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Command Responsibility, Australian War Crimes in Afghanistan, and the Brereton Report

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and Melanie O'Brien*

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I. INTRODUCTION

In November 2020 Australia faced a reckoning with its recent past in Afghanistan. There had been growing disquiet for some time regarding rumored war crimes committed in Afghanistan by Australian special forces, corroborated by shocking footage screened on national television in 2017. On 19 November 2020 General Angus Campbell, Chief of the Australian Defence Force (ADF), released the summary of the final report of a long-running inquiry into those accusations.¹ That report had been commissioned by the Inspector-General of the Australian Defence Force, an independent office outside the military chain of command. It is now widely known as the “Brereton Report” after the head of the inquiry: Paul Brereton, a Justice of the New South Wales Court of Appeal and a major general in the Australian Army Reserves.

Much of the report will remain redacted pending criminal proceedings before civilian courts. Its key finding is the identification of twenty-three incidents involving twenty-five Australian personnel resulting in thirty-nine killings which will be referred for prosecution. Critically, the report finds none of these killings occurred in heat of battle, nor “in circumstances in which the intent of the perpetrator was unclear, confused or mistaken,” and that all persons involved understood the relevant law of armed conflict and rules of engagement.² These were deliberate killings of unarmed persons, either *hors de combat* or under Australian control, in circumstances where there could be no confusion as to their legal status or targetability.

The press conference releasing the public version of the report was a very sober affair. General Campbell acknowledged that the events have damaged “our moral authority as a military force” but emphasized “many thousands of Australians . . . served in Afghanistan . . . professionally and with honour. And this includes many, many of our Special Forces personnel.”³ Nonetheless, the redacted report includes the grim summary that, in respect of one chapter in particular: “What is described . . . is possibly the most disgraceful episode in Australia’s military history, and the commanders at

1. Transcript, Australian Department of Defence, Press Conference—IGADF Afghanistan Inquiry (Nov. 19, 2020), <https://news.defence.gov.au/media/transcripts/press-conference-igadf-afghanistan-inquiry> [hereinafter Afghanistan Inquiry Press Conference].

2. *Id.*

3. *Id.*

troop, squadron and task group level bear moral command responsibility for what happened under their command, regardless of personal fault.⁴

Precise details of specific events remain redacted pending potential prosecutions. Nonetheless, a recurrent concern has been that prosecutions may divert all legal responsibility to a limited number of frontline Special Air Service Regiment (SASR) “operators” without any accountability for commanding officers who either knew or should have known what was happening. As one journalist put it in the press conference, it is difficult to believe that no one from the rank of lieutenant to lieutenant general had any direct knowledge of what was going on.⁵ In particular there was actual knowledge on the part of at least one officer of troops planting incriminating evidence (“throwdowns”) on the bodies of persons killed to make them appear as direct participants in hostilities;⁶ as well as evidence of systemic misreporting of operations to exaggerate or fabricate compliance with rules of engagement (ROE);⁷ and complaints made of unlawful killings by Afghan nationals to Australian forces.⁸ The fundamental question is: given such facts, were relevant commanders obliged to do more?

This article examines the question of command responsibility for such crimes under international and Australian law, and how far such responsibility extends. While this is very much an Australian case study, the concerns it raises should be of interest to all professional militaries. In any command responsibility case key questions will usually include: who knew what, when; and what were they obliged to do about it? It also provides an important case study of the implications when the national legal standards adopted differ from the provisions of international law.

The article proceeds as follows. Part II places the Brereton Report in context and provides an overview of its key findings and the relevant legal framework for prosecutions of Australian military personnel. It notes the

4. INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE, AFGHANISTAN INQUIRY REPORT 103 (2020), <https://afghanistandinquiry.defence.gov.au/> [hereinafter Brereton Report].

5. Afghanistan Inquiry Press Conference, *supra* note 1 (Australian Special Forces, however, do not use the rank of Lieutenant).

6. Brereton Report, *supra* note 4, at 31, 470, 490 (albeit only one officer may have had such direct knowledge or suspicion, redactions making it difficult to be certain); *id.* at 115, 446, 457, 471, 484, 486–88.

7. On the use of “boilerplate” language in reporting, see Brereton Report, *supra* note 4, at 298–99, 36.

8. Brereton Report, *supra* note 4, at 34–35, 112, 115, 359, 362, 422, 443, 445–46, 448–50, 458, 464, 494, 497, 525.

seeming lack of appetite in the Report—and in its reception by the ADF—for prosecutions to extend above the patrol commander level and examines the vision of command responsibility put forward in the Report. To the extent such conclusions are based on the particular facts (e.g., that junior officers on deployment were rotated with such frequency that none were in a position to see the whole picture) this may raise structural or organizational issues.

Part II also highlights a difficulty for Australian prosecutors: the wording of the relevant Australian Commonwealth Criminal Code provisions on command responsibility is largely copied from the text of the Rome Statute of the International Criminal Court (ICC). This makes sense, given Australia's status as a party. However, some of the relevant wording was changed in order to "translate" Rome Statute concepts into concepts more familiar to Australian law. The result is an offence which has never been prosecuted in Australian civilian or military courts and which may set a different and higher bar for command responsibility than that found in international law. Nonetheless, it is an established principle of Australian law that where a Commonwealth statute seeks to give effect to a treaty obligation, courts may have regard to relevant international law in interpreting it.⁹

Part III examines the international law of command responsibility with a focus on Article 28 of the Rome Statute. Regrettably, it concludes that the ICC case law is of limited guidance on key issues that will face Australian prosecutors. These include the required mental element (*mens rea*) for command responsibility and the element of causation introduced by Article 28. In this respect, it will show that ICC decisions in the *Bemba* case have done more to confuse than clarify.

Part IV focuses on the key *mens rea* discrepancy between the Rome Statute law of command responsibility and that embodied in the Commonwealth Criminal Code. It also returns to the vexed question of causation in command responsibility.

Part V concludes by asking the question: if the relevant Australian law makes it more difficult to prosecute commanders than the Rome Statute, does this have implications for the ICC principle of complementarity? That is: if Australian law means prosecutors are unable to effectively prosecute defendants because our law sets the bar higher than the Rome Statute, does this make Australia "unable or unwilling" to prosecute in a manner which

9. For a classic and concise statement of the Australian law, see *Minister for Foreign Affairs and Trade v. Magno* (1992) 112 Australian Law Reports 529, 534–35 (Gummow, J.) (Austl.).

would allow the ICC Prosecutor to step in? We conclude that while an Australian being “sent to the Hague” is unlikely as both a pragmatic matter and on a conventional understanding of the operation of complementarity, the law is unsettled.

II. THE BRERETON REPORT

A. Chronology and Context

The Australian Parliamentary Library has compiled a chronology of at least fifty-three specific incidents of reported misconduct or alleged crimes—as well as wider, less specific patterns of misconduct—by Australian special forces in the period 2006–2013. These include, for example, reports in 2009–2010 that SASR personnel referred to some colleagues as “having ‘gone up the Congo’, a reference to the moral wilderness in Conrad’s novel *Heart of Darkness*.”¹⁰ Among many shocking incidents, the one which has been most widely reported (as discussed below) involved the shooting in 2012 of a prostrate and unarmed man, Mr. Dad Mohammad, at close range by a person known as “Soldier C.” The incident was recorded on another patrol member’s private head camera.¹¹ It is further alleged that Soldier C was also involved in a 2012 incident in which a patrol commander accidentally shot one of a group of farmers. Following this event, Soldier C’s patrol members “made the decision that they couldn’t leave anyone behind to tell [what happened]. So they decided to kill all [ten] of them,” including a boy as young as thirteen and a person who attempted to hide in a tractor wheel.¹²

Despite such incidents, only one court martial appears to have occurred out of all cases investigated by the ADF. The one reported 2011 case, *Re Civilian Casualty Court Martial*,¹³ involved allegations of negligent manslaughter for the deaths of five children that occurred when two commandos threw fragmentation grenades into a house from which they were coming under

10. Karen Elphick, Reports, Allegations and Inquiries into Serious Misconduct by Australian Troops in Afghanistan 2005–2013 (Nov. 9, 2020), Parliament of Australia, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp2021/Chronologies/AllegationsAfghanistan.

11. *Id.* at report no. 33.

12. Mark Willacy, *Defence Force Relocates Key War Crimes Witness After Blast at Her NSW Home*, AUSTRALIAN BROADCASTING CORPORATION NEWS (Aug. 26, 2021), <https://www.abc.net.au/news/2021-08-26/defence-relocates-war-crimes-witness-after-blast/100407172>.

13. *Re Civilian Casualty Court Martial* (2011) 259 FEDERAL LAW REPORTS 208 (Austl.).

fire. The case is complex, but it appears that no war crimes charges were pursued due to “heat of battle” factual circumstances making it difficult to prove the commandos knew of the presence of civilians and children. The case was prosecuted as a Service Tribunal offence (discussed below) applying ordinary Australian criminal law. On appeal, the charges were dismissed as “wrong in law” following a finding that the Australian law of negligent manslaughter could not apply to these facts as no underlying civil duty of care existed between the soldiers and civilians in armed conflict.¹⁴ The case highlights the difficulty of prosecuting potential war crimes as service offences based upon “ordinary crimes,” rather than under the Rome Statute offences found in the Commonwealth Criminal Code.

Separately, and at least as early as 2014, Australian Department of Defence documents suggest knowledge of problems with the organizational culture of special forces, including “desensitisation” and “drift in values” as well as divisions and rivalry between “the SAS based in Perth and 2 Commando Regiment based in Sydney.”¹⁵ This led to the commissioning of sociologist Dr. Samantha Cromptvoets in 2015 to prepare a report into the organizational culture of the Australian SASR.¹⁶ Perhaps due to her status as a civilian outsider, but as one who had been directly appointed by the Chief of Defence, frontline personnel (known as “operators”) spoke to Cromptvoets frankly and candidly.¹⁷ Cromptvoets heard accounts of torture and indiscriminate fire on Afghan men, women, and children—albeit that these accounts were given in highly generalized terms and without identifying detail. More horrifyingly, such events were presented to her as “normal and recurring.”¹⁸ Her report was presented to the Chief of the ADF in two parts in January and February 2016.

14. Joshua Kelly, *Re Civilian Casualty Court Martial: Prosecuting Breaches of International Humanitarian Law Using the Australian Military Justice System*, 37 MELBOURNE UNIVERSITY LAW REVIEW 342 (2013).

15. Dan Oakes & Sam Clark, *The Afghan Files*, AUSTRALIAN BROADCASTING CORPORATION NEWS (July 11, 2017), <https://www.abc.net.au/news/2017-07-11/killings-of-unarmed-afghans-by-australian-special-forces/8466642?nw=0>.

16. Brereton Report, *supra* note 4, at 119.

17. Christopher Knaus, *Expert Whose Work Sparked War Crimes Inquiry Says Report Will Force Rethink of Special Forces Culture*, THE GUARDIAN (Nov. 15, 2020), <https://www.theguardian.com/australia-news/2020/nov/15/australian-war-crimes-inquiry-report-will-force-adf-to-re-think-special-forces-culture-expert-says>.

18. Rashida Yosufzai, *The Expert Whose Work Sparked the Afghan War Crimes Report Says the Alleged Conduct is “Unbelievable,”* SBS NEWS (NOV. 19, 2020), <https://www.sbs.com.au/news/the-expert-whose-work-sparked-the-afghan-war-crimes-report-says-the-alleged-conduct-is-unbelievable>.

Following the Cromptvoets report, the Inspector-General of the ADF appointed Justice Paul Brereton on May 12, 2016 to conduct a “scoping inquiry” into “whether there is any substance to persistent rumours of criminal or unlawful conduct by, or concerning, Special Operations Task Group (SOTG) deployments in Afghanistan during the period 2007 to 2016,” with a subsequent comprehensive investigation authorized on January 17, 2017.¹⁹ Notably, the Inspector-General is an independent statutory office holder outside the military chain of command with broad powers and responsibilities of oversight, review, and investigation of matters pertaining to military justice. Justice Brereton was authorized to consider whether there was “credible information or allegations which, if accepted, could potentially lead to a criminal conviction” but was not authorized to determine that any “criminal or disciplinary offence [had] been committed.”²⁰ His final report was transmitted to the Chief of the ADF on November 10, 2020.

The inquiry “reviewed over 20 000 documents and 25 000 images” and “interviewed 423 witnesses.”²¹ As an administrative inquiry conducted under the Defence Act, ADF personnel had no right to silence. Instead, witnesses enjoyed a qualified immunity, meaning information or documents obtained as a result of their evidence before the inquiry “are not admissible in evidence against the individual in any civil or criminal proceedings in any [Australian] court . . . , or [in] proceedings before a [Defence] Service Tribunal.”²² This does not, however, prevent such evidence being used against *other* persons in subsequent proceedings.²³ Nonetheless, the “Inquiry frequently encountered ‘resistance to interrogation’ techniques, in which Special Forces operators are trained, deployed against it in the course of interviews, by witnesses who did not want to give a full and frank account.”²⁴

During this period, the Australian Broadcasting Corporation began its “Afghan Files” reporting of whistleblower accounts and leaked documents relating to alleged war crimes committed by Australian Special Operations Task Group personnel in Afghanistan. In March 2019 the network broadcast

19. Brereton Report, *supra* note 4, at 45, 51. The enquiry was established under Section 110C of the Defence Act 1903 (Cth) (Austl.) and Regulation 87 of the Defence (Inquiry) Regulations 1985 (Cth) (Austl.).

20. Brereton Report, *supra* note 4, at 52.

21. *Id.* at 2.

22. *Id.* at 38. *See also* Defence Act 1903 (Cth) sec. 124(2CA) (Austl.) and the Inspector-General of the Australian Defence Force Regulation 2016 (Cth) reg. 32(2) (Austl.).

23. Brereton Report, *supra* note 4, at 39.

24. *Id.* at 37.

the helmet camera footage of Soldier C executing an unarmed, prostrate Afghan man holding nothing but prayer beads. This was the death of Mr. Dad Mohammad, described above.²⁵ This reporting was said to have “shocked the military establishment.”²⁶ This footage, in particular, may have made prosecutions before civilian courts inevitable. The “shadow” of the ICC may also have played a role, as discussed further below.

Prior to, and in obvious anticipation of, the release of the Brereton Report, the Prime Minister of Australia announced the establishment on November 12, 2020 of the Office of the Special Investigator (OSI).²⁷ The Special Investigator is to conduct investigations of possible crimes disclosed by the Brereton Report, gather evidence, and refer cases to the Commonwealth Director of Public Prosecutions. Reportedly, at least two high-profile lawyers were approached to fill the role and declined, given the “sensitive nature” of the cases.²⁸ On December 16, 2020 it was announced that Justice Mark Weinberg, an experienced federal and state-level judge and a former Commonwealth Director of Public Prosecutions, would take up the role.²⁹ The OSI commenced work on January 4, 2021. At the time of writing it has over fifty investigators and intelligence analysts recruited from state and federal jurisdictions, organized into ten teams. It is not presently planning to attempt direct investigations in Afghanistan.³⁰

The creation of the OSI and the possibility of proceeding before Australia’s ordinary courts was not inevitable. Certainly, Division 268 of the

25. Mark Willacy, *The Inquiry into Australian Soldiers in Afghanistan is Finally Over. The Reckoning is About to Begin*, AUSTRALIAN BROADCASTING CORPORATION NEWS (Nov. 18, 2020), <https://www.abc.net.au/news/2020-11-18/igadf-inquiry-into-special-forces-in-afghanistan-is-over/12816626>.

26. *Id.*

27. *Prime Minister Scott Morrison Outlines the Office of the Special Investigator*, AUSTRALIAN BROADCASTING CORPORATION NEWS (Nov. 12, 2020), <https://www.abc.net.au/news/2020-11-12/prime-minister-scott-morrison-office-of-the-special-investigator/12876254>.

28. Anthony Galloway & Nick McKenzie, *Former Federal Court Judge Appointed to Investigate Alleged War Crimes*, THE AGE (Dec. 16, 2020), <https://www.theage.com.au/politics/federal/former-federal-court-judge-appointed-to-investigate-alleged-war-crimes-20201216-p56o1f.html>.

29. Press Release, The Hon Peter Dutton MP, Office of the Special Investigator (Dec. 16, 2020), <https://minister.homeaffairs.gov.au/peterdutton/Pages/office-of-the-special-investigator.aspx>.

30. Senate of Australia, Legal and Constitutional Affairs Legislation Committee, Hearing of 25 October 2021, 54–55, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2F25201%2F0000%22>.

Commonwealth Criminal Code contains a comprehensive code of international crimes, including crimes against humanity, genocide, and war crimes applicable to the conduct of Australians (or, indeed, any person) anywhere in the world.³¹ This is unsurprising since Division 268 was enacted in 2002 to give effect to the ICC Rome Statute.³² Other than under federal criminal law, however, it is also possible to prosecute Australian service personnel for extraterritorial offences under Section 61 of the Defence Force Discipline Act 1982. Section 61 allows a Service Tribunal to prosecute (in closed proceedings) conduct anywhere in the world by an ADF member that would violate the criminal law applicable in the Australian federal territory of Jervis Bay. Such Section 61 offences are “complex in their application to ADF members” and underlay the unsuccessful prosecution in *Re Civilian Casualty Court Martial*.³³ The given reasons for pursuing the Commonwealth Criminal Code option in the wake of the Brereton Report were

that many of the suspected perpetrators are no longer serving and thus not amenable to Defence Force Discipline Act jurisdiction, that there are considerable overlaps in the conduct and individuals in question so that a single agency should be responsible for any criminal investigation, avoiding any potential problem with complementarity, and any arguable constitutional complication (for example, with the constitutional guarantee under s 80 of trial by jury).³⁴

Finally, it would theoretically have been possible for Australia to choose not to further investigate or prosecute the suspects in question and invite the ICC Office of the Prosecutor to do so. Politically, such an outcome would be undesirable, if not unthinkable. Indeed, a number of comments throughout the Brereton Report suggest that one concern (though not necessarily a preponderant one) was to ensure a thorough investigation precisely in order to preclude ICC involvement. Thus, the report notes that while national investigations may be painful, it “also ensures that the only courts current or former Australian Defence Force members may face are those established

31. This is known as “Extended Geographical Jurisdiction Category D” under Section 15.4 of the Code; it applies to genocide, crimes against humanity, and war crimes by virtue of Section 268.117.

32. The implementing legislation was the International Criminal Court (Consequential Amendments) Act 2002 (Cth) (Austl.).

33. Kelly, *supra* note 14, at 347.

34. Brereton Report, *supra* note 4, at 171.

by the laws of Australia.”³⁵ This may be taken as an oblique reference to ICC jurisdiction. It may also have been thought that prosecution for international crimes *as such* would more clearly operate to prevent the admissibility of individual cases before the ICC than prosecution of such conduct as a service offence based upon an “ordinary” domestic crime.

It is notable that responsibility for investigation and prosecution of Division 268 offences usually fall to ordinary civilian agencies—the Australian Federal Police and the Director of Public Prosecutions, albeit that proceedings for Division 268 offences can only be commenced with the written consent of the Attorney General.³⁶ There have to date been no such prosecutions in Australia. The creation of the OSI inserts an ad hoc investigatory body into the process, but prosecutions will remain a matter for the Director of Public Prosecutions. As noted, proceedings under the Defence Force Discipline Act would have occurred before a military service tribunal. The relevant investigatory body would have been the Joint Military Police Unit, and cases would have been brought by the Office of the Director of Military Prosecutions. Questions of the interaction between the Defence Force Discipline Act, the territory criminal law covered by Section 61, and the Commonwealth Criminal Code are historically complex and beyond the scope of this article.³⁷ Suffice to say that proceeding under Division 268, while inevitably complex, was quite possibly the simpler option than attempting to apply the Defence Force Discipline Act.

B. *Command Responsibility in the Brereton Report*

The essential vision of command responsibility put forward in the Brereton Report is one in which legal responsibility stops at the patrol commander level. The Report takes the view that command responsibility is also a moral concept and thus: “Special Operations Task Group troop, squadron and task group Commanders must bear moral command responsibility and accountability for what happened under their command and control . . . and [are] accountable for what happens ‘on their watch’, regardless of their personal knowledge, contribution or fault.”³⁸

35. *Id.* at 42.

36. Criminal Code Act 1995 (Cth) § 268.121 (Austl.).

37. *See, e.g.*, Judge Advocate General (Australia), Defence Force Discipline Act 1982: Report for the Period 1 January to 31 December 2002, ¶¶ 21–24 (2003), <https://nla.gov.au/nla.obj-2203652736>.

38. Brereton Report, *supra* note 4, at 32.

Disciplinary and administrative consequences are thus envisaged in the report, including the possibility of cancelling meritorious unit citations.³⁹ (The removal of such awards would be a purely administrative action, ordinarily within the authority of the Chief of the ADF. However, the decision to cancel such awards was overruled by the civilian Defence Minister Peter Dutton.⁴⁰) Nonetheless, the Report asserts that the inquiry found—in a passage worth quoting in full—

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. It is easy now, with the benefit of retrospectivity, to identify steps that could have been taken and things that could have been done. However, in judging the reasonableness of conduct at the time, it needs to be borne in mind that few would have imagined some of our elite soldiers would engage in the conduct that has been described; for that reason there would not have been a significant index of suspicion, rather the first natural response would have been disbelief. Secondly, the detailed superintendence and control of subordinates is inconsistent with the theory of mission command espoused by the Australian Army, whereby subordinates are empowered and entrusted to implement, in their own way, their superior commander's intent. That is all the more so in a Special Forces context where high levels of responsibility and independence are entrusted at relatively low levels, in particular to patrol commanders.⁴¹

It is important to understand the factual background against which this conclusion is framed, but before turning to that background, a number of critical observations should be made. First, terms such as “reckless indifference” do not appear in the Rome Statute and appear to refer to Australian criminal law conceptions of *mens rea*. The consequences of this difference are explored in Part III of this article. Second, the Report is correct in its assertion that failures of command responsibility are not to be judged with

39. *Id.* at 41.

40. Michelle Grattan, *View from the Hill: Dutton Humiliates Defence Force Chief Angus Campbell Over Citation*, THE CONVERSATION (Apr. 19, 2021), <https://theconversation.com/view-from-the-hill-dutton-humiliates-defence-force-chief-angus-campbell-over-citation-159243>.

41. Brereton Report, *supra* note 4, at 31.

20-20 hindsight, but against what could reasonably have been done at the time. However, in this assessment the idea that it was unimaginable that war crimes would be committed by well-trained soldiers is belied by the Report itself. A substantial section (Chapter 1.08) is dedicated to a history of Australian war crimes, including cases during the Vietnam War of liberal targeting of Vietnamese citizens by Australian troops and use of “throwdowns” to conceal potentially criminal conduct. The suggestion is not that such crimes are either common or widespread in professional militaries. However, history shows such crimes are plainly imaginable and the possibility of them occurring should have been within the contemplation of a professional force with a knowledge of its own history. Indeed, any competently run large organization should be aware that no matter how good one’s training or recruitment processes, a small percentage of people will inevitably abuse the power with which they are entrusted. This is an unfortunate fact of life to which competent leadership should be alert, at the very least as a matter of risk management.

Second, it is no answer to the requirements of the law to say that a particular “theory of mission command” makes compliance with the law difficult. We would not and do not countenance other professions entrusted with matters of life and death—surgeons, for example—claiming that compliance with their established practices should determine the limits of their legal liability. Accepted professional working methods may be a relevant consideration—especially in establishing what was reasonably feasible at the time—but they cannot override the law. In any event, it is not the case that the law of command responsibility requires micro-management of subordinates. It does, however, require a degree of alertness to the possibility of misconduct and a willingness to investigate if in possession of sufficient information to put one on notice that further inquiries should be made. The need for such alertness is only higher—not lower—when subordinates are trusted with substantial autonomy. That is, delegation of responsibility does not absolve a commander of responsibility, rather it imposes new duties “*of proper selection, instruction and follow up control.*”⁴²

Nonetheless, and particularly for civilian lawyers, it is important to understand the relevant context in Afghanistan in order to understand how the law of command responsibility might apply in these cases. Afghanistan itself is a mountainous environment, presenting some of the most challenging

42. KAI AMBOS, 1 TREATISE ON INTERNATIONAL CRIMINAL LAW: FOUNDATIONS AND GENERAL PART 296 (2d ed. 2021).

war-fighting terrain on Earth.⁴³ In this environment SASR patrols operate in groups of four to six men who “can be isolated for weeks, save occasional radio situation reports.”⁴⁴ While on operations “outside the wire” the patrol commander is typically a non-commissioned sergeant with potentially a decade or more of frontline fighting experience. Junior officers, captains, in command of SASR units at troop level “were usually located remotely from the target compound, in an overwatch position, and did not have visibility of events on the objective.”⁴⁵ Indeed, given the complexity of the terrain members of the same patrol might not have visibility of events occurring one valley away from their position. Thus, “the operation on the ground was effectively driven by the lead patrol commander.”⁴⁶ Unfortunately, this leads to a result that “to a junior Special Air Service Regiment trooper, the patrol commander is a ‘demigod’, and one who can make or break the career of a trooper.”⁴⁷ Loyalty flows to the patrol commander directing operations in the field, not the troop commander back on base. SASR captains might serve only one or two rotations in Afghanistan. In the words of one commentator:

if you keep the same squadron in Afghanistan and rotate people through it, it’s very clear that the sergeants and corporals will feel that they are the true custodians of the regiment. They largely pay lip service to inexperienced young officers who are most likely on their first tour, or the slightly less young majors in the command centre.

...

So, on operations the sergeants are running the show. Officers are flowing through and out. Some do come back to command, but they rarely step onto red earth; they are simply too valuable.⁴⁸

It is important to underscore that junior officers typically remained “inside the wire.” In the language of the Report, “it made perfectly good tactical sense for the Troop Commander to be in a position where he was out of the immediate fight on the ground, with good communications, and optimally

43. David Kilcullen, *Crossing the Line*, THE AUSTRALIAN (Nov. 21, 2020), at 17.

44. Jonathan Huston, *The Anatomy of the Special Air Service’s Descent into a One-Battalion Army*, THE STRATEGIST (Dec. 4, 2020), <https://www.aspistrategist.org.au/the-anatomy-of-the-special-air-services-descent-into-a-one-battalion-army/>.

45. Brereton Report, *supra* note 4, at 32.

46. *Id.* at 489.

47. Brendan Nicholson, *Investigation Uncovers Firm Evidence of Australian War Crimes in Afghanistan*, THE STRATEGIST (Nov. 19, 2020), <https://www.aspistrategist.org.au/investigation-uncovers-firm-evidence-of-australian-war-crimes-in-afghanistan/>.

48. Huston, *supra* note 44.

placed to co-ordinate air support.”⁴⁹ However, the result was that such commanders “were not well-positioned—structurally or geographically—to discover anything that the patrol commanders did not want them to know.”⁵⁰ These circumstances also fostered a sense that it was not for those “inside the wire” to challenge the accounts given by those who operated “outside the wire” whose “lives were in jeopardy.”⁵¹

It is also important to emphasize the background and status of troop-level commanders. Such junior officers were typically relatively young graduates of Royal Military College Duntroon and the ADF Academy (where they undertake, concurrent with military training, a bachelors degree). These new captains were considered to be, in part, “under training” from the sergeants ostensibly under their command.⁵² These sergeants held enormous power and status and there are reports that in at least one case a junior officer who raised concerns with SASR Command “about what was going on out on the patrols,” and who whistle-blew about the SASR culture of heavy drinking on base, was humiliated, ostracized, and effectively driven out of the SASR.⁵³ Junior officers in such a position were not necessarily supported; indeed, there was a “sink or swim” mentality held towards these officers-in-training by those above and below them.⁵⁴ The Report noted that “[w]ith the benefit of hindsight” there was an “erosion of the authority of the officers, and [evidence of] their insecurity” in an operational environment dominated by “powerful NCOs and experienced operators.”⁵⁵ It was under such circumstances that a “warrior culture,” including a sense that the rules do not apply to those who are “special,” took hold in some units. Thus, the Report found:

But for a small number of patrol commanders, and their protégées, [such crimes] would not have been thought of, . . . would not have begun, . . . would not have continued, . . . and . . . would have been discovered. It is overwhelmingly at that level that responsibility resides. Their motivation cannot be known with certainty, but it appears to include elements of an intention to “clear” the battlefield of people believed to be insurgents, regardless of Law of Armed Conflict; to “blood” new members of the patrol

49. Brereton Report, *supra* note 4, at 489.

50. *Id.* at 32.

51. *Id.* at 34.

52. *Id.* at 32.

53. Willacy, *supra* note 25.

54. Brereton Report, *supra* note 4, at 499.

55. *Id.* at 491.

and troop; and to outscore other patrols in the number of enemy killed in action achieved; superimposed on the personal psyche of the relevant patrol commander.⁵⁶

In any event, the key point to underscore is that patrol commanders involved in criminal acts were in a strong position to conceal their misconduct. “[A]n accumulation of practices, all of them apparently adopted for sound reasons” led to the position, noted above, that patrol commanders were well placed to conceal from troop commanders anything that they “did not want them to know.”⁵⁷ Thus, the Brereton Report concludes:

Compartmentalisation of information and misguided loyalty has significantly contributed to the concealment of misconduct and the difficulty of uncovering it. It is recognised that the close-holding of information is a necessary feature of military units generally, and it is accentuated in the sphere of special operations. . . .

...

It is evident that fear of the consequences of reporting misconduct to the chain of command has deterred some from doing so. In most cases, this is fear for career prospects, although in some there has been fear of physical reprisals. In any event, experience shows that where a complaint or report is adverse to a member’s chain of command, there are powerful practical constraints on making it.⁵⁸

The toxic culture which appears to have festered in some units was undoubtedly exacerbated by the high tempo of operations and the fact that many special forces personnel deployed repeatedly to Afghanistan in short time frames. This occurred despite the Army’s usual policy that such deployments should normally be followed by a year of service within Australia to allow personnel to regain resilience and reintegrate into their ordinary personal and family lives.⁵⁹ The exception that permitted redeployment was that special forces members could redeploy as “volunteers.” It is also true that Australia has fallen into a pattern of over-reliance on its special forces in Afghanistan. Politically, it has been seen as lower risk to repeatedly deploy special forces personnel rather than conventional infantry, given the smaller

56. *Id.* at 30–31.

57. *Id.* at 31.

58. *Id.* at 326.

59. *Id.* at 252.

numbers, elite training, and high skill levels of those forces.⁶⁰ This has led to criticisms that the Australian SASR was not being used for its original function of reconnaissance behind enemy lines and limited counter-terrorism operations, but as an “uber-infantry battalion” to conduct tasks which would normally fall to the “regular infantry who were trained and equipped to clear villages, conduct searches and sniper operations, and seize and hold ground.”⁶¹ As the Brereton Report puts it:

While, because of the standard of their training and their professional skill levels, as well as their high degree of readiness and their flexibility, the Special Forces provide an attractive option for an initial deployment, it is a misuse of their capability to employ them on a long term basis to conduct what are essentially conventional military operations. Doing this on a protracted basis in Afghanistan detracted from their intended role in the conduct of irregular and unconventional operations, and contributed to a wavering moral compass, and to declining psychological health.⁶²

This set of circumstance should, however, have called for heightened concern for, and scrutiny of, the moral welfare of personnel being pushed to their limits.

There are other reasons to take the conclusion that a conspiracy of silence meant no one at the level of captain or above had any knowledge with a grain of salt. At the least, the international law of command responsibility applies where a responsible commander knew enough that they should have initiated further inquiries.⁶³ There was certainly evidence that could have indicated that something was going wrong. First, there were the “persistent rumours of criminal or unlawful conduct” noted in the Brereton Report’s terms of reference. While these may have begun sometime after the fact, with whistleblowers or accomplices who had attacks of conscience, the obligation of command responsibility is to *prevent* future crimes or *punish* past ones.

60. Neil James, *Special Forces Issues Have Deep Historical Roots*, THE STRATEGIST (OCT. 22, 2019), <https://www.aspistrategist.org.au/special-forces-issues-have-deep-historical-roots/>.

61. Huston, *supra* note 44.

62. Brereton Report, *supra* note 4, at 325.

63. DOUGLAS GUILFOYLE, INTERNATIONAL CRIMINAL LAW 335 (2016); GERHARD WERLE & FLORIAN JESSBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 272 (4th ed. 2020) (arguing that the ICC Statute imposes a higher duty than this, applying command responsibility to military superiors who “would have gained knowledge of the commission of the crime” had they properly exercised their duties).

Second, at least one officer admitted to the Brereton inquiry that he had actual knowledge of the practice of using throwdowns. Thus,

By late 2012 to 2013 there was, at troop, and possibly up to squadron level, suspicion if not knowledge that throwdowns were carried, but for the purpose of avoiding questions being asked about apparently lawful engagements when it turned out that the person killed was not armed, as distinct from facilitating or concealing deliberate unlawful killings. While dishonest and discreditable, it was understood as a defensive mechanism to avoid questions being asked, rather than an aid for covering up war crimes.⁶⁴

However, in exonerating higher levels of leadership by finding that the “use of throwdowns to conceal deliberate unlawful killings was not known to commanders,”⁶⁵ the Report does not ask the next obvious question. Was suspicion of use of throwdowns of itself enough that further inquiries should have been conducted, enquiries which if conducted diligently might have exposed what was occurring? The logic of the Brereton Report is that so long as a non-war crime rationale, albeit still a wrongful and potentially criminal rationale,⁶⁶ can be found for misconduct no further duty of enquiry arises. Can this be a correct statement of the law? Or of the level of diligence, or simple curiosity, we should expect from commissioned officers?⁶⁷

Third, there is the fact that operational reports of engagements that ended in an Afghan national being killed used “boilerplate” language (to indicate or fabricate compliance with rules of engagement) so frequently that a new directive on reporting was issued.⁶⁸ This was done so that higher command could understand the actual basis on which targeting decisions had been made. Thus, the Report finds that there “may well have been a sense . . . that the ROE were being exploited, and lethal force was being used very readily” given the number of persons classed as “enemies killed in action” who were “found to be unarmed, or armed with only a pistol, grenade or ICOM, but [were held] to have been ‘manoeuvring tactically against the [Force Element].’”⁶⁹ However, while this sense was likely felt “at least up to

64. Brereton Report, *supra* note 4, at 31.

65. *Id.*

66. It is, for example, an offence to create false documentary records with an intention to deceive. Defence Force Discipline Act 1982 (Cth) §§ 55.1.

67. Indeed, the Report itself notes a level of “abandoned curiosity” regarding “matters which ought to have attracted attention.” Brereton Report, *supra* note 4, at 496.

68. Brereton Report, *supra* note 4, at 298–99; *see also id.* at 36.

69. *Id.* at 495.

Squadron level,” Brereton found it fell “well short of knowledge, information, or even suspicion that prisoners were being killed.”⁷⁰ Charitably put, this is salami-slicing. It is another example of the Report’s presumption that the facts must give rise to *suspicion of the precise war crime actually committed* before superior responsibility is legally engaged.

Fourth, local complaints by Afghan nationals of unlawful killings were received—indeed some were transmitted by the International Committee of the Red Cross—but were dismissed as insurgent propaganda or compensation-seeking.⁷¹ Thus, where “tribal elders had made an allegation that coalition forces had shot a local national, killing him, but they had not witnessed the incident and could not provide the names of other witnesses” the usual reaction was to dismiss such complaints as false. The presumption being that elders had either been coerced into or were willingly supporting “insurgent messaging.”⁷²

At the least, these four matters should have raised a set of concerns regarding very liberal interpretations of ROE which could obviously be resulting in non-combatant deaths. Such deaths were both tragically unnecessary and had the obvious capacity to undermine counter-insurgency objectives by turning the local population against Australian forces. However, a key difficulty in “connecting the dots” was that all such investigations appeared to be ad hoc. It does not seem as though anyone in the ADF Investigative Service (ADFIS) had a view of the bigger picture. The high tempo of operations meant there was also considerable turn-over of commanders at the troop and squadron level. This may have prevented any one person knowing enough to have engaged a legal obligation to know more. If this is the case, as it appears to be, it does not reflect well on organizational leadership within the ADF.

To the extent that incidents were investigated by ADFIS, the Special Operations Task Group exhibited “a general and systematic resistance towards ADFIS’ independent investigative process[es].”⁷³ This pattern of obstruction was facilitated in part by task group legal officers. It appears such legal officers, in part, lost their way by forgetting that their client was the Commonwealth of Australia and not the task group; instead, some “perceived their role as being to act for SOTG or its members.”⁷⁴ The Brereton

70. *Id.*

71. *Id.* at 34, 112, 359, 362, 446, 450, 464, 525.

72. *Id.* at 359, 525.

73. *Id.* at 420.

74. *Id.* at 114–15.

Report reveals a complex environment in which the task group was both *not legally required to cooperate* with ADFIS investigations, and in which the Joint Taskforce 633 Commander had—on at least one occasion—to delicately negotiate ADFIS access to a base and give “space” to the troop-level commander to “make the right decision” and permit access or risk “fundamentally compromis[ing] the whole command relationship.”⁷⁵ That is, the Joint Taskforce Commander felt that had he ordered the troop commander to allow ADFIS access, that would have compromised his ability to retain a command relationship in respect of the troop commander.

In any event, the next relevant question is how the international and Australian law of command responsibility may apply to these facts.

III. THE INTERNATIONAL LAW OF COMMAND RESPONSIBILITY

A. Introduction

The purpose of Part III of the article is to consider how the *international law* of command responsibility might apply to the facts as found in the Brereton Report, so we can then ask how Australian law measures up against it. Before turning to the responsibility of commanders for war crimes, we should return briefly to the substantive offences uncovered by the Brereton Report. The conflict in Afghanistan involves coalition forces fighting against non-State armed groups including the Taliban and al-Qaeda. Consequently, the relevant international humanitarian law that applies is Common Article 3 of the Geneva Conventions and Additional Protocol II to the Geneva Conventions, which are applicable in non-international armed conflicts. The allegations in the Report cover only two war crimes: unlawful killing of civilians or prisoners, and cruel treatment. Such crimes fall within Common Article 3, which provides that persons who are *hors de combat* (no longer taking active part in hostilities) shall be treated humanely. It prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” against such protected persons. Article 4 of Additional Protocol II prohibits the same conduct and also includes an obligation to protect the civilian population (under Article 13).

The applicable Australian law is found in the Commonwealth Criminal Code Act 1995. As noted, all of the Australian war crimes provisions apply

75. *Id.* at 424–25.

extraterritorially.⁷⁶ In particular, Section 268.70 proscribes the war crime of murder: causing the death of one or more persons who are *hors de combat*. Violation brings a penalty of life imprisonment. This would apply to the killings of civilians and captured prisoners as we understand them to have occurred. The war crime of cruel treatment is covered by Section 268.72, under which it is an offence to “inflict severe physical or mental pain or suffering upon one or more persons” *hors de combat*. This is punishable by twenty-five years imprisonment. It is not clear on the face of the redacted Report precisely what conduct has been categorized as cruel treatment, so it is not possible to consider whether such conduct would also, or alternatively, amount to torture under Section 268.73 (also punishable by twenty-five years imprisonment). The essential point being that these are clearly defined offences in international and Australian law to which command responsibility might attach.

For present purposes, the best source of international law on command responsibility is Article 28 of the Rome Statute of the International Criminal Court.⁷⁷ This follows for several reasons. In drafting Article 28 a group of 148 States had the opportunity to reflect upon and (to the extent they considered it correct) codify the jurisprudence of the ad hoc International Criminal Tribunals for Yugoslavia and Rwanda (ICTY and ICTR, respectively). Article 28 also draws a number of concepts, and some of its language, from Additional Protocol I (API) to the 1949 Geneva Conventions.⁷⁸ API has 174 State parties. Given these origins, Article 28 is, pragmatically, our best evidence for what the generally accepted standard for command responsibility is in international law. Further, Australia is, as noted, a party to the Rome Statute and has incorporated Article 28 into its national law (albeit with some variations).

In sum, the elements of command responsibility under the ICTY and ICTR statutes and jurisprudence are usually taken to be: (1) the existence of a commander-subordinate relationship; (2) that the commander failed to take reasonable and available measures to prevent or punish the crimes of

76. See Criminal Code Act 1995 (Cth) §§ 15.4, 268.117 (Austl.).

77. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

78. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, July 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

subordinates; and (3) a culpable mental state (*mens rea*).⁷⁹ The Rome Statute reflects these elements and specifically adds to this a further element of causation: (4) the crimes must have occurred as “a result of” a commander’s failure to act. These elements, however, leave a degree of critical detail to be filled in. Namely, what is the nature of this form of criminal responsibility—does it entail accessorial responsibility for the underlying crime, or is it a freestanding offence?; what mental state is sufficient to incur responsibility?; and how flexible or contextually sensitive is the doctrine? These general questions will be addressed briefly before turning to the content of Article 28 in particular.

As to the first question, it is now generally agreed that superior responsibility under the Rome Statute results in culpability for the crimes that occurred as a consequence of the superior’s failure to prevent or punish them.⁸⁰ That is, superior responsibility is a mode of participation in a crime or a form of accessorial liability and not a separate, freestanding dereliction of duty offence.⁸¹ This is an issue not merely of classification but of potential consequence—especially as regards “fair labelling” and potential judicial reluc-

79. *See, e.g.*, Prosecutor v. Milutinović et al., Case No. IT-05-87-T, Judgment, ¶¶ 113–23 (Int’l Crim. Trib. for the former Yugoslavia Feb. 26, 2009). Commentary in: WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 607–19 (2d ed. 2016); ROBERT CRYER ET AL., *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 370–77 (4th ed. 2019); WERLE & JESSBERGER, *supra* note 63, at 225–32; Ambos, *supra* note 42, at 276; GUILFOYLE, *supra* note 63, at 332–38.

80. CRYER ET AL., *supra* note 79, at 378. On the duty to punish, see also Brian Finucane, *U.S. Recognition of a Commander’s Duty to Punish War Crimes*, 97 *INTERNATIONAL LAW STUDIES* 995 (2021).

81. On its face the Rome Statute provision is not a “crime of omission” but rather one of liability “for the crime of his or her subordinates.” WERLE & JESSBERGER, *supra* note 63, at 223–24. Nonetheless, the doctrine has, as a matter of customary international law and in some national legal systems, certainly been theorized as a dereliction of duty offence. CRYER ET AL., *supra* note 79, at 377–78; Ambos, *supra* note 42, at 257–61, 287 (where Ambos argues the Rome Statute embodies an offence of direct responsibility for failure of repression *plus* vicarious or accomplice liability for the resultant crimes); CASSANDRA STEER, *TRANSLATING GUILT: IDENTIFYING LEADERSHIP LIABILITY FOR MASS ATROCITY CRIMES* 263–64 (2017) (arguing for the separate crime approach in general but acknowledging the Rome Statute suggests a “move away from this understanding” towards the mode of liability approach). For a robust defense of command responsibility as being “a justified extension of aiding and abetting by omission,” see Darryl Robinson, *A Justification of Command Responsibility*, 28 *CRIMINAL LAW FORUM* 633, 638 (2017).

tance to apply the doctrine to geographically and structurally remote commanders.⁸² That is, it might be more palatable to convict a structurally remote superior at a higher level of command for a dereliction of duty regarding offences committed on the front lines than as having *participated in* that crime. In a case where such a superior did not encourage, or willingly turn a blind eye, then a dereliction of duty offence might be thought to reflect relatively precisely their degree of culpability. Similarly, a commander at brigade level could be convicted for failures of oversight resulting in war crimes but (using the Brereton Report as an example) their degree of culpability and sentence might be slight where there was evidence that information was actively concealed from them by the lower ranks. This is not, however, how command responsibility works as a legal doctrine under the Rome Statute or Australian federal law. Rather, one is held guilty *of* the crimes committed by subordinates. In this case, the “fair labelling” question is who deserves to be held guilty of *having committed or participated in* the war crimes themselves? Applying such direct responsibility too far up the chain of command may seem a harsh outcome. In some cases, such considerations do appear to have informed judicial misgivings about applying the doctrine to “remote” commanders.⁸³

As regards the culpable mental state required, there are essentially three possibilities: strict liability (a commander is always responsible for subordinates’ crimes); actual knowledge (a commander is responsible for crimes they knew had occurred or were about to occur); and some intermediate standard of constructive or imputed knowledge which will turn on showing the commander knew enough that their failure to take further action should be considered culpable (be that willful blindness, recklessness, or a requirement of due diligence). Notably, it is widely accepted that command responsibility is not a doctrine of strict liability and that proof of actual knowledge on the part of a commander of subordinates’ crimes will always be sufficient to give rise to culpability.⁸⁴ The question is how to frame what falls between.⁸⁵ The

82. On fair labelling in international criminal law, see Douglas Guilfoyle, *Responsibility for Collective Atrocities: Fair Labelling and Approaches to Commission in International Criminal Law*, 64 CURRENT LEGAL PROBLEMS 255 (2011); STEER, *supra* note 81, at 264–65, 380–83. On the risks of over-stigmatizing commanders on the basis of mere negligence rather than active participation in crimes, see Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AMERICAN JOURNAL OF COMPARATIVE LAW 455, 463 (2001).

83. See discussion *infra* regarding the *Bemba* case.

84. SCHABAS, *supra* note 79, at 615.

85. GUILFOYLE, *supra* note 63, at 334–36.

Rome Statute speaks in this regard of a military commander who “knew, or owing to the circumstances at the time, should have known.”⁸⁶

Finally, we should note that superior responsibility embodies a degree of flexibility. The key question is the “degree of effective control” a commander exercises over subordinates.⁸⁷ This factual and contextual inquiry will determine the limits of what a commander could, in practice, have done to prevent or punish crimes. A commander is “not obliged to do the impossible.”⁸⁸

B. Article 28 of the Rome Statute

The ICC Statute distinguishes between military and other superiors (e.g., civilian officials), somewhat controversially establishing a less stringent standard of responsibility for the latter. Nonetheless, only the standard applicable to military superiors is relevant here. To this end Article 28(a) provides that:

A military commander . . . shall be criminally responsible for [international] crimes . . . committed by forces under his or her effective command and control . . . as a result of his or her failure to exercise control properly over such forces, where:

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

(ii) That military commander . . . failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.⁸⁹

Somewhat controversially, Article 28(b) of the Rome Statute confirmed the jurisprudence of the ICTY and ICTR that command responsibility could extend to other superior-subordinate (i.e., civilian) relationships outside a military (or military-like) chain of command. However, in doing so, it set a different mens rea requiring that: “The superior either knew, or *consciously*

86. Rome Statute, *supra* note 77, art. 28(a)(i).

87. Prosecutor v. Orić, Case No. IT-03-68-T, Judgment, ¶ 329 (Int’l Crim. Trib. for the former Yugoslavia June 30, 2006). See to similar effect, Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08-A, Judgment on Appeal against Trial Chamber III’s “Judgment Pursuant to Article 74 of the Statute,” ¶ 169 (June 8, 2018) [hereinafter *Bemba Gombo*, Judgment on Appeal].

88. *Id.*

89. Rome Statute, *supra* note 77, art. 28(a).

disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.”⁹⁰ This provision is notable for two reasons. First, it indicates that the threshold for responsibility applied to military commanders is lower than that applied to civilian superiors. This is justifiable by, *inter alia*, the greater powers of effective control afforded by military discipline. Second, as we shall see, the “should have known” standard is replaced by the concept of recklessness in the Australian statutory provisions on military command responsibility. As discussed further in Part III, it appears that this was done to “translate” relevant Rome Statute concepts into Australian law. However, recklessness under the Australian Commonwealth Criminal Code would appear to set a different and higher threshold for the culpability of military commanders.

In any event, other than drawing on the ICTY and ICTR case law noted above, the drafting of Article 28 also plainly draws on Articles 86(2) and 87(1) of API to the 1949 Geneva Conventions. Those sections read in relevant part:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility . . . if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.⁹¹

The High Contracting Parties . . . shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.⁹²

While, strictly speaking, API does not apply to a NIAC such as the situation in Afghanistan, its language was drawn upon in drafting the doctrine of command responsibility for the purposes of the Rome Statute as regards all “core” international offences and war crimes. Given the Rome Statute’s widespread ratification it may represent a generally accepted standard. This makes determinations about how Article 28 should be applied of potential

90. *Id.* art. 28(b)(i) (emphasis added).

91. Additional Protocol I, *supra* note 78, art. 86(2).

92. *Id.* art. 87(1).

relevance to States not party to the Rome Statute as, to the extent Article 28 is congruent with other widely accepted sources, there is an argument that it may represent customary international law.

Returning to the facts of the Brereton Report, we can take it that neither the existence of a commander-subordinate relationship nor the failure to take measures to prevent the commission of war crimes are in question. The critical questions in the Australian context will thus be: (1) the required culpable mental state; and (2) the Rome Statute test of causation (introduced by the requirement that such crimes occurred “as a result of his or her failure to exercise control properly”). It is therefore useful to turn to the ICC case law on point.

C. ICC Case Law on Command Responsibility

For better or worse, there has only been one case to date before the ICC in which the question of how to interpret Article 28 has been considered: *Prosecutor v. Bemba Gombo*.⁹³ Unfortunately, at each stage of proceedings the Pre-Trial Chamber, Trial Chamber, and Appeals Chamber took different approaches to critical issues. The first issue is the question of the mental element to be proved, the second is the role of causation as an element of this form of liability (or whether it is an element at all).

The Pre-Trial Chamber was the only chamber to address the question as to what, other than actual knowledge, constitutes a sufficient mens rea for command responsibility. It held that the “should have known” standard imposed a stringent requirement of due diligence:

Thus, it is the Chamber’s view that the “should have known” standard requires more of an *active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops* and to inquire, regardless of the availability of information at the time on the commission of the crime. The drafting history of this provision reveals that it was the intent of the drafters to take a more stringent approach towards commanders and military-like commanders compared to other superiors that fall within the parameters of article 28(b) of the Statute. This is justified by the nature and type of responsibility assigned to this category of superiors.⁹⁴

93. *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute (Mar. 21, 2016).

94. *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08-T, Decision on Confirmation of Charges, ¶ 433 (June 15, 2009) (footnotes omitted) (emphasis added).

In support of its reasoning, the Pre-Trial Chamber cited the ICTY Trial Chamber decision in *Blaskic* of 2000. The Chamber does not elaborate much further beyond the passage quoted. Nonetheless, it does appear to set here a very high standard: that irrespective of any immediately available information suggestive of a crime having occurred, a superior is under a continual duty to “secure knowledge of the conduct of his troops.”⁹⁵ This to some extent elides the “dereliction of duty” understanding of command responsibility into the accessorial liability conception: a failure of the duty of supervision is enough to mean one “should have known.” ICTY case law, however, did not always speak with one voice on this question and the standard is not uniformly set so high. Other, later, ICTY jurisprudence, such as the Appeals Chamber decision in *Delalic*, held that it is enough to satisfy the mens rea that a commander possessed sufficient information to put him on notice of the risk of such offences and the need for additional inquiries.⁹⁶ Thus, if the standard to be applied is either that articulated by the Pre-Trial Chamber in *Bemba* or the ICTY in *Delalic* then a case could be made that a hypothetical commander could incur responsibility for the international crimes of subordinates if either: (a) they failed to take “necessary measures to secure knowledge of the conduct of [their] troops;” or, alternatively, (b) possessed sufficient facts to suggest the need for further inquiries but did nothing.

Either view should be worrying for Australian military commanders. On its face, not enough was done at the time to “secure knowledge” of what troops were actually doing. To the objection that circumstances made obtaining such information difficult, Justice Brereton’s own inquiry makes the answer that obtaining the relevant information was by no means impossible. Even on the less stringent *Delalic* view, any commander with knowledge of the use of throwdowns or of complaints by Afghan nationals of unlawful killings should have made further inquiries.

Is this, however, the settled jurisprudence of the ICC? The answer is that it is difficult to know. The Trial Chamber in *Bemba* did not address the issue at all, convicting Mr. Bemba on the basis that he had actual knowledge of the crimes of his subordinates.⁹⁷ The Appeals Chamber, however, overturned Mr. Bemba’s conviction. It did so not in relation to mens rea, but on

95. *Id.*

96. Prosecutor v. Delalić et al., Case No. IT-96-21-A, Judgment, ¶¶ 238–39 (Int’l Crim. Trib. for the former Yugoslavia Feb. 20, 2001).

97. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08-T, Decision on Sentence Pursuant to Article 76 of the Statute (June 21, 2016).

the question whether he had taken reasonable and available measures to prevent or punish the crimes of his subordinates. In particular, the majority in the Appeals Chamber found that “the Trial Chamber erred by failing to properly appreciate the limitations that Mr Bemba would have faced in investigating and prosecuting crimes as a remote commander sending troops to a foreign country.”⁹⁸

In so finding, it appears to have accepted the defense submission that “the Trial Chamber did not take into account what was feasible and possible for him in the circumstances, given the ‘unique conditions of this case.’ . . . [including] that his case was one of non-linear command.” Thus, the Appeals Chamber found that “the Trial Chamber paid insufficient attention to the fact that the MLC troops were operating in a foreign country with the attendant difficulties on Mr Bemba’s ability, as a remote commander, to take measures.”⁹⁹

It is not controversial, indeed it is foundational, that the doctrine of command responsibility does not require a superior to do the impossible. The substance of the finding in *Bemba* is that in judging whether a commander has taken “all necessary and reasonable measures” to prevent or punish the commission of crimes by subordinates one must consider factors including whether a commander’s geographic and structural remoteness from crimes attenuates their material power to prevent or punish such crimes. Mr. Bemba’s acquittal drew widespread criticism on the basis that the Appeals Chamber had introduced a new, lower standard applicable to “remote commanders.”¹⁰⁰ This is not an entirely fair reading. To the extent the case stands for any generalizable proposition it is likely only that “the remoteness of a commander may be a relevant fact rather than the basis of a legal distinction” in assessing the measures practically open to a military commander charged with the suppression of crimes by subordinates.¹⁰¹ Thus the position of the majority appeared to rest on the concept of effective control, albeit with an assumption that the greatest material power to repress crimes rests with

98. *Bemba Gombo*, Judgment on Appeal, *supra* note 87, ¶ 189.

99. *Id.* ¶ 171 (footnotes omitted).

100. See, e.g., Leila Nadya Sadat, *Prosecutor v. Jean-Pierre Bemba Gombo*, 113 AMERICAN JOURNAL OF INTERNATIONAL LAW 353, 358 (2019); and more forcefully, Leila Nadya Sadat, *Fiddling While Rome Burns? The Appeals Chamber’s Curious Decision in Prosecutor v. Jean-Pierre Bemba Gombo*, EJIL:TALK! (June 12, 2018), <https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo/> [hereinafter *Fiddling While Rome Burns?*].

101. Miles Jackson, *Geographical Remoteness in Bemba*, EJIL:TALK! (July 30, 2018), <https://www.ejiltalk.org/geographical-remoteness-in-bemba/>.

those commanders closest to them in time and space. Judges Van Den Wyngaert and Morrison of the majority explained the point in their separate opinion thus:

what is required of a commander, both in terms of how closely they should monitor the troops and in terms of what measures they are expected to take to prevent criminal behavior, depends on how proximate they are to the physical perpetrators in the chain of command. The primary obligation to prevent/repress/refer criminal behavior rests upon the immediate commander of the physical perpetrator (that is, the platoon or section commander). This follows from the fact that article 28 of the Statute requires the commander to have effective control. It is simply impossible for senior commanders to control hundreds or thousands of individual troops effectively. This is the role of those who work closely with them in the field.¹⁰²

This is consistent with established case law holding that leaders with “over-all command” but principally logistical or strategic duties will not attract criminal responsibility on that basis alone.¹⁰³ The judges went on to reason:

The main responsibility of the higher-level commander is to make sure that the unit commanders are up to the task of controlling their troops. It is not the task of the higher-level commander to micro-manage all lower level commanders or to do their jobs for them. The duty of higher-level commanders is to ensure that those immediately under them comply with their obligations. . . . It is important not to get into a mind-set that gives priority to the desire to hold responsible those in high leadership positions and to always ascribe to them the highest levels of moral and legal culpability.¹⁰⁴

Some have characterized this second passage, with its focus on senior commanders, as being at odds with prior case law which made no such distinction.¹⁰⁵ However, the phrase “main responsibility” should not necessarily be taken to exonerate commanders at a higher-level from all responsibility as regards crimes committed at the front lines nor should this emphasis be

102. *Bemba Gombo*, Judgment on Appeal, *supra* note 87, Separate Opinion of Wyngaert, J., and Morrison, J., ¶ 33.

103. ROGER O’KEEFE, INTERNATIONAL CRIMINAL LAW 203 (2015) (quoting *Halilović*, Appeals Chamber Judgment, ¶ 214).

104. *Bemba Gombo*, Separate Opinion of Wyngaert, J., and Morrison, J., ¶¶ 34–35.

105. Sadat, *Fiddling While Rome Burns?*, *supra* note 100.

taken as rejecting principles established in ICTY case law.¹⁰⁶ Rather, the case may turn on its own facts. The majority in the Appeals Chamber found the case against Mr. Bemba so weak as to require them to overturn Trial Chamber fact finding in order to prevent a miscarriage of justice.¹⁰⁷ In such “situations of perceived over-inculpation, judges tend to seek a limiting device,” such as geographical remoteness.¹⁰⁸ In any event their honors, regrettably, did not go on to give examples of what the responsibilities of senior commanders might actively entail. Nonetheless, from the context of the case one might infer they considered it sufficient that Mr. Bemba, inter alia, made efforts to establish a commission of inquiry.

Despite this finding being the basis of the acquittal in *Bemba*, the separate opinions of the judges notably divided on the mens rea requirement. The minority, Judges Monageng and Hofmański, held:¹⁰⁹ “article 28(a)(i) of the Statute establishes, in effect, a unitary standard for the mental element and that the difference between the ‘knew’ and the ‘should have known’ standards has no practical consequence for the purpose of triggering liability.” Thus:

Liability under article 28 (a) of the Statute is triggered irrespective of which of the two standards is satisfied. As long as it is established that the commander, owing to the circumstances at the time should have known that the forces under his effective control were committing or about to the [sic] commit the crimes charged, the mental element of article 28 of the Statute is satisfied. We note that, in particular as far as commanders removed from the crime scene are concerned, it will be often difficult to neatly distinguish between knowledge of the (imminent) commission of crimes and the “should have known” standard. Given that it is irrelevant for the commander’s criminal liability whether he or she “knew” of the subordinates’ crimes, of [sic] “should have known” of them, there is *therefore no reason to require a trial chamber to make a clear distinction between the two standards*.¹¹⁰

106. Galand finds the views of Judges Van den Wyngaert and Morrison consistent with ICTY case law, especially as regards the legitimacy of a senior commander establishing commissions of inquiry as a bona fide means of investigating potential war crimes. Alexandre Skander Galand, *Bemba and the Individualisation of War: Reconciling Command Responsibility under Article 28 Rome Statute with Individual Criminal Responsibility*, 20 INTERNATIONAL CRIMINAL LAW REVIEW 669, 679 (2020).

107. *Bemba Gombo*, Judgment on Appeal, *supra* note 87, ¶ 40.

108. Jackson, *supra* note 101.

109. *Bemba Gombo*, Judgment on Appeal, *supra* note 87, Dissenting Opinion of Monageng, J. and Hofmański, J., ¶ 266.

110. *Id.* ¶ 265 (emphasis added).

That is, Judges Monageng and Hofmański appear to view Article 28 as establishing one mens rea standard that can be proven one of two ways. They appear to take this view based on, in part, the fact that actual knowledge can be proven by circumstantial evidence and that this may blur the distinction between actual and constructive knowledge. With respect, this view lacks any appreciable foundation in scholarship or case law. Judges Van Den Wyngaert and Morrison were right to point out in this regard that the two different mental standards may have consequences for how the prosecution or defense run their cases:

What the Prosecution must plead and prove therefore depends on which of the two alternatives the Prosecution alleges. If the Prosecutor alleges that the accused “should have known”, the questions that arise are (a) what information did the commander have at which point in time and (b) what did the commander do with this information, if anything? It should be noted, in this regard, that a commander may take all reasonable steps to follow up on the information and still not acquire actual knowledge of criminal activity. By contrast, if it is established that the commander had knowledge, the question that must be answered is: what would a reasonable commander in the position of the accused have done to prevent/repress/refer the criminal conduct of his/her subordinates in light of the information he/she actually had.¹¹¹

The introduction of a causation requirement into the Article 28(a) definition of command responsibility has also engendered a degree of both controversy and confusion. At one level, we normally require that accused individuals “must contribute in some way to a crime to be a party to it.”¹¹² Yet a failure to punish after the fact cannot cause an event to occur, and even a failure to take steps which might have prevented an outcome cannot be said—in any ordinary sense—to have directly caused that outcome. Thus, the case law of the ICTY held that under customary international law, the prosecutor need *not* prove that “a superior’s failure to take the necessary and reasonable measures . . . caused [the] crimes” to occur in order to convict on the basis of command responsibility.¹¹³ Nonetheless, confronted with the

111. *Bemba Gombo*, Separate Opinion of Wyngaert, J. and Morrison, J., ¶ 39.

112. Robinson, *supra* note 81, at 634.

113. *Compare* Prosecutor v. Milutinović et al., Case No. IT-05-87-T, Judgment, ¶ 122 (Int’l Crim. Trib. for the former Yugoslavia Feb. 26, 2009) *with* Prosecutor v. Orić, Case No.

ICC Statute's causation requirement, how is it to be applied? Several options have been presented in the literature. One is a theory of causation, the so-called guarantor position doctrine,¹¹⁴ under which a superior has a duty to exercise proper control at all times over subordinates sufficient to prevent crimes. Thus, any failure to exercise proper control may be said to have resulted in the crimes.¹¹⁵ Alternatively, Kai Ambos has suggested: "it is sufficient that the supervisor's failure of supervision increases the risk that the subordinates commit certain crimes."¹¹⁶

Again, the approach to this issue in *Bemba* is fragmented. Judges Monageng and Hofmański in their dissenting opinion took a view similar to Ambos,¹¹⁷ explaining:

it may only be said that the subordinates' crimes are the *result* of the commander's failure to exercise control properly if there is a close link between the commander's omission and the crimes. Based on a comparative assessment of domestic approaches to causation in cases of omission, Judge Steiner, in her separate opinion [in the Trial Chamber], concluded that the "result"-element would be established if "there is a *high probability* that, had the commander discharged his duties, the crime would have been prevented or it would not have been committed by the forces in the manner it was committed". In our view, this test indeed is appropriate in the circumstances.¹¹⁸

IT-03-68-T, Judgment, ¶ 338 (Int'l Crim. Trib. for the former Yugoslavia June 30, 2006); Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Chamber Judgment, ¶¶ 75–77 (Int'l Crim. Trib. for the former Yugoslavia July 29, 2004); and Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47-A, Judgment ¶¶ 38–42 (Int'l Crim. Trib. for the former Yugoslavia Apr. 22, 2008).

114. Roberta Arnold & Otto Triffterer, *Article 28: Responsibility of Commanders and Other Superiors*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT OBSERVERS' NOTES, ARTICLE BY ARTICLE 835 ¶ 109 (Otto Triffterer ed., 2d ed. 2006).

115. WERLE & JESSBERGER, *supra* note 63, at 233.

116. Kai Ambos, *Superior Responsibility*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 860 (A. Cassese et al. eds., 2002); Ambos, *supra* note 42, at 215, 302.

117. See also Kai Ambos, *Critical Issues in the Bemba Decision*, LEIDEN JOURNAL OF INTERNATIONAL LAW 715, 715–26 (2009).

118. *Bemba Gombo*, Judgment on Appeal, *supra* note 87, Dissenting Opinion of Monageng, J. and Hofmański, J., ¶ 339.

This seems a sensible approach. Any assessment of causation in such cases will necessarily involve some consideration of counter-factual scenarios. A probabilistic assessment is likely the best that can be established. The words “high probability” may, however, need to be taken with a grain of salt—at least in the circumstances of regular armed forces. The probability of a military commander influencing events will be a function of the degree of their effective control; and a reasonably high degree of effective control will need to be established for the relationship to exist. Talking of a “high probability” may set a high bar in theory but a relatively low one in practice—at least in cases concerning formal military command over regular armed forces. The point is returned to below.

Judges Van den Wyngaert and Morrison, however, took the view that the ICC Statute imposes no causation requirement and thus de facto advocate an interpretation more consistent with ICTY jurisprudence:

51. . . . We cannot agree with the theory of probabilistic causation, as developed by Judge Steiner in her concurring opinion and as accepted by our colleagues in the minority.

52. We do agree with the point made by many that a causation requirement cannot be upheld from a logical point of view. . . .

...

56. In sum, we are of the view that article 28 does not—and should not—require that the commander’s failure caused his or her subordinates to commit crimes.¹¹⁹

Their honors appear to reach this conclusion in part on the basis that while the English, Russian, Arabic, and Spanish texts of Article 28 may be read as importing a “result” or causation element, the “the French and Chinese versions appear to pertain more to the responsibility of the commander.”¹²⁰ On this view the “as a result of” wording in Article 28(a) seems a purely formal statement: the law deems a commander responsible on this basis when there is a failure to take all reasonable and necessary measures to prevent and punish the commission of crimes.¹²¹

119. *Bemba Gombo*, Judgment on Appeal, *supra* note 87, Separate Opinion of Wyngaert, J., and Morrison, J., ¶¶ 51, 52, 56.

120. *Id.* ¶ 51 n.40.

121. Thus, it is the failure to take required measures which is deemed to have caused the crimes. Kazuya Yokohama, *The Failure to Control and the Failure to Prevent, Repress and Submit: The Structure of Superior Responsibility under Article 28 ICC Statute*, 18 INTERNATIONAL

It is open to conjecture whether these differences in theory would make much difference in practice. Imagine a case in which: (1) the existence of a superior-subordinate relationship of effective control was established; (2) it was proven that international crimes had been committed by subordinates; and (3) it was proven that the commander in question had failed in their duty to take all reasonable and necessary preventative measures ahead of time or had taken no action to effectively punish such crimes after the fact. Would a court in such a case be likely to conclude that, on balance, whatever the commander did it was unlikely to have stopped the commission of the crimes or made any difference to the manner in which they were committed? Or that there was only a low probability that had they acted events would have transpired differently? One suspects such a finding would take extreme facts under which a *de lege* commander exercised very limited effective control *de facto*. But in a case of such limited effective control, it could be argued that no superior-subordinate truly existed. If this analysis is correct, then it matters little whether Article 28(a) assumes a result or establishes a requirement (with a relatively low bar) of probabilistic causation.

Against this background it is now relevant to examine how the law of command responsibility articulated under the Rome Statute has been implemented in Australia.

IV. AUSTRALIAN FEDERAL CRIMINAL LAW AND COMMAND RESPONSIBILITY

A. Introduction

Australia's command responsibility law is set out in Section 268.115 of the Criminal Code Act (Criminal Code).¹²² Its wording differs in one crucial respect from the definition adopted in the Rome Statute, replacing the words "should have known" with "reckless as to" in defining the mental element applicable to military commanders. It thus reads:

CRIMINAL LAW REVIEW 275, 302 (2018). This does not, however, imply the obverse. The fact that crimes occurred is not of itself proof of a failure to take all necessary and reasonable measures. Martha M. Bradley & Aniel de Beer, "All Necessary and Reasonable Measures": *The Bemba Case and the Threshold for Command Responsibility*, 20 INTERNATIONAL CRIMINAL LAW REVIEW 163, 211–12 (2020).

122. Criminal Code Act 1995 (Cth) § 268.115 (Austl.).

A military commander . . . is criminally responsible for offences under this Division committed by forces under his or her effective command and control . . . as a result of his or her failure to exercise control properly over those forces, where: (a) the military commander . . . either knew or, owing to the circumstances at the time, *was reckless as to* whether the forces were committing or about to commit such offences.¹²³

The difference is likely to be consequential. This part of the article examines how the Australian standard is likely to operate.

Such an assessment is challenging, for three reasons. First, there is the lack of Australian jurisprudence not only on the doctrine itself but on any of the international crimes provisions of the Criminal Code. This is notwithstanding the potential for Australian war crimes prosecutions to have been pursued had there been appetite to do so, given the likely presence of war criminals from a variety of conflicts on Australian soil.¹²⁴ Second, the international crimes provisions were enacted as part of the Criminal Code without much reflection on how they would interact with the broader legislative framework of the Code, which has led to uncertainties.¹²⁵ Finally, inasmuch as Australian courts can refer to international law when interpreting domestic legislation that gives effect to a treaty,¹²⁶ any court that does so in order to interpret the Australian command responsibility test will have to grapple with the uncertain state of international jurisprudence, discussed above. Our conclusions are therefore tentative but lead us to the view that the test for command responsibility of military commanders is harder to satisfy under Australian law than under its Rome Statute counterpart. Part V will consider the implications of this conclusion for complementarity in the context of current investigations.

B. *Legislative Context*

In order to anticipate the likely scope of Section 268.115, it is worthwhile recalling two significant moments in Australian criminal law reform history. The first is the development of the Model Criminal Code in the early 1990s,

123. *Id.* (emphasis added).

124. Gideon Boas & Pascale Chifflet, *Suspected War Criminals in Australia: Law and Policy*, 40 MELBOURNE UNIVERSITY LAW REVIEW 46 (2016).

125. SIMON BRONITT & BERNADETTE MCSHERRY, *PRINCIPLES OF CRIMINAL LAW* 1045–61 (4th ed. 2017).

126. *Minister for Foreign Affairs and Trade v. Magno* (1992) 112 Australian Law Reports 529, 534–35 (Gummow, J.) (Austl.).

one of the most ambitious criminal law reform projects in Australian history to that point.¹²⁷ The project was undertaken by the Model Criminal Code Officers Committee (MCCOC) with the intention to produce a national uniform criminal code.¹²⁸ It was inspired by the goal to systematize, rationalize, and modernize Australian criminal law.¹²⁹ Paramount to the project was the development of a General Part on general principles of criminal responsibility that would provide an internally coherent and conceptually consistent foundation for Australian criminal law.¹³⁰ Those principles were intended to inform all subsequent crimes legislation, to be consciously adopted or expressly displaced by parliaments when constructing future criminal law.¹³¹ The General Part produced by the MCCOC (Chapter Two) was adopted by the Commonwealth in 1995, creating the foundation of the Commonwealth Criminal Code.¹³²

Notably, the MCCOC self-consciously adopted a subjectivist approach in developing the Model Code's general principles of criminal responsibility that placed a rational subject and their personal guilt at the center of culpability. The drafters therefore eschewed, as a general rule, objective bases (such as negligence) as being inappropriate for the imposition of personal guilt.¹³³ Reflective of this philosophy, the Criminal Code provides that a fault element attaches to every physical element of an offence unless Parliament clearly provides otherwise.¹³⁴ This part also provides definitions of four fault elements that are intended to reflect a "descending order of culpability."¹³⁵

127. Explanatory Memorandum, Criminal Code Bill 1994 (Cth) 1 (Austl.).

128. The Committee was established by the Standing Committee of Attorney-Generals. It went through a few name changes, being known first as the Criminal Law Offices Committee, the Model Criminal Code Officers Committee and, finally, the Model Criminal Law Offices Committee. For a history of the process, see Matthew Goode, *Constructing Criminal Law Reform and the Model Criminal Code*, 26 CRIMINAL LAW JOURNAL 152 (2002).

129. Arlie Loughnan, *The Very Foundations of Any System of Criminal Justice: Criminal Responsibility in the Australian Model Criminal Code*, INTERNATIONAL JOURNAL FOR CRIME, JUSTICE & SOCIAL DEMOCRACY, Sept. 1, 2017, at 8, 9.

130. *Id.* at 15.

131. *Id.* at 17–19. See Criminal Code Act 1995 (Cth) § 2.1 (Austl.).

132. The Criminal Code was appended as a schedule to the Criminal Code Act 1995 (Cth) (Austl.).

133. Loughnan, *supra* note 129, at 15–19.

134. Criminal Code Act 1995 (Cth) § 3.1 (Austl.). Loughnan describes this as the Code's "presumption of fault." Loughnan, *supra* note 129, at 15.

135. Model Criminal Law Officers Committee of the Standing Committee of Attorneys-General, Report, Chapters 1 and 2: General Principles of Criminal Responsibility 23 (Dec. 1992) (Austl.) [hereinafter MCCOC Report].

intention, recklessness, knowledge, and negligence.¹³⁶ Where no fault element is expressed, recklessness is the general default.¹³⁷ Recklessness has therefore been described as the “universal fault element” within the Code and its “threshold of criminal liability.”¹³⁸ Moreover, the Code demonstrates a clear legislative intent that recklessness and negligence should remain distinct, which can be challenging as, in practice, the two concepts are easily collapsed together.¹³⁹

The second important reform to note is the introduction of the Australian international crimes provisions in the early 2000s, creating Division 268 of the Criminal Code.¹⁴⁰ Gillian Triggs describes this moment as constituting a “quiet revolution” in Australian law for two reasons. First, because the Australian approach to legislating for international crimes laws had been piecemeal to that point. Second, because Division 268 radically amended Australian federal criminal law.¹⁴¹

When adopting implementing legislation for the purposes of participation in the ICC, there are broadly three approaches a State could take. Some States adopt the text of the Rome Statute verbatim, while other States directly reference the Rome Statute (and any documents or decisions of the ICC), and yet other States adopt legislation that draws from the Rome Statute, but with modifications.¹⁴² Throughout the drafting and passage of the implementing legislation in Australia, the key concern that emerged was the issue of maintaining Australian sovereignty.¹⁴³ For this reason, the first option (adopting the Rome Statute text verbatim) was never a possibility.¹⁴⁴

136. Criminal Code Act 1995 (Cth) §§ 5.1–5.5 (Austl.).

137. *Id.* § 5.6 (but note that intention is the default fault element in respect of a physical element that consists only of conduct).

138. Ian Leader-Elliot, *Elements of Liability in the Commonwealth Criminal Code*, 26 CRIMINAL LAW JOURNAL 28, 39 (2002).

139. *Id.* at 39–40.

140. The implementing legislation was the International Criminal Court (Consequential Amendments) Act 2002 (Cth) (Austl.).

141. Gillian Triggs, *Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law*, 25 SYDNEY LAW REVIEW 507, 533–34 (2003).

142. EITHNE DOWDS, FEMINIST ENGAGEMENT WITH INTERNATIONAL CRIMINAL LAW: NORM TRANSFER, COMPLEMENTARITY, RAPE AND CONSENT 65–67 (2019).

143. For a discussion of the political process surrounding the introduction of the implementing legislation, see Alex J. Bellamy & Marianne Hanson, *Justice Beyond Borders? Australia and the International Criminal Court*, 56 AUSTRALIAN JOURNAL OF INTERNATIONAL AFFAIRS 417–33 (2002).

144. BRONITT & MCSHERRY, *supra* note 125, at 1047.

Australia instead chose to follow the latter path, adopting what were described as Rome Statute “equivalent” crimes.¹⁴⁵ Divergences have resulted, including the inclusion of additional war crimes that do not exist in the Rome Statute,¹⁴⁶ and a definition of rape as a crime against humanity and war crime that specifically refers to lack of consent, an element missing from the corresponding ICC definitions.¹⁴⁷

More generally, the enactment of the Australian international crimes provisions within the Criminal Code was undertaken with little consideration of how they would interact with the Code’s General Part and, as a result, there is a very real possibility of Australian divergence from ICC jurisprudence on principles of extended criminal responsibility.¹⁴⁸ When the Joint Standing Committee on Treaties was considering the implementing legislation, it received very few submissions that addressed substantive criminal law matters at all and only one of its final recommendations was directed to that topic.¹⁴⁹ In the case of the modes of liability, including command responsibility, there is little evidence of discussion around the motivation for the text that was chosen. The report issued by the Joint Standing Committee on the legislation has extensive discussion about the divergence from the Rome Statute on the definition of rape, but does not mention command responsibility.¹⁵⁰ The legislation’s Explanatory Memorandum merely mentions the Rome Statute text of Article 28, giving the impression that, in fact, the Australian law was going

145. Explanatory Memorandum accompanying the International Criminal Court (Consequential Amendments) Bill 2002 (Cth) 1 (Austl.).

146. Criminal Code Act 1995 (Cth) ch. 8, div. 268(H) (Austl.) (war crimes that are grave breaches of Protocol I to the Geneva Conventions).

147. Criminal Code Act 1995 (Cth) ch. 8, div. 268, §§ 268.14, 268.59, 268.82 (Austl.). The Australian definition of rape was a result of discussion about harmonizing the international definition with the Commonwealth definition; see Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, Report 45: The Statute of the International Criminal Court (May 2002) [hereinafter JSCOT 45]. This lack of inclusion of the concept of consent in the ICC definition has been criticized; see DOWDS, *supra* note 142, at 150–84. It has also been defended on the basis that the crime should be one based on proof of presence of coercive circumstances, not absence of consent. See, e.g., Phillip Weiner, *The Evolving Jurisprudence of the Crime of Rape in International Criminal Law*, 54 BOSTON COLLEGE LAW REVIEW 1207 (2013).

148. BRONITT & MCSHERRY, *supra* note 125, at 1048.

149. *Id.* at 146–48.

150. JSCOT 45, *supra* note 147.

to be a direct copy of the Rome Statute definition.¹⁵¹ Without further explanation provided in the Joint Standing Committee report or in the Explanatory Memorandum, it is unclear why the Australian government ultimately chose to implement the provision on command responsibility in a manner divergent from the Rome Statute.

What is clear is the firm insistence by the government at the time that Australian law would take primacy and the Australian “equivalent” international crimes were intended to harmonize with Australian domestic legal principles.¹⁵² Indeed, Australia went so far as to include a declaration that accompanied its ratification of the Rome Statute which concluded: “Australia further declares its understanding that the offences in Article 6, 7 and 8 will be interpreted and applied in a way that accords with the way they are implemented in Australian domestic law.”¹⁵³

The drafting decision to adopt the Code’s threshold fault element of recklessness in the Australian command responsibility standard may thus be understood as part of a broader performance of State sovereignty, even as the full implications of doing so went unexamined. With this background in mind, we can better understand the context in which the Australian command responsibility standard must be approached.

C. Section 268.115 of the Criminal Code and Military Command Responsibility

The question of whether and how the Australian command responsibility test is likely to differ from the ICC standard turns principally upon how federal courts would be likely to treat the elements of recklessness and causation. The first of these elements turns upon its construction within the Code.

Section 5.4 of the Criminal Code defines recklessness as follows:

151. Parliament of the Commonwealth of Australia, House of Representatives, International Criminal Court (Consequential Amendments) Bill 2002 (Cth) Explanatory Memorandum, at 13–14 (Austl.) (June 25, 2002), <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr1607%22#ems>.

152. See, e.g., Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2002, 4326 (Daryl Williams, Attorney-General, 2nd reading speech on the International Criminal Court (Consequential Amendments) Bill 2002) (Austl.).

153. For the full text of the Australian declaration, see United Nations Treaty Collection, Rome Statute of the International Criminal Court, Declarations and Reservations, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en#EndDec (last visited Mar. 14, 2022). For a discussion of the likely legal status of the declaration, see Triggs, *supra* note 141, at 513–16.

- (1) A person is reckless with respect to a circumstance if:
 - (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (2) A person is reckless with respect to a result if:
 - (a) he or she is aware of a substantial risk that the result will occur; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is one of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

The essence of this test of recklessness is an attribution to the defendant of a subjective awareness that a substantial risk exists and their going ahead with a choice of action or inaction despite such awareness.¹⁵⁴ Awareness, in turn, means that the person is cognizant or conscious of something.¹⁵⁵ Some have interpreted this to furthermore require that the relevant knowledge is consciously recalled at the critical moment.¹⁵⁶ In any event, the fact that a risk “was obvious, well known or within the defendant’s past experience” is not sufficient of itself,¹⁵⁷ though the presence of such factors may provide evidence of recklessness.¹⁵⁸

In the context of command responsibility, the requirement of an awareness of risk refers to a given circumstance, namely that the commander’s forces were committing, or about to commit, certain specific offences. This standard is not met where the commander, objectively speaking, *should have known of* such a risk but, in fact, did not. The MCCOC were explicit that wilful blindness is not sufficient for recklessness.¹⁵⁹ Moreover, a failure to undertake due diligence to apprise oneself as to whether a risk exists is also unlikely to be sufficient. This is because a failure of due diligence is generally

154. BRONITT & MCSHERRY, *supra* note 125, at 215.

155. STEPHEN ODGERS, PRINCIPLES OF FEDERAL CRIMINAL LAW 70 (4th ed. 2019).

156. *Id.* at 70–71.

157. Commonwealth Attorney-General’s Department, The Commonwealth Criminal Code: A Guide for Practitioners 75 (Mar. 2002) (Austl.) [hereinafter Practitioner’s Guide].

158. *Id.* at 77. *See also* Hann v. Commonwealth Director of Public Prosecutions (Cth) (2004) 88 SASR 99, 107–8 (Gray, J.) (Austl.).

159. MCCOC Report, *supra* note 135, at 25.

understood as a condition of negligence¹⁶⁰ which, as discussed earlier, is a distinct and lesser form of fault under the Code.

In addition to such general principles, the recklessness standard adopted in Australian command responsibility law will presumably have to cohere with the fact that Section 268.115 retains a distinction between military and civilian superiors. As per the Rome Statute, under the Australian law, non-military commanders can be liable for the crimes of their subordinates only where they knew or “consciously disregarded information that clearly indicated, that the subordinates were committing or about to commit such offences.”¹⁶¹ If this differentiation between military and non-military leaders is to remain meaningful, then recklessness in the context of Australian command responsibility law is something other than a conscious disregard of particularly incriminating information. Moreover, a standard of recklessness is presumably an easier threshold to meet than “conscious disregard”; namely, it is a test more permissive of a finding of responsibility rather than less. This all suggests that recklessness in the case of military commanders might therefore be proven under the Australian law with something less than evidence of a conscious disregard of information clearly indicating a risk but something more than the existence of circumstances that would put a reasonable commander on notice.

It is possible (subject to our observations below) that an Australian court may find some assistance in the indicia developed by the ICC and the ad hoc tribunals in respect of proving the mental element of “awareness of risk.” Nonetheless, the bar for liability under Section 268.115 seems clearly higher than that of the Rome Statute standard of “should have known,” and likely also above the customary international law standard of “had reason to know.” Moreover, there are a further two elements of the Australian standard of recklessness that may tend to distinguish it from the standard(s) set at international law.

160. *Tesco Supermarkets v. Nattrass* [1972] AC 153 (HL) 199 (Lord Diplock stating: “Due diligence is in law the converse of negligence and negligence connotes a reprehensible state of mind—a lack of care for the consequences of his physical acts on the part of the person doing them.”).

161. Criminal Code Act 1995 (Cth) sec. 268.115(3)(a) (Austl.).

First, and separate from the question of awareness of risk, is the requirement that the commander's awareness must relate to an objectively "substantial" risk.¹⁶² The choice to use the language of substantial risk rather than refer to the probability or possibility of risk was intentional on the part of the MCCOC in order to avoid speculation about mathematic chances that a circumstance or result exists or might come about.¹⁶³ Instead, this terminology "appears to have been chosen for its irreducible indeterminacy of meaning."¹⁶⁴ We can, however, understand substantial risk to entail something that is a "real chance" and more than merely speculative.¹⁶⁵ In this respect, the point of view expressed in the Brereton Report as to the likely incredulity of commanders to the prospect that Australian forces would commit atrocities may, if accepted, support an argument that they were not aware of a substantial risk, notwithstanding the information in their possession.

Second, even where a commander was aware of a substantial risk, criminal responsibility only follows where the taking of that risk (or inaction in the face of that risk) was objectively unjustifiable. This element of the test tends to narrow the scope of recklessness in a fashion not dissimilar to the justificatory defenses, such as necessity.¹⁶⁶ The justifiability of taking a risk goes to factors such as the degree of risk, the social utility of the person's conduct in how they respond to that risk, the social harm of the danger inherent in the risk, and practicability of eliminating the risk.¹⁶⁷ Moreover, the elements here are relational in that there is a link between the substantiality of a risk and the justifiability of running that risk in the circumstances.¹⁶⁸ To illustrate, the MCCOC give the example of engaging in "Russian roulette" where even a small risk that a given discharge of the gun will result in harm is such that doing so would be unjustifiable and the risk a substantial one.¹⁶⁹

162. This aspect of the test is objective in so much as it relates to the question of whether "a reasonable observer would have taken it to be substantial at the time the risk was taken." Practitioner's Guide, *supra* note 157, at 73.

163. MCCOC Report, *supra* note 135, at 27.

164. Practitioner's Guide, *supra* note 157, at 73.

165. *Bouhey v. The Queen* (1986) 161 CLR 10, 21 (Mason, J., Wilson, J., and Deane, J.) (Austl.); *Hann v. Commonwealth Director of Public Prosecutions (Cth)* (2004) 88 SASR 99, 106–7 (Gray, J.) (Austl.). This test does not, however, demand that the risk be probable and something less than more likely than not may, in appropriate circumstances, be sufficient. ODGERS, *supra* note 155, at 71.

166. Practitioner's Guide, *supra* note 157, at 77; BRONITT & MCSHERRY, *supra* note 125, at 216.

167. ODGERS, *supra* note 155, at 73.

168. MCCOC Report, *supra* note 135, at 27; ODGERS, *supra* note 155, at 72.

169. MCCOC Report, *supra* note 135, at 103.

How these two elements (the existence of a substantial risk and the justifiability of taking that risk) might operate in the context of command responsibility invites a number of reflections. First, it is not clear how they will interact with other aspects of the command responsibility test, in particular assessing a commander's failure to take necessary and reasonable measures. There seems likely to be substantial overlap between these considerations.

Second, we can speculate regarding the assessment of substantial and unjustifiable risks in the context of war. On the one hand, the context of an armed conflict may tend to expand the potential for proving recklessness in respect of risk. For example, the high degree of social harm inherent in war crimes, the known potential for psychological injuries to soldiers (particularly those being repeatedly redeployed) and thus heightened risks of rogue conduct, and the real potential for abuse of power in war, all tend to lessen (in our view) any justification for ignoring what *is* known and increase any objective assessment of how substantial the risk of war crimes being committed is.

On the other hand, a commander's limited material capacity to eliminate risk due to the conditions of war may make the taking of a risk more justifiable. An example might arise due to command's remoteness from the crimes. This is of course relevant in the context of the Australian Afghanistan investigations given findings of the Brereton Report regarding the physical remoteness of commanders in the Australian Special Forces, and the related independence of patrol leaders, which may thus have made any actions by commanders less consequential.¹⁷⁰ Indeed, such actions as were taken by command apparently failed to stem the alleged criminal behaviors.¹⁷¹

Finally, it is worth noting that command responsibility under the Criminal Code likely constitutes a mode of complicity in the underlying offence of the person's subordinate, rather than a distinct dereliction of duty offence. It thus mirrors what we believe is the correct interpretation of command responsibility at international law. This is suggested by the drafting of Section 268.115, which indicates that command responsibility is categorized as one mode of liability (among others) for the underlying offence of another.¹⁷² There is also no penalty specified under Section 268.115, unlike each of the

170. *See supra* note 41 and accompanying text.

171. *See supra* note 68 and accompanying text.

172. In particular, see the description of command responsibility as one of "other grounds of criminal responsibility . . . for acts and omissions that are offences under this Division" (§ 268.115(1)) and that responsibility is for "offences . . . committed by forces" (§ 268.115(2)).

international crime offences in the Code. The penalty for command responsibility is therefore determined by reference to the offence of the subordinate. This makes sense in the context of the Code given that, generally speaking, liability for conduct that creates a risk of criminal responsibility by others is treated as a crime of inchoate complicity.¹⁷³ As discussed earlier in the paper, the fact that command responsibility is a mode of complicity rather than a distinct dereliction of duty offence may tend to reinforce expectations that it sets a strict standard of personal guilt.

In sum, Section 268.115 of the Criminal Code is likely to set a higher standard of fault in the case of military commanders than its Rome Statute counterpart. Moreover, the Australian drafting engages a number of distinctive evaluative steps. This is likely to lead to divergent jurisprudence on the scope of this mode of liability under Australian law relative to the development of the doctrine at the ICC. There is some Australian High Court authority that legislation that directly transposes the text of a treaty into domestic law should be interpreted according to the relevant international principles of treaty interpretation rather than domestic principles.¹⁷⁴ However, the fact that Section 268.115 so clearly adopts the mens rea of recklessness marks a clear departure from the treaty text. Further, it does so in the context of a conceptually principled approach within the Code to criminal responsibility. These considerations make ICC jurisprudence a potentially less appropriate source to rely upon when Australian federal courts interpret the mental element of the Australian test for command responsibility.

The second major question under Australian law is that of causation. Causation in the case of command responsibility is challenging, particularly where responsibility is in the form of a failure to punish offenders rather than to prevent their committing crimes. As discussed earlier, the state of ICC jurisprudence on the question of causation is somewhat vexed given the divided court in *Bemba*.

The Australian command responsibility test mimics the Rome Statutes' requirement of a causative nexus. The Criminal Code does not provide any default definition of causation and therefore Australian common law principles regarding causation in the context of criminal responsibility would ordinarily apply. There is, however, no single test of causation in proving criminal responsibility under Australian common law but rather three tests that

173. Practitioner's Guide, *supra* note 157, at 81.

174. Patrick Wall, *The High Court of Australia's approach to the Interpretation of International Law and its Use of International Legal Materials in Maloney v The Queen* [2013] HCA 28, 15 MELBOURNE JOURNAL OF INTERNATIONAL LAW 228, 231–38 (2014).

may arise depending upon the facts of the case and the nature of any intervening cause. These tests are the reasonable foreseeability of harm test, the substantial cause test, and the natural consequence test, though the substantial cause test is the most favored in modern cases.¹⁷⁵

It is beyond the scope of this paper to delve in any great detail into causation in Australian criminal law, however a few general points are worth noting. First, it seems unlikely that Australian federal courts would read out the requirement of a causative nexus for command responsibility (or read it down to a purely formal statement) given the lack of textual ambiguity as to its inclusion as an element of liability. Second, while numerous tests render the state of Australian common law on this subject complex, what is clear is that the “but for” test of causation has been rejected on the basis that it suggests even a negligible causal relationship would be sufficient to demonstrate criminal responsibility.¹⁷⁶ Regardless of the test adopted, Australian common law thus seems to set a higher degree of causative nexus between the defendant’s conduct and its relevant consequence than that suggested by ICC jurisprudence to this point which, as discussed earlier, tends toward an increased risk approach.

There is some possibility that Australian federal courts may adopt ICC jurisprudence in preference to domestic criminal legal principles on the subject of causation and thus harmonize this aspect of the Australian command responsibility laws with international law. This is because, on this element, Section 268.115 mimics the language of the Rome Statute. Moreover, in light of the unique nature of causation in the context of assessing wrongful omissions that create a risk of criminal conduct by others, the international jurisprudence would seem more apt. If the courts do not adopt international jurisprudence, however, causation seems another possible point of departure between the ICC and Australian standards of command responsibility.

D. Concluding Comments

Despite the foregoing, when developing the General Part of the Model Code, the MCCOC acknowledged that negligence may well reflect a higher

175. For a discussion of these tests, see BRONITT & MCSHERRY, *supra* note 125, at 197–206.

176. *Arulthilakan v. The Queen* (2003) 203 Australian Law Reports 259, 268 (Gleeson, CJ., Gummow, J., Hayne, J., Callinan, J., Heydon, J.), 273–74 (Kirby, J., separate opinion) (Austl.).

degree of culpability than recklessness in certain circumstances.¹⁷⁷ In our view, gross failures of oversight constitute a highly culpable form of wrongdoing in the context of military command over armed forces. A critical social function of the doctrine of command responsibility is to incentivize the maintenance of adequate systems of oversight and to ensure command is accountable where rule of law has become degraded within subordinate units.¹⁷⁸ It is at the higher levels of military hierarchies that the power to shape institutional systems lies. In this sense, we can understand command responsibility as the fulcrum of any responsible military system capable of complying with humanitarian law.

Both the “had reason to know” and (even more so) the “should have known” standards that have developed under international law provide effective frameworks to incentivize action by commanders where there are warning signs of potential wrongdoing by subordinates. By contrast, the Australian standard presents the risk of rewarding systems that keep higher levels of command from being apprised of wrongdoing. It is a risk that arises due to the uncritical adoption of the Code standard of “recklessness” within the Australian test, without consideration of the unique functions of command responsibility and the contexts in which it operates.

We are concerned that the bar has been set too high within the Australian command responsibility test. Nonetheless, it is our view that the evidence of command knowledge of special forces conduct in Afghanistan may substantiate a finding of recklessness on the part of higher levels of command, or at least is sufficient to put the question to proof. This is because, among other things, reasonable minds may differ as to whether such information as was known to some commanders (such as persistent rumors of unlawfulness among troops, suspicion regarding the practice of “throwdowns” and, perhaps most significantly, the testimony of Afghan nationals) would indeed be met with incredulity. Others might consider that the same facts instead demonstrated a consciousness of a more than merely speculative risk that unlawful killings were taking place and that such a risk should not have been ignored. We would hope that in a responsible, professional, and disciplined military the latter view would ordinarily prevail.

177. MCCOC Report, *supra* note 135, at 27.

178. Amy McCarthy, *Erosion of Rule of Law as a Basis for Command Responsibility under International Humanitarian Law*, 18 CHICAGO JOURNAL OF INTERNATIONAL LAW 553–93 (2018).

V. AUSTRALIAN LAW AND ICC COMPLEMENTARITY

A. Introduction

The ICC functions under the doctrine of complementarity. Under the ICC system, States have primary responsibility and prerogative to investigate and prosecute international crimes. This is based on the central notion of State sovereignty and non-intervention in States' internal affairs. Indeed, it could be posited that the principle of complementarity was essential to State parties' consent to be bound by the Statute. Sarah Nouwen has stated that the goal of complementarity is "to protect sovereign interests in the pursuit of justice for crimes within the Court's jurisdiction."¹⁷⁹ Carsten Stahn emphasizes that the ICC is not an isolated court, but that there is a "Rome system of justice," within which there is a "duty of states to investigate and prosecute crimes under their jurisdiction."¹⁸⁰ This duty is found in the Rome Statute's preamble, which expressly states, "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."¹⁸¹

Complementarity is generally perceived as either "classical" or "positive."¹⁸² Classical complementarity involves the promotion of domestic prosecution of international crimes. Under this approach, the threat of ICC jurisdiction motivates compliance and prompts States to implement legislation enabling prosecution of international crimes and to act on any cases. Positive complementarity involves the facilitation of domestic prosecution of international crimes and the mobilization of domestic reform of ordinary crimes. Under the positive complementarity approach, the burden of prosecution is

179. SARAH M. H. NOUWEN, *COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYSING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN* 58 (2013).

180. Carsten Stahn, *Taking Complementarity Seriously*, in *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE* 238 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

181. Rome Statute, *supra* note 77, preambular ¶ 6. This duty is also found in the common "grave breaches" provisions of the Geneva Conventions (e.g., Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277).

182. EITHNE DOWDS, *FEMINIST ENGAGEMENT WITH INTERNATIONAL CRIMINAL LAW: NORM TRANSFER, COMPLEMENTARITY, RAPE AND CONSENT* 60–77 (2019); Stahn, *supra* note 180, at 251–73.

shared and cooperation between States and the ICC is encouraged, while ultimately prioritizing domestic jurisdiction. The ICC can provide assistance and guidance to State prosecutions, or States can defer to ICC action under a cooperative agreement. Positive complementarity emphasizes State capacity building, based on the fact that, given its limited resources, the ICC cannot possibly undertake investigations and prosecutions of every mass atrocity situation.

As discussed earlier in the paper, the Australian international crimes laws diverge in some crucial respects from the Rome Statute equivalent crimes and their modes of liability, and there exists limited information to explain the reasons for those differences and their implications. With that in mind, given the content of the Brereton Report and the issues raised in this article about Australia's ICC legislation, it is necessary to explore whether these give rise to any possible ICC complementarity issues. There are two main points at which complementarity comes into question: at the investigation stage and the trial stage. This section will examine complementarity at these two stages of the ICC process relating to the alleged Australian war crimes in Afghanistan.

B. If Investigators Do Not Investigate Command Responsibility

We know that it is not in the prosecutorial or public interest to proceed with prosecution where there is little prospect of conviction. However, the Brereton Report is not the result of a law enforcement investigation nor is it part of any prosecutorial proceeding. Thus, although the Report has already dismissed the idea of command responsibility prosecutions, whether to proceed with a command responsibility investigation and subsequent prosecution is a decision for the OSI investigation team and Director of Public Prosecutions, who should carefully consider the command responsibility options. Thus, the discussion here must first consider the complementarity issues that may arise if the OSI chooses not to investigate command responsibility as a potential mode of liability.

Domestic investigations are considered in admissibility challenges before the ICC.¹⁸³ The ICC has determined that the existence of an active investigation is shown through steps such as “interviewing witnesses or suspects,

183. See, e.g., Prosecutor v. Simone Gbagbo, Case No. ICC-02/11-01/12 OA, Judgment on the Appeal of Côte d'Ivoire against the Decision of Pre-Trial Chamber I of 11 Dec. 2014, ¶ 28 (May 27, 2015) [hereinafter *Gbagbo*].

collecting documentary evidence, or carrying out forensic analyses.”¹⁸⁴ The Court has declared that “[i]naction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court.”¹⁸⁵ Therefore, the Court will assess whether or not a State is investigating a case, and if the Court finds a State is not doing so, the ICC will step in. In doing so, the Court looks at (in)activity in the investigation process. The ICC Office of the Prosecutor (OTC) has stated that inactivity “may result from numerous factors, including the absence of an adequate legislative framework; [or] the deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more responsible.”¹⁸⁶ This statement is significant in the context of Australia’s command responsibility provisions and the Brereton Report outlook on command responsibility: the ICC could, perhaps, determine that there is absence of an adequate legislative framework due to the divergence in the framing of the command responsibility provisions. Alternatively, if the OSI were to focus only on low-level perpetrators the ICC could deem this to be “inactivity” at the investigation stage and thus find that the ICC has jurisdiction (at least as regards the culpability of commanders).

At what point, however, does admissibility come into question? Article 17 provides that the ICC can determine admissibility relating to a “case.”¹⁸⁷ The Court has determined that

184. *Id.*; Prosecutor v. Ruto et al., Case No. ICC-01/09-01/11 OA, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011, ¶ 41 (Aug. 30, 2011) [hereinafter *Ruto*]; Prosecutor v. Muthaura, Kenyatta and Ali, Case No. ICC-01/09-02/11 OA, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011, ¶ 40 (Aug. 30, 2011) [hereinafter *Kenyatta*]. For criticism of the Kenya admissibility cases, see Claire Brighton, *Avoiding Unwillingness: Addressing the Political Pitfalls Inherent in the Complementarity Regime of the International Criminal Court*, 12 INTERNATIONAL CRIMINAL LAW REVIEW 629 (2012).

185. *Gbagbo*, *supra* note 183, ¶ 30.

186. ICC Office of the Prosecutor, Policy Paper on Preliminary Examination ¶ 48 (Nov. 2013), https://www.icc-cpi.int/Pages/item.aspx?name=otp-policy-pe-11_2013.

187. A situation is “defined in terms of temporal, territorial and in some cases personal parameters”; a case refers to “specific incidents during which one or more crimes within the jurisdiction of the court seem to have been committed by one or more identified subjects.” Situation in the Democratic Republic of Congo, Case No. ICC-01/04, Decision on the Applications for Participation in the Proceedings of VPRS-1 through VPRS-6, ¶ 65 (Jan. 17, 2006).

The defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under article 17(1)(a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.¹⁸⁸

“Thus, the parameters of a ‘case’ are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute.”¹⁸⁹ Under this requirement, Australia will have to show that it is investigating specific people, and in respect of the same conduct that could form the subject of an ICC investigation.¹⁹⁰ Thus, if Australia is not investigating commanders (above patrol level), this would not meet the threshold for any complementarity challenge to the admissibility of a case before the Court in respect of a specific commander. Merely investigating the general situation is insufficient; likewise if only subordinates are under investigation. The ICC has required that, for a case against a particular person to be deemed inadmissible under complementarity, a State must be investigating the “substantially same conduct” (SSC).¹⁹¹ Thus, at investigation level, Australia would be expected to investigate *commanders (person) for command responsibility (conduct)*.¹⁹² This is particularly so given that the ICC has held that the concept

188. *Ruto*, *supra* note 184, ¶ 40; This decision in *Ruto* has been affirmatively cited in *Prosecutor v. Saif Al-Islam Gaddafi*, Case No. ICC-01/11-01/11 OA 4, Judgment on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013, ¶¶ 60, 63 (May 21, 2014) [hereinafter *Gaddafi*]. See also Rod Rastan, *Situation and Case: Defining the Parameters*, in *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE* (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

189. *Gaddafi*, *supra* note 188, ¶¶ 61, 73, 85.

190. *Kenyatta*, *supra* note 184, ¶ 40.

191. *Gaddafi*, *supra* note 188, ¶ 72; CHRISTIAN M. DE VOS, *COMPLEMENTARITY, CATALYSTS, COMPLIANCE: THE INTERNATIONAL CRIMINAL COURT IN UGANDA, KENYA, AND THE DEMOCRATIC REPUBLIC OF CONGO* 68–103 (2020) (Chapter 3, “Mirror Images? Complementarity in the Courtroom”).

192. Admissibility challenges may arise at either the situation or case phase of investigations, to avoid duplication of investigation by the ICC and national authorities. The standard of review is the same, and will examine “investigations, prosecutions, decisions not to prosecute and final judgements in relation to a given individual and a limited set of incidents,” but “the level of scrutiny of national proceedings needs to be lower when ascertaining the admissibility of a situation than when ascertaining the admissibility of a case.” HÉCTOR OLÁSULO, *THE TRIGGERING PROCEDURE OF THE INTERNATIONAL CRIMINAL COURT* 166, § 43 (2005). Admissibility assessment is also about “admissibility of one or more potential [as opposed to actual] cases within the context of a situation.” Situation in

of gravity under Article 17(1)(d) of the Rome Statute, which the Prosecutor must consider when making admissibility decisions, should prioritize bringing “cases only against the most senior leaders suspected of being the most responsibility for crimes within the jurisdiction of the Court allegedly committed in any given situation under investigation.”¹⁹³

The SSC requirement means that a State must pursue the “crux” of a case.¹⁹⁴ In the context of the alleged Australian SASR war crimes, it is unlikely that the ICC would consider investigating only the lower-ranked soldiers as direct perpetrators as sufficient. Given that the Breerton Report specifically discusses problems with strategic, operational, organizational, and cultural aspect of the SASR,¹⁹⁵ it seems unlikely that a focus on low-ranking soldiers could satisfy the “crux” argument, not only because commanders oversee such matters—but more importantly, they carry out disciplinary measures. An underlying principle of command responsibility is to hold

the Republic of Kenya, Case No. ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 48 (Mar. 31, 2010). Thus, there does not need to be a case being made against a specific person at domestic level, but potential cases must be at play, and if Australia is not investigating commanders, then clearly no potential cases against commanders are possible. The allegations against the SASR are “limited sets of incidents,” with specific personnel already named (albeit not publicly), and thus may already be deemed to be at the case phase. The issue of admissibility will only arise if the OTP considers there are ADF commanders who *prima facie* fit the Article 53 parameters for investigation/prosecution. *See also* Héctor Olásolo & Enrique Carnero-Rojo, *The Application of the Principle of Complementarity to the Decision of Where to Open an Investigation: The Admissibility of “Situations,”* in *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE* (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

193. Situation in the Democratic Republic of Congo, Case No. ICC-01/04-01/07, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, ¶ 51 (Feb. 10, 2006). An emphasis on senior leaders *only* has been criticized, but even with a more open prosecution strategy, the prosecution of senior leaders remains a priority for the ICC.

194. *Gaddafi*, *supra* note 188, ¶ 72.

195. Breerton Report, *supra* note 4, at 325–58.

commanders responsible for failure to punish.¹⁹⁶ If commanders are not creating a culture of certainty of punishment for wrongdoing,¹⁹⁷ they have contributed to a strategy and culture of impunity for the commission of war crimes.

Notably, the ICC OTP implements a prosecutorial policy that includes consideration of lower-level “perpetrators in its investigation and prosecution strategies to build the evidentiary foundations for subsequent case(s) against” higher-ranked perpetrators.¹⁹⁸ The OTP itself thus acknowledges that an investigation may need to begin with lower-ranked perpetrators before being able to progress to investigation of commanders/superiors. However, if the OTP chose to begin with commanders and the ICC follows its “same person” jurisprudence, then the Australian OSI investigations would be no bar to admissibility if there were no current investigations into commanders. Despite the OTP’s policy, there is precedent from the Court for this type of approach. In the *Ruto* case, Kenya argued “that it could not be considered inactive because it had opened formal investigations into the Ocampo Six and intended to develop evidence against them by ‘building on

196. In *United States v. List et al. (The Hostages Case)*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NURENBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 at 1271–72 (1950), the court found that Field Marshal List’s failure to discipline perpetrators for a massacre rendered List responsible for the massacre. See also Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICHIGAN JOURNAL OF INTERNATIONAL LAW 251 (2009), for a discussion of ICTY case law and U.S. military law on failure to punish. See also Chantal Meloni, *Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 619 (2007); Christopher Greenwood, *Command Responsibility and the Hadzjhasanovic Decision*, 2 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 598 (2004); Beatrice I. Bonafé, *Finding a Proper Role for Command Responsibility*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 599 (2007); Darryl Robinson, *How Command Responsibility got so Complicated: A Culpability Contradiction, its Obfuscation, and a Simple Solution*, 13 MELBOURNE JOURNAL OF INTERNATIONAL LAW 1 (2012).

197. Certainty of punishment is the strongest deterrent against criminal conduct. Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, THE SENTENCING PROJECT (Nov. 19, 2010), <http://www.sentencingproject.org/publications/deterrence-in-criminal-justice-evaluating-certainty-vs-severity-of-punishment/>.

198. ICC Office of the Prosecutor, Strategic Plan June 2012–2015, at 6 (Oct. 11, 2013), <https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf>; Strategic Plan 2016–2018, at 16 (Nov. 16, 2015), https://www.icc-cpi.int/iccdocs/otp/EN-OTP_Strategic_Plan_2016-2018.pdf; Strategic Plan 2019–2021, at 20 (July 17, 2019), <https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf>.

the investigation and prosecution of lower level perpetrators.’”¹⁹⁹ This argument was rejected by the Pre-Trial Chamber and the Appeals Chamber, with the Court seeing Kenya’s argument instead as direct proof that Kenya was not yet investigating those at the top of the hierarchy.²⁰⁰ If the OSI were to first investigate low-ranked soldiers to build a possible case for later investigation into and prosecution of commanders, this strategy would need to be clearly indicated in any reporting to the ICC; yet from the *Ruto* case there is clear indication that even this strategy may be insufficient to satisfy the Court’s requirements with regards to “same person, same conduct” active investigations. The Court requires proof of investigatory steps and clear contours or parameters of the case under investigation by domestic authorities,²⁰¹ and a strategy that intends to conduct future investigations into commanders may fail to pass these tests.

C. Challenge of Investigations in a Conflict Zone

There is a possibility that the challenges of investigating crimes committed in Afghanistan (a conflict zone) could affect the question of admissibility with regards to investigations. Australia has the resources to conduct an investigation, but the investigation may need to include gathering evidence in Afghanistan, which is geographically distant, still in conflict, and now unfortunately under Taliban rule, with all foreign troops evacuated. In 2021, Australia withdrew its military personnel from Afghanistan and closed its embassy and residential representation.²⁰² Thus, even with the resources Australia has, an investigation will be extremely challenging. With an anti-foreigner group such as the Taliban in control of Afghanistan, there is little likelihood that Australian investigators will be able to gain access to Afghanistan to conduct interviews or other direct evidence gathering. Indeed, the OSI staff appointed to investigate the allegations²⁰³ raised in the Brereton

199. Kevin Jon Heller, *Radical Complementarity*, 14 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 637, 644 (2016).

200. *Ruto*, *supra* note 184, ¶¶ 62, 82–83.

201. *Gaddafi*, *supra* note 188, ¶ 83–84.

202. See Australian Embassy Afghanistan, Welcome to Australia’s Interim Mission to Afghanistan, <https://afghanistan.embassy.gov.au/> (last visited Mar. 15, 2022).

203. For information regarding the investigative appointments, see generally the OSI website: <https://www.osi.gov.au/>.

Report have already expressed their concern that the changes on the ground in Afghanistan will render any in-country investigation impossible.²⁰⁴

In the *Gbagbo* case, the ICC dismissed an argument from Côte d'Ivoire that it was investigating relevant crimes but that such investigations were challenging, because of the State's post-conflict situation and its difficulties in collecting evidence for such a complex case.²⁰⁵ Côte d'Ivoire submitted that "in the 32 months following the issuance of the *réquisitoires introductifs* (initial indictments) [of Gbagbo] of 6 February 2012 only four such activities were undertaken": a civil party hearing, questioning Gbagbo, and two redacted activities, with the questioning taking place over a twenty month period.²⁰⁶ It was observed that no investigative steps occurred such as taking witness testimonies or ordering forensic expert reports into the alleged crimes.²⁰⁷ The Court held that these four activities in the timeframe was not sufficient proof that an investigation was taking place, rejected Côte d'Ivoire's argument, and deemed the case admissible before the ICC.²⁰⁸ "Investigative steps were 'scarce in quantity and lacking in progression'"²⁰⁹ on the part of Côte d'Ivoire—even if explained by underlying conditions in the State. The action taken did not satisfy the Court that the State was "taking tangible, concrete and progressive investigative steps into Gbagbo's criminal responsibility for the crimes alleged" to render the case inadmissible before the ICC.²¹⁰

If access to witnesses or other evidence in Afghanistan created a delay or difficulties in the investigations, along the lines of those experienced in Côte d'Ivoire, would the ICC determine that Australia has not made substantial progress in these investigations? It is an extraordinary proposition. Afghanistan is a State party to the Rome Statute,²¹¹ however, given the Taliban's own extensive commission of atrocities, it is unlikely that the Taliban will ever engage with the ICC, let alone allow ICC investigators into Afghanistan. Rather, it is feasible that the Taliban might attempt to withdraw from the ICC, given that the crimes they have committed fall within the ICC's

204. See Conversations, *Inside a Rogue Force*, ABC RADIO NATIONAL (Aug. 18, 2021), <https://www.abc.net.au/radio/programs/conversations/mark-willacy-australian-forces-in-afghanistan-sas-war-crimes/13493508> (audio interview with journalist Mark Willacy).

205. *Gbagbo*, *supra* note 183, ¶¶ 120–21.

206. *Id.* ¶ 129 (a search and seizure operation is mentioned at ¶ 120).

207. *Id.* ¶ 130.

208. *Id.* ¶¶ 120, 122.

209. *Id.* ¶ 122.

210. *Id.* ¶ 119.

211. Afghanistan has been a State party to the Rome Statute since February 10, 2003.

subject-matter jurisdiction and the OTP has re-focused its investigation in Afghanistan to target Taliban crimes.²¹² If so, or in any event, the ICC may face the same challenges that Australia would: the logistics of investigating crimes in a conflict zone,²¹³ and of investigating crimes in territory controlled by a group known for committing mass atrocities and being unfriendly to foreign States and international organizations.

That said, it could be possible that the focus of an investigation on a commander would not necessarily require evidence collection *in* Afghanistan, but rather Australian military evidence *from* Afghanistan, in other words tracking the available intelligence, understanding what was known at each level of the chain of command, and interviewing SASR personnel. All this evidence would come from the ADF and its personnel in Australia, not Afghanistan. Thus, it would possibly be easier—and face fewer unique investigative challenges—to pursue cases of command responsibility as compared to investigating the underlying crimes. In fact, Australian investigators will have an advantage over the ICC: an understanding of the ADF and the Australian legal system, as well as direct access to ADF witnesses and suspects.²¹⁴ Therefore, it is unlikely that the ICC would determine for these reasons that Australia was justified in not investigating its military command in such circumstances.

212. Although this would not stop the ICC from maintaining jurisdiction over any conduct in Afghanistan prior to a withdrawal, as “the Court retains jurisdiction over crimes that are alleged to have occurred on the territory of that State during the period when it was a State Party to the Rome Statute.” ICC OTP, *Statement of the Prosecutor, Fatou Bensouda, on Her Request to Open an Investigation of the Situation in the Philippines*, INTERNATIONAL CRIMINAL COURT (June 14, 2021), <https://www.icc-cpi.int/Pages/item.aspx?name=210614-prosecutor-statement-philippines> (referring to Situation in the Republic of Burundi, Case No. ICC-01/17-X, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi, ¶¶ 22–26 (Oct. 25, 2017)). This has also been confirmed at the domestic level, with the Philippines Supreme Court holding that the ICC’s jurisdiction remains for the time the Philippines was a State party. Agence France-Presse, *Philippines’ Top Court Rules ICC has Jurisdiction*, FRANCE24 (July 21, 2021), <https://www.france24.com/en/live-news/20210721-philippines-top-court-rules-icc-has-jurisdiction>.

213. See generally Mark B. Harmon & Fergal Gaynor, *Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings*, 2 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 403 (2004) (on the difficulties of investigating crimes in conflict zones). Nouwen discusses the challenges of investigating crimes in the active conflict zones in Sudan and Uganda, including lack of cooperation from local authorities; NOUWEN, *supra* note 179, at 369–78.

214. Heller, *supra* note 199, at 652.

D. Prosecutorial Choices and Outcomes Under Australian Law

This section will consider the situation under which an investigation has taken place, but prosecutions against commanders do not proceed or end in acquittals due to an inability to meet the higher evidentiary threshold of command responsibility under Australia's domestic law. Let us return to the SSC test, under which "the issue is the degree of overlap required as between the incidents."²¹⁵ The SSC test raises a number of questions: Would Australia's command responsibility provision meet the SSC test? Given that the Australian provision is not the same as the ICC provision, and because the Australian requirements for command responsibility are higher, does this mean Australia has a gap in its domestic criminal law that the ICC could fill by arguing that the conduct is not substantially the same?

As demonstrated above, the Australian command responsibility provision is substantially different from the equivalent Rome Statute provision. Key to this is our conclusion that the Australian command responsibility test adopts a higher threshold of fault than the Rome Statute; and that the Australian provision contains distinctive evaluative steps that diverge from the Rome Statute. The lack of specific direction from the ICC on the consequences of such a divergence in national law (which is to some extent inevitable)²¹⁶ renders it difficult to apply the SSC test in theory to such a divergence in practice. The Court has said that the extent of overlap or sameness under the SSC test will depend on the specific facts of the case. It has thus provided no general guidance, holding that it is "not possible to set down a hard and fast rule to regulate the issue" of what constitutes the same case, "and in particular the extent to which there must be overlap, or sameness, in the investigation of the conduct described in the incidents under investigation which is imputed to the suspect, which instead will depend upon the specific facts of the case."²¹⁷

The Court must thus assess the "overlap" between conduct that the OTP is pursuing and that pursued by domestic prosecutors, and whether said overlap is large or small. In turn, this requires judicial assessment of whether the national and ICC cases "sufficiently mirror" each other. This involves comparing the underlying incidents along with the conduct of the suspect

215. *Gaddafi*, *supra* note 188, ¶ 72.

216. CRYER ET AL., *supra* note 79, at 78–81; WERLE & JESSBERGER, *supra* note 63, at 182–87.

217. *Gaddafi*, *supra* note 188, ¶ 71.

giving rise to their criminal responsibility.²¹⁸ If only “discrete aspects” of the OTP case are being investigated domestically, the Court will not find enough overlap for the purpose of rendering the case inadmissible before the ICC as “it will most likely not be possible for a Chamber to conclude that the same case is under investigation.”²¹⁹ However, again, the ICC provides no definition of “discrete aspects,” so it is impossible to understand the parameters of “overlap” and “discrete aspects.” The conclusion to be drawn is not that the Rome Statute requires Australia to adopt precisely the same definition of command responsibility. It does not. However, if the Australian definition’s evidentiary threshold means that certain persons are not investigated at all—because the prospect of a conviction would seem too remote—then those persons would be open to ICC prosecution under the SSC test. The more difficult question would be if a genuine investigation of an individual resulted in a decision not to prosecute on this basis. Article 17(1)(b) of the Rome Statute would then appear to preclude the case being admissible, unless the higher evidentiary threshold in Australian law was considered to render Australia unable to Prosecute.

However, when considering the application of the SSC test, it is crucial to note that the ICC case law and literature has not addressed the role of modes of liability in complementarity, instead the focus has invariably been on substantive crimes.²²⁰ However, this question was addressed by the ICTY when considering whether to refer a case to Croatia for domestic prosecution. In the *Ademi and Norac* case, the Tribunal had to consider whether differences in the law of command responsibility between the 1993 Croatian domestic law—the Fundamental Criminal Statute of Croatia—and the ICTY

218. *Id.* ¶¶ 72–73.

219. *Id.* ¶ 77.

220. An exception is Rod Rastan. See Rod Rastan, *What is “Substantially the Same Conduct”?: Unpacking the ICC’s “First Limb” Complementarity Jurisprudence*, 15 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1 (2017); Rod Rastan, *Situation and Case: Defining the Parameters*, in THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY 421 (Carsten Stahn & Mohamed El Zeidy eds., 2011). Simon Meisenberg considers modes of liability in Cambodian domestic law, noting that the absence of command or superior responsibility modes of liability in the Cambodian Criminal Code “could have significant implications for any prosecution of international crimes in Cambodia.” Simon M. Meisenberg, *Complying with Complementarity? The Cambodian Implementation of the Rome Statute of the International Criminal Court*, 5 ASIAN JOURNAL OF INTERNATIONAL LAW 123, 136 (2015). Others have discussed the relevance of sentencing and sanctions in the complementarity assessment. Beatriz E. Mayans-Hermida & Barbora Holá, *Balancing “the International” and “the Domestic”: Sanctions under the ICC Principle of Complementarity*, 18 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1103 (2021).

Statute were significant enough to prevent referral to Croatia. The Croatian criminal statute did not contain an applicable provision for command responsibility,²²¹ with the intention instead to prosecute the accused as a form of complicity and as an “*omission* to prevent the commission of a crime or failure to punish the perpetrator.”²²² The Referral Bench of the Tribunal noted some significant differences in the law under the Croatian criminal statute. These differences were:

- The concept of direct command responsibility in Croatian law was confined only to “ordering,” which is a separate mode of liability under the ICTY Statute (as in the Rome Statute).
- The Croatian criminal statute provision covering offences by omission would only apply if the element of causation was met, “*i.e.* if it is established as highly probable that the accused’s actions would have averted the criminal consequences. Therefore, criminal responsibility for omission may not extend to a failure to act after the commission of the crime.”²²³
- If a commander did not have direct knowledge but had reason to know that an offence was about to be committed or had been committed, failure to act in such a case would likely not establish criminal responsibility under the Croatian criminal statute.²²⁴

Consequently, the Referral Bench admitted that there was a risk of acquittal due to these differences in law; however, it did not find “this possible and limited difference in the law as an obstacle to the referral proposed.”²²⁵ Consequently, the Referral Bench did not exclude referral “for the reason only that there may well be found to be a limited difference between the law applied by the Tribunal and the Croatian court.”²²⁶ As Rod Rastan notes, the difference between the Croatian criminal statute and the ICTY Statute “could be overcome to a large extent and would not prove fatal to the charges tended by the Prosecutor.”²²⁷ In a more recent discussion, Rastan

221. By the time of the case in 2005, the Fundamental Criminal Statute of Croatia did have a provision, but it would not be applied under non-retroactive application norms.

222. Prosecutor v. Ademi and Norac, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11bis, ¶ 36 (Int’l Crim. Trib. for the former Yugoslavia Sept. 14, 2005) (emphasis in original). It was also suggested that command responsibility could be tried through customary international law. *Id.* ¶¶ 33, 34, 37.

223. *Id.* ¶ 41.

224. *Id.* ¶¶ 41–42.

225. *Id.* ¶ 45.

226. *Id.* ¶ 46. The case was referred to Croatia.

227. Rastan, *Situation and Case: Defining the Parameters*, *supra* note 220, at 452.

discusses this case in the context of the subsequent SSC case law from the ICC, noting that consideration could be made

whether the characterization of the criminal conduct in one set of proceedings would deprive the alleged crime of its essential features in another. . . . [T]his approach could also permit comparison of the legal characterization of the suspect's role (i.e. the mode of liability) to the extent that it bears relevance on whether the national authorities are seeking to ascertain the criminal responsibility of the suspect for substantially the same conduct.²²⁸

Rastan also points out the importance of considering *ne bis in idem*, which would be relevant here only at a later stage, if Australia had tried a suspect who was then acquitted. If such an acquittal were due to an inability to prove that conduct fell under the higher threshold of fault demanded by the Australian command responsibility provision, the ICC would then have to consider whether an ICC trial of the same person, for command responsibility, would necessarily amount to trying the accused for the same conduct, thereby violating *ne bis in idem*.²²⁹ As noted above, if proceedings were terminated at an earlier stage due to a lack of evidence to meet the higher Australian standard, the ICC would have to consider whether this difference in law was such as to render Australia “unable” to prosecute. While the case law on “inability” under Article 17 is at best contradictory,²³⁰ the standard for such a finding would seem high.²³¹ In line with the result in *Ademi and Norac* it would seem unwarranted to reach such a conclusion based on a (perhaps relatively subtle, if consequential) variation in the mens rea requirement for command responsibility.

228. Rastan, *What is “Substantially the Same Conduct”?*, *supra* note 220, at 17.

229. See also Patryk I. Labuda, *The Flipside of Complementarity: Double Jeopardy at the International Criminal Court*, 17 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 369 (2019) (considering *ne bis in idem* if the ICC has prosecuted first).

230. Prosecutor v. Gaddafi and Al-Senussi, Case No. ICC-OI/II-OI/II OA 6, Decision on the Admissibility of the Case against Abdullah Al-Senussi (July 24, 2014).

231. On its face, Article 17(3) of the Rome Statute requires a determination of inability to consider whether “a total or substantial collapse or unavailability of its national judicial system” has precluded action; but it is unclear if this precludes other lesser matters as potentially giving rise to “inability” to prosecute.

E. Unwillingness and Shielding

In relation to complementarity, Kevin Jon Heller states that the only question for the ICC should be “whether a state’s selection of conduct exhibits an unwillingness to genuinely investigate or prosecute.”²³² Ultimately, we will be left with the two questions of whether Australia’s conduct shows it is unwilling or unable to investigate or prosecute, and whether Australia’s conduct is trying to shield a suspect from criminal investigation. As to the first question, clearly, Australia is genuinely *generally* willing to investigate and prosecute alleged SASR war crimes. However, the Brereton Report dismisses the idea of investigating or prosecuting on the basis of command responsibility above the patrol level. “Unwillingness could stem from the lack of an appropriate legal framework, lack of institutional capacity or of political will,”²³³ yet “inaction on the part of a state having jurisdiction renders a case admissible before the Court regardless of any question of unwillingness or inability.”²³⁴ As noted, a decision not to investigate would be considered inaction. As to the second question,²³⁵ not pursuing investigation or prosecution of commanders could be perceived as shielding suspects from criminal responsibility. The OTP’s Policy Paper on Preliminary Examinations offers examples of indicators of shielding a person from criminal responsibility, which include “manifest inadequacies in charging and modes of liability in relation to the gravity of the alleged conduct and the purported role of the accused.”²³⁶ A decision at the investigation or prosecutorial stage not to investigate or prosecute commanders may be considered “a manifest inadequacy in charging” if the OTP otherwise deems there to be a case to answer

232. Heller, *supra* note 199, at 659.

233. OVO CATHERINE IMOEDMHE, *THE COMPLEMENTARITY REGIMES OF THE INTERNATIONAL CRIMINAL COURT: NATIONAL IMPLEMENTATION IN AFRICA* 33 (2017). *See also Kenyatta*, *supra* note 184.

234. IMOEDMHE, *supra* note 233, at 36 (citing Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (June 16, 2009)). *See also* Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07-1497, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 78 (Sept. 25, 2009); Kristýna Urbanová, *The Principle of Complementarity in Practice, in THE ROME STATUTE OF THE ICC AT ITS TWENTIETH ANNIVERSARY: ACHIEVEMENTS AND PERSPECTIVES* 163 (Pavel Šturma ed., 2019).

235. Rome Statute, *supra* note 77, art. 17(2)(a).

236. ICC Office of the Prosecutor, Policy Paper on Preliminary Examinations, ¶ 51 (Nov. 2013), https://www.icc-cpi.int/Pages/item.aspx?name=otp-policy-pe-11_2013.

on command responsibility. Likewise, a decision not to prosecute based on the higher threshold of the Australian law could be deemed a “manifest inadequacy in modes of liability,” where “defects in domestic law, which might render the national judicial system substantially or totally unavailable, can make a case admissible before the ICC.”²³⁷ Either way, these decisions could potentially be seen by the ICC as shielding suspects from criminal responsibility.

VI. CONCLUSION

This paper has sought to explore two ostensibly simple questions: does the Brereton Report disclose a basis for prosecuting commanders in relation to Australian war crimes in Afghanistan? And if not, could the ICC step in? The answers are, as we have sought to explain, not straightforward. The approach of this paper was first to examine the facts as found by the Brereton Report (and as disclosed by Australian media reporting); second, to consider the international law of command responsibility; third, to examine how closely the relevant Australian law tracks international law; and fourth, to ask whether this has implications for the “complementary” jurisdiction of the ICC. There appears to be incontrovertible evidence that a number of war crimes were committed in Afghanistan by Australian special forces. Further, the Brereton Report finds evidence of a wider culture of doctoring operational reporting through use of “throwdowns” and boilerplate language, either to conceal crimes or to create a false impression that civilian deaths occurred only when justified under rules of engagement. Warning signs, including complaints from tribal elders, interventions from the Red Cross, and a culture of obstructing investigations, all appear to have gone unheeded. Nonetheless, according to the Brereton Report, it does not appear, given both the frequent rotation of commanders at all levels above the patrol level and the operational environment which lent itself to compartmentalization of information, that any commander necessarily had anything approaching the full picture. The question then becomes what the law requires of commanders. International law will attach liability to commanders who, given the circumstances, should have known crimes were being or had been committed. Australian law, however, requires that such commanders be reckless as to whether such crimes were occurring. As we have sought to explain, the difference may appear subtle, but it is potentially consequential. On one

237. IMOEDMHE, *supra* note 233, at 59.

view, the international rule may require commanders in possession of sufficient facts to make further enquiries and impute constructive knowledge of crimes to them if they do not. The Australian law requires a commander to have a genuine appreciation that there is a real risk of such crimes occurring and to have acted (or failed to act) regardless. The latter is likely to be a higher standard to prove and could lead Australian prosecutors to conclude that—on the available evidence—there is no realistic prospect of convicting anyone above patrol level. However, such a conclusion could in turn admit the argument that Australia is either unwilling or unable to prosecute implicated commanders, thus opening the door to ICC prosecution under its complementary jurisdiction. The rest of these concluding remarks focus on that possibility and its wider implications.

The complementarity principle is designed to create a system of justice and cooperation between the Court and States.²³⁸ The ICC is not a court of appeal, nor does it have primacy over national jurisdictions. Complementarity prioritizes domestic systems conducting their own investigations and prosecutions, particularly given the ICC's limited resources. Stahn refers to complementarity as “a ‘catalyst’ for compliance,”²³⁹ under which the ICC monitors a State party's actions, requests information on investigations and trials, and may ultimately exercise its jurisdiction over that State's nationals if the State fails in its duty to investigate and prosecute. States are motivated, in theory, to carry out this duty “through potential loss of ownership over proceedings and embarrassment resulting from ICC scrutiny.”²⁴⁰ Essentially, the Court may intervene when States do not comply with their obligations under the Rome Statute. The Court also exists to complement weaknesses of domestic jurisdiction, meaning that if a State has shortcomings in its ability to comply with the Rome Statute, Article 17 allows the Court to step in in certain circumstances.²⁴¹

There are two potential complementarity scenarios arising from the Brereton Report that may give rise to ICC jurisdiction over international crimes committed by Australian forces in Afghanistan. First, at the investigation stage, if there is no investigation at all of relevant commanders by the

238. Obviously State parties are obligated to cooperate with the Court under Part 9 of the Rome Statute, but see Rome Statute, *supra* note 77, art. 93(10), which provides for the Court to “cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct” under ICC jurisdiction.

239. Stahn, *supra* note 180, at 250.

240. *Id.* at 250.

241. *Id.* at 253.

OSI. In this scenario, the ICC would have jurisdiction under the “same person same conduct” test. Second, at the prosecution stage, if the discrepancy between the Australian and the Rome Statute command responsibility provisions results in a decision not to prosecute a given individual based on the inability of the evidence to reach the higher standard in Australian law. Whether this second scenario would constitute a case of Australia being unable or unwilling to prosecute under the Rome Statute is an open question. The limited ICTY referral jurisprudence on the question of variations between national and international definitions of command responsibility would suggest not, as would the seemingly high threshold for a finding of inability under Article 17 of the Rome Statute. Nonetheless, a teleological interpretation of the ICC Statute could support a more liberal approach, based on the principle that the Court is intended to prevent impunity and step in where national jurisdictions fail in their duties. Notably, there is no ICC case law on point and such Article 17 case law as there is remains contradictory.

It seems certain that Australia would not want ICC scrutiny of its conduct in Afghanistan nor the embarrassment of the ICC stepping in to prosecute Australian military personnel. This would particularly be the case if some personnel are prosecuted by Australia and the ICC steps in to fill the gap regarding those who are either not investigated, or who are investigated and not prosecuted due to difficulties of proof. It would then be up to Australia to challenge admissibility and prove that a case taken up by the ICC is not admissible. This would require Australia to demonstrate that its command responsibility law covers substantially the same conduct as the Rome Statute.²⁴²

There is a question, then, as to how such proceedings might interact with broader ICC investigations in Afghanistan. While a full discussion of the ICC’s own Afghanistan investigation is outside the scope of this paper, it is worth noting several pertinent aspects. In March 2020, the Court approved the OTP to investigate crimes committed in Afghanistan since 1 July 2002.²⁴³ Later that same month, the Afghanistan government requested the OTP defer its investigation under complementarity principles, whereby the Court would share investigatory burdens with Afghanistan. However, after the

242. “[A] state that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible.” IMOEDMHE, *supra* note 233, at 62.

243. Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17-138, Judgment on the Appeal against the Decision on the Authorisation of an Investigation (Mar. 5, 2020).

takeover of Afghanistan by the Taliban in 2021, the OTP requested authorization to resume this investigation, concluding that “there is no longer the prospect of genuine and effective domestic investigations into Article 5 crimes within Afghanistan.”²⁴⁴ In doing so, the OTP specifically stated that the focus of these investigations would be on “crimes allegedly committed by the Taliban and the Islamic State—Khorasan Province (‘IS-K’) and to deprioritise other aspects of this investigation,” because of the gravity and continuing nature of alleged crimes by the Taliban and IS-K.²⁴⁵ In other words, the OTP is no longer focussing on investigating possible crimes committed by the United States or any other allied forces in Afghanistan. This appears to indicate that the OTP has no immediate interest in taking on the prosecution of ADF commanders, even if Australia were to not investigate or prosecute commanders, or commanders were to be acquitted due to the nature of the wording of the command responsibility provision in Australian law.

Quite apart from such specifics relating to the Afghanistan investigation, given the ICC’s recent woes and controversies,²⁴⁶ it would seem easier for the OTP to claim any Australian prosecutions as a win for complementarity rather than engage in complex command responsibility prosecutions of its own. It also seems likely that the possibility (or threat?) of an ICC investigation into ADF personnel could motivate Australian investigators and prosecutors to ensure that their work is particularly thorough—the ICC thus serving as a catalyst for domestic action.²⁴⁷

244. ICC Office of the Prosecutor, Statement of the Prosecutor, Karim A. A. Khan QC, Following the Application for an Expedited Order under Article 18(2) Seeking Authorisation to Resume Investigations in the Situation in Afghanistan (Sept. 27, 2021), <https://www.icc-cpi.int/Pages/item.aspx?name=2021-09-27-otp-statement-afghanistan>.

245. *Id.*

246. See Douglas Guilfoyle, *Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis*, 20 MELBOURNE JOURNAL OF INTERNATIONAL LAW 401 (2019).

247. NOUWEN, *supra* note 179; Geoff Dancy & Florencia Montal, *Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions*, 111 AMERICAN JOURNAL OF INTERNATIONAL LAW 689 (2017); Fannie Lafontaine & Sophie Gagné, *Complementarity Revisited: National Prosecutions of International Crimes and the Gaps in International Law*, in INTERNATIONAL CRIMINAL LAW IN CONTEXT 260 (Philipp Kastner ed., 2017).