COMMAND RESPONSIBILITY IN THE *BRERETON REPORT*: WEAKENED ACCOUNTABILITY AND THE THREAT TO RIGHTS, FREEDOMS, AND REPUTATION

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While the Brereton Report found that there was credible information that Australian soldiers committed numerous war crimes, it stated that no commander above patrol level should bear criminal responsibility. The wide spectrum of standards adopted for command responsibility in international law means that there is some basis to argue that applying the Brereton Report's standard would comply with Australia's international obligations. However, this standard does not offer the best balance of upholding high criminal justice standards and ensuring convictions are 'deserved', while deterring serious violations of rights during armed conflicts, such as the right to life and freedom from torture. In addition, a failure to address the scepticism that no Australian commander above patrol level is legally accountable raises questions of adherence to the rule of law. It may impact on Australia's standing and its perceived commitment to international criminal justice.

I INTRODUCTION

In November 2020, the confronting findings from the *Inspector-General of the Australian Defence Force Afghanistan Inquiry Report* ('*Brereton Report*') were released. The *Brereton Report* revealed that there was credible information that Australian Special Forces committed numerous war crimes, particularly violating the right to life and freedom from cruel treatment.[1] Serious violations of fundamental rights and freedoms have persistently occurred throughout the history of war and armed conflict and civilians have increasingly been the victims of these violations.[2] The *Brereton Report* represents a contemporary confirmation that armed conflict is a time where there is a significantly heightened risk of serious violations of fundamental rights and freedoms. Moreover, it demonstrates that these violations

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1 Paul Brereton, *Inspector-General of the Australian Defence Force Afghanistan Inquiry* (Report, November 2020) 28–9 [12]–[19] ('*Brereton Report*').

2 See generally Michael Bryant, *A World History of War Crimes: From Antiquity to the Present* (Bloomsbury Publishing, 2nd ed, 2021) <https://doi.org/10.5040/9781350106635>.

are not only committed by rogue or opportunistic perpetrators or by the troops of developing and ill-disciplined militaries or non-state actors. Instead, the crimes, if proven, were committed by an elite and highly trained group of soldiers from a developed 'civilised' nation. A nation that has the capacity and stated commitment to discipline their troops, and to instruct them in, and enforce, the laws of armed conflict. How a nation with that capacity responds to credible information of war crimes by its own forces has repercussions for criminal justice, the rule of law, and ultimately, the protection of fundamental rights and freedoms during armed conflict.

The *Brereton Report* recommended that matters involving 19 individuals be referred to the Australian Federal Police,[3] but found that no commander above patrol level bore any criminal responsibility.[4] Yet, the doctrine of command responsibility, which Australia is bound by international law to implement, provides that commanders are criminally liable for their subordinates' crimes when they knew or should have known of the crimes and failed to prevent or punish them.[5] This doctrine is justified, in part, on the basis that commanders have a duty to properly supervise their troops and it is known that there is a substantial risk of severe and irremediable harm during armed conflict, especially if troops are inadequately supervised and controlled. Commanders have often voluntarily assumed this duty and their failure to fulfil it endangers fundamental rights and freedoms.[6] The *Brereton Report*, by limiting criminal liability to the lower ranks of the military (especially when there are indicia that the commanders are potentially responsible under the doctrine), raises questions of not only whether Australia is meeting its international obligations but also whether it is undermining the underlying rationale and justification for the doctrine.

In Part II, this article starts by setting out the relationship between armed conflict and fundamental rights and freedoms. It outlines the role that the command responsibility doctrine, as a legal accountability mechanism, plays in the protection of these rights and freedoms. It then applies criminal justice and legal theories to the command responsibility doctrine to examine the tension between the right of commanders to core criminal justice standards and the rights of persons in armed conflict to protection from violation of their fundamental rights and freedoms, including the right to life and freedom from torture or other cruel, inhuman or degrading treatment or punishment. That is, commanders are often best positioned to prevent or repress serious violations, and a high accountability standard can have a strong deterrent effect, but the culpability principle also requires that criminal conviction is based on personal culpability and connection to the crime. The conviction must be 'deserved'.

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3 *Brereton Report* (n 1) 29 [21].

4 Ibid 31 [28].

5 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 28 ('*Rome Statute*'). Australia is a State party to and bound by the *Rome Statute* (n 5): see 'Australia', *International Criminal Court* (Web Page) <https://asp.icc-cpi.int/states-parties/western-european-and-other-states/australia>.

6 See Part II.

Part III outlines the impetus for and the main findings of the *Brereton Report*, while Part IV focuses on its findings in relation to command responsibility. It details the *Brereton Report*'s conclusion on command responsibility and extracts and summarises findings from the *Brereton Report* and external sources that would support or draw into question its conclusion. The Part determines that the *Brereton Report* appears to set a high threshold before the doctrine applies, which would mean a lower level of legal accountability.

To ascertain whether there is a basis in international law for this high threshold, Part V explores the complex international jurisprudence on the mental standard required under the command responsibility doctrine. It surveys the various standards that have been adopted since World War II. It then assesses the *Brereton Report*'s findings against these various standards in order to establish where, if anywhere, on the spectrum of standards in international law the *Brereton Report* rests. This article principally focuses on international law, rather than Australian domestic law, because it seeks to place the *Brereton Report*'s response within the international framework. An analysis of the difference between international law and the Australian *Criminal Code Act 1995* (Cth) on command responsibility is largely outside the scope of this article, especially as this analysis has been conducted elsewhere.[7] As opposed to determining whether the *Brereton Report* aligns with domestic law, this article is concerned with whether the adoption of the *Brereton Report*'s conclusion would meet or breach Australia's international obligations and the potential impact on Australia's standing and the protection of fundamental rights and freedoms during current and future armed conflicts.

While Part V considers whether Australia is meeting its international obligations through the *Brereton Report*, Part VI addresses whether Australia should still adopt the *Brereton Report*'s conclusion that no commander above patrol level is criminally liable even if it can be argued to be compliant with international law. This Part connects the criminal justice and legal theories analysis in Part II with the legal analysis of the various international standards in Part V to explore which standard more closely supports the justifications of the command responsibility doctrine and the objectives of international criminal law more broadly. This article contends that given the wide spectrum of standards that have been advocated for the command responsibility doctrine, there are some grounds to support the high threshold apparently set in the *Brereton Report*. However, this article argues that this standard does not represent the best balance between upholding core criminal justice standards and the protection of fundamental rights and freedoms. It also maintains that without addressing the known indicia of subordinates' wrongdoing, it is difficult to maintain that a lower or better-balanced standard is being promoted. By advocating a high threshold and leaving unaddressed the concerns of commanders' culpability, Australia may undermine its moral authority and its status as a nation committed to the rule of law, international criminal justice, and the protection of fundamental rights and freedoms during armed conflict.

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7 See, eg, Douglas Guilfoyle, Joanna Kyriakakis and Melanie O'Brien, 'Command Responsibility, Australian War Crimes in Afghanistan, and the *Brereton Report*' (2022) 99 *International Law Studies* 220, 253–63.

II COMMAND RESPOSIBILITY: ACCOUNTABILITY AND THE PROTECTION OF RIGHTS AND FREEDOMS

For centuries, the right to life, liberty, bodily integrity, and protection of property have been advocated as fundamental freedoms.[8] They are now widely recognised as basic human rights.[9] Armed conflict is an environment that poses a significantly increased risk to people's rights and freedoms and serious violations have occurred in many conflicts.[10] Indeed, history is replete with examples of serious violations of rights during armed conflict,[11] including murder, torture and cruel treatment, enforced disappearances, rape and sexual violence, and violation of adequate conditions and treatment during detention.[12] Furthermore, in many contemporary conflicts, the rights and fundamental freedoms of civilians as well as those participating in the armed conflict are directly endangered.[13]

The risk to these fundamental freedoms is reflected in the laws of armed conflict which seek to regulate the use of violence and the means and methods of warfare to protect persons affected by armed conflict. For example, the *Geneva Conventions* and their *Protocols Additional*, which are core instruments in the laws of armed

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8 See, eg, John Locke, *Two Treatises of Government*, ed Lee Ward (Hackett Publishing, 2016) 123, who argued that since all people are 'equal and independent, no one ought to harm another in his life, health, liberty, or possessions'.

9 See, eg, *International Covenant on Civil and Political Rights*, opened for signature on 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 6 (right to life), 7 (freedom from torture or to cruel, inhuman or degrading treatment or punishment), 9 (right to liberty and security of person), 10 (right to be treated with humanity while deprived of liberty), 14 (right to a fair trial) ('*ICCPR*'); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 17 (right to own and not be arbitrarily deprived of property) ('*UDHR*'). There are currently 174 states party to the *ICCPR* (n 9): see '4. International Covenant on Civil and Political Rights', *United Nations Treaty Collection* (Web Page) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en>. The *UDHR* (n 9) is not intended to be binding but is highly regarded and many of its provisions are argued to be customary international law: see Frederic L Kirgis Jr, 'Custom on a Sliding Scale' (1987) 81(1) *American Journal of International Law* 146, 147–8 <https://doi.org/10.2307/2202144>.

10 Office of the High Commissioner for Human Rights, *International Legal Protection of Human Rights in Armed Conflict*, UN Doc HR/PUB/11/01 (2011) 1 ('*Human Rights in Armed Conflict*'). Note that there is debate on whether the laws of armed conflict replace human rights law during armed conflict. The dominant position appears now to be that both laws apply concurrently: see *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion*) [1996] ICJ Rep 226, 240 [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion*) [2004] ICJ Rep 136, 178 [106]. Where there is a conflict between the two bodies of law on how to regulate an issue, the principle of *lex specialis derogat legi generali* (specific law derogates from general law) means that a specific rule of the laws of armed conflict prevails over the general rule of human rights law: see *Human Rights in Armed Conflict* (n 10) 58–64.

11 For world history, see Bryant (n 2). For an overview of war crimes in Australian history, see *Brereton Report* (n 1) ch 1.08.

12 See, eg, International Committee of the Red Cross, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (2007) 89(867) *International Review of the Red Cross* 719, 719–20 <https://doi.org/10.1017/S1816383107001294>.

13 For civilians being primary victims of violations of the laws of armed conflict, see ibid. See also Andreas Wenger and Simon JA Mason, 'The Civilianization of Armed Conflict: Trends and Implications' (2008) 90(872) *International Review of the Red Cross* 835 <https://doi.org/10.1017/S1816383109000277> for the increasing role of civilians as victims and perpetrators in armed conflict.

conflict,[14] impose an obligation to ensure that persons taking no active part in the hostilities, such as civilians and those who have laid down their arms or are hors de combat because of sickness, wounds, detention or any other cause, are treated humanely. It is prohibited to commit violence against protected persons, including murder, mutilation, or torture. It is also prohibited to take hostages, commit outrages upon personal dignity such as humiliating and degrading treatment or to sentence or execute a person without a judgment by a competent court.[15] There are also provisions for protection against extensive destruction or seizure of property not justified by military necessity and carried out unlawfully and wantonly.[16] As such, even though human rights law and the laws of armed conflict are different bodies of law, there is considerable overlap in their objectives and the failure to adhere to the laws of armed conflict can also lead to violations of the fundamental rights and freedoms protected under human rights law.

The use, and often widespread use, of violence and the destruction caused by armed conflict present an inherently heightened risk that fundamental rights and freedoms will be violated. This risk of unlawful violence can be increased by several factors. Soldiers are provided with weapons and trained in the use of, and desensitised to, violence. Military culture can foster obedience and group loyalty while the enemy can be dehumanised or even demonised. These factors can combine to distort inhibitions against violence and killing.[17] Commanders hold positions of authority and have power and control over their subordinates and, consequently, are often in the best position to prevent or stop crimes and to ensure

14 Note that although these are core instruments, they are not rules that are applicable to every violent conflict or every person potentially affected by conflict. Instead, for example, the conventions and protocols draw distinctions between international and non-international armed conflicts and each convention is limited in its scope and intended to apply to certain groups: see *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) ('*First Geneva Convention*'); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) ('*Second Geneva Convention*'); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('*Third Geneva Convention*'); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Fourth Geneva Convention*'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) ('*Additional Protocol I*'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978).

15 See *First Geneva Convention* (n 14) art 3; *Second Geneva Convention* (n 14) art 3; *Third Geneva Convention* (n 14) art 3; *Fourth Geneva Convention* (n 14) art 3.

16 See, eg, *First Geneva Convention* (n 14) art 50; *Second Geneva Convention* (n 14) art 51; *Fourth Geneva Convention* (n 14) art 147.

17 See, eg, Darryl Robinson, 'A Justification of Command Responsibility' (2017) 28(4) *Criminal Law Forum* 633, 658–9 <https://doi.org/10.1007/s10609-017-9323-x>; Carmel O'Sullivan, *Killing on Command: The Defence of Superior Orders in Modern Combat* (Palgrave Macmillan, 2016) <https://doi.org/10.1057/978-1-137-49581-5>.

respect for the laws of armed conflict.[18] Accordingly, States involved in armed conflict and their commanders have duties under international law to prevent, suppress, and punish crimes by their subordinates,[19] and to monitor and properly supervise and control their troops. If commanders fail to fulfil this important duty – a duty which they have generally voluntarily assumed – then serious crimes and violations of fundamental rights and freedoms and irreparable harm can ensue.[20]

Commanders' accountability for this important duty is reflected in the imposition of liability under the command responsibility doctrine. This doctrine holds military commanders criminally liable for their subordinate's crimes when they knew or should have known of the crimes and did not take all necessary and reasonable measures to prevent or repress the crimes or submit the matter to the competent authorities.[21] This should incentivise commanders to fulfil the duty of being vigilant and properly monitoring their troops to prevent serious crimes and violations of fundamental rights and freedoms. The high accountability standard of imposing criminal liability for failing to prevent, repress or punish the crime committed by someone else could also have a strong deterrent effect. It could not only deter commanders from neglecting their duty, but it could also have a deterrent effect on those under their command. When troops on the ground and junior officers witness high-ranking commanders being held to account then they are less likely to believe that they will be able to avoid punishment for their own crimes.[22]

By acting as a deterrent, accountability, including accountability through prosecution, can play a valuable role in preventing further victimisation and atrocities.[23] As such, accountability can not only provide justice and retribution for the rights violated, but it can prevent the infringement of rights and freedoms. Yet, the theory of deterrence rests on the certainty of punishment and the severity of the sentence; that is, the probability of being caught and convicted and the harshness of the penalty.[24] These elements also need to have sufficient strength to outweigh

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18 Otto Triffterer, 'Article 28: Responsibility of Commanders and Other Superiors' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (CH Beck, 3rd ed, 2016) 1056, 1069, 1076 <https://doi.org/10.5771/9783845263571-1057>; Mirjan Damaška, 'The Shadow Side of Command Responsibility' (2001) 49(3) *American Journal of Comparative Law* 455, 471 <https://doi.org/10.2307/840901>. See also *Prosecutor v Bemba Gombo (Judgment)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08, 21 March 2016) [172] ('*Bemba Trial*').

19 See, eg, *Additional Protocol I* (n 14) arts 86–7. See also Jamie Allan Williamson, 'Some Considerations on Command Responsibility and Criminal Liability' (2008) 90(870) *International Review of the Red Cross* 303, 317 <https://doi.org/10.1017/S1816383108000349> on the imposition of criminal liability on superiors for a failure of this duty in international law.

20 See, eg, *Bemba Trial* (n 18) [172].

21 *Rome Statute* (n 5) art 28.

22 Triffterer (n 18) 1069.

23 M Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59(4) *Law and Contemporary Problems* 9, 18 <https://doi.org/10.2307/1192187>; 'Joint Statement of the Prosecutors' (November 2004) *ICTR Newsletter* 2 <https://unictr.irmct.org/sites/unictr.org/files/news/newsletters/November2004.pdf>; Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years* (Report, July 2008) 70.

24 Kate Cronin-Furman, 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) 7(3) *International Journal of Transitional Justice* 434, 441 <https://doi.org/10.1093/ijtj/ijt016>.

the 'overriding interests' of the individual to commit, or to allow another to commit, the crime. In an armed conflict, the overriding interest, such as believing the tactics will assist in defeating the enemy, may be stronger than the belief that international law will prosecute and impose a heavy sentence.[25] The individuals who commit serious violations of rights and freedoms during armed conflict may also be motivated by 'bloodlust' or hatred and be less likely to be deterred by the threat of punishment,[26] especially if the likelihood or severity of punishment is low. Some argue that the deterrence theory has its greatest relevance and weight in armed conflict when it is applied to commanders who permit but do not order the commission of the crimes. Commanders who fail to prevent or punish may not have an overwhelming or overriding interest in the commission of the crime and are more likely to be influenced by and motivated to be vigilant and to restrain and discipline their troops by the prosecution of other commanders in similar positions.[27] As such, command responsibility is the doctrine that may potentially hold the greatest deterrent value in preventing atrocities and the violation of fundamental rights and freedoms in armed conflict.

However, accountability is not merely based on the consequential or utilitarian rationales of the social benefit generated from deterring future crimes. Accountability should also rest on deontological grounds, including that the conviction and punishment is 'deserved'.[28] In a liberal criminal justice system, for criminal liability to be imposed, a person must generally have personally engaged or participated in the crime. They must have the necessary mens rea and actus reus.[29] This is known as the culpability principle and it is a core criminal justice principle recognised by all major legal systems.[30] Command responsibility could impinge on the culpability principle, especially if it is classed as a mode of liability for principal, as opposed to

25 Ibid 439–47. Cronin-Furman notes the challenges of applying deterrence theory to international criminal law, including the theory's reliance on a rational actor and the presence of 'bloodlust' in armed conflict. She explores if and when international prosecution may be effective in preventing atrocities.

26 Ibid 439–40. See also Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, 1998) 50; Frédéric Mégret, 'Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project' (2001) 12 *Finnish Yearbook of International Law* 193, 203 <https://doi.org/10.2139/ssrn.1156086>.

27 Cronin-Furman (n 24) 447, 452–3.

28 See Darryl Robinson, 'How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution' (2012) 13(1) *Melbourne Journal of International Law* 1, 23–4 <https://doi.org/10.2139/ssrn.1950770> ('How Command Responsibility Got So Complicated'). For the different philosophical rationales for criminal punishment in domestic law, see ibid 439.

29 See, eg, *Prosecutor v Tadić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [186]; *Prosecutor v Bemba Gombo (Judgment)* (International Criminal Court, Appeals Chamber, Case No ICC-01/05-01/08-A, 8 June 2018) [334] (Judges Monageng and Hofmański) ('*Bemba Appeal*'); Robinson, 'How Command Responsibility Got So Complicated' (n 28) 12; Barrie Sander, 'Unravelling the Confusion Concerning Successor Superior Responsibility in the ICTY Jurisprudence' (2010) 23(1) *Leiden Journal of International Law* 105, 116–20, 123 <https://doi.org/10.1017/S0922156509990355>.

30 Triffterer (n 18) 1060; Damaška (n 18) 464. This does not mean that there is never deviation from this principle. Instead, many States allow for the principle to be compromised and there are differences between States regarding the extent to and circumstances under which the principle must be adhered to: see Damaška (n 18) 464–5.

accessorial, liability.[31] This is because a commander who did not personally commit or order the crime, and may not even have direct knowledge, could be convicted of the crime committed by their subordinate.[32] Their right to liberty could be removed without meeting a core principle of criminal justice. This could raise concerns over whether the punishment imposed is 'deserved'.

This should bring to the forefront questions regarding *how* the command responsibility doctrine should be construed or implemented,[33] not *whether* it should be implemented. The doctrine has been an important feature of international criminal law and accountability, particularly since World War II. The rule of law requires that all persons are accountable to the law and that the law is applied equally to everyone, including more powerful nations and high-ranking commanders.[34] This does not mean that the law cannot distinguish between individuals and circumstances, such as differentiating between permissible use of violence in peace or war, or its use by police or citizens. Instead, it means that any difference should be made by law and that the law should be applied to and enforced against everyone, without distinction based on the person or group's power or status.[35] Adherence to the rule of law is of particular significance in armed conflict because of the role it plays in protecting fundamental human rights and in coordinating peace and post-conflict reconstruction.[36]

In the *Brereton Report*, the credibility of serious violations of the laws of armed conflict, including war crimes, was investigated. While the *Brereton Report* did not directly consider whether there was a violation of human rights, its investigation indirectly sheds light on whether there is credible information that serious violations of non-combatants' fundamental rights and freedoms, including the right to life and freedom from cruel treatment, was breached. Its findings could

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31 See Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press, 2012) 70–2 <https://doi.org/10.1093/acprof:oso/9780199560363.001.0001> for the difference between principal and accessorial liability and the rationale for ensuring there is a distinction.

32 For a discussion of the potential tension between the command responsibility doctrine and the culpability principle, see, eg, Damaška (n 18) 461–71; Arthur Thomas O'Reilly, 'Command Responsibility: A Call to Realign Doctrine with Principles' (2004) 20(1) *American University International Law Review* 71, 98–105.

33 For an argument that command responsibility should be classed as a separate offence, instead of a mode of liability, in order to uphold the culpability principle while also imposing a high (and tailored) accountability standard, see Carmel O'Sullivan, 'New Court, Same Division: The *Bemba* Case as an Illustration of the Continued Confusion regarding the Command Responsibility Doctrine' (2022) 35(3) *Leiden Journal of International Law* 661, 675–7 <https://doi.org/10.1017/S0922156522000309> ('New Court, Same Division').

34 See, eg, AV Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Classics, 8th ed, 1982) 114 (stating that every person, regardless of 'rank or condition', is subject to the law). Dicey argued that there are three elements to the rule of law. That everyone is subject to the law regardless of rank or condition relates to the equality before the law and equal subjection to the law element.

35 Note that officials may be able to perform certain functions but they 'are as responsible for any act which the law does not authorise as is any private and unofficial person': ibid.

36 See, eg, 'Rule of Law and Human Rights', *United Nations and the Rule of Law* (Web Page) <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/>; Harry Amankwaah, 'The Rule of Law and Armed Conflict Reconstruction Implementation Practices: A Human Right-Based Analysis of the Rwandan Experience' (2023) 9(1) *Cogent Social Sciences* 2171573:1–14, 1–2 <https://doi.org/10.1080/23311886.2023.2171573>.

have important implications for the alleged victims and perpetrators, including individual retribution if criminally convicted. The findings also potentially have important implications for criminal justice standards as well as for accountability and the prevention of future crimes and violations. The position it advocates could also reflect its compliance with the rule of law. Supporting the adoption of a different and more 'favourable' standard than international law for Australian militaries or supporting applying the law for low-ranking soldiers but not high-ranking commanders would undermine the rule of law. That is, the response to credible information of war crimes has important implications for accountability, the rule of law, and ultimately, the protection of fundamental rights and freedoms. The *Brereton Report* is a key initial step in that response.

III *BRERETON REPORT*: IMPETUS AND CORE FINDINGS

The authorisation for the *Brereton Report* came amongst persistent rumours of serious misconduct by Australia's Special Forces in Afghanistan.[37] In addition, a paper by the sociologist Dr Samantha Crompvoets into the Special Operations command organisational culture revealed accounts by frontline personnel of the illegal use of violence in operations and disregard for human life and dignity.[38] This included the use of torture and indiscriminate fire on Afghan men, women and children.[39] Moreover, Dr Crompvoets' paper revealed that this type of criminal misconduct 'happened all the time' and was normal and recurring, at least according to the accounts given to her.[40]

Consequently, in 2016, the Inspector-General of the Australian Defence Force appointed Justice Paul Brereton of the New South Wales Court of Appeal to conduct an independent inquiry into these persistent rumours of serious misconduct by or involving elements of the Australian Special Operations Task Group ('SOTG') in Afghanistan.[41] It was initially to cover the period from 2006 to 2016 but it was later

37 *Brereton Report* (n 1) 10, 118–22 [4]–[15]. There was also increasing media attention on alleged misconduct: see, eg, Michael Brissenden, 'SAS Corporal Could Be Charged for Cutting Off Hands of Taliban Fighters in Afghanistan', *ABC News* (online, 29 October 2014) <http://www.abc.net.au/news/2014-10-29/charges-considered-after-taliban-fighters-hands-cut-off/5849090>; Alex McDonald, 'More than 180 Australian Defence Force Members Sacked for Misconduct in Past Year, Figures Show', *ABC News* (online, 5 August 2014) <http://www.abc.net.au/news/2014-08-05/more-than-180-defence-force-members-sacked-for-misconduct/5647980>; Ian McPhedran, 'Army Run by Special-Forces Officers', *News.com.au* (online, 7 June 2015) <http://www.news.com.au/national/army-run-by-specialforces-officers/news-story/a969154609cfb304c7430d5e88f5dd67>; Louise O'Shea, 'Australia's Crimes in Afghanistan', *Redflag* (online, 24 July 2015) <https://redflag.org.au/article/australias-crimes-afghanistan>; Dan Oakes and Sam Clark, 'The Afghan Files: Defence Leak Exposes Deadly Secrets of Australia's Special Forces', *ABC News* (online, 11 July 2017) <https://www.abc.net.au/news/2017-07-11/killings-of-unarmed-afghans-by-australian-special-forces/8466642>.

38 Samantha Crompvoets, 'Special Operations Command (SOCOMD) Culture and Interactions: Insights and Reflection' (Paper, January 2016) 3–7. See also *Brereton Report* (n 1) 119–22 [4]–[12].

39 Crompvoets (n 38) 3–4.

40 Ibid 2.

41 *Brereton Report* (n 1) 10.

extended to 2005 to 2016.[42] The *Brereton Report* was highly anticipated, in part due to the notable journalistic and media attention given to these allegations, and its findings were publicly released in 2020 in a heavily redacted report.

The *Brereton Report* concluded that there was credible information to support allegations that war crimes occurred and recommended that 36 matters be referred to the Australian Federal Police for criminal investigation. Those matters related to 23 incidents and involved a total of 19 individuals.[43] Of particular note is the *Brereton Report*'s finding that there was credible information that 39 individuals were unlawfully killed, and a further two individuals were cruelly treated.[44] Importantly, the *Brereton Report* emphasised that none of these alleged crimes occurred in the 'heat of battle'. Instead, the incidents considered by the *Brereton Report* involved killings where 'it was or should have been plain that the persons killed were non-combatant[s], or hors de combat'.[45] These were circumstances where there was no doubt or confusion regarding the victim's status or targetability. The personnel involved were also well-informed of the laws of armed conflict and knew that these persons were not legitimate targets.[46]

Two other findings that are of particular significance relate to the practice of 'blooding' and the use of 'throwdowns'. The *Brereton Report* found credible information that patrol commanders directed junior soldiers to shoot prisoners in order for the soldier to achieve their first kill. This practice was called '"blooding"'.[47] There was also credible information that some Special Forces members carried 'throwdowns'. Throwdowns are foreign weapons or equipment, such as pistols or radios, and they were placed with the bodies of 'enem[ies] killed in action' in order to portray that the unarmed person who was killed was a legitimate target. Throwdowns are believed to have been used to conceal deliberate unlawful killings as well as to avoid scrutiny where a person was legitimately engaged but turned out not to be armed.[48]

IV *BRERETON REPORT*: CULTURE, ACCOUNTABILITY, AND COMMAND RESPONSIBILITY

The *Brereton Report* points to a number of factors that would have contributed to the occurrence of the alleged crimes and the failure to uncover or stop them. These include the dominance of a clique of non-commissioned officers, the disempowerment of junior officers, the extensive and prolonged utilisation of a small group of Special Forces personnel to the detriment of their psychological welfare, the lack of effective operational oversight, the compartmentalisation of

42 Ibid 1.
43 Ibid 28–9 [15], [21], 40 [68].
44 Ibid 29 [16(a)].
45 Ibid 29 [17] (emphasis omitted).
46 Ibid 28 [12].
47 Ibid 29 [19].
48 Ibid.

information, and a misguided loyalty to the group over truth and morality.[49] While the *Brereton Report* considers in detail how the organisational culture – including the presence of a 'warrior culture' and belief that 'special' meant exempted from the rules[50] – and the failures in oversight mechanisms – including commanders' trust and protection of their subordinates and weak integrity in reporting[51] – facilitated the alleged war crimes, it limits higher leadership's accountability to the domain of moral responsibility at most.

In particular, the *Brereton Report* found that there was

> no evidence that there was knowledge of, or reckless indifference to, the commission of war crimes, on the part of commanders at troop/platoon, squadron/company or Task Group Headquarters level, let alone at higher levels such as Commander Joint Task Force 633, Joint Operations Command, or Australian Defence Headquarters. Nor is the Inquiry of the view that there was any failure at any of those levels to take reasonable and practical steps that would have prevented or detected the commission of war crimes.[52]

The *Brereton Report* goes on to state that these higher headquarters did not have 'a sufficient degree of command and control' to attract legal liability and acted appropriately to ascertain the facts when they became aware of relevant information and allegations.[53] The *Brereton Report* then concludes that: 'However, SOTG troop, squadron and task group Commanders bear moral command responsibility and accountability for what happened under their command and control.'[54] As such, in essence, the *Brereton Report* limits legal responsibility, as opposed to moral accountability, to the patrol commander level.

This finding has been met with some academic and public scepticism.[55] A core reason is that it potentially conflicts with Australia's international obligation to uphold the doctrine of command responsibility. The *Brereton Report* notes that commanders trusted and were protective of their subordinates and that there was a reluctance to question suspicious behaviour because of loyalty and even deference to those '"outside-the-wire"' risking their lives.[56] The *Brereton Report* states that few would have imagined Australian Special Forces committing such crimes and so would not have been suspicious.[57] However, these are not the bases or elements of the command responsibility doctrine.[58] Instead, the doctrine rests on the grounds of awareness or knowledge and a failure of duty. It rests on whether the commander

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49 Ibid 325.
50 Ibid 329–33 [3]–[18].
51 Ibid 110–14.
52 Ibid 31 [28].
53 Ibid 33 [35]. It notes that Joint Task Force 633 had a 'national command' function and not 'operational command'.
54 Ibid 115, 472, 502.
55 See, eg, Guilfoyle, Kyriakakis and O'Brien (n 7); Emily Crawford and Aaron Fellmeth, 'Command Responsibility in the *Brereton Report*: Fissures in the Understanding and Interpretation of the "Knowledge" Element in Australian Law' (2022) 23(1) *Melbourne Journal of International Law* 164.
56 *Brereton Report* (n 1) 31 [27], 34 [40], 361, 463 [334].
57 Ibid 31 [27].
58 For a critique of this style of rationale in the *Brereton Report* (n 1) to justify the command responsibility doctrine not applying, see, eg, Crawford and Fellmeth (n 55) 186; Guilfoyle, Kyriakakis and O'Brien (n 7) 231–2.

knew or should have known of the crimes and did not prevent, repress, or punish them. The ability to assess whether higher ranking commanders would fall within the doctrine's scope for the alleged war crimes in Afghanistan is hampered because the *Brereton Report* is heavily redacted for national security, privacy, and legal reasons.[59] Nevertheless, the *Brereton Report* itself points to circumstances that draw into question whether legal responsibility under the command responsibility doctrine should be limited to solely the patrol commander level.

In the *Brereton Report*, there are several key factors that indicate that more senior commanders knew or should have known that the alleged crimes were occurring. In particular, the *Brereton Report* acknowledges that Afghan nationals complained to the Australian forces that unlawful killings were occurring.[60] The *Brereton Report*, however, claims that these complaints were presumed to be insurgent propaganda or motivated by compensation.[61] There was also actual knowledge by at least one officer of the use of 'throwdowns' and the *Brereton Report* concludes that, by late 2012 to 2013, commanders at troop and possibly squadron level suspected if not knew that throwdowns were carried.[62] However, the *Brereton Report* asserts that the commanders believed that throwdowns were being used to avoid questions for lawful engagements that turned out to have involved killing a person that was not armed. It concludes that commanders did not believe that throwdowns were being used to conceal deliberate unlawful killings.[63] It should be noted that it is also unlawful to use throwdowns to avoid scrutiny of the killing of an unarmed individual even if it is deemed to be a lawful engagement.

The *Brereton Report* also highlights that the reports on engagements were purposefully manipulated, including the systemic and suspicious use of boilerplate language in operational reports, to make each engagement appear to be compliant with the rules of engagement.[64] This practice was so pervasive that a new directive on reporting was issued.[65] In addition, there were also 'persistent rumours of criminal or unlawful conduct'.[66] These rumours eventually led to investigation through the Brereton inquiry itself but they appear to have persisted for some time before this action was taken.

These factors, especially when combined, appear to be prima facie indicators that commanders, at a level higher than patrol level, knew or should have known that crimes were potentially occurring or that further investigations were warranted. These indicia that there was available information that warranted

59 *Brereton Report* (n 1) 10–11.
60 Ibid 112, 362.
61 Ibid 112.
62 Ibid 31 [30]. It notes that there is credible information that one officer believed that his troops were carrying throwdowns, at least to fabricate evidence to justify the detention and prosecution of local nationals: at 471–2.
63 Ibid 31 [30].
64 Ibid 35–6 [48].
65 Ibid 298–300 [51]–[59]. Note that it reports the 'Command Legal Officer' stating that the directive was not issued 'because of a suspicion that there had been unlawful killings by members, but because it was felt that there was a need to provide some guidance to command to assist in decision-making in the field and reporting': at 299 [55].
66 Ibid 10.

further investigation is reinforced by sources external to the *Brereton Report*. For example, in Dr Crompvoets' paper, she notes that being 'too high up the chain to see it', seeing 'one incident in isolation not the pattern over time' or trying to do something but being 'dismissed/marginalized/moved on'[67] were some of the reasons offered for why 'good' soldiers and officers did not intervene. However, she also notes that the violations were regular and normalised. They happened all the time.[68] The *Brereton Report* corroborates that Afghans reported illegal killings to the Australians on a weekly basis as well as reports being made to interpreters and non-governmental organisations and that these allegations were seemingly 'muted' by the Special Forces leadership in Afghanistan.[69] The 'bad' soldiers and officers were also apparently 'known to everyone' and Dr Crompvoets' paper also supports that there was a pattern where most killings were perpetrated by the same units, squadrons and patrols and they were accounted for with similar circumstances and witness accounts. Yet, rather than being met with suspicion and robust investigation, the individuals apparently received citations and medals for gallantry and valour.[70] Dr Crompvoets' paper observes that '[t]here is a perception that the SLG [Senior Leadership Group] know but "don't want to know" so turn a blind eye'.[71] Another indicia of knowledge or grounds for further inquiry include that former military lawyer, David McBride, lodged an official internal whistleblower complaint highlighting serious and systemic issues after serving two tours in Afghanistan in 2011 and 2013. However, his complaint seemingly was not pursued, which led to him eventually leaking the information to the media.[72] This leaked information formed the basis of the Australian Broadcasting Corporation's 'Afghan Files', which contained allegations of war crimes.[73]

Accordingly, the *Brereton Report*'s finding that no commander above patrol level should bear any legal liability or had any information that would

67 Crompvoets (n 38) 2.
68 Ibid.
69 Ibid 3.
70 Ibid 6.
71 Ibid.
72 It is noteworthy that David McBride said that he leaked the information to expose what he felt was the 'over-investigation' of misconduct rather than to expose war crimes: see Tiffanie Turnbull, 'David McBride: Australian War Crimes Whistleblower Pleads Guilty', *BBC News* (online, 17 November 2023) <https://www.bbc.com/news/world-australia-67447254>; Rebecca Ananian-Welsh, 'David McBride Is Facing Jailtime for Helping Reveal Alleged War Crimes. Will It End Whistleblowing in Australia?', *The Conversation* (online, 20 November 2023) <https://theconversation.com/david-mcbride-is-facing-jailtime-for-helping-reveal-alleged-war-crimes-will-it-end-whistleblowing-in-australia-218108>; Aaron Patrick, 'Is David McBride a Whistleblower, a Criminal or Both?', *Australian Financial Review* (online, 21 November 2023) <https://www.afr.com/policy/foreign-affairs/is-david-mcbride-a-whistleblower-a-criminal-or-both-20231120-p5ela0>.
73 Adele Ferguson, 'As David McBride Readies Himself for Trial, His Fellow Whistleblowers Have a Message for the Government', *ABC News* (online, 6 November 2023) <https://www.abc.net.au/news/2023-11-06/david-mcbride-whistleblower-open-letter/103060116>; Kieran Pender and Kobra Moradi, 'The Prosecution of David McBride for Exposing Australian War Crime Allegations Is an Outrageous Injustice', *The Guardian* (online, 27 October 2022) <https://www.theguardian.com/commentisfree/2022/oct/27/the-prosecution-of-david-mcbride-for-exposing-australian-war-allegations-is-an-outrageous-injustice>.

have warranted investigation seems to be a lenient standard that favours higher command or a high threshold before accountability. This perception could be countered if exculpatory evidence is revealed or further explanation of the factual basis for the *Brereton Report*'s finding, and the reason these concerning indicia were found not to meet the standard, is provided. However, even with the more 'lenient standard' interpretation, the jurisprudence on the command responsibility doctrine is complex and the standard imposed at the international level has varied significantly and even been contradictory. Accordingly, the next Part of this article examines whether the lenient standard adopted in the *Brereton Report* can find purchase in international law and, as such, whether Australia in adopting the 'Brereton standard' would be compliant with its international obligations.

V COMMAND RESPONSIBILITY IN INTERNATIONAL LAW: A SPECTRUM OF STANDARDS

Article 28(a) of the *Rome Statute of the International Criminal Court* ('*Rome Statute*') sets out the command responsibility doctrine for military and de facto military commanders.[74] It provides that military commanders are criminally responsible for crimes committed by subordinates under their effective command and control as a result of their failure to exercise their control properly. However, it must be shown that the commander 'knew or should have known' that their subordinates were committing or were about to commit such crimes and did not take all necessary and reasonable measures within their power to prevent or repress the crimes or to submit the matter to a competent authority. Similarly, article 7(3) of the *Statute of the International Criminal Tribunal for the Former Yugoslavia* ('*ICTY Statute*') and article 6(3) of the *Statute of the International Criminal Tribunal for Rwanda* ('*ICTR Statute*') state that commanders are criminally responsible if they 'knew or had reason to know' that the subordinate was about to commit or had committed a crime and they failed to take the necessary and reasonable measures to prevent or to punish the crime.[75]

Accordingly, to establish command responsibility, certain elements need to be present. Namely, there must be: (i) a superior–subordinate relationship; (ii) the commander knew, or should have known/had reason to know, that the subordinate was committing or about to commit the crime (mens rea element); and (iii) the commander did not take all necessary and reasonable measures to prevent or punish the crimes (actus reus element). There are some differences between the *Rome Statute* and the *ICTY Statute* and the *ICTR Statute*, including that the *Rome Statute* explicitly acknowledges that the subordinate must be under the commander's 'effective command and control' while this element has been

74 *Rome Statute* (n 5) art 28(b) addresses other superior-subordinate relationships, such as a civilian superior, which is outside the purview of this article.

75 SC Res 827, UN Doc S/RES/827 (25 May 1993) art 7(3) ('*ICTY Statute*'); SC Res 955, UN Doc S/RES/955 (8 November 1994) art 6(3) ('*ICTR Statute*').

interpreted into the *ICTY Statute* in its jurisprudence.[76] Moreover, the *Rome Statute* requires that the subordinate's crime was 'as a result' of their failure to exercise control properly over the subordinate.[77] That is, it imposes a causation element. However, the International Criminal Tribunal for the Former Yugoslavia ('ICTY') explicitly excludes causation as an element of command responsibility.[78]

There are disputes around some of these elements, including whether the International Criminal Court ('ICC') or the ICTY's position for causation should be adopted,[79] and even whether command responsibility is a mode of liability or a separate offence.[80] As such, even the nature of the doctrine is disputed. The different standards advocated in response to these disputes can have significant consequences. They not only set the limits of the doctrine's scope with the ensuing repercussion of conviction or acquittal for the individual, but the standard adopted can have broader implications for the legitimacy of international criminal law. If the standard adopted is seen to undermine core criminal justice standards, such as the culpability principle,[81] or a central objective of international criminal law, such as to end impunity for serious violations of international humanitarian law,[82] then it could weaken the authority and legitimacy of the international criminal law regime.

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76 See, eg, *Prosecutor v Delalić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [370] ('*Čelebići Trial*'). See also Beatrice I Bonafé, 'Finding a Proper Role for Command Responsibility' (2007) 5(3) *Journal of International Criminal Justice* 599, 608–10 <https://doi.org/10.1093/jicj/mqm030>.

77 *Rome Statute* (n 5) art 28.

78 *Prosecutor v Karadžic (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-5/18-T, 24 March 2016) [590]; *Čelebići Trial* (n 76) [398]–[400]; *Prosecutor v Blaškić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) [73]–[77] ('*Blaškić Appeal*'); *Prosecutor v Hadžihasanović (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-01-47-A, 22 April 2008) [38]–[39]; *Prosecutor v Halilović (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-01-48-T, 16 November 2005) [78]. See also 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, 632 <https://doi.org/10.1093/jicj/mqm029>; Robinson, 'How Command Responsibility Got So Complicated' (n 28) 12.

79 See, eg, Stefan Trechsel, 'Command Responsibility as a Separate Offense' (2009) 3 *Berkeley Journal of International Law Publicist* 26, 30 (no causal link needed); Robinson, 'How Command Responsibility Got So Complicated' (n 28) 57–8 (causal link needed).

80 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) vol 1, 823, 850; Gideon Boas, James L Bischoff and Natalie L Reid, *Forms of Responsibility in International Criminal Law: International Criminal Law Practitioner Library Series* (Cambridge University Press, 2007) vol 1, 178; Bing Bing Jia, 'The Doctrine of Command Responsibility Revisited' (2004) 3(1) *Chinese Journal of International Law* 1, 31–3 <https://doi.org/10.1093/oxfordjournals.cjilaw.a000504>; James G Stewart, 'The End of "Modes of Liability" for International Crimes' (2012) 25(1) *Leiden Journal of International Law* 165, 183 <https://doi.org/10.1017/S0922156511000653>; Carol T Fox, 'Closing a Loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Known Past Offences' (2004) 55(2) *Case Western Reserve Law Review* 443, 491; O'Sullivan, 'New Court, Same Division' (n 33) 664–8; Robinson, 'How Command Responsibility Got So Complicated' (n 28) 58; Robinson, 'A Justification of Command Responsibility' (n 17) 635; Sander (n 29) 116–20.

81 Damaška (n 18) 456, 463–4; Stewart (n 80) 179; O'Sullivan, 'New Court, Same Division' (n 33) 668–74.

82 See *Rome Statute* (n 5) Preamble para 4 for its objective that 'the most serious crimes of concern to the international community as a whole must not go unpunished'.

For the commanders within the purview of the *Brereton Report*, the established hierarchy means that the superior-subordinate relationship is unlikely to be a key issue. Whether causation is required and the standard adopted to determine whether the commander took 'all necessary and reasonable measures' to prevent or punish the crimes would also impact on the individual commander's criminal liability and international standards and legitimacy. From the *Brereton Report*, it appears that some commanders took limited action, such as requesting more information and more detailed and clearer operational reports on engagements.[83] In addition, it states that Special Air Service Regiment ('SASR') troop commanders who did try to exercise more control and address culture were ostracised and often did not get support from their superior officers.[84] What actions these troop commanders took and what actions or omissions their superiors took to be classed as being unsupportive is less clear. As such, the level of information provided in the *Brereton Report* and its heavily redacted nature means that it is difficult to conduct a sufficiently robust analysis of these elements.

Moreover, the need to take all necessary and reasonable measures is triggered when the commander has a culpable mental state; that is, when they knew, or should have known/had reason to know, of their subordinate's crimes. As outlined above, the *Brereton Report* stipulates facts that point to the information – or at least part of the information – that was potentially available to commanders and when some of this information was available. This provides the grounding for a preliminary analysis of whether Australian commanders above the patrol level would satisfy the mens rea element of the command responsibility doctrine under international law. If this element is satisfied, then the importance of ascertaining and demonstrating causation and whether those commanders took all necessary and reasonable measures becomes key to establishing whether Australia is fulfilling its international obligations. This article focuses on that first step and preliminary analysis.

A Mens Rea Standard: From Strict Liability to Wanton Disregard

The mens rea standard for command responsibility is satisfied if the commander knew or 'had reason to know' (under the *ICTY Statute*/*ICTR Statute*) or 'should have known' (under the *Rome Statute*). Actual knowledge can be established through direct or express evidence, such as when the commander sees the crime or makes statements that acknowledge the crime, or through circumstantial evidence that infer knowledge, such as reports received by their office or if they were personally informed.[85] In principle, it should be clearer what standard is required and it should be more readily assessable whether that standard has been met for this form of knowledge.[86]

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83 *Brereton Report* (n 1) 298–9 [51]–[54].

84 Ibid 32–3 [33].

85 See, eg, *Bemba Trial* (n 18) [191]–[193]; *Čelebići Trial* (n 76) [386]; Triffterer (n 18) 1083.

86 However, there can be confusion and disagreement on the standard required. For example, Judges Monageng and Hofmański appear to conflate 'knew' or 'should have known' into a single mental standard because either one would establish liability: *Bemba Appeal* (n 29) [265]. Whereas in the same decision, Judges Van den Wyngaert and Morrison in their separate opinion stated that the two standards

It is more difficult to ascertain the exact standard, and whether it has been satisfied, for the constructive or 'hypothetical' knowledge of 'should have known' or 'had reason to know'. With the exception of credible information that one officer had actual knowledge of troops carrying throwdowns and took no action to prevent or prohibit it,[87] the *Brereton Report* makes limited reference to commanders above patrol level having actual knowledge. Accordingly, unless other evidence comes to light, it is likely that it is this form of knowledge that will apply. However, the standard that is required to establish this mental state is varied and contested.

1 Post-World War II Jurisprudence

There were significant developments in the command responsibility doctrine following World War II. Indeed, the birth of the contemporary command responsibility doctrine is often associated with the controversial *Yamashita* trial.[88] In this case, the United States ('US') Military Commission stated that:

> It is absurd … to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.[89]

While this sets a standard of 'effective attempt to discover and control', the Commission failed to adequately address the issue of Yamashita's mental state and there was a lack of clear and direct evidence that he had knowledge of, ordered, or even condoned the crimes.[90] Instead, the Commission appeared to impose liability, and the death penalty, on the basis of his failure to maintain control over his troops.[91] While some scholars assert that the Commission did not explicitly state but in effect found that Yamashita must have known of his subordinate's crimes, many have argued that the Commission imposed a form of liability akin to strict

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are 'fundamentally different and cannot be interchanged': at [37]. Guilfoyle, Kyriakakis and O'Brien (n 7) point out that the conflation of the standards appears to be based, at least in part, on the belief that actual knowledge can be established by circumstantial evidence blurring the line between actual and constructive knowledge: at 249–50.

87 *Brereton Report* (n 1) 471–2.

88 Guénaël Mettraux, *The Law of Command Responsibility* (Oxford University Press, 2009) 5 <https://doi.org/10.1093/acprof:oso/9780199559329.001.0001>.

89 *Law Reports of Trials of War Criminals* (United Nations War Crimes Commission, 1948) vol 4, 35 <https://tile.loc.gov/storage-services/service/ll/llmlp/Law-Reports_Vol-4/Law-Reports_Vol-4.pdf> ('*Yamashita Trial*').

90 While the crimes were widespread and notorious, Yamashita was in Baguio cut off from where the crimes were occurring in Manila and the United States armed forces had disrupted Japanese communication and caused confusion: see *Re Yamashita*, 327 US 1, 31–3 (1946) (Murphy J) ('*Yamashita SC*'). See Ann Marie Prévost, 'Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita' (1992) 14(3) *Human Rights Quarterly* 303, 318 <https://doi.org/10.2307/762369>. See also Jamie Fellows, 'Law at a Critical Juncture: The US Army's Command Responsibility Trials at Manila, 1945–1947' (2020) 60(2) *American Journal of Legal History* 192, 195–9 <https://doi.org/10.1093/ajlh/njaa005> for how other factors, such as a lack of definitive law governing this area and racism, could have impacted on this decision.

91 *Yamashita Trial* (n 89) 35–6. See also Mettraux (n 88) 7.

liability.[92] Yet, strict liability can impose liability without establishing criminal intent and, accordingly, it is generally restricted to lower offences and not serious offences such as war crimes.[93]

When reviewing his petition of habeas corpus, the majority of the US Supreme Court upheld the Commission's decision.[94] However, there was strong dissent in the Supreme Court too. Justice Murphy noted that Yamashita had not been charged with ordering, personal participation, or having knowledge of the crime and that there was no precedent for the charge.[95] He highlighted that Yamashita was being convicted of being ineffective in maintaining control of his troops. Yet, at the time, the US armed forces were deliberately and effectively besieging and eliminating his troops and blocking his ability to maintain that effective control.[96] Justice Murphy also classed the indictment as 'in effect permitt[ing] the military commission to make the crime whatever it willed, dependent upon its biased view as to petitioner's duties and his disregard thereof'.[97] Criticism of the standard imposed in *Yamashita* has been echoed in some scholarly literature,[98] and several later tribunals have sought to distance themselves from this findings and reinforced that command responsibility does not impose a form of strict liability.[99]

In *United States v List*, acting under Allied Control Council Law No 10, the US Military Tribunal at Nuremberg stated that a commanding general of occupied territory

> is charged with notice of occurrences taking place within that territory. He may require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence … Want of knowledge of the contents of reports made to him is not a defence. … Any failure to acquaint

92 See Jenny S Martinez, 'Understanding *Mens Rea* in Command Responsibility: From *Yamashita* to *Blaškić* and Beyond' (2007) 5(3) *Journal of International Criminal Justice* 638, 649 <https://doi.org/10.1093/jicj/mqm031>; Mettraux (n 88) 7; William H Parks, 'Command Responsibility for War Crimes' (1973) 62 *Military Law Review* 1, 37, 40, 42–3; A Frank Reel, *The Case of General Yamashita* (University of Chicago Press, 1949) 169; Richard Wasserstrom, 'The Responsibility of the Individual for War Crimes' in Virginia Held, Sidney Morgenbesser and Thomas Nagel (eds), *Philosophy, Morality, and International Affairs* (Oxford University Press, 1974) 47, 68.

93 See Damaška (n 18) 464–5, 481 n 46. In *Prosecutor v Musema*, the Trial Chamber stated that strict liability would mean that 'the superior is criminally responsible for acts committed by his subordinates solely on the basis of his position of responsibility, with no need to prove the criminal intent of the superior': see *Prosecutor v Musema (Judgement and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-T, 27 January 2000) [129] ('*Musema Trial*').

94 *Yamashita SC* (n 90) 37.

95 Ibid 28 .

96 Ibid 34.

97 Ibid 28.

98 See, eg, Prévost (n 90) 327–8; Martinez (n 92) 648–50; Mettraux (n 88) 5–8; Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003) 203.

99 For example, the International Tribunal for the Former Yugoslavia Appeals Chamber has stated that it would not describe command responsibility as a form of vicarious liability 'insofar as vicarious liability may suggest a form of strict imputed liability': *Prosecutor v Delalić (Judgement)* (International Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) [239] (emphasis in original) ('*Čelebići Appeal*').

> themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.[100]

As such, commanding generals of occupied territories are ordinarily expected to know what is occurring within their territory and to know the content of reports received by them. Moreover, when reports are incomplete or inadequate, they are required to obtain supplementary reports in order to gain knowledge of the relevant facts. They have an affirmative duty to collect information and a lack of knowledge that stems from a commander's own dereliction of these duties is not a defence.[101] This standard would make it more difficult for commanders to use hierarchical distance to claim a lack of knowledge of their subordinates' crimes.

In *United States of America v Araki* ('*Tokyo War Crimes Trial*'), the International Military Tribunal for the Far East held that the commander is responsible if they had knowledge or should have had the knowledge but for their 'negligence or supineness' and their position required or permitted them to take action to prevent the crimes.[102]

However, in *United States of America v von Leeb*, the US Military Tribunal stated that criminal liability can be imposed on high commanders where their failure to properly supervise their subordinates amounts to criminal negligence. However, it sets a high standard by providing that this failure must be a 'personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence'.[103]

2 Ad Hoc Tribunals

The next major opportunity for the international community to clarify the liability of commanders for their subordinates' crimes and the mental standard required was through the ad hoc tribunals of the ICTY and International Criminal Tribunal for Rwanda ('ICTR'). In *Prosecutor v Musema*, the ICTR Trial Chamber noted that there were varying interpretations of the mens rea standard for command responsibility, including that it derives from strict liability or that it is negligence so serious that it amounts to consent or criminal intent.[104] The Trial Chamber concluded that to establish criminal intent, there must be 'malicious intent' or failing that 'at least … negligence was so serious as to be tantamount to acquiescence or even malicious intent'.[105]

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100 *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>.

101 See also Martinez (n 92) 650–1.

102 *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>, quoted in Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgments* (Oxford University Press, 2008) 83. See also ibid 652.

103 *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> ('*High Command Trial*').

104 *Musema Trial* (n 93) [129].

105 Ibid [131].

In *Prosecutor v Delalić* ('*Čelebići*'), both the ICTY Trial Chamber and Appeals Chamber held that 'had reason to know' was satisfied if 'information was available to [the commander] which would have put him on notice of offences committed by subordinates'.[106] The Chambers acknowledged that the information did not have to be sufficient to conclude that crimes were occurring. Instead, it was sufficient if the commander had general information that would put the commander on notice that further inquiry or additional investigation was required to determine whether offences were being committed or about to be committed by their subordinates.[107] While the Appeals Chamber stated that it would be necessary to conduct a case-by-case assessment to establish whether the individual commander had the requisite mens rea, it clarified that the type of general information that could put a commander on notice included that some subordinates have a violent or unstable character or that some subordinates had been drinking prior to a mission.[108] This information also only needed to have been provided to or available to the commander and the prosecution did not need to show that the commander acquainted themselves with the information.[109] However, the Appeals Chamber held that 'had reason to know' did not impose criminal liability on commanders for their general failure or negligence in their duty to acquire knowledge of the crimes or possible future crimes or to remain informed of subordinate's actions.[110]

In *Prosecutor v Blaškić* ('*Blaškić*'), the Trial Chamber took a different approach and held that 'had reason to know' captured commanders who lacked knowledge of their subordinates' crimes 'where the absence of knowledge is the result of negligence in the discharge of his duties'.[111] Their own induced ignorance would not be a defence. This largely aligns with some of the post-World War II positions, such as the *Tokyo War Crimes Trial* where commanders were liable if they lacked actual knowledge due to their own 'negligence or supineness'.[112] The Trial Chamber also referred to Yves Sandoz, Christophe Swinarski and Bruno Zimmermann's *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* to support that the commander's 'role obliges them to be constantly informed of the way in which their subordinates carry out the tasks entrusted them, and to take the necessary measures for this purpose'.[113] However, it was a notable departure from the *Čelebići* case as it did not require commanders to have information that put them on notice. Instead, it appeared to impose a general duty to remain informed and that negligence in that

106 *Čelebići Trial* (n 76) [383]; *Čelebići Appeal* (n 99) [241].
107 *Čelebići Trial* (n 76) [383]; *Čelebići Appeal* (n 99) [238].
108 *Čelebići Appeal* (n 99) [238]–[239].
109 Ibid [239].
110 Ibid [226]. The Appeals Chamber noted that such neglect of duty may lead to liability within the military disciplinary framework but that it did not necessarily result in criminal liability.
111 *Prosecutor v Blaškić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [332] ('*Blaškić Trial*').
112 See above n 102.
113 *Blaškić Trial* (n 111) [329], quoting Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, 1987) 1022 [3560].

duty would be sufficient. That is, it found that 'had reason to know' meant there was 'an affirmative duty on the part of commanders to investigate the conduct of their subordinates regardless of whether they have specific information giving rise to suspicion'.[114]

The Appeals Chamber disagreed and affirmed the *Čelebići* standard of 'had reason to know' being satisfied only if information was available to the commander which would have put them on notice of the subordinate's crimes. It held that negligence would not be an adequate basis for liability and that a commander's general failure or neglect of their duty to seek or acquire information would not amount to 'had reason to know'.[115]

Similarly, the ICTR Trial Chamber in *Prosecutor v Bagilishema* held that command responsibility could be satisfied if there was criminal or gross negligence. It stated that this was a form of liability by omission that constituted a 'criminal dereliction of a public duty' and classed it as a 'third basis of liability'.[116] Again, the Appeals Chamber overruled this classification and stated that it was an error of law for the Trial Chamber to have considered it.[117] Further, it cautioned trial chambers against making any reference to 'negligence' in the context of command responsibility.[118] It affirmed that there were only two bases for a commander's mens rea: actual knowledge or had reason to know.[119] Moreover, it referred to and concurred with the *Čelebići* standard and held that 'had reason to know' required that commanders had some general information available to them which would put them on notice of possible crimes by their subordinates.[120]

This standard has been followed in a number of other ad hoc decisions, including *Prosecutor v Krnojelac* ('*Krnojelac*').[121] When applying this standard, the ICTY Appeals Chamber in *Krnojelac* stated that while the information available to the commander does not need to contain specific details of the crimes, the general information must relate to the elements of the specific offence. For example, if the commander is charged with torture, in order for the commander to have the requisite mens rea, it must be shown that they had 'sufficiently alarming information' that their subordinates were beating prisoners 'not arbitrarily but for one of the prohibited purposes of torture'.[122]

As such, a variety of standards have been advanced for the mental state of a criminally liable commander, ranging from a form of strict liability to criminal or gross negligence being sufficient to evidence of malicious intent or acquiescence

114 Martinez (n 92) 657. For a discussion on issues with the Trial Chamber's judgment, including clarity of its rationale for imposing liability, see at 657–8.

115 *Blaškić* Appeal (n 78) [62]–[63].

116 *Prosecutor v Bagilishema (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-95-1A-T, 7 June 2001) [897].

117 *Prosecutor v Bagilishema (Judgement)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-95-1A-A, 3 July 2002) [37].

118 Ibid [35].

119 Ibid [34], [37].

120 Ibid [33].

121 *Prosecutor v Krnojelac (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-97-25-A, 17 September 2003) [154] ('*Krnojelac Appeal*').

122 Ibid [155].

being advocated. Nevertheless, a dominant standard appeared to emerge in the ad hoc jurisprudence: the *Čelebići* standard. That is, commanders have 'reason to know' of their subordinates' crimes if they have information that puts them on notice. This information can be general and does not have to be sufficient to conclude that crimes are occurring or about to occur. However, it must be specific enough to alert them to a general risk and that further inquiry or investigation is warranted.

3 ICC

The ICC is the first permanent international criminal court, and not a temporary tribunal established in response to a particular conflict, and its jurisdiction has been accepted by a large number of nations.[123] As such, the standard it imposes is not only a contemporary and important interpretation but it is directly applicable to the states bound by the *Rome Statute*, including Australia. The *Rome Statute* holds that the commander is criminally liable if they 'should have known', instead of 'had reason to know'.[124] Some have argued that this imposes a substantially different standard. Guénaël Mettraux, for example, contends that 'should have known' could lower the mens rea threshold for accountability so that negligence is sufficient or, depending on the interpretation adopted, vicarious liability based on a failure to keep properly informed may even be enough.[125] The opportunity for the ICC to provide this interpretation of 'should have known' arose in *Prosecutor v Bemba Gombo*, which was the first time that the Court substantially dealt with the command responsibility doctrine. Unfortunately, the case does not provide a unified or definitive position. Indeed, on appeal, the Court was divided and, by a 3–2 majority, it reversed the Trial Chamber's conviction of Jean-Pierre Bemba Gombo under command responsibility.[126] In addition, a number of the pronouncements made in relation to the mens rea standard are in dicta because, for example, the Appeals Chamber acquitted Bemba on the different ground that it had not been established that he failed to take all necessary and reasonable measures.[127] However, the statements made in relation to a commander's requisite mens rea again span a spectrum of possible standards within the one case.[128]

The Pre-Trial Chamber held that 'should have known' meant that the commander had 'an active duty … to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime'.[129] This is similar to some of the post-war jurisprudence and the Trial Chamber in *Blaškić* where it was advocated that

123 At the time of writing, there are 123 nations that are party to the *Rome Statute*: see 'The States Parties to the Rome Statute', *International Criminal Court* (Web Page) <https://asp.icc-cpi.int/states-parties>.

124 *Rome Statute* (n 5) art 28. Cf *ICTY Statute* (n 75) art 7(3); *ICTR Statute* (n 75) art 6(3).

125 Mettraux (n 88) 78.

126 *Bemba Appeal* (n 29).

127 The majority judgment in the Appeals Chamber principally addresses 'all necessary and reasonable' measures and not other elements, such as mens rea, of the command responsibility doctrine: ibid [32].

128 See, eg, O'Sullivan, 'New Court, Same Division' (n 33) 669–71.

129 *Prosecutor v Bemba 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) [433] ('*Bemba Pre-Trial*').

a commander had an affirmative duty to keep informed and their negligence or supineness in failing to do so should not be a defence.[130] On appeal, Judges Van den Wyngaert and Morrison maintained that while actual knowledge requires that the information the commander possessed is 'sufficiently specific',[131] the 'should have known' standard is intended to capture situations where the commander has an 'awareness that something is going on without having sufficiently clear and dependable information as to what is happening/has happened, when it is going to happen/has happened, or who is/was involved'.[132] This seems to have parallels to the *Čelebići* standard but it may set a lower threshold as it requires only a subjective awareness that 'something is going on' as opposed to possessing actual, albeit general, information that 'puts the commander on notice' of the need to investigate further. Judge Eboe-Osuji noted that criminal responsibility under the doctrine should be founded on evidence that the 'commander's failings suggest his own connivance in the crimes or his condonation of them – in the manner of wilful subscription or callous indifference – such as would convincingly approximate a mental disposition to commit the crimes that he failed to prevent or punish'.[133] This appears to align more with the 'wanton disregard amounting to acquiescence' end of the spectrum of standards.

B Situating the *Brereton Report* on the Spectrum of Mens Rea Standards

The mens rea standard for Australian commanders is complicated by its domestic criminal law deviating from the *Rome Statute* and stating that commanders are liable if they knew or are 'reckless as to' their subordinates' crimes.[134] The *Brereton Report* also refers to reckless indifference when determining that Australian commanders above patrol level bore no criminal liability.[135] 'Reckless indifference' appears to set a higher mens rea standard than 'should have known'. The consequences of the difference are explored elsewhere,[136] and include that the domestic standard of 'reckless' is likely to be interpreted as requiring something lower than a 'conscious disregard of information clearly indicating a risk' but requiring something higher than 'circumstances that would put a reasonable commander on notice'.[137] As such, it may set a higher threshold before commanders are legally accountable than the seemingly dominant standard in international criminal law and may lead to a divergence in jurisprudence between international law and Australian domestic law.[138] This article focuses on the mens rea standard at the international level in order to determine whether Australia would meet its international obligations if it adopts the

130 See above n 111.
131 *Bemba Appeal* (n 29) [44].
132 Ibid [47].
133 Ibid [11].
134 *Criminal Code Act 1995* (Cth) s 268.115. For a potential interpretation of this section, see Anthony Gray, 'The Doctrine of Command Responsibility in Australian Military Law' (2022) 45(3) *University of New South Wales Law Journal* 1251, 1281–6 <https://doi.org/10.53637/JPIB4732>.
135 *Brereton Report* (n 1) 31 [28].
136 Guilfoyle, Kyriakakis and O'Brien (n 7) 253–63; Crawford and Fellmeth (n 55) 176–9, 185–6.
137 Guilfoyle, Kyriakakis and O'Brien (n 7) 260.
138 Ibid 263.

Brereton Report's conclusion that commanders above patrol level should not even be investigated or prosecuted and the implication this could have for international law's protection of fundamental rights and freedoms during armed conflict.

Any assessment of an individual commander's mental state would need to be based on the information that the individual possessed and when they possessed this information. This type of information is not provided in the *Brereton Report*. However, based on some of the broad information provided in the *Brereton Report*, it is possible to make a preliminary and surface level assessment of whether and which mens rea standard the *Brereton Report*'s determination is most closely aligned with on the spectrum of advocated standards. The standard that the *Brereton Report* proposes that Australia holds its own commanders accountable to can have implications for meeting its international obligations, its international reputation, the rule of law, and the rights and freedoms of those involved in armed conflicts.

Strict liability has been rejected as an appropriate standard for command responsibility on several occasions,[139] and, as such, an Australian commander should not be criminally liable merely because they were the perpetrators' superior. However, it is questionable that these crimes remained undetected for so long if every commander above patrol level actively took the necessary measures to secure knowledge of SASR conduct and to inquire even if they did not have information at the time of crimes being committed. Potentially, a commander above patrol level was negligent in failing to keep properly informed.[140] This style of standard maintains that commanders should not be able to use their own (gross) negligence or supineness as a defence.

As noted above, the *Brereton Report* acknowledges that there was some information regarding potential crimes, namely: local Afghans had told Australian forces that unlawful killings were occurring, there were persistent rumours of unlawful conduct, there was a prevalent use of suspicious 'boilerplate' language in operational reports, and there was suspicion if not knowledge at troop and possibly squadron level of the unlawful practice of carrying throwdowns. While the *Brereton Report* offers alternative explanations – such as a belief that local Afghan complaints were insurgent propaganda or motivated by compensation or that the use of throwdowns was for avoiding questions rather than concealing unlawful killings – this does not mean that there was not the requisite information in their possession to warrant further investigation. If a commander above patrol level knew of some or all of this information, then they may be held to have had a 'subjective awareness that something was going on'. The commanders who are stated to have suspicion if not knowledge of the use of throwdowns would have an increased likelihood of satisfying this standard.

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139 See, eg, *Čelebići Appeal* (n 99) [239].

140 See Guilfoyle, Kyriakakis and O'Brien (n 7) 246 for an analysis of how the *Bemba Pre-Trial* (n 129) standard of active duty to secure knowledge and *Čelebići Appeal* (n 99) standard of need to investigate further if put on notice are potentially satisfied. See also Crawford and Fellmeth (n 55) 185–6 for an analysis of how international standards, including the *Čelebići Appeal* (n 99) standard, are potentially satisfied.

In addition, if a commander above patrol level had this general information available to them, for example they received reports on locals' complaints of unlawful killing, then they may also potentially be classed as being 'put on notice' and required to investigate further. The information does not have to be sufficient to conclude that crimes were occurring or to include specific details of the crime or perpetrators.[141] *Čelebići* indicated that information that subordinates have a violent or unstable character or that some subordinates had been drinking prior to a mission could be sufficient while *Krnojelac* indicated that there must be 'sufficiently alarming information' relating to the specific type of crime that was actually committed.[142] It appears that there were several accounts regarding a drinking and warrior style culture in SASR,[143] and a commander above patrol level may have been exposed to this information. If a commander above patrol level received reports of the local Afghans' complaints of unlawful killing, then this may be sufficiently alarming information of the unlawful killings that the *Brereton Report* finds there is credible information to support occurred. The stated belief that commanders thought that throwdowns were only being used to avoid questioning for lawful engagements leaves some scope to argue that they did not know of the practice of using throwdowns to conceal unlawful killings. However, suspicion if not knowledge of the use of throwdowns at all may arguably mean that there is sufficiently alarming information to warrant investigation of the more sinister purpose, especially as the practice would not have been unheard of in other armed conflicts and so is conceivable as a possibility. It is less clear from the *Brereton Report* if there was sufficiently alarming information relating to the cruel treatment offences.

If the perception noted in Dr Crompvoets' paper of commanders being wilfully blind was substantiated, then the standard of 'wanton, immoral disregard … amounting to acquiescence' or 'wilful subscription or callous indifference' amounting to 'connivance in the crimes' or 'condonation of them' could be triggered.[144] However, based on the information provided in the *Brereton Report*, and bar further or more direct evidence for individual commanders coming to light, it is less likely that this standard is satisfied. This is supported by a number of particular factors that existed in the armed conflict in Afghanistan. The conflict was in another country and many commanders above patrol level would have been

141 See, eg, *Bemba Trial* (n 18) [194]:

> Article 28 does not require that the commander knew the identities of the specific individuals who committed the crimes. In addition, it is unnecessary to establish that the accused mastered every detail of each crime committed by the forces, an issue that becomes increasingly difficult as one goes up the military hierarchy.

142 *Čelebići Appeal* (n 99) [238]–[239]; *Krnojelac Appeal* (n 121) [154]–[155].

143 See, eg, *Brereton Report* (n 1) 33 [34], 471–2, 495 [71]; Mark Willacy, 'Defence Chief Was Told of Infamous Afghanistan Soldiers' Bar Years Ago, Documents Reveal', *ABC News* (online, 27 May 2021) <https://www.abc.net.au/news/2021-05-27/questions-around-defence-chiefs-knowledge-of-unauthorised-bar/100166404>; Rory Callinan, 'Photo Reveals Australian Solider Drinking Beer Out of Dead Taliban Fighter's Prosthetic Leg', *ABC News* (online, 1 December 2020) <https://www.theguardian.com/australia-news/2020/dec/01/photo-reveals-australian-soldier-drinking-dead-taliban-prosthetic-leg>.

144 For these respective standards: see *High Command Trial* (n 103) 76; *Bemba Appeal* (n 29) [11] (Judge Eboe-Osuji).

remote and in a different jurisdiction. For commanders that were in Afghanistan, for example junior officers at troop command level, they were generally still remote from the 'on-the-ground' operation, patrol, or fights. They generally remained 'behind-the-wire' with an overwatch, coordination, and air support function. However, this meant that they may not have direct knowledge of events, were reliant on operational reports, and were less able to discover something the patrol commander did not want to disclose.[145] This was compounded by a culture of loyalty to the patrol commanders and the unit, and that individuals with knowledge or suspicion of misconduct who wanted to report it to higher command feared the professional, social and (in some cases) physical consequences or reprisals of doing so.[146] In addition, the high turnover of troop and squadron commanders may have inhibited an individual commander from seeing the bigger picture and having sufficient information and knowledge to be aware of the need to investigate further.[147] As Douglas Guilfoyle, Joanna Kyriakakis and Melanie O'Brien point out, if this is what occurred then it does not reflect well on the Australian Defence Force's organisational leadership.[148]

As such, international jurisprudence has supported a standard that, based on the limited information available, the *Brereton Report* could rely upon to sustain its determination of higher commanders not having the requisite mens rea. However, this standard would be at the higher end of the spectrum or thresholds advocated. There is the potential though that the *Brereton Report*'s determination is inconsistent with other standards adopted in international jurisprudence, particular the lower side of the spectrum that supports an affirmative duty to secure knowledge. Even on the more intermediate positions, such as the *Čelebići* standard of a duty to investigate further when put on notice of possible crimes, it seems that there is insufficient information to conclude, but there are notable grounds for concern, that this standard has been fulfilled. This leads to the question: even if there is some support for the *Brereton Report*'s position, should this be the standard that Australia adopts?

VI UNANSWERED QUESTIONS: RIGHTS, RESPONSIBILITIES, AND REPUTATION

The different accountability standards advocated correlate with the protection of different sets of fundamental rights and freedoms. The low threshold of negligence and an active duty to secure knowledge of subordinates' actions could deter commanders, particularly high-ranking commanders, from attempting to use hierarchical distance to avoid gaining personal knowledge or to conceal their

145 See *Brereton Report* (n 1) 489 [43]–[45]; Guilfoyle, Kyriakakis and O'Brien (n 7) 233–4.
146 *Brereton Report* (n 1) 113, 326, 340 [53].
147 Guilfoyle, Kyriakakis and O'Brien (n 7) 238.
148 Ibid.

acquiescence.[149] This strong incentive for commanders to be vigilant and properly supervise their troops could lower the number of violations of fundamental rights and freedoms during armed conflict.

On the other extreme, the high threshold of wanton disregard amounting to connivance or acquiescence ensures that the culpability principle is satisfied, as the commander is personally connected to the crime. The commander's conviction and punishment are 'deserved'. The *Brereton Report* appears to align with this position and upholds commanders' right to a core criminal justice standard. However, this standard may also impose 'an exacting burden upon the Prosecution',[150] and may run counter to the justifications for the command responsibility doctrine, including that commanders generally have voluntarily assumed this important duty with the known risk of violence and are best positioned to prevent abuses. This is compounded by the argument that the commanders who fail to properly supervise, but do not order crimes, are the group most likely to be deterred by prosecution. Such a high threshold for prosecution of these commanders may reduce the incentive to remain vigilant, and even inadvertently discourage vigilance in order to have credible deniability of subordinates' crimes. This, in turn, could increase the risk of unlawful violence and breaches of civilians' and non-combatants' fundamental rights and freedoms.

Intermediate positions, such as the *Čelebići* standard of a duty to investigate further once the commanders possess information that put them on notice, might offer a better balance. There is some level of personal connection, as the commander must have some information or awareness of wrongdoing. There is also some deterrence against complacency as there is a duty to investigate even if the commander does not have actual knowledge of a specific crime. Each intermediate position may fall closer to one end of the spectrum and offer greater protection for one set of rights or freedoms than their counterparts. For example, Judges Van den Wyngaert and Morrison's 'subjective awareness that something is going on' is likely to require a weaker personal connection by the defendant than *Čelebići*'s 'possessed information that put them on notice' standard but it would act as a stronger deterrent and, in turn, arguably provide better protection for civilian and non-combatants' fundamental rights and freedoms.

The *Brereton Report* states that commanders above patrol level did not have the necessary knowledge and they took the appropriate actions once information came to their attention, which would appear to fall within an intermediate standard. However, as discussed, there are some concerning indicia of information that could have warranted further investigation. While there are solid grounds for limiting the information publicly revealed, without further information for Brereton's conclusion, there may remain scepticism that no commander above patrol level possessed information warranting further investigation. Left unanswered, this

149 See Damaška (n 18) 471–2. See also *Bemba Appeal* (n 29) [194] (Judges Monageng and Hofmański) which alludes to the practical difficulties of proving personal knowledge by high-ranking commanders of low-ranking subordinates' crimes.

150 Judge Eboe-Osuji makes a similar point regarding a 'wilful' standard: *Bemba Appeal* (n 29) [199]–[200], [202].

remaining uncertainty could create the impression that a more favourable and lenient standard is being adopted for Australian commanders. Left unanswered, this remaining uncertainty could even potentially reinforce the perception identified in Dr Crompvoets' paper of higher commanders not wanting to know and turning a blind eye to questionable or even unlawful conduct.[151] Yet, this use of hierarchical distance could run counter to the stated objective of ending impunity for serious crimes and increase the risk of serious violations of fundamental rights and freedoms during armed conflict.[152]

This remaining uncertainty could create a perception of insulation for higher commanders, and a corresponding exposure of the on-the-ground troops. Left unaddressed, the remaining uncertainty may create the perception that the law is being applied to low-ranking soldiers but not high-ranking commanders. It may create the impression that the rule of law is being undermined. This is especially so as David McBride, the former military lawyer who leaked the information revealing these war crimes to the media, has pleaded guilty to unlawfully sharing classified material and, at the time of writing, is awaiting sentencing. The maximum sentence is 100 years.[153] This could create the impression that those who exposed war crimes through unlawful means or low-ranking and less powerful personnel may be held to account, but high-ranking and powerful leaders may avoid accountability. As such, left unanswered, this remaining uncertainty could also impact on Australia's standing amongst the international community and its moral authority to compel other States to adhere to and enforce international rules for the prevention and prosecution of such violations.[154]

VII CONCLUSION

Armed conflict is a time when fundamental rights and freedoms are at a significantly heightened risk of violation. In contemporary armed conflicts, this increasingly includes the fundamental rights and freedoms of civilian men, women and children. A strong accountability mechanism plays a key role in not just individual retribution but also in deterring future crimes and in protecting these fundamental rights and freedoms. Commanders are often uniquely placed to be able to deter, prevent, and punish their subordinates' crimes during armed conflict. Accordingly, international law imposes a duty on commanders to properly supervise and control their troops and, under the command responsibility doctrine, they can be held criminally liable for their failure to do so if they knew or should have known/had reason to know of the crimes. This accountability mechanism

151 See Crompvoets (n 38) 6.

152 See above n 82.

153 Ferguson (n 73); Ananian-Welsh (n 72); Patrick (n 72).

154 As an analogy, see Gideon Boas and Pascale Chifflet, 'Suspected War Criminals in Australia: Law and Policy' (2016) 40(1) *Melbourne University Law Review* 46, 46, 81, 85–6, who noted that Australia's insufficient policy for domestic prosecution of suspected war criminals in Australia could diminish the country's standing in the international community and advocated that Australia assert itself as a State committed to international criminal justice.

involves an inherent tension between the protection of the commander's right to criminal justice, including only being liable for crimes where they are personally connected, and the protections of the fundamental rights and freedoms of those in combat zones.

The *Brereton Report* was Australia's initial response to credible information that elite and highly trained soldiers committed war crimes. While the *Brereton Report* recommended 19 individuals be referred for potential prosecution and the Office of the Special Investigator has been set up to investigate alleged crimes,[155] it did not recommend that commanders above patrol level be investigated for prosecution. Without justification beyond the *Brereton Report* simply stating that these commanders did not and should not have known, it would appear that the *Brereton Report* is advocating a high threshold before commanders are legally accountable. This could create the impression that a more favourable and lenient standard is being adopted for Australian commanders and leaders. This is especially so as there are indicia that information was available that could support that further investigation was warranted. Left unaddressed, this remaining uncertainty could also create the perception of low-ranking soldiers being held accountable to the law but not high-ranking and powerful leaders. While there is some support for this high threshold standard in international jurisprudence, it is not the standard that provides the best balance of upholding criminal justice principles while deterring crimes and protecting fundamental rights and freedoms. It could also run counter to the rationale and justification for the doctrine. By not addressing the scepticism that no commander above patrol level has any criminal liability, it could affect Australia's international standing and reputation and provide precedent for a weakened accountability standard and the ensuing curtailment of the protection of fundamental rights and freedoms for the most vulnerable in armed conflict.

155 Commonwealth, *Government Notices Gazette*, No C2020G01030, 18 December 2020.