Should Have Known Better?
The Standard of Knowledge for
Command Responsibility in
International Criminal Law

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The thoughts and opinions expressed are those of the author and not necessarily those of the Israeli or U.S. governments or any of their respective military organizations.
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I. INTRODUCTION

The concept of holding commanders responsible for the behavior of their subordinates is as ancient as it is contentious. It is natural to refer to the Chinese strategist and philosopher Sun Tzu for one of the earliest expressions of the impact a commander has over the conduct of subordinates, dating back to the fifth century BCE: “When troops flee, are insubordinate, distressed, collapse in disorder, or are routed, it is the fault of the general. None of these disorders can be attributed to natural causes.”1 The Roman statesman Cicero resounded the assertion that a commander must bear some responsibility for the transgressions of subordinates as far back as the first century BCE.2 Describing a scenario wherein Governor Verres faced a difficult decision on whether to hold fleet commander Cleomenes accountable for leading his subordinates to flee in the face of adversity, Cicero voices Verres’ conflict:

What is to be done with Cleomenes? Can I possibly punish subordinates and yet let off the man whom I put in full authority over them? can [sic] I execute the men who followed Cleomenes’ lead, and acquit Cleomenes who ordered them to follow after him and join him in running away?3

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1. Sun Tzu, The Art of War 125 (Samuel B. Griffith trans., Oxford University Press 1963) (c. 3d century BCE). Greek and Roman scholarship has also referred to the responsibility and influence of commanders and overseers over the behavior of their subordinates. See also 1 Columella, On Agriculture 89 (Harrison Boyd Ash trans., Harvard University Press 1941) (c. 1st century A.D.) (“This he can accomplish if he will choose rather to guard his subordinates from wrongdoing than to bring upon himself, through his own negligence, the necessity of punishing offenders”); 2 Xenophon, Cyropaedia 321 (Walter Miller trans., Harvard University Press 1914) (c. 370 BCE) (“by setting such an example, Cyrus secured at court great correctness of conduct on the part of his subordinates, who gave precedence to their superiors”); Cicero, On the Republic, On the Laws 467 (Clinton W. Keyes trans., Harvard University Press 1928) (56 AD) (dictating that officials with the power of State (“imperium”) shall “hold themselves and, their subordinates in check”). In a different context, Cicero advised Quintus “to keep your subordinates in order.” Cicero, Letters to Quintus and Brutus, Letter Fragments, Letter to Octavian, Invectives, Handbook of Electioneering 33 (D.R. Shackleton Bailey ed., trans., Harvard University Press 2002) (c. 43 AD).


3. Cicero, supra note 2, at 581.
Cicero depicts Verres’s decision to spare Cleomenes but execute the captains under his command as reflecting foul judgment that favors Cleomenes and disregards his dereliction of duty.4

Historically, various theatres of war have put to the test the question of command responsibility for crimes committed by subordinates, and judicial bodies subjected its legal implications to vehement discourse.5 This does not come as a surprise when one considers the high stakes involved in such criminal legal discourse where commanders face trial—and the potential loss of life or liberty—for atrocity crimes attributed to them, despite those crimes not being directly committed by the commander.

The post-World War II case of General Yamashita, who the U.S. Military Commission in the Western Pacific convicted for war crimes that his subordinates committed during Yamashita’s tenure as commander of the Japanese armed forces in the Philippines, sparked heated discord among the justices of the U.S. Supreme Court.6 In his dissent, Justice Rutledge applied impassioned and admonishing rhetoric, barely restraining his frustration:

With all deference to the opposing views of my brethren, whose attachment to that tradition needless to say is no less than my own, I cannot believe in the face of this record that the petitioner has had the fair trial our Constitution and laws command. Because I cannot reconcile what has occurred with their measure, I am forced to speak. At bottom, my concern is that we shall not forsake in any case, whether Yamashita’s or another’s, the basic standards of trial which, among other guaranties, the nation fought to keep; that our system of military justice shall not, alone among all our forms of judging, be above or beyond the fundamental law or the control of Congress within its orbit of authority, and that this Court shall not fail in its part under the Constitution to see that these things do not happen.7

4. Id.
7. Id. at 42 (Rutledge, J., dissenting). For an in-depth account of the dynamics behind Justice Rutledge’s approach to the case, see John M. Ferren, General Yamashita and Justice Rutledge, 28 JOURNAL OF SUPREME COURT HISTORY 54 (2003). The military commission

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These exceptional remarks are inextricably linked to the nature of command responsibility as a legal construct for criminal liability.

Still, despite the vibrant discourse regarding its content and application, it is safe to say that the modality of command responsibility is now an indispensable part of international criminal law and is considered part of customary international law.8

A. The Legal Construction of Command Responsibility

The conventional formula for a criminal charge encompasses a two-pronged test: (1) did the accused carry out specific conduct which is prohibited by law (actus reus), and (2) did he carry out such conduct with a particular mental disposition (actus non facit reus nisi mens sit rea).9 For instance, the most severe form of murder typically comprises a physical act leading to the demise of the victim, accompanied by a mental state of intention to end the victim’s life (or at least cause the victim grave bodily harm).10 Conversely, in most cases that deal with command responsibility, the factual analysis maintains two uncontested findings: (1) that the crimes attributed to the commander have indeed taken place, and (2) that the commander has not directly participated in carrying out the conduct which produced the crimes.11 Hence, in terms of traditional criminal law, the construct of command responsibility is anomalous.12

sentenced General Yamashita to hang and he was executed on February 23, 1946. See infra Part III for further analysis.


Rather than a direct physical act, the doctrine of command responsibility seeks some other association between the commander and the offense that may amount to criminal liability that is equal or graver in severity with respect to the main perpetrator. The legal characterization of this association is where doctrine and jurisprudence begin to diverge.

Academic and juristic discourse regarding the various elements of command responsibility is abundant. For example, some relates to the scope and nature of the measures expected from the commander in order to quell the misconduct of subordinates, some dissects the modes of liability that command responsibility embodies, and some invokes discussion regarding the authority of the commander over subordinates.

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14. See, e.g., Prosecutor v. Bemba Gombo, ICC-01/05-01/08-3636-Anx1-Red, Dissenting Opinion of Judge Mmasenono and Judge Hofmański, ¶¶ 41–49 (June 8, 2018). The accused was the president and commander-in-chief of the Mouvement de liberation du Congo (Movement for the Liberation of Congo) and was indicted with war crimes and crimes against humanity allegedly committed in the Central African Republic in the years 2002–3, as part of an attempt to curtail a military uprising against the regime. The charges imputed the crimes to Bemba on the basis of command responsibility. After being convicted in trial court, Bemba was acquitted of all charges in an appeal judgment which focused on the measures that he could (or could not) reasonably have taken to address the acts of his subordinates.


16. Prosecutor v. Delalić et al., Case No. IT-96-21-A (the Čelebići Case), Judgment, ¶¶ 186–199 (Int’l Crim. Trib. for the former Yugoslavia Feb. 20, 2001). The case revolved around criminal acts that the Yugoslav People’s Army allegedly committed against detainees in the Čelebići camp in Bosnia and Herzegovina, including murder, sexual assault, and torture. Three of the accused held command positions in the camp during the events and were convicted of war crimes. Delalić was a coordinator of Bosnian forces in the region and later a commander of a tactical unit within the Bosnian army; he was acquitted of all charges due to lack of knowledge and control of the criminal activity.
An essential part of the legal debate raises the question of the mens rea, i.e., what is the required mental nexus between the commander and the primary criminal acts that subordinates commit? One of the focal points for discussion revolves around the question of knowledge—could commanders be liable for acts of which they had no knowledge based solely on their authoritative duties as commanders, or would such lack of knowledge negate liability for crimes their subordinates committed? Notably, much of the scholarship discusses whether commanders should be liable for crimes of which they lacked knowledge, thus approaching the realm of lex feranda, i.e., the supposedly desirable legal norm, rather than the current and prevailing legal norm (lex lata). Such discourse is integral for progressing international law in a direction that combats impunity while protecting the fundamental rights of the accused and the integrity of the judicial procedure. Still, judicial bodies that apply the doctrine of command responsibility should arguably care more about where the law currently stands and should be conscious of conflating current law and aspirational law. To that end, this article seeks to provide a reference for the lex lata concerning the component of knowledge as it is determined by the framework of command responsibility within international criminal law.

Focusing on how States treat the doctrine of command responsibility, this article takes the position that the prevailing international legal standard is that of actual knowledge, and that it is an inseparable part of the doctrine, in the absence of sufficient support for the extension of the standard to constructive knowledge. While certain contextual (and not insignificant) instances demonstrate broader modes of liability (including constructive knowledge), they do not amount to the necessary gravitational force to create a binding norm of customary international law. Thus, a standard of constructive knowledge lacks sufficient legal ground in international law and should be avoided as a matter of lex lata.

Furthermore, there are substantial reasons of legal policy that should encourage any adjudicating body, be it national or international, to apply the


18. Id. See also Darryl Robinson, CRIMINAL LAW THEORY MEETS INTERNATIONAL CRIMINAL LAW 206–23 (2020).
more legally founded standard of actual knowledge. This is particularly applicable when the case involves a foreign national and the judicial proceeding could implicate international relations and give rise to consequences in the realm of State sovereignty and State responsibility. Insisting on a standard of constructive knowledge as a basis to apprehend a foreign national, when such a standard is unfounded in international law, could consist of an internationally wrongful act and could even amount to illegal intervention or use of force. Judicial bodies should minimize such risks by applying actual knowledge as a standard of culpability, since it is more firmly grounded within the identifiable framework of customary international law. Judicial operation within a solid and demonstrable legal framework will also preserve and promote the credibility and legitimacy of the judicial process in the face of criticism.

B. Scope and Sequence

Part II of this article establishes the methodological framework for identifying customary international law, focusing on the two interlinked elements of custom, which are State practice and opinio juris. Applying this framework to the doctrine of command responsibility is the key for identifying whether there is a norm of customary law that dictates the required standard of knowledge for command responsibility. Part III surveys essential State practice pertaining to the standard of knowledge in command responsibility and any accompanying articulation of the binding legal standard according to the State (opinio juris). The survey focuses on six States with diverse legal systems that faced issues of command responsibility in differing circumstances and varying contexts. The analysis submits that these States provide a meaningful sample that can educate on the current legal status of the issue at hand and assist in evaluating the customary rule governing mens rea in command responsibility. While the survey is qualitative in nature rather than quantitative, it is more than sufficient in demonstrating the elusiveness of State practice and opinio juris in this context. Still, the conclusion of the survey will include a reference to additional State behavior that weighs in on the issue of knowledge in command responsibility to complement the survey. While much analysis of command responsibility focuses on international case law,
this part brings to the fore the primary shaper of international law—State behavior—rather than the subsidiary source of judicial decisions.\textsuperscript{21}

Part IV demonstrates some of the broader implications for judicial bodies seeking to hold commanders liable based on their actual or constructive knowledge of subordinates’ crimes. The analysis focuses on the fora that are expected to trigger these implications—cases of universal jurisdiction and cases in the International Criminal Court (ICC). This part submits that there is a cost for applying a legal standard that oversteps customary international law, and it should be avoided. Finally, Part V concludes the analysis with the assertion that constructive knowledge does not reflect customary international law and should not be applied to cases of command responsibility. Rather, applying the standard of actual knowledge would be in line with the law as it stands and would avoid the costs of applying an erroneous legal standard.

II. Customary International Law as a Framework

Customary international law serves as one of the cornerstones for the identification of legal norms that bind State conduct.\textsuperscript{22} In the context of command responsibility, these norms frame the boundaries of the legal field in which command responsibility may result in criminal liability. Therefore, the following analysis seeks to determine whether there is an identifiable customary standard regarding the mens rea of command responsibility.

As described in the following paragraphs, the main attributes of customary international law suggest that a customary standard of knowledge must rely on widespread and consistent State practice, which can include legislation, executive guidance, and domestic jurisprudence that addresses the issue of knowledge. Additionally, independent evidence of \textit{opinio juris}—i.e., a sense that a particular standard of knowledge is legally required—is also necessary. Acceding to a treaty that sets a certain standard, for instance, will not be sufficient to demonstrate State practice nor \textit{opinio juris}, which could even contradict and override the treaty standard. This aspect will be addressed when discussing States that acceded to the Rome Statute of the International

\textsuperscript{21} Statute of the International Court of Justice art. 38(d), June 26, 1945, 59 Stat. 1055. As discussed below, domestic judicial decisions could nonetheless be a form of relevant State behavior.

\textsuperscript{22} Continental Shelf (Libya v. Malta), Judgment, 1985 I.C.J. 13, ¶ 26 (June 3).
Criminal Court, which treats command responsibility in Article 28 of the statute.  

A. Article 38 of the ICJ Statute and the Identification of Custom

Although the concept of command responsibility may have varying domestic manifestations, its general framework is widely considered an indivisible element of international criminal law. Consequently, the binding norms that frame command responsibility are extracted from the underlying sources of international law. The widely recognized codification of these sources is found in Article 38 of the Statute of the International Court of Justice (ICJ), which enumerates international conventions and custom as the primary sources of international law, as well as other “general principles of law recognized by civilized nations.” Article 38 construes custom as “evidence of

23. Rome Statute, supra note 13. While Article 28 is not the subject matter of this analysis, it is worth commenting that its contribution to the codification or formation of customary law regarding the mens rea of command responsibility is unsettled. Indeed, the drafters seem to have aimed to incorporate negligence as mens rea in Article 28 through the “should have known” formula, presumably based on certain case law of the post-World War II tribunals. See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/C.1/SR.1, at 136–38 (1998). Yet, as will be addressed below, subsequent developments such as the intriguing way member States incorporated the Rome Statute into their domestic legislation and the ambiguous treatment of Article 28 in jurisprudence of the court. The incongruent history of the doctrine further suggests that Article 28 was an introduction of a new standard rather than a natural extension of previous standards. See, e.g., Triffterer, supra note 12, at 1075 (“Though most of the reported regulations, statements and decisions refer to one or more singular aspects which later have been defined in articles 86 and 87 Add. Prot. I 1977, (and in article 28 Rome Statute) none of them offers not even an approximately comprehensive scope and notion of a consistent definition for command responsibility”).

24. Bassiooni, supra note 5, at 9 (deeming international criminal law as “The penal aspects of international law”).

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a general practice accepted as law.” Therefore, the plain language of Article 38 concludes that in the absence of a governing international agreement between two nations, custom is the prominent legal source that will shape the obligations and rights of these nations (and their citizens) in the interstate relationship. Moreover, Article 38(1)(d) acknowledges “judicial decisions and the teachings of the most qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

A contemporaneous portrait of the binding norms of command responsibility demands a careful application and exploration of the sources of international law as they currently stand—particularly international custom. Accountability through command responsibility has carried enduring importance, but its implementation in different instances has not necessarily provided more clarity for its legal contours, which seem to fluctuate constantly over time.

The exercise of identifying a customary norm is not a simple task. Unlike domestic statutory rules or binding legal precedent, a customary rule does not pronounce itself in a ceremonious and concise fashion. Instead, customary rules emerge from the steady and laborious accumulation of expressions of State behavior that demonstrate adherence to the rule, in practice as well as in perception (“general practice” coupled with “acceptance as law”). A comprehensive analysis of custom as a source of law far exceeds the scope of this study. Instead, the following segment provides foundational remarks that contribute to the methodological framework for the subsequent analysis of State behavior in relation to command responsibility.

26. Statute of the International Court of Justice, supra note 21, art. 38.
27. Continental Shelf (Libya v. Malta), supra note 22, ¶ 26. It is also well established that even in the face of an existing international agreement, custom continues to serve as an overarching source of obligations between the parties; see Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331; Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr), Judgment, 2008 I.C.J. 177, ¶ 112 (June 4); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 172–82 (June 27).
28. Statute of the International Court of Justice, supra note 21, art. 38(1)(d).
31. Statute of the International Court of Justice, supra note 21, art. 38.
B. The Two Elements of Custom

Article 38 indicates that only two elements of behavior are constitutive for determining that custom exists. The first element is the general practice by States (also referred to as “State practice”); the second element is the acceptance as law by States (also referred to as “opinio juris”). One without the other will not sustain a claim for a customary status, as stated by the UN International Law Commission:

Practice without acceptance as law (opinio juris), even if widespread and consistent, can be no more than a non-binding usage, while a belief that something is (or ought to be) the law unsupported by practice is mere aspiration; it is the two together that establish the existence of a rule of customary international law.

Thus, general State practice that applies a certain standard of knowledge to command responsibility will satisfy one aspect of the analysis, but it will not rise to a level of a customary rule if that practice is not backed by evidence States apply the standard out of a sense of legal obligation. The next paragraphs will address both State practice and opinio juris to understand what kind of evidence is relevant to establish each of these elements in the context of command responsibility.

1. Practice

A sovereign State executes its will, goals, and values through a myriad of agents and mechanisms. Some acts are explicit and easily attributable to the

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33. ILC Draft Conclusions, supra note 32, at 126; see also North Sea Continental Shelf (F.R.G./Den.; F.R.G./Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20) (“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it”).
State, while others are surreptitious and remotely traceable to a State footprint; some acts exhibit a decisive resolve of the executive, while others may come in the form of a judicial injunction or a perplexing legislative proposal. Any of these acts demonstrate some form of practice on behalf of an organ of the State. Still, not all of these acts are equally consequential for the assessment of “State practice” for the purposes of recognizing custom, and some of them may be inconsequential to begin with. Therefore, it is imprudent to assign decisive weight to a single act on behalf of a State. Instead, it is sound to consider the totality of available indications of the State’s practice. When it comes to the issue of command responsibility, a State could, for instance, implement prosecutorial guidance that endorses a certain standard, yet the State’s jurisprudence could point toward a different standard. The U.S. example, as detailed below, resembles such a case and highlights the importance of examining the overall behavior of a State over time.

The distinction between practice and the potentially accompanying sense of obligation (opinio juris) means that relevant practice, in and of itself, is not


35. See, e.g., Biden v. Texas, No. 21A21 (Sup. Ct. Aug. 24, 2021) (order directing the president to reinstate the Migrant Protection Protocols, also known as “Remain in Mexico”).

36. For instance, a governmental agency may act in a certain way that supposedly manifests the power of the State, but the legislature could protest and dispute that act. See, e.g., Congressional Review of Agency Rulemaking, 5 U.S.C. §§ 801–808 (2017); Todd Garvey & Daniel J. Sheffner, Cong. Rsch. Serv., R45442, Congress’s Authority to Influence and Control Executive Branch Agencies 17–31 (updated May 12, 2021). In other cases, an agent may purportedly act on behalf of the State, but a domestic court may find the act to be ultra vires and therefore void. See, e.g., Woolwich Equitable Building Society v. Inland Revenue Commissioners [1993] A.C. 70 (H.L.) ¶ 265 [appeal taken from Eng.]; Kleinwort Benson Ltd. v. Lincoln City Council [1999] 2 A.C. 349 (H.L.) ¶ 387 [appeal taken from Eng.]; Central Transp. Co. v. Pullman’s Palace Car Co., 139 U.S. 24, 59–60 (1891). See also ILC Draft Conclusions, supra note 32, at 128:

when considering legislation as practice, what may sometimes matter more than the actual text is how it has been interpreted and applied. Decisions of national courts will count less if they are reversed by the legislature or remain unenforced because of concerns about their compatibility with international law. Statements made casually, or in the heat of the moment, will usually carry less weight than those that are carefully considered; those made by junior officials may carry less weight than those voiced by senior members of the Government.

indicative of a perception that there is a legal obligation to carry out such practice. In other words, it is untenable to deduce opinio juris merely from the existence of practice; instead, independent evidence of opinio juris is required.37

Generally, an act of an authorized capacity of the executive branch is a definitive example of “State practice,” and in many cases it is the most formative practice for the sake of custom.38 Naturally, the legislative framework that governs the executive is in itself an expression of State practice, but its interpretation by the judicial and executive branches could decisively inform its analysis.39

The role of judicial decisions in this regard is somewhat evasive. Article 38(1)(d) of the ICJ Statute assigns to judicial decisions the role of “subsidiary means for the determination of the law.”40 That is the case for national courts as well as international tribunals.41 Yet, decisions of national courts could themselves be a form of State practice that is impactful in the assessment of a State’s position on a certain legal issue.42 However, there appears to be no


Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, as will presently be seen, there are other circumstances calculated to show that the contrary is true.

See also North Sea Continental Shelf (F.R.G./Den.; F.R.G./Neth.), supra note 33, ¶ 78.


39. See, e.g., Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), supra note 32, ¶ 55.

40. Statute of the International Court of Justice, supra note 21, art. 38(1)(d).

41. 1 KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: FOUNDATIONS AND GENERAL PART 132–33 (2d ed. 2021); ILC Draft Conclusions, supra note 32, at 149; CRAWFORD, supra note 25, at 38–39.

general concurrence regarding the relative weight that should be assigned to decisions of courts of varying instances.\textsuperscript{43} The determinative value of judicial decisions for the identification of custom is still equivocal.\textsuperscript{44} Hence, a judicial decision would have to be inspected in light of its particular merits and in consideration of factors that may affect its value in the context of identifying customary law. Such factors could include the precedential value of the case, the compliance of the executive authorities, and the endorsement or overriding of the decision by the legislature.\textsuperscript{45} The analysis of State practice below demonstrates the central role that national judicial decisions play in shaping the State’s stance on the standard of knowledge in command responsibility.

Finally, an international customary norm can only emerge from “general practice accepted as law.”\textsuperscript{46} For practice to be considered “general,” it must be widespread to such a measure that it is “both extensive and virtually uniform.”\textsuperscript{47} Practice must also be consistent to such a degree that it presents a clear pattern of behavior.\textsuperscript{48} Dispersed, inconsistent, or fluctuant practice will deny the putative norm the element of “general practice.”\textsuperscript{49}

\begin{quote}
\textsuperscript{43} Compare Dinstein, supra note 42 (viewing any national ruling as “an authoritative expression of the practice [of a State]”), and I.L.C Draft Conclusions, supra note 32, at 134 (viewing “Decisions of national courts at all levels” as State practice, but considering that “greater weight will be given to higher courts”), with Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), supra note 32, ¶ 565 (regarding domestic judicial decisions as important state practice, but specifically for questions of sovereign immunity), and Wood, supra note 38, at 25 (presenting the opinions of the states of Israel and New Zealand that only decisions of higher courts might bear significance in regards to practice (in contrast to the view of Australia presented therein).
\textsuperscript{44} Dinstein, supra note 42, at 315–16; Crawford, supra note 25, at 38–39.
\textsuperscript{45} I.L.C Draft Conclusions, supra note 32, at 134.
\textsuperscript{46} Statute of the International Court of Justice, supra note 21, art. 38(1)(b).
\textsuperscript{47} North Sea Continental Shelf (F.R.G./Den.; F.R.G./Neth.), supra note 33, ¶ 74; see also Asylum (Colom./Peru), Judgment, 1950 I.C.J. 266, 276 (Nov. 20); Geoffrey Corn et al., National Security Law: Principles and Policy 134 (2d ed. 2019); Office of the General Counsel, U.S. Department of Defense, Law of War Manual § 1.8.2–1.8.2.1 (rev. ed. Dec. 2016) [hereinafter DoD Manual]; Wood, supra note 38, at 28–31 (endorsing the views of the Russian Federation, United States, and Israel, according to which the language “virtually uniform” should be adopted in Conclusion 8 of the ILC Draft Conclusions, which concerns the general nature of the practice. The language was modified to add the element of consistency in lieu of the language suggested by the rapporteur; the final version reads “The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.” I.L.C Draft Conclusions, supra note 32, at 135); but see Cassese, supra note 25, at 157.
\textsuperscript{48} I.L.C Draft Conclusions, supra note 32, at 135.
\textsuperscript{49} Asylum (Colom./Peru), supra note 47, at 277; I.L.C Draft Conclusions, supra note 32, at 137 (“The requirement that the practice be consistent means that where the relevant acts
Accordingly, if some States adopt a certain standard of knowledge for command responsibility, but others endorse a different standard, and yet other States are still undecided on the precise standard of knowledge for incriminating a commander, then the position of the first group of States cannot materialize into a norm of customary international law.

2. Acceptance as Law

As previously mentioned, practice by itself—general and uniform as it may be—is not sufficient to establish the existence of custom. Any practice must be accompanied by a conviction that the State is compelled to execute such practice as a matter of binding international law, and not merely due to domestic law, voluntary policy, or other considerations. Therefore, if a significant number of States would treat cases of command responsibility based on a certain standard of knowledge, the standard could rise to a norm of customary law only if it is clear that a sufficient magnitude of States perceives the application of the standard as obligatory in the legal sense.

The ratification of a treaty by a State, or its compliance with the treaty, is not analogous to a sense of customary obligation, and therefore would not, by itself, reflect the requisite opinio juris.

For instance, as will be demonstrated below, certain States who decided to join the Rome Statute clearly have not done so out of a sense of legal obligation to adopt its standards as customary law, since the judicial and legislative practice of these States establishes an altogether different standard.
Additionally, a State engaging in treaty relations may also wish to do the opposite of supporting an emerging legal norm, i.e., to segregate itself from a general customary norm and to create *lex specialis* which surpasses it.\(^52\)

*Opinio juris* can manifest itself in a variety of ways, so long as there is proper attribution of the expression to the State and it presents its position regarding the putative norm.\(^53\) Furthermore, the State is considered a uniform entity expressing its “state-of-mind” in relation to a certain norm.\(^54\) In reality, however, State organs may produce conflicting accounts of its position or produce incongruent statements, resulting in ambiguity as to its genuine position.\(^55\) Like the assessment of practice, the upshot is that a single proclamation that a State organ issues should be approached with caution and in consideration of the circumstances surrounding the proclamation, its alignment with the practice of the State, and any subsequent or prior statements that reflect on the State’s current position.

3. **Command Responsibility: Relevant State Practice and *Opinio Juris***

As mentioned, the notion that every criminal offense must encompass an element of mens rea is an elementary concept of criminal law.\(^56\) Since international criminal law incorporates such essential concepts,\(^57\) offenses that are charged under the auspices of command responsibility must also possess an appropriate mental element. Any particular content for the mental element will be universally binding only if it can be identified as a customary legal norm.

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\(^{53}\) ILC Draft Conclusions, *supra* note 32, at 140.

\(^{54}\) ARSIWA, *supra* note 36, art. 4.

\(^{55}\) See, e.g., CLAYTON THOMAS ET AL., CONG. RSCH. SERV., R46148, U.S. KILLING OF QASEM SOLEIMANI: FREQUENTLY ASKED QUESTIONS 2 (2020) (highlighting some disparity between statements of the U.S. President and the Secretary of Defense regarding the underlying reasons for the targeting of Soleimani, commander of the Iranian Quds Force, which operated intensively throughout Iraq, among other places).

\(^{56}\) See references in *supra* note 9.

\(^{57}\) See, e.g., Rome Statute, *supra* note 13, art. 30, which provides that absent an explicit mental element in a criminal article, the mens rea shall be “intent and knowledge.” This clarification was warranted since the attachment of a mental element to the physical act is “now a basic requirement common to contemporary legal systems.” Donald K. Pigaroff & Darryl Robinson, *Article 30—Mental Element*, in *ROME STATUTE COMMENTARY, supra* note 12, at 1111, 1113. See also ANTONIO CASSESE ET AL., CASSESE’S INTERNATIONAL CRIMINAL LAW 41 (3d ed. 2013).
Absent a customary norm, States may supposedly decide by themselves the content of the mental element, for instance actual or constructive knowledge. Yet, a decision to incriminate behavior that is beyond the boundaries of customary international law may run afoul of another entrenched concept in international criminal law, that of strict legality. As Antonio Cassese expressed:

The principle of strict legality usually implies that national criminal courts . . . do not extend the scope and purport of a criminal rule to a matter that is unregulated by law (analogia legis). The same principle applies in [international criminal law] and is prohibited with regard to both treaty and customary rules.

This means that absent a customary rule that dictates constructive knowledge as the mental element of command responsibility, a State’s decision to extend liability to constructive knowledge may be at odds with the concept of strict legality, which will leave the State with the more restrictive standard of actual knowledge.

The question remains, therefore, whether there is sufficient State practice and opinio juris that forms a customary rule that dictates if such a standard should lean towards constructive knowledge or actual knowledge. Relevant practice of States in the realm of command responsibility may include, among other sources, the publication of military regulations and manuals, prosecutorial guidelines or policy, and perhaps more importantly, cases that exhibit their use by the relevant authorities, including judicial bodies. The manner in which criminal legislation enunciates the elements of command responsibility, and the manner in which the judiciary and the executive construe and apply it, is pertinent for assessing the practice of the State.

Relevant opinio juris could exist in statements, which are imputed to the State, that articulate what the State perceives as the obligatory standard of knowledge. The executive can incorporate such statements into relevant directives, regulations, and operational manuals. States may also express them in the global sphere through presentations on behalf of the State regarding

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58. See, e.g., Rome Statute, supra note 13, art. 22(2) (“The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”).
59. CASSESE ET AL., supra note 57, at 33.
60. See Part III, infra, for detailed examples.
61. See, e.g., Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), supra note 32, ¶ 55, 70–71.
its legal commitment (or reservation) to a certain formula of command responsibility. Further, *opinio juris* regarding the standard of command responsibility can exist in the content of legal arguments States present in judicial fora. Finally, it may be extracted from the decisions of judicial bodies of the State that are required to tackle command responsibility in particular cases.

The assessment of State practice and *opinio juris* through these resources could reach a conclusion regarding the appropriate standard of knowledge that a judicial body should apply in a given case, as a matter of customary international law.62

The next part focuses on five States in particular. The selection is not random but seeks to encompass a diverse sample of States from varying legal traditions and geopolitical contexts, who have been driven to consider the application of command responsibility from differing angles. As the conclusion of that part will submit, the example of those States is a telling reflection of the broader status of command responsibility around the globe.

III. **How Select States Approach the Standard of Knowledge**

A. **United States**

The overall practice of the United States with respect to the standard of knowledge for command responsibility leaves a somewhat blurry image. U.S. criminal jurisprudence in different fora mostly adopts a standard of actual knowledge, while current executive guidance endorses a standard of constructive knowledge. This guidance has yet to be tested in court and would possibly encounter difficulties in its application, as discussed below.

The core of U.S. jurisprudence on the issue of command responsibility traces back to the post-World War II Nuremberg cases. The *von Leeb* case is one of the most important of them, and its judgment includes the seminal articulation that is referenced in U.S. policy:

> Criminality does not attach to every individual in this chain of command from that fact alone [the fact of crimes committed by subordinates]. There must be a personal dereliction. That can occur only where the act is directly traceable to [the commander] or where his failure to properly supervise his

subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of International Law would go far beyond the basic principles of criminal law as known to civilized nations.63

The case examined the responsibility of high-ranking German officers over various crimes, mainly war crimes and crimes against humanity.64 Since the German officers did not participate directly in the crimes, the tribunal had to assess their criminal responsibility based on their superior role as commanders over the forces who perpetrated the crimes. Specifically, the tribunal dedicated a significant part of its judgment to the “responsibility of a commanding officer for acts not ordered by him.”65

As for commanders responsible for occupied territory, the tribunal concluded they “must have knowledge of these offences and acquiesce or participate or criminally neglect to interfere in their commission and that the offences committed must be patently criminal.”66

It is noteworthy that the latter statement presents two elements in conjunction besides the criminal nature of the acts themselves; there must be “knowledge of these offences” and acquiescence, participation, or criminal negligence to interfere with their commission.67 Indeed, the tribunal ends the general analysis with a reference to the importance of determining such knowledge: “And it is further pointed out that to establish the guilt of a defendant from connection with acts of the SIPO and SD by acquiescence, not only must knowledge be established, but the time of such knowledge must be established.”68 The tribunal stresses this further in the individual analysis of von Leeb’s responsibility: “He must be shown both to have had

64. Among the criminal acts attributed to the accused were “murder, illtreatment [of prisoners of war], denial of status and rights, refusal of quarter, employment under inhumane conditions . . . and other inhumane acts and violations of the laws and customs of war.” United States v. von Leeb et al., 10 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 29 (1951).
65. U.N. WAR CRIMES COMM’N, 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 74 (1949).
66. United States v. von Leeb et al., supra note 64, at 545.
67. This was also the understanding of the United Nations War Crimes Commission. U.N. WAR CRIMES COMM’N, supra note 65, at 110.
68. United States v. von Leeb et al. supra note 63, at 549.
knowledge and to have been connected with such criminal acts either by way of participation or criminal acquiescence.” 69 Clearly, the von Leeb case primarily relies on actual knowledge for its analysis of command responsibility. The following segment will establish that while U.S. policy repeatedly references the von Leeb case, it may have misapplied its jurisprudence.

1. U.S. Policy

Various directives and regulations covering the conduct of commanders in the U.S. armed forces refer to command responsibility as a basis for imposing liability over international crimes committed by subordinates. 70 This is contrasted with the fact that the primary penal code for the U.S. armed forces does not include a provision that addresses command responsibility or establishes it as a mode of liability. 71

Current U.S. policy largely relies on the von Leeb case. 72 Yet, there is some disparity between the merits of the von Leeb judgment and the manner in which U.S. policy relies on it to ground its position on command responsibility.

The U.S. Department of Defense Law of War Manual (DoD Manual) specifically enumerates command responsibility as a mode of liability for an “offense committed by the subordinates of the commander.” 73 While the DoD Manual acknowledges that in such cases responsibility is “imputed” to the commander, 74 the DoD Manual itself does not articulate the elements that

69. Id. at 555. Von Leeb was acquitted of murder that forces within the area of his command committed, due to insufficient evidence of knowledge or acquiescence. Id. See also id. at 547 (“The sole question then as to such defendants in this case is whether or not they knew of the criminal activities of the Einsatzgruppen of the Security Police and SD and neglected to suppress them”).

70. DOOD MANUAL, supra note 47, § 18.23.3.2; HEADQUARTERS, DEPARTMENT OF THE ARMY, HEADQUARTERS, UNITED STATES MARINE CORPS, FM 6-27/MCTP 11-10C, THE COMMANDER’S HANDBOOK ON THE LAW OF LAND WARFARE (2019) [hereinafter FM 6-27].


72. United States v. von Leeb et al., supra note 63.

73. Id.

74. Id.
form such liability (the requisite standard of knowledge among them). Instead, it refers by footnotes to other sources that have done so.75

A source referred to in the DoD Manual is the 1956 Department of the Army Field Manual 27-10, *The Law of Land Warfare* (FM 27-10).76 In the context of the requisite knowledge for command responsibility, FM 27-10 reiterates that a commander may be responsible “if he has actual knowledge, or should have knowledge, through reports received by him or through other means,” that his subordinates committed war crimes, and he failed to act appropriately.77

In August 2019, the Department of the Army and the U.S. Marine Corps issued a superseding field manual entitled *The Commander’s Handbook on the Law of Land Warfare* (FM 6-27).78 This document presents a statement similar to the one found in FM 27-10, emphasizing that “constructive knowledge” is a valid basis for imputing responsibility. This standard would apply if the commander “should have known, through reports received by him or through other means” of his subordinates’ transgressions.79

FM 6-27 adds that the commander may be criminally liable where there is “personal neglect amounting to a wanton, immoral disregard of the action of the commander’s subordinates that amounts to acquiescence in the crimes.”80 This wording closely follows the words of the von Leeb judgment regarding the mental element of command responsibility.81

The DoD Manual makes additional references to sources that are not identical in their treatment of the standard of knowledge for command responsibility.82 One reference imposes liability if the commander knew “or

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75. See, e.g., DoD Manual, supra note 47, § 18.23.3 (“Failures by commanders of their duties to take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war can result in criminal responsibility”). While this paragraph confirms that failure to take measures “can result in criminal responsibility,” there is no direct statement of the legal conditions for this result.


77. Id. ¶ 501.

78. FM 6-27, supra note 70.

79. Id. ¶ 8-31.

80. Id.

81. United States v. von Leeb et al., supra note 63, at 543–44 (“In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence”).

82. Note that the DoD Manual does not refer to FM 6-27 since it was last updated before the document’s publication.
had information which should have enabled them to conclude in the circumstances at the time” that a crime is imminent;\textsuperscript{83} another source refers to a commander who “had reason to know” that a crime is committed by a subordinate;\textsuperscript{84} yet another source holds commanders liable if they “knew, had reason to know, or should have known” of their subordinate’s crimes.\textsuperscript{85}

While not stated explicitly, the reference to international legal sources suggests that the DoD Manual perceives their content as a reflection of customary international law, albeit a reflection that is not entirely unequivocal. Field Manual 6-27 is more definitive in this regard and maintains that the legal standard it has presented is enforceable “under international law.”\textsuperscript{86}

The U.S. Department of the Army has made additional efforts to implement its perception of the governing legal standard, specifically in relation to its law enforcement policy. A document issued by the Office of The Judge Advocate General entitled Law of War Compliance: Administrative Investigations & Criminal Law Supplement addresses command responsibility over violations of the law of war.\textsuperscript{87} The Supplement directly refers to the von Leeb case.\textsuperscript{88} It also refers to international instruments such as the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), Additional Protocol I to the Geneva Conventions (API), and the Rome Statute of the ICC.\textsuperscript{89}

The resulting formulation of the standard of liability in the Supplement is “gross” or “culpable” negligence, which is understood as “a negligent act or failure to act accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others.”\textsuperscript{90} This is reminiscent of the von Leeb standard, which added that such negligence “amounts to acquiescence

\textsuperscript{83} Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 86(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API].

\textsuperscript{84} Statute of the International Criminal Tribunal for the former Yugoslavia art. 7, S.C. Res. 827 (May 25, 1993) (adopting the Secretary General report pursuant to ¶ 2 of S.C. Res. 808 (Feb. 22, 1993)) [hereinafter ICTY Statute].

\textsuperscript{85} 10 U.S.C. § 950q. This statute governs the procedures of the U.S. military commissions, which are tasked with trying “alien unprivileged enemy belligerents” for law of war violations. See 10 U.S.C. § 948b. There is no similar provision in the UCMJ.

\textsuperscript{86} FM 6-27, supra note 70, ¶ 8-31.


\textsuperscript{88} Id. at 7.

\textsuperscript{89} See LAW OF WAR COMPLIANCE: ADMINISTRATIVE INVESTIGATIONS & CRIMINAL LAW SUPPLEMENT, supra note 87, at 7.

\textsuperscript{90} U.S. DEP’T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES’ BENCHBOOK 482 (Feb. 29, 2020).
in the crimes.”\textsuperscript{91} The \textit{Supplement} stresses further that “mere negligence is insufficient to prove a violation.”\textsuperscript{92} “Mere negligence” is most probably equivalent to “simple negligence,” which the U.S. military justice system identifies as “the absence of due care.”\textsuperscript{93} While culpable negligence is more challenging to prove than mere negligence, both modalities are in the realm of constructive knowledge: they allow imputing knowledge to the perpetrator without having to prove that the perpetrator positively knew the incriminating fact, if “a reasonable person in such circumstances would have realized the substantial and unjustified danger created by his act.”\textsuperscript{94}

The \textit{Supplement} offers several examples for the potential application of culpable negligence to command responsibility. One example is a situation in which a subordinate committed murder. The \textit{Supplement} instructs to charge the commander of that subordinate with involuntary manslaughter,\textsuperscript{95} if that commander was culpably negligent in their supervisory duties over the subordinate’s behavior and there is proximate cause between the commander’s dereliction and the criminal result.\textsuperscript{96}

Ultimately, the doctrine of the U.S. armed forces seems relatively consistent in its endorsement of a standard that couples the general concept of “culpable negligence”\textsuperscript{97} with the nuanced adjustments presented in the \textit{von Leeb} case.\textsuperscript{98}

One possible adjustment may be accounting for the phrase “amounts to acquiescence in the crimes,” which appears originally in the \textit{von Leeb} case,\textsuperscript{99} reappears in the instructions of FM 6-27,\textsuperscript{100} and is referenced in the \textit{Supplement}.\textsuperscript{101} In cases of command responsibility, this phrase could arguably present an additional element to the general mens rea of culpable negligence that could draw it further from the traditional realm of negligence and closer

\textsuperscript{91} United States v. von Leeb et al., \textit{supra} note 63.
\textsuperscript{92} \textit{LAW OF WAR COMPLIANCE: ADMINISTRATIVE INVESTIGATIONS & CRIMINAL LAW SUPPLEMENT, supra} note 87, at 7.
\textsuperscript{93} \textit{MILITARY JUDGES’ BENCHBOOK, supra} note 90, at 258.
\textsuperscript{95} UCMJ art. 119, 10 U.S.C. § 919.
\textsuperscript{96} \textit{LAW OF WAR COMPLIANCE: ADMINISTRATIVE INVESTIGATIONS & CRIMINAL LAW SUPPLEMENT, supra} note 87, at 14; for an explanation of “proximate cause,” see \textit{supra} note 90, at 402.
\textsuperscript{97} \textit{MILITARY JUDGES’ BENCHBOOK, supra} note 90.
\textsuperscript{98} United States v. von Leeb et al., \textit{supra} note 63.
\textsuperscript{99} Id.
\textsuperscript{100} FM 6-27, \textit{supra} note 70, ¶ 8-31.
\textsuperscript{101} \textit{LAW OF WAR COMPLIANCE: ADMINISTRATIVE INVESTIGATIONS & CRIMINAL LAW SUPPLEMENT, supra} note 87, at 7.
to the realm of actual knowledge of the crimes. The dictionary definitions of acquiescence include “passive acceptance or submission,”\textsuperscript{102} “the act of accepting or agreeing to something, often unwillingly,”\textsuperscript{103} and “a person’s tacit or passive acceptance; implied consent to an act.”\textsuperscript{104} These definitions share a presumption that the acquiescing person is at least partly conscious of the act to which he or she is acquiescing.

Aside from the \textit{von Leeb} case, other tribunal cases present a similar analysis in relation to command responsibility; that is, applying a standard of actual, rather than constructive, knowledge.

2. U.S. Jurisprudence

A Nuremberg tribunal charged Erhard Milch\textsuperscript{105} with a myriad of crimes, including responsibility over illegal experiments carried out by his subordinates.\textsuperscript{106} In its description of “the controlling legal questions” regarding the experiments charge, the tribunal included the following question: “Were [the experiments] conducted with prior knowledge on his part that they might be excessive or inhuman?”\textsuperscript{107} The tribunal answered that question in the negative and ultimately acquitted Milch of that particular charge.\textsuperscript{108} In his concurring opinion, Judge Phillips stated that Milch did not possess the requisite “guilty knowledge” in relation to the illegal experiments.\textsuperscript{109}

In the case of \textit{Oswald Pohl et al.},\textsuperscript{110} the tribunal acquitted battalion commander Erwin Tschentscher of brutal murders that his subordinates committed throughout eastern Poland and Ukraine. The acquittal rested primarily on the question of actual knowledge: “There is some evidence that he had

\begin{itemize}
  \item \textsuperscript{102} \textit{Acquiescence}, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/acquiescence (last visited May 12, 2023).
  \item \textsuperscript{103} \textit{Acquiescence}, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/acquiescence (last visited May 12, 2023).
  \item \textsuperscript{104} \textit{Acquiescence}, BLACK’S LAW DICTIONARY (11th ed. 2019).
  \item \textsuperscript{105} United States v. Milch, 2 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 355 (c. 1950)
  \item \textsuperscript{106} Id. at 623.
  \item \textsuperscript{107} Id. at 774.
  \item \textsuperscript{108} Id. at 776. Milch was convicted of other charges and was sentenced to life imprisonment. \textit{See id.} at 779–97.
  \item \textsuperscript{109} Id. at 875. The majority opinion has used the same term. \textit{See id.} at 777.
  \item \textsuperscript{110} United States v. Pohl et al., 5 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 195 (1950).
\end{itemize}
constructive knowledge of the participation of members of his command, but absolutely no evidence that he had actual knowledge of such facts.”

The Hostage Case demonstrates a deviation from the recurring reliance on actual knowledge as a basis for the criminal liability of commanders. The defendant, Field Marshal Wilhelm List, argued that he was unaware of the murders that his forces committed in the territory under his command. The tribunal rejected the claim and determined that a failure to be informed by reports made specifically for the commander is a dereliction of duty that cannot serve as a defense.

Many of the tribunal cases dealing with command responsibility mention the U.S. Supreme Court case of General Tomoyuki Yamashita. The case has been afflicted with controversy from its inception, which could perhaps explain in part the tendency of tribunal judges to distinguish the cases before them from the holding in In re Yamashita.

The findings relating to the question whether Yamashita had knowledge of the atrocities that took place in his territory are somewhat cryptic. The commission found that the crimes that Yamashita’s subordinates committed

111. Id. at 1011.
113. Id. at 1271 (“Want of knowledge of the contents of reports made to him is not a defense. Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.”).
114. See, e.g., United States v. von Leeb, supra note 63, at 544 (stating that the U.S. Supreme Court decision in In re Yamashita, 327 U.S. 1 (1946), is not entirely applicable because of differences in the scope of authorities vested in him and in the commanders in the current case); United States v. Pohl, supra note 110, at 1011 (referring to the Supreme Court’s articulation in In re Yamashita of the duty of the commander to take reasonable measures to protect prisoners of war and the civilian population, but concluding that such duty does not apply to the defendant Tschentscher due to his lack of knowledge); United States v. Milch, supra note 105, at 876 (concluding that In re Yamashita “is not controlling in the case at bar,” because the defendant had a lack of actual knowledge in regards to the inhumane nature of medical experiments he ordered).
115. Ferren, supra note 7; see generally Martinez, supra note 17; Damaška, supra note 17; A. FRANK REEL, THE CASE OF GENERAL YAMASHITA (1950).
116. See references in supra note 114.
117. Trial of Tomoyuki Yamashita, supra note 11, at 4057–63.
were widespread and systematic rather than isolated incidents, and that Yamashita failed “to provide effective control” over his subordinates. However, the commission did not clearly articulate Yamashita’s state of knowledge and whether it had a decisive role in his conviction.

The U.S. post-World War II case law includes compelling examples of utilizing the standard of actual knowledge for assessing criminal liability for war criminals. This standard was not reserved solely for the crimes of World War II. Rather, it was carried forward and applied to the actions of U.S. servicemembers as well. The prominent example for that is the case of Captain Ernest Medina and the My Lai massacre.

On March 16, 1968, Lieutenant William Calley led an assault on the South Vietnamese village of My Lai. When his platoon did not encounter...
any resistance, its members proceeded to systematically kill several hundred people from the village, including women and children.\textsuperscript{123} At the time, Captain Medina was the commander of Lieutenant Calley’s company and his superior officer. Based on this command relationship, Captain Medina was charged as a principal to the murders.\textsuperscript{124} The premise for the charges was that Captain Medina had actual knowledge of the perpetration of the murders and failed to discharge his duty as a commander to stop them when he had the chance.\textsuperscript{125} The military judge instructed the court-martial panel what standard to apply regarding the responsibility of the commander. The instruction included a reference to actual knowledge as the prevailing standard:

Furthermore, a commander is also responsible if he has actual knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of war. You will observe that these legal requirements placed upon a commander require actual knowledge plus a wrongful failure to act.\textsuperscript{126}

There is a striking disparity between the expressed policy of the Department of Defense and the way U.S. legal practice implemented the doctrine of command responsibility. While more recent policy documents such as the Supplement and the DoD Manual seem to promote the broader standard of constructive knowledge,\textsuperscript{127} historic U.S. case law suggests that actual

\begin{flushleft}
\textsuperscript{123} Id.
\textsuperscript{125} Eckhardt, supra note 119, at 13–14.
\textsuperscript{126} Id. at 15. The instruction followed the judge’s decision to replace the initial charge based on UCMJ Article 77 (“principals”) with an involuntary manslaughter charge (UCMJ art. 119(b)(1)). The instruction was subsequently criticized for being inconsistent with the Article 119(b)(1) requirement for culpable negligence as the mental element. See Kenneth A. Howard, Command Responsibility of War Crimes, 82 YALE LAW JOURNAL 1274, 1274 (1973) (editor’s note); James T. Hill, Jus in Bello Futura Ignus: The United States, the International Criminal Court, and the Uncertain Future of the Law of Armed Conflict, 223 MILITARY LAW REVIEW 672, 692–93 (2015); Solis, supra note 120, at 215. Nevertheless, the instruction is consistent with prior World War II case law, as discussed above.
\textsuperscript{127} See also U.S. DEP’T OF DEF., FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR 713 (Apr. 1992) (applying a standard of “should have known” to Saddam Hussein as head of the Iraqi military at the time and his responsibility over crimes of Iraqi soldiers against the Kuwaiti civilian population).
\end{flushleft}
knowledge has yet to be dismissed as the governing standard for applying command responsibility.

B. United Kingdom

The United Kingdom has made a substantial contribution to post-World War II case law by conducting numerous war crime trials in British military courts. One of these was the trial of Franz Schönfeld, in which ten German Security Police officers were charged with killing three allied airmen. Among the ten was the officer in charge of the squad’s operations, who was not present at the incident and was acquitted. The judge advocate accompanying the court explained that the commanding officer lacked “reasonable grounds” to foresee the misconduct of his men and that his inaction did not amount to “culpable negligence.” While such terminology implies a standard of constructive knowledge, the judge advocate clouded this conclusion to some extent by adding that the officer would have been liable if he was aware of the squad’s intention to commit murder, thus concluding his remarks with a requirement for actual knowledge. As discussed below, the next episode that required the UK to delve into command responsibility revolved around the conduct of its own forces.

The doctrine of command responsibility is not incorporated into the penal statute that covers the armed forces of the UK. Rather, it is included in the International Criminal Court Act, which discharges the obligations of the UK as a party to the Rome Statute of the ICC. Article 65(2) of the

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129. UNITED NATIONS WAR CRIMES COMM’N, 11 LAW REPORTS OF TRIALS OF WAR CRIMINALS 64 (1949).

130. Id. at 65, 67.

131. Id. at 70.

132. Id. at 71.


134. International Criminal Court Act 2001, c. 17 (UK), https://www.legislation.gov.uk/ukpga/2001/17/contents [hereinafter ICC Act]. The fact that the legislation adopts the Rome Statute so explicitly may testify to the State’s commitment to the treaty, but it does not—in and of itself—provide evidence of *opinio juris* regarding the customary nature of the rules within the statute.

International Criminal Court Act includes an almost verbatim copy of Article 28 of the Rome Statute, which codifies command responsibility for the ICC. The operative clause reads that a commander will be responsible for subordinates’ conduct if “he either knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such offences.”

UK jurisprudence has yet to interpret the standard of knowledge embodied in Article 65(2) for the specific context of command responsibility. Other legal fields outside the criminal domain, however, have provided meaning for the phrase “should have known” for other purposes. Such meaning includes incriminating a person that “has the means at his disposal of knowing” the relevant facts but “chooses not to deploy it,” or if the person “chooses to ignore obvious inferences from the facts and circumstances.” The phrase also served as the equivalent of “turning a blind eye” and imposing liability when “the means of knowledge were available” to the culprit. Evidently, interpretations differ and are subject to the legal settings of the case. It is difficult, therefore, to prospectively conclude whether the application of the “should have known” phraseology to command responsibility would result in a standard of knowledge that is more constructive in nature or actual.

137. ICC Act, supra note 134.
138. Mobilx Ltd. v. Commissioners for Her Majesty’s Revenue and Customs [2010] EWCA (Civ) 517, [2010] STC 1436, [52] (applying the “should have known” terminology for participation in fraudulent transactions).
139. Id. [61].
140. Id.
141. Wilson v. Peter Vassallo Ltd. [1997] UKEAT 86/97/1804, at 2 (assessing the dismissal of an employee suspected to have been involved in theft).
142. R v. Rimmington [2005] UKHL 63, [39–40] (appeal taken from Eng.) (applying the standard test for a conviction of causing a public nuisance). Notably, the England and Wales Court of Appeals held that the terminology “should have known” is inappropriate for cases of gross negligence manslaughter, in which the court must assess the “reasonable foreseeability of serious and obvious risk of death”; see Rose v. R [2017] EWCA (Crim) 1168 [1]; see also Gross Negligence Manslaughter, CROWN PROSECUTION SERVICE (Mar. 14, 2019), https://www.cps.gov.uk/legal-guidance/gross-negligence-manslaughter. In such cases, the court may not consider information that “would, could, or should have been available to the defendant”; Rose, EWCA (Crim) 1168 [78].
143. As may be inferred from terms such as “means of knowledge” that are available; Rimmington, UKHL 63, [39–40].
144. As may be inferred from terms such as “turning a blind eye,” Wilson, UKEAT 86/97/1804, at 2, or “choosing to ignore” certain facts, Mobilx, EWCA 517 [61].
While there is scant evidence of UK judicial application of command responsibility, the UK has expressed its general approach to command responsibility through official publications. The *Joint Service Manual of the Law of Armed Conflict* codifies the UK perspective for the implementation and application of the law of armed conflict, including its enforcement by imputing liability for transgressions.

The *UK Manual* refers in this regard to “responsibility of commanders.” It turns to Article 28 of the Rome Statute as the basic reference for the required standard of responsibility, that is, that the commander “knew or, owing to the circumstances at the time, should have known” about the crimes of their subordinates. Yet, the *UK Manual* does not rest its analysis with Article 28. It continues to refer to various articulations of the requisite standard of knowledge. Finally, the *UK Manual* does not revert to Article 28 (or its counterpart in the International Criminal Court Act) as the governing articulation of the standard of knowledge. Instead, it cites the ICTY Delalić case, which provides a somewhat different enunciation. The tribunal injected its interpretation to the “had reason to know” wording of the

145. Certain allegations concerning command responsibility were raised in the context of the UK involvement in Iraq in 2003. These allegations did not produce criminal charges. See *Office of the Prosecutor, International Criminal Court, Situation in Iraq/UK: Final Report* (Dec. 9, 2020), ¶¶ 210–12, 239 [hereinafter *The Iraq Report*].


147. *Id.* ¶ 16.36.


149. *Id.*


151. *Id.* ¶ 16.36.1 (referring to the Yamashita case, supra note 114); ¶ 16.36.2 (referring to art. 7(3) of the ICTY Statute, which requires that a commander “had reason to know” of the criminal acts).

152. The *UK Manual* mentions elsewhere that the ICC Act adopts the Rome Statute provisions on command responsibility. *UK Manual,* supra note 146, ¶ 16.39.3. It does not clarify, however, that the UK will unhesitatingly adopt the jurisprudence of the ICC. Instead, the *UK Manual* states that “National tribunals will normally be governed by the general principles of law contained in their own domestic legislation although these will undoubtedly be influenced by any international jurisprudence that may exist.” *Id.* The UK has stated, however, that “the ICC Act covers the same ground as the ICC’s doctrine of command responsibility.” *The Iraq Report,* supra note 145, ¶ 239.

153. *UK Manual,* supra note 146, ¶ 16.36.6. See Delalić, supra note 16, for a brief description of the underlying facts of the case. The case is the most prominent ICTY case to reject constructive knowledge for command responsibility. Martinez, supra note 17, at 656.
ICTY Statute\textsuperscript{154} by determining that a commander is liable if “he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.”\textsuperscript{155}

Absent interpretive case law, the varying references in the \textit{UK Manual} provide an obscure impression regarding its purported application of the “should have known” standard and whether it will take the form of constructive or actual knowledge.

The involvement of the UK in the war in Iraq in the early 2000’s\textsuperscript{156} provided a substantial test case for domestic mechanisms tasked with upholding and enforcing the law of armed conflict within the ranks of the UK armed forces. Indeed, UK operations in Iraq yielded a myriad of investigative processes, including a preliminary examination by the prosecutor of the ICC.\textsuperscript{157}

\footnotesize
\begin{itemize}
\item \textsuperscript{154} ICTY Statute, supra note 84.
\item \textsuperscript{155} Prosecutor v. Delalić et al., supra note 16, ¶ 223 (upholding the trial chamber’s judgment); see also ¶ 233. The appeals chamber rejected the notion of neglect to acquire information as a basis for responsibility. See ¶ 226 (“Neglect of a duty to acquire such knowledge, however, does not feature in the provision as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish”; “The point here should not be that knowledge may be presumed if a person fails in his duty to obtain the relevant information of a crime, but that it may be presumed if he had the means to obtain the knowledge but deliberately refrained from doing so”).
\item \textsuperscript{157} For a survey of the various investigative mechanisms that the UK employed in the Iraqi context, see THE IRAQ REPORT, supra note 145, ch. IX. On May 13, 2014, based on communications the ICC Prosecutor deemed to be credible, she reinitiated a preliminary examination into UK conduct in Iraq in 2003 (the initial examination was terminated in 2006). The prosecutor concluded that there is “reasonable basis to believe that members of UK armed forces committed war crimes within the jurisdiction of the Court against persons in their custody.” Id. ¶ 1. Thus, the focus of the prosecutor’s examination was on complementarity, i.e., whether the UK has genuinely investigated credible allegations of war crimes (see Rome Statute, supra note 13, art. 17). Despite “numerous concerns” the prosecutor found regarding the investigatory process, she eventually concluded that they did not rise to a determination that the UK authorities were unable or unwilling to genuinely investigate alleged crimes. THE IRAQ REPORT, supra note 145, ¶¶ 499–500.
\end{itemize}
These processes did not result in significant criminal consequences. Consequently, they do not provide additional insight into the UK perspective on command responsibility.

The overall inference from the UK legislative status, official documentation, and judicial experience in the realm of command responsibility is inexact. The legislature adopted verbatim the “should have known” standard of the ICC, but the executive and judicial bodies have yet to put it into action. Rather than decisively adopt the articulation of the International Criminal Court Act, the UK Manual interjects with other variations of command responsibility and adopts in its conclusion a different phraseology it borrows from the ICTY (“had reason to know,” “put him on notice”).

Even presuming that the ICC standard of “should have known” is a clear

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159. Some inquiries by the Iraq Historic Allegations Team and Service Policy Legacy Investigations led to recommendations for charges of command responsibility but were subsequently dismissed due to lack of evidence. See THE IRAQ REPORT, supra note 145, ¶¶ 210–12. Three officers were charged with a military offense of negligent failure to perform their duties, in connection with the death of Baha Mousa, a receptionist who UK captured and interrogated in Basra, Iraq. The three were subsequently acquitted. 1 THE BAHAMOUSA PUBLIC INQUIRY REPORT 6–7 (2011); see also Gerry Simpson, The Death of Baha Mousa, 8 MELBOURNE JOURNAL OF INTERNATIONAL LAW 8 (2007) (highlighting that the charges were disciplinary in nature and as such are distinguishable from the general form of command responsibility under international criminal law).

160. ICC Act, supra note 134.

endorsement of constructive knowledge, the UK falls short of embracing it wholeheartedly and it remains pending for the determination of future cases.

C. Germany

Germany enacted particular legislation focusing on crimes against international law. The German International Crimes Code encompasses specific provisions dealing with the responsibility of a “military commander” for the crimes of subordinates. Analysis of these provisions is intertwined with

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162. This is not an indubitable conclusion, considering the discrepant ICC jurisprudence regarding the requisite standard of knowledge under art. 28(a)(i) of the Rome Statute, supra note 13; see Prosecutor v. Bemba Gombo, ICC-01/05-01/08-3636-Anx1-Red, Dissenting Opinion of Judge Monageng and Judge Hofmański, ¶ 265 (June 8, 2018):

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, or “should have known” of them, there is therefore no reason to require a trial chamber to make a clear distinction between the two standards.

See also id. ¶ 266 (“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 under article 28(a) of the Statute.”); contra Prosecutor v. Bemba Gombo, ICC-01/05-01/08-3636-Anx2, Separate Opinion of Judge Wyngaert and Judge Morrison, ¶ 38 (June 8, 2018) (“Our esteemed colleagues, Judges Monageng and Hofmański, suggest, that article 28 of the Statute contains a single mental element, which encompasses both the knowledge and should have known standard. With the greatest of respect, we do not believe this is correct.”). Even according to this approach, it must be proved that the commander had some information regarding subordinates’ misconduct, and not merely that they neglected to acquire it. Id. ¶ 39, 46. Judge Eboe-Osuji addresses the modes of liability in art. 28(a)(i) as “actual or constructive knowledge,” but does not expand any further on the issue. Prosecutor v. Bemba Gombo, ICC-01/05-01/08-3636-Anx3, Concurring Separate Opinion of Judge Eboe-Osuji, ¶ 257 (June 14, 2018). Unfortunately, the majority opinion itself does not address the issue whatsoever. Cf. Ambos, supra note 8, at 845 (acknowledging the negligent element in Article 28 but raising significant concerns regarding its application).


the general framework of German criminal law, which the International Crimes Code incorporates.165

The main thrust of command responsibility is that the commander must bear equal responsibility for atrocities committed by subordinates.166 This notion is manifested in § 4 of the code, which determines that the commander “shall be punished in the same way as a perpetrator of the offense committed by that subordinate.”167 Such punishment awaits a commander that “omits to prevent his or her subordinate from committing an offence pursuant to this Act.”168

The ensuing question is, what is the mental state of a commander who is culpable of such an omission? While the provision remains silent, § 2 instructs to consult the general criminal code.169 Indeed, the German penal code provides a resolution: “Unless the law expressly provides for criminal liability for negligent conduct, only intentional conduct attracts criminal liability.”170 The upshot is that a commander will only be liable under § 4 if they carried out the omission intentionally.171 This disposition invariably presumes actual knowledge of the subordinate’s conduct.

The International Crimes Code does, however, include a separate provision that incriminates a commander who “intentionally or negligently” fails to adequately supervise a subordinate and that subordinate subsequently commits an offense.172 The punishment for the commander’s failure, in this case, is considerably reduced and is limited to three years.173

Thus, despite Germany being a State party to the ICC,174 its legislative framework for command responsibility seems to be at odds with the Rome Statute, wherein the culpability of a commander is commensurate with that

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165. Id. § 2 (“Application of the general law: The general criminal law shall apply to offences pursuant to this Act so far as this Act does not make special provision in sections 1, 3 to 5, and 13 subsection (4”)”.
166. See references in supra note 13.
168. Id.
169. Id. § 2.
172. Id. § 14(1).
173. Id. § 14(4). The main perpetrator could suffer stricter penalties that could extend to life imprisonment. See, e.g., id. § 8(1).
of the subordinate perpetrator and is not restricted *ex ante* by the Statute.\(^{175}\) German law reserves the more serious form of commander liability to cases of intentional misconduct, whereas negligent misconduct produces a mitigated offense.\(^{176}\)

The obligations under the International Crimes Code are underscored in the official guidance for the German armed forces. The German *Law of Armed Conflict Manual* recites the sections concerning command responsibility and further stresses: “If a disciplinary superior learns about occurrences which justify the suspicion of LOAC [Law of Armed Conflict] violations, he or she must investigate and consider whether disciplinary measures should be taken.”\(^{177}\)

German jurisprudence has so far dealt with the application of command responsibility in a single context. In 2009, Germany arrested the former head and deputy of the Democratic Forces of the Liberation of Rwanda and charged them with an array of international crimes in relation with the bloody conflict in the Democratic Republic of the Congo. The indictment included charges based on their superior positions as military commanders,

\(^{175}\) Rome Statute, *supra* note 13, art. 28(a) (“a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control”); *see also* Prosecutor v. Bemba Gombo, ICC-01/05-01/13-2276-Red, Judgment on the Appeal, ¶ 60 (Mar. 8, 2018) (“the Court’s legal framework does not indicate an automatic correlation between the person’s form of responsibility for the crime/offence for which he or she has been convicted and the sentence, nor does it provide any form of mandatory mitigation in case of conviction as an accessory to a crime/offence”).

\(^{176}\) Interestingly, the German jurist Kai Ambos opined that such an arrangement is also preferrable to the current Article 28 of the Rome Statute:

> The literal application of the Rome Statute would entail *negligence* liability for intentional acts, a construction which is not only logically impossible [sic] but, more importantly, hardly compatible with the principle of guilt. De lege lata the only way out of this logical impasse consists in the creation of a separate offence of ‘failure of proper supervision’ which certainly deserves a much more lenient punishment than the superior’s intentional omission to prevent his or her subordinates from committing international crimes.

Ambos, *supra* note 8, at 853.

such as the knowledge and approval of punitive operations against the civilian population. Following their conviction in the trial court, the two filed an appeal. The Federal Court of Justice overturned the conviction for charges solely based on command responsibility but sustained some of the other charges. However, an earlier interlocutory decision of the Federal Court of Justice that affirms the arrest warrant contains informative language regarding the mens rea of § 4 of the International Crimes Code, which will be discussed below.

The decision confirms that a conviction under § 4 of the code, which equates the responsibility of a commander with that of the original perpetrator, requires actual knowledge on behalf of the commander. In other words, military commanders will be responsible if they “knowingly” allow their subordinates to commit the crimes. The decision further confirms that § 2 in conjunction with § 15 requires some form of awareness of the impending

178. Bundegerichtshof [BGH] [Federal Court of Justice] Dec. 20, 2018, 3 StR 236/17, ¶ 3, 26–29 (F.R.G.). Murwanashyaka and his deputy, Musoni, held broad administrative and representative authorities in the Democratic Forces of the Liberation of Rwanda from the early 2000s until their arrest in 2009. Rwanda has been plagued with a bloody civil war since the early 1990s, peaking in the widespread massacre of hundreds of thousands of members of the Tutsi tribe by the rival Hutus in 1994. The Tutsis eventually overturned the pro-Hutu government, and advocates of the Hutu government fled to the nearby Republic of Zaire (today the Democratic Republic of the Congo). From there, the Democratic Forces of the Liberation of Rwanda was founded to coordinate efforts to retake power in Rwanda. The activities of the Democratic Forces of the Liberation of Rwanda included defensive and retaliatory operations against opposing factions, including against civilians who the Democratic Forces of the Liberation of Rwanda perceived as supporting or encouraging the enemy. Id. ¶¶ 5–20; see generally MARINA RAFTI, SOUTH KIVU: A SANCTUARY FOR THE REBELLION OF THE DEMOCRATIC FORCES FOR THE LIBERATION OF RWANDA (2006).


180. Id. ¶¶ 29, 174, 147–53 (the acquittal revolved around lack of effective control, which is considered a necessary element of command responsibility); German Court Partially Overturns War Crimes Verdict for Rwandan, REUTERS (Dec. 20, 2018), https://www.reuters.com/article/us-germany-congo-court-idUSKCN1OJ1YA.


182. Id. ¶ 35 (“Nach dieser Vorschrift warden militärische und zivile Vorgesetzte wie ein Täter der von ihren Untergebenen begangenen Straftaten nach dem Völkerstrafgesetzbu ch bestraft, wenn sie diese Straftaten bewusst geschehen lassen.” [“According to this provision, military and civilian superiors are punished as perpetrators of crimes committed by their subordinates under the International Criminal Code if they knowingly allow these crimes to happen.”]).
crime and rules out negligence as a valid basis for liability.\textsuperscript{183} This, the court stresses, falls short of the alternative framework of the Rome Statute, which German legislation does not completely endorse.\textsuperscript{184}

Despite a first impression that may indicate otherwise, merely due to Germany’s membership of the ICC,\textsuperscript{185} legislative and judiciary practice validates that actual knowledge is the standard of command responsibility under German law. Broader forms of mens rea are applicable only to lesser forms of responsibility, which result in mitigated liability in comparison to the main perpetrator.\textsuperscript{186}

\textbf{D. Australia}

Australia earned its place in the legacy of the post-World War II jurisprudence with a series of trials that the Australian Military Court conducted in the years 1945–51 in respect to Japanese, Korean, and Taiwanese defendants.\textsuperscript{187} Among these trials stand out the “command responsibility trials” that specifically dealt with the command responsibility of five senior officers in the Japanese armed forces over atrocities that their subordinates committed.\textsuperscript{188}

The trials strongly reflect the influence of the \textit{Yamashita} precedent,\textsuperscript{189} if only for the fact that the charges against most of the commanders repeated verbatim the wording of the original charge against Yamashita.\textsuperscript{190} While four

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\textsuperscript{183.} Id. ¶ 39–40 (“Im Gegensatz zur völkerstrafrechtlichen Vorgesetztenverantwort- lichkeit reicht im Rahmen des § 4 VStGB auch für militärische Vorgesetzte somit Fahrlässigkeit nicht aus.” [“In contrast to the responsibility of superiors under international criminal law, negligence is not sufficient within the framework of § 4 VStGB, even for military superiors.”]).

\textsuperscript{184.} Id. (“Die Regelung des Völkerstrafgesetzbuchs bleibt damit hinter derjenigen nach Art. 28 IStGH-Statut zurück.” [“The regulation of the International Criminal Code thus lags behind that of Article 28 of the ICC Statute.”]).

\textsuperscript{185.} Germany, \textit{INTERNATIONAL CRIMINAL COURT: ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE}, supra note 174.

\textsuperscript{186.} German International Crimes Code, supra note 13.


\textsuperscript{188.} Id. at 146–47; \textit{2 BRIDGING AUSTRALIA AND JAPAN: THE WRITINGS OF DAVID SISSONS, HISTORIAN AND POLITICAL SCIENTIST} 105–6 (Keiko Tamura & Arthur Stockwin eds., 2020).

\textsuperscript{189.} \textit{In re} Yamashita, supra note 6.

\textsuperscript{190.} \textit{2 BRIDGING AUSTRALIA AND JAPAN}, supra note 188, at 106 (the commander “unlawfully disregarded and failed to discharge his duty as such Commander to control the
of the five defendants were convicted of their charges, the reasoning for their conviction is not apparent due to the absence of written decisions throughout the proceedings. Still, the notes of the United Nations’ War Crimes Commission and the judge advocate at the seat of the court provide some insight. Thus, in the case of Lieutenant General Baba Masao, the commission remarked that the mens rea for command responsibility may be either intent that a crime will be committed or criminal negligence. Such negligence may manifest itself either with awareness of the crimes or by indifference whether they occur or not. In the words of the judge advocate, it is necessary to prove “that war crimes were committed as a result of the accused’s failure to discharge his duties as a commander, either by deliberately failing in his duties or by culpably or wilfully disregarding them, not caring whether this resulted in the commission of a war crime or not.”

The phraseology of negligence repeats itself in the case of Major General Hirota, who was held criminally responsible for his subordinates’ ill-treatment and murder of civilians and prisoners of war. The judge advocate remarked regarding culpable negligence:

The essential thing for the court to consider is whether in the whole circumstances of the case as they existed at the time of the offence, the degree of neglect proved is such as, having regard to the evidence and their military knowledge as to the amount of care that ought to have been exercised,
renders the neglect so substantially blameworthy as to be deserving of punishment.\textsuperscript{198}

This line of analysis was also expressed in the other command responsibility trials.\textsuperscript{199}

Evidently, the Australian approach to command responsibility in the aftermath of World War II has carved a clear path to criminal liability through the route of criminal negligence. Subsequent developments, however, indicate a change of course towards a narrower approach that draws nearer to actual rather than constructive knowledge.

Like the two preceding States, Australia is also a party to the Rome Statute.\textsuperscript{200} The examples of Germany and the United Kingdom have already determined, however, that acceding to the Rome Statute does not necessarily mean fully adopting its legal precepts in the party State’s domestic law.\textsuperscript{201} Indeed, while Australia incorporated international crimes into its legal code, it also chose to diverge from the Rome Statute formula of command responsibility.\textsuperscript{202} To recall, the Rome Statute incriminates a commander who “knew or, owing to the circumstances at the time, should have known” that a subordinate is committing or about to commit a crime.\textsuperscript{203} Conversely, the Australian construct in the Criminal Code imposes liability where the commander “knew, or owing to the circumstances at the time, was reckless as to whether forces were committing or about to commit such offenses.”\textsuperscript{204}

\textsuperscript{198} Id. at 148 (quoting the Rabaul R172 trial report of Major General Hirota Akira). Boas & Lee clarify that the focus on the commander’s duties was necessary when the commander was held accountable due to “reckless disregard” rather than “positive intention.” (“As for the reckless type of \textit{mens rea}, the Military Court was advised to consider the scope of commander duties and what was reasonably required to exercise those duties in context of the relevant circumstances”). Id.

\textsuperscript{199} Id. at 149 (referring to the trial of General Hatazō Adachi, who was convicted of murder and ill-treatment of prisoners of war under his command); id. at 150–51 (referring to the trial of General Imamura, who was convicted of responsibility for murder, torture, mutilation of bodies and other war crimes his subordinates committed).


\textsuperscript{201} UK Manual, \textit{supra} note 146, ¶ 16.36.6; 2010 AK 3/10, \textit{supra} note 181, ¶ 40.

\textsuperscript{202} See Criminal Code Act 1995 (Cth) ch 8 (Austl.).

\textsuperscript{203} Rome Statute, \textit{supra} note 13.

Reckless has its own definition as a mental state in the Criminal Code.205 A person is reckless in relation to a result or a circumstance if “he or she is aware of a substantial risk” that the result or circumstances occurred or will occur, and despite such awareness, that person took an unjustifiable risk.206 Recklessness cannot be conflated with negligence, since the latter is a distinct mental state that the Criminal Code treats separately.207 The implication is that Australia has elected de jure to substitute the negligent element from its past jurisprudence with a narrower mental state of recklessness.208 This mental state is also narrower, prima facie, than the standard of the Rome Statute.209 In the past several years, events in the operational theaters of Australian forces necessitated putting this legal framework into action.

Following prolonged operational activity in Afghanistan,210 the Australian government contended with allegations of criminal misconduct by its deployed special forces against Afghan nationals.211 The examination of

206. Id. ¶ 5.5.
207. Id. ¶ 5.5.
208. Interestingly, the Australian law of war manual establishes a “should have known” standard that is potentially broader than recklessness, while simultaneously stating that the Criminal Code is the ultimate authority for breaches of LOAC without addressing the possible disparity. Compare AUSTRALIAN DEFENCE HEADQUARTERS, ADDP 06.4, LAW OF ARMED CONFLICT ¶ 13.5–6 (2006), https://www.defence.gov.au/adtwc/documents/doctorinelibrary/addp/addp06.4-lawofarmedconflict.pdf, with Criminal Code Act 1995, supra note 202, ¶ 1.12.
209. Douglas Guilfoyle, Joanna Kyriakakis & Melanie O’Brien, Command Responsibility, Australian War Crimes in Afghanistan, and the Brereton Report, 99 INTERNATIONAL LAW STUDIES 220, 259 (2022) (“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. Awareness, in turn, means that the person is cognizant or conscious of something. Some have interpreted this to furthermore require that the relevant knowledge is consciously recalled at the critical moment. . . . This standard is not met where the commander, objectively speaking, should have known of such a risk but, in fact, did not.” (footnotes omitted)).
these allegations culminated in a comprehensive report of the Inspector General of the Australian Defense Force led by Major General Paul Brereton. The Brereton Report analyzes the conduct of Australian special forces in Afghanistan in the years 2005–16, focusing on suspicions of “illegal killings and inhumane and unlawful treatment of detainees” and determining whether there is sufficient evidentiary basis to conduct a criminal investigation. Important segments of the report deal with the potential responsibility of military commanders in the various echelons in charge of the relevant operations. In multiple cases, the report recommends initiating a criminal investigation based on command responsibility for the crime of murder.

Unsurprisingly, the Brereton Report’s interpretation of command responsibility starts with Australia’s domestic codification of command responsibility in the Criminal Code. This is followed by a summary of international and Australian case law dealing with command responsibility. The report carries on to enumerate what it perceives as the elements of criminal command responsibility, one of them being “knowledge, or reckless indifference to, the actual or imminent commission of the offences.” Hence, the focus of the Brereton Report was to identify whether there was either knowledge or “reckless indifference” of the commander in the face of war crimes. The inquiry indeed found these criminal mental states within the ranks of the patrol units, but it exonerated higher levels of command such as the platoon, squadron, and headquarters of the Joint Task Force and the Joint Operations Command.

There is not much further analysis as to the interplay between the prevailing standard of “reckless indifference” and the previously cited case


213. Id. at 26.
215. See, e.g., id. at 74, 80, 92.
216. Id. at 273–74.
217. Brereton Report, supra note 212, at 274–76. The cited Australian case law is from the World War II era and therefore predates the current formula of command responsibility in the Criminal Code.
218. Id. at 276; see also id. at 474.
219. Id. at 470.
220. Id.
law.\textsuperscript{221} Such analysis could have been useful, considering that the case law utilizes legal terminology that is absent from the contemporary legislation. Still, when considering the responsibility at the squadron level, the Brereton Report does remark that the squadron level may have shared a “sense” of irregularities in the forces’ conduct, but such a sense “falls short of knowledge, information, or even suspicion that non-combatants were being deliberately killed.”\textsuperscript{222} Noticeably, these three states of knowledge seem to imply a subjective test that considers the actual knowledge of the commanders. An alternative objective test could have asked what a reasonable commander would suspect or deduce from the “sense” that prevailed within the squadron. This objective test would have been in the realm of constructive knowledge, while the words chosen by the Brereton Report seem closer to the realm of actual knowledge.

The Brereton Report is just the first phase in what seems to entail a lengthy investigatory process.\textsuperscript{223} The emerging picture so far is that the legal standard for command responsibility resides within the confines of subjective or actual knowledge, rather than imputing constructive knowledge based on lesser modes of liability such as negligence.

\textbf{E. Israel}

On February 6, 2013, the Israeli prime minister received a report entitled “Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law.”\textsuperscript{224} The report was delivered by a special commission of inquiry

\begin{itemize}
\item \textsuperscript{221} One potential caveat to this statement is that a major portion of the Brereton Report is redacted. See, e.g., \textit{id.} at 477–80.
\item \textsuperscript{222} \textit{Id.} at 495; see also \textit{id.} at 481, 488, 495.
\item \textsuperscript{224} 2 Jacob Turkel et al., \textsc{Public Commission to Examine the Maritime Incident of 31 May 2010: Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law} (2013), https://www.gov.il/BlobFolder/generalpage/downloads_en/ENG_turkel_eng_b1-474.pdf [hereinafter the \textsc{TURKEL REPORT}]. The first part of the Turkel Report focused on a specific incident which occurred on May 31, 2010, in the waters adjacent to the Gaza Strip: A belligerent engagement between the Israel Defense Forces and foreign nationals aboard a maritime vessel which attempted to advance towards Gazan shores. The incident was the trigger for the broader examination of Israel’s
\end{itemize}
appointed by the Israeli government. Its chair was a former justice of the Israeli Supreme Court, Jacob Turkel. Several independent observers reviewed the commission’s report prior to its release.\(^{225}\)

As the formal title indicates, the Turkel Report examines the legislative and administrative framework that governs allegations of LOAC violations. Specifically, the report analyzes whether this framework addresses LOAC violations in a manner that is comparable to other national jurisdictions and in line with the requirements of international law.\(^{226}\)

One of the issues the Turkel Report discusses, in particular, is command responsibility. The commission sought to determine Israel’s international legal obligations in the realm of command responsibility, and whether its mechanisms stand up to these obligations. In doing so, the report refers primarily to API as a reflection of the duty of commanders to suppress and repress violations of subordinates.\(^{227}\) The report asserts further that Articles 86–87 of API are reflective of customary international law.\(^{228}\) Article 86 incorporates the mental element that triggers the responsibility of commanders “if they knew, or had information which should have enabled them to conclude in the circumstances at the time” that a subordinate committed a violation.\(^{229}\) Still, the Turkel Report also refers to other articulations of command responsibility, such as the ICTY Statute\(^{230}\) and the Rome Statute.\(^{231}\)

Thus, while the Turkel Report concludes that commanders clearly have a duty to examine and investigate LOAC violations,\(^{232}\) it does not present a definite statement as to the requisite standard of knowledge of the commander.


225. The observers were Professor Tim McCormack (Australia), Rt. Hon. David Trimble (Northern Ireland), and Brigadier General (ret.) Kenneth Watkin (Canada). TURKEL REPORT, supra note 224, at 21–29.

226. Id. at 31–32. The Report concluded that Israel’s mechanisms “generally comply with the obligations of the State of Israel under the rules of international law” but saw fit to provide several recommendations to further improve those mechanisms, or to make sure that their practice is adequately codified in written policy and legislation. Id. at 49.

227. Id. at 78.

228. Id.

229. API, supra note 83, art. 86(2).

230. TURKEL REPORT, supra note 224, at 90 (citing the “knew or had reason to know” standard).

231. TURKEL REPORT, supra note 224, at 90.

232. Id. 79.
The Turkel Report goes on to examine the domestic incorporation of command responsibility in Israel. While it finds that military doctrine and legal jurisprudence substantiate the duty of commanders to uphold the law and to address violations, it does not identify explicit legal codification of command responsibility. Therefore, the Turkel Report recommends:

Enacting provisions that impose direct criminal liability on military commanders and civilian superiors for offenses committed by their subordinates, where the former did not take all reasonable measures to prevent the commission of offenses or did not act to bring the matter to the competent [sic] authorities when they became aware of the offenses ex post facto.

The Israeli Ministry of Justice has since undertaken a continuous process of implementing the Turkel Report’s recommendations.

Referring to the Turkel Report’s recommendation on command responsibility, the Implementation Report informs that the Ministry of Justice and the Military Advocate General of the Israel Defense Forces (IDF) are researching possibilities for embedding command responsibility in domestic legislation. This, while bearing in mind existing legislation that allows imposing liability on commanders “under certain circumstances” and considering “legal questions pertaining to basic principles of criminal law in Israel.”

The Implementation Report concludes this issue by supporting the ongoing research and recommending that it will bear legislative determinations “as soon as possible.”

233. Id. at 272, 367.
234. Id. at 369.
236. THE IMPLEMENTATION REPORT, id. at 13.
237. Id.
The Implementation Report does not elaborate about pre-existing legislation that allows liability of commanders or superiors in general. The Turkel Report, however, briefly mentions a previous commission of inquiry whose specific mandate was to tackle the issue of indirect responsibility head-on.238

Between September 16 and 18, 1982, amid a bloody civil war in Lebanon, a group of Christian militants labeled “Phalangists” entered Muslim refugee camps in west Beirut and slaughtered hundreds of their dwellers.239 The massacre took place after IDF forces took over the region. IDF forces were in the area as part of operation “Peace for Galilee,” whose main purpose was to curtail rockets and artillery attacks from Lebanon into Israel.240

The immediate presence of IDF forces in the area of the massacre and their tactical affiliation with the Phalangists inevitably raised questions of accountability.241 Consequently, the Israeli government established a commission of inquiry into the facts and causes involved with the atrocities in the refugee camps.242 The resultant Kahan Report (named after the president of the Supreme Court at the time, who chaired the commission) was published on February 8, 1983, and its conclusions impute indirect responsibility to senior military and political superiors who were in a position to potentially mitigate the violent acts but failed to do so.243

The Kahan Report determined that responsibility should apply if the authorities “should have foreseen—from the information at their disposal and

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238. TURKEL REPORT, supra note 224, at 91.
from things which were common knowledge” that atrocities were imminent.\(^{244}\) Yet, the report goes on to clarify that this principle reflects more of an ethical or moral standard rather than a legal one.\(^{245}\) While the Kahan Report concedes that legal responsibility may apply under the legal regime of occupied territory under international law, it refrains from concluding that such was the case in west Beirut when the actions took place.\(^{246}\) In the same vein, it does not delve into Israeli domestic law and leaves the legal application of its recommendation to the authorities.\(^{247}\)

While there were no criminal repercussions following the Kahan Report, the primary figures that the report held accountable resigned from their positions.\(^{248}\)

Both the Turkel Report and the Kahan Report recognize the importance of assessing the responsibility of commanders when their subordinates allegedly violate international law.\(^{249}\) However, the two reports also highlight that Israel has yet to take a clear legislative stand regarding the legal expectation from commanders and the legal boundaries of their responsibility when it comes to legal violations committed by subordinates.\(^{250}\)

\(^{244}\) Id. at 37.

\(^{245}\) Id. ("It is not our function as a commission of inquiry to lay a precise legal foundation for such indirect responsibility"). This also accounts for the main course of action the commission suggested for the culpable figures, which was removal from their positions. See, e.g., id. at 69.

\(^{246}\) Id. at 37.

\(^{247}\) See, e.g., id. at 70 ("[If] it be found that certain persons bear responsibility for these shortcomings, it is fitting that the appropriate conclusions be drawn in their regard, whether in accordance with the appropriate provisions of the military legal code, or in some other manner").


\(^{249}\) See, e.g., TURKEL REPORT, supra note 224, at 277, 368–69; REPORT OF THE COMMISSION OF INQUIRY INTO THE EVENTS AT THE REFUGEE CAMPS IN BEIRUT, supra note 239, at 37–38.

\(^{250}\) There is Israeli jurisprudence that imposes direct responsibility on commanders for misconduct when they have actively participated in some manner in the illegal acts of their subordinates. See, e.g., HCJ 7195/08 Abu Rahme v. Military Advocate General 63(2) PD 325, par. 50 (2013) (Isr.). Still, in a report analyzing legal aspects of IDF military operation, the Israeli State Comptroller highlighted the need to also properly define the legal treatment of commanders who failed to take reasonable measures to prevent subordinate misconduct. See State Comptroller, Special Audit Report: Operation “Protective Edge” 92–94 (Mar. 2018).
F. South Korea

It may come as no surprise at this point that despite being a State party to the ICC, South Korea has also chosen to depart from the wording of Article 28 of the Rome Statute in its formulation of the standard for command responsibility.

The codification of command responsibility in South Korean law is somewhat similar to the German construct. The “classic” embodiment of command responsibility is located in Article 5 of the South Korean Act on Punishment of Crimes under Jurisdiction of the International Criminal Court. This provision incriminates a commander (or other superior) who fails to take measures to prevent subordinates from committing the covered crimes when the commander is aware of their actions. In such a case, the commander could be subject to the same punishment that attaches to the crime that the subordinates perpetrate. It appears that this provision is strictly limited to actual knowledge by the commander and does not contemplate incrimination that is based on negligence or a form of constructive knowledge.

253. See Sec. III(C), supra.
255. Id.
256. Id.

First, as to mens rea, by eliminating the second leg of mental elements in Article 28, (i.e., “should have known” and “consciously disregarded information”) Article 5 of the Act leaves no room for negligence-based superior responsibility to intervene. Consequently, in the Korean criminal law context where there are two categories of omission classified on the basis of mens rea, (i.e., “omission by intent” and “omission by negligence”), the command responsibility under Article 5 has no other option but to fall into the former. Put differently, what Article 5 of the Act requires is that a commander/superior intentionally fails to prevent the crimes by subordinates despite his knowledge thereof.
Article 15 of the Korean Act separately codifies dereliction of duty that originates in the negligent disposition of the commander. While Article 15(1) is reminiscent of Article 5 in its subject of conscious failure to prevent, Article 15(2) imposes liability on a commander who negligently fails to prevent a covered crime. As in the German framework, the provision caps the punishment for such an offense rather than imputes the punishment for the main crime that the subordinate perpetrated.

Lastly, Article 15(3) deals with a failure to inform the authorities of the crimes that the subordinates committed and caps the punishment for such a failure at five years, similar to Article 15(2). The article does not expressly state the mens rea required for conviction. However, the stipulation in Article 14 of the Korean Criminal Act that negligence should be prescribed explicitly strongly suggests that this article also resorts to actual knowledge.

While South Korean executive guidelines acknowledge command responsibility in specific contexts, it does not delve into the various elements of its criminal aspect. Although applicable case law in the Korean context is pending, the legislative framework is unequivocal in its deference to actual knowledge as a ruling standard for command responsibility.

See also Criminal Act art. 14 (2020) (S. Kor.) (translated in the Korea Legislation Research Institute’s Korea Law Translation Center, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=60888&lang=ENG) (determining that negligent acts will only be punishable when explicitly prescribed in the law).

258. Act on Punishment of Crimes under Jurisdiction of the International Criminal Court, supra note 254, art. 15.
259. Choi & Kim, supra note 257, at 617, 621 (submitting that there is redundancy in having both Article 5 and Article 15(1) and therefore suggesting eliminating Article 15(1)).
260. Act on Punishment of Crimes under Jurisdiction of the International Criminal Court, supra note 254, art. 15(2).
262. The punishment is capped at five years. Act on Punishment of Crimes under Jurisdiction of the International Criminal Court, supra note 254, art. 15(2).
263. Id. art. 15(3).
264. Criminal Act, supra note 257, art. 14. See also Choi & Kim, supra note 257, at 622–23.
G. Assessment—The Persistence of Actual Knowledge

A face value glance at the several States surveyed above might generate some initial impression of a trend toward a standard of constructive knowledge for command responsibility. Indeed, one might deduce as much from the ratification of the Rome Statute by most of these States. Such ratification could have served as a preliminary indication of acceptance of the statute’s legal standards, including the embodiment of command responsibility in Article 28.266 A closer look, however, reveals a strikingly different picture.

Australia, Germany, and South Korea, all of which are parties to the Rome Statute, actively chose to deviate from the Rome Statute and isolate the traditional construct of command responsibility to cases with some form of commander’s knowledge or awareness of the subordinates’ deeds.267

The UK, also a signatory to the Rome Statute, implemented legislation that incorporates Article 28 virtually verbatim.268 Even still, the differing annotations in its executive guidance,269 coupled with the ambiguity of the term “should have known” in British jurisprudence,270 deny a positive conclusion that the British term “should have known” indisputably means constructive knowledge.

Israel provides an example of a country that has yet to incorporate explicitly the doctrine of command responsibility. The limited instances that have driven Israel to address the subject resulted in general endorsement of the concept and its imperatives, but not with the adoption of a specific legal standard, which may come forth in the future.271

The U.S. demonstrates a momentous heritage of dealing with command responsibility. Yet, its treatment of the standard of knowledge by its three

266. It is worth recalling, however, that the content of the standard in Article 28 seems far from settled. See supra note 162.
268. ICC Act, supra note 134.
269. UK Manual, supra note 146, ¶ 16.36.
270. See, e.g., Mobilx Ltd. v. Commissioners for Her Majesty’s Revenue and Customs, supra note 138; Wilson v. Peter Vassallo Ltd., supra note 141; R v. Rimmington, supra note 142.
271. TURKEL REPORT, supra note 224, at 369.
branches of government is conflicting. Its executive guidance seems to promote the more expansive standard of constructive knowledge. Yet, its legislation codifies this standard solely for the limited confines of the U.S. military commission rather than the full purview of its armed forces. The pivotal jurisprudence of the post-World War II trials predominantly relies on determinations of actual knowledge for holding commanders liable, rather than constructive knowledge. The same is true for the one seminal case dealing with the U.S.’s own armed forces. The accumulative testimony from these sources does not convincingly support a standard of constructive knowledge.

The survey of the aforementioned States does not exhaust the myriad of approaches that States employ to address command responsibility. Nevertheless, it is useful in two respects; firstly, it demonstrates the intricate, and at times incongruent, nature of state practice and opinio juris. Thus, it could serve as a cautionary note for one who seeks to attach a State to a certain legal school without due regard to the State’s entire body of legal practice and expressions. Secondly, the spectrum of States discussed herein may serve well as a microcosm of the widely divergent ways in which States treat command responsibility. Evidently, a notable portion of States demands a standard of actual knowledge in order for command responsibility to be tantamount to the culpability of the main perpetrator. Other States articulate
the standard more ambiguously, in a manner that does not lend clear support to a specific approach to the commander’s knowledge.\textsuperscript{277} Indeed, some States do refer to the broader standard of constructive knowledge for holding their commanders accountable.\textsuperscript{278} Yet, these States hardly accumulate to

13, 1927, RS 101 (Switzerland, limiting commanders’ liability in cases of negligence to three years or an equivalent monetary penalty); Kryminal’nyy Kodeks Ukrayiny [BBP] [Criminal Code] art. 426 (Ukraine, incriminating commanders for intentional (Умыш) failure to stop subordinates’ crimes).

For executive guidance, see, e.g., \textit{MINISTERIO DE DEFENSA, MANUAL DE DERECHO INTERNACIONAL DE LOS CONFLICTOS ARMADOS} 39 (2010) (Argentina, stating commanders bear responsibility for subordinates’ crimes if they knew (conocimiento) that they are perpetrating them); \textit{COMANDO CONJUNTO DE LAS FUERZAS ARMADAS, MANUAL DE DERECHO INTERNACIONAL HUMANITARIO} (2016) (Ecuador, stating that a commander will be liable for knowing (conociendo) of impending crimes of subordinates and failing to report); \textit{MINISTÈRE DE LA DÉFENSE, SECRÉTARIAT GÉNÉRAL POUR L’ADMINISTRATION, MANUEL DE DROIT DES CONFLITS ARMÉS}, chap. R (France, holding commanders liable for knowingly (sciemment) allowing subordinates to commit crimes); Chief of Staff of the Armed Forces of the Philippines, \textit{Strict Adherence to the Doctrine of Command Responsibility, Directive} (Feb. 4, 2007) (as cited in \textit{Int’l Comm. of the Red Cross, Practice Relating to Rule 153, supra note 265}) (Philippines, holding commanders accountable if they had knowledge of subordinates’ crimes but failed to act despite such knowledge).

Most of the references herein and below may be found in the \textit{Int’l Comm. of the Red Cross, Practice Relating to Rule 153, supra note 265}.

\textsuperscript{277} For legislation, see, e.g., \textit{Krivični Zakon, Službene novine Federacije BiH}, br. 3/2003, art. 180 (Bosnia and Herzegovina, referring to the “knew or had reason to know” (lice znalo ili je moglo znati) standard of the ICTY Statute, \textit{supra} note 84. The standard has not been interpreted consistently, and as mentioned above, an appeal decision of the tribunal ruled that it negates a standard of negligence. \textit{Delalić, supra} note 16, ¶ 226); \textit{Karistusseadustik, RT I} 2001, 61, 364, § 88, June 6, 2001 (Estonia, incriminating a commander who ordered, consented or failed to prevent subordinates’ crimes); \textit{Sakartvelos Siskhlis Samartlis K’odeksi}, SSM 41(48), art. 413, Aug. 13, 1999 (Georgia, noting that commanders are liable for subordinates’ crimes if they are caused by the commanders’ inactivity (umokmedobit)).

For executive guidance, see, e.g., Order of the Minister of Defence on the Adoption of Service Regulations, § 22(e) (2005) (as cited in \textit{Int’l Comm. of the Red Cross, Practice Relating to Rule 153, supra note 265}) (Hungary, instructing a commander to enforce the law and not tolerate violations of subordinates); \textit{Ministère de la Défense Nationale, Forces Armées du Bénin, Le Droit de la Guerre, Fascicule II}, at 19 (1995) (as cited in \textit{Int’l Comm. of the Red Cross, Practice Relating to Rule 153, supra note 265}) (Benin, instructing commanders to take measures to prevent and repress violations); \textit{Stato Maggiore della Difesa, Manuale di Diritto Umanitario}, SMD-G-014, vol. 1, ¶ 83 (1991) (Italy, mentioning that Italian law holds individuals accountable for perpetrating or ordering the perpetration of a crime, without discussing command responsibility).

practice that is “both extensive and virtually uniform”\(^{279}\) or that is “sufficiently widespread and representative, as well as consistent.”\(^{280}\)

Therefore, the notion that command responsibility may rest on a mens rea of negligence or constructive knowledge simply lacks the requisite volume and extent of practice necessary to establish a customary norm of international law.\(^{281}\)

Furthermore, the limited State practice that does favor constructive knowledge is seldom accompanied with clear \textit{opinio juris} that expresses a sense of legal obligation to uphold this particular standard.\(^{282}\)

This is not to say that the doctrine of command responsibility lacks a basis in customary international law. There is ample State practice and \textit{opinio juris} that acknowledge the legal obligation to hold commanders accountable

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\(^{280}\) II.C Draft Conclusions, \textit{supra} note 32, at 135.

\(^{281}\) \textit{See} Asylum Case (Colom./Peru), \textit{supra} note 47, at 276; II.C Draft Conclusions, \textit{supra} note 32, at 137; Damaška, \textit{supra} note 17, at 464.

\(^{282}\) As in the case of the States previously discussed, mere accession to a treaty is not tantamount to adopting its legal standards as binding international law. North Sea Continental Shelf (F.R.G./Den.; F.R.G./Neth.), \textit{supra} note 33, ¶ 76. \textit{See also} supra note 50 and references therein. Consequently, the sheer number of States that are party to the Rome Statute is not in itself testimony to \textit{opinio juris} that its standards reflect customary law.
for the crimes of their subordinates, when it is determined that they are culpably responsible for these crimes. There is not, however, sufficiently consistent and widespread State behavior that supports stretching the doctrine of command responsibility beyond traditional modes of criminal liability for grave crimes, that is, intent or some form of actual knowledge as a minimum. As the law stands today, convicting a commander of a war crime solely based on constructive knowledge would be, therefore, untenable from a customary international law standpoint. In other words, the currently standing customary doctrine of command responsibility must rest on actual knowledge.

IV. IMPLICATIONS OF OVERSTEPPING CUSTOMARY LAW RELATING TO COMMAND RESPONSIBILITY

A. Implications for Universal Jurisdiction

Having established that incriminating a commander on the basis of constructive knowledge is unfounded in customary international law, how should this conclusion impact a State’s exercise of criminal jurisdiction? Naturally, a State is entitled to employ its criminal process to uphold the rule of law within its “domestic jurisdiction,” given that its subjects enjoy

283. See, e.g., DoD Manual, supra note 47, § 18.23.3.2; UK Manual, supra note 146, ¶ 16.36; German LOAC Manual, supra note 177; Brereton Report, supra note 212, ch. 1.10, 3.03; Turkel Report, supra note 224, at 369.

284. Indeed, this would arguably present an excessive extension of traditional modes of liability. See, e.g., Nersessian, supra note 9, at 88 (“Perhaps no concept stretches traditional notions of individual criminal responsibility as far as superior or command responsibility for criminal conduct by underlings”); Martinez, supra note 17, at 639 (“command responsibility doctrine has been dogged by the criticism that it seemingly allows commanders to be punished in the absence of the conscious wrongdoing usually associated with moral culpability”; but see id. at 660–64, where Martinez argues that there are justifications for imposing a duty of knowledge on the commander); Damaška, supra note 17, 491–92 (“while [war manuals] acknowledge that commanders are responsible for failing to prevent or punish, they leave the nature of this responsibility unspecified”); Ohlin, supra note 17 (“It produces an odd result to make a negligent actor guilty of a crime—even as an accessory—that usually requires a much higher mental element such as intent and knowledge”).

285. U.N. Charter art. 2, ¶ 7; The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) (“The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power”).
certain fundamental rights throughout the proceedings. Command responsibility that is based on constructive knowledge does not necessarily infringe on these rights, and a State has considerable discretion in exercising its sovereignty in this regard without outside interference. The analysis is utterly different when a State attempts to exercise jurisdiction over another State or a national of another State. Such an attempt may potentially activate the latter State’s protection against foreign intervention into its affairs, particularly when the attempt is to apprehend a formal official of another State. A forceful exercise of jurisdiction—which includes the arrest and confinement of a foreign national—might even risk activating the fundamental prohibition against the use of force.

An interstate exercise of jurisdiction may arise in the context of command responsibility when State A seeks to indict a national of State B based on universal jurisdiction. Universal jurisdiction is a concept in international law that allows States to exercise jurisdiction over the gravest violations of international law.


287. James Crawford, Sovereignty as a Legal Value, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 117, 120–21 (James Crawford ed., 2012) (“Within the state, sovereignty involves a monopoly of governing authority . . . [including] what the law of the state shall be on any matter and how (or when) it is to be enforced”); Ole Spiermann, General Legal Characteristics of States: A View from the Past of the Permanent Court of International Justice, in SOVEREIGNTY, STATEHOOD, AND STATE RESPONSIBILITY: ESSAYS IN HONOR OF JAMES CRAWFORD 144, 145 (Christine Chinkin & Freya Baetens eds., 2015).


289. U.N. Charter art. 2, ¶ 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”). Indeed, this is an underlying reason for establishing the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda under Chapter VII of the U.N. Charter, which empowers the Security Council to legitimize use of force to maintain peace and security. S.C. Res. 827, ¶ 4 (May 25, 1993); S.C. Res. 955, ¶ 2 (Nov. 8, 1994); Jamnejad & Wood, supra note 288, at 360 (“Enforcement measures taken or authorized by the UN Security Council under Chapter VII of the Charter do not contravene the prohibition on the use of force or the principle of non-intervention”); ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 341–42 (2004).

In recent years the application of universal jurisdiction has been associated at times with the concept of “lawfare,” which is the employment of legal tools to achieve military or political aims.\footnote{291. Charles J. Dunlap, Lawfare Today . . . and Tomorrow, 87 International Law Studies 315 (2011); Orde F. Kittrie, Lawfare: Law as Weapon of War 11 (2016); Douglas Guilfoyle, The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea, 95 International Affairs 999, 1005 (2019); Joel. P. Trachtman, Integrating Lawfare and Warfare, 39 Boston College International & Comparative Law Review 267, 268–69 (2016).}

“Lawfaring” entities are susceptible to resort to universal jurisdiction due to its unique potential to spawn criminal proceedings regardless of geographic or personal boundaries.\footnote{292. Kittrie, supra note 291, at 13; Greg Simons & Iulian Chifu, The Changing Face of Warfare in the 21st Century 91 (2018); Henry A. Kissinger, The Pitfalls of Universal Jurisdiction, 80 Foreign Affairs 86, 88 (2001); Michael P. Scharf, Universal Jurisdiction and the Crime of Aggression, 53 Harvard International Law Journal 358, 381 (2012) (“Assertions of universal jurisdiction—even an indictment—can enable one state to intimidate and harass another state or its officials as a form of ‘lawfare’”); Mark F. Cancian, Coping with Surprise in Great Power Conflicts 76 (2018) (“A key element of lawfare is the notion of ‘universal jurisdiction’, which allows states or international organizations to claim criminal jurisdiction over an accused person regardless of where the alleged crime was committed, and regardless of the accused’s nationality or country of residence”); Sienho Yee, Universal Jurisdiction: Concept, Logic, and Reality, 10 Chinese Journal of International Law 503, 510 (2011) (“the exercise of universal jurisdiction may infringe, or at least detract from, the principle of sovereignty and sovereign equality and is easily subjected to political abuse including discrimination as manifested in selective prosecution, thus destabilizing international relations”).}

Consequently, various States implemented safeguards—mostly procedural—to maintain the integrity of universal jurisdiction and minimize the risk of its abuse.\footnote{293. See, e.g., Police Reform and Social Responsibility Act 2011 c. 13, § 153 (Gr. Brit.) (requiring the consent of the Director of Public Prosecutions for any arrest warrant based on a private complaint for a grave breach of the Geneva conventions); HM Government, Note on the Investigation and Prosecution of Crimes of Universal Jurisdiction (2018) (detailing the procedural steps necessary to activate universal jurisdiction); see}
Beyond the importance of such procedural “gatekeepers,” this undesired side-effect of international legal discourse simply underscores what is by itself a fundamental principle—that States would do well to ensure that the substantive legal standard that is applied to cases of universal jurisdiction is properly rooted in customary international law, rather than contested or novel legal theories that do not reflect lex lata. The application for command responsibility is that any exercise of universal jurisdiction based on this doctrine should apply the more conservative and less controversial standard of actual knowledge rather than constructive knowledge.

This approach will ensure that universal jurisdiction is fulfilled in a manner that is more defensible and legally sound. This, in turn, will undercut allegations that the exercise of jurisdiction amounts to an illegal intervention or use of force against the home State of the accused. Otherwise, a judiciary that applies legal principles that overstep customary international law risks entangling its nation State with an internationally wrongful act that invokes State responsibility. Current events suggest that such scenarios may be tested in the Russian-Ukrainian context, which has already raised concerns that focus on command responsibility. It remains to be seen whether future criminal cases will be directed in a responsible manner that promotes accountability while avoiding shaky and contested legal footing.


294. A State is at fault for an internationally wrongful act when it breaches an international obligation. Such an international obligation “may be established by a customary rule of international law.” See Int’l Law Comm’n, Rep. on the Work of its Fifty-Third Session, U.N. Doc. A/56/10, at 55 (2001); see also id. at 35, 55 (“In some cases precisely defined conduct is expected from the State concerned; in others the obligation only sets a minimum standard above which the State is free to act.” The commission goes on to mention “a final judicial decision” as a possible example of conduct that is “proscribed by an international obligation.” Id. at 55. This means that in a criminal case of command responsibility, a judicial decision should apply a “minimum standard” of actual knowledge to avoid “a final judicial decision” that could entail an internationally wrongful act.). See also API, supra note 83, art. 75(4)(c) (“no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed”).

B. Implications for the International Criminal Court

States are not the only entities that may wish to exercise jurisdiction over foreign nationals to impose command responsibility. Multinational tribunals, most prominent of which is the ICC, could also share the mandate to handle such cases.

The ICC has been struggling with the application of command responsibility and has yet to reach conclusive jurisprudence on the subject.\(^{296}\) Also, in recent years the ICC has been suffering a general crisis of legitimacy for a myriad of reasons, including interagency animosity and controversy.\(^{297}\)


\(^{296}\) Sadat, *supra* note 30 (stating, in regard to the Bemba case, that “the result in this case is deeply unsatisfying. The inability of the Appeals Chamber to achieve consensus means that the judgment actually decided very little, and the two points it did decide remain hotly contested.”); Diane Marie Amann, *In Bemba and Beyond, Crimes Adjudged to Commit Themselves*, EJIL:TALK! (June 13, 2018), https://www.ejiltalk.org/in-bemba-and-beyond-crimes-adjudged-to-commit-themselves/; Alexander Heinze, *Some Reflections on the Bemba Appeals Chamber Judgment*, OPINIO JURIS (June 18, 2018), https://opiniojuris.org/2018/06/18/some-reflections-on-the-bemba-appeals-chamber-judgment/.

doubts of judicial integrity, reports of a toxic workplace environment, and claims of inefficiency, overreach, and poor prioritization. While there is no straightforward panacea to these maladies, part of the solution has to do with judicial reasonableness and its ability to produce sustainable jurisprudence that relies on firm legal precepts.

When the ICC indulges in overly inventive rulemaking or stretches its jurisdictional grasp excessively, there is considerable backlash across the board from the various stakeholders. If the ICC wishes to amend its legitimacy and retrieve some of its lost credibility, one crucial course of action is


302. See, e.g., Guilfoyle, supra note 297, at 403–4 (discussing the decision to exercise jurisdiction over Myanmar, which is not a party to the Rome Statute, and stating that the decision “had the effect of extending the reach of an already over-stretched court”); Jay Alan Sekulow & Robert Weston Ash, The Issue of ICC Jurisdiction over Nationals of Non-consenting, Non-party State to the Rome Statute: Refuting Professor Dapo Akande's Arguments, SOUTH CAROLINA JOURNAL OF INTERNATIONAL LAW & BUSINESS, Spring 2020, at 1, 26–27 (arguing that the exercise of jurisdiction over U.S. nationals when the United States is not a party to the Rome Statute is illegitimate overreach; see also American Servicemembers' Protection...
to withdraw from the avant-garde zone of judicial lawmaking and revert to firm legal footing that is delimited by recognized norms of customary international law.303

In the context of command responsibility, this would mean interpreting Article 28 of the Rome Statute304 in a manner that is confined to the customary standard of actual knowledge. This would require the court to reconcile the prevailing customary standard with the “should have known” wording of Article 28. As the examples of State behavior suggest, this is not an impossible feat.305 Its potential to assist in mending the perception of the ICC Act, 22 U.S.C. § 7427, which grants the U.S. president the authority “to use all means necessary and appropriate” to release U.S. and allied officials detained in relation to ICC proceedings); State of Israel, Office of the Attorney General, The International Criminal Court’s Lack of Jurisdiction over the so-called “Situation in Palestine” (Dec. 20, 2019) (arguing that the exercise of jurisdiction over Israeli officials in the “Situation in Palestine” is legally untenable and exceeds the confines of the Rome Statute); Dapo Akande, ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals, EJIL:TALK! (May 6, 2019), https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals (criticizing the ICC decision to nullify the customary rule of head of states immunity); Statement by Andrew Murdoch, Legal Director to the International Criminal Court Assembly of States Parties, at its 17th Session in the Hague, GOV.UK (Dec. 5, 2018), https://www.gov.uk/government/speeches/uk-statement-to-icc-assembly-of-states-parties-17th-session (“the Court has no mandate, and no jurisdiction, nor will it ever have nearly enough capacity, to act as a human rights monitoring organisation for the whole world. It must focus on its core and essential task, set out under the Statute.”).


303. Cf. Niels Petersen, The International Court of Justice and the Judicial Politics of Identifying Customary International Law, 28 EUROPEAN JOURNAL OF INTERNATIONAL LAW 357, 364–66 (explaining that the ICJ strives to maintain legitimacy to avoid the hazard of non-compliance, and one way to do so is to ensure that the identification of customary rules “stands on firm methodological grounds”).


305. This interpretive approach for art. 28 may also be essential from a different perspective, that of art. 22(2) of the Rome Statute (“The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”); see also Prosecutor v. Ngudjolo Chui, ICC-01/04-02/12-4, Concurring Opinion of Judge Wyngaert, ¶ 19 (Dec. 18, 2012):
as a competent institution, as well as encouraging State cooperation without fear of overstepping international obligations, is worth the trouble. Once again, the legal aftermath of the Russian-Ukrainian conflict might provide a test case for the legal approach of the Office of the Prosecutor of the ICC and of its judiciary when it comes to applying the regime of the Rome Statute to Russia, which is a not a member of the ICC.  

V. CONCLUSION

For decades, the doctrine of command responsibility has been an integral tool of accountability for atrocities that forces committed under responsible command. The notion that culpability does not only lie solely with the physical perpetrator, but also with the supervisory capacity that could have intervened, is by now an indispensable component of international criminal justice.

There is much academic discourse regarding the desired contours of the doctrine, and a portion of it revolves around the level of knowledge that is expected of a commander regarding the behavior of his or her subordinates. On the one hand, the commander is in a supervisory role with the authority and responsibility to manage the conduct of subordinates; on the other, the tasks assigned to a commander are manifold and complex, doubly so during active hostilities. Disassociated and sterile judicial institutions should be acutely conscious of the challenges a commander must face and calibrate their legal expectations accordingly.

By including this principle in Part III of the Statute, the drafters wanted to make sure that the Court could not engage in the kind of “judicial creativity” of which other jurisdictions may at times have been suspected. Moreover, this principle is an essential safeguard to ensure both the necessary predictability and legal certainty that are essential for a system that is based on the rule of law.

Be that as it may, this article attempts to shed light on where the law currently stands rather than take an academic stance on where the law should be. Since international law is predominantly a creation of States, its status also represents, arguably, what States think the status of the law should be. States create law primarily through their verbal and practical behavior, which creates customary international law. Custom is determined by State practice and *opinio juris*. An assessment of these two components establishes that customary law does not support a standard of constructive knowledge for imposing criminal command responsibility. Rather, a standard of actual knowledge is more prevalent and enjoys firmer footing in the national application of command responsibility.

The ramifications of this conclusion are most relevant when there is an effort to incriminate a foreign national for command responsibility, whether it is by a domestic court or a multinational tribunal such as the ICC. In such cases, overstepping customary law by applying a standard of constructive knowledge could consist of an internationally wrongful act, and even illegal intervention or use of force, when the foreign national is being remanded forcefully. In addition, insisting on a standard of constructive knowledge without a sound basis in customary law would damage the legitimacy and professional credibility of the judicial institution when those traits are most needed.

Therefore, any judicial institution that confronts a case for command responsibility would do well to apply the law as it currently stands—that is, a standard of actual knowledge—and resist the urge to progressively develop the law in a manner that jeopardizes the integrity of the judicial process.