cast over Australian law on the doctrine as it presently stands. The shadow is manifest in an analysis of the findings and recommendations of the Brereton Inquiry into alleged war crimes by Australian special forces as they relate to the issue of command responsibility.

As a consequence of the necessary multidisciplinary approach to this legal doctrinal study, this concluding chapter takes the form of a synthesis of ideas and findings rather than a purely conclusive statement. This approach adopts that of Maria Nybondas in her seminal work and doctoral thesis on command responsibility[1039] in synthesising the multiplicity of concepts in a concluding chapter with a practical focus. Australian command responsibility is thus synthesised by a chronological reference to the chapters of this work, with evolution flowing into elements and implementation flowing into proof. Command is then interjected as a necessary intermission before a return to an elemental analysis in terms of divergence. Demonstrative of the practical nature of this research, the synthesis ends with an overview of the research findings regarding the Brereton Inquiry and report.

[1038] Douglas MacArthur, *Reminiscences* (William Heinemann, 1964) 298.

[1039] Nybondas-Maarschalkerweerd (n 29); Nybondas (n 51).

8.2 Australian command responsibility by chapters

After introducing the topic subject of the research and the questions to be addressed and defining the scope and structure of the research in Chapter 1, the substantive chapters developed the thesis in a chronological and comparative manner focusing on the elements of command responsibility and matters affecting both the deconstruction and application of the elements through the comparative lens.

8.2.1 Evolution

Chapter 2 of this study described the evolution of the command responsibility doctrine in international law through the descriptive lens of a tidal flow. The doctrine has ebbed and flowed from a narrow foundation akin to accessorial liability to a very strict application of the doctrine in terms of the threshold of the duty imposed on commanders in the high-water mark case of *Yamashita* and back to somewhere in between before invoking the 'ghost of Yamashita'[1040] in contemporary international law. An argument has been posited that the nature of warfare has changed so fundamentally since the post-WWII tribunals that the *Yamashita* standard or, indeed, standards akin to *Yamashita* are no longer relevant or appropriate. The reality is the international community, through the states parties to the Rome Statute, has confirmed this strict standard of command responsibility for reasons discussed in the preceding chapters of this thesis. In any event, the conflict in Ukraine, which is ongoing at the time of writing, evidences a return to state-on-state, predominantly conventional warfare. That fact tends to rebut the revisionist arguments attempting to discredit the historical relevance and contemporary applicability of the *Yamashita* standard.

Chapter 2 further described how the ad hoc tribunals evidence three distinct tidal flows in their analysis of the nexus between commanders and subordinates and the articulation of the requisite elements of the command responsibility mode of liability. This study subsequently found that the Rome Statute, in Article 28, and jurisprudence on point represent a settling of the tidal flow insofar as a strict standard of knowledge – the knew or should have known

[1040] Ryan (n 138) 341.

standard – is imposed on commanders akin to that imposed in *Yamashita* and is the international standard as it presently stands.[1041]

8.2.2 Elements

Chapter 3 defined the material and mental elements of command responsibility as derived from Article 28 of the Rome Statute and articulated in the jurisprudence of the ICC. Article 28(a) provides that:

> A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
>
> i. That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
>
> ii. That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[1042]

Whilst the precedential value of case law in the interpretation of elements is afforded influential rather than obligatory status, the ICC in practice tends to apply its own decisions as precedent. In *Bemba*, Pre-Trial Chamber II opined that offences in the Rome Statute are constructed on the basis of an element analysis approach in which different mental elements are assigned to each material element. This approach to the deconstruction of Article 28(a) was taken by the Pre-Trial Chamber in its articulation of the requisite elements and by Trial Chamber III in its modification of the requisite elements. Significantly, Article 30(1) provides a default rule in which the mental elements of intent and knowledge apply unless otherwise provided in the subject provisions. Article 28(a) only expressly provides the mental element of 'knew or should have known' to one material element – the commission of crimes by subordinate forces – with all other articulated material elements being silent as to the requisite mental element. In that

[1041] Whilst the 'knew or should have known' standard is common to both *Yamashita* and *Bemba*, the articulated indicia of liability were more nuanced in *Bemba.*

[1042] *Rome Statute* (n 22) art 28(a).

light, intent and knowledge apply by default to the remaining material elements. Article 30 provides, by inference, the requisite material elements – conduct elements, consequence elements and circumstance elements. In the application of the default rule, where no mental elements are expressed, the mental element of intent applies to material elements of conduct and consequence and the mental element of knowledge applies to material elements of circumstance and consequence.

In Chapter 3 it was confirmed that the law, as it presently stands, is that an active duty is imposed on a commander to secure knowledge of the conduct of subordinates and such duty of knowledge is a strict one. In order to overcome the 'should have known' standard of Article 28, as it relates to the commission of crimes by subordinates, the commander must exercise the duty to inquire. In *Bemba*, Pre-Trial Chamber II appeared to confirm that the active duty to secure knowledge is breached in a situation in which information was available to the commander but the commander did not look at it.

In drawing from the jurisprudence of the ICTY, Pre-Trial Chamber II, in *Bemba*, formed the view that actual knowledge on the part of a commander cannot be presumed but, rather, must be evidenced directly or circumstantially. The Chamber subsequently provided a non-exhaustive list of indicia of the existence of actual knowledge. In Chapter 3 an observation was made in this regard that one such indicium – the availability of means of communication – is a significant aspect in determining actual and constructive knowledge in contemporary Australian military operations.

Chapter 3 further considered elements which did not subsequently make their way into Article 28 but warrant analysis in light of the comparative analysis with Australian law on command responsibility, which is central to this study. Significantly, the mental element of recklessness was banished from the Rome Statute and, as such, does not appear in the statute or the *Elements of Crimes* instrument. Pre-Trial Chamber I, in *Lubanga*, expressly ruled out common law recklessness as falling short of the *mens rea* threshold in Article 30 and went further in rejecting the application of recklessness to offences in which the 'should have known' standard is expressed, equating that standard with the concept of negligence. Similarly, Pre-Trial Chamber II, in Bemba, expressly held that the 'should have known' standard in Article 28(a) is a form of negligence. It follows that recklessness has no application to the Rome Statute crimes and to the modes of liability including command responsibility. In rejecting the concept of

recklessness, the ICC determined that the 'should have known' standard of fault within Article 28 falls within the mental elemental concept of negligence. On a deconstruction of the provisions of Article 28 into its elements, the element of recklessness is thus non-existent.

8.2.3 Implementation

The analysis in Chapter 3 flowed naturally into Chapter 4 which described the passage of the doctrine of command responsibility into domestic Australian criminal law. Chapter 4 considered that applying strictly domestic law principles to legislation implementing international treaties risks non-compliance with international obligations under the treaty. The reference to international obligations, in this context, is not a contention that a blunt obligation is imposed on Australia to implement the Rome Statute. Rather, the term is applied with a view to posing a more nuanced argument that a failure by Australia to faithfully implement command responsibility can trigger the jurisdiction of the ICC over Australian commanders by preventing Australia from successfully invoking the principle of complementarity. That risk of non-compliance was determined as being no more apparent than in the interpretation of the elements of offences, as is the case with the command responsibility provisions. The apparent rush to ratify the Rome Statute saw ministerial statements and even the Explanatory Memoranda for the legislation adopting the principles of command responsibility from Article 28 verbatim but, on the introduction of the implementing legislation, the constructive knowledge fault element of Article 28 was replaced with the fault element of recklessness in deference to existing general principles of criminal law as codified in the Commonwealth Criminal Code.

Significantly, Chapter 4 identified that there is no constitutional or legislative barrier to the legislature applying a fault element other than recklessness or the other fault elements in the code to command responsibility in section 268.115. It also confirmed the need for congruence between a treaty and its implementing legislation in terms of the faithful pursuit of the object or purpose of the treaty. These findings left open the questions whether the faithful implementation of Article 28 warranted an available departure from the fault element options in the code and whether the non-departure from those options and the resultant departure from Article 28 poses other dangers. Those questions were answered in Chapter 7, which considered the implications of any divergence between the respective provisions.

8.2.4 Proof

Chapter 5, in building on the work of Chapter 4 in its analysis of the mechanisms by which Article 28 was implemented into Australian law, took a purely domestic approach to proving command responsibility under Australian law as it presently stands. This required an elemental deconstruction of subsection 268.115(2), in light of the focus of this study on military or military-like command responsibility as opposed to non-military superior responsibility as described in subsection 268.115(3). Chapter 5 provided a deconstruction at Table 3 and, noting these provisions are yet to be tested in Australian jurisprudence and, as such, judicial determinations as to the proper elemental deconstruction have not been made to date, an alternative deconstruction was provided at Table 4. Chapter 5 identified that international jurisprudence has equated the 'should have known' standard of fault in Article 28 with the fault concept of negligence but negligence does not exist in codified command responsibility under section 268.115.

The Criminal Code distinguishes between recklessness and negligence such that the two are placed in a hierarchy of culpability placing recklessness above negligence. This point, as raised in Chapter 5, is considered in Chapter 7 as a point of divergence between Article 28 and subsection 268.115(2) which has implications for Australia's good faith implementation of Article 28 and its ability to rely on the principle of complementarity.

8.2.5 Command

In recognition of the fact that the legal doctrine of command responsibility is not applied in some form of jurisprudential bubble free from the pressures and often competing demands of military command, Chapter 6 analysed Australian command doctrine, structures and philosophies through the lens of command responsibility in practical application. The command authority structure, including the definitions of command and control as applied in Australian military doctrine, is entirely consistent with the indicia of effective command and control – a key element of command responsibility at law – as articulated by the ICC.

Reliance on the demarcation of command and control in the degrees of authority structures as a basis on which to generally exculpate commanders up the chain of command is problematic from the outset. Similarly, the leadership philosophy of mission command, to which the

Australian Defence Force ascribes, has been relied upon as a mechanism by which to exculpate higher commanders from liability under command responsibility. In applying the elements of command responsibility to the practice of mission command in the Australian operational setting, exculpation on this basis is flawed. The central tenet of mission command – delegation – imposes a new range of responsibilities and duties on a commander such that the effective control element of command responsibility is not displaced merely as a result of the practice of mission command.

Chapter 6 also analysed the leading ICC decision on command responsibility and the remote commander in the context of Australian military command structures on contemporary operational deployments. The decision of the ICC Appeals Chamber in *Bemba*, of itself, does not free ADF higher commanders from liability under the command responsibility provisions. The *Bemba* appellate decision turned on the ability of the commander to take all necessary and reasonable measures within his or her power to prevent/suppress/report the crimes of subordinates and considered limitations on this ability due to geographical remoteness from subordinate forces.

Noting that the element of effective control has been held to be a matter of evidence rather than a purely legal determination, a distinction should properly be drawn between the factual circumstances confronting Bemba and those of the strict hierarchical ADF military command structure and the reporting capacities of the ADF. The former, a civilian politician and self-imposed commander-in-chief of composite state and militia forces, operated within a loose command structure inclusive of limited or reduced means of communication. The latter involves military commanders operating within a tight structure inclusive of readily available and strictly maintained means of communication. This study determined that the evidence and weight to be afforded to these distinct command structures, in terms of the ability of commanders to take the requisite necessary and reasonable measures, is likely to be so markedly different that the test of ‘within his or her power’ is likely to be more readily satisfied with respect to commanders operating within the latter structure. This study further confirmed that remoteness of command will not be the key determinant in any consideration of command responsibility regarding ADF commanders but, rather, will merely be one relevant fact in determining the test of effective control.

Notably, the analysis in Chapter 6 identified a change in the Australian national command role from 2001 to the establishment of a Joint Task Force (JTF 633) following the invasion of Iraq in 2003. Limited control was exercised by the Australian national commander over deployed Australian forces under the former command structure, whilst under the latter structure the command authority accorded to the commanders of JTF 633 over the period commencing in 2003 was one of operational control over the various deployed task groups. Significantly, and through the lens of the indicia of effective control, the role of CJTF 633 was not merely limited to logistical command. The subsequent elevation in rank level of CJTF 633 from Brigadier and a change in the level of command authority provided to CJTF 633 lend additional weight to the argument that the test of effective control is satisfied for CJTF 633.

8.2.6 Divergence

Chapter 7 returned the study to the identified divergence between the elements of Article 28(a) and those of subsection 268.115(2). The tables in Chapter 7, reproduced below, provide a visual comparison of the elements including the alternative deconstruction of subsection 268.115(2).

Table 8: Comparative element analysis of Article 28(a) and subsection 268.115(2)

Art 28(a) material element	Art 28(a) mental element	Subsection 268.115(2) physical element	Subsection 268.115(2) fault element
Crimes within the jurisdiction of the Court	Knowledge	Offences under Division 268	Recklessness
Superior–subordinate relationship	Knowledge	Superior–subordinate relationship	Recklessness
Effective command/authority and control	Knowledge	Effective command/authority and control	Recklessness
Forces were committing/about to commit crimes	Knew or should have known	Forces were committing/about to commit crimes	Knowledge or recklessness
Failure to prevent/repress/submit to authorities	Intention	Failure to prevent/repress/submit to authorities	Intention

Crimes were a result of the failure to exercise control properly	Intention	Crimes were a result of the failure to exercise control properly	Recklessness

Table 9: Comparative element analysis (alternative subsection 268.115(2) deconstruction)

Art 28(a) material element	Art 28(a) mental element	Subsection 268.115(2) physical element	Subsection 268.115(2) fault element
Crimes within the jurisdiction of the Court	Knowledge	Offences under Division 268	Recklessness
Superior–subordinate relationship	Knowledge	Superior–subordinate relationship	Recklessness
Effective command/authority and control	Knowledge	Effective command/authority and control	Recklessness
Forces were committing/about to commit crimes	Knew or should have known	Forces were committing/about to commit crimes	Knowledge or recklessness
Failure to prevent/repress/submit to authorities	Intention	Failure to prevent/repress/submit to authorities	Intention
Crimes were a result of the failure to exercise control properly	Intention	Failure to exercise control properly	Intention
		Failure to exercise control properly resulted in the commission of the crimes	Recklessness

The tables demonstrate a clear divergence between the mental elements of Article 28(a) and the fault elements of subsection 268.115(2). For clarity, the terms material and mental elements in the Rome Statute and physical and fault elements are equivalent concepts which equate to the common law elemental concepts of *actus reus* and *mens rea*, respectively. This divergence

establishes a different scope of criminality such that a dual system of criminality exists which, in turn, adversely impacts the coherence, credibility and legitimacy of the system of international criminal justice. Further, divergence to this extent could prejudice the system of complementarity which is a central tenet of the jurisdiction of the ICC. The proper construction and application of domestic implementing legislation will undoubtedly contribute to the deterrent effect of command responsibility laws in terms of preventing the commission of crimes by subordinates.

It follows that improperly constructed domestic legislation which alters the criminality attached to command responsibility or, indeed, adversely impacts the ability to investigate and prosecute such matters will diminish the deterrent effect of the doctrine and weaken the fight against impunity which is at the heart of the ICC. These facts go to the good faith performance of the treaty on Australia's part including the risks posed by domestic provisions which defeat the intent of the Rome Statute. The inconsistent incorporation of key elements of command responsibility, and the resultant impact on the ability to prosecute cases, is likely to manifest such risks.

In analysing the divergence, Chapter 7 drew on Chapter 3, which discussed the elements in the Rome Statute, and Chapter 5, which discussed the proof of command responsibility under Australian law. The following table provides a comparative visualisation of the definitions of the respective mental/fault elements and indicia thereof in practical application:

Table 10: Comparative visualisation of the definitions and indicia of mental/fault elements

Art 28(a) mental element	Definition	Indicia	Subsection 268.115(2) fault element	Definition	Indicia
Knowledge	Awareness that a circumstance exists or a consequence will occur in the ordinary course of events.	The number of illegal acts; their scope; whether their occurrence is widespread; the time during which the prohibited acts took place; the type and number of	**Knowledge**	Awareness that a circumstance or result exists or will exist in the ordinary course of events.	Consciously aware that the forces were committing or about to commit crimes at the time of the failures to exercise control and to prevent/

		forces involved; the means of available communication; the modus operandi of similar acts; the scope and nature of the superior's position and responsibility in the hierarchal structure; the location of the commander at the time; the geographical location of the acts; the routine or extraordinary systems available to provide information to the accused; effectiveness of systems and relevant information provided; the tactical tempo of operations; the logistics involved; the officers and staff involved.			repress/ submit or, alternately, aware that the forces were committing or about to commit crimes at some point in time but not necessarily at the time of the proscribed failures; denies recourse to 'wilful blindness'.
Should have known	A form of negligence.	Requires the superior to have merely been negligent in failing to acquire such knowledge; ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of a commander's duty; imposes	**Recklessness**	A person is reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist and, having regard to the circumstances known to him or her, it is unjustifiable	Conscious awareness of the substantial risk of the requisite physical elements existing; unjustified to take those risks as a question of fact; not merely that the risks were obvious or

		an active duty of the part of the superior to take the necessary measures to secure knowledge of the conduct of subordinate troops and to inquire, regardless of the availability of information at the time on the commission of the crime.		to take the risk; a person is reckless with respect to a result if he or she is aware of a substantial risk that the result will occur and, having regard to the circumstances known to him or her, it is unjustifiable to take the risk.	well known but the more obvious or well known the risk was, the more likely an inference will be drawn as to awareness of the risk and that it was a substantial risk.
Intention	A person has intent where: in relation to conduct, that person means to engage in the conduct; in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.	In the case of conduct, the conscious or volitional aspect of the act of committing a crime – distinguishes between voluntary and involuntary conduct and includes a degree of knowledge; in the case of consequence, a degree of certainty in the foreseeability of the consequence of the conduct manifesting is required.	**Intention**	A person has intention with respect to conduct if he or she means to engage in that conduct; a person has intention with respect to a circumstance if he or she believes that it exists or will exist; a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.	Means to engage in the omissive conduct; may be inferred from all the facts and circumstances of the case; inference may be drawn from the commander's awareness that a duty existed to perform the acts subject of the physical elements – evidence proving one state of mind might support an inference of another state of mind.

Having established the extent of divergence between command responsibility in the Rome Statute and command responsibility in the Criminal Code, and the implications of such divergence, this thesis subsequently established that the net outcome, in the event that Australia's provisions on command responsibility are found to not satisfy the broader objectives of the Rome Statute, including the denial of impunity, could be an inability by Australia to rely upon the principle of complementarity in respect of the command responsibility provisions. In that event, Australia could retain primacy over some cases arising from a situation, including the prosecution of principal offenders, whilst the ICC exercises jurisdiction over responsible commanders up the chain of command. This outcome, it has been established, would fill the impunity gap whilst concurrently injecting the deterrent effect which the threat of the prosecution of commanders has on the conduct of subordinates in terms of their enforced compliance with the laws of war. It would, however, run counter to the strongly expressed public policy of Australia, underlying the implementation of the Rome Statute offences in Division 268 of the Commonwealth Criminal Code, that Australia 'will always be in a position to investigate and, if appropriate, prosecute a person who is accused of a crime under the Statute'.[1043]

8.3 Case study

In light of the attention given to the Brereton Inquiry as a case study in this thesis, and the fact that aspects of the Brereton Report regarding the command responsibility, or purported lack thereof, of commanders above the tactical level served as a trigger to this research, the Brereton Report warrants discrete attention in this concluding synthesis to this work. This attention serves to highlight, in a practical setting, the risks posed by the manner in which Australia implemented the command responsibility provisions into domestic law, the interpretation and application of the doctrine broadly, and the resultant risk to Australia's 'sovereignty' in the prosecution of international crimes which the Australian legislature held so dearly in the passage of the implementing provisions into Australian law.

[1043] Explanatory Memorandum, International Criminal Court (Consequential Amendments) Bill 2002 (Cth) 3.

8.3.1 Ab initio exculpation of higher commanders

The practical outcome of the Brereton Report's exculpation of commanders above the tactical patrol commander level is that Australia is unlikely to take any investigative or prosecutorial action against such higher commanders. Open-source reporting of the inquiry report, the contents of the redacted version of the report, and subsequent actions by the Chief of the Australian Defence Force support a conclusion that higher commanders were not recommended for referral for criminal investigation, were not subsequently referred for such investigation and, as such, are not subject of any investigative action by Australian criminal investigative authorities. This study has ascertained that this outcome is clear evidence that Australia is not taking investigative steps in accordance with the law and jurisprudence on the admissibility of cases before the ICC. The 'inactivity' trigger of admissibility is thus available to the ICC.

An obstacle to admissibility under the Rome Statute is the instance in which a state has properly investigated the case and decided not to prosecute. In the present case, there is no public indication that an investigation into the culpability of the higher chain of command has been undertaken and, thus, a competent prosecuting authority has not been required to make a decision on whether to proceed to prosecute any individuals. In light of the fact that, as a matter of logic, no decision could possibly be made in these circumstances in which no referral for investigation has apparently been undertaken, this study concluded that the reasoning underpinning the exculpation of the higher chain of command is irrelevant to the issue of admissibility. The Brereton Inquiry and its subsequent report thus poses no barrier to admissibility before the ICC.

This research confirms the fact that a state must take investigative steps with a certain degree of quality regarding the collection and analysis of evidence and bona fide matters of process and procedure in order to be considered genuine in order to avoid admissibility before the ICC. In the event the higher chain of command considered in the Brereton Report is not genuinely investigated through the prism of command responsibility, as appears to be the case to date, impunity is likely to prevail and the intent of the Rome Statute would be denied. This, in turn, would tend to diminish Australia's recognition of a mode of liability which has long been considered a general principle of criminal law in international criminal courts and tribunals, existing alongside the principle of individual criminal responsibility.

From a normative perspective, any outcome which denies the intent of the Rome Statute in combating impunity for international crimes whilst concurrently overturning the accepted wisdom that positions of command have a critical role to play in the enforcement of norms of international humanitarian law would be disastrous for a state, such as Australia, which advocated so vigorously in favour of the Rome Statute.

This work has concluded that internal administrative inquiries at any level are not investigations for the purposes of complementarity. In any event, Australia cannot argue that the Brereton Inquiry comprised 'investigative steps' since individual higher commanders were not the subject of the inquiry and, on the publicly available material, Australia is not able to submit tangible evidence pointing to specific investigative steps in accordance with the requirements of the ICC Appeals Chamber in *Muthaura.*[1044] In the Brereton Report, the applicability of legal command responsibility to the chain of command above the highly operational level of patrol commander was rejected in favour of what Brereton deemed 'moral command responsibility'.[1045] Whilst the report's author went on to state that '[c]ommand responsibility is both a legal and a moral concept',[1046] the extrapolation of a doctrine which is one exclusively of law to include a moral dimension, in an inquiry of a legal nature aimed at identifying potential criminality, is irrelevant and, indeed, distracting from the necessary demarcation between law and morality in adjudicating criminality. Earlier attempts at assigning moral responsibility in the context of war crimes were described as 'failing to articulate cognizable harms'.[1047]

The upshot of this analysis is that, in the event the ICC Prosecutor opens a case involving the higher chain of command regarding the incidents identified in the Brereton Inquiry and report, and in light of the fact Australia cannot argue the same case is being investigated by both the ICC and Australia, admissibility could be triggered by Australia's inaction in not taking investigative steps regarding those commanders. In contrast to the Australian Government's apparent understanding of the test of ICC admissibility, that admissibility turns exclusively on

[1044] *Muthaura Admissibility Appeal* (n 988) [68].

[1045] IGADF (n 1) pt 3, 472.

[1046] Ibid pt 3, 27, 30.

[1047] Sepinwall (n 11) 251.

unwillingness or inability to investigate or prosecute[1048] – a flawed understanding which has also been applied almost as a slogan by commentators including Major General Justice Brereton[1049] – the first limb of the test is inactivity in investigating. The concepts of unwillingness and inability are exceptions to be applied where a state is apparently investigating but the ICC nonetheless assumes jurisdiction. In these circumstances, it has been established, Australia could not avoid the invocation of the jurisdiction of the ICC and could well be limited to an arrangement of shared jurisdiction in order to ensure the Court's focus on combating impunity is maintained.

8.3.2 Structural exculpation of higher commanders

The Brereton Inquiry report relied, to some extent, on the ADF command structure and, as pointed out by commentators, the ADF command and control terminology and responsibility[1050] in exculpating the higher chain of command from legal responsibility under the command responsibility doctrine. This study has shown this to be a manifestly flawed interpretation of command responsibility and, indeed, of the command and control structures, as well as a flawed application of the law of command responsibility to the facts of command and control in Afghanistan specifically and the MEAO more broadly. The writings of former commanders of JTF 633 and other military academics lend significant weight to that conclusion reached in this research.

The analysis in this thesis considered the environment in which military commanders operate in order to properly superimpose the elements of command responsibility over the military command and control structure. Specifically, this research determined that, in establishing the circumstantial element of the superior–subordinate relationship, the consequence element of effective command/authority and control, and the conduct element of the power to take measures to prevent or repress the crimes or submit the matter for investigation and prosecution, a deeper analysis of the degrees of authority in the ADF command structure was warranted. Notwithstanding that commentators on the Brereton findings regarding the command responsibility of higher commanders did not contemplate the concepts comprising

[1048] *JSCOT Report 45* (n 574) 7–8.

[1049] Brereton (n 998).

[1050] Shanahan (n 733).

the command and control structure through a legal lens, the reality is, of course, that command responsibility is a legal doctrine which is enshrined in the codified provisions of Australian criminal law inclusive of the requisite elements of proof.

It is clearly improper to merely refer to command responsibility as some form of moral obligation or, worse, as a throw-away term within the lexicon of military terminology. To do either is to discard the intent of the international community to fight impunity from international crimes and to adequately deter the commission of such crimes, thus adhering to norms of conduct in armed conflict.

Whilst the determination of whether command arrangements satisfy the applicable elements of command responsibility is a matter of evidence rather than being a purely legal determination, this research confirmed that the adoption by the ADF of deployed Joint Task Force command arrangements in the MEAO in the period subject of the Brereton Inquiry prima facie places such arrangements within the ambit of the elements of command responsibility. At the time of writing, the evidence of former higher commanders including JTF commanders, internal defence reviews, and ADF doctrine supports a conclusion of effective control. In that light, this study has confirmed the structural degrees of authority do not, of themselves, exculpate higher commanders from command responsibility.

Seeing through the opacity and complexity of Australia's command arrangements in Afghanistan, this research has provided a clear assessment that the chain of command had significant capacity for effective command and control and, indeed, exercised such capacity, at the very least in later iterations of the command arrangements in the MEAO and, most certainly, in the period covered by the Brereton Report.

The leadership philosophy of mission command has similarly been relied upon as a mechanism by which to broadly exculpate higher ADF commanders from liability under the law of command responsibility. This work has revealed that denying liability on this basis is flawed both as a matter of the application of the elements of command responsibility to the practice of mission command and as a matter of the practice of mission command in the Australian operational setting. ADF doctrine itself recognises that mission command, in practice, does not displace the necessity for 'active control' and active control is, in turn, equated in international jurisprudence to effective control and the proper discharge of the duty of command.

Further, this thesis confirms that the notion of delegation, a concept which is at the heart of mission command, injects into the function of command a new range of responsibilities and duties rather than allowing for the abrogation of responsibility. Whilst mission command is, philosophically, a form of decentralised control, former ADF commanders have rejected notions of 'set and forget' within the application of the philosophy such that, in the context of oversight and discipline, the monitoring of the conduct of subordinates warrants more centralised control.

8.4 Concluding contemplation

By way of a relevant and topical concluding statement to this thesis, the following quotations are at once instructive and contemplative:

> Every great institution is the lengthened shadow of a single man. His character determines the character of the organisation.[1051]
>
> If institutions are shadows of men, they are cast far and wide.[1052]

The allegations of war crimes by Australian special operations forces in Afghanistan undoubtedly cast a shadow over the Australian Defence Force as a whole and may even raise questions about the strength of Australia's commitment to international humanitarian law. As a matter of command, leadership and management practice, this institutional shadow reflects on the leadership of the organisation generally. Specifically, it also reflects on the chain of command of the Special Operations Task Group force elements identified in the Brereton Inquiry report, and on the higher command at the Joint Task Force level, in terms of the liability of individual commanders under the legal doctrine of command responsibility as enacted in the Commonwealth Criminal Code and as purportedly derived from the counterpart provisions in the Rome Statute.

[1051] Ralph Waldo Emerson, 'Self-Reliance' in Ralph Waldo Emerson, *Essays and English Traits*, ed Charles Eliot (PF Collier & Son, 1965) 59, 65.

[1052] Binoy Kampmark, 'The Shadow of Responsibility: Australian War Crimes Allegations in Afghanistan', *Eureka Street* (Blog Post, 24 November 2020) <https://www.eurekastreet.com.au/article/the-shadow-of-responsibility--australian-war-crimes-allegations-in-afghanistan>.

The codified provisions diverge from those of the Rome Statute in material respects in the requisite mental/fault elements applicable to each material/physical element of the command responsibility mode of liability. This divergence has implications for the coherence and consistency of the law on point and, thus, the capacity of the Australian provisions to support a claim of complementarity by Australia. It is likely the implementation of command responsibility in Australian law does not satisfy Australia's obligations under the Rome Statute, and thus an Australian investigation of commanders (or failure to investigate commanders) will not displace the jurisdiction of the ICC under the principle of complementarity.

In recognising the lengthened shadow cast from the allegations of war crimes but failing to properly apply the law of command responsibility to the chain of command, it is likely the flawed implementation of the doctrine into Australian law does not provide an effective means of ensuring the responsibility of the commanders in whom the Australian public place their trust. As Frame states, in the context of the fallout from the Brereton Inquiry, '[g]oodwill and confidence are integral to a sound relationship between the people and their defence force, and between politicians and senior commanders'.[1053] The ineffectual enactment or improper application of laws of this nature does little to ensure the maintenance of goodwill and confidence between all parties to this transaction – the Australian people, their defence force, the politicians responsible for the creation of the laws, and the commanders responsible for their enforcement. In public commentary on the doctrine of command responsibility, Major General Justice Brereton stated, 'fundamentally, laws are pointless if they're not enforced and the law which is not enforced soon becomes a dead letter'.[1054] The questions arising are whether the law of command responsibility, if not enforced properly or at all by Australia, will become a dead letter and whether such dead letter of Australian command responsibility law could lead to the ICC exercising jurisdiction over Australian commanders. The answers identified in this thesis are resoundingly in the affirmative.

[1053] Frame (n 12) 1.

[1054] Brereton (n 998).

BIBLIOGRAPHY

Articles/books/reports

Afghanistan Inquiry Implementation Oversight Panel, *Quarterly Report to the Minister for Defence* (Report No 2, 26 February 2021)

Aksenova, Marina, 'The ICC Involvement in Colombia: Walking the Fine Line Between Peace and Justice' in Morten Bergsmo and Carsten Stahn (eds), *Quality Control in Preliminary Examinations: Volume 1* (Torkel Opsahl Academic EPublisher, 2018) 257 <https://www.legal-tools.org/doc/5b3704/pdf>

Ambos, Kai, *Treatise on International Criminal Law: Volume 1 Foundations and General Part* (Oxford University Press, 2021)

Anderson, Troy, *Commonwealth Criminal Law* (Federation Press, 2014)

Arendt, Hannah, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Viking Press, 1963)

Arnold, Roberta and Otto Triffterer, 'Responsibility of Commanders and other Superiors' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (CH Beck Hart Nomos, 2nd ed, 2008) 795

Asymmetric Warfare Group, *Russian New Generation Warfare Handbook* (Asymmetric Warfare Group, December 2016)

Badar, Mohamed, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (Hart Publishing, 2013)

Badar, Mohamed Elewa, 'The Mens Rea Enigma in the Jurisprudence of the International Criminal Court' in Carsten Stahn, Larissa van den Herik and Nico Schrijver (eds), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff Publishers, 2012) 503

Bantekas, Ilias, 'The Contemporary Law of Superior Responsibility' (1999) 93(3) *American Journal of International Law* 573

Bartels, Rogier et al (eds), *Military Operations and the Notion of Control Under International Law* (TMC Asser Press, 2021)

Bartley, Reg, *Crawford's Proofs in Criminal Cases* (LBC Information Services, 5th ed, 1996)

Bassiouni, Mahmoud Cherif and William A Schabas, 'The ICC's Nature, Functions, and Mechanisms' in Mahmoud Cherif Bassiouni (ed), *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text* (Transnational Publishers, 2005) 132

Bassiouni, Mahmoud Cherif (ed), *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute* (Transnational Publishers, 2005)

Bassiouni, Mahmoud Cherif (ed), *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text* (Transnational Publishers, 2005)

Batros, Ben, 'The Judgment on the Katanga Admissibility Appeal: Judicial Restraint at the ICC' (2010) 23(2) *Leiden Journal of International Law* 343

Beehner, Lionel et al, *Analyzing the Russian Way of War: Evidence from the 2008 Conflict with Georgia* (Modern War Institute at West Point, 2018)

Bellelli, Roberto (ed), *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (Ashgate Publishing, 2010)

Bellelli, Roberto, 'Obligation to Cooperate and Duty to Implement' in Roberto Bellelli (ed), *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (Ashgate Publishing, 2010) 211

Bellew, Geoffrey, 'Foreword' in Troy Anderson, *Commonwealth Criminal Law* (Federation Press, 2014) v.

Bernard, Diane, 'Beyond Hierarchy: Standard of Review and the Complementarity of the International Criminal Court' in Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (Oxford University Press, 2014) 371

Bevan, David, *A Case to Answer: The Story of Australia's First European War Crimes Prosecution* (Wakefield Press, 1994)

Bitti, Gilbert, 'Article 21 of the Statute of the ICC and the Treatment of Sources of Law in the Jurisprudence of the ICC' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009) 281

Blaxland, John, Marcus Fielding and Thea Gellerfy (eds), *Niche Wars: Australia in Afghanistan and Iraq, 2001–2014* (Australian National University Press, 2020)

Boas, Gideon, James Bischoff and Natalie Reid, *International Criminal Law Practitioner Library Volume I: Forms of Responsibility in International Criminal Law* (Cambridge University Press, 2007)

Boas, Gideon, James Bischoff and Natalie Reid, *International Criminal Law Practitioner Library Volume 2: Elements of Crimes Under International Law* (Cambridge University Press, 2008)

Boister, Neil and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford University Press, 2008)

Borda, Aldo, 'Precedent in International Criminal Courts and Tribunals' (2013) 2(2) *Cambridge Journal of International and Comparative Law* 287

Bronitt, Simon and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 3rd ed, 2010)

Burchard, Christoph, Otto Triffterer and Joachim Vogel (eds), *The Review Conference and the Future of the International Criminal Court* (Wolters Kluwer, 2010)

Burke-White, William, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice' (2008) 19 *Criminal Law Forum* 59

Burnett, Western, 'Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra' (1985) 107 *Military Law Review* 71

Bussani, Mauro and Ugo Mattei, *The Cambridge Companion to Comparative Law* (Cambridge University Press, 2012)

Butterworths Australian Legal Dictionary (1st ed, 1997)

Bryman, Alan, *Social Research Methods* (Oxford University Press, 5th ed, 2016)

Caligari, John, 'The Application of Mission Command by the 1st Battalion, The Royal Australian Regiment (1 RAR) Group on Operation Solace in Somalia in 1993' in Russell Glenn (ed), *Trust and Leadership: The Australian Army Approach to Mission Command* (University of North Georgia University Press, 2020) 156

Cane, Peter and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2013)

Cantwell, John, *Exit Wounds: One Australian's War on Terror* (Melbourne University Press, 2012)

Caron, David, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 *American Journal of International Law* 857

Charlesworth, Hillary et al, *No Country is an Island: Australia and International Law* (UNSW Press, 2006)

Ching, Ann, 'Evolution of the Command Responsibility Doctrine in Light of the Čelebići Decision of the International Criminal Tribunal for the Former Yugoslavia' (1999) 25(1) *North Carolina Journal of International and Commercial Regulation* 167

Clapham, Andrew, 'Issues of Complexity, Complicity and Complementarity: From the Nuremberg Trials to the Dawn of the New International Criminal Court' in Philippe Sands (ed), *From Nuremberg to the Hague: The Future of International Criminal Justice* (Cambridge University Press, 2003) 30

Clark, Roger, 'Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations of the Rome Statute of the International Criminal Court and by the Court's First Substantive Law Discussion in the Lubanga Dyilo Confirmation Proceedings' (2008) 19 *Criminal Law Forum* 519

Clark, Roger, 'Medina: An Essay on the Principles of Criminal Liability for Homicide' (1973) 5 *Rutgers-Camden Law Journal* 59

Clark, Roger, 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences' (2001) 12(3) *Criminal Law Forum* 291

Collins, Pauline, 'What is Good for the Goose is Good for The Gander: The Operation of the Rome Statute in the Australian Context' (2009) 32(1) *University of New South Wales Law Journal* 106

Crane, Michael, 'Command and Control' in John Blaxland, Marcus Fielding and Thea Gellerfy (eds), *Niche Wars: Australia in Afghanistan and Iraq, 2001–2014* (Australian National University Press, 2020) 155

Crawford, Emily and Aaron Fellmeth, 'Command Responsibility in the Brereton Report: Fissures in the Understanding and Interpretation of the "Knowledge" Element in Australian Law' (2022) 23(1) *Melbourne Journal of International Law* 164

Cribb, Robert, 'Conventional War Crimes: The International Military Tribunal for the Far East and the Ill-Treatment of Prisoners of War and Civilian Internees' in Viviane Dittrich et al (eds), *The Tokyo Tribunal: Perspectives on Law, History and Memory* (Torkel Opsahl Academic Publisher, 2020) 177

Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapters 1 and 2 General Principles of Criminal Responsibility* (Report, December 1992)

Cullison, Alan, 'Morality and the Foundation of Legal Positivism' (1985) 20(1) *Valparaiso University Law Review* 61

Darcy, Shane and Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press, 2010)

Department of Defence, *Afghanistan Inquiry Reform Plan: Delivering the Defence Response to the IGADF Afghanistan Inquiry* (Report, 30 July 2021)

Dinstein, Yoram, *The Conduct of Hostilities under the Law of Armed Conflict* (Cambridge University Press, 2004)

Dittrich, Viviane, Kerstin von Lingen, Philipp Osten and Jolana Makraiová (eds), *The Tokyo Tribunal: Perspectives on Law, History and Memory* (Torkel Opsahl Academic Publisher, 2020)

Donlon, Fidelma, 'The Judicial Role in the Definition and Implementation of the Completion Strategies of the International Criminal Tribunals' in Shane Darcy and Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press, 2010) 353

Dörmann, Knut, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press, 2002)

Douglass, John Jay, 'High Command Case: A Study in Staff and Command Responsibility' (1972) 6(4) *International Lawyer* 686

Dunnaback, Jeremy, 'Command Responsibility: A Small-Unit Leader's Perspective' (2014) 108(4) *Northwestern University Law Review* 1385

Emerson, Ralph Waldo, 'Self-Reliance' in Ralph Waldo Emerson, *Essays and English Traits*, ed Charles Eliot (PF Collier & Son, 1965) 59

Fairall, Paul, *Homicide: The Laws of Australia* (Thomson Reuters, 2012)

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

Fenrick, William, 'Some International Law Problems Related to Prosecutions before the International Criminal Tribunal for the Former Yugoslavia' (1995) 6(1) *Duke Journal of Comparative & International Law* 103

Fenrick, William, 'The Prosecution of International Crimes in Relation to the Conduct of Military Operations' in Terry Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2nd ed, 2015) 501

Ferdinandusse, Ward, *Direct Application of International Criminal Law in National Courts* (TMC Asser Press, 2005)

Ford, Stuart, 'The Impact of the Ad Hoc Tribunals on the International Criminal Court' in Milena Sterio and Michael Scharf (eds), *The Legacy of Ad Hoc Tribunals in International Criminal Law* (Cambridge University Press, 2019) 307

Frame, Tom and Albert Palazzo (eds), *Ethics Under Fire: Challenges for the Australian Army* (UNSW Press, 2017)

Frame, Tom, *Veiled Valour: Australian Special Forces in Afghanistan and War Crimes Allegations* (UNSW Press, 2022)

Gadirov, Erkin and Roger Clark, 'Elements of Crimes' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (CH Beck Hart Nomos, 2nd ed, 2008) 505

Gardiner, Richard, *Treaty Interpretation* (Oxford University Press, 2010)

Garraway, Charles, 'War Crimes' in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, 2007) 377

Generous, William, *Swords and Scales: The Development of the Uniform Code of Military Justice* (Associated Faculty Press, 1973)

Gilbert, Felix, 'Machiavelli: The Renaissance of the Art of War' in Peter Paret (ed), *Makers of Modern Strategy from Machiavelli to the Nuclear Age* (Princeton University Press, 1986) 11

Gill, Terry and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2nd ed, 2015)

Gillies, Peter, *The Law of Criminal Complicity* (Law Book Company, 1980)

Glenn, Russell, 'Mission Command Overview' in Russell Glenn (ed), *Trust and Leadership: The Australian Army Approach to Mission Command* (University of North Georgia University Press, 2020) 1

Glenn, Russell (ed), *Trust and Leadership: The Australian Army Approach to Mission Command* (University of North Georgia University Press, 2020)

Goode, Matthew, 'The Model Criminal Code Project' (1997) 5(4) *Australian Law Librarian* 265

Goy, Barbara, 'Individual Criminal Responsibility before the International Criminal Court: A Comparison with the *Ad Hoc* Tribunals' (2012) 12 *International Criminal Law Review* 1

Grande, Elisabetta, 'Comparative Criminal Justice: A Long Neglected Discipline on the Rise' in Mauro Bussani and Ugo Mattei, *The Cambridge Companion to Comparative Law* (Cambridge University Press, 2012) 191

Gray, Anthony, 'The Doctrine of Command Responsibility in Australian Military Law' (2022) 45(3) *University of New South Wales Law Journal* 1251

Greenwood, Christopher, 'What the ICC Can Learn from the Jurisprudence of Other Tribunals' (2017) 58 *Harvard International Law Journal* 71

Greppi, Edoardo, 'Inability to Investigate and Prosecute under Article 17' in Mauro Politi and Federica Gioia (eds), *The International Criminal Court and National Jurisdictions* (Ashgate Publishing, 2008) 65

Grover, Leena, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge University Press, 2015)

Guariglia, Fabricio et al, *The Appeals Chamber of the International Criminal Court: Commentary and Digest of Jurisprudence* (Cambridge University Press, 2018)

Guilfoyle, Douglas, Joanna Kyriakakis and Melanie O'Brien, 'Command Responsibility, Australian War Crimes in Afghanistan, and the Brereton Report' (2022) 99 *International Law Studies* 220

Hansen, Thomas, 'Case Note: A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity' (2012) 13 *Melbourne Journal of International Law* 1

Hébert, Valerie, *Hitler's Generals on Trial: the Last War Crimes Tribunal at Nuremberg* (University Press of Kansas, 2010)

Henckaerts, Jean-Marie and Louise Doswald-Beck, *The International Committee of the Red Cross: Customary International Humanitarian Law* (Cambridge University Press, 2005) vol 1: Rules

Higgins, Alexander Pearce, *The Hague Peace Conferences and other International Conferences Concerning the Laws and Usages of War: Texts of Conventions with Commentaries* (Cambridge University Press, 1909)

Higgins, Rosalyn, *Problems & Processes: International Law and How We Use It* (Clarendon Press, 2003)

Hobbs, Patricia, 'The Catalysing Effect of the Rome Statute in Africa: Positive Complementarity and Self-Referrals' (2020) 31 *Criminal Law Forum* 345

Holder, Leonard, 'Foreword' in Russell Glenn (ed), *Trust and Leadership: The Australian Army Approach to Mission Command* (University of North Georgia University Press, 2020) xv

Horner, David, *Strategy and Command: Issues in Australia's Twentieth-Century Wars* (Cambridge University Press, 2022)

Hurley, David, 'An Application of the Laws of Armed Conflict: Operation Solace' in Hugh Smith (ed), *The Force of Law: International Law and the Land Commander* (Australian Defence Studies Centre, 1994) 179

Independent Expert Review of the International Criminal Court and the Rome Statute System, ASP, 19th sess, ICC-ASP/19/16 (Final Report, 7–17 December 2020)

Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report* (Final Report, November 2020)

International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, 1987)

International Criminal Court Office of the Prosecutor, *Preliminary Examination Colombia – Decision Not to Prosecute* (Report, 28 October 2021)

International Military Tribunal Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal* (Official Record, 1947)

Jackson, Miles, 'Causation and the Legal Character of Command Responsibility after Bemba at the International Criminal Court' (2022) 20(2) *Journal of International Criminal Justice* 437

Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Visit to Australian Forces Deployed to the International Coalition Against Terrorism* (Report, October 2002)

Joint Standing Committee on Treaties, Parliament of Australia, *Inquiry into the Statute of the International Criminal Court* (Report No 45, May 2002)

Jones, John and Steven Powles, *International Criminal Practice* (Oxford University Press, 3rd ed, 2003)

Kelly, Justin and J P Smith, *Strategic Command and Control Lessons – Scoping Study* (Final Report, Noetic Solutions, July 2013)

Khan, Karim and Rodney Dixon, *Archbold International Criminal Courts: Practice, Procedure & Evidence* (Thomson Reuters, 3rd ed, 2009)

Kittichaisaree, Kriangsak, *International Criminal Law* (Oxford University Press, 2002)

Kleffner, Jann, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press, 2008)

Knoops, Geert-Jan, *Mens Rea at the International Criminal Court* (Brill Nijhoff, 2017)

Lael, Richard, *The Yamashita Precedent: War Crimes and Command Responsibility* (Scholarly Resources, 1982)

Landrum, Bruce, 'The Yamashita War Crimes Trial: Command Responsibility Then and Now' (1995) 149 *Military Law Review* 293

Langford, Ian, 'The Australian Special Forces Approach to Mission Command' in Glenn, Russell (ed), *Trust and Leadership: The Australian Army Approach to Mission Command* (University of North Georgia University Press, 2020) 300

Langford, Ian, 'Ethics in Special Operations' in Tom Frame and Albert Palazzo (eds), *Ethics Under Fire: Challenges for the Australian Army* (UNSW Press, 2017) 104

Langston, Emily, 'The Superior Responsibility Doctrine in International Law: Historical Continuities, Innovation and Criminality: Can East Timor's Special Panels Bring Militia Leaders to Justice?' (2004) 4(2) *International Criminal Law Review* 141

Leader-Elliott, Ian, 'Elements of Liability in the Commonwealth Criminal Code' (2002) 26 *Criminal Law Journal* 28

Lee, Roy, 'Introduction' in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (Kluwer Law International, 1999) 1

Lee, Roy (ed), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (Kluwer Law International, 1999)

Lietzau, William and Joseph Rutigliano, 'History and Development of the International Law of Military Operations' in Terry Gilland and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2nd ed, 2015) 14

Lipman, Matthew, 'Humanitarian Law: The Uncertain Contours of Command Responsibility' (2001) 8(2) *Tulsa Journal of Comparative & International Law* 1

Lord Russell of Liverpool, *The Knights of Bushido: A Short History of Japanese War Crimes* (Cassell & Company Ltd, 1958)

Lord Russell of Liverpool, *The Trial of Adolf Eichmann* (William Heinemann Ltd, 1962)

Lyon, Alan, *Japanese War Crimes: The Trials of the Naoetsu Camp Guards* (Australian Military History Publications, 2000)

Machiavelli, Niccolò, *The Art of War*, tr Ellis Farneworth (Da Capo Press, 1956) [trans of: *Dell'arte de la Guerra* (1521)]

Machiavelli, Niccolò, *The Art of War*, tr Henry Neville (Dover Publications, 2006) [trans of: *Dell'arte de la Guerra* (1521)]

MacArthur, Douglas, *Reminiscences* (William Heinemann, 1964)

MacCormick, Neil, 'A Moralistic Case for A-moralistic Law?' (1985) 20 *Valparaiso University Law Review* 1

Maga, Tim, *Judgment at Tokyo: The Japanese War Crimes Trials* (University Press of Kentucky, 2001)

Malaguti, Maria Chiara, 'Can the Nuremberg Legacy Serve any Purpose in Understanding the Modern Concept of Complementarity?' in Mauro Politi and Federica Gioia (eds), *The International Criminal Court and National Jurisdictions* (Ashgate Publishing, 2008) 114

Maogoto, Jackson, *State Sovereignty and International Criminal Law: Versailles to Rome* (Transnational Publishers, 2003)

Martinez, Jenny, 'Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond' (2007) 5 *Journal of International Criminal Justice* 638

McAuliffe deGuzman, Margaret, 'Applicable Law' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (CH Beck Hart Nomos, 2nd ed, 2008) 701

McCormack, Timothy, 'Australia's Legislation for the Implementation of the Rome Statute' in Matthias Neuner (ed), *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries* (Berliner Wissenschafts-Verlag GmbH, 2003) 65

McCormack, Timothy, 'From Sun Tzu to the Sixth Committee', in Timothy McCormack and Gerry Simpson (eds), *The Law of War Crimes: National and International Approaches* (Kluwer Law International, 1997) 31

McCormack, Timothy, 'Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law' (1997) 60(3) *Albany Law Review* 681

McCormack, Timothy and Gerry Simpson (eds), *The Law of War Crimes: National and International Approaches* (Kluwer Law International, 1997)

McDaniel, Dan, 'Australia's Intervention in Afghanistan 2001-02' in John Blaxland, Marcus Fielding and Thea Gellerfy (eds), *Niche Wars: Australia in Afghanistan and Iraq, 2001–2014* (Australian National University Press, 2020) 65

McDougall, Carrie, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press, 2nd ed, 2021)

McKelvey, Ben, *Find, Fix, Finish. From Tampa to Afghanistan: How Australia's Special Forces Became Enmeshed in the US Kill/Capture Program* (Harper Collins Publishers, 2022)

McNeilly, Mark, *Sun Tzu and the Art of Modern Warfare* (Oxford University Press, 2001)

Meloni, Chantal, *Command Responsibility in International Criminal Law* (TMC Asser Press, 2010)

Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities (Annex II to Report, 4 April 1919)

Meron, Theodor, 'Revival of Customary Humanitarian Law' (2005) 99(4) *American Journal of International Law* 817

Mettraux, Guénaël, 'Command Responsibility in International Law – The Boundaries of Criminal Liability for Military Commanders and Civilian Leaders' (PhD Thesis, London School of Economics and Political Science, 2008)

Mettraux, Guénaël, *The Law of Command Responsibility* (Oxford University Press, 2009)

Ministry of Defence, *Manual of Military Law* (Part III, 1958)

Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, 2005)

Molan, Jim, *Running the War in Iraq: An Australian General, 300 000 Troops, the Bloodiest Conflict of Our Time* (Harper Collins Publishers, 2008)

Nautilus Institute for Security and Sustainability, *Australia in Afghanistan Briefing Book* (Nautilus Institute for Security and Sustainability, 2010)

Nederman, Cary, 'Introduction' in Niccolò Machiavelli, *The Prince on the Art of Power*, tr WK Marriot (Watkins Publishing, 2012) 4

Nerlich, Volker, 'The Status of ICTY and ICTR Precedent in Proceedings Before the ICC' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009) 305

Nerlich, Volker, 'Superior Responsibility under Article 28 ICC Statute' (2007) 5(3) *Journal of International Criminal Justice* 665

Neuner, Matthias (ed), *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries* (Berliner Wissenschafts-Verlag GmbH, 2003)

Newton, Michael, 'Absolutist Admissibility at the ICC: Revalidating Authentic Domestic Investigations' (2021) 54(2) *Israel Law Review* 143

Nouwen, Sarah, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press, 2013)

Nybondas, Maria, *Command Responsibility and its Applicability to Civilian Superiors* (TMC Asser Press, 2010)

Nybondas-Maarschalkerweerd, Maria, 'The Command Responsibility Doctrine in International Criminal Law and its Applicability to Civilian Superiors' (PhD Thesis, University of Amsterdam, 2009)

Odgers, Stephen, *Principles of Federal Criminal Law* (Thomson Reuters, 2nd ed, 2010)

Office of United States Chief of Counsel For Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression* (United States Government Printing Office, 1946)

O'Hanlon, Michael, *The Future of Land Warfare* (Brookings Institution Press, 2015)

Olásolo, Héctor, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Hart Publishing, 2010)

Olásolo, Héctor, *The Triggering Procedure of the International Criminal Court* (Martinus Nijhoff Publishing, 2005)

O'Neill, J R, 'Mission Command and Command Responsibility: It is Time to Talk Ethics' (2021) 22 *Centre for Army Leadership – Leadership Insight* 1

Opeskin, Brian and Donald Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997)

Orend, Brian, *The Morality of War* (Broadview Press, 2006)

Osiel, Mark, *Obeying Orders: Atrocity, Military Discipline & the Law of War* (Transaction Publishers, 2009)

Overy, Richard, 'The Nuremberg Trials: International Law in the Making' in Philippe Sands (ed), *From Nuremberg to the Hague: The Future of International Criminal Justice* (Cambridge University Press, 2003) 1

Pappas, Caroline, 'Law and Politics: Australia's War Crimes Trials in the Pacific 1943–1961' (PhD Thesis, University of New South Wales, 1998)

Paret, Peter (ed), *Makers of Modern Strategy from Machiavelli to the Nuclear Age* (Princeton University Press, 1986)

Parks, William, 'Command Responsibility for War Crimes' (1973) 62 *Military Law Review* 1

Pearce, Dennis and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011)

Piragoff, Donald and Darryl Robinson, 'Article 30 Mental Element' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (CH Beck Hart Nomos, 2nd ed, 2008) 849

Politi, Mauro and Federica Gioia (eds), *The International Criminal Court and National Jurisdictions* (Ashgate Publishing, 2008)

Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court: Compilation of Proposals*, UN GAOR, 51st sess, Supp No 22, UN Doc A/51/22 (13 September 1996)

Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court: Proceedings of the Preparatory Committee during March–April and August 1996*, UN GAOR, 51st sess, Supp No 22, UN Doc A/51/22 (13 September 1996)

Pritchard, John and Sonia Zaide (eds), *The Tokyo War Crimes Trial* (Garland Publishing, 1981)

Quick, John and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901)

Raimondo, Fabián, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff Publishers, 2008)

Reel, Frank, *The Case of General Yamashita* (Octagon Books, 1949)

Report of the Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties (Report, 29 March 1919)

Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/25704 (3 May 1993)

Rescher, Nicholas, *Presumption and the Practices of Tentative Cognition* (Cambridge University Press, 2006)

Robinson, Darryl, 'How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution' (2012) 13(1) *Melbourne Journal of International Law* 1

Robinson, Darryl, 'The Mysterious Mysteriousness of Complementarity' (2010) 21 *Criminal Law Forum* 67

Robinson, Paul and Jane Grall, 'Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond' (1983) 35 *Stanford Law Review* 681

Rockwood, Lawrence, *Walking Away from Nuremberg: Just War and the Doctrine of Command Responsibility* (University of Massachusetts Press, 2007)

Röling, Bernard Victor Aloysius, *The Tokyo Trial and Beyond*, ed Antonio Cassese (Polity Press, 1993)

Rothwell, Donald, 'International Law and Legislative Power' in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 104

Ryan, Alan, *Yamashita's Ghost: War Crimes, MacArthur's Justice and Command Accountability* (University Press of Kansas, 2012)

Saland, Per, 'International Criminal Law Principles' in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (Kluwer Law International, 1999) 189

Sander, Barry, 'Unravelling the Confusion Concerning Successor Superior Responsibility in the ICTY Jurisprudence' (2010) 23(1) *Leiden Journal of International Law* 105

Sands, Philippe (ed), *From Nuremberg to the Hague: The Future of International Criminal Justice* (Cambridge University Press, 2003)

Sands, Philippe, *Torture Team: Deception, Cruelty and the Compromise of Law* (Allen Lane, 2008)

Schabas, William, 'Prosecutorial Discretion v Judicial Activism at the International Criminal Court' (2008) 6 *Journal of International Criminal Justice* 731

Schabas, William, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010)

Schabas, William, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, 2008)

Seils, Paul, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes* (International Center for Transitional Justice, 2016)

Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (Report, November 1995)

Sepinwall, Amy, 'Failures to Punish: Command Responsibility in Domestic and International Law' (2009) 30(2) *Michigan Journal of International Law* 251

Shearer, Ivan, 'The Relationship Between International Law and Domestic Law' in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 34

Shereshevsky, Yahli, 'The Unintended Negative Effect of Positive Complementarity' (2020) 18 *Journal of International Criminal Justice* 1017

Sherman, Michael, 'Standards in Command Responsibility Prosecutions: How Strict and Why' (2018) 38(2) *Northern Illinois University Law Review* 298

Shirreff, Richard, *War with Russia* (Coronet, 2016)

Smidt, Michael, 'Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations' (2000) 164 *Military Law Review* 155

Smith, Chris, 'Mission Command and the 2RAR Battle Group in Afghanistan: A Case Study in the Relationship Between Mission Command and Responsibility' in Russell Glenn (ed), *Trust and Leadership: The Australian Army Approach to Mission Command* (University of North Georgia University Press, 2020) 271

Smith, Hugh (ed), *The Force of Law: International Law and the Land Commander* (Australian Defence Studies Centre, 1994)

Stahn, Carsten and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009)

Stahn, Carsten, Larissa van den Herik and Nico Schrijver (eds), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff Publishers, 2012)

Stamp, Helen, 'Divergence in a System of Complementarity? The Incorporation of *Dolus Eventualis* in the Interpretation of Criminal Intent for Serious Crimes of International Concern: A Comparison of the International Criminal Court and the National Legal System of Canada' (Honours Dissertation, Curtin University, 2017)

Sterio, Milena and Michael Scharf (eds), *The Legacy of Ad Hoc Tribunals in International Criminal Law* (Cambridge University Press, 2019)

Stroud, Douglas, *Mens Rea or Imputability under the Law of England* (Alpha Editions, 2020)

Stuart, Nic, 'Afghanistan – Can We Ever Discover the Truth?' (2021) 47(5) *Asia-Pacific Defence Reporter: Australian Defence in a Global Context* 20

Swart, Bert, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011)

Taylor, Lawrence, *A Trial of Generals: Homma, Yamashita, Macarthur* (Icarus Press, 1981)

Tenet, George, *At the Center of the Storm* (Harper Collins, 2007)

Tinta, Monica Feria, 'Commanders on Trial: The Blaškić Case and the Doctrine of Command Responsibility under International Law' (2000) 47 *Netherlands International Law Review* 293

Tladi, Dire, 'A Horizontal Treaty on Cooperation in International Criminal Matters: The Next Step for the Evolution of a Comprehensive International Criminal Justice System?' (2014) 29 *South African Public Law* 368

Triffterer, Otto, 'Can the "Elements of Crimes" Narrow or Broaden Responsibility for Criminal Behaviour Defined in the Rome Statute?' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009) 381

Triffterer, Otto (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (CH Beck Hart Nomos, 2nd ed, 2008)

Triffterer, Otto, 'The New International Criminal Law: Its General Principles Establishing Individual Criminal Responsibility' in Kalliopi Koufa (ed), *The New International Criminal Law* (Sakkoulas Publications, 2003) 639

Triggs, Gillian, 'Australia's War Crimes Trials: All Pity Choked' in Timothy McCormack and Gerry Simpson (eds), *The Law of War Crimes: National and International Approaches* (Kluwer Law International, 1997) 123

Triggs, Gillian, 'Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law' (2003) 25(4) *Sydney Law Review* 507

Tzu, Sun, 'The Art of War', tr Samuel Griffith in Mark McNeilly, *Sun Tzu and the Art of Modern Warfare* (Oxford University Press, 2001) 237.

UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, 2005)

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN Doc A/CONF.183/2/Add.1 (14 April 1998)

United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (His Majesty's Stationery Office, 1948)

United States War Department, *The 1863 Laws of War* (Stackpole Books, 2005)

van der Wilt, Harmen and Maria Nybondas, 'The Control Requirement of Command Responsibility: New Insights and Lingering Questions Offered by the Bemba Appeals Chamber Case' in Rogier Bartels et al (eds), *Military Operations and the Notion of Control Under International Law* (TMC Asser Press, 2021) 329

Vandergriff, Donald, *Adopting Mission Command: Developing Leaders for a Superior Command Culture* (Naval Institute Press, 2019)

Vandergriff, Donald and Stephen Webber (eds), *Mission Command: The Who, What, Where, When and Why* (CreateSpace, 2018)

Vangjel, Peter, 'Mission Command: A Clarification' in Donald Vandergriff and Stephen Webber (eds), *Mission Command: The Who, What, Where, When and Why* (CreateSpace, 2018) 3

van Sliedregt, Elies, 'Command Responsibility at the ICTY: Three Generations of Case Law and Still Ambiguity' in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) 1

van Sliedregt, Elies, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (TMC Asser Press, 2003)

Vetter, Greg, 'Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)' (2000) 25(1) *Yale Journal of International Law* 89

von Clausewitz, Carl, *On the Nature of War*, tr J Graham (Penguin Books, 2005) [trans of: *Vom Kriege* (1832)]

Waisbord, Silvio, 'Politics and Identity in the Argentine Army' (1991) 26(2) *Latin American Research Review* 157

Waller, Vivienne, Karen Farquharson and Deborah Dempsey, *Qualitative Social Research: Contemporary Methods for the Digital Age* (Sage, 2016)

Weigend, Thomas, 'Superior Responsibility: Complicity, Omission or Over-Extension of the Criminal Law?' in Christoph Burchard, Otto Triffterer and Joachim Vogel (eds), *The Review Conference and the Future of the International Criminal Court* (Wolters Kluwer, 2010) 67

Whisker, James and Kevin Spiker Jr, *Command Responsibility: Holding Military Leaders Accountable for Their Troops* (Academica Press, 2020)

Wilson, Sandra et al, *Japanese War Criminals: The Politics of Justice After the Second World War* (Columbia University Press, 2017)

Wu, Timothy and Yong-Sung Kang, 'Criminal Liability for the Actions of Subordinates – The Doctrine of Command Responsibility and its Analogues in United States Law' (1997) 38(1) *Harvard International Law Journal* 272

Zeller, Bruno, 'Case Law Summaries – Maritime Law/Air Law: *Povey v Qantas Airways Ltd* (2005)' (2005) 10(3) *Uniform Law Review* 602

Cases

Australia

Airlines of New South Wales Pty Ltd v New South Wales [No 2] (1965) 113 CLR 54

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) (2009) 239 CLR 27

Ansari v The Queen (2010) 241 CLR 299

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225

Australian Federation of Construction Contractors; Ex parte Billing (1986) 68 ALR 416

Bluett v Popplewell [2018] ACTMC 2

Christian v Sawka (2012) 268 FLR 361

Commonwealth v Tasmania (1983) 158 CLR 1

Cunliffe v Commonwealth (1994) 182 CLR 272

Director of Public Prosecutions (Cth) v Poniatowska (2011) 244 CLR 408

Hann v Commonwealth (2004) 88 SASR 99

Herbert v Chief of Air Force [2018] ADFDAT 1

Jervis v The Queen [1993] 1 Qd R 643

Kinsela v Russell Kinsela Pty Ltd (in liq) (1986) 4 NSWLR 722

Koowarta v Bjelke-Petersen (1982) 153 CLR 168

Li v Chief of Army (2013) 250 CLR 328

Maloney v The Queen (2013) 252 CLR 168

Nydam v R [1977] VR 430

Pemble v R (1971) 124 CLR 107

Polites v Commonwealth (1945) 70 CLR 60

Polyukhovich v Commonwealth (1991) 172 CLR 501

Povey v Qantas Airways Ltd (2005) 223 CLR 189

Private R v Brigadier Michael Cowan [2020] HCA 31

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

Re Civilian Casualty Court Martial (2011) 259 FLR 208

Re Nolan; Ex Parte Young (1991) 172 CLR 460

Re Tracey; Ex Parte Ryan (1989) 166 CLR 518

Richardson v Forestry Commission [1988] 164 CLR 261

R v Barlow (1997) 188 CLR 1

R v Burgess; Ex parte Henry (1936) 55 CLR 608

R v Campbell (2008) 73 NSWLR 272

R v JS (2007) 230 FLR 276

R v Lee (2007) 71 NSWLR 120

R v LK and RK (2010) 241 CLR 177

R v Navarolli [2010] 1 Qd R 27

R v Poole; Ex parte Henry [No 2] (1939) 61 CLR 634

R v Tang (2008) 237 CLR 1

Saad v The Queen [1987] 29 A Crim R 20

Simpson v R (1998) 194 CLR 228

Smith v The Queen (2017) 259 CLR 291

SS Pharmaceutical Co Ltd v Qantas Airways [1991] 1 Lloyd's Rep 288

Victoria v Commonwealth (1996) 187 CLR 416

Zecevic v DPP (Vic) (1987) 162 CLR 645

United Kingdom

Fowler v Padget (1798) 101 ER 1103

R v Secretary of State for the Home Department; Ex parte Adan [2001] 2 AC 477

Post-Second World War

Attorney-General v Adolf Eichmann (1968) 36 ILR 18

In Re Yamashita 327 US 1 (1946)

Trial of Franz Schonfeld and Nine Others (British Military Court, Essen, Case No 66, 11–26 June 1946)

USA v Araki (Separate Opinion of the President) (Tokyo International Military Tribunal, 4 November 1948)

United States of America v Wilhelm von Leeb et al., Case No 12, (1948) 11 TWC 462, 27–28 October 1948, International Military Tribunal

United States of America v List (Wilhelm), Trial Judgment, Case No 7, (1948) 11 TWC 757, 19 February 1948, International Military Tribunal

Ad hoc international criminal tribunals

Prosecutor v Akayesu (Judgment) (International Criminal Tribunal for Rwanda, Chamber I, Case No ICTR-96-4-T, 2 September 1998)

Prosecutor v Aleksovski (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/1-T, 25 June 1999)

Prosecutor v Bagilishema (Judgment) (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-95-1A-T, 7 June 2001)

Prosecutor v Bagilishema (Reasons for Judgment) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-95-1A-T, 3 July 2002)

Prosecutor v Blagojević (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-02-60-A, 9 May 2007)

Prosecutor v Blaškić (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000)

Prosecutor v Blaškić (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-T, 29 July 2004)

Prosecutor v Delić (Decision on Motion for Referral of Case Pursuant to Rule 11 BIS) (International Criminal Tribunal for the Former Yugoslavia, Referral Bench, Case No IT-04-83-PT, 9 July 2007)

Prosecutor v Erdemović (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-22-A, 7 October 1997) (Separate and Dissenting Opinion of Judge Cassese)

Prosecutor v Fofana (Judgment) (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-04-14-A, 28 May 2008)

Prosecutor v Furundžija (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998)

Prosecutor v Hadžihasanović (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-01-47-AR72, 16 July 2003)

Prosecutor v Hadžihasanović (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-01-47-T, 15 March 2006)

Prosecutor v Halilović (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-01-48-T, 16 November 2005)

Prosecutor v Karemera (Judgment and Sentence) (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44-T, 2 February 2012)

Prosecutor v Kayishema (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No ICTR-95-1-T, 21 May 1999)

Prosecutor v Kordić (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2-T, 26 February 2001)

Prosecutor v Kunarac (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-23-T, 22 February 2001)

Prosecutor v Kvočka (Decision on Defence Preliminary Motions on the Form of the Indictment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-30/1, 12 April 1999)

Prosecutor v Musić ('Čelebići') (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998)

Prosecutor v Musić ('Čelebići') (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-T, 20 February 2001)

Prosecutor v Ntagerura (Appeal Judgment) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-46-A, 7 July 2006)

Prosecutor v Orić (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-03-68-T, 30 June 2006)

Prosecutor v Orić (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-03-68-T, 3 July 2008)

Prosecutor v Perišić (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-04-81-T, 6 September 2011)

Prosecutor v Stakić (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-24-T, 31 July 2003)

Prosecutor v Strugar (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005)

Prosecutor v Taylor (Judgment) (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-T, 18 May 2012)

International Court of Justice

LaGrand (Germany v United States of America) (Judgment) [2001] ICJ Rep 466

Oil Platforms (Islamic Republic of Iran v United States of America) (Preliminary Objection) [1996] ICJ Rep 803

International Criminal Court

Prosecutor v Al Bashir (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009)

Prosecutor v Al Bashir (Final Submissions of the Prosecution following the Appeal Hearing) (International Criminal Court, Appeals Chamber, Case No ICC-02/05-01/09, 28 September 2018)

Prosecutor v Al-Senussi (Judgment on the Appeal of Mr Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 Entitled 'Decision on the Admissibility

of the Case against Abdullah Al-Senussi') (International Criminal Court, Appeals Chamber, Case No ICC-01/11-01/11 OA 6, 24 July 2014)

Prosecutor v Bemba (Appeal Brief) (International Criminal Court, Appeals Chamber, Case No ICC-01/05-01/08, 28 September 2016)

Prosecutor v Bemba (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 15 June 2009)

Prosecutor v Bemba (Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański) (International Criminal Court, Appeals Chamber, Case No ICC-01/05-01/08, 8 June 2018)

Prosecutor v Bemba (Judgment) (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08, 21 March 2016)

Prosecutor v Bemba (Judgment) (International Criminal Court, Appeals Chamber, Case No ICC-01/05-01/08, 8 June 2018)

Prosecutor v Bemba (Separate Opinion of Judge Van den Wyngaert and Judge Morrison) (International Criminal Court, Appeals Chamber, Case No ICC-01/05-01/08-A Anx 2, 8 June 2018)

Prosecutor v Gaddafi (Judgment on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 Entitled 'Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi') (International Criminal Court, Appeals Chamber, Case No ICC-01/11-01/11 OA 4, 21 May 2014)

Prosecutor v Gdagbo (Judgment on the Appeal of Côte d'Ivoire against the Decision of Pre-Trial Chamber I of 11 December 2014 Entitled 'Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case against Simone Gbagbo') (International Criminal Court, Appeals Chamber, Case No ICC-02/11-01/12 OA, 27 May 2015)

Prosecutor v Katanga (Decision on the Application for Participation in the Proceedings of Applicants a/0327/07 to 1/0337/07 and a/0001/08) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/07-357, 2 April 2008)

Prosecutor v Katanga (Decision on the Confirmation of Charges) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/07-717, 30 September 2008)

Prosecutor v Katanga (Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case) (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/07 OA8, 25 September 2009)

Prosecutor v Katanga (Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case) (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 16 June 2009)

Prosecutor v Lubanga (Decision on the Confirmation of Charges) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, 29 January 2007)

Prosecutor v Lubanga (Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, 10 February 2006)

Prosecutor v Lubanga (Judgment) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012)

Prosecutor v Lubanga (Judgment on the Appeal of Mr Thomas Dyilo Lubanga against his Conviction) (International Criminal Court, Appeals Chamber I, Case No ICC-01/04-01/06A5, 1 December 2014)

Prosecutor v Lubanga (Judgment Pursuant to Article 74 of the Statute) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012)

Prosecutor v Muthaura (Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled 'Decision on the Application by the

Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute') (International Criminal Court, Appeals Chamber, Case No ICC-01/09-02/11 OA, 30 August 2011)

Situation in the Democratic Republic of the Congo (Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-135-tEN, 31 March 2006)

Situation in the State of Palestine (Submission Pursuant to Rule 103 (Todd F Buchwald and Steven J Rapp) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/18, 16 March 2020)

Legislation/statutes/resolutions

Australia

Australian Constitution

Corporations Act 2001 (Cth)

Criminal Code Act 1995 (Cth)

Defence Legislation Amendment (Discipline Reform) Act 2021 (Cth)

Explanatory Memorandum, International Criminal Court Bill 2002 (Cth)

Explanatory Memorandum, International Criminal Court (Consequential Amendments) Bill 2002 (Cth)

International Criminal Court Act 2002 (Cth)

International Criminal Court (Consequential Amendments) Act 2002 (Cth)

International War Crimes Tribunals Act 1995 (Cth)

War Crimes Act 1945 (Cth)

Foreign domestic

United States Constitution

War Crimes Regulations 1946, 10 Geo 6, c 73

International

Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed 16 January 2002, 2178 UNTS 137 (entered into force 12 April 2002) annex (*'Statute of the Special Court for Sierra Leone'*)

Allied Control Council, *Control Council Law No 10 – Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity* (20 December 1945)

International Criminal Court, *Elements of Crimes*, Doc No ICC-PIDS-LT-03-002/11 (adopted 1 July 2002)

International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 53rd sess, UN Doc A/56/10 (2001)

International Law Commission, *Draft Statute for an International Criminal Court*, 46th sess, UN Doc A/CN.4/L.491/Rev 2 (1994)

Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002)

SC Res 780, UN SCOR, UN Doc S/RES/780 (6 October 1992)

SC Res 827, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN Doc S/RES/1877 (7 July 2009) ('*ICTY Statute*')

SC Res 955, UN Doc S/RES/955 (8 November 1994) annex ('*Statute of the International Tribunal for Rwanda*')

Statute of the International Court of Justice

Treaties

Hague Convention IV Respecting the Laws and Customs of War on Land, signed 18 October 1907, 36 Stat 2277; TS 539 (entered into force 26 January 1910)

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1979)

Treaty of Peace Between the Allied and Associated Powers and Germany (Treaty of Versailles), signed 28 June 1919, ATS 1 (entered into force 10 January 1920)

United Nations, *Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 82 UNTS 280 (8 August 1945).

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

Other

Amann, Dianne Marie, 'In *Bemba*, Command Responsibility Doctrine Ordered to Stand Down', *ICC Forum* (Blog Post, 27 May 2019) <https://iccforum.com/responsibility>

Attorney-General's Department, 'Rule of Law' (Information Sheet, 2022) <https://www.ag.gov.au/about-us/what-we-do/rule-of-law>

Australian Defence Force Warfare Centre, *Command and Control* (Australian Defence Doctrine Publication, ADDP 00.1, 27 May 2009)

Australian Defence Force Warfare Centre, *Operations* (Australian Defence Doctrine Publication, ADDP 3.0, 2011)

Australian Government, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (February 2004)

Brady, Helen, Submission No 7 to Joint Standing Committee on Treaties, Parliament of Australia, *Australia's Ratification of the International Criminal Court Statute* (2001)

Brereton, Paul, 'War Crimes in Australian History: From Boer War to Vietnam War' (Speech, Military History Society of NSW, 15 June 2022) <https://youtube.com/watch?v=ESkyAUSbk>

'Briefing Note from United States Attorney General Tom C. Clark to President Harry S. Truman' (29 October 1945)

Centre for International Law Research and Policy, *Command Responsibility* (Guidelines, 2nd ed, November 2016)

Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2002

Cryer, Robert, 'Command Responsibility at the ICC and ICTY: In Two Minds on the Mental Element?', *EJIL Talk!* (Blog Post, 20 July 2009) <http://ejiltalk.org/command-responsibility-at-the-icc-and-icty-in-two-minds-on-the-mental-element/>

de Gurmendi, Silvia Fernández, 'From Ratification to Action: The Importance of Full Implementation of the Rome Statute' (Keynote Speech, Hague Institute for Global Justice Seminar, 16 September 2015)

Department of Defence, *Administrative Inquiries Manual* (Australian Defence Force Publication, ADFP 06.1.4, June 2006)

Department of Defence, *Guide to Administrative Decision-Making* (Australian Defence Force Publication, ADFP 06.1.3, August 2003)

Department of Defence, HQ JTF633, 'Force Elements Currently Deployed as part of JTF633', *Australian Operations in Afghanistan* (Fact Sheet, 3 February 2010)

'Downer Speaks on the ICC Decision', *ABC Radio National PM* (interview with Alexandra Kirk, 20 June 2002)

'Downer Urges Deal on World Court', *The Age* (online, 14 June 2002) <http://www.theage.com.au/national/downer-urges-deal-on-world-court-20020614-gduasa.html>

International Criminal Court Office of the Prosecutor, 'Paper on Some Policy Issues Before the Office of the Prosecutor' (Policy Paper, September 2003)

International Criminal Court Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation' (Policy Paper, 15 September 2016)

International Criminal Court Office of the Prosecutor, 'Policy Paper on Preliminary Examinations' (Policy Paper, November 2013)

International Criminal Court Office of the Prosecutor, 'Strategic Plan 2019–2021' (Policy Paper, 17 July 2019)

Jackson, Miles, 'Geographical Remoteness in Bemba', *EJIL Talk!* (Blog Post, 30 July 2018) <https://www.ejiltalk.org/geographical-remoteness-in-bemba/>

Joint Chiefs of Staff, JCS Directive 1023/3, *Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders* (25 September 1944)

Kampmark, Binoy, 'The Shadow of Responsibility: Australian War Crimes Allegations in Afghanistan', *Eureka Street* (Blog Post, 24 November 2020) <https://www.eurekastreet.com.au/article/the-shadow-of-responsibility-australian-war-crimes-allegations-in-afghanistan>

Land Warfare Development Centre, *Command, Leadership and Management* (Land Warfare Doctrine, LWD 0.0, 17 November 2003)

Land Warfare Development Centre, *Operations (Developing Doctrine)* (Land Warfare Doctrine, LWD 3-0, 19 September 2008)

Land Warfare Development Centre, *The Military Appreciation Process* (Land Warfare Doctrine, LWD 5-1-4, 16 October 2007)

Leader-Elliott, Ian, 'The Commonwealth Criminal Code: A Guide for Practitioners' (Guidance Paper, Commonwealth Attorney-General's Department, March 2002)

Letter from the Secretary General to the President of the Security Council, UN Doc S/1994/674 (24 May 1994)

Levine, Eugenia, 'Command Responsibility: The Mens Rea Requirement' (Research Paper, Global Policy Forum, February 2005)

McKenzie, Nick and Chris Masters, 'Special Forces Chief Acknowledges War Crimes, Blames "Poor Moral Leadership"', *The Age* (Melbourne, 28 June 2020)

Nelson, Brendan, 'Enhanced Command and Control Arrangements in the Middle East' (Media Release 57/07, Department of Defence, 18 June 2007)

O'Brien, Patricia, 'Supporting Complementarity at the National Level: An Integrated Approach to the Rule of Law' (Speech, International Center for Transitional Justice/United Nations Development Program Greentree Retreat, 7 December 2011)

Office of the Queensland Parliamentary Counsel, 'Principles of Good Legislation: OQPC Guide to FLPs' (Guidance Paper, 19 June 2013)

Petkovich, Faust, 'The ICC Appeals Chamber's *Bemba* Judgment – A Necessary Contextualization of Article 28's *Actus Reus* Element', *ICC Forum* (Blog Post, 25 May 2019) <https://iccforum.com/forum/responsibility>

Preparatory Committee on the Establishment of an International Criminal Court, Committee of the Whole, *Summary Record of the 1st Meeting*, UN Doc A/CONF.183/C.1/SR.1 (20 November 1998)

Question on Notice No 2793 to Department of Defence, Canberra, *Australian Government Expectations of Command and Control*, 27 January 2021

Response to Question on Notice No 2791 to Department of Defence, Canberra, *Terms of Delegation of Authority*, 27 January 2021

Response to Question on Notice No 2793 to Department of Defence, Canberra, *Australian Government Expectations of Command and Control*, 27 January 2021

Shanahan, Rodger, 'The Afghan Inquiry and the Question of Responsibility', *The Interpreter, The Lowy Institute* (Web Page, 7 December 2020), <https://www.lowyinstitute.org/the-interpreter/afghan-inquiry-and-question-responsibility>

United Nations Conference on the Law of Treaties, Official Records: Documents of the Conference, UN Doc A/CONF.39/11/Add2 (26 March – 24 May 1968)

United Nations Information Organisation, *Moscow Declaration on Atrocities by President Roosevelt, Mister Winston Churchill and Marshal Stalin* (1 November 1943)

United States War Department, 'Articles of War: An Act for Establishing Rules and Articles for the Government of the Armies of the United States' (1863)

United States War Department, ‘Instructions for the Government of Armies of the United States in the Field’ (1863)

Wierczyńska, Karolina, ‘Admissibility of a Case Before the International Criminal Court: Summary’ (Research Paper, Polish Academy of Sciences, 30 October 2019)