

COMMAND RESPONSIBILITY IN THE *BRERETON REPORT*: FISSURES IN THE UNDERSTANDING AND INTERPRETATION OF THE ‘KNOWLEDGE’ ELEMENT IN AUSTRALIAN LAW

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*In May 2016, the Inspector-General of the Australian Defence Force ('ADF'), Major General Paul Brereton, began an investigation into allegations of war crimes by ADF special forces in Afghanistan, leading to the release in November 2020 of the *Afghanistan Inquiry Report*, also known as the *Brereton Report*. The report found credible evidence to support claims that some members of the Australian Special Air Service ('SAS') had committed war crimes during deployment in Afghanistan between 2005 and 2013. The report notes that Command were aware of certain problematic practices in the SAS, practices that were, at the very least, suggestive of illegal conduct. The report, however, recommends against prosecuting SAS commanders on the theory that, while the commanders' actions were 'dishonest and discreditable', they could not reasonably have 'known' that their subordinates were concealing war crimes. In doing so, the *Brereton Report* misinterprets and misapplies the law of command responsibility. In this article, the authors examine the law of command responsibility at international law and as enacted in Australian domestic law, to attempt to account for how Brereton ultimately came to his conclusions.*

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I INTRODUCTION

In May 2016, the Inspector-General of the Australian Defence Force ('ADF'), Major General Paul Brereton, began an investigation into allegations of war crimes by ADF special forces in Afghanistan during Operation Slipper.¹ In November 2020, Major General Brereton released the *Afghanistan Inquiry Report*, also known as the *Brereton Report*.² The report found credible evidence

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¹ For an outline of Operation Slipper: see ‘Operation Slipper’, *Australian War Memorial* (Web Page) <<https://awm.gov.au/collection/E84816>>, archived at <<https://perma.cc/JV7P-EZXU>>.

² Inspector-General of the Australian Defence Force, ‘Afghanistan Inquiry Report’ (Report, November 2020) <<https://afghanistaninquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>>, archived at <<https://perma.cc/8GGB-64WZ>> (‘*Brereton Report*’).

to support claims that, between 2005 and 2013, some members of the Australian Special Air Service ('SAS') had committed war crimes such as intentional targeting of civilians, and torture and murder of prisoners of war.

In addition to evidence of war crimes, the report also recounted troubling practices that gave clues about what SAS soldiers were doing. One of these was the carrying of 'throwdowns', foreign weapons or materiel that were placed with the bodies of Afghans killed in action to suggest that the person killed was an enemy combatant and therefore a lawful target.³ Another recurrent practice was that after-action reports ('AAR') were routinely written up in stock or "boilerplate" language, or sometimes even fabricated, to generically describe events in a vague and non-specific way — even in situations where AARs reported on lawful engagements under the international law of armed conflict ('LOAC').⁴ Justification for the use of boilerplate language was explained in the report as being done with the approval of staff officers 'in order proactively to demonstrate apparent compliance with rules of engagement, and to minimise the risk of attracting the interest of higher headquarters'.⁵

The *Brereton Report* also recounted evidence that SAS officers were aware of at least some of these practices. The use of throwdowns was known to SAS command,⁶ and Afghan civilians reported some of the war crimes, which SAS officers disregarded.⁷ The *Brereton Report* seems to treat these events as aberrations, sometimes even justifiable aberrations, rather than evidence of a sub-culture of criminality and disregard for the LOAC. Admittedly, the report calls the actions of the SAS 'disgraceful and a profound betrayal' of the ADF's 'professional standards and expectations'.⁸ However, the report goes on to dismiss the activities as the poor behaviour of a select few, essentially attributing the behaviour to part of a desirable culture of insularity and exceptionalism typical of special forces.⁹ The report even justifies and excuses the behaviour as being necessary for unit cohesion, stating that the

close-holding of information — frequently referred to as 'compartmentalisation' — is a necessary feature of military units generally, and it is accentuated in the sphere of special operations. The security of the nation and the lives of individuals can depend on it.¹⁰

The report notes that knowledge of certain practices, including carrying and using throwdowns and falsifying reports, was known to Command but concludes that carrying throwdowns could not be considered evidence of responsibility for the war crimes these practices concealed.¹¹ Brereton consequently recommends against prosecution for SAS commanders on the theory that, while the

³ Ibid 29 [18]–[19].

⁴ Ibid 34 [41], 35 [48].

⁵ Ibid 35 [48].

⁶ Ibid 31 [30].

⁷ Ibid 34 [42].

⁸ Ibid 41 [77].

⁹ Ibid 111, 325.

¹⁰ Ibid 332 [15].

¹¹ Ibid 31 [30].

commanders' actions were 'dishonest and discreditable', they could not reasonably have 'known' that their subordinates were concealing war crimes.¹²

The report ultimately comes to the conclusion that Command bears only 'moral'¹³ rather than legal responsibility for the war crimes at issue. In doing so, the *Brereton Report* misinterprets and misapplies the law of command responsibility. The law of command responsibility makes a commander criminally responsible for crimes committed by forces 'under his or her effective command and control' (or 'effective authority and control') if the commander knew or, owing to the circumstances at the time, should have known that the forces were committing, had committed, or were going to commit such crimes, yet failed to take all necessary and reasonable measures to prevent or repress the commission of the acts.¹⁴ It is understandable and appropriate that Major General Brereton did not wish to propose the collective punishment of the *entirety* of ADF command. *Nemo punitur pro alieno delicto* — no one is to be punished for the crime or wrong of another — is a long-established principle of the LOAC.¹⁵ However, under the proper interpretation of the law of command responsibility, knowledge of throwdowns, falsified or manipulated language in AARs and complaints about war crimes from Afghan soldiers and civilians, should have triggered further investigation by superior officers. Indeed, as soon as it became known that the purpose of such practices was to avoid scrutiny and to preserve unit cohesion, further investigation was required. Any disavowal by soldiers or lower-ranking officers that the purpose of the suspicious activities was to conceal war crimes could not relieve commanders of their obligations to prevent or punish war crimes.

How was it possible for the *Brereton Report* to come to these conclusions? A complex and often contradictory aspect of the law of command responsibility may have contributed to the confusion. Specifically, international criminal law holds commanders responsible for both war crimes committed by subordinates of which they knew, as well as those of which they 'should have known'.¹⁶ This phrase suggests that, in order for commanders to become responsible for the war crimes of their subordinates, they must be held to some standard of suspicion.

¹² Ibid.

¹³ Ibid 32 [32].

¹⁴ See s 268.115 of the *Criminal Code Act 1995* (Cth) sch 1 ('Australian Criminal Code'), which largely, but not precisely, replicates the command responsibility provision in the *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) art 28 ('Rome Statute').

¹⁵ See *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 75(2)(d) ('Additional Protocol I'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) art 4(2)(b).

¹⁶ *Rome Statute* (n 14) art 28. See also *Additional Protocol I* (n 15) art 86(2) which uses the phrase 'had information which should have enabled them to conclude'. See also SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993) as amended by SC Res 1877, UN SCOR, 64th sess, 6155th mtg, UN SCOR S/RES/1877 (7 July 2009) art 7(3) ('ICTY Statute') and SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994) annex ('Statute of the International Tribunal For Rwanda') art 6(3) ('ICTR Statute') which both use the phrase 'had reason to know'.

The challenge that has repeatedly foiled both international tribunals and scholars is how to determine when a commander will be considered to have constructive knowledge of the war crimes of subordinates. Many scholars addressing the question have argued that there should be a clear distinction between a commander who has actual knowledge of a subordinate's war crime and wantonly permits it (thereby triggering direct command responsibility), and a commander who negligently supervises subordinates who then go on to commit war crimes (resulting in innocence under international law, but possibly subjecting them to disciplinary measures at the discretion of their own military organisation).¹⁷ Complicating matters also is the fact that the Australian reception of the law of command responsibility uses different terminology to that employed in international treaty and customary law.

As we have argued at length elsewhere, international law makes no such distinction and most certainly does not require commanders to share the criminal intent of their subordinates.¹⁸ Instead, the LOAC recognises that a commander's failure to properly investigate evidence of war crimes by subordinates triggers command responsibility for those war crimes, even if the evidence is incomplete or vigorously denied by subordinates.¹⁹ The appropriate standard for command responsibility is that a commander may not recklessly disregard evidence of war crimes, and any disregard of even incomplete or ambiguous evidence is *ipso facto* reckless.²⁰ The *Brereton Report*, with its disjunction between the suspicious behaviour of subordinates who committed war crimes and the recommendation not to prosecute commanders reluctant to investigate these suspicious facts, provides an alarming example of the consequences of holding commanders to a standard of actual knowledge or shared intent.

The first section of this paper will discuss the findings of the *Brereton Report*, with the second section outlining international and Australian domestic law on command responsibility. The third section will analyse the 'knowledge' element of command responsibility, exploring how it has been interpreted and applied in the various instruments and cases. Finally, this paper concludes that the *Brereton Report* misinterpreted and misapplied the standard of knowledge in international criminal law and thereby undermined command responsibility both for the war crimes investigated in the report and for the Australian implementation of international law generally.

II THE BRERETON REPORT: BACKGROUND TO THE FINDINGS

Following Australian involvement in the Afghani International Security Assistance Force ('ISAF'), rumours circulated that Australian SAS personnel

¹⁷ See, eg, Mirjan Damaška, 'The Shadow Side of Command Responsibility' (2001) 49(3) *American Journal of Comparative Law* 455; Guénaël Mettraux, *The Law of Command Responsibility* (Oxford University Press, 2009) 73–4, 89; Chantal Meloni, 'Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?' (2007) 5(3) *Journal of International Criminal Justice* 619, 633–7; Arthur Thomas O'Reilly, 'Command Responsibility: A Call to Realign Doctrine with Principles' (2004) 20(1) *American University International Law Review* 71.

¹⁸ 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.

¹⁹ *Ibid* 1229, 1238.

²⁰ *Ibid* 1264–5.

had committed war crimes during their time in Afghanistan. ADF command ordered an internal investigation by military sociologist Dr Samantha Crompvoets in late 2015 ('*Crompvoets Report*').²¹ Dr Crompvoets' mandate was to report on the organisational culture of the SAS. However, as Dr Crompvoets notes, '[c]ontrary to what has been commonly reported in the media, this review was not an "investigation into war crimes"'.²² Instead, she states, '[i]t was about understanding culture, reputation and trust' in the Special Operations Command ('SOCOMD'), a unit separate from the Army, Navy and other groups that unified the special operations of each service into a single command structure.²³ However, the report's conclusion, submitted in January 2016, deviated substantially from its initial objective. The report detailed explicit allegations of misconduct and raised serious questions about the culture of some units within SOCOMD.²⁴ It included interviews with insiders who revealed multiple war crimes, including incidents in which SAS forces cordoned off entire villages, escorting men and boys to guesthouses where they were tied up, tortured for days and finally shot in the head or sliced through the throat. SAS soldiers would then bag the bodies and throw them in a river to dispose of the evidence.²⁵

The *Crompvoets Report* was initially a confidential, internal investigation, but, while it was being evaluated, in 2017 the Australian Broadcasting Corporation (ABC) ran a series of stories entitled 'The Afghan Files', which revealed details about the allegations, including claims by ADF personnel that unarmed civilians and prisoners of war or other detainees had been executed by SAS soldiers.²⁶ Immediately following the internal report, the Inspector-General appointed Major General Brereton to examine these incidents and rumours in more detail.²⁷

Major General Brereton's mandate was to conduct a fact-finding inquiry, not a criminal investigation, to inquire into possible war crimes committed

²¹ Samantha Crompvoets, *Special Operations Command (SOCOMD) Culture and Interactions: Perceptions, Reputation and Risk* (Report, February 2016) <<https://afghanistaninquiry.defence.gov.au/sites/default/files/2020-11/SOCOMD-Culture-and-Interactions-Perceptions-Reputation-and-Risk-Feb-16.pdf>>, archived at <<https://perma.cc/5APZ-PZLH>> ('*Crompvoets Report*').

²² Samantha Crompvoets, 'Bringing the Truth to Light: My Account of the Review into Special Operations Command Culture', *Rapid Context* (Web Page, 15 November 2020) <<https://rapidcontext.com.au/dr-crompvoets-statement>>, archived at <<https://perma.cc/7982-FW32>>.

²³ Ibid. Note that the 'Special Operations Command' was established in 2003 to unite all of the ADF's special forces under a single command structure.

²⁴ *Crompvoets Report* (n 21) 20, app 3. See also *ibid*.

²⁵ 'Samantha Crompvoets' Inside Story of Australia's Afghanistan War Crimes Report', *New Zealand Herald* (online, 21 November 2020) <<https://www.nzherald.co.nz/world/samantha-crompvoets-inside-story-of-australias-afghanistan-war-crimes-report/HQ5EDKYZU22NSCGYQPXFNZHVMM/>>, archived at <<https://perma.cc/NC84-7MXN>>.

²⁶ Dan Oakes and Sam Clark, 'The Afghan Files: Defence Leak Exposes Deadly Secrets of Australia's Special Forces', *ABC News* (online, 11 July 2017) <<https://www.abc.net.au/news/2017-07-11/killings-of-unarmed-afghans-by-australian-special-forces/8466642?nw=0&r=HtmlFragment>>, archived at <<https://perma.cc/8XXD-NENS>>.

²⁷ Inspector-General of the Australian Defence Force, *Annual Report: 01 July 2016 to 30 June 2017* (Report, 2017) 3 <https://defence.gov.au/mjs/_Master/docs/IGADFAnnualReport2016-17.pdf>, archived at <<https://perma.cc/66TD-QKYS>>.

over a lengthy period in the course of the Special Operations Task Group ('SOTG') deployments in Afghanistan. He was also tasked with evaluating the cultural normalisation of deviance from professional standards within SOCOMD, including intentional inaccuracy in operational reporting related to possible crimes; a culture of silence within SOCOMD; the deliberate undermining, isolation and removal from special operations units of some individuals who tried to address this rumoured conduct and culture; and a systemic failure, including of commanders and legal officers at multiple levels within SOCOMD, to report or investigate the stories as required by ADF policies.²⁸

The *Brereton Report*, issued in three parts in 2020, included a background and context section; the main body of the report, which inquired into 57 incidents and issues of interest; and the final part, which took a more holistic view, looked at systemic issues: the strategic, operational, organisational and cultural shortcomings that may have contributed to the creation of an environment in which war crimes could take place; why the mechanisms of the ADF for inquiries and oversight failed to detect them; and the responsibility of commanders. Parts one and three were released publicly, but part two was largely redacted so as not to prejudice possible criminal investigations or trials. Among the sections released to the public are summaries of the relevant LOAC, the applicable rules of engagement, and the general conclusions reached by the investigators both condemning and exonerating relevant actors in the ADF.

The report found that, after detailed examination, 28 alleged incidents of a breach of the LOAC could not be substantiated.²⁹ Investigations of an additional 11 were discontinued,³⁰ not necessarily because breaches were unlikely to have occurred, but because investigators were unable to verify the facts of specific incidents so long after the relevant events. However, the Inquiry did find credible information of 23 incidents in Afghanistan in which one or more non-combatants or persons hors de combat were unlawfully killed by or at the direction of members of SOTG under circumstances that would qualify as war crimes.³¹ These incidents involved:

²⁸ See *Brereton Report* (n 2) 26–7 [3]. As of this writing, '[n]either the instrument directing the Inquiry nor the terms of reference of the Inquiry have been published': Karen Elphick, 'The Inspector-General of the Australian Defence Force Afghanistan Inquiry (Brereton Inquiry): A Quick Guide' (Research Paper Series 2020-21, Parliament of Australia, 3 September 2020) 2 <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/7528572/upload_binary/7528572.pdf>, archived at <<https://perma.cc/73FT-W94A>>. See also Department of Defence, Australian Government, *Annual Report 17–18* (Report, 2018) 61 <https://theforge.defence.gov.au/sites/default/files/defence_annual_report_17-18_complete.pdf>, archived at <<https://perma.cc/6GUF-WT3E>> which provides

[a]t the request of the Chief of Army, and at the direction of the Chief of the Defence Force, the Inspector-General of the Australian Defence Force has established an inquiry into rumours of breaches of the law of armed conflict in Afghanistan between 2005 and 2016 and associated matters. In 2017–18, the inquiry gained significant momentum after a public call for information was made on 1 September 2017. The public call concluded on 3 November 2017, and the inquiry is now pursuing additional lines of inquiry. Over 200 witnesses have been interviewed to date.

²⁹ *Brereton Report* (n 2) 28 [14].

³⁰ Ibid. Specific information about the investigation remains censored.

³¹ Ibid 28 [15].

- a. a total of 39 individuals killed, and a further two cruelly treated; and
- b. a total of 25 current or former [ADF] personnel who were perpetrators, either as principals or accessories, some of them on a single occasion and a few on multiple occasions.³²

Perhaps most damning is the finding that none of the incidents occurred in situations that could be attributed to the ‘fog of war’ or being under pressure in the heat of battle. As the report states:

The cases in which it has been found that there is credible information of a war crime are ones in which it was or should have been plain that the person killed was a non-combatant, or *hors-de-combat* ... the vast majority are cases where the persons were killed when hors-de-combat because they had been captured and were persons under control, and as such were protected under international law, breach of which was a crime.³³

Adding to this, the report found that there seemed to have been a degree of premeditation or calculation in the acts of the perpetrators through the practice of some SOTG members carrying so-called throwdowns which are foreign weapons or equipment, typically easily concealable (such as pistols, small handheld radios, and/or weapon magazines and grenades). They were carried to be placed with the bodies of Afghans ‘killed in action’ for the purposes of site exploitation photography in order to portray that the person killed had been carrying the weapon or other military equipment when engaged and had been a legitimate target.³⁴ The report also uncovered evidence that there was post engagement fabrication of reporting for the purpose of covering up the crimes, and that the falsification of reports was known and tolerated by SAS non-commissioned officers (‘NCOs’).³⁵

The report seems to place the blame for these violations of military discipline mainly on a small group of junior NCOs:

While it would have been much easier to report that it was poor command and leadership that was primarily to blame for the events disclosed in this Report, that would be a gross distortion. While, as will appear, commanders at troop, squadron and Special Operations Task Group level must bear some responsibility for the events that happened ‘on their watch’, the criminal behaviour of a few was commenced, committed, continued and concealed at the patrol commander level, that is, at corporal or sergeant level.³⁶

The report found no evidence that commanders at the troop/platoon or higher level ordered or authorised the war crimes. The acts were thus not a case of *qui facit per alium, facit per se* — he who acts through another does the act himself. But neither did the report find evidence that commanders tolerated or consciously ignored war crimes by SAS forces:

The Inquiry has found no evidence that there was knowledge of, or reckless indifference to, the commission of war crimes, on the part of commanders at

³² Ibid 29 [16].

³³ Ibid 29 [17].

³⁴ Ibid 29 [18].

³⁵ Ibid 492 [56], 518–19 [42]–[43].

³⁶ Ibid 30 [25].

troop/platoon, squadron/company or Task Group Headquarters level, let alone at higher levels such as Commander Joint Task Force 633, Joint Operations Command, or Australian Defence Headquarters. Nor is the Inquiry of the view that there was any failure at any of those levels to take reasonable and practical steps that would have prevented or detected the commission of war crimes.³⁷

The report thus denied it was a case of *qui non prohibet quod prohibere potest, assentire videtur* — that he who does not prohibit when he is able to prohibit, is in fault. Yet, the report then goes on to assert:

By late 2012 to 2013 there was, at troop, and possibly up to squadron level, suspicion if not knowledge that throwdowns were carried, but for the purpose of avoiding questions being asked about apparently lawful engagements when it turned out that the person killed was not armed, as distinct from facilitating or concealing deliberate unlawful killings. While dishonest and discreditable, it was understood as a defensive mechanism to avoid questions being asked, rather than an aid for covering up war crimes.³⁸

The legitimate goal of tolerating such dishonesty, according to the report, was to maintain ‘proper trust’ in subordinates.³⁹ The SAS operated with substantial delegation of authority to junior officers and NCOs,⁴⁰ and NCOs wished to avoid unpopularity with their subordinates, who responded to questions about their suspicious practices with hostility.⁴¹

Although the report does summarise the relevant LOAC as Major General Brereton understood it, its conclusions applying that law to the facts disclosed in the report reveal a deeply flawed interpretation of that law, specifically of the rules relating to command responsibility when commanders possess information that suggests that war crimes are being committed. To understand the mistakes in the *Brereton Report*’s interpretation of that law, we must begin with a better understanding of the complex, sometimes contradictory, and generally problematic law of command responsibility, and in particular its mental component.

III THE LAW OF COMMAND RESPONSIBILITY: HISTORY AND PRACTICE

The law of command responsibility is a comparatively new doctrine in international law,⁴² with the law emerging on the international stage during the post-World War Two trials of Axis war criminals, most prominently, the trial of the Commander of the Japanese Army in the Philippines, Tomoyuki Yamashita. Yamashita became the first person to be charged solely based on responsibility

³⁷ Ibid 31 [28].

³⁸ Ibid 31 [30].

³⁹ Ibid 496 [72].

⁴⁰ The *Brereton Report*’s reliance on delegation of authority as an excuse for officers not to supervise subordinates nor to investigate facts suggesting a breach of established procedures was recently criticised 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.

⁴¹ *Brereton Report* (n 2) 499 [83]–[84].

⁴² For detailed historical summaries of state practice, see William H Parks, ‘Command Responsibility for War Crimes’ (1973) 62 *Military Law Review* 1, 2–16; Matthew Lippman, ‘Humanitarian Law: The Uncertain Contours of Command Responsibility’ (2001) 9(1) *Tulsa Journal Comparative and International Law* 1.

for an omission, specifically in ‘permitting’ officers and troops under his command to plan and commit thousands of war crimes. Despite Yamashita’s disavowals, and even though there was no strong evidence that Yamashita knew or approved of the war crimes,⁴³ the US Military Commission found that Yamashita, as highest military commander in the Philippine Islands, had a responsibility to prevent and investigate war crimes committed by subordinate officers under his command. According to the Commission:

[T]he crimes were so extensive and widespread, both as to time and area, that they must either have been wilfully permitted by the accused, or secretly ordered by the accused ... where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.⁴⁴

The *Yamashita* case is properly interpreted as establishing two new standards for an officer’s criminal responsibility. First, a commander must not passively tolerate war crimes of which he or she knows. Second, a commander who fails to supervise and discipline troops under his or her command will share responsibility for the war crimes of subordinates, at least if these war crimes are ‘extensive and widespread’.⁴⁵ These principles were reaffirmed by the Nuremberg and Tokyo tribunals,⁴⁶ and have been considered by some as customary international law.⁴⁷

The doctrine was not included in the 1949 *Geneva Conventions*, but was eventually incorporated in *Additional Protocol I*:

⁴³ Several authors have argued that there was credible evidence that Yamashita was aware of the war crimes. See, eg, Parks (n 42) 22–38; William G Eckhardt, ‘Command Criminal Responsibility: A Plea for a Workable Standard’ (1982) 97 *Military Law Review* 1, 19. However, the Tribunal never in fact found direct evidence that Yamashita had knowledge. It held instead that the war crimes were so open, systematic and in propinquity to Yamashita’s location that knowledge could reasonably be imputed to him on the facts. The Tribunal put great emphasis on those duties of a commander that, if properly exercised, would have led to the discovery of the war crimes, but this emphasis is more consistent with a ‘reason to know’ standard than with an actual knowledge standard: *Trial of General Tomoyuki Yamashita* (United States Military Commission, Manila, Case No 21, 7 December 1945) in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (His Majesty’s Stationery Office, 1948) vol 4, 1, 34–5 (‘Trial of General Tomoyuki Yamashita’).

⁴⁴ *Trial of General Tomoyuki Yamashita* (n 43) 34–5.

⁴⁵ *Ibid* 34.

⁴⁶ See, eg, *Trial of Wilhelm von Leeb and Thirteen Others*, (United States Military Tribunal, Nuremberg, Case No 72, 28 October 1948) in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (His Majesty’s Stationery Office, 1949) vol 12, 1, 106, 110 (‘High Command Trial’). That said, some tribunals varied the phrasing of the duty of command responsibility. Thus, for example, in the Toyoda trial, the Tribunal characterised the commander’s duty as one of ‘the exercise of ordinary diligence’ or ‘use of reasonable diligence’ to learn of the commission of crimes by subordinates: ‘*United States of America v Toyoda*’ (Record, 1948–49) (National Diet Library Digital Collections, Records of the Trial of Accused War Criminal Soemu Toyoda, Tried by a Military Tribunal Appointed by the Supreme Commander of the Allied Powers, Tokyo, Japan, vol 19) 5006 <<https://dl.ndl.go.jp/info:ndljp/pid/9884782>>, archived at <<https://perma.cc/8HAZ-Z7S6>> (‘*United States v Toyoda*’).

⁴⁷ See Michael L Smidt, ‘Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations’ (2000) 164 *Military Law Review* 155, 201.

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from ... 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 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.⁴⁸

In the 1987 Commentary to *Additional Protocol I*, the International Committee of the Red Cross ('ICRC') argues that command responsibility includes a duty to investigate suspicious facts whenever such facts might suggest that war crimes will occur, are occurring or have occurred, and to take 'all feasible measures within their power'⁴⁹ to prevent war crimes.⁵⁰ *Additional Protocol I* thus imposes a strict obligation on the commander once facts have come to his or her attention that warrant further investigation.⁵¹ Apathy fails to satisfy this obligation quite as well as malicious intent. As Ilias Bantekas has observed:

This standard ... creates an objective negligence test that takes into account the circumstances at the time. Absence of knowledge is no defence if the superior did not take reasonable steps to acquire such knowledge, which in itself constitutes criminal negligence. Superiors have reason to know if they exercise due diligence ... [t]his inevitably raises a duty to know, rebuttable only through evidence of due diligence, because it is a commander's duty to be apprised of events within his or her command.⁵²

In contrast, art 7 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia* ('ICTY Statute') formulated command responsibility in more general terms, providing that a superior would be responsible for the illegal acts of their subordinate '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'.⁵³ Article 6 of the *Statute of the International Criminal Tribunal for Rwanda* uses a nearly identical formula.⁵⁴

The most recent iteration of the law of command responsibility comes with the *Rome Statute of the International Criminal Court* ('Rome Statute') which

⁴⁸ *Additional Protocol I* (n 15) art 86(2).

⁴⁹ Ibid.

⁵⁰ Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, 1987) 1014.

⁵¹ It is thus incorrect to argue that a commander must have verified proof of a potential war crime by subordinates to incur liability for failing to prevent those crimes, and he must consciously choose not to act. See Mettraux (n 17) 206–9, 216–17, 223. Such an argument excuses both total neglect of supervision on the commander's part and his wilful blindness to indicators of possible war crimes.

⁵² Ilias Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law* (Manchester University Press, 2002) 113–14 (citations omitted). But see Mettraux (n 17) at 217–18 who provides on the basis of ICTY precedent (including *Prosecutor v Delalić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) ('Čelebići Appeal Judgement')) that commanders may be exonerated in situations where evidence of war crimes is readily available, but commanders take no steps whatsoever to acquire it.

⁵³ *ICTY Statute* (n 16) art 7(3).

⁵⁴ *ICTR Statute* (n 16) art 6(3).

develops and expands on *Additional Protocol I* and the *ICTY Statute*. Article 28(a) provides:

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.⁵⁵

The ‘should have known’ standard of responsibility comes from the International Military Tribunal for the Far East (‘IMTFE’) in the *Toyoda* trial,⁵⁶ a standard that was debated but ultimately rejected during the drafting of *Additional Protocol I*.⁵⁷ Article 28’s ‘should have known’ also draws on the *ICTY Statute*, ultimately emphasising the obligation of prevention,⁵⁸ but adding the additional element of a necessity to ‘exercise control properly’ over forces under his or her command.⁵⁹

The International Criminal Court (‘ICC’) has only had cause to examine command responsibility and its knowledge element in one case, *Prosecutor v Bemba* (‘Bemba’), and it is worth discussing in some detail here as the most recent, albeit at times problematic, international judicial analysis on command responsibility. After receiving reports of rapes, murders and pillaging by subordinates, General Bemba failed to ensure that the allegations were properly investigated, and the responsible officers and soldiers were tried in a thorough proceeding. In the Pre-Trial Chamber, the ‘should have known’ element of command responsibility was held as requiring the high standards 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’.⁶⁰

⁵⁵ *Rome Statute* (n 14) art 28(a).

⁵⁶ *United States v Toyoda* (n 46) 5006.

⁵⁷ There was insufficient published debate at the Diplomatic Conference to explain why the original ‘should have known’ language was amended to ‘had information which should have enabled them to conclude’. The United States had proposed altering the phrase to ‘should reasonably have known’, but one can only guess as to why the ‘information’ language was added: see Howard S Levie, ‘Command Responsibility’ (1998) 8 *United States Air Force Academy Journal of Legal Studies* 1, 8–9.

⁵⁸ See Mettraux (n 17) 77–8, 210–12.

⁵⁹ *Rome Statute* (n 14) art 28(a).

⁶⁰ *Prosecutor v Bemba (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 15 June 2009) [433] (citations omitted) (‘Bemba (Pre-Trial Chamber)’).

In the Trial Chamber, the Court did not analyse what it meant to ‘secure knowledge’, finding that Bemba had actual knowledge of the crimes of his subordinates.⁶¹ However, the Court did state that the ““minimal and inadequate measures”” taken by Bemba to deter and punish subordinate war crimes were primarily intended ““to protect the image”” of his political party.⁶² The Trial Chamber further noted *inter alia* Bemba’s failure to ensure the troops were trained in the LOAC, to issue clear orders that the LOAC must be respected, to remove or replace officers and soldiers involved in war crimes, and to take measures to minimise civilian exposure to armed force.⁶³

In reversing the Trial Chamber’s judgment, the majority of the Appeals Chamber rejected the claim that a commander who is motivated to counter public allegations of war crimes necessarily lacks the requisite intent to prevent or punish war crimes.⁶⁴ A commander who takes all reasonable measures to prevent and punish war crimes cannot share in responsibility for the crimes even if his motivations are impure, because the commander’s obligation is to take appropriate action, not to serve as a moral exemplar. In any case, a commander may have more than one motivation for preventing and punishing war crimes.⁶⁵ The Appeals Chamber’s reasoning on this abstract point is indisputable, and a narrow reading of the *Bemba* decision seems equally reasonable — the reversal of the Trial Chamber rested heavily on the Appeals Chamber’s conclusion that the Trial Chamber had failed to demonstrate that Bemba had the *actual* capability to prevent and punish the crimes due to his high position and the fact that he had sent his troops to fight in a foreign country.

However, a potentially troubling argument exists in parallel, and one that is specifically relevant for the construction of the concept of ‘knowledge’. The reasoning of the Trial and Appeals Chambers collectively seems to suggest that Bemba’s failure to take reasonable measures to prevent and punish the crimes was a matter of policy rather than inability. The Appeals Chamber made an extraordinarily problematic assertion unsupported in any previous treaty language or other legal authority: ‘Commanders are allowed to make a cost/benefit analysis when deciding which measures to take, bearing in mind their overall responsibility to prevent and repress crimes committed by their subordinates’.⁶⁶ By the strictest construction, this statement does not exonerate commanders who neglect the duty to prevent and punish war crimes for any reason whatsoever. However, the language is sufficiently ambiguous that it could be interpreted to propose that commanders have discretion not to investigate, prevent and punish allegations of war crimes being committed by subordinates if other priorities seem more pressing.

⁶¹ *Prosecutor v Bemba (Decision on Sentence Pursuant to Article 76 of the Statute)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08, 21 June 2016) [61].

⁶² *Prosecutor v Bemba (Judgment on the Appeal against Trial Chamber III’s ‘Judgment Pursuant to Article 74 of the Statute’)* (International Criminal Court, Appeals Chamber, Case No ICC-01/05-01/08A, 8 June 2018) [131].

⁶³ *Ibid* [133].

⁶⁴ *Ibid* [179].

⁶⁵ *Ibid*.

⁶⁶ *Ibid* [170].

The outcome of the appeal unfortunately supports this latter interpretation. In discounting a factual recording showing that Bemba was more concerned with public image than substance, in discounting the Trial Chamber's specific factual findings regarding actions that Bemba could have taken (but did not take) to prevent and punish war crimes, and in implying that commanders may subordinate the prevention and punishment of war crimes to other priorities, the ICC Appeals Chamber set a dangerous precedent.⁶⁷ It is indeed a precedent that may have influenced the *Brereton Report*'s apologia for the decision of SAS officers not to press the investigation of war crimes to avoid undermining unit cohesion and morale.

The differing approaches to command responsibility evidenced at all stages of the *Bemba* case thus create more complexity regarding how to untangle the knowledge element of command responsibility — a task that becomes even more complicated when one examines the Australian law on command responsibility.

IV THE AUSTRALIAN APPROACH TO COMMAND RESPONSIBILITY

In the Australian context, the law of command responsibility is outlined in s 268.115 of the *Australian Criminal Code*, which specifies that:

- (2) 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.
- (3) With respect to superior and subordinate relationships not described in subsection (2), a superior is criminally responsible for offences against this Division committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over those subordinates, where:

⁶⁷ The *Bemba* appellate decision has been criticised as undermining command responsibility by others on both procedural and substantive grounds: see, eg, Susana SáCouto and Patricia Viseur Sellers, 'The *Bemba* Appeals Chamber Judgment: Impunity for Sexual and Gender-Based Crimes?' (2019) 27(3) *William and Mary Bill of Rights Journal* 599; Sarah Hibbert, 'The Bemba Acquittal: A Blow to the ICC's Legitimacy in a Time of Crisis' (2019) 34(1) *Temple International and Comparative Law Journal* 95; Leila N Sadat, 'Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in *Prosecutor v Jean-Pierre Bemba Gombo*', *EJIL:Talk!* (Blog Post, 12 June 2018) <<https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo/>>, archived at <<https://perma.cc/47CS-EX22>>; Diane Marie Amann, 'In Bemba and Beyond, Crimes Adjudged to Commit Themselves', *EJIL:Talk!* (Blog Post, 13 June 2018) <<https://www.ejiltalk.org/in-bemba-and-beyond-crimes-adjudged-to-commit-themselves/>>, archived at <<https://perma.cc/6AAX-J6ZB>>.

- (a) the superior either knew, or consciously disregarded information that clearly indicated, that the subordinates were committing or about to commit such offences; and
- (b) the offences concerned activities that were within the effective responsibility and control of the superior; and
- (c) the superior 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.

The *Australian Criminal Code* most closely follows the formulation of command responsibility in the *Rome Statute*. However, Australian law uses language that is potentially much more forgiving for superiors who fail to detect or investigate war crimes than the international law, and therefore could put Australia at odds with its obligations under international criminal law. Specifically, it interprets ‘should have known’ or ‘had reason to know’ as either recklessness (for military commanders) or ‘conscious disregarding’ of information (for others). In the Australian context, recklessness is defined in s 5.4 of the *Australian Criminal Code*:

- (1) A person is reckless with respect to a circumstance if:
 - (a) he or she is aware of a substantial risk that the circumstances 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 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.

Recklessness is understood as a subjective awareness or ‘foresight’⁶⁸ of a probable or possible consequence, meaning that the person is aware of a substantial risk that a threat of harm exists and disregards that risk unjustifiably.⁶⁹

⁶⁸ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 4th ed, 2017) 211 [3.185].

⁶⁹ *Australian Criminal Code* (n 14) s 5.4. See *Black’s Law Dictionary* (11th ed, 2019) ‘recklessness’ (def 1); *R v Lawrence* [1982] AC 510, 526 (Lord Diplock). See also Lord Irvine of Lairg, ‘Intention, Recklessness and Moral Blameworthiness: Reflections on the English and Australian Law of Criminal Culpability’ (2001) 23(1) *Sydney Law Review* 5; Findlay Stark, ‘The Reasonableness in Recklessness’ (2019) 14(1) *Criminal Law and Philosophy* 9.

In the context of war crimes by military subordinates, this could be interpreted in several ways. It could mean that, for a commander's duty to prevent or punish war crimes to arise, the commander must possess information drawn from 'the circumstances at the time'⁷⁰ indicating that subordinates are likely committing or intending to commit war crimes. Alternatively, it could mean that such information suggests the mere possibility that subordinates are committing war crimes. Or it could mean that the information must pass some litmus test of credibility before triggering the commander's duty to investigate, with the nature of that test unspecified in any treaty and undefined by any decision of an international criminal tribunal.

The absence of relevant Australian jurisprudence leaves the question of interpretation in doubt.⁷¹ There has been little in the way of Australian case law regarding the prosecution of war crimes, let alone the more complex question of command responsibility, to assist in developing a clear understanding of the Australian approach to command responsibility, both pre- and post-*Rome Statute*.⁷² Aside from the immediate post-World War Two prosecutions of Japanese war criminals,⁷³ Australian courts have not given s 268.115 judicial consideration. As a result, the literature on s 268.115 remains speculative. Recourse to the Australian armed forces manual on the law of armed conflict does not provide any better illumination or guidance — Chapter 13 of the *Law of Armed Conflict* simply affirms the 'Yamashita principles', including that a

commander will be held responsible if the commander ... knows subordinates have committed war crimes and does not punish them, should know subordinates are going to commit war crimes and does not prevent them, or should know subordinates have committed war crimes and does not punish them.⁷⁴

However, no elucidation of the relevant standard of knowledge is provided.

Even 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. Assume arguendo that a commander receives information suggesting nothing more than that subordinates are behaving suspiciously or insubordinately, or that they simply lack adequate training in or appreciation of their obligations under the LOAC. Under such circumstances, it is not clear that the commander would be acting recklessly by not investigating the suspicious or problematic behaviour. By emphasising 'recklessness' instead of 'reason to

⁷⁰ Additional Protocol I (n 15) art 86(2); Rome Statute (n 14) art 28(a)(i).

⁷¹ See Guilfoyle, Kyriakakis and O'Brien (n 40) 254.

⁷² See generally Gillian Triggs, 'Australia's War Crimes Trials: A Moral Necessity or Legal Minefield?' (1987) 16(2) *Melbourne University Law Review* 382; Yvette Zegenhagen and Geoff Skillen, 'Implementation of International Humanitarian Law Obligations in Australia: A Mixed Record' in Suzannah Linton, Tim McCormack and Sandesh Sivakumaran (eds), *Asia-Pacific Perspectives on International Humanitarian Law* (Cambridge University Press, 2019) 491, 495–500; Emily Crawford, 'International Humanitarian Law in the Courts of Australia' in Derek Jinks, Jackson N Maogoto and Solon Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies* (TMC Asser Press, 2014) 335.

⁷³ See Georgina Fitzpatrick, Tim McCormack and Narrelle Morris, *Australia's War Crimes Trials 1945–51* (Brill Nijhoff, 2016).

⁷⁴ *Law of Armed Conflict* (Australian Defence Doctrine Publication 06.4, June 2006) [13.5]–[13.6].

know', Australian law implies that a commander who negligently or apathetically disregards information suggesting that subordinates may be acting improperly in some manner cannot qualify as 'reckless'. In this respect, the *Australian Criminal Code's* approach to command responsibility 'is likely to set a higher standard of fault in the case of military commanders than its *Rome Statute* counterpart',⁷⁵ which will potentially create 'divergent jurisprudence on the scope of this mode of liability under Australian law relative to the development of the doctrine at the ICC'.⁷⁶ Yet, it is precisely the nature of military command that the officer is obligated to ensure that troops under his or her direct command are properly trained, and observing military discipline, the rules of engagement and the LOAC.⁷⁷ As the next section explains, this obligation particularly includes the duty under the LOAC to investigate information suggesting that subordinates may be committing war crimes, even if that information is incomplete or ambiguous.

V COMMAND RESPONSIBILITY AND 'REASON TO KNOW': ARE RUMOURS OF CRIMINAL BEHAVIOUR SUFFICIENT TO DEMAND FURTHER INVESTIGATION AND ACTION?

It is straightforward and uncontroversial that when a military or civilian commander has positive knowledge of a subordinate's war crime, that commander becomes responsible as a principal by failing to take all reasonable measures to prevent or punish the crime. The difficulty arises in the more common scenario that a commander becomes aware of facts of uncertain reliability or import that raise a suspicion that subordinates might have committed war crimes or might commit them in the future. The concept of 'should have known' or 'reason to know' precludes the plea that a commander must have actual and definite knowledge that subordinates were planning or committing a crime before the mental state requirement is satisfied.⁷⁸

Part of the confusion arises from the difficulty of ascertaining when a commander has 'reason to know' of the intentions or activities of subordinates. Would sporadic rumours of misbehaviour that were brought to the attention of a commander be sufficient for holding that they had 'reason to know', given that, if true, such information would tend to indicate a breakdown in discipline? Would a commander need to have detailed and easily verifiable sources of information before he or she could be considered to possess the requisite knowledge? There is in international criminal law no definitive statement of where on the spectrum between unsubstantiated rumour and verified evidence 'reason to know' falls for purposes of command responsibility.⁷⁹ Neither is it clear what specific obligations command responsibility entails when the reasons for believing subordinates intend to commit or have committed war crimes are

⁷⁵ Guilfoyle, Kyriakakis and O'Brien (n 40) 263.

⁷⁶ Ibid.

⁷⁷ See Fellmeth and Crawford (n 18).

⁷⁸ See Jamie Allan Williamson, 'Some Considerations on Command Responsibility and Criminal Liability' (2008) 90(870) *International Review of the Red Cross* 303, 307–8.

⁷⁹ In the ICC, there are different standards for military and civilian commanders. Essentially, military commanders are held to a higher standard, whereas civilian commanders must either know or consciously disregard information that clearly indicated subordinates intended to commit or had committed war crimes: see ibid.

unsubstantiated or contested. These are subjects on which neither the LOAC nor international criminal law has developed a coherent and consistent doctrine.⁸⁰

One of the first attempts to grapple with the concept of ‘knowledge’ came with the post-World War Two trial of Wilhelm List, often known as the *Hostages Case*. The Nuremberg Tribunal affirmed that a commander need not be aware of war crimes committed by his subordinates to incur liability; rather, the commander’s failure to review reports of war crimes and to order investigation made the commander criminally liable.⁸¹ If a commander

fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence ... ‘Want of knowledge of the contents of reports made to him is not a defence. Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.⁸²

Likewise, in the *United States of America v Araki* judgment, the IMTTE held that a commander is responsible in having ‘failed to acquire’ knowledge through ‘negligence or supineness’ that war crimes were being committed by subordinates.⁸³ It was insufficient that a commander ‘accepted assurances from others more directly associated with the’ facts on the ground ‘if having regard to the position of those others ... he should have been put upon further enquiry as to whether those assurances were true or untrue’.⁸⁴ The standard was reaffirmed by the IMFTE in the *Toyoda* trial, holding that if the commander

knew, or should have known, by use of reasonable diligence, of the commission by his troops of atrocities and if he did not do everything within his power and capacity under the existing circumstances to prevent their occurrence and punish the offenders, he was derelict in his duties.⁸⁵

Command responsibility can therefore arise from constructive or imputed knowledge that subordinates were committing or about to commit war crimes, and assurances from subordinates are insufficient unless confirmed by the commander’s reasonably diligent investigation.

By the time of the ICTY and International Criminal Tribunal for Rwanda (‘ICTR’) both tribunals’ Appeals Chambers found that the commander’s actual knowledge of past or future war crimes by subordinates need not be proved. It is enough that the accused ‘had “some general information in his possession, which

⁸⁰ For a full analysis of the relevant jurisprudence and the most coherent doctrine to reconcile the conflicting precedents with the policy of deterring war crimes, see generally Fellmeth and Crawford (n 18).

⁸¹ *Trial of Wilhelm List and Others* (United States Military Tribunal, Nuremberg, Case No 47, 19 February 1948) in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (His Majesty’s Stationery Office, 1949) vol 8, 34, 71–2.

⁸² *Ibid* 71.

⁸³ *United States v Araki (Judgment)* (International Military Tribunal for the Far East, 4 November 1948), reproduced in R John Pritchard and Sonia M Zaide (eds), *The Tokyo War Crimes Trial* (Garland Publishing, 1981) vol 22, 40275, 48445 (‘Tokyo Trial’).

⁸⁴ *Ibid*.

⁸⁵ *United States v Toyoda* (n 46) 5006.

would put him on notice of possible unlawful acts by his subordinates”.⁸⁶ The use of the word ‘general’ suggests that a commander’s duty will be engaged even on limited evidence; because the commander is alerted by no more than ‘possible unlawful acts’, this suggests that a commander need not know specifics like the identity of the subordinate(s) involved, the time or date of the delict, the identity of the target or victim or other details.⁸⁷ General information, even from outside sources such as media reports, suffices. Neither need the information be complete nor include highly dependable sources of evidence in order to put the commander on notice of possible war crimes by subordinates and trigger a duty to prevent possible crimes or investigate and punish past crimes.⁸⁸

Despite the seemingly low bar that the tribunals have set for ‘knowledge’, their jurisprudence does set a minimum threshold: the ICTY Appeals Chamber has notably required ‘possession’ of information, rejecting a commander’s criminal responsibility for dereliction of duty, even if such dereliction enabled or contributed to the commission of war crimes. In the Čelebići case, the Appeals Chamber ignored the IMFTE precedents, holding that a commander can only be responsible for war crimes committed by subordinates if they had actual possession of some incriminating knowledge.⁸⁹ This decision would seem to suggest that a military commander has no legal obligation to supervise the LOAC compliance of his or her direct subordinates,⁹⁰ and that responsibility arises only from ‘deliberately refraining’ from investigating information in his or her possession about subordinates’ war crimes, but not for ‘negligently failing’ to gather such information in the first place through inadequate training or, indeed, a total lack of supervision.⁹¹

Divergent approaches to the standard for knowledge are also evidenced in the municipal military and criminal laws of states. The United States Department of Defense *Law of War Manual* follows the *High Command Trial*, stating that

[t]he commander’s personal dereliction must have contributed to or failed to prevent the offense; there must be a personal neglect amounting to a wanton, immoral disregard of the action of his or her subordinates amounting to acquiescence in the crimes.⁹²

⁸⁶ *Prosecutor v Bagilishema (Judgement)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-95-IA-A, 3 July 2002) [28], quoting *Čelebići Appeal Judgement* (n 52) [238].

⁸⁷ *Čelebići Appeal Judgement* (n 52) [238].

⁸⁸ See Bing Bing Jia, ‘The Doctrine of Command Responsibility: Current Problems’ (2000) 3 *Yearbook of International Humanitarian Law* 131, 159–60; Diane A Desierto, ‘The Contours of Command Responsibility: Philippine Incorporation and Customary Evolution’ (2006) 2 *Asia-Pacific Yearbook of International Humanitarian Law* 226, 227–8.

⁸⁹ *Čelebići Appeal Judgement* (n 52) [239].

⁹⁰ Ibid, cited with approval in *Prosecutor v Blaškić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) [62] (‘Blaškić’).

⁹¹ *Blaškić* (n 90) [406]. For a critique of this line of reasoning, see Fellmeth and Crawford (n 18) 1238–41.

⁹² Office of the General Counsel, Department of Defense, *Department of Defense Law of War Manual* (Manual, December 2016) 1141 [18.23.3.2].

The *Manual* entirely ignores both contemporaneous and subsequent jurisprudence applying a higher standard to commanders.⁹³ In the United Kingdom, the *Manual of the Law of Armed Conflict* uses the *Rome Statute's* ‘reason to know’ language on the commander’s mental state.⁹⁴ In contrast, German criminal law holds a commander liable if he or she ‘omits to prevent’ a subordinate from committing a war crime or ‘negligently omits properly to supervise a subordinate under his or her command or effective control’.⁹⁵

These doctrinal variations and contradictions have long proved a source of frustration to military and international lawyers.⁹⁶ There has been some attempt at reconciliation by enlisting the mens rea requirement into the service of a sharp dichotomy between a commander’s active (if indirect) participation in a subordinate’s war crime, leading to full criminal responsibility, and the commander’s mere ‘passive’ failure to supervise the subordinates, leading to a much reduced responsibility (or no responsibility whatsoever) for such crimes. The merging of command responsibility into a peculiar form of accomplice liability on one hand and the exoneration of commanders who abdicate their leadership roles on the other, has resulted in the problematic conclusion that command responsibility requires a military commander to actually approve or at least appear to acquiesce in the crimes of the subordinates.⁹⁷

This binary is too stark; it would relieve commanders controlling mass lethal violence of all responsibility for training and supervising their subordinates. In this conception of command responsibility, the officer is a mere passive receptacle for any information that may (or, more probably, may not) come into his or her possession through the courage and diligence of junior officers, soldiers or sources outside the military organisation that bring it to the commander’s attention. The commander who sends forth an army of untrained or poorly trained soldiers equipped with lethal weapons, or who puts helpless prisoners and detainees in their hands, and who cannot be bothered to supervise their tactics or treatment of persons under their power, is not responsible for any

⁹³ US military jurisprudence under the *Uniform Code of Military Justice*, 10 USC §§ 801–946 (2016) similarly frequently ignores the ‘reason to know’ standard and requires ‘actual knowledge’ of the subordinates’ intentions to commit war crimes for the criminal conviction of the commanding officer: see, eg, Andrew D Mitchell, ‘Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes’ (2000) 22(3) *Sydney Law Review* 381, 395–6; *United States v Flaherty*, 12 CMR 466, 469 (United States Army Board of Review, 1953) (‘Flaherty’). For criticism of this approach as incompatible with international law (and, indeed, with US military law at the time and since): see Eckhardt (n 43) 11–22; Smidt (n 47) 211–34; Mitchell (n 93) 396–7.

⁹⁴ UK Ministry of Defence, ‘Joint Service Manual of the Law of Armed Conflict’ (Service Manual JSP 383, Joint Doctrine and Concepts Centre, 2004) 440 [16.36.6]. With uncharacteristic optimism, the manual also asserts that, despite the various formulations of command responsibility, ‘there is general agreement on the nature of command and the degree of knowledge required’: at 439 [16.36.4].

⁹⁵ Gesetz zur Einführung des Völkerstrafgesetzbuches [Act to Introduce the Code of Crimes against International Law] (Germany) 26 June 2002, Bundesgesetzblatt Jahrgang II, 2002, 2254, §§ 4, 13 [tr author].

⁹⁶ See, eg, Lippman (n 42); O'Reilly (n 17); Beatrice I Bonafé, ‘Finding a Proper Role for Command Responsibility’ (2007) 5(3) *Journal of International Criminal Justice* 599.

⁹⁷ See, eg, *High Command Trial* (n 46) 75–6; Mettraux (n 17) 42–3. See also Meloni (n 17) 619, 621–3 nn 23–4 who notes that the ICTY interpreted the post-World War Two legislation on command responsibility as a form of accomplice liability, and correctly notes that the *Tokyo Trial* (n 83) judgment took a different view.

war crimes of these subordinates because the commander lacked any positive information that would suggest war crimes were being committed. Indeed, in this view, a commander who actively fosters a culture of hostility toward opposing belligerents and civilians cannot be blamed when subordinates torture enemy prisoners of war or murder civilians, because that commander lacks any information relating to the planning or commission of a specific war crime.

A less supine approach was adopted by the ICTY Appeals Chamber in the *Čelebići* case — that if a military commander chooses not to investigate facts suggesting a significant risk that subordinates had committed or planned to commit war crimes (or, in the language of the ICTY, possessed ‘sufficiently alarming information’⁹⁸), that failure must engage the commander’s criminal responsibility.⁹⁹ The essential point here is that a commander need not have sufficient information to conclude that crimes had been or were about to be committed by subordinates to incur command responsibility, nor must the commander acquiesce in or consciously tolerate crimes. If the commander has enough information to be put on reasonable notice of a serious risk of such war crimes, and the commander fails to investigate this information, the commander is responsible.¹⁰⁰ It follows that blinding oneself to the specific facts relevant to possible past, present or future war crimes of one’s subordinates cannot immunise the commander from liability because the mere awareness of general information suffices to trigger the duty to act. Moreover, as the discussion above and the *Rome Statute*’s reference to the commander’s duty to ‘exercise control properly’¹⁰¹ over subordinates both suggest, there are sound reasons for not limiting the information relevant to command responsibility to specific war

⁹⁸ *Prosecutor v Krnojelac (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-97-25-A, 17 September 2003) [155].

⁹⁹ *Čelebići Appeal Judgement* (n 52) [238]–[239].

¹⁰⁰ Cf Daryl A Mundis, ‘Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute’ in Gideon Boas and William A Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (Martinus Nijhoff Publishers, 2003) 239, 262. The distinction appears to have eluded at least one author, who interprets several criminal tribunal decisions, notably *Prosecutor v Halilović (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-01-48-T, 16 November 2005) [68] (‘Halilović’), to establish that a commander must be entirely certain that a specific subordinate will commit the specific crime that was actually committed to engage his or her responsibility to prevent the crime: see Mettraux (n 17) 77, 204–5, 209, 217. Some statements in *Halilović* (n 100) and *Prosecutor v Orić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-03-68-A, 3 July 2008) (‘Orić’) could arguably be interpreted to support a high standard of certainty and specificity. In *Orić* (n 100) [59]–[60] it was held that it was not enough for the commander to know that someone would commit a crime; he must know that his own subordinate was committing the crime. Moreover, national courts martial sometimes display a disappointing eagerness to exonerate officers when accused of war crimes, as in the US practice of requiring actual knowledge for a superior officer’s criminal conviction: see, eg, *Flaherty* (n 93) 469. However, this position does not accurately reflect the international criminal jurisprudence, which punishes wilful blindness to the war crimes of subordinates as well as active participation.

¹⁰¹ *Rome Statute* (n 55) art 28(a)–(b).

crimes.¹⁰² Relevant information should also include the ages, training, experiences, service records and attitudes of subordinates.¹⁰³

VI EVALUATION OF COMMAND RESPONSIBILITY IN THE *BRERETON REPORT*

With this background of the complex and sometimes contradictory nature of command responsibility doctrine in mind, we turn to the *Brereton Report* and ask whether the report accurately applied the international law on command responsibility when it essentially exonerated SOCOMD from everything but ‘moral’¹⁰⁴ responsibility for what took place in Afghanistan at the hands of Australian SAS troops. Of particular note are two specific sections of the report. The first of these is the following paragraph:

By late 2012 to 2013 there was, at troop, and possibly up to squadron level, suspicion if not knowledge that throwdowns were carried, but for the purpose of avoiding questions being asked about apparently lawful engagements when it turned out that the person killed was not armed, as distinct from facilitating or concealing deliberate unlawful killings. While dishonest and discreditable, it was understood as a defensive mechanism to avoid questions being asked, rather than an aid for covering up war crimes. The more sinister use of throwdowns to conceal deliberate unlawful killings was not known to commanders.¹⁰⁵

The second element of concern in the report is the various pieces of evidence offered by the report as precipitating the investigation, including: the ‘persistent rumours of criminal or unlawful conduct’;¹⁰⁶ actual knowledge among officers of the practice of using throwdowns;¹⁰⁷ operational reports that used ‘boilerplate’ language (to indicate or fabricate compliance with rules of engagement) so frequently that a new Directive for reporting was issued so that higher command could understand the actual basis on which targeting decisions had been made by subordinates;¹⁰⁸ and that local complaints by Afghan nationals, civil society organisations and Afghan government authorities of unlawful killings were received but dismissed as insurgent propaganda or (presumably fraudulent) compensation seeking.¹⁰⁹ As noted in the report, ‘[i]t is clear that there were

¹⁰² As others have recently observed, ‘[i]f commanders are not creating a culture of certainty of punishment for wrongdoing, they have contributed to a strategy and culture of impunity for the commission of war crimes’: Guilfoyle, Kyriakakis and O’Brien (n 40) 271 (citations omitted). See also Fellmeth and Crawford (n 18).

¹⁰³ See Bantekas (n 52) 116–17. But see Mettraux (n 17) 201 who asserts that a commander’s awareness of ‘criminal propensities among some subordinates’ triggers no legal duty of supervision to prevent possible war crimes.

¹⁰⁴ *Brereton Report* (n 2) 32 [32].

¹⁰⁵ Ibid 31 [30].

¹⁰⁶ Ibid 44.

¹⁰⁷ Ibid 115, 470.

¹⁰⁸ Ibid 298–9 [54].

¹⁰⁹ Ibid 359–60. The *Brereton Report* characterises the beliefs of commanders regarding claimants as ‘motivated by compensation’ at 359, but this cannot be strictly accurate. Victims of war crimes are entitled to seek compensation from military organisations under whose authority war criminals were acting: see Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press, 2012) 36–9, 125–8. Consequently, a commander violates his duty by ignoring reparations claims merely because compensation is sought. He or she has reason to ignore claims of war crimes only based on strong evidence that such claims are false. Nothing in the redacted version of the *Brereton Report* indicates that SAS commanders had any such evidence.

warning signs out there, but nothing happened'.¹¹⁰ The report therefore supports the conclusion that SOCOMD showed no interest in uncovering the truth about whether war crimes were occurring, being more interested in self-protection than compliance with the LOAC.

Returning to the operative sections on command responsibility under Australian law, ss 268.115(2)(a)–(b) provide that the military commander¹¹¹ incurs liability if he or she knows or, owing to the circumstances at the time, is ‘reckless’ as to whether the forces were committing or about to commit such offences, and fails to take all necessary and reasonable measures within his or her power to prevent or repress their commission. A commander equally incurs liability if he or she fails to submit information in his or her possession relating to a war crime by subordinates to the competent authorities for investigation and prosecution. The SAS soldiers and SOCOMD officers under investigation are part of the ADF hierarchy and were acting in their capacity as members of the ADF. At no point in the *Brereton Report* is there any suggestion that the incidents at issue were committed by the soldiers while not on an ordered deployment, nor committed by the soldiers acting entirely from personal, individual motives.

Assuming arguendo that no SOCOMD officer ‘knew’ of war crimes, the question becomes whether any officer ‘was reckless’ in disregarding information suggesting that subordinates were committing war crimes. As noted, ‘recklessness’ means acting without consideration for the foreseeable risk of harmful consequences of one’s actions to others. War crimes are by definition seriously harmful to their victims. As noted in the *Brereton Report*, by 2013 there was suspicion if not outright knowledge at troop and possibly squadron levels of the use of throwdowns, but this was attributed to ‘avoiding questions’ about whether targets were directly participating in hostilities, rather than as an attempt to conceal the commission of war crimes. The knowledge of soldiers carrying throwdowns without a legitimate reason, coupled with information from civil society, persistent rumours of unlawful conduct and the ‘boilerplate’ AARs triggers the commander’s responsibility to investigate exactly what was taking place during patrols and engagements even under the ICTY, ICTR and ICC definitions of command responsibility. These standards do not require positive knowledge of subordinate war crimes; the commander shares in the subordinate’s guilt by failing to investigate when sufficiently alarming information comes to the commander’s attention.

International law holds commanders responsible for failing to prevent and punish war crimes of which they have ‘reason to know’, and Australian law interprets that standard as one of recklessness. It was therefore logically possible for Major General Brereton to conclude that SOCOMD had ‘moral’ but not ‘legal’ responsibility if a commander aware of suspicious, surreptitious and deceptive conduct by subordinates could conclude that neither international criminal law nor s 258.115 of the *Australian Criminal Code* obligated a commander to investigate such conduct. Instead, the commander may satisfy

¹¹⁰ *Brereton Report* (n 2) 525, [61].

¹¹¹ Under this section, a person in effective command and control, or a person having effective authority and control over the relevant forces, incur responsibility to the same extent as a military commander: *Australian Criminal Code* (n 14) s 268.115(3).

himself or herself that no war crimes are being committed in the absence of any positive knowledge of such crimes. This interpretation, of course, would render the ‘has reason to know’ or ‘should have known’ language nugatory, contrary to the well-established canon of treaty interpretation that, whenever possible, treaty language should not be interpreted as superfluous.¹¹²

Admittedly, nowhere in s 258.115 is there explicit reference to a commander’s duty of investigation, nor that a failure to investigate is itself a criminal offence. However, even the Australian criminal law’s recklessness standard indicates that a commander need not positively know that subordinates are planning, are committing or have committed a war crime, because recklessness occurs in the code as an alternative to actual knowledge. Inexplicably, the *Brereton Report* strongly suggests a belief that, because theoretical alternative explanations for the suspicious behaviour of subordinates existed, commanders were justified in concluding that the facts could not possibly be interpreted to indicate that subordinates were torturing and murdering civilians.

Even if one could charitably discount the ‘persistent rumours’ discussed in the *Brereton Report* as baseless, and even if there was some evidence that complaints from civilians were indeed simply propaganda or fraudulent compensation-seeking, and even if the boilerplate language in AARs might have been a sign of administrative fatigue rather than deliberate, criminal obfuscation, the combined elements of widespread use of throwdowns coupled with the information from civil society organisations was sufficient to warrant further investigation. The failure to do so very likely resulted in further commission of war crimes by SAS personnel. As noted by the ICC in *Bemba*, passivity and blithe hope in the unerringly lawful conduct of subordinates cannot exonerate a commander:

[T]he ‘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. The drafting history of this provision reveals that it was the intent of the drafters to take a more stringent approach towards commanders and military-like commanders compared to other superiors that fall within the parameters of article 28(b) of the *Statute*. This is justified by the nature and type of responsibility assigned to this category of superiors.¹¹³

Even under the ICTY Appeals Chamber’s relatively lenient jurisprudence, the *Brereton Report*’s interpretation of the commander’s legal duty is unsustainable.

¹¹² See, eg, *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 24 which provides that ‘[i]t would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect’. The International Law Commission, in drafting the *Draft Articles on the Law of Treaties* that provided the basis for the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), considered this principle inherent in the obligation to interpret treaties in good faith: ‘Draft Articles on the Law of Treaties with Commentaries’ (1966) II *Yearbook of the International Law Commission* 187, 219. See generally Edward Gordon, ‘The World Court and the Interpretation of Constitutive Treaties: Some Observations on the Development of an International Constitutional Law’ (1965) 59(4) *American Journal of International Law* 794, 814.

¹¹³ *Bemba (Pre-Trial Chamber)* (n 60) [433].

Major General Brereton evidently believed that the commander's obligation is discharged when they dismiss information about possible war crimes by subordinates based merely on personal scepticism about the motivations of those providing information, unquestioning faith in the pure intentions of subordinates or fear of alienating subordinates and undermining unit cohesion by asking uncomfortable questions. Neither the *Rome Statute*, nor the language of *Additional Protocol I*, nor the case law of the international criminal tribunals offers any such exoneration. The general information about personality traits or generally irresponsible behaviour by subordinates mentioned in the Appeals Chamber's opinion is on par with knowledge that subordinates were not filing accurate AARs and were carrying throwdowns. Such information is, moreover, much less specific than actual allegations of specific war crimes heard by the SAS and SOCOMD commanders, as described in the *Brereton Report*. Indeed, per the *Ćelebići Appeal Judgement*, upon the presentation of such general information, the commander is *already considered* as 'having the required knowledge'.¹¹⁴ In a sense, the commander's duty to investigate the information is a measure of self-protection, because failure to investigate adequately makes the commander legally responsible for the war crimes of subordinates just as surely as if the commander *had* investigated the information and definitely discovered the crimes.

VII THE BRERETON REPORT AND ITS DISCONTENTS

Although the *Brereton Report* did recommend that 19 of the 25 soldiers implicated in war crimes be referred to criminal investigation, most continued to serve without impediment a year later, and no officer has been indicted based on command responsibility.¹¹⁵ The *Brereton Report*'s recommendation not to charge commanders who ignored credible allegations of war crimes reflects a fundamental misunderstanding of the crime of command responsibility. Even under the most forgiving interpretation of the modern treaty language and customary law of command responsibility, commanders do not escape liability for the war crimes of subordinates because they put faith or trust in those subordinates, much less because they believed unit loyalty, cohesion, or reputation justified protecting subordinates from a court martial. The commander's duty to act diligently in protecting the defenceless who might be subjected to abuse or destruction by forces under his or her command is not only moral, it is decidedly legal. And it is especially compelling because, if a commander does not protect civilians, prisoners of war or detainees from his or her subordinates, rarely is anyone else available and willing to perform that crucial military function.

It bears repeating that seeking a perfect correlation between the commander's intentions and the resulting crime is counterproductive. Many scholars and international tribunals have been drawn into that error by the lure of false

¹¹⁴ *Ćelebići Appeal Judgement* (n 52) [238].

¹¹⁵ See Daniel Hurst, 'Special Investigator Continues to Examine Alleged ADF War Crimes in Afghanistan, Despite Reports', *The Guardian* (online, 2 September 2021) <<https://www.theguardian.com/australia-news/2021/sep/02/special-investigator-continues-to-examine-alleged-adf-war-crimes-in-afghanistan-despite-reports>>, archived at <<https://perma.cc/AZ5X-FHTT>>.

analogy between international criminal law and municipal criminal law.¹¹⁶ But the contexts are not even remotely analogous. In the municipal realm, the stresses of combat, the training in obedience and group loyalty of the actors and the unique control of commanders over subordinates are all lacking. Also lacking in the domestic criminal context is the exceptionally serious nature of war crimes and the enormous power imbalances between combatants, and the civilians, prisoners, detainees and others vulnerable to the violence of combatants. Even had the ADF commanders investigated the evidence of SAS war crimes, that investigation would have come too late for the murdered and tortured detainees. In retrospect, it is clear that SOCOMD and the SAS commanders failed in their duty to set a proper tone of respect for the LOAC, to train combatants in the importance of respecting that law and to supervise them throughout the mission to ensure they followed required procedures. Such measures, if properly implemented, would have reduced the chances of war crimes occurring in Afghanistan. Given that those measures were never taken, the *Brereton Report* does a further disservice to the LOAC, the victims of ADF war crimes and the reputation of the SOCOMD by exonerating officers who, having the authority and responsibility to protect Afghans from war crimes by soldiers under their command, chose to look the other way.

¹¹⁶ See Damaška (n 17) 455–6; Mettraux (n 17) 47, 56–63; Meloni (n 17) 632, 637; O'Reilly (n 17) 105. See generally Fellmeth and Crawford (n 18).