THE DOCTRINE OF COMMAND RESPONSIBILITY IN AUSTRALIAN MILITARY LAW

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The recently released Brereton Inquiry Report found there was credible evidence to suggest a small number of members of the Australian Defence Force were involved in war crimes in Afghanistan. If the allegations are proven to be true at the required standard of proof, one important legal question is the extent, if any, to which those in command of those who committed the crimes are liable for them. This is the doctrine of command responsibility. The article charts development of the doctrine in international law, explores its controversial and uncertain legal basis, considers its compatibility with fundamental principles of criminal law, and offers some suggestions as to how the relevant statutory provision might be interpreted, in a way that is compatible with international law as well as fundamental aspects of Australian criminal law.

I INTRODUCTION

The release of the Inspector General of the Australian Defence Force's *Afghanistan Inquiry Report* on October 2020 ('*Brereton Inquiry Report*') was a landmark event in the law of war. The *Brereton Inquiry Report* determined there was credible information to suggest a small number of Australian defence personnel in Afghanistan may have committed breaches of the law of armed conflict. Of course, only criminal proceedings can determine whether these allegations can be proven beyond reasonable doubt, and anyone accused of wrongdoing is entitled to the presumption of innocence.[1]

That said, the *Brereton Inquiry Report* has raised many legal issues. Among them is the doctrine of command responsibility, under which a superior officer is liable for the actions of those soldiers ostensibly under their authority and control.[2] This article will explore the development of this doctrine in international

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1 Anthony Gray, *Presumption of Innocence in Peril: A Comparative Critical Perspective* (Lexington Books, 2017).

2 Weston D 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, 76.

law before considering some current difficulties in terms of principles within our domestic legal system. The doctrine has been recognised in Australian law in section 268.115 of the *Criminal Code Act* (Cth),[3] but has never been utilised to date.[4] This may well change, given the *Brereton Inquiry Report*.

When (if) an Australian court is asked to interpret the section, it will face challenges. The first is that the doctrine does not fit easily within existing domestic legal doctrine in the non-military context, including punishment based on and proportionate to culpability, mens rea, accomplice-style liability, joint criminal enterprise, or vicarious liability. The article will consider the extent to which command responsibility can fit within existing criminal law principle, either in its essence or through interpretation. This discussion might guide the interpretation of section 268.115 of the *Criminal Code Act 1995* (Cth). This links to larger scholarly questions regarding the exceptionality of legal principles applicable in the military context compared with those in the non-military context, and the desirability and justifiability of a bifurcated system of jurisprudence.[5] A starting premise is that a novel legal principle should be interpreted, where possible, in a manner compatible with, rather than not compatible with, established legal principles within that system.

As the doctrine of command responsibility has become accepted as part of customary international law, and part of treaty law, it is important to understand landmark legal developments through which this occurred. It is possible that, when an Australian court considers the command responsibility principle, it will have regard to these international authorities, particularly given the dearth of established domestic precedent. This justifies full consideration of the historical development of the principle. Though command responsibility requires demonstration of the existence of a commander-subordinate relationship, and can include failures to punish, and of course acknowledging that commanders may be criminally liable for their own positive acts, the immediate focus here will be on failures to prevent, and the mens rea issues relating to a commander's possible liability for such.

The article is divided into seven parts. Part II summarises the relevant *Brereton Inquiry Report* findings. Part III considers the development of the doctrine of command responsibility in international law. Part IV considers development of the doctrine in Australian law. Part V considers the theory of command responsibility, specifically the correct mode of liability. Part VI considers how command

3 *Criminal Code Act 1995* (Cth) s 268.115.

4 Something like it was recognised in Australia's war crime trials between 1945–51, but this was at a time when the doctrine was not in a mature form: Gideon Boas and Lisa Lee, 'Command Responsibility and Other Grounds of Criminal Responsibility' in Georgina Fitzpatrick, Tim McCormack and Narrelle Morris (eds), *Australia's War Crimes Trials 1945–1951* (Brill Nijhoff, 2016) 134 <https://doi.org/10.1163/9789004292055_006>.

5 '[A] gap between military and civilian values cannot become a chasm in any healthy society or its security sector': Christopher Waters, 'Democratic Oversight through Courts and Tribunals' in Alison Duxbury and Matthew Groves (eds), *Military Justice in the Modern Age* (Cambridge University Press, 2016) 36, 46 <https://doi.org/10.1017/CBO9781107326330.004>; Matthew Groves, 'The Civilianisation of Australian Military Law' (2005) 28(2) *University of New South Wales Law Journal* 364; Pauline Collins, 'Civil–Military "Legal" Control' in Pauline Collins (ed), *Civil-Military 'Legal' Relations: Where to from Here?* (Brill Nijhoff, 2018) 1, 16–22 <https://doi.org/10.1163/9789004338258_002>.

responsibility should be interpreted in section 268.115 of the *Criminal Code Act 1995* (Cth). Part VII concludes.

II SUMMARY – RELEVANT *BRERETON INQUIRY REPORT* FINDINGS

The *Brereton Inquiry Report* determined there was credible information about 23 incidents involving Australian Defence Force ('ADF') personnel, suggesting involvement in the unlawful killing of non-combatants and those hors-de-combat.[6] That information involved members of the Special Operations Task Group either conducting the unlawful killing, or directing other members to conduct it, in circumstances amounting to the war crime of murder,[7] and two other incidents that, if proven, would amount to the war crime of cruel treatment.[8] The credible information involved the death of 39 individuals, and the cruel treatment of 2 individuals. It involved 25 current or former ADF personnel. In these cases, it was determined it should have been obvious to those accused of wrongdoing that those killed or tortured were either non-combatants, or hors-de-combat. In other words, it would have been obvious to those accused that their actions were, in fact, wrong in the sense of being illegal.

The *Brereton Inquiry Report* found evidence of other unsavoury practices within the ADF, including so-called 'throwdowns'.[9] This involved placement of weapons upon the body of an individual after they had been killed, to make it appear the person had been armed and/or engaged in armed combat with Australian forces, to justify or explain their death. The *Brereton Inquiry Report* also found evidence of the existence of 'blooding',[10] under which soldiers and non-commissioned officers were ordered by commanders to shoot a prisoner in order to gain their first experience of killing another.

Regarding responsibility for the above, the *Brereton Inquiry Report* found that, overwhelmingly, responsibility should be placed at the patrol commander (corporal or sergeant) level. The *Brereton Inquiry Report* concluded there was no evidence of either knowledge of, or reckless indifference to, commission of war crimes at a troop/platoon commander level, squadron/company or Task Group

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6 Paul Brereton, *Inspector-General of the Australian Defence Force Afghanistan Inquiry* (Report, 6 November 2020) 28 [12] ('*Brereton Inquiry Report*'). A person who is hors-de-combat is typically injured or wounded, and so unable to participate in hostilities.

7 See generally *Criminal Code Act 1995* (Cth) ss 268.24, 268.40. The word 'murder' is generally considered analogous (albeit not identical) to the phrase 'wilful killing' or 'unlawful killing': see, eg, *Criminal Code Compilation Act 1913* (WA) s 277. It is acknowledged there is some imprecision on how the *Brereton Inquiry Report* refers to these offences.

8 See, eg, *Criminal Code Act 1995* (Cth) ss 268.25, 268.26, 268.28.

9 *Brereton Inquiry Report* (n 6) 29 [18] defined a throwdown as

> foreign weapons or equipment, typically though not invariably easily concealable such as pistols, small hand held radios ('ICOMs'), weapon magazines and grenades – to be placed with the bodies of 'enemy 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 was a legitimate target.

10 Ibid 29 [19].

Headquarters, or at Commander Joint Task Force, Joint Operational Command, or Defence Headquarters. The *Brereton Inquiry Report* did not find there was a failure at those levels to take reasonable care and practical steps that would have prevented the commission of war crimes. The *Brereton Inquiry Report* noted:

> [T]he detailed superintendence and control of subordinates is inconsistent with the theory of mission command espoused by the Australian Army, whereby subordinates are empowered and entrusted 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 independence are entrusted at relatively low levels, in particular to patrol commanders.[11]

The *Brereton Inquiry Report* found that due to factors of structure as well as geography, troop commanders were

> not well-positioned … to discover anything that the patrol commanders did not want them to know. Information was closely held, within individual patrols. Even within a patrol, not every member would necessarily know of events. For sound tactical reasons, troop commanders were usually located remotely from the target compound, in an overwatch position, and did not have visibility of events on the objective.[12]

It discerned the existence of a culture permitting wrongdoing to occur. It suggested responsibility for this may reside with commanders within the Special Air Service Regiment squadrons, and some Commando Regiment Company Groups, but not at the level of the Special Operations Task Group or any Commanding Officer within it, because that group was drawn from a range of units and involved multiple rotations, limiting the chance any one individual person could foster a particular culture.[13]

It considered why these practices may have continued without coming to the notice of more senior officials.[14] Reasons given included the high degree of trust commanders placed in subordinates, including to make good decisions in accordance with rules of engagement, and to report events honestly and accurately.[15] The *Brereton Inquiry Report* noted a 'war against higher command'.[16] As part of this, reporting of events was manipulated so incidents would not attract the attention of more senior officers. Reporting took on a 'boilerplate' quality involving the use of generic, template style responses,[17] with standardised reporting often not accurately conveying events, featuring embellishment, and designed to

11 Ibid 31 [28]. The *Brereton Inquiry Report* concluded that 'the devolution of operational command of Special Operations Task Group not only had the potential to result in the national interest and mission being overlooked or subordinated, but deprived national command of effective oversight of Special Operations Task Group operations': at 36 [51]. See also Cameron Moore, 'Structure of the Australian Defence Force' in Robin Creyke, Dale Stephens and Peter Sutherland (eds), *Military Law in Australia* (Federation Press, 2019) 24.

12 *Brereton Inquiry Report* (n 6) 31 [29].

13 Ibid 32 [33].

14 Ibid 34–5 [39]–[46].

15 Ibid 34 [41].

16 Ibid.

17 Ibid.

show compliance with rules of engagement.[18] Commanders were involved in this.[19] There was a presumption that complaints made by various parties about wrongful behaviour by military personnel were incorrect, and made to obtain compensation.[20] Those charged with investigating a complaint often considered their objective was to find evidence to disprove a complaint, rather than investigate it with open eyes.[21] Relevant members of the military charged with investigating complaints were not well trained in such practices, and did not have the required degree of suspicion to investigate complaints thoroughly.[22] The *Brereton Inquiry Report* referred to the problem of 'abandoned curiosity' in respect of matters which ought to have attracted attention. Specifically, it was considered to be wrong for those not on the front line to question or second-guess decisions made by those who were.[23] Commanders were part of this failure.[24] These findings will be reconsidered later, in the context of possible criminal responsibility for commanders under section 268.115 of the *Criminal Code Act 1995* (Cth).

III DEVELOPMENT OF THE COMMAND RESPONSIBILITY DOCTRINE IN INTERNATIONAL LAW

A Early References

Notions of communal responsibility appear in primitive legal systems. Traces of the doctrine appear in writings of Sun Tzu in circa 500 BC.[25] It appears in European military practice in the 1400s. In the 17th century, Hugo Grotius in *The Law of War and Peace* contemplated rulers of a community could be held liable if they were aware of a crime and did not act sufficiently to prevent it.[26] The doctrine is reflected in the Articles of War drawn up in respect of the American Revolution,[27] and reflected in the *Hague Conventions* of 1907.[28] There was a limited attempt to

18 Ibid 35 [48].
19 Ibid 32 [31].
20 Ibid 34 [42].
21 Ibid 35 [44].
22 Ibid 35 [45].
23 Ibid 496 [72]. Elsewhere, particular aspects of military culture, including excessive 'loyalty to colleagues' has been noted as leading to cases where incidents are not reported, and evidence fabricated to support colleagues: Peter Rowe 'Military Misconduct during International Armed Operations: Bad Apples or Systemic Failure?' (2008) 13(2) *Journal of Conflict and Security Law* 165, 182 <https://doi.org/10.1093/jcsl/krn024>.
24 *Brereton Inquiry Report* (n 6) 32 [31]–[33].
25 '[W]hen troops flee, are insubordinate, distressed, collapse in disorder or are routed, it is the fault of the general. None of these disorders can be attributed to natural causes': Sun Tzu, *The Art of War*, tr Samuel B Griffith (Oxford University Press, 1963) 125.
26 Hugo Grotius, *The Law of War and Peace*, tr Francis W Kelsey (Lonang Institute, 2005) 523.
27 William Winthrop, *Military Law and Precedents* (Government Printing Office, 2nd ed, 1920) 953, cited in John Kiel Jr, 'War Crimes in the American Revolution: Examining the Conduct of Lt Col Banastre Tarleton and the British Legion during the Southern Campaigns of 1780–1781' (2012) 213 (Fall) *Military Law Review* 29, 53.
28 *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, opened for signature 18 October 1907, 205 ConTS

prosecute high-ranking military officers within the defeated forces in the aftermath of World War I, but this was largely practically useless; only one was convicted on the basis of the command responsibility doctrine.[29]

World War II is typically the conflict identified as the catalyst for the development of the command responsibility doctrine in international criminal law.[30] The Charter of the International Military Tribunal, drawn up by the Allies at the war's end, provided the Tribunal would have jurisdiction over war crimes. It added:

> Leaders, organisers, 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.[31]

Given the content of this article, it is noteworthy that the American representatives on the committee expressed a dissenting view. They noted:

> It is one thing to punish a person who committed, or, possessing the authority, ordered others to commit an act constituting a crime; it is quite another thing to punish a person who failed to prevent, to put an end to, or to repress violations of the laws or customs of war. In one case the individual acts or orders others to act, and in so doing commits a positive offence. In the other he is to be punished for the acts of others without proof being given that he knew of the commission of the acts in question or that, knowing them, he could have prevented their commission. 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 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.[32]

Perhaps the single most important judgment in the development of the doctrine of command responsibility, and acceptance as a doctrine of customary international law, was *Re Yamashita*[33] ('*Yamashita*'), to which discussion now turns.

B *Yamashita* and Subsequent American Development

Yamashita was a commanding officer within the Imperial Japanese Army. Yamashita's forces were focused on fighting in the Philippines. It was alleged that for nearly a year prior to the war's end, his forces were engaged in large-scale atrocities against Philippines' civilians, including serious assault and murder, and

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277 (entered into force 26 January 1910) annex arts 1 (stating the commander of a belligerent force is responsible for subordinates), 3 (stating a belligerent party shall be responsible for all acts committed by those forming part of its armed forces).

29 See 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference' (1920) 14(1¬–2) *American Journal of International Law* 95, discussed in William H Parks, 'Command Responsibility for War Crimes' (1973) 62 (Fall) *Military Law Review* 1, 11–13.

30 Jamie A Williamson, 'Some Considerations on Command Responsibility and Criminal Liability' (2008) 90(870) *International Review of the Red Cross* 303, 305.

31 *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 28 UNTS 280 (signed and entered into force 8 August 1945) annex I art 6. The work of the United States Military Court and the International Military Tribunal of the Far East will be discussed presently.

32 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties' (1920) 14(1–2) *American Journal of International Law* 95, 143 <https://doi.org/10.2307/2187841>.

33 327 US 1 (1946) ('*Yamashita*').

destruction of settlements. It was said none of these actions were committed with reasonable cause.

Yamashita was accused of wrongdoing in not controlling his troops, enabling atrocities to occur. Part of Yamashita's defence was that he was unaware of the atrocities being committed, because the United States' forces had successfully crippled the Japanese army, including its communication systems. A military commission conducted a trial, finding Yamashita guilty of failing to control his troops, resulting in atrocities. He was sentenced to death by hanging. His appeal to the United States Supreme Court was unsuccessful. Most of the case concerned the validity of the military commission hearing, which is not of present concern. However, the Court briefly considered the question of the liability of a commanding officer for wrongful conduct committed by troops. There was no direct evidence that Yamashita either actively participated in any of the relevant crimes or was aware they were occurring.[34]

A majority of the Court found a superior military officer could be held liable for wrongful acts of subordinates.[35] It confirmed the nature of the proceeding was against the superior officer for breaching a duty they owed as a commander to control operations and activities of troops. It required a commander to take 'appropriate measures as are within [their] power' to control them.[36] They could be charged for failing to exercise such control as was reasonable. The majority noted this was essential to protect against the risk of civilians being injured during war. The majority did not assess whether there was sufficient evidence that Yamashita had not exercised reasonable control; this was a matter within the special competence of the military commission and for it to decide, according to the majority. Yamashita was hanged.

Murphy J (dissenting) noted it had not been alleged the accused personally committed any atrocities, ordered their commission, or knew they were being committed. He said international law did not define the duties of an army commander for failing to meet a required standard; this was understandable, because of the infinite variety of factual scenarios attending a particular conflict. It would be difficult and speculative to determine what, if anything, a commander ought to have done by way of response. He was dismayed with the idea of imposing personal liability upon commanders 'in the absence of personal culpability'.[37] There was no evidence the defendant had knowledge of or direct connection with the atrocities committed. Rutledge J said it was the antithesis of due process to impute to an individual responsibility for something where the individual had not been shown to have participated in it, or knowingly failed to take action to prevent wrongs by others, where they had the duty and power to do so.[38] He agreed with

34 Arthur Thomas O'Reilly, 'Command Responsibility: A Call to Realign Doctrine with Principles' (2004) 20(1) *American University International Law Review* 71, 75–6 ('A Call to Realign Doctrine with Principles').

35 *Yamashita* (n 33) 15 (Stone CJ for the Court, Murphy J dissenting at 26, Rutledge J dissenting at 41).

36 Ibid 15 (Stone CJ for the Court).

37 Ibid 39 (Murphy J).

38 Ibid 43–4.

Murphy J.[39] He noted that nowhere in the majority judgment was any conclusion expressed about a need to prove a defendant in such a situation knew atrocities were being committed.[40]

This decision has been the subject of significant criticism.[41] One basis is that the Court did not clearly articulate the basis for finding Yamashita guilty. It is not known whether the majority of the United States Supreme Court found that, despite his denials, he knew of the crimes perpetrated by his troops, or that he was unaware, but failed to take reasonable measures to prevent what occurred and/or punish the perpetrators. Use of hearsay evidence to find Yamashita guilty has been criticised.[42] Some say the Court operated on the basis Yamashita must have been aware of what was going on; that his denials were found not credible.[43] Others deny this.[44] Uncertainty over the premise upon which the Court proceeded in the case leads to speculation about whether strict liability or the guilt by association standard was applied.[45]

Given some of the uncertainties involved in the result, it is noteworthy that in proceedings against Admiral Soemu Toyoda, the Tribunal coined the term 'constructive notice' in terms of what a commander knew. It was held sufficient in terms of command responsibility that the accused knew, or ought by the exercise of reasonable diligence to have known of, the atrocities being committed by others.[46] Summarising the law on command responsibility, a Judge Advocate General in the United States Navy stated:

> Absent actual knowledge, there must be conduct to support a finding that the commander encouraged the criminal misconduct of [their] subordinates through [their] failure to discover and intervene, where [they] had a duty to prevent such action. For this to occur, there must be either such serious personal dereliction on the part of the commander as to constitute wilful and wanton disregard of the possible consequences or an imputation of constructive knowledge, that is, despite pleas to the contrary, the commander under the facts and circumstances of the particular case must have known of the offenses charged and acquiesced therein.[47]

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39 Ibid 47 (Rutledge J).

40 Ibid 53.

41 Cassese describes it as a 'highly questionable interpretation of existing rules of international humanitarian law, as well as a wrong application of the principles to the case at bar, in addition to total disregard for the required mental element for the crime': Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003) 203. 'The tribunal's judgment can be seen as an example of judicially sanctioned vengeance, rather than justifiable retribution': O'Reilly, 'A Call to Realign the Doctrine with Principles' (n 34) 132.

42 Burnett (n 2) 90.

43 Ibid 97–8.

44 '[B]ecause of the widespread belief that General Yamashita may have lacked actual knowledge of the atrocities, the result of this case rests uneasily upon the international conscience': Kenneth Howard, 'Command Responsibility for War Crimes' (1972) 21 *Journal of Public Policy* 7, 16. '[T]he Supreme Court held that his total ignorance, and the complete delegation of authority associated with it, themselves raised unacceptable general risks of future subordinate criminality': Note, 'Command Responsibility for War Crimes' (1973) 82(6) *Yale Law Journal* 1274, 1283 <https://doi.org/10.2307/795564>.

45 Allison Marston Danner and Jenny S Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93(1) *California Law Review* 75, 124.

46 Transcript of Proceedings, *United States v Toyoda* (International Military Tribunal for the Far East, 6 September 1949) 5005–6.

47 Burnett (n 2) 133.

It may also be of interest to reflect upon the development and application of these principles in United States domestic law, given the *Yamashita* decision and its international influence. The *Uniform Code of Military Justice* (1953) does not specifically contain the principle of command responsibility.[48] Article 77 states a person is punishable where they (a) commit an offence against the relevant chapter, or aid, abet, counsel, command or procures its commission; or (b) cause an act to be done which, if directly performed by them, would be punishable under the chapter.[49] In the Ernest Medina trial concerning the Vietnam War and the My Lai massacre, this article was interpreted narrowly, to apply only to situations where a commander had *actual* knowledge of war crimes committed by more junior officers.[50] This position was apparently at odds with norms of international customary law, discussed below, as well as the *Yamashita* decision. Article 92(c) deals with 'dereliction of duty', and is more consistent with that case.

Notwithstanding this interpretation, the 'should have had knowledge' principle from *Yamashita* is reflected in other materials, including the *United States Field Manual* (1956), *United States Naval Handbook* (1997 and 2007), *United States Manual for Military Commissions* (2007) part IV, *United States Code* Title 10 §§ 948q and 950q, and reflected in United States appellate courts.[51]

C Subsequent Developments in International Law

In the aftermath of World War II, the Nuremberg trials commenced against senior officers of the Nazi regime. In *United States of America v Wilhelm von Leeb* ('*German High Command*'), the United States Military Court considered allegations based on command responsibility for various war crimes. The Court noted in relation to the criminal liability of senior officers for war crimes committed by more junior officers:

> Criminality does not attach to every individual in [the] chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law known to civilized nations.[52]

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48 'Command Responsibility for War Crimes' (n 44) 1289.

49 10 USC § 877 (1956).

50 Michael L Smidt, 'Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Operations' (2000) 164 *Military Law Review* 155, 197. This led Smidt to conclude that:

> [C]riminal culpability for failure to prevent a crime can only exist where the failure to act is intended to encourage the subordinates. Mere failure to act is not, by itself, grounds for criminal liability … to be held criminally responsible for failing to take action to prevent another from committing a crime, a person must first have a legal duty to intercede … accepting for the sake of analysis that a commander does have a lawful obligation to prevent crimes committed by subordinates, the failure to act must be tantamount to encouragement and intended to act as such.

51 See, eg, *Ford ex rel Estate of Ford v Garcia*, 269 F 3d 1283, 1288 (2nd Cir, 2002) (Kravitch J for Carnes J, Barkett J concurring at 1297) (where the test was, 'knew or should have known').

52 *Law Reports of Trials of War Criminals* (United Nations War Crimes Commission, 1949) vol 12, 76 <https://tile.loc.gov/storage-services/service/ll/llmlp/Law-Reports_Vol-12/Law-Reports_Vol-12.pdf>. Major William Parks interpreted 'wanton, immoral disregard amounting to acquiescence … must be such

The Tribunal suggested in order for the doctrine of command responsibility to apply, the senior officer would have to have knowledge of the offence, and acquiesce or participate or criminally neglect to interfere in their commission, and the offence would have to be patently criminal in nature.[53] The accused, Wilhelm von Leeb, was acquitted because the court was not satisfied he knew of the murder of civilians within his zone of responsibility, or that he had acquiesced in such activity.

In *United States v List* ('*Hostages*'), the United States Military Tribunal held a commander would generally not be permitted to claim ignorance of reports made to them. Failure to read these, or failure to require and obtain additional reports where it was apparent on their face those provided were inadequate, would in the Tribunal's view amount to an indefensible dereliction of duty.[54]

Article 86 of the *Additional Protocol to the Geneva Conventions* (1949) ('*Additional Protocol*'), issued in 1977, requires parties in conflict to ensure no breaches of the *Geneva Conventions* or the *Additional Protocol* resulting from a failure to act.[55] It adds the fact that a breach committed by a more junior officer does not absolve superiors from penal disciplinary responsibility, where they knew or had information that should have enabled them to conclude the subordinate was going to commit the breach, and failed to take all practical measures to prevent or suppress it.[56] Even this created difficulties, because while the English version of the article used the above phrasing, the French version used the phrase that more closely translates to 'information enabling them to conclude'; the reference to 'should' does not appear.[57] The French version may be closer to the intent, but this is not entirely clear.[58] The *Commentary on the Additional Protocols* suggest something more than negligence was intended.[59]

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as to support a finding that the commander is an accomplice in the sense that [they] shared the criminal intent of his subordinates' and effectively encouraged their behaviour through failure to detect the wrongdoing and take steps to have it investigated and punished if proven: Parks (n 29) 103.

53 *Law Reports of Trials of War Criminals* (United Nations War Crimes Commission, 1949) vol 12, 110–11. The concept of acquiescence in the context of command responsibility was also utilised by the Canadian Military Court in the *Abbaye Ardenne* case involving Kurt Meyer, considering whether the accused commander 'ordered, encouraged or verbally or tacitly acquiesced in the killing of prisoners, or wilfully failed in his duty as a military commander to prevent, or to take such action as the circumstances required to endeavour to prevent' the acts in question: *Law Reports of Trials of War Criminals* (United Nations War Crimes Commission 1948) vol 4, 89 (emphasis omitted) <https://tile.loc.gov/storage-services/service/ll/llmlp/Law-Reports_Vol-4/Law-Reports_Vol-4.pdf>.

54 *Law Reports of Trials of War Criminals* (United Nations War Crimes Commission 1949) vol 8, 71 <https://tile.loc.gov/storage-services/service/ll/llmlp/Law-Reports_Vol-8/Law-Reports_Vol-8.pdf> ('*Hostages*').

55 *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 June 8 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 86.

56 Ibid art 86(2).

57 Danner and Martinez (n 45) 126.

58 Ibid.

59 '[T]his does not mean that every case of negligence may be criminal. For this to be so, the negligence must be so serious that it is tantamount to malicious intent': Claude Pilloud et al, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff, 1987) 1012 [3541]. 'The drafters of the *Additional Protocol* intended a mens rea that approached recklessness or willful blindness, rather than mere negligence': O'Reilly, 'A Call to Realign Doctrine with Principles' (n 34) 80.

In response to the atrocities committed in the former Yugoslavia in 1993, the *Statute of the International Criminal Tribunal for the Former Yugoslavia* ('*ICTY Statute*') was established.[60] Article 7(1) states '[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime',[61] is individually responsible for it.[62] One of the noteworthy features of this article is how it lumps together concepts that, at least in many countries, would be treated differently.[63] In the common law, for example, generally (merely) aiding and abetting of a crime would be treated less seriously than actually committing the substantive crime. Article 7(3) states a superior officer might be criminally liable for actions of subordinates where they knew or had reason to know the subordinate was about to commit such acts or had done so, and failed to take necessary and reasonable measures to prevent such acts or punish the perpetrators. Similarly, article 6(3) of the *Statute of the International Criminal Tribunal for Rwanda* provides a superior is criminally liable for actions of subordinates where they knew or ought to have known the subordinate would commit them, if the superior failed to prevent them, or failed to punish them.[64] Article 6(1) is identical to article 7(1) discussed above. These two tribunals will be referred to as the 'ad hoc tribunals'.

In *Prosecutor v Delalic* ('*Čelebići*'), the International Criminal Tribunal for the Former Yugoslavia ('ICTY') considered articles 7(1) and (3). It found the phrase 'had reason to know' in article 7(3) meant effectively 'had information enabling them to conclude'.[65] In other words, failure of the commander to conclude, or conduct additional inquiry, 'in spite of alarming information' would amount to effective knowledge of the offences being committed by more junior officers, and criminal liability being attached to the superior officer.[66] However, it did not articulate any duty to investigate to obtain information, absent this kind

60 SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993).

61 Ibid art 7(1).

62 It has been noted this provision is expressed in a broad-brushed manner, not distinguishing in terms of culpability between a person who commits such a crime, and one who (merely) aids and abets it: Mirjan Damaška, 'The Shadow Side of Command Responsibility' (2001) 49 *American Journal of Comparative Law* 455, 458 <https://doi.org/10.2307/840901>. At one time, it was thought article 7(1) was confined to positive acts, rather than (mere) omissions. However, this view is no longer tenable after *Prosecutor v Blaškić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) ('*Blaškić Trial Judgment*'); Monica Feria Tinta, 'Commanders on Trial: The *Blaskic* Case and the Doctrine of Command Responsibility under International Law' (2000) 47(3) *Netherlands International Law Review* 293, 297 <https://doi.org/10.1017/S0165070X00001005>. For example, the failure to act to prevent or prosecute previous war crimes can be argued to be aiding and abetting war crimes committed subsequently: *Blaškić Trial Judgment* (n 62) 107 [337].

63 Damaška (n 62) 459.

64 SC Res 995, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994).

65 *Prosecutor v Delalic (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) 70 [232] ('*Čelebići*').

66 The Tribunal pointed out there had been lack of consistency in the military trials after World War II in terms of the degree of knowledge required of commanding officers in order to make them criminally liable for the actions of the more junior officers, but it cited *Hostages* to the effect that the senior officer could be held liable for dereliction of duty where they had sufficient information in their possession such that they should have made further inquiry*: Hostages* (n 54) 68 [229].

of 'alarming information'.[67] So interpreted, the ICTY observed there would be congruence between article 7(3) and article 86(2) of the *Additional Protocol*.[68] It rejected a presumption should apply that the commander knew of the war crimes, unless they could prove otherwise.

In *Prosecutor v Blaškić* ('*Blaškić*'), the Appeals Chamber of ICTY considered the requirement, if any, of a causal connection between the supervision failures and the actual war crimes committed.[69] It found it was not essential, in order to find a commander in breach of article 7(3), to demonstrate their failure to prevent war crimes from occurring *caused* them to occur, or to recur. Although in some factual scenarios causation would exist, it confirmed the position reached by the ICTY in *Delalic*, that article 7(3) confirmed the lack of a need to demonstrate causation.[70]

This position is unusual in terms of criminal responsibility – typically, most legal systems require that, in order to hold a defendant criminally liable for actions committed by another, the defendant would had to have contributed to the successful commission of the crime; in other words, some causal nexus between the action of the defendant and the commission of the crime by the primary wrongdoer would be necessary.[71] The lack of a requirement to demonstrate causation is amplified by the further fact international tribunals have held a defendant can be guilty of a breach of relevant articles (for instance, article 7(1)), by omission, rather than commission.

The question of the relative sentencing position of a commander found to have breached their article 7(3) obligations, and that of the junior officers who committed the relevant crimes, was considered by the Trial Chamber in *Blaškić*.[72] There the Chamber concluded:

> When a commander fails in his duty to prevent the crime or to punish the perpetrator thereof he should receive a heavier sentence than the subordinates who committed the crime insofar as the failing conveys some tolerance or even approval on the part of the commander towards the commission of crimes by his subordinates and thus contributes to encouraging the commission of new crimes. It would not in fact be consistent to punish a simple perpetrator with a sentence

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67 'It is only once alarming information makes it into his "possession" that he is required to take steps': Darryl Robinson, 'A Justification of Command Responsibility' (2017) 28 *Criminal Law Forum* 633, 641 <https://doi.org/10.1007/s10609-017-9323-x> ('Justification of Command Responsibility'), citing to *Čelebići* (n 65).

68 *Čelebići* (n 65) 71 [235].

69 *Prosecutor v Blaškić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) 26–7 [76]–[77] ('*Blaškić Appeal Judgment*').

70 '[T]he jurisprudence of the Tribunal has generally found that there is no need to prove the element of causation in relation to command responsibility': 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, 629 <https://doi.org/10.1093/jicj/mqm029>. This position has been criticised: Darryl Robinson, 'How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution' (2012) 13 *Melbourne Journal of International Law* 1, 12–18 <https://doi.org/10.2139/ssrn.1950770> ('How Command Responsibility Got So Complicated').

71 Damaška (n 62) 461 notes that the International Criminal Tribunal for the Former Yugoslavia ('ICTY') has repeatedly held that no causal link needs to be proven between a superior's act of assistance and the crime committed by subordinates. The prevailing rule in national systems is … to the contrary. Individuals who render acts of assistance to crime tend to be held responsible as accomplices only if their acts actually contributed to the success of the criminal enterprise.

72 *Blaškić Trial Judgment* (n 62).

> equal or greater to that of the commander. … Command position must therefore systematically increase the sentence or at least lead the Trial Chamber to give less weight to the mitigating circumstances.[73]

On appeal, the Appeals Chamber in *Blaškić* affirmed mere negligence is not, of itself, sufficient to make a commander liable under article 7(3). It held references to negligence would likely mislead in relation to liability under this article. The behaviour of the commander had to be assessed in terms of command responsibility on the basis of what information was available to them at the relevant time, and whether it would have put them on notice about the war crimes. The mere fact the commander neglected to acquire such knowledge was not the subject of a specific provision in article 7. The commander could only be held liable for a failure to take reasonable and necessary steps to prevent or to punish; it did not specifically provide for a failure to make reasonable inquiry.[74]

These decisions are particularly important because they can, according to one commentator, be taken to reflect the generally accepted correct understanding of command responsibility in international law.[75]

D *Rome Statute*

A clear change in the principle of command responsibility occurred with the creation of the International Criminal Court ('ICC'), including jurisdiction over crimes committed during wartime. The *Rome Statute of the International Criminal Court 1998*[76] ('*Rome Statute*') departed significantly from the principles of international customary law reflected in the above judgments.[77] It may herald a shift in these principles.

Article 28 of the *Rome Statute* provides that, with respect to military commanders, they are criminally responsible for crimes recognised by the court committed by those under their effective control *as a result of their failure* to exercise control properly, where the commander *knew or ought to have known* that the forces were committing or about to commit such crimes, and failed to

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73 Ibid 259 [789]. General Blaskic was convicted and sentenced to 45 years' imprisonment. See Danesh Sarooshi and Malcolm D Evans, 'Command Responsibility and the *Blaškić Case*' (2001) 50 *International and Comparative Law Quarterly* 452 <https://doi.org/10.1093/iclq/50.2.452>.

74 *Blaškić Appeal Judgment* (n 69) 22 [62]–[63]; Guénaël Mettraux, *The Law of Command Responsibility* (Oxford University Press, 2009) 209 <https://doi.org/10.1093/acprof:oso/9780199559329.001.0001>:

> [T]he ad hoc Tribunals have expressly rejected the view that a commander could be held criminally responsible for the actions of his subordinates based solely on a failure to obtain information of a general nature within his reasonable access due to a serious dereliction of duty. In other words, the ad hoc Tribunals have said that customary law does not recognize a 'should have known' standard of mens rea.

75 '[T]he rippling effect of the jurisprudence of the ad hoc Tribunals suggests that the law of command responsibility and its main elements as have been identified by these tribunals are now generally accepted as a correct expression of international law': Mettraux (n 74) 11. '[T]heir pronouncements have been regarded on a number of occasions by other tribunals as reflecting the state of customary international law': at 22.

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

77 '[T]he ICC Statute could not be said to be a reflection of customary international law in all of its aspects and such a claim could certainly not be made in relation to the regime of superior responsibility that was adopted in Article 28': Mettraux (n 74) 22.

take all necessary and reasonable measures within their power to prevent their commission, and/or failed to have the matter investigated for possible prosecution.[78] In respect of non-military commanders, it makes them criminally liable for crimes committed by those under their effective control as a result of this failure, where the superior either knew or effectively disregarded information indicating that the subordinates were committing or were about to commit such crimes, the crimes were within the effective control of the supervisor, and the superior failed to take all necessary and reasonable measures to prevent their commission and/or have the matter investigated for possible prosecution. Practically, this provision will only be useful where a national body (signatory to the statute) is unable or unwilling to prosecute an alleged war crime, due to the principle of complementarity.[79]

In proceedings involving article 28, the commander will, if found guilty, be deemed guilty for the crimes committed by the subordinates.[80] This can include crimes of intent, including murder. A reasonableness standard is applied – it is not sufficient for the prosecutor to demonstrate the commander failed to take all possible measures to prevent the crimes being committed. The ICC will consider the operational realities facing the commander. It will permit them to make a cost/benefit analysis of the costs of abandoning the operation versus its risks, including that subordinates will commit crimes, and its value. The Court is careful not to view the commander's conduct through the prism of hindsight. It is not fatal to the commander's defence that they had mixed motives in taking the actions they did in a particular situation.[81]

There are at least three important differences between the expression of command responsibility in the *Rome Statute* and the legal principles developed by the ad hoc tribunals, in particular. Firstly, the former makes explicit the required causal connection between the command failure and the wrongful acts. As noted above, the ad hoc tribunals did not require a causal connection to exist in order for the commander to be held liable. Secondly, the *Rome Statute* adopts a mere negligence standard ('should have known'),[82] while the ICTY emphasised in *Blaškić* mere negligence was not the appropriate test to be utilised to determine

78 There is debate about whether the failure to exercise control aspect of article 28 is separate and distinct from the failure to take all reasonable and necessary measures aspect: see Kazuya Yokohama, 'The Failure to Control and the Failure to Prevent, Repress and Submit: The Structure of Superior Responsibility under Article 28 ICC Statute' (2018) 18(2) *International Criminal Law Review* 275 <https://doi.org/10.1163/15718123-01802002>.

79 Cedric Ryngaert, 'Applying the Rome Statutes Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting under the Universality Principle' (2008) 19 *Criminal Law Forum* 153 <https://doi.org/10.1007/s10609-007-9053-6>.

80 *Prosecutor v Gombo (Judgment)* (International Criminal Court, Appeals Chamber, Case No ICC-01/05-01/08A, 8 June 2018) ('*Gombo Appeals Judgment*') (the accused was originally convicted as a result of article 28 of crimes committed by his subordinates including murder, rape and pillage).

81 Ibid 67 [169]–[170].

82 This was confirmed to amount to a negligence standard. In *Gombo Appeals Judgement*, the Appeals Chamber concluded that the commander would have to have taken all 'necessary and reasonable measures', bearing in mind the scope of their powers. It does not require that all conceivable measures be taken, without regard to proportionality and feasibility: ibid 66–7 [167]–[169].

command responsibility.[83] There has been highly cogent criticism of the 'should have known'/negligence standard in this context.[84] Referring to the ICC's 'should have known' test, Guénaël Mettraux notes this

> standard of mens rea effectively replaces the requirement of knowledge with a legal fiction of knowledge whereby a commander is attributed knowledge of a fact which he did not possess. In so doing, the ICC Statute greatly dilutes the principle of personal culpability that underlies the doctrine of superior liability under customary law. Whilst the 'had reason to know' standard requires proof that the accused possessed some information that should have allowed him to draw certain conclusions as regards the commission of a crime or the risk thereof, the ICC standard goes one step below that standard and attributes knowledge based on a set of circumstances which, it is assumed, should have put the accused on notice of the commission of a crime or of the risk thereof. … Once evidence of crimes committed by subordinates of a military commander has been adduced which the commander should have known about – but which he in fact did not know of or was not shown to have been known to him – he will almost necessarily be found criminally responsible: having had no information about those crimes at the time, he will almost unavoidably be said to have failed to take adequate steps to prevent and punish them. … [T]he basis for liability has shifted from a failure to prevent or punish crimes to a failure to keep oneself informed, something that finds little or no support in existing case law and has been said to fall short of customary law … [noting that in cases of crimes requiring proof of specific intent, that intent might be imputed to the commanding officer under the doctrine] … [t]urning a commander into a murderer, a rapist or a *génocidaire* because he failed to keep properly informed seems excessive, inappropriate and plainly unfair.[85]

Thirdly (related to the first point), the ICTY phrasing ties the commander's responsibility more closely into actions of subordinates; in contrast, on one view the *Rome Statute* focuses more on the commander's failures, thus giving strength to an argument that the basis of liability (see discussion below) differs.[86] Noteworthy here is that article 25, purporting to deal with 'individual criminal responsibility', does not deal with command responsibility.

The position in the *Rome Statute* is of particular interest in the Australian domestic context, since the relevant amendments made to the *Criminal Code 1995* (Cth) which contain the doctrine of command responsibility (discussed below) were passed pursuant to Australia's commitments under the *Rome Statute*. Thus, the Australian provision is based upon the *Rome Statute* provision. It partly adopts a negligence standard.

It should also be acknowledged there is no Australian case law yet involving interpretation of the relevant section. Frankly, it is not entirely known how an Australian court will interpret the relevant section, and the extent, if at all, to which it will have regard to the above decisions as providing guidance. This matter will be considered further in Part VI.

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83 For discussion, see Danner and Martinez (n 45) 129–30.

84 Mettraux (n 74).

85 Ibid 210–1. Mettraux suggests the *Rome Statute of the International Criminal Court* ('*Rome Statute*') had 'disfigured the doctrine of superior responsibility': at 270.

86 Elies van Sliedregt, 'Article 28 of the ICC Statute: Mode of Liability and/or Separate Offense?' (2009) 12(3) *New Criminal Law Review* 420, 429 <https://doi.org/10.1525/nclr.2009.12.3.420>.

IV COMMAND RESPONSIBILITY DOCTRINE IN AUSTRALIAN LAW

Australia held war crimes trials in the aftermath of World War II, particularly involving Japanese commanders. These trials were held at a time when the principle of command responsibility was in a nascent state in international law,[87] though aspects of it appear in the judgments. There are clear statements acknowledging commanders can be held criminally liable under this doctrine for actions of subordinates, either for positive acts accompanied by guilty knowledge or intent, or for negative acts of recklessness.[88] In the latter case, Judge-Advocate Brock was very clear that the recklessness would have to be at a level that was so substantially blameworthy as to warrant (criminal) punishment.[89] He used language such as 'wilful and culpable negligence' reflecting that the commander 'did not care whether or not any offence was committed in [their] command'.[90] There is evidence of acceptance of something like joint criminal responsibility,[91] and sometimes commanders were convicted of aiding and abetting crimes by subordinates.[92]

Elsewhere, the International Military Tribunal for the Far East noted:

> It is not enough for the exculpation of a person [military commander], otherwise responsible, for [them] to show that [they] 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.[93]

Today, the relevant section is found in the *Criminal Code Act 1995* (Cth). Prior to discussing the specific provision, some general points about the Australian *Criminal Code Act 1995* (Cth) are pertinent. Firstly, section 3.1 provides that, generally, offences in the code contain physical elements and fault elements. A physical element can include omissions. Fault elements may be sub-classified as intent, knowledge, recklessness and negligence. Section 5.4 defines reckless with respect to a particular circumstance in terms that the accused is aware of a substantial risk that such a circumstance exists or will exist, and having regard to the circumstances known to them, it was an unjustifiable risk. Section 11.2 deals

87 See generally Boas and Lee (n 4) 140.

88 Ibid 148–51.

89 Ibid.

90 Ibid 151.

91 'Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as prima facie evidence of the responsibility of each member of that unit or group for that crime. In any such case, all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court': *War Crimes Regulations 1945* (Cth) reg 12, quoted in Fitzpatrick, McCormack and Morris (n 4) 160.

92 Boas and Lee (n 4) 167 (if infrequently).

93 *United States of America v Araki (Judgment)* (International Military Tribunal for the Far East, 4 November 1948) 31 <https://tile.loc.gov/storage-services/service/ll/llmlp/Judgment-IMTFE-Vol-I-PartA/Judgment-IMTFE-Vol-I-PartA.pdf>.

with aiding and abetting offences, making clear the conduct of the aider/abetter must have in fact done so, and be intended to do so.

The doctrine is contained in section 268.115 of the *Criminal Code Act 1995* (Cth). No one has yet been convicted of an offence against this section. Research has disclosed no proceeding involving the section since its introduction in 2002.[94] Subsection (2) states a military commander or equivalent is criminally responsible for offences committed under division 268 of the *Criminal Code Act 1995* (Cth).[95] Offences committed by forces under the person's effective command and control, *as a result of their failure* to exercise proper control over those forces, include where:

> (a) the military commander knew or, due to circumstances at the time, was *reckless* as to whether the forces were committing or were about to commit such offences; and
>
> (b) the military commander failed to take all reasonable and necessary measures within their power to prevent or repress their commission, or submit the matter to competent authorities for investigation and possible prosecution.[96]

The Australian provision mirrors the *Rome Statute* in requiring causation between the commander's failure to control and war crimes committed by more junior officers. One point of distinction is that the provision requires the commander either knew of the subordinates' commission of an offence or was *reckless* as to whether they were doing so. There is clearly a difference between 'recklessness' and the mere negligence requirement contained in the *Rome Statute*.[97] Importantly, however, 'recklessness' is defined broadly in the *Criminal Code Act 1995* (Cth) to include situations where a person knows of a substantial risk a circumstance exists or will exist, or that a result will occur, and having regard to the circumstances, it was unreasonable to take that risk.[98]

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94 *International Criminal Court (Consequential Amendments) Act 2002* (Cth); Joint Standing Committee on Treaties, Parliament of Australia, *The Statute of the International Criminal Court* (Report No 45, May 2002); Dale Stephens and Mark Giddings, 'International Criminal Law and the ADF' in Robin Creyke, Dale Stephens and Peter Sutherland (eds), *Military Law in Australia* (Federation Press, Sydney, 2019) 181, 189.

95 *Criminal Code Act 1995* (Cth) s 268.115(2).

96 Ibid s 268.115(2)(a)–(b) (emphasis added).

97 For a discussion of differences in the default elements, see Stephens and Giddings (n 94) 185–6. Note in particular that under the International Criminal Court, *Elements of Crimes* (2011) 1 ('*Crimes Elements*'), intent and knowledge are the default elements, in contrast with the default elements in the *Criminal Code Act 1995* (Cth) of either intent (conduct) or recklessness (circumstance-based offences). This apparent conflict between the default elements at the international and domestic level has not been resolved. Although the Explanatory Memorandum, International Criminal Court (Consequential Amendments) Bill 2002 (Cth) 3 states an intention that the new provisions will be based closely on the *Crimes Elements*, they insert provisions into the *Criminal Code Act 1995* (Cth) which clearly specifies different default fault elements.

98 This reflects the meaning of 'reckless' in the United Kingdom, which refers to a person who ignores the possibly harmful consequences of one's acts or failing to consider such risks, that were obvious to an ordinary person: see *R v Caldwell* [1982] AC 341, 353–4 (Lord Diplock, Lord Keith agreeing at 362, Lord Roskill agreeing at 362). It is said that the provision is based on the United States' *Model Penal Code*, and its interpretation may be informed by that *Code*: Stephen Odgers, *Principles of Federal Criminal Law* (Thomson Reuters, 4th ed, 2019) 70. That *Code* defines recklessness in terms of a '[conscious disregard of] a substantial and unjustifiable risk … [where the disregard involves] a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation': *Model Penal Code* § 2.02 (2)(d) (Am Law Inst, Proposed Official Draft 1962) § 2.02(2)(c) ('*Model Penal Code*').

This is potentially difficult to apply in the context of a commander in a military situation. Much will depend on the level of abstraction at which the concept of 'recklessness' is applied, and how 'substantial risk' is interpreted.[99] On one view, there is always risk subordinates will commit war crimes. Can a court, and how can a court, assess whether it was 'unreasonable' for the commander to take that risk, by ordering their troops into the area in which their criminal behaviour occurred? Courts are traditionally deferential to the military, particularly in relation to operational issues.[100] Maybe the relevant superior was acting under orders from their superior.[101] Or is the requirement of 'recklessness' to be applied more narrowly, to what the commander did or did not do by way of response to the identified risk? But this is difficult, since section 268.115(2)(b) of the *Criminal Code Act 1995* (Cth) above already deals with the question of what, if anything, the commander did to respond to the risk, and it applies a negligence standard. The *Criminal Code Act 1995* (Cth) clearly intends that the concept of recklessness differs from that of negligence, because it identifies them as discrete fault elements. It is believed that the concept of 'recklessness' must be interpreted to mean something more than 'mere' negligence, given the seriousness of the context. Part VI of this article will make specific recommendations regarding how a court should interpret the word 'reckless' in section 268.115(2)(a), bearing in mind fundamental principles of Australian criminal law.

Regarding sub-clause (b) and what the commander might reasonably have done to prevent commission of the offences, it has been noted that international law provides little detail on this; thus effectively domestic law plays an important role in filling out the meaning of this concept.[102] Further, sub-clause (b) appears to be contrary to the Commonwealth's own *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) which states 'negligence can be applied to a circumstance or result but should not be applied to conduct, as the definition of negligence in the *Criminal Code* is problematic when applied to conduct'.[103] Sub-clause (b) clearly relates to 'conduct', which includes omissions.[104]

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99 In *Hann v DPP (Cth)* (2004) 88 SASR 99, 106–7 [25], Gray J referred to an American legal dictionary which defined it to mean a real and apparent risk, as opposed to one that was without substance, fanciful or speculative. Gray J suggested it required a consciousness of the risk. See *Boughey v The Queen* (1986) 161 CLR 10, 21 where Mason, Wilson and Deane JJ suggested a substantial risk was one that was real and not remote. See also Odgers (n 98).

100 Rob McLaughlin, 'The Impact of the "Civilianisation" of Military Administrative Law on the "Command Power"' in Alison Duxbury and Matthew Groves (eds), *Military Justice in the Modern Age* (Cambridge University Press, 2016) 130, 154–5 <https://doi.org/10.1017/CBO9781107326330.008>.

101 The possible interaction between sections 268.115 and 268.116 is, at best, uncertain. However, the section 268.116 defence is clearly not available to a commanding officer in many situations. The phrase 'committed by a person' is particularly interesting in light of the argument as to whether a commanding officer is deemed to have committed the crime/s which their subordinate committed (though, in fact, they did not do so).

102 Mettraux (n 74) 47.

103 Attorney-General's Department , 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (Guide, Australian Government, September 2011) 21.

104 *Criminal Code Act 1995* (Cth) s 4.1(2) (definition of 'engage in conduct').

In respect of situations involving a person other than a military commander, a superior officer is criminally responsible for offences committed under division 268 of the *Criminal Code Act 1995* (Cth) by those under the person's effective control as a result of their failure to exercise proper control. This applies where the superior knew or consciously disregarded information clearly indicating subordinates were committing or were about to commit such offences, those offences concerned activity that was within the effective responsibility and control of the superior, and they did not take all reasonable and necessary measures within their power to prevent or suppress their commission or submit the matter to competent authorities for investigation and possible prosecution.

It is noteworthy that there is no specific penalty applicable to the breach of section 268.115. This suggests the commander held to be in breach of the provision is liable to the punishment provided for in the specific provision/s breached by their subordinates. It is difficult, given the lack of a specific penalty for breach of section 268.115, to argue it is a specific crime involving dereliction of duty, as opposed to a derivative offence based on the primary wrongdoing of the subordinate.

There is a broad range of offences contained in division 268 of the *Criminal Code Act 1995* (Cth), including murder, rape, pillage, torture, mutilation, interference with dignity, forced prostitution, sexual slavery, conscription of minors and destruction of particular kinds of property. Prosecutions may only be commenced with the consent of the Australian Attorney-General.[105] Notably many of these offences carry significant penalties, including life imprisonment. Some of them, such as section 268.38 (attacking undefended places) and section 268.58 (outraging personal dignity), provide for very serious penalties (maximum life imprisonment and maximum 17 years' imprisonment respectively) and are silent on the fault element. In the case of outrage to personal dignity, this is likely in default to be recklessness; in the case of attacking undefended places, it is likely to be intent.[106] Notably, many of the offences contained in division 268 are offences requiring specific intent.

In sum, section 268.115 imposes potentially very serious criminal liability upon a commander, based on a combination of proven recklessness plus negligence, where the recklessness may amount to mere awareness of a substantial risk that the war crimes might be committed, and a court's view that it was unreasonable in the circumstances for the commander to order the troops into the area where the crimes actually occurred.

V THEORY OF COMMAND RESPONSIBILITY – BASIS OF LIABILITY

There are at least three aspects of the doctrine of command responsibility that appear to run against *generally* accepted features of the common law. The first is

105 Ibid s 268.121(1). See *Taylor v A-G (Cth)* (2019) 268 CLR 224.
106 *Criminal Code Act 1995* (Cth) s 5.6.

that it makes one person liable for actions or omissions of another (which might be better expressed as it makes one person liable because their own failure/s enabled others to commit crimes). The second is that it, in effect, imposes a duty on a person to do something. Under the command responsibility doctrine, a person can be liable, and criminally liable, for failing to act – an omission can be the basis of criminal liability. Generally again, it is not typically accepted in common law nations that there is a duty to act, and criminal liability if one fails to act.[107] If I see a person drowning, and fail to assist them, this might attract moral opprobrium, but generally not legal sanction in the common law. Thirdly, at least in some iterations, command responsibility applies in the absence of culpability. A commander can be held liable although there is no evidence that their actions or omissions caused the war crime to occur. Generally, in a common law country, and (on one view) international law itself,[108] imposition of criminal sanctions, and in particular serious criminal sanctions, requires proof beyond reasonable doubt of culpability. And a commander can be held criminally liable for mere negligence.

Generally it is exceptional and unusual in the law for one person to be held liable for actions or omissions of another.[109] What characterises those unusual relationships, where one does hold one person liable for the actions of another, is often 'control', that the person being held liable was in a position to exercise control or influence over the party who actually committed the wrong.[110] In such cases, something like a 'duty to control the actions of another' has been recognised.[111] This begs the question as to whether command responsibility can be analogised to existing situations in which the law makes one person liable (civilly or criminally) for the actions of another, whether it is about individual responsibility for failures to perform duty, or whether it is simply a unique category of its own. In other words, is the commander under the command responsibility doctrine liable as a party to the offences committed, simply because of the chain of command and the fact they are analogous in liability terms to the position of an employer of the

107 'Domestic criminal laws do not usually impose criminal liability for a failure to intervene in, prevent or attempt to prevent a crime … against this background, it is unsurprising that the doctrine of command responsibility …. is the subject of disagreement': Andrew Mitchell, 'Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes' (2000) 22(3) *Sydney Law Review* 381, 408. Howard (n 44) 16–17, 19:

> [T]he imposition of criminal responsibility recognized … by the law of nations … seems to run contrary to a well-established exception to the law of principals which is a part of the criminal law of those nations who base their criminal jurisprudence in the common law. It is a well established and uniformly accepted principle of law that in order to constitute a non-perpetrator as a principal to a crime, there must be more than mere presence at the scene or mere failure to prevent the commission of an offense. … The dilemma presented is that there was not within the contemplation of common law a sanction against such a non-interference which was not designed to aid, encourage, incite, or protect the perpetrator.

108 'The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which [they were] not personally engaged or in some other way participated': *Prosecutor v Tadic (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [186].

109 *Smith v Leurs* (1945) 70 CLR 256, 262 (Dixon J).

110 *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1038 (Lord Morris).

111 *Smith v Leurs* (n 109) 261–2 (Dixon J).

troops, liable for failures to meet a duty imposed on them personally? Or is the responsibility best conceived in another way entirely?[112]

It is to be regretted that international law has apparently not spoken with one voice on this issue, and great uncertainty on the matter remains.[113] While the original *Yamashita* decision appeared to proceed on a dereliction of duty basis, this was not the way in which subsequent international instruments including the *ICTY Statute* and the *Rome Statute* were (specifically) couched. They do not refer specifically to command responsibility being based upon and dependent on proof of dereliction of duty. Members of the ICTY have themselves noted the ambiguity.[114] It is thus not altogether surprising that, in implementing the *Rome Statute* into domestic legislation, countries have adopted different positions on the question. For instance, the implementation statute in the United Kingdom clearly takes the view the commander is considered a party to the actions committed by the perpetrators, and is liable on that basis,[115] Canada clearly takes the dereliction of duty line.[116] Where adopting nations have not specifically stated one way or the other, uncertainty remains, with diametrically opposed views remaining as to the basis of liability under article 28.[117]

Meloni cites examples from the case law of expressions which tend to suggest that the commanding officer is deemed to have committed the crimes actually perpetrated by the ones who committed the war crimes, reflected in what they are convicted of and punished for, and cases where the commander is not considered to

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112 It is appreciated that the gain to be made by seeking analogies in the civil law may be limited, because there is a view that command responsibility is part of a *lex specialis* regime, applicable in strictly limited circumstances. This may tend to support the *sui generis* liability argument below.

113 Meloni (n 70) 619–20 (emphasis in original):

> '[T]he (legal) nature of command responsibility is still open to debate in international criminal law: is it a mode of liability for the crimes committed by subordinates or rather a separate offence of the superior for failure to discharge his duties of control pursuant to international law? … [I]s a superior to be held criminally responsible for the crimes committed by his subordinates '*as an accomplice*', or for a separate offence of omission, consisting of the dereliction of his duty to control, prevent or punish?'.

114 See *Prosecutor v Halilović (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-01-48-T, 16 November 2005) 20 [49] ('*Halilović*'). See generally *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) [32] ('*Hadžihasanović*').

115 'A person responsible under this section for an offence is regarded as aiding, abetting, counselling or procuring the commission of the offence': *International Criminal Court Act 2001* (UK) s 65(4).

116 *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, s 5.

117 See, eg, Cherif Bassiouni, *Introduction to International Criminal Law* (2nd rev ed, 2013) 361–2 states that 'an accused under the command responsibility doctrine will be held individually criminally liable for participation in war crimes, crimes against humanity, genocide, or for command over individuals who committed such crimes, and not for a lesser offense, such as dereliction of duty'. Cf Kai Ambos, 'Superior Responsibility' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) 833 <https://doi.org/10.2139/ssrn.1972189>:

> [A] separate crime of omission that consists, on an *objective* level, of the superior's failure properly to supervise subordinates. The underlying crimes of the subordinates are neither an element of the offence nor a purely objective condition of the superior's punishability. Rather, they constitute the point of reference of the superior's failure of supervision.

have committed the crime which the subordinates did, but rather a separate offence around dereliction of duty.[118] Root also notes the inconsistencies in approach, finding that the majority of ICTY decisions adopt the commander as participant approach, but also noting cases that have been based on the dereliction of duty approach.[119] Given its importance, the issue warrants extended treatment.

A View That the Commander Is Considered Liable as a Party or Participant to the Actual Wrongdoing (as a Principal or Accessory) (Mode of Liability Approach)

There is significant authority which suggests that the commanding officer is deemed to be responsible for the actual crimes committed by the subordinates, just as if they had committed the crimes themselves. For instance, there is a suggestion that '*those crimes* [committed by subordinates *become*] *chargeable to him* as soon as they occurred'.[120] This language suggests the commanding officer is treated as if they were a party to the offence/s committed by the subordinates, as a principal. Danner and Martinez state that '[i]t is important to realize that, under command responsibility, the commander is convicted of the actual crime committed by his subordinate and not of some lesser form of liability, such as dereliction of duty'.[121] Hansen makes a similar observation,[122] as does Root.[123] This is often referred to as the 'mode of liability' approach.

It has been observed the ICTY jurisprudence typically proceeds on this approach.[124] It is also likely the *Rome Statute* proceeds on this basis[125] which is particularly important in the Australian context given that our statutory provision is based on it. Further, it is noteworthy in this regard that the relevant Australian provision contains no specific penalty for breach of command responsibility, tending to reinforce that this would have been regarded by the framers as unnecessary, because the intent was that the commander would be liable to the penalties contained elsewhere in the division for the specific crime/s committed by subordinates. This approach has been the subject of significant criticism.[126]

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118 Meloni (n 70) 621–7.

119 Joshua L Root, 'Some Other Men's Rea? The Nature of Command Responsibility in the Rome Statute' (2013–2014) 23 *Journal of Transnational Law and Policy* 119, 129–35.

120 'Command Responsibility for War Crimes' (n 44) 1283 (emphasis added).

121 Danner and Martinez (n 45) 121.

122 '[T]he commander is punished as if he or she had committed those crimes and not merely for dereliction of duty as a commanding officer': Victor Hansen, 'The Impact of Military Justice Reforms on the Law of Armed Conflict: How to Avoid Unintended Consequences' in Alison Duxbury and Matthew Groves (eds), *Military Justice in the Modern Age* (Cambridge University Press, 2016) 106, 110–11 <https://doi.org/10.1017/CBO9781107326330.007>.

123 Root (n 119) 123.

124 Sliedregt (n 86) 425. '[C]ommanders are indeed charged with the underlying crimes and sentenced as parties to the underlying crimes': Robinson, 'How Command Responsibility Got So Complicated' (n 70) 36.

125 Hansen (n 122) 115.

126 'Turning a commander into a murderer, a rapist or a *génocidaire* because he failed to keep properly informed seems excessive, inappropriate and plainly unfair': Mettraux (n 74) 211; Root (n 119) 156 referring to command responsibility 'pretending' that the commander committed the crime in fact committed by subordinates.

Some explain command responsibility as a form of accessory liability, under which the commander is considered liable as such, rather than as a principal. This idea is reflected in section 65(4) of the *International Criminal Court Act 2001* (UK). Earlier subsections explain the doctrine of command responsibility consistently with the *Rome Statute*. Subsection (4) then provides that a person responsible under the section is 'regarded as aiding, abetting, counselling or procuring the commission of the offence'.[127]

However, there are conceptual difficulties with viewing command responsibility as a form of accessorial liability.[128] Firstly, the doctrine makes commanders liable for their own failures, whereas accomplice liability is typically premised on assistance being provided to another to commit wrongdoing. This assistance is typically of the practical variety. It may be argued that it is the failure of the commander to provide due oversight that has, in effect, assisted the wrongdoing, but typically accomplice liability would require a more direct connection between the actions or omissions of the accomplice, and the actions of the wrongdoer. Further, accomplice liability would typically require proof of knowledge of the accused that their actions were assisting the wrongdoer;[129] however, command responsibility has typically not required this level of knowledge in order to render the commander culpable. And in relation to accomplice liability, it would need to be shown that their actions materially contributed to/caused the commission of the crime; whereas in relation to international customary law, at least from the ad hoc tribunals, such causality is not necessary in relation to command responsibility.

It is also noteworthy that the *Rome Statute* deals specifically with accessorial liability in article 25, but deals separately with command responsibility in article 28. This might suggest its drafters do not consider it a form of accessorial liability, though the position is not clear.[130] Further, the *Rome Statute* provides that, subject to its other provisions, individuals are liable for criminal punishment only for crimes committed with intent and knowledge. In this context, it becomes particularly difficult to make commanders liable as if they are principals or accessories to crimes committed by subordinates, in particular where it is not shown that the commander had specific knowledge of the commission of such crimes, and did not intend that they occur. This will be elaborated upon below.

B View That the Commander Is Considered Liable as if They Were a Party or Participant to the Actual Wrongdoing – Vicarious Liability

At times, the literature on command responsibility can suggest analogies between vicarious liability, under which an employer can be held liable for actions

127 '[C]ommand responsibility is a form of accessory liability, which simply conveys that the commander facilitated crimes in a criminally blameworthy manner': Robinson, 'Justification of Command Responsibility' (n 70) 656.

128 See Mettraux (n 74) 39–43.

129 '[I]f a commander ordered, encouraged or otherwise supported forces in committing war crimes, *and shared in the criminal purpose or design of the perpetrators*, and this action or failure to act aids, abets, counsels or commands the perpetrator to commit the offence, then the commander could be guilty as a principal': Hansen (n 122) 109 (emphasis added).

130 '[I]t does not explain what theory of liability is embraced under the Rome Statute': Root (n 119) 124.

of their employees within the scope of employment, and command responsibility. As an interesting aside, at one time a 'command theory' of vicarious liability was accepted, to the effect that an employer was liable for actions of an employee to the extent they had expressly commanded them.[131] This concept was expanded, as the size of business grew, to something like an 'implied command theory', which postulated that the employer would be liable for actions of the employee that were implicit in the express directions and commands given.[132] Eventually, it expanded again towards a 'scope of employment' concept, where it has largely remained.[133]

There are some obvious analogies between command responsibility and vicarious liability. At times, both the case law[134] and the commentary[135] suggests that command responsibility is really a type of vicarious liability. This view has led to some commentators taking the view that the commander is actually guilty of the crime/s committed by the subordinates,[136] and that the commander is held liable under the doctrine 'almost without fault'.[137] These views are submitted to be incorrect, proceeding upon a mistaken (though understandable) understanding of the true nature of command responsibility liability.

On the other hand, there are key differences. Typically, vicarious liability is used in civil law, not criminal law, to make an employer civilly liable for what an employee did. Secondly, vicarious liability is not a fault-based doctrine. The employer is not liable for anything they did wrong; they are deemed to be liable for the actions of those whom they employed. In contrast, (at least on one view)

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131 *Kingston v Booth* (1685) 90 ER 105, 105 (Withins, Holloway and Walcot JJ); Anthony Gray, *Vicarious Liability: Critique and Reform* (Hart Publishing, 2018) 8–10.

132 *Turberville v Stampe* (1697) 91 ER 1072.

133 *Lloyd v Grace, Smith and Co* [1912] AC 716; *Prince Alfred College Inc v ADC* (2016) 258 CLR 134.

134 *Prosecutor v Delilac (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [645], [647] (emphasis in original):

> [T]he Prosecution would seem to have ignored the principle of vicarious criminal responsibility which is the basis of the doctrine of command responsibility, the *alter ego* of superior authority. … The doctrine of command responsibility is clearly articulated and anchored on the relationship between superior and subordinate, and the responsibility of the commander for actions of members of his troops. It is a species of vicarious responsibility through which military discipline is regulated and ensured. This is why a subordinate unit of the superior or commander is a *sine qua non* for superior responsibility.

135 Kai Ambos, 'Joint Criminal Enterprise and Command Responsibility' (2007) 5 *Journal of International Criminal Justice* 159, 176 (emphasis in original) <https://doi.org/10.1093/jicj/mql045> who, speaking about article 28 of the *Rome Statute*, states that command responsibility 'creates … direct liability for the lack of supervision, and … *indirect* liability for the criminal acts of others (the subordinates), thereby producing a kind of *vicarious liability*'. '[I]t seems that the doctrine of superior responsibility also involves elements of vicarious liability': Shane Darcy, 'Imputed Criminal Liability and the Goals of International Justice' (2007) 20 *Leiden Journal of International Law* 377, 391 <https://doi.org/10.1017/S0922156507004116>. Mitchell (n 107) 404:

> '[A] more certain test would be to require direct control to found a superior-subordinate relationship (a pre-requisite to command responsibility liability). This test imposes a higher test threshold than effective control and would not be satisfied by informal influence. The level of control required by the direct control test is analogous to the control exercised by an employer over an employee in relation to matters within the scope of their employment'

136 '[B]ecause of the commander's identification with and adoption of the subordinate's criminal actions, the commander also is guilty of the crime committed by the subordinate': Howard (n 44) 19.

137 Ibid 21.

the doctrine of command responsibility does not make the superior liable for the actions of those under their charge. They are held to account for something they did do wrong – a failure to supervise troops and thus to prevent war crimes, and/or failure to punish or refer alleged wrongdoers to prosecution authorities. Further, command responsibility applies to war which involves life and death situations and the potential for gross abuse of power and responsibility, in a way that is clearly not applicable in a traditional employment context.

Thus, while it is understandable that the law seeks to analogise command responsibility to other known doctrines of the law, vicarious liability is different in important respects to command responsibility doctrine, and attempts to analogise the two have been criticised.[138] The ICTY in *Čelebići* confirmed that the liability of commanders should not be regarded as 'strict'; this is taken to amount to a rejection of the vicarious liability theory.[139]

Finally, it should be conceded that there are occasions where the criminal law reflects notions of strict liability. However, these tend to be in the area of regulatory offences, with limited penalties such as fines, rather than in an area where jail terms are possible.[140]

C View That Commander Is Liable for a Dereliction of a Duty They Owe

It is sometimes argued the commander is criminally responsible not *for* the acts of the subordinates, but merely *as a result* of those acts having been committed. In this line of reasoning, the commanding officer is held criminally liable for a dereliction of *their* duty. This enjoys support from the way in which command responsibility was perceived by the United States Supreme Court in *Yamashita*, and apparently accepted subsequently in the *German High Command* and *Hostages* cases.[141] It is also accepted in Canada.[142] This mode of thinking would not make the commanding officer a party to the offence/s committed by the subordinates. They are liable because when the subordinates committed crimes they are liable for breach of a duty the commander owed, not liable *for* their criminality. Potential confusion can arise because it is the fact that subordinates committed criminal activity that gives rise to the breach of the duty the commander owed. However, some case law suggests the person convicted under command responsibility is not convicted of the same offence as the perpetrators.[143] The notion that the commander

138 Ilias Bantekas, 'The Contemporary Law of Superior Responsibility' (1999) 93 *American Journal of International Law* 573, 577 <https://doi.org/10.2307/2555261>; 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, 282.

139 *Čelebići* (n 65) 103–4 [313].

140 *Provincial Motor Cab Co Ltd v Dunning* [1909] 2 KB 599, 603 (Lord Alverstone CJ).

141 Root (n 119) 134.

142 See above n 116.

143 *Halilović* (n 114) 23 [54]:

> '[F]or the acts of his subordinates … [language in the ICTY Statute] does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act. … [A] commander is responsible not as though he had committed the act himself.

is essentially being held liable for a dereliction of their duty is consistent with that. This view of command responsibility enjoys judicial[144] and scholarly support.[145]

D Sui Generis Liability

Scholars such as Meloni and Yokohama say that command responsibility is best seen as a sui generis form of liability.[146] Meloni says that it is of a kind that is unknown in domestic criminal law systems, given the lack of a requirement of causality in order to find a commander liable, the fact that they can be held criminally liable for mere omissions, and may be criminally convicted although they may have not intended any wrongdoing, and be 'guilty' only of negligence (or some higher standard of carelessness, depending on the precise source chosen). Further, that the sentence to which the commanding officer may be subject is dependent in part on the gravity of the acts committed by others. Others explain it as simply a handy mechanism to expedite and facilitate prosecutions,[147] or a utilitarian view as to the most efficient way to deter breach of international humanitarian law.[148]

It is not completely clear what is gained by referring to the command responsibility doctrine as sui generis. One danger is that this label might be used to discount the concern that otherwise arises in that the doctrine apparently runs counter to fundamental, established features of criminal law. Does the fact that a doctrine is sui generis mean that there should be no expectation that it conforms with orthodoxy? Often, the orthodoxy is well-established and exists for good reason.

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144 'It cannot be overemphasised that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control': *Prosecutor v Krnojelac (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-97-25-A, 17 September 2003) 72 [171]. *Hadžihasanović* (n 114) [32] (Judge Shahabuddeen, partly dissenting) (emphasis in original):

> The position of the appellants seems to be influenced by their belief that article 7(3) of the ICTY Statute has the effect … of making the commander 'guilty of an offence committed by others even though he neither possessed the applicable *mens rea* nor had any involvement whatsoever in the *actus reus*. No doubt, arguments can be made in support of that reading of the provision, but I prefer to interpret the provision as making the commander guilty for failing in his supervisory capacity to take the necessary corrective action after he knows or has reason to know that his subordinate was about to commit the act or had done so.

145 '[U]nder international law a superior is not charged with the crimes of his subordinates … but with a failure to carry out [their] duty as a superior to exercise the required control over (their) subordinates': Mettraux (n 74) 45; Root (n 119); Meloni (n 70) 623, 626 stating that the modern view of command responsibility is 'based on a pre-existing legal duty to prevent or punish', compared with the older view that the commander was considered to be a party to the subordinates' offences and sentenced on that basis; and the 'the superior is responsible not "for the crime committed by subordinates" but "merely" for his "neglect of duty" with regard to the crimes committed'.

146 Meloni (n 70) 631–2; Yokohama (n 78) 302.

147 Darcy (n 135) 403.

148 Jenny Martinez, 'Understanding Mens Rea in Command Responsibility: From *Yamashita* to *Blaškić* and Beyond' (2007) 5 *Journal of International Criminal Justice* 638, 663 <https://doi.org/10.1093/jicj/mqm031>.

E Negligence or Gross/Criminal Negligence as a Basis for Criminal Sanction

As indicated above, one of the major differences between the decisions of the ad hoc tribunals and the provisions of the *Rome Statute* concerning command responsibility is that the former determined that proof of mere negligence would not be sufficient to attract command responsibility liability. Something more serious such as this, which might be termed recklessness and/or gross negligence, would be necessary. Development of this jurisprudence was partly due to evident discomfort with the notion of applying criminal sanctions to 'merely' negligent behaviour. In contrast, it has been established that the *Rome Statute* does accept mere negligence as an adequate basis for command responsibility.[149]

Some difficulties are apparent with the concept of negligence in this context. Negligence is highly problematic in international law.[150] This is because a consideration of whether a person acted reasonably typically involves an assessment of norms of community behaviour, and some assessment of the defendant's behaviour against those norms, in at least a crude fashion. However, this is very difficult, if not impossible, to do at an international level, where there would be even more disagreement as to what norms of community behaviour would be than at a purely national level.

In the context of decisions made during war, the dangers are even more apparent. Damaška refers to the

> widespread human tendency to exaggerate in hindsight what could have been anticipated in foresight. The tendency is especially likely to manifest itself among adjudicators who, ensconced in the calm of their chambers, try to divine what a commander should have foreseen amidst the confusions and pressures of warfare … [u]nder these circumstances, the minimum threshold of negligence can easily begin to shade into liability without culpability. And even if well-meaning international judges disavow strict liability, the disturbing possibility cannot be ruled out that a hapless commander be convicted as a scapegoat for atrocities committed on the territory formally under [their] control.[151]

There are further serious issues. It raises the spectre of a person being held criminally responsible, and suffering criminal consequences, for behaviour that is 'merely' negligent. Of course, negligence is a concept borne of non-criminal law, to describe the circumstances in which a party that has breached a duty of care is liable to pay compensation to someone who suffered injuries as a result of the breach.[152]

Its use as an indicium of criminal liability raises very significant conceptual difficulties. Criminal law and criminal proceedings typically serve very different ends to the civil law and civil proceedings. The former is focused on retribution, deterrence, rehabilitation and punishment. The latter is primarily focused on

149 *Prosecutor v Gombo (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) 152 [429].

150 'Command Responsibility for War Crimes' (n 44) 1284–5. Some may argue that given the assimilation of professional military education internationally, it is possible to develop generally accepted norms of behaviour.

151 Damaška (n 62) 480–1.

152 *Donoghue v Stevenson* [1932] AC 562.

compensation. Criminal law sanctions attract opprobrium and stigma.[153] They signify a society's collective agreement that particular conduct is a breach of the social contract, and deserving of the most serious sanctions, including deprivation of liberty (and worse, historically). This is quite a universal principle of criminal law, as Damaška notes, '[i]f one were to catalog [sic] general principles of law so widely recognized by the community of nations that they constitute a subsidiary source of public international law, the culpability principle would be one of the most serious candidates for inclusion in the list'.[154]

The criminal law has traditionally been very wary about imposing such serious sanctions in the absence of very clear proof of wrongdoing. As a result, various legal doctrines operate together to minimise the chances that an innocent person will erroneously suffer penal sanction. This includes the presumption of innocence, that the accuser bears the onus of proof to prove the truth of the accusation/s they make, and that they must prove each and every element of the alleged wrongdoing, at the standard of beyond reasonable doubt, and negative almost all defences. The accused is not required to assist the accuser with any of this. These broadly accepted doctrines are a fundamental aspect of our system of criminal justice.

As a result, there is significant concern with the *Rome Statute*, and its implementation in Australian law through section 268.115 of the *Criminal Code Act 1995* (Cth). This is because it appears to contemplate the imposition of a very serious criminal sanction without the requisite degree of culpability. A person could be the subject of criminal sanction although they have been merely negligent, in the absence of proof of intent,[155] provided an aspect of 'recklessness' exists, which might be easily satisfied.[156] The undesirability of that outcome has long been noted in this context, including the judgments of Murphy and Rutledge JJ in *Yamashita*, the *German High Command* case and the ICTY judgment in *Blaškić*.

One might also add that it is possible that the commander will be held to have breached their legal responsibilities under section 268.115 by an omission. This is also very unusual in the criminal law, which typically focuses on an actus reus. In the eyes of some, at least, an omission is typically less culpable than an act. While our law accepts civil liability for omissions, criminal liability for omissions is more problematic. It is understood that criminal liability for an omission may be imposed when there is a (legal) 'duty to act', but of course this begs the question as to why there should be a duty to act in this instance, but not others. I will return to this argument below. And some have observed that it may not be the mere fact that negligence is being used as the basis for criminal liability, in itself, or that the thing

153 *In Re Winship*, 397 US 358, 363 (1970) (Brennan J for the Court).

154 Damaška (n 62) 470.

155 'Commentators have panned Article 28's should have known standard, because as a mode of liability it leads to culpability for intentional conduct, regardless of the fact that the defendant had no criminal intent': Root (n 119) 136.

156 It is acknowledged this situation is not unprecedented in the context of military justice: *Defence Force Discipline Act 1982* (Cth) ss 35(1), 36 provide for offences punishable by jail terms for 'pure' negligence.

complained of might be an omission, not an act, in itself, but it is the combination of those two in the one situation that is highly troubling.[157]

This is bad enough, but it is potentially worse than so far described. Of course, some crimes are defined in such a way that intention is an element of the offence; others are defined such that intention is not an element of the offence. It is not currently known how an Australian court will interpret section 268.115, and in particular whether it will consider a commander to be a party (either a principal or an accessory) to the crime/s committed by the subordinates, or will be held liable for breach of their own duty. As explained above, both positions have been taken by those interpreting the *Rome Statute*. If an Australian court were to take the view that the commander is a principal or accessory to the crime/s committed by the subordinates, those crimes may be crimes that typically require intention on the part of the perpetrator to be proven. If this were the case, the even more unwelcome spectre arises of the commander being effectively held liable for a crime requiring specific intent to be proven, where there is in fact no evidence that the commander had the required intention. At its most extreme, the commander could be held liable for the crime of committing genocide, one of the offences for which proof of specific intent is required, without any evidence that, in fact, the commander so intended. In fact, this has happened elsewhere.[158] Numerous commentators have pointed out the undesirability of this.[159] Thus, it would be preferable (ideally) for an Australian court interpreting section 268.115 to view it as a dereliction of duty matter, rather than through the mode of liability lens. But even so, the highly undesirable position remains that a person can be subject to criminal sanction although they have committed 'mere' negligence. This is, of course, contrary to the traditional approach of Australian criminal law, which does not typically punish 'mere' negligence, but requires at least something like 'criminal negligence' in order to justify the imposition of criminal penalty. Further consideration of how section 268.115 appears in Part VI below.

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157 O'Reilly, 'A Call to Realign Doctrine with Principles' (n 34) 91. 'The most recent [command responsibility] declaration … in the ICC statute indicates that a negligence standard likely will persist under international law. Such a standard in combination with an *actus reus* of omission is offensive to a deontological retributive theory of criminal law that values the individual': at 151. Bantekas (n 138) 593.

158 *Prosecutor v Brđadin (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) 254–5 [720]–[721]; *Prosecutor v Stupar (First Instance Verdict)* (Court of Bosnia and Herzegovina, Case No X-KR-05/24, 29 July 2008) 161–4.

159 '[I]t is the attribution to the superior of the subordinate's conduct even though the superior did not know of the conduct that causes the doctrinal difficulties and the seemingly unfair results': Volker Nerlich, 'Superior Responsibility under Article 28 ICC Statute' (2007) 5 *Journal of International Criminal Justice* 665, 676 <https://doi.org/10.1093/jicj/mqm033>. 'It is … doubtful … whether negligent behaviour in failure to exercise command responsibility can be reconciled with a crime requiring the highest level of intent. Logically, it is impossible to commit a crime of intent by negligence': William A Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute (Part III)' (1998) 6(4) *European Journal of Crime, Criminal Law and Criminal Justice* 400, 417 <https://doi.org/10.1163/15718179820518638>. 'It is logically impossible to convict a person who is merely negligent of a crime of specific intent': William A Schabas, 'Canadian Implementing Legislation for the Rome Statute' (2000) 3 *Yearbook of International Humanitarian Law* 337, 342 <https://doi.org/10.1017/S1389135900000684>; Root (n 119) 135–44.

F Argument That Command Responsibility Should Not Necessarily Adhere to General Principles of Criminal Law

Perhaps some of the discussion below betrays an assumption – that fundamental, ordinary principles of the criminal law, including sufficient culpability for the imposition of criminal sanction, and requirements of mens rea, should be applied in the military context. As noted above, there is a rich literature as to the complex interaction between the military and non-military realms which this article cannot explore in detail.[160] The High Court of Australia has, though, acknowledged possible difficulties where specialist tribunals are set up to administer specialist areas of the law, and the risk that the principles applied by such tribunals will become detached from the main corpus of a country's laws.[161] There are clearly analogous possible difficulties with one area of law, here military law, detaching from the main corpus of Australian criminal law, in what it requires for a person to be considered guilty of a crime. This may also be seen to undermine the rule of law, by apparently not applying generally understood, fundamental principles of the criminal law to one category of alleged offender, namely commanders in a military setting.

On the other hand, others argue that the application of unique principles in the context of defence is justified.[162] If this 'defence exceptionalism' is accepted, it might lessen concerns that otherwise, command responsibility rubs up against traditional notions of criminal law, such as no criminal liability without culpable conduct, (generally) no criminal liability for mere omissions etc.

How might 'defence exceptionalism' be justified, at least in this context? It might be argued that a military commander is in a position of enormous power. It is a criminal offence for subordinates to fail to comply with orders made by the commander.[163] They are often in control of large quantities of troops. They are literally in a position to make life or death decisions, and to order the killing of individuals. They represent their nation in the theatre of war. They voluntarily accept this responsibility, presumably aware of the extent to which international law typically imposes significant, unusual legal responsibilities upon them. Given the vast scope of this power, it is argued that it is appropriate to make them legally accountable for their decisions, acts and omissions, in a way that would not typically apply in other contexts.[164]

Suffice it to say that I am not convinced that these arguments justify such a significant departure from principles that have characterised our system of criminal justice for many years, where an individual's liberty (over a potentially very long period) is at stake.

160 Waters (n 5); Collins (n 5).

161 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 589–90 [122] (Heydon J).

162 'Command Responsibility for War Crimes' (n 44).

163 *Defence Force Discipline Act 1982* (Cth) ss 15F, 27 (disobeying a lawful command – an offence of strict liability with a maximum penalty of two years' imprisonment).

164 Wu and Kang (n 138) 290.

VI HOW COMMAND RESPONSIBILITY SHOULD BE INTERPRETED IN AUSTRALIAN LAW

A Compatibility with Principles of Australian Criminal Law

Existing principles of Australian criminal law accept, in very limited circumstances, the possibility that a person can be held liable for criminal behaviour involving acts committed by others. The very limited circumstances represent an exception to the general position that '[a] central and informing principle of criminal liability in Australia … is that guilt is personal and individual'.[165] It will now be considered whether command responsibility can be reconciled or at least analogised with existing exceptions.

One exception relates to aiding, abetting, counselling or procuring another to commit a crime. The High Court has made it clear that this type of offence requires proof that the person charged *intended* to assist, encourage or induce the principal offender to commit the wrong, and must *know* of the general nature of the wrong to be committed.[166] In other words, 'mere' recklessness regarding the commission of the wrong is not sufficient to convict a person of aiding, abetting etc.[167] The case also refers to the person accused of aiding and abetting being required to have done something participatory in relation to the wrong being committed.

It is true that some members of the High Court in the case held that 'wilful blindness' of particular wrongdoing being committed could equate to the required knowledge.[168] However, even if that were accepted, proof of intention would also be required.

Another exception relates to the doctrine of 'joint criminal enterprise'. But here again, a person charged on this basis must be shown to have *intended*, along with others as part of an understanding or arrangement, to commit some kind of wrongdoing.[169] And with the doctrine known in Australia as 'extended joint criminal enterprise', it must also be shown that the parties mutually agreed to commit a crime, where the accused continues to participate in the criminal

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165 *South Australia v Totani* (2010) 242 CLR 1, 90 (Hayne J). 'Central to the concept of criminality are the notion of individual culpability and the criminal intention for one's actions': see also Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report No 95, December 2002) 65 [2.9].

166 *Giorgianni v The Queen* (1985) 156 CLR 473, 482 (Gibbs CJ), 493–4 (Mason J) ('*Giorgianni*'). The offender 'must have intentionally participated in the principal offences and so must have had knowledge of the essential matters which went to make up the offence: at 500 (Wilson, Deane and Dawson JJ). Jenny Richards and Luke McNamara, 'Just Attribution of Criminal Liability: Consideration of Extended Joint Criminal Enterprise Post-*Miller*' (2018) 42 *Criminal Law Journal* 372, 377; Malcolm Barrett and Joachim Dietrich, 'The Knowledge Element for Accessories to Strict Liability and Limited Cognition Offences: Revisiting Tabe v The Queen' (2014) 38 *Criminal Law Journal* 197, 198.

167 *Giorgianni* (n 166) 487 (Gibbs CJ), 506 (Wilson, Deane and Dawson JJ).

168 Ibid 487 (Gibbs CJ), 495 (Mason J). But see Wilson, Deane and Dawson JJ at 505:

> [A]lthough it may be a proper inference from the fact that a person has deliberately abstained from making an inquiry about some matter that he knew of it and, perhaps, that he refrained from inquiry so that he could deny knowledge, it is nevertheless actual knowledge which must be proved and not knowledge which is imputed or presumed.

169 *Likiardopoulos v The Queen* (2012) 247 CLR 265, 273 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

enterprise, and another party to the agreement commits a crime incidental to that originally agreed.[170]

It should also be conceded that, in that context, a majority of the High Court of Australia has accepted that a participant to the arrangement may be liable for criminal behaviour committed by others to it that was merely foreseeable as a mere possibility.[171] This is in contrast to the position of the United Kingdom Supreme Court,[172] which overturned a previous view of the Privy Council[173] that accepted reasonable foreseeability as a possible basis of criminal liability in the context of joint criminal enterprise. In so doing, the Supreme Court pointed out there was a significant difference between mere foresight and intent,[174] and decried the notion of 'constructive crime';[175] in other words, findings of criminality (and serious criminality – a murder charge) in the absence of proof of intent.

What is relevantly evident from the above instances for current purposes is clear concern by members of the High Court that a person is not convicted of an offence in the absence of proof of intent and knowledge of the wrongdoing, and without participation. There is evident concern with the concept of 'blameworthiness' – that a person not be convicted of a particular crime unless their behaviour is regarded as sufficiently and proportionately 'blameworthy'.[176] This underpins the Court's eventual acceptance that it was necessary to show, in the case of a murder charge, where there was no evidence that the accused intended to kill or do grievous bodily harm, that the accused could reasonably foresee that it was probable, and not merely possible, that death would result from the accused's actions.[177]

Four members of the High Court in *Wilson v The Queen* referred with evident approval to a statement that there should be close correlation between moral culpability and legal responsibility.[178] Gageler J (dissenting on other grounds) discussed these matters at some length in *Miller v The Queen* ('*Miller*').[179] Gageler J acknowledged the fundamental importance of the linkage between criminal

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170 *Miller v The Queen* (2016) 259 CLR 380, 387 (French CJ, Kiefel, Bell, Nettle and Gordon JJ) ('*Miller*').

171 *Clayton v The Queen* (2006) 81 ALJR 439, 444 (Gleeson CJ, Gummow, Hayne, Callinan Heydon and Crennan JJ) ('*Clayton*'); *Miller* (n 170) 388 (French CJ, Kiefel, Bell, Nettle and Gordon JJ, Keane J agreeing). There has been criticism that Australian law in this way is overcriminalising: Richards and McNamara (n 166) 372; Luke McNamara, 'A Judicial Contribution to Over-Criminalisation? Extended Joint Criminal Enterprise Liability for Murder' (2014) 38 *Criminal Law Journal* 104; Andrew Dyer, 'The "Australian Position" Concerning Criminal Complicity: Principle, Policy or Politics?' (2018) 40(2) *Sydney Law Review* 289; Timothy Smartt, 'The Doctrine of Extended Joint Criminal Enterprise: A "Wrong Turn" in Australian Common Law' (2018) 41(3) *Melbourne University Law Review* 1324.

172 *R v Jogee* [2017] AC 387 ('*Jogee*').

173 *Chan Wing-Siu v The Queen* [1985] AC 168.

174 *Jogee* (n 172) 417 (Lords Hughes and Toulson JJSC, Baroness Hale DPSC, Lords Neuberger PSC and Thomas CJ agreeing).

175 Ibid 416. The majority in *Wilson v The Queen* (1992) 174 CLR 313, 327 ('*Wilson*'), quoting *R v Wilson* (1991) 55 SASR 565, 570 (King CJ) expressed a similar view, 'the scope of constructive crime should be confined to what is truly unavoidable'.

176 *Callaghan v The Queen* (1952) 87 CLR 115, 121 ('*Callaghan*') where Dixon CJ, Webb, Fullagar and Kitto JJ referred to 'description of fault so blameworthy as to be punishable as a crime'.

177 *R v Crabbe* (1985) 156 CLR 464, 469; *La Fontaine v The Queen* (1976) 136 CLR 62, 76 (Gibbs J).

178 *Wilson* (n 175) 327 (Mason CJ, Toohey, Gaudron and McHugh JJ).

179 *Miller* (n 170).

liability and moral culpability.[180] An uncoupling of these concepts would create 'incoherence'. This explained the importance of intent in the criminal law, which he observed to be growing in importance, and exceptions few and becoming fewer. He said there was a 'basic distinction in terms of moral culpability between acting with an intention or an equivalent expectation [which he defined to be acting in a certain way, knowing that a particular result was probable] and acting with mere foresight'.[181] Kirby J (dissenting) had expressed similar views in *Clayton v The Queen* ('*Clayton*').[182]

It is true that the criminal law contains offences which do not require proof of intent. Manslaughter is one example. Yet, in a case where the High Court considered provisions of the *Criminal Code 1913* (WA) dealing with dangerous driving and manslaughter,[183] the Court was at pains to insist that the words 'failed to use reasonable care' be interpreted in a manner different than how those words would apply in a civil context. This was because the provision was 'in a criminal code dealing with major crimes involving grave moral guilt'.[184] The Court concluded that parliament should not be taken to have intended that the standard required in a civil context be the same as that required in the criminal context.[185] It said it was 'out of keeping with the conceptions of the purpose of *The Criminal Code*' to apply the same rules to civil liability as to criminal liability.[186] This position is reflected in the position of the House of Lords in *Andrews v DPP*,[187] the United States *Model Penal Code*,[188] and enjoys significant scholarly support.[189] Mens rea became prominent in England in the thirteenth century, through a combination of the influence of Roman general law (through Bracton)[190] and ecclesiastical law,[191]

180 Ibid 419.
181 Ibid 420 [116] (Gageler J).
182 '[I]t is highly desirable that legal responsibility should generally accord with community notions of moral culpability': *Clayton* (n 171) 456 [90].
183 *Callaghan* (n 176); Eric Colvin, 'Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility' (2001) 27(2) *Monash University Law Review* 197, 207–8.
184 *Callaghan* (n 176) 124 (Dixon CJ, Webb, Fullagar and Kitto JJ).
185 Ibid 124.
186 Ibid 121.
187 [1937] AC 576, 582–3 (Lord Atkin and Lord Thankerton agreeing at 585–6, Lord Wright and Lord Roche agreeing at 586).
188 *Model Penal Code* (n 98) § 2.02 (2)(d).
189 Francis Bowes Sayre, 'Mens Rea' (1932) 45(6) *Harvard Law Review* 974 <https://doi.org/10.2307/1332142>; Jerome Hall, 'Negligent Behavior Should Be Excluded from Penal Liability' (1963) 63 *Columbia Law Review* 632 <https://doi.org/10.2307/1120580>.
190 Eugene J Chesney, 'Concept of Mens Rea in the Criminal Law' (1939) 29(5) *Journal of Law and Criminology* 627, 631–2 <https://doi.org/10.2307/1136853>, quoting Henry de Bracton, *The Laws and Customs of England* (1235) 101b. It is acknowledged that de Bracton's writing was heavily influenced by Roman law, and his writings cannot be assumed to accurately reflect the law of England as it then was.
191 Sayre (n 189) 983–4.

before being accepted as the basis for criminal liability by Bacon,[192] Coke,[193] Hale,[194] and Blackstone.[195] It is absolutely fundamental to our system of criminal justice.

B How Should Section 268.115 Be Interpreted?

1 Can It Be Interpreted as a Separate Crime?

Ideally, the section might be interpreted as a separate crime committed by the commander, based on a serious dereliction of duty. There are suggestions in the literature that article 28 of the *Rome Statute*, upon which section 268.115 is based, should be interpreted in this way.[196] This would avoid the problems that would otherwise be caused by making the commander effectively criminally liable for the criminality of another, including convicting the commander of crimes of specific intent, when there is no evidence that they in fact had the intent required, merely because their subordinates had the required criminal intent. Others say that, however desirable it would be for the *Rome Statute* to take the separate crime approach, the wording is more consistent with the mode of liability approach.[197] I agree.

Ideal as it may be to view section 268.115 as involving a dereliction of duty, it is effectively precluded, in my view, by the fact that no specific penalty exists for breach of section 268.115. In my view, this clearly indicates a legislative intent that something like the 'mode of liability' theory has been accepted, and the commander is liable in a way that reflects the criminality of the subordinate/s. This conclusion is reinforced by the explanatory memorandum to the draft legislation. This memorandum, discussing the doctrine of command responsibility, refers to the importance of those who are 'ultimately responsible for the commission of crimes' being held accountable, although they did not specifically commit the wrongful acts.[198] This dereliction of duty option is not available to an Australian court.

2 Require Proof of at Least Criminal Negligence on Commander's Part

However, other options are available. It is an accepted canon of statutory construction (principle of legality) that, in the event of ambiguity, a statute should be interpreted so as not to abrogate fundamental rights and freedoms.[199] There are at least two ways in which this can be applied to an interpretation of section 268.115.

The first way is that, in considering whether or not the commander has failed to take all reasonable and necessary measures within their power to prevent the

192 Chesney (n 190) 633–4, quoting Francis Bacon, *Maxims of the Law* (1596) regs 7, 15.
193 Ibid 636, quoting Edward Coke, *The Third Part of the Institutes of the Laws of England* (1644) 47.
194 Ibid 634, quoting Matthew Hale, *Pleas of the Crown* (1736) 38.
195 William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765) vol 1, ch 2 <https://ia600209.us.archive.org/24/items/lawsofenglandc01blacuoft/lawsofenglandc01blacuoft.pdf>.
196 Root (n 119) 144; Sliedregt (n 86) 429.
197 Robinson, 'How Command Responsibility Got So Complicated' (n 70) 32–3.
198 Explanatory Memorandum, International Criminal Court (Consequential Amendments) Bill 2002 (Cth) 13.
199 *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *X7 v Australian Crime Commission* (2013) 248 CLR 92, 109–10 (French CJ and Crennan J), 131–2 (Hayne and Bell JJ), 153 (Kiefel J).

crimes, the court should interpret this requirement as only being met where the failure to take reasonable and necessary measures is so egregious as to amount to criminal negligence, in the way that criminal law typically interprets that requirement. Ordinary negligence of the civil variety would not be sufficient. There is direct precedential support for this position, in *Callaghan v The Queen*, where a provision in a criminal statute apparently requiring mere negligence as a basis for criminal liability was read to require criminal negligence.[200] To do so in this context would, as it happens, be congruent with the position of the Australian War Crimes Tribunal that 'culpable' negligence was required for commander criminal liability, would be consistent with the *German High Command* case, and would be consistent with ICTY approach in *Blaškić*. In other words, it finds significant support in international customary law. It also finds support in Canadian legislation. Section 5(1)(b) of the legislation that implements into Canadian domestic law the *Rome Statute*, including article 28 relating to command responsibility, the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, requires proof that the commander either knows or is criminally negligent in failing to know that their subordinates are about to commit a war crime, or are committing a war crime. The influence of international law on Australian domestic law remains contentious, but courts are becoming more prepared to consider international law principles in interpreting Australian statute[201] and common law.[202]

3 Meaning of 'Reckless' in Section 268.115

There is substantial concern with the use of the word 'reckless' in section 268.115 in the context of command responsibility. It is incongruent with the admonition of the High Court in *Giorgianni v The Queen* ('*Giorgianni*') that 'mere' recklessness could not be the basis of an aiding and abetting offence.[203] The definition of the word is also problematic. Section 5.4 of the *Criminal Code Act 1995* (Cth) defines it to mean (mere) awareness of a substantial risk that a circumstance exists or result will occur, where it is unreasonable to take a risk. This seems broader than the traditional 'not caring whether or not a particular

200 *Callaghan* (n 176) 121 (Dixon CJ, Webb, Fullagar and Kitto JJ).

201 'A second important consideration that bears upon the proper construction of s 198 … is that the ambit and operation of a statutory power to remove an unlawful non-citizen from Australia must be understood in the context of relevant principles of international law concerning the movement of persons from state to state': *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 190 (Gummow, Hayne, Crennan and Bell JJ). See also *Western Australia v Ward* (2002) 213 CLR 1, 388–9 (Callinan J); *Al-Kateb v Godwin* (2004) 219 CLR 562, 629 (Kirby J) which can be compared to McHugh J's reasoning: at 590.

202 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 31–2 (Brennan J); *Chow Hung Ching v The King* (1948) 77 CLR 449, 462 (Latham CJ). '[M]ost Australian courts currently confine international customary norms to an unspecified influence on the common law': Gillian Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, 2nd ed, 2011) 193; Donald Rothwell et al, *International Law: Cases and Materials with Australian Perspectives* (Cambridge University Press, 2011) 195–233.

203 See above n 166.

thing happens or result occurs'.[204] For the same reasons as those stated above, 'unreasonableness' in this context should not be interpreted to mean mere negligence. It must be interpreted so that it was criminally negligent for the commander to have taken the risk in the circumstances.

Further, the concept of 'awareness of a substantial risk' that a circumstance exists or result will occur should be interpreted to deal only with the following possibilities:

(a) The commander intends or knows that it will occur or is occurring – on this basis, there can be no argument about criminal culpability;
(b) The commander intends or knows that it will probably occur, not merely that it could potentially or foreseeably occur – this reflects the United Kingdom's Supreme Court decision in *R v Jogee* [2017] AC 387, and the dissenting position of Kirby J in *Clayton* and that of Gageler J in *Miller*;
(c) Wilful (in the sense of deliberate) blindness that it is occurring or will probably occur – consistent with the position of the Australian War Crimes Tribunal, Admiral Soemu Toyoda's 'wilful and wanton disregard', *German High Command*'s 'wanton disregard', and (on the French translation at least) the *Additional Protocol to the Geneva Convention*, dicta comments of the High Court in *Giorgianni* and the 'conscious disregard' of the *United States Model Penal Code*.[205] It is possible that failure to follow up clearly inadequate reports (*Hostages*) and failing to investigate alarming information (*Delalic*) might be within this category.

It will be recalled the *Brereton Inquiry Report* found many instances of the use of 'boilerplate' incident reports,[206] containing a standardised approach and content, based on what was considered by the author/s likely to be sufficient to avoid further scrutiny of incidents. There was a culture of 'abandoned curiosity'.[207] Further investigation would be required as to these findings, but it is considered *possible*, given the above description of wilful blindness and failure to follow up inadequate reports in the context of command responsibility, that this behaviour might fit within those descriptions.

These categories go a long way, at least, to addressing serious concerns about maintaining a link between culpability and criminality.

It was thought important that, where possible, the Australian provision reflecting command responsibility be congruent both with established principles of international customary law, and general domestic criminal law provisions in related (not identical) contexts.

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204 '[R]ecklessness refers to a subjective state of mind where the actor was aware of the risk but did not care whether or not it occurred': Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Final Report No 123, June 2014) 7.71, citing *Three Rivers DC v Bank of England [No 3]* [2003] 2 AC 1, [179] (Lord Millet).

205 *Model Penal Code* (n 98) § 2.02(2)(c). Odgers (n 98) 68 suggests the Australian provision was based on the American.

206 *Brereton Inquiry Report* (n 6) 34 [41].

207 Ibid 496 [72].

VII CONCLUSION

A possible result of the *Brereton Inquiry Report* is the initiation of charges against one or more commanders in the ADF based on an alleged violation of command responsibility principles enshrined in section 268.115 of the *Criminal Code Act 1995* (Cth). A court will need to interpret this provision for the first time. This article has charted development of this principle in international customary law through to its adoption into Australian domestic legislation. It has highlighted a variety of approaches to interpretation of command responsibility, including in particular the fault standard to be applied to the commander allegedly responsible. Approaches have varied, including in particular an oscillation as to whether or not it is sufficient that the commander is negligent, or whether something more is required to convict them, and whether the commander is liable for a breach of their own duty, or are liable in some way for the actions of subordinates.

It has been concluded that the wording of section 268.115 leaves no doubt as to the second point, that the law in Australia makes the commander liable for actions of subordinates, not for a separate duty that they owe. More uncertainty attends the first point. It was concluded that, consistent with fundamental criminal law principles such as culpability, that something more than unreasonableness be required in order to make a commander liable. This 'something more' should be proof of intent or knowledge by the commander that the relevant activity will occur or is occurring, intends or knows that it will probably occur, and/or is wilfully blind to the fact that it is occurring or will probably occur. This position enjoys support in various sources of international law and is not antagonistic towards the fabric of Australian criminal law.