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HAGUE INTERNATIONAL TRIBUNALS

Unravelling the Confusion Concerning Successor Superior Responsibility in the ICTY Jurisprudence

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Abstract

The recent jurisprudence of the ICTY concerning the proper interpretation of the doctrine of superior responsibility under Article 7(3) of the ICTY Statute has been stifled by division and uncertainty. In particular, the question of the responsibility of successor superiors for crimes committed by their subordinates prior to taking command has led to a number of 3–2 majority decisions. This paper seeks to reconcile the divergent judicial opinions by moving away from a narrow analysis of successor superior responsibility, instead focusing on the determination of the underlying nature of the doctrine of superior responsibility. While a polarity of opinions also exists in relation to the nature of the doctrine of superior responsibility, this paper argues that the opinions can be reconciled by adopting a more principled approach to customary international law, an approach justified by the international criminal law context. Such an approach involves two elements: first, ensuring that a clear distinction is drawn between international humanitarian and international criminal legal concepts; and, second, the invocation of the principle of individual culpability as a standard against which the weight to be attributed to authorities evidencing custom ought to be assessed. A principled approach would enable the identification of the nature of the doctrine of superior responsibility while ensuring that the doctrine reinforces international criminal law principles rather than acts as an exception to them; in addition, by determining the nature of the doctrine of superior responsibility, the principled approach would unravel the confusion concerning successor superior responsibility in the ICTY jurisprudence.

Key words

International Criminal Tribunal for the former Yugoslavia (ICTY); successor superiors; superior responsibility

1. Introduction

Soldiers of an army invariably reflect the attitude of their general. The leader is the essence . . . Resultant liability is commensurate with resultant crime. To hold otherwise would be to prevaricate the fundamental nature of the command function. This

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> imposes no new hazard on a commander, no new limitation on his power. He has always, and properly, been subject to due process of law. Powerful as he may become in time of a war, he still is not an autocratic or absolute, he still remains responsible before the bar of universal justice.[1]

The sentiment of General MacArthur's conviction that commanders are 'subject to due process of law' was identifiable as early as the writings of Sun Tzu and Grotius.[2] While command has always imposed responsibility,[3] it was not until the end of the Second World War that such responsibility became more consistently criminal and international in nature,[4] finding expression in the doctrine of superior responsibility.[5] This doctrine, now a well-established principle of customary international law,[6] has recently been developed and clarified by the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) under Article 7(3) of its Statute.[7] From this jurisprudence it is clear that for a superior to incur

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1 D. MacArthur, *Reminiscences* (1964), 298.

2 Sun Tzu, *The Art of War*, trans. S. Griffith (1963), 125, cited in W. H. Parks, 'Command Responsibility for War Crimes', (1973) 62 *Military Law Review* 1, at 3: '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'; H. Grotius, *De Jure Belli ac Pacis: Libri Tres* (1625), cited in G. Boas, J. L. Bischoff, and N. L. Reid, *Forms of Responsibility in International Criminal Law* (2007), 145: '[C]ommunity, or its rulers, may be held responsible for the crime of a subject if they know of it and do not prevent it when they could and should prevent it'.

3 It is widely recognized that the doctrine of superior responsibility is rooted in the principle of responsible command, first codified in Art. 1 of the Regulations annexed to the Regulations Concerning the Laws and Customs of War on Land annexed to the Fourth Hague Convention Respecting the Laws and Customs of War on Land (1907). See *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Judgement, Case No. IT-96-21-T, T.Ch., 16 November 1998 (hereinafter *Čelebići* Trial Chamber Judgement), para. 335; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 (hereinafter *Hadžihasanović* Interlocutory Appeal Decision), para. 14.

4 Parks, *supra* note 2, at 19; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), 120.

5 Based on its military origins the doctrine was formerly known as 'command responsibility'. It will be referred to in this paper as the doctrine of 'superior responsibility', in line with the terminology used in the Statutes of the ICTY and the ICTR. See J. D. Levine, 'The Doctrine of Command Responsibility and its Application to Superior Civilian Leadership: Does the International Criminal Court have the Correct Standard?', (2007) 193 *Military Law Review* 52, at 53, n. 8, for a description of the development of this broader terminology.

6 There exists an extensive literature on the history and customary-law development of the principle of superior responsibility; see Parks, *supra* note 2; L. C. Green, 'Command Responsibility in International Humanitarian Law', (1995) 5 *Transnational Law & Contemporary Problems* 319; M. Lippman, 'Humanitarian Law: The Uncertain Contours of Command Responsibility', (2001–2) 9 *Tulsa Journal of Comparative & International Law* 1; K. Ambos, 'Superior Responsibility', in A. Cassese, P. Gaeta, and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court* (2002), I; Van Sliedregt, *supra* note 4; A. P. V. Rogers, *Law on the Battlefield* (2004); Levine, *supra* note 5; Boas et al., *supra* note 2; R. Arnold and W. Triffterer, 'Responsibility of Commanders and Other Superiors', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008); A. Cassese, *International Criminal Law* (2008); and G. Mettraux, *The Law of Command Responsibility* (2009). The customary status of the doctrine has been recognized by both the ICTY and ICTR. See *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Judgement, Case No. IT-96–21-A, A.Ch., 20 February 2001 (hereinafter *Čelebići* Appeals Chamber Judgement), para. 195; see also Boas et al., *supra* note 2, at 175, n.179, citing all relevant jurisprudence to similar effect. See also J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law: Volume 1, Rules* (2005), 558–9, setting out Rule 153.

7 The seminal case recognizing superior responsibility under Art. 7(3) of the ICTY Statute is the *Čelebići* Appeals Chamber Judgement, in particular at paras. 182 ff. For confirmation that superior responsibility falls within the jurisdiction of the ICTY see also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704, (1993) (hereinafter Report of the Secretary-General), para. 56; Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674 (1994) (hereinafter Final Report of the Commission of Experts).

international criminal responsibility, in addition to establishing that his subordinate is criminally responsible, the following three elements must be established beyond reasonable doubt:

1. the existence of a superior–subordinate relationship;
2. that the superior knew or had reason to know that his subordinate was about to commit a crime or had done so; and
3. that the superior had failed to take the necessary and reasonable measures to prevent his subordinate's criminal conduct or punish his subordinate.[8]

While the substance of these elements has gradually been clarified by the ICTY,[9] one question has recently caused particular confusion, dividing judges and scholars alike. The question concerns what may be termed 'successor superior responsibility', namely whether a superior can be held responsible for failing to punish the crimes of his subordinates committed prior to his taking command. This paper seeks to reconcile this judicial division by moving away from the overly narrow analysis often adopted by the judges of the ICTY to a broader assessment of the nature of the doctrine of superior responsibility itself.

This paper begins by summarizing the arguments put forward by different judges of the ICTY to support their competing views on the question of successor superior responsibility. It will be shown that the judges of the ICTY are united by their failure to deal with the fundamental problem that underlies the issue of successor superior responsibility, namely the confusion which exists concerning the nature of the doctrine of superior responsibility. Against this background, the paper then focuses on determining the underlying nature of the doctrine of superior responsibility. In this regard, two competing conceptions of the doctrine of superior responsibility are identified: the 'mode of liability' approach and the 'dereliction of duty' approach. By analysing the different justifications for each conception, this paper proposes that the different approaches can be reconciled by adopting a more principled approach to customary international law, an approach justified by the international criminal law context. Such an approach involves two elements: first, ensuring that a clear distinction is drawn between international humanitarian and international criminal legal concepts; and, second, the invocation of the principle of individual culpability as a standard against which the weight to be attributed to authorities evidencing custom ought to be assessed. A principled approach would enable the identification of the nature of the doctrine of superior responsibility while ensuring that the doctrine reinforces international criminal law principles rather than acts as an exception to them. In addition, by determining the nature of the doctrine of superior responsibility, the principled approach also resolves the debate concerning successor superior responsibility in the ICTY jurisprudence.

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8 *Prosecutor v. Naser Orić*, Judgement, Case No. IT-03-68-A, A.Ch., 3 July 2008 (hereinafter *Orić* Appeals Chamber Judgement), para. 18. See generally Boas et al., *supra* note 2, at 181, n. 206, citing all relevant jurisprudence to similar effect. See also Van Sliedregt, *supra* note 4, at 135, who refers to these elements as the functional, cognitive, and operational aspects.

9 For a recent extensive overview of the development of the jurisprudence of the ICTY, see generally Boas et al., *supra* note 2, at 174–252.

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2. Successor superior responsibility: confusion at the ICTY

The issue of successor superior responsibility has been the cause of great division at the appellate level of the ICTY. In the *Hadžihasanović* Interlocutory Appeal Decision, a 3–2 majority of the Appeals Chamber held that a successor superior is *not* responsible for crimes committed by his subordinates prior to his taking command.[10] In *Orić*, the Appeals Chamber was again divided, with a 3–2 majority declining to address the *ratio decidendi* of the *Hadžihasanović* Interlocutory Appeal Decision;[11] however, two dissenting judges not only supported addressing the issue but also supported the minority approach in *Hadžihasanović*.[12] Curiously, Judge Shahabuddeen, supporting the majority on the issue of whether to address the *ratio decidendi*, but supporting the minority (and his previous position in *Hadžihasanović*) on the approach he would take *had* the issue been relevant for discussion, concluded that consequently 'there is [now] a new majority of appellate thought'.[13] Such statements are unhelpful. A Trial Chamber is now bound to follow the original *Hadžihasanović* Interlocutory Appeal Decision in the knowledge that a new appellate majority *may* exist (depending on the composition of the chamber) leaning towards the opposite conclusion. As Judge Schomburg succinctly stated, 'the Appeals Chamber ... has not only missed the unique opportunity to spell out the correct interpretation of command responsibility as laid down in Article 7(3) of the Statute of this International Tribunal, it [has] failed to fully carry out its mandate.'[14]

While it is not the purpose of this article to provide an extensive analysis of the arguments set forth by the Appeal Chambers of the ICTY, especially since such analyses have already been covered elsewhere,[15] this section sets out some of the arguments put forward in favour of and against successor superior responsibility to illustrate the types of issue covered. The important point to note is that the judges have tended to narrow their focus on the specific issue of successor superior responsibility, rather than broadening their perspectives to consider the underlying nature of the doctrine of superior responsibility.

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10 *Hadžihasanović* Interlocutory Appeal Decision, *supra* note 3, at para. 51.

11 *Orić* Appeals Chamber Judgement, *supra* note 8, at para. 167.

12 Ibid., Partially Dissenting Opinion and Declaration of Judge Liu, at paras. 11–34, and Separate and Partially Dissenting Opinion of Judge Schomburg, at paras. 5–29.

13 Ibid., Declaration of Judge Shahabuddeen, at para. 3.

14 Ibid., Separate and Partially Dissenting Opinion of Judge Schomburg, at para. 33.

15 For commentary in support of the majority position in the *Hadžihasanović* Interlocutory Appeal Decision, see generally Van Sliedregt, *supra* note 4, at 167–75, criticizing the prior Trial Chamber decision in *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Decision on Joint Challenge to Jurisdiction, Case No. IT-01–47-PT, T.Ch., 12 November 2002; C. Greenwood, 'Command Responsibility and the *Hadzihasanovic* Decision', (2004) 2 *Journal of International Criminal Justice* 598; and T. Meron, 'Revival of Customary Humanitarian Law', (2005) 99 AJIL 817. For commentary in support of the minority position in the *Hadžihasanović* Interlocutory Appeal Decision, see generally M. Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?', (2004), 2 *Journal of International Criminal Justice* 1007; C. T. Fox, 'Closing a Loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Known Past Offences', (2004) 55 *Case Western Law Review* 443; Boas et al., *supra* note 2, at 233–7; and Cassese, *supra* note 6, at 246–7.

2.1. Arguments against successor superior responsibility

The principal arguments against holding successor superiors responsible for failing to punish crimes committed by their subordinates prior to taking command have been set out by the majority in the *Hadžihasanović* Interlocutory Appeal Decision. The arguments can be grouped under three themes.

First, the majority held that they could find neither state practice nor any evidence of *opinio juris* that supports the proposition that a superior can be held responsible for crimes committed by a subordinate prior to the superior's assumption of command over that subordinate.[16] The majority further submitted that even if no authority could be found directly confirming that successors should *not* be responsible for failing to punish the previous crimes of their subordinates, 'absence of authority . . . does not establish the conclusion that such criminal responsibility does exist'.[17]

Second, the majority utilized case law to support their position. In particular, the majority relied on the *Kuntze* case before the Nuremberg Military Tribunals, placing emphasis on the fact that

> While it is clear that this judgment recognizes a responsibility for failing to prevent the recurrence of killings *after* an accused has assumed command, it contains no reference whatsoever to a responsibility for crimes committed prior to the accused's assumption of command.[18]

Finally, the majority pointed to various treaties and other texts in support of their position. In particular, the majority emphasized that the natural language of Article 28 of the Rome Statute of the International Criminal Court (ICC Statute),[19] Article 6 of the International Law Commission (ILC) Draft Code of Crimes against the Peace and Security of Mankind,[20] and Article 86(2) of Additional Protocol I to the Geneva Conventions[21] all lean towards the conclusion that the superior–subordinate relationship must exist at the time the subordinate was committing or was going to commit a crime. In this way, these texts do not allow for the responsibility of superiors for crimes committed by their subordinates prior to taking command.

What is clear from this brief overview is that all the arguments of the majority analyse the relevant case law, treaties, state practice, and *opinio juris* in relation to the specific question of successor superior responsibility, failing to comment on the nature of the superior responsibility doctrine.

2.2. Arguments supporting successor superior responsibility

The principal arguments in favour of holding successor superiors responsible for failing to punish crimes committed by their subordinates prior to taking command have been set out in the various separate and dissenting opinions in the *Hadžihasanović* Interlocutory Appeal Decision and the *Orić* Appeals Chamber Judgement. Again, the

16 *Hadžihasanović* Interlocutory Appeal Decision, *supra* note 3, at paras. 45 and 53.
17 Ibid., at para. 54.
18 Ibid., at para. 50 and n.65 (emphasis in original).
19 Ibid., at para. 46.
20 Ibid., at para. 49.
21 Ibid., at para. 47.

arguments focus on the narrow issue of successor superior responsibility, without recognizing the need to deal with the broader issue of the underlying nature of superior responsibility.

Judge Shahabuddeen comes closest to framing the debate in terms of requiring an assessment of the nature of the doctrine of superior responsibility, arguing that, in the absence of any particular prior case dealing directly with the issue of successor superior responsibility, the relevant question is whether successor superior responsibility 'is *capable* of being governed by the established principle [of superior responsibility]'.[22] Equally, Judge Hunt argues that the relevant question is whether successor superior responsibility 'reasonably falls within the application of the [doctrine of superior responsibility]'.[23] In order to answer these questions, the exact nature of the underlying doctrine of superior responsibility must first be determined. However, while some of the judges expressed their opinions on the nature of the doctrine of superior responsibility,[24] they all failed to provide any extensive analysis of the issue. Instead, all the judges resorted to analysing the following narrower issues: the weight to be accorded to texts such as Article 28 of the ICC Statute and Article 6 of the ILC Draft Code of Crimes against the Peace and Security of Mankind, both of which were adopted subsequent to the dates on which the alleged acts of the subordinates took place;[25] whether Article 86(2) of Additional Protocol I to the Geneva Conventions should be read in isolation or together with Article 87(3);[26] the correct interpretation of Article 7(3) of the ICTY Statute;[27] the correct interpretation of relevant case law concerning successor superior responsibility;[28] and the policy

22 Ibid., Separate and Partly Dissenting Opinion of Judge Shahabuddeen, at para. 10 (emphasis added).

23 Ibid., Separate and Partly Dissenting Opinion of Judge Hunt, at para. 8.

24 See ibid., Separate and Partly Dissenting Opinion of Judge Shahabuddeen, at para. 32, arguing that under the doctrine of superior responsibility a superior is responsible 'for failing in his supervisory capacity to take the necessary corrective action . . . [The doctrine] could not have been designed to make the commander a party to the particular crime committed by his subordinate'; *Hadžihasanović* Interlocutory Appeal Decision, *supra* note 3, Separate and Partly Dissenting Opinion of Judge Hunt, at para. 9, arguing that under the doctrine of superior responsibility a superior is responsible 'for his own acts (or, rather, omissions) in failing to prevent or punish the subordinate when he knew or had reason to know that he was about to commit acts amounting to a war crime or had done so'. See also *Orić* Appeals Chamber Judgement, *supra* note 8, Declaration of Judge Shahabuddeen, at para. 19, arguing that 'where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control'; and *Orić* Appeals Chamber Judgement, *supra* note 8, Separate and Partially Dissenting Opinion of Judge Schomburg, at para. 12, concurring with Judge Shahabuddeen.

25 See *Hadžihasanović* Interlocutory Appeal Decision, *supra* note 3, Separate and Partly Dissenting Opinion of Judge Shahabuddeen, at paras. 20–21; ibid., Separate and Partly Dissenting Opinion of Judge Hunt, at paras. 25–34; *Orić* Appeals Chamber Judgement, *supra* note 8, Partially Dissenting Opinion and Declaration of Judge Liu, at paras. 22–26; ibid., Separate and Partially Dissenting Opinion of Judge Schomburg, at para. 20.

26 See *Hadžihasanović* Interlocutory Appeal Decision, *supra* note 3, Separate and Partly Dissenting Opinion of Judge Shahabuddeen, at paras. 22–25; ibid., Separate and Partly Dissenting Opinion of Judge Hunt, at paras. 20–24 and 43; *Orić* Appeals Chamber Judgement, *supra* note 8, Partially Dissenting Opinion and Declaration of Judge Liu, at paras. 16–21; ibid., Separate and Partially Dissenting Opinion of Judge Schomburg, at para. 19. For further discussion of the relevance of this issue, see *infra* note 132 and accompanying text.

27 See *Hadžihasanović* Interlocutory Appeal Decision, *supra* note 3, Separate and Partly Dissenting Opinion of Judge Shahabuddeen, at paras. 27–31; *Orić* Appeals Chamber Judgement, *supra* note 8, Partially Dissenting Opinion and Declaration of Judge Liu, at para. 29; ibid., Separate and Partially Dissenting Opinion of Judge Schomburg, at para. 13.

28 See *Hadžihasanović* Interlocutory Appeal Decision, *supra* note 3, Separate and Partly Dissenting Opinion of Judge Hunt, at paras. 15–19; *Orić* Appeals Chamber Judgement, *supra* note 8, Partially Dissenting Opinion and Declaration of Judge Liu, at para. 27.

arguments in favour of successor superior responsibility.[29] The common thread of these issues is that they all focus on analysing the relevant cases and texts in respect of successor superior responsibility, rather than dealing with the more fundamental question of the underlying nature of the doctrine of superior responsibility.

3. Shifting the focus: the elusive nature of superior responsibility

3.1. The relationship between the successor superior responsibility debate and the underlying nature of the doctrine of superior responsibility

The debate concerning successor superior responsibility highlights a deeper confusion concerning the nature of the doctrine of superior responsibility. In fact, this paper submits that it is the ICTY's failure to make an authoritative determination as to the nature of superior responsibility that is the root cause of the recent uncertainty over successor superior responsibility.[30]

Before examining the nature of the doctrine of superior responsibility, it is necessary to recognize that the doctrine has two different forms: the *duty to prevent* form and the *duty to punish* form. Since this paper is focused on the issue of successor superior responsibility, it is only necessary to consider the nature of the *duty to punish* form of the doctrine.[31] However, it must be emphasized that part of the confusion over the nature of the doctrine of superior responsibility in general has been caused by the practice of international rules and judicial findings tending to 'lump together' different classes and forms of superior responsibility,[32] often 'obscur[ing] the fundamental principles of the doctrine and complicat[ing] its translations into the context of criminal law'.[33]

Having identified the task of determining the nature of the *duty to punish* form of superior responsibility, it is useful to turn to the pertinent question put forward by the Trial Chamber in *Hadžihasanović*:

29 In particular, there appears to be a fear that if successor superior responsibility were not recognized, it would leave 'a gap in the line of responsibilities'. See *Hadžihasanović* Interlocutory Appeal Decision, *supra* note 3, Partially Dissenting Opinion of Judge Shahabuddeen, at paras. 14–15, 24; ibid., Separate and Partially Dissenting Opinion of Judge Hunt, at para. 22; and *Orić* Appeals Chamber Judgement, *supra* note 8, Partially Dissenting Opinion and Declaration of Judge Liu, at para. 30.

30 To date only one ICTY Appeals Chamber has given any indication of the nature of superior responsibility, in what seemed to be a passing reference. See *Prosecutor v. Milorad Krnojelac*, Judgement, Case No. IT-97-25-A, A.Ch, 17 September 2003 (hereinafter *Krnojelac* Appeals Chamber Judgement), para. 171: 'It cannot be overemphasized that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinate but with his failure to carry out his duty as a superior to exercise control.' See also *Orić* Appeals Chamber Judgement, *supra* note 8, Declaration of Judge Shahabuddeen, at paras. 18–26. A more extensive analysis has been provided by one ICTY Trial Chamber: see *Prosecutor v. Sefer Halilović*, Judgement, Case No. IT-01-48-T, T.Ch., 16 November 2005 (hereinafter *Halilović* Trial Chamber Judgement), paras. 42–54. This analysis has been reaffirmed by other trial chambers; see *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Judgement, Case No. IT-01-47-T, T.Ch., 15 March 2006 (hereinafter *Hadžihasanović* Trial Chamber Judgement), para. 75; and *Prosecutor v. Naser Orić*, Judgement, Case No. IT-03-68-T, T.Ch., 30 June 2006 (hereinafter *Orić* Trial Chamber Judgement), para. 293.

31 The responsibility of successor superiors for crimes committed by their subordinates prior to taking command can only involve a failure to punish, since the superior, by definition, takes command *after* the fact of the crimes.

32 Cassese, *supra* note 6, at 243.

33 Boas et al., *supra* note 2, at 275.

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> [T]he question arises as to whether a commander who has failed in his obligation to ensure that his troops respect international humanitarian law is held criminally responsible *for his own omissions* or rather *for the crimes resulting from them*.[34]

From this passage, two conceptions of the *duty to punish* form of superior responsibility are readily identifiable. On the one hand, it is possible to argue that the doctrine of superior responsibility is a mode of liability, under which a superior is responsible for the same crimes as those committed by his subordinates ('mode of liability approach'). On the other hand, it is possible to argue that the doctrine is a separate dereliction of duty offence, under which a superior is responsible merely for his own omissions and not the crimes that result from them ('dereliction of duty approach').

The polar views in relation to the successor superior responsibility debate should be seen as extensions of the above two conceptions of the doctrine of superior responsibility. If superior responsibility were characterized as a mode of liability, a superior's criminal liability would be derivative of his subordinates' crimes, the superior being liable for his participation in the actual crimes *through* his subordinates.[35] Consequently, successor superiors *could not* be responsible for crimes committed by their subordinates prior to assuming command because the existence of a superior–subordinate relationship would need to coincide with the timing of the commission of his subordinates' crimes. Under this formulation of the superior responsibility doctrine, it is this coincidence that provides one of the very justifications for imposing liability on the superior.[36] As Meron has argued, under this conception of the superior responsibility doctrine, 'a commander cannot fairly be held responsible for crimes not occurring on his watch'.[37] Since a superior *derives* his responsibility from his relationship to his subordinates and the link between his omission and the crimes committed by his subordinates, he can only be held responsible to the extent that he had the power to intervene but failed to do so.[38]

By contrast, if superior responsibility were characterized as a separate dereliction of duty offence, a superior's criminal liability would not be derivative of his subordinates' crimes, the superior being liable for his own conduct *in relation to* his subordinates.[39] Consequently, successor superiors *could* be responsible for crimes

34 *Hadžihasanović* Trial Chamber Judgement, *supra* note 30, para. 68 (emphasis added). See also *Halilović* Trial Chamber Judgement, *supra* note 30, para. 42.

35 See T. Henquet, 'Convictions for Command Responsibility under Articles 7(1) and 7(3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia', (2002) 15 LJIL 805, at 827; V. Hansen, 'What's Good for the Goose is Good for the Gander: Lessons from Abu Ghraib – Time for the United States to Adopt a Standard of Command Responsibility towards its Own', (2006–7) 42 *Gonzaga Law Review* 335, at 348. See also *Prosecutor v. Naser Orić*, Prosecution's Appeal Brief, Case No. IT-03–68-A, 16 October 2006 (hereinafter *Orić* Prosecution's Appeal Brief), paras. 152–204.

36 See Arnold and Triffterer, *supra* note 6, at 837, where Arnold makes the point succinctly: 'a link must be established, in that the commander shall not be subject to strict liability and should incur responsibility only where he/she had power to intervene and failed to do so'. See also Van Sliedregt, *supra* note 4, at 168 and 172; Meron, *supra* note 15, at 825; and *Prosecutor v. Naser Orić*, Defence Respondent's Brief, Case No. IT-03-68-A, 27 November 2006 (hereinafter *Orić* Defence Respondent's Brief), paras. 402–410.

37 Meron, *supra* note 15, at 825.

38 See Hansen, *supra* note 35, at 348; and Arnold and Triffterer, *supra* note 6, at 837.

39 See C. Eboe-Osuji, 'Superior or Command Responsibility: A Doubtful Theory of Criminal Responsibility at the Ad Hoc Tribunals', in E. Decaux, A. Dieng, and M. Sow (eds.), *From Human Rights to International Criminal*

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committed by their subordinates prior to assuming command. Under this formulation, coincidence between the existence of a superior–subordinate relationship and the timing of the commission of his subordinates' crimes would not be a precondition of superior responsibility.[40] Since the superior is being punished for his own failure to punish rather than for the crimes of his subordinates, and since punishment is something that necessarily arises after the commission of the subordinate crimes, 'there is no justification for excusing a post facto commander for failing to exercise his punitive functions at the same time that any commander, in a position to punish, would have done the same'.[41] The unwillingness of the ICTY Appeals Chamber to grapple directly with this issue has left the law uncertain, confused, and unsound.[42]

Whenever a division exists as to the interpretation of a doctrine in any legal system, it is necessary to determine which interpretation should be adopted so that the law is made certain; in the context of international criminal law, this requirement of legal certainty is particularly relevant since there are significant fair labelling and sentencing repercussions for the accused.[43] In an effort to unravel the nature of the doctrine of superior responsibility, and consequently resolve the debate in relation to successor superior responsibility, the following subsections outline the arguments used to justify each of the mode of liability and dereliction of duty approaches respectively so as to gain a better understanding of each approach.

3.2. The mode of liability approach

3.2.1. Defining the mode of liability approach

Before explaining the justifications put forward in support of the mode of liability approach, it is first necessary to define with sufficient precision what is meant by 'mode of liability'. Since several modes of liability exist in international criminal law,[44] the

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Law: Des droits de l'homme au droit international penal, (2007), 322, n.27, noting that '[i]f responsibility under article 7(3) is a unique brand of responsibility . . . the superior is not being punished for the culpability of his subordinates, but for his own failings.' See also B. B. Jia, 'The Doctrine of Command Responsibility: Current Problems', (2000) 3 *Yearbook of International Humanitarian Law* 131, at 162; *Orić* Defence Respondent's Brief, *supra* note 36, at paras. 438–452.

40 See Eboe-Osuji, *supra* note 39, at 322, n.27; *Orić* Prosecution's Appeal Brief, *supra* note 35, at paras. 102–120.

41 Eboe-Osuji, *supra* note 39, at 322–3.

42 It is interesting to note that the prosecution and defence briefs for the *Orić* Appeals Chamber Judgement both fail to identify this connection between the nature of superior responsibility and the issue of successor superior responsibility. Consequently, their arguments appear somewhat incoherent; for instance, the prosecution argues that superior responsibility is a mode of liability but also that a successor superior is responsible for crimes committed by his subordinates prior to taking command, even though these conclusions are inherently incompatible (see *Orić* Prosecution's Appeal Brief, *supra* notes 35 and 40 and accompanying text).

43 For a clear illustration of this see *Orić* Trial Chamber Judgement, *supra* note 30, at para. 293, where the doctrine of superior responsibility is characterized as a separate dereliction of duty offence. As a consequence, Naser Orić was convicted of the offence of '[f]ailure to discharge his duty as a superior to take necessary and reasonable measures to prevent the occurrence of murder [and cruel treatment]', rather than the offences of murder and cruel treatment themselves, which had been committed by his subordinates (see *Orić* Trial Chamber Judgement, *supra* note 30, at para. 782 (Disposition)). In addition, the accused's sentence was limited to two years' imprisonment (see *Orić* Trial Chamber Judgement, *supra* note 30, at para. 783 (Disposition)), a term described by the prosecution on appeal as 'manifestly inadequate' (see *Orić* Prosecution's Appeal Brief, *supra* note 35, at para. 226).

44 S. Darcy, 'Imputed Criminal Liability and the Goals of International Justice', (2007) 20 LJIL 377, at 377. See also A. M. Danner and J. S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', (2005) 93 *California Law Review* 75, at 102, noting how

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starting point for defining the mode of liability approach is to identify which mode accurately describes the doctrine of superior responsibility. In this regard, it is clear that those advocating this approach regard the superior responsibility doctrine as a mode of *imputed* liability:[45] a superior is held liable for the crimes of his subordinates notwithstanding the fact that he has not satisfied 'the paradigm' of the underlying offences,[46] in the sense that one or more of the offences' definitional elements have not been fulfilled.[47] In this way, liability for the crimes of his subordinates is said to be 'imputed' to the superior. The basis for this imputation of liability lies in the concept of the superior–subordinate relationship. The ICTY has consistently held that the doctrine of superior responsibility is 'clearly articulated and anchored on the relationship between superior and subordinate',[48] a relationship which itself is premised on the concept of effective control.[49] The Trial Chamber in *Strugar* makes the point succinctly:

> The superior–subordinate relationship lies in the very heart of the doctrine of a commander's liability for the crimes of his subordinates . . . [because it] is the position of command over the perpetrator which forms the legal basis for a superior's duty to act, and for his corollary liability for a failure to so.[50]

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modes of liability function as 'the central doctrinal device through which . . . normative questions relating to the proper attribution of responsibility, guilt, and wrongdoing are mediated'.

45 See Report of the Secretary-General, *supra* note 7, at para. 56; M. C. Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996), 345; M. Damaška, 'The Shadow Side of Command Responsibility', (2001) 49 *American Journal of Comparative Law* 455, at 461; I. Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law* (2002), 98; Hansen, *supra* note 35, at 348; S. Darcy, 'The Doctrine of Superior Responsibility', in O. Olusanya (ed.), *Rethinking International Criminal Law: The Substantive Part* (2007), 142.

46 P. H. Robinson, 'Imputed Criminal Liability', (1983–4) 93 *Yale Law Journal* 609, at 611.

47 See D. L. Nersessian, 'Whoops I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes', (2006) 30 *Fletcher Forum of World Affairs* 81, at 89, noting that a superior is held responsible for the actual crimes of his subordinates 'not because his conduct falls within its definition, but because he failed to prevent its commission by others'.

48 *Čelebići* Appeals Chamber Judgement, *supra* note 6, at para. 254, referring to *Čelebići* Trial Chamber Judgement, *supra* note 3, at para. 647.

49 See *Čelebići* Appeals Chamber Judgement, *supra* note 6, at para. 256, where the Appeals Chamber held that '[t]he concept of effective control over a subordinate . . . is the threshold to be reached in establishing a superior–subordinate relationship for the purpose of Article 7(3) of the Statute'. See also *Prosecutor v. Tihomir Blaškić*, Judgement, Case No. IT-95–14-A, A.Ch., 29 July 2004 (hereinafter *Blaškić* Appeals Chamber Judgement), para. 375; *Prosecutor v. Sefer Halilović*, Judgement, Case No. IT-01–48-A, A.Ch., 16 October 2007 (hereinafter *Halilović* Appeals Chamber Judgement), para. 59; and *Orić* Appeals Chamber Judgement, *supra* note 8, at para. 20. See generally Boas et al., *supra* note 2, at 152, and Bassiouni, *supra* note 45, at 349, who refer to the concept of effective control as the 'touchstone' of the superior–subordinate relationship. See also Y. Sandoz, C. Swinarski, and B. Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), para. 3544 (hereinafter ICRC Commentary on the Additional Protocols), noting that 'we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control'.

50 *Prosecutor v. Pavle Strugar*, Judgement, Case No. IT-01–42-T, T. Ch., 31 January 2005 (hereinafter *Strugar* Trial Chamber Judgement), para. 359. See also *Čelebići* Trial Chamber Judgement, *supra* note 3, at para. 377 ('The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates'); *Prosecutor v. Aleksovski*, Judgement, Case No. IT-95-14/1-A, A.Ch., 30 May 2001 (hereinafter *Aleksovski* Appeals Chamber Judgement), para. 76; *Prosecutor v. Limaj et al.*, Judgement, Case No. IT-03-66-T, T.Ch., 30 November 2005 (hereinafter *Limaj* Trial Chamber Judgement), para. 521; *Halilović* Trial Chamber Judgement, *supra* note 30, at para. 57.

In this way, it is the superior–subordinate relationship which provides the very justification and legal basis for imputing liability to the superior.[51]

Merely asserting that superior responsibility is a form of imputed liability does not go far enough. The question naturally arises as to whether the imputed liability is *vicarious*,[52] understood as the imputation of liability 'where the defendant lacked the culpability required for the offense and did not satisfy the objective elements of the offense',[53] or *derivative*, in the sense that the imputation of liability 'is linked to the acts of subordinates',[54] whose crimes 'constitute the point of reference of the superior's failure of supervision'.[55] In this regard, the ICTY Appeals Chamber has clearly concluded that it 'would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of strict imputed liability'.[56] Instead, the ICTY has clearly favoured the characterization of the superior responsibility doctrine as a form of *derivative* imputed liability. This is evident in its emphasis *not only* on the need to identify a superior–subordinate relationship, *but also* on the need for the superior to possess the requisite *mens rea* in order for liability to be imputed.[57] Unlike the concept of vicarious liability, derivative liability reinforces the significance of the superior–subordinate relationship without erroneously insisting that it acts as the *sole* condition that must be met for responsibility to be imputed to the superior.

3.2.2. Justifying the mode of liability approach

Turning to the justifications put forward in support of the mode of liability approach, a quick perusal of the ICTY jurisprudence reveals that the vast majority of case law favours this approach. This is most clearly illustrated by the fact that the Appeals Chamber of the ICTY has consistently entered and affirmed the convictions of superiors for the crimes proscribed in Articles 2–5 of the Statute committed by their

51 See van Sliedregt, *supra* note 4, at 151, noting that 'it is this relationship, governed by authority and obedience, which justifies holding a superior liable for subordinate behaviour'; R. Dixon, 'Prosecuting the Leaders: The Application of the Doctrine of Superior Responsibility before the United Nations ICTs for the former Yugoslavia and Rwanda', in P. J. van Krieken (ed.), *Refugee Law in Context: The Exclusion Clause* (1999), 127, referring to the superior–subordinate relationship as the 'fundamental premise . . . for imposing criminal sanctions on superiors'.

52 For support of this approach among scholars see G. R. Vetter, 'Command Responsibility of Non-military Superiors in the International Criminal Court (ICC)', (2000) 25 *Yale Journal of International Law* 89, at 99; Y. Shany and K. R. Michaeli, 'The Case against Ariel Sharon: Revisiting the Doctrine of Command Responsibility', (2002) 34 *NYU Journal of International Law and Politics* 797, at 803, 831–2; and Darcy, *supra* note 45, at 145.

53 Robinson, *supra* note 46, at 618, n. 26. See also A. P. Simester and G. R. Sullivan, *Criminal Law Theory and Doctrine* (2003), 243: 'Vicarious liability involves the attribution to . . . [the accused] of conduct and states of mind possessed by another'.

54 Van Sliedregt, *supra* note 4, at 219.

55 Ambos, *supra* note 6, at 851.

56 *Čelebići* Appeals Chamber Judgement, *supra* note 6, at para. 239. See also T. Wu and J.Y.-S. Kang, 'Criminal Liability for the Actions of Subordinates: The Doctrine of Command Responsibility and Its Analogues in United States Law', (1997) 38 *Harvard International Law Journal* 272, at 279–82, who argue persuasively that it would only be appropriate to characterize superior responsibility as a strict liability offence if the subordinate crimes were also strict liability offences.

57 See *supra* note 8 and accompanying text outlining the three elements of the doctrine of superior responsibility under Art. 7(3) of the ICTY Statute.

subordinates rather than for separate crimes of omission.[58] Such an approach has also been followed by the International Criminal Tribunal for Rwanda (ICTR).[59] In addition, a review conducted by the ICTY Office of the Prosecutor reveals that both the ICTY and ICTR have consistently confirmed indictments that uniformly charge superior responsibility as a mode of liability.[60] These convictions and confirmed indictments are in line with more general statements issued by the ICTY to the effect that superior responsibility is a 'type of individual criminal responsibility for the illegal acts of subordinates' under which superiors 'may be held criminally responsible for the unlawful conduct of their subordinates'.[61]

The overriding justification for construing the superior responsibility doctrine as a mode of liability is that it is in conformity with customary international law as presently formulated by the ICTY.[62] While it is not the purpose of this article to

58 See *Aleksovski* Appeals Chamber Judgement, *supra* note 50, at para. 77 (conviction of superior for outrages upon personal dignity); *Čelebići* Appeals Chamber Judgement, *supra* note 6, at para. 214 (conviction of superior for violations of the laws and customs of war; see also *Čelebići* Trial Chamber Judgement, *supra* note 3, at paras. 1240 and 1285); *Blaškić* Appeals Chamber Judgement, *supra* note 49, at para. 633 (conviction of superior for the crime of inhuman treatment); *Krnojelac* Appeals Chamber Judgement, *supra* note 30, at 113–15, Disposition (conviction of superior for torture, murder, and persecution); *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Judgement, Case No. IT-98-34-A, A.Ch., 3 May 2006 (hereinafter *Naletilić* Appeals Chamber Judgement), para. 156 and pp. 207–8, Disposition (conviction of superior for unlawful labour, cruel treatment, unlawful transfer, plunder and persecution); and *Prosecutor v. Pavle Strugar*, Judgement, Case No. IT-01-42-A, A.Ch., 17 July 2008 (hereinafter *Strugar* Appeals Chamber Judgement), at 146, Disposition (conviction of superior for attacks on civilians, destruction or wilful damage, devastation not justified by military necessity, and unlawful attacks on civilian objects; see also *Strugar* Trial Chamber Judgement, *supra* note 50, at para. 478). See also *Orić* Prosecution's Appeal Brief, *supra* note 35, at paras. 159–62; and *Halilović* Trial Chamber Judgement, *supra* note 30, at para. 53, confirming that 'the consistent jurisprudence of the Tribunal has found that a commander is responsible for the crimes of his subordinates under Article 7(3)'.

59 See *Prosecutor v. Jean Kambanda*, Judgement, Case No. ICTR-97–23-S, T.Ch., 4 September 1998, para. 40 (conviction of superior for genocide, direct and public incitement to genocide, complicity in genocide, and murder and extermination as crimes against humanity; see also *Jean Kambanda v. Prosecutor*, Judgement, Case No. ICTR-97–23-A, A.Ch., 19 October 2000, upholding this conviction); *Prosecutor v. Omar Serushago*, Judgement, Case No. ICTR-98–39-S, T.Ch., February 1999, paras. 26–29 (conviction of superior for genocide and murder, extermination and torture as crimes against humanity; see also *Prosecutor v. Omar Serushago*, Judgement, Case No. ICTR-98–39-A, A.Ch., 6 April 2000, upholding this conviction); *Prosecutor v. Clemént Kayishema*, Judgement, Case No. ICTR-95–1-T, T.Ch., 21 May 1999, paras. 555, 559, 563, and 569 (conviction of superior for genocide; see also *Prosecutor v. Clemént Kayishema and Obed Ruzindana*, Judgement, Case No. ICTR-95–1-A, A.Ch., 1 June 2001, para. 372, upholding this conviction); *Prosecutor v. Alfred Musema*, Judgement, Case No. ICTR-96-13-A, T.Ch., 27 January 2000, paras. 936 and 951 (conviction of superior for genocide and extermination as a crime against humanity; see also *Prosecutor v. Alfred Musema*, Judgement, Case No. ICTR-96–13-A, A.Ch., 16 November 2001, upholding this conviction); and *Prosecutor v. Nahimana et al.*, Judgement, Case No. ICTR-99-52-A, A.Ch., 28 November 2007, at 346, Disposition (conviction of superiors for direct and public incitement to genocide, and persecution as a crime against humanity). See also *Orić* Prosecution's Appeal Brief, *supra* note 35, at para. 163.

60 *Orić* Prosecution's Appeal Brief, *supra* note 35, at para. 165.

61 *Čelebići* Trial Chamber Judgement, *supra* note 3, at paras. 331 and 333. See also *Čelebići* Appeals Chamber Judgement, *supra* note 6, at para. 198; *Prosecutor v. Kordić and Čerkez*, Judgement, Case No. IT-95–14/2-T, T.Ch., 26 February 2001 (hereinafter *Kordić* Trial Chamber Judgement), para. 364; *Krnojelac* Appeals Chamber Judgement, *supra* note 30, at para. 93; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Judgement, Case No. IT-98–34-T, T.Ch., 31 March 2003 (hereinafter *Naletilić* Trial Chamber Judgement), para. 163; *Prosecutor v. Milomir Stakić*, Judgement, Case No. IT-97–24, T.Ch., 21 July 2003 (hereinafter *Stakić* Trial Chamber Judgement), para. 462; *Hadžihasanović* Interlocutory Appeal Decision, *supra* note 3, at para. 18; *Prosecutor v. Radoslav Brđanin*, Judgement, Case No. IT-99–36-T, T.Ch., 1 September 2004 (hereinafter *Brđanin* Trial Chamber Judgement), para. 720.

62 In the context of the ICTY, the general position regarding customary international law has been set out by the Appeals Chamber in *Tadić*: 'In appraising the formation of customary rules . . . one should . . . be aware that, on account of the inherent nature of this subject, reliance must be placed on such elements as official pronouncements of States, military manuals and judicial decisions' (*Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94–1-AR-72, 2 October 1995, para. 99).

set out a full historical account of the development of the superior responsibility doctrine, especially since extensive analysis has been carried out elsewhere,[63] a brief summary is still useful.

Turning first to case law, and in particular the military tribunals established in the aftermath of the Second World War, it is clear that, although the resulting case law was 'not uniform in its determination as to the nature of . . . [superior] responsibility',[64] the doctrine was generally interpreted as a mode of liability under which superiors were held accountable for the crimes of their subordinates.[65] Support for the mode of liability approach can also be ascertained from the *Medina* case in relation to the Vietnam conflict, in particular from the restrictive actual knowledge *mens rea* standard adopted by the court in disregard of the internationally recognized *mens rea* standard at the time.[66] It can be argued that a restricted formulation of the superior responsibility doctrine emerged precisely because the doctrine was characterized as a mode of liability through which superiors could be held responsible for the same crimes committed by their subordinates. Langston notes that this case offers a striking example of the extent to which 'a domestic "unsafe" tribunal will devise a restricted formulation of the superior responsibility doctrine in order to avoid a prosecution of its own nationals'.[67] Had

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A further insight into the tribunal's approach was revealed by the Trial Chamber in *Krstić*, which in effect set out a model procedure for examining the customary nature of an international criminal norm: first, a review of codification work carried out by international bodies; second, a review of international case law, International Law Commission drafts, the work of other international law committees, and the Elements of Crimes of the ICC Statute; and, finally, a review of the legislation and practice of states, in particular judicial interpretations and their decisions (*Prosecutor v. Radislav Krstić*, Judgement, Case No. IT-98–33-T, T.Ch., 2 August 2001, para. 541).

63 See *supra* note 6.

64 *Halilović* Trial Chamber Judgement, *supra* note 30, at para. 48.

65 Hansen, *supra* note 35, at 373; C. Meloni, 'Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?', (2007) 5 *Journal of International Criminal Justice* 619, at 621, 623. See *In Re Yamashita*, 327 US 1, 13–14 (1946); *U.S. v. Hermann Goring* (Nuremberg Judgement) (1946), *Trial of the Major War Criminals before the International Military Tribunal* (1948), Vol. XXII, 411, 546–7; *United States v. von Leeb* (High Command) (1948), United States Military Tribunal, LRTWC, UNWCC, Vol. XII (1949), 76 and 94–5; *United States v. Wilhelm List et al.* (Hostages) (1948), United States Military Tribunal, LRTWC, UNWCC, Vol. VIII (1949), 71 and 75–6; Pohl, *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (TWC), Vol. V (1950), 1011 (defendant Tschentscher), 1052–3 (defendant Mummenthey); Medical, TWC, Vol. II (1950), 193–4 (defendant Brandt), 207 (defendant Handloser), 212 (defendant Schroeder); Flick, TWC, Vol. VI (1952), 1202; Roechling, TWC, Vol. XIV, Appendix B (1952), 1136; Tokyo Trials (1948), International Military Tribunal for the Far East, repr. in L. Friedman (ed.), *The Law of War: A Documentary History* (1972), II, 1039; Toyoda, Official Transcript of Record of Trial, 5005–6, cited in Parks, *supra* note 2, at 72.

66 American military judge Kenneth Howard, in the *Medina* case, held that a superior is only responsible if he has 'actual knowledge plus a wrongful failure to act . . . mere presence at the scene without knowledge will not suffice. . . the commander–subordinate relationship alone will not allow an inference of knowledge' (K. Howard, 'Command Responsibility for War Crimes', (1972) 21 *Journal of Public Law* 7, at 11). This restrictive interpretation of the knowledge standard is inconsistent with customary international law and the provisions found in the US Army's Field Manual, which provides that a superior may be responsible if 'he has actual knowledge, or should have knowledge, through reports received by him or through other means' (US Department of the Army, Field Manual, 27–10: The Law of Land Warfare, at para. 501 (1956)). To this effect see Bassiouni, *supra* note 45, at 363; Lippman, *supra* note 6, at 39; Shany and Michaeli, *supra* note 52, at 859; Van Sliedregt, *supra* note 4, at 133; and Boas et al., *supra* note 2, at 167. See also Ambos, *supra* note 6, at 842, noting that the US Army's Field Manual has no legally binding effect, merely providing 'authoritative guidance'.

67 E. Langston, 'The Superior Responsibility Doctrine in International Law: Historical Continuities, Innovation and Criminality: Can East Timor's Special Panels Bring Militia Leaders to Justice?', (2004) 4 *International Criminal Law Review* 141, at 157.

the doctrine been considered merely a dereliction of duty offence, such a restricted formulation would have been unnecessary, since, although the nationals would still have been prosecuted, their convictions would have been far less grave: the nationals would have been held responsible for derelictions of duty rather than for the same crimes committed by their subordinates. The issue of superior responsibility also arose in the Kahan Report,[68] written in response to the massacres in the Palestinian Sabra and Shatila refugee camps in Lebanon in 1982. Leaving aside the substantive findings of the commission of inquiry,[69] it is important to note that the commission determined that the doctrine of superior responsibility is a form of 'indirect responsibility',[70] under which 'responsibility [for the acts of subordinates] is to be imputed' to the superior.[71] Such findings clearly support the mode of liability approach.

The doctrine of superior responsibility has also been codified in both treaty and statutory form. However, while such codifications have helped to clarify the substantive elements of the doctrine,[72] they have remained elusive as to its precise nature. Article 86(2) of Additional Protocol I to the Geneva Conventions, the first international instrument expressly to codify the doctrine of superior responsibility,[73] merely stipulates that 'the fact that a breach of the Conventions or of this Protocol was committed by a subordinate, does not absolve his superiors from penal or disciplinary responsibility'.[74] The more specific determination of the precise nature of this responsibility – penal or disciplinary, dereliction of duty offence or mode of liability for the crimes of subordinates – was left to domestic law.[75] A similar approach is adopted in Article 7(3) of the Statute of the

68 Final Report of the Commission of Inquiry into the Events at the Refugee Camp in Beirut, (1983), repr. in 22 ILM 473 (1983) (hereinafter Kahan Report). See Boas et al., *supra* note 2, at 168–9, noting that although the Kahan commission was not a criminal court, in the light of the fact that it was composed of several eminent judges, the final report that followed has been considered 'a relevant contribution to the development of customary law on superior responsibility'. See also Van Sliedregt, *supra* note 4, at 134.

69 For a factual background and discussion of the substantive points of the Kahan Report, see generally Green, *supra* note 6, at 356–68; Lippman, *supra* note 6, at 44–51; Shany and Michaeli, *supra* note 52, at 806–16; Van Sliedregt, *supra* note 4, at 133–4; and Boas et al., *supra* note 2, at 168–9.

70 Kahan Report, *supra* note 68, at 496.

71 Ibid., at 503.

72 See Hansen, *supra* note 35, at 387.

73 See Meloni, *supra* note 65, at 623.

74 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (1977), 1125 UNTS 3 (hereinafter Additional Protocol I), Art. 86(2).

75 See Damaška, *supra* note 45, at 486; Darcy, *supra* note 44, at 391; Eboe-Osuji, *supra* note 39, at 325; Meloni, *supra* note 65, at 624; *Halilović* Trial Chamber Judgement, *supra* note 30, at para. 49. See also ICRC Commentary on the Additional Protocols, *supra* note 49, at para. 3524, which is equally elusive, merely referring to 'the special responsibility of a superior'. However, see also Hansen, *supra* note 35, at 379, noting that the language of Art. 86(2) is 'certainly broad enough to impute liability on to the commander for the crimes committed by his subordinates'; *Orić* Prosecution's Appeal Brief, *supra* note 35, at para. 169, arguing that '[i]f Article 7(3) was a separate dereliction of duty offence that did not involve the attribution of conduct committed by subordinates to a superior, the notion of a superior being "relieved" of responsibility would be inapposite. To be "relieved" from a separate crime of dereliction of duty there would have to be some prior reference in the provision to such a crime. The only prior reference is to the crimes in Article 2–5.' Such interpretations are in line with the *travaux préparatoires*, in which a number of delegations expressed the view that the principles expressed in Art. 86 were not intended to change existing customary international law; see *Čelebići*, Trial Chamber Judgement, *supra* note 3, at para. 304.

ICTY, which refers to superiors being subject to 'criminal responsibility',[76] without elaboration.[77]

Despite such ambiguity, other documents are of more assistance in identifying the nature of responsibility intended by these treaty and statutory provisions. First, the Secretary-General's report concerning Article 7(3) refers to superior responsibility as a form of imputed responsibility.[78] Second, the Final Report of the Commission of Experts concerning Article 7(3) refers approvingly to a passage in its first interim report in which it stated that, under the superior responsibility doctrine, superiors are 'individually responsible for a war crime or crime against humanity committed by a subordinate';[79] the Commission concludes that 'Article 7 of the statute of the international tribunal uses an essentially similar formulation'.[80] Third, Article 2 of the 1996 ILC Draft Code of Crimes provides that a superior 'shall be responsible for a crime set out in article 17, 18, 19, or 20 if that individual: ... (c) fails to prevent or repress the commission of such a crime'.[81] Fourth, the Commentary to the 1996 ILC Draft Code of Crimes confirms that under the superior responsibility doctrine, a superior is 'held criminally responsible for the wrongful conduct of a

76 Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/25704 (1993), Art. 7(3).

77 *Halilović* Trial Chamber Judgement, *supra* note 30, at para. 50. See also Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994, SC Res. 955, Annex (1994), Art. 6(3); Draft Code of Crimes against the Peace and Security of Mankind (1991), in Report of the International Law Commission on the Work of Its Forty-Third Session, UN Doc. A/46/10 (1991), Art. 12; Statute of the Special Court for Sierra Leone, UN Doc. S/2002/246, 2178 UNTS 138, Appendix II, (2002), Art. 6(3); and United Nations Transitional Administration in East Timor Regulation No. 2000/15, UNTAET/REG/2000/15, (2000), s. 16, which also refer to 'criminal responsibility' without elaboration. See also Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, NS/RKM/1004/006 (2004), Art. 29, which refers to 'personal criminal responsibility', without elaboration. However, see W. J. Fenrick, 'Some International Law Problems Related to Prosecutions before the International Criminal Tribunal for the Former Yugoslavia', (1995–6) 6 *Duke Journal of Comparative and International Law* 103, at 112, who argues that 'a superior who is held liable under Article 7(3) is a party to the main offence and is liable for the commission of the applicable offence under Articles 2 through 5 of the Statute'; and Van Sliedregt, *supra* note 4, at 173, noting that '[t]he close connection between a culpable subordinate and a culpable superior as a result of the same crime, suggests that the superior is responsible for the crime and should be punished for it.'

78 Report of the Secretary-General, *supra* note 7, at para. 56. The Secretary-General's Report may be relied on as a supplementary means of interpreting the ICTY Statute (*Čelebići* Trial Chamber Judgement, *supra* note 3, at para. 131).The Trial Chamber in *Čelebići* relied upon this report to find that superiors are held 'criminally responsible for the unlawful conduct of their subordinates' under Art. 7(3) (*Čelebići* Trial Chamber Judgement, *supra* note 3, at para. 333; see also *Halilović* Trial Chamber Judgement, *supra* note 30, at para. 51, n. 117).

79 Final Report of the Commission of Experts, *supra* note 7, at 16.

80 Ibid., at 16.

81 Draft Code of Crimes against the Peace and Security of Mankind, (1996), in Report of the International Law Commission on the Work of its Forty-Eighth Session, UN Doc. A/51/10, (1996), Art. 2(c). For criticism of reliance on the ILC Draft Code before the ICTY, see *Hadžihasanović* Interlocutory Appeal Decision, *supra* note 3, Partially Dissenting Opinion of Judge Shahabuddeen, at para. 21; ibid., Separate and Partially Dissenting Opinion of Judge Hunt, at para. 26; *Orić* Appeals Chamber Judgement, *supra* note 8, Partially Dissenting Opinion and Declaration of Judge Liu, at paras. 22 and 26; and ibid., Separate and Partially Dissenting Opinion of Judge Schomburg, at para. 20.

subordinate'.[82] Finally, some argue that Article 28 of the ICC Statute supports the mode of liability approach by holding superiors 'criminally responsible for crimes within the jurisdiction of the Court committed by subordinates'.[83] Taken together, these authorities strongly support the characterization of superior responsibility as a mode of liability for the crimes of subordinates.

From the preceding brief analysis, it can be concluded that, from the perspective of customary international law as presently formulated by the ICTY, the vast majority of authorities support the characterization of the doctrine of superior responsibility as a mode of derivative imputed liability.[84]

3.3. The dereliction of duty approach

Unlike the mode of liability approach, the dereliction of duty approach is relatively simple to explain:[85] a superior is responsible *not* for the same crimes of his subordinates, but for a separate crime of omission. In this way, the level of a superior's culpability is matched to the extent of his conduct.

3.3.1. Justifying the dereliction of duty approach under customary international law

While simple to explain, the dereliction of duty approach is far more difficult to justify under customary international law as presently formulated by the ICTY. Yet despite the strength of the evidence pointing towards the mode of liability approach, several chambers and individual judges have nonetheless attempted to justify the doctrine of superior responsibility as a crime of omission under customary international law.[86] For instance, the superiors before the Trial Chamber in *Orić* and the Appeals Chamber in *Hadžihasanović* were convicted and acquitted of various

82 Commentary to Draft Code of Crimes against the Peace and Security of Mankind, (1996), in Report of the International Law Commission on the Work of its Forty-Eighth Session, UN Doc. A/51/10 (1996) (hereinafter ILC Commentary to the 1996 ILC Draft Code of Crimes), at 26.

83 See Henquet, *supra* note 35, at 828; Hansen, *supra* note 35, at 386; Meloni, *supra* note 65, at 633; and Arnold and Triffterer, *supra* note 6, at 827. See also Law of the Supreme Iraqi Criminal Tribunal, Number 10 of 2005, translated by the International Center for Transitional Justice, (2006) (available at www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf), s. 15(4), which similarly refers to the fact that '[a] superior is not relieved of the criminal responsibility for crimes committed by his subordinates'. However, for the opposite view, see *infra* note 166 ff. and accompanying text.

84 See D. Robinson, 'The Identity Crisis of International Criminal Law', (2008) 21 LJIL 925, 952, submitting that 'a cursory review of the Tribunal statutes and practice shows unmistakably that the commanders *are* in fact charged with, and convicted for, the war crimes or crimes against humanity committed by subordinates' (emphasis in original); and A. J. Sepinwall, 'Failures to Punish: Command Responsibility in Domestic and International Law', (2009) 30 *Michigan Journal of International Law* 251, at 269, submitting that 'the weight of history and precedent lies on the side of the mode of liability view'.

85 For support of the dereliction of duty approach among scholars see B. B. Jia, 'The Doctrine of Command Responsibility Revisited', (2004) 3 *Chinese Journal of International Law* 1, at 31–3; Fox, *supra* note 15, at 491; and Boas et al., *supra* note 2, at 178.

86 Only one Appeals Chamber has explicitly endorsed the dereliction of duty approach: see *Krnojelac* Appeals Chamber Judgement, *supra* note 30, at para. 171: 'It cannot be overemphasized that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinate but with his failure to carry out his duty as a superior to exercise control'. Several dissenting and separate opinions of Appellate Judges have offered support for the dereliction of duty approach: see *Hadžihasanović* Interlocutory Appeal Decision, *supra* note 3, Separate and Partially Dissenting Opinion of Judge Shahabuddeen, at para. 32; ibid., Separate and Partially Dissenting Opinion of Judge Hunt, at para. 9; *Orić* Appeals Chamber Judgement, *supra* note 8, Separate Opinion of Judge Shahabuddeen, at para. 25; ibid., Partially Dissenting Opinion and Declaration of Judge Liu, at paras. 31–32; and ibid., Separate and Partially Dissenting Opinion of Judge Schomburg, at para. 12. Several trial chambers have endorsed the dereliction of duty approach: see *Halilović* Trial Chamber

charges of dereliction of duty rather than for the crimes of their subordinates.[87] Such an approach has also been endorsed by several scholars.[88] Yet only twice in the jurisprudence has any attempt been made to substantiate the assertions made in support of the dereliction of duty approach and in each case the analysis does not withstand scrutiny.

First, the Trial Chamber in *Halilović* carried out an extensive review of the superior responsibility jurisprudence since the Second World War.[89] Yet the conclusions which the Trial Chamber drew from its analysis are highly dubious: first, the Trial Chamber found that the Second World War jurisprudence was 'not uniform in its determination as to the nature of the responsibility arising from the concept of command responsibility', despite finding only one case unequivocally in support of the dereliction of duty approach (the *Toyoda* case);[90] and, second, the Trial Chamber found that 'the consistent jurisprudence of the Tribunal has found that a commander is responsible for the crimes of his subordinates under Article 7(3)', but then placed undue weight on the *Aleksovski* Trial Chamber and the Partially Dissenting Opinion of Judge Shahabuddeen in the *Hadžihasanović* Interlocutory Appeal Decision to conclude that 'the commander should bear responsibility for his failure to act [. . . and] not as though he had committed the crime himself'.[91] In this light, the conclusions of the *Halilović* Trial Chamber should be discarded, given that the analysis used to reach them points in the opposite direction, in fact supporting the characterization of superior responsibility as a mode of liability.[92]

A subsequent analysis of the dereliction of duty approach can be found in the Separate Opinions of Judge Shahabuddeen in the Appeals Chambers in *Hadžihasanović* and *Orić*.[93] On each occasion, Judge Shahabuddeen acknowledges that Article 7(3) of the ICTY Statute can be construed as a mode of liability.[94] However, he 'prefer[s]' to interpret the provision as a separate dereliction of duty offence:[95] first, on the basis

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Judgement, *supra* note 30, at para. 54; *Hadžihasanović* Trial Chamber Judgement, *supra* note 30, at para. 75; *Orić* Trial Chamber Judgement, *supra* note 30, at para. 293.

87 *Orić* Trial Chamber Judgement, *supra* note 30, at para. 782 (Disposition); *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Judgement, Case No. IT-01–47-A, A.Ch., 22 April 2008 (hereinafter *Hadžihasanović* Appeals Chamber Judgement), Disposition.

88 See Jia, *supra* note 85, at 31–3; Fox, *supra* note 15, at 491; Boas et al., *supra* note 2, at 178.

89 *Halilović* Trial Chamber Judgement, *supra* note 30, at paras. 42–54.

90 Ibid., at para. 48.

91 Ibid., at paras. 53–54.

92 Despite the flaws in the *Halilović* Trial Chamber's analysis, it has been explicitly reaffirmed: see *Hadžihasanović* Trial Chamber Judgement, *supra* note 30, at para. 75, and *Orić* Trial Chamber Judgement, *supra* note 30, at para. 293. For further criticism of the Trial Chamber's analysis in *Halilović*, see Sepinwall, *supra* note 84, at 264–7.

93 *Hadžihasanović* Interlocutory Appeal Decision, *supra* note 3, Separate and Partially Dissenting Opinion of Judge Shahabuddeen, at para. 32; *Orić* Appeals Chamber Judgement, *supra* note 8, Separate Opinion of Judge Shahabuddeen, at para. 25.

94 *Hadžihasanović* Interlocutory Appeal Decision, *supra* note 3, Separate and Partially Dissenting Opinion of Judge Shahabuddeen, at para. 32: 'Article 7(3) of the Statute has the effect . . . of making the commander guilty of an offence committed by others . . . No doubt, arguments can be made in support of that reading'; *Orić* Appeals Chamber Judgement, *supra* note 8, Separate Opinion of Judge Shahabuddeen, at para. 25: '[T]he language of several cases does suggest that the commander himself committed the crime of the subordinate.'

95 *Hadžihasanović* Interlocutory Appeal Decision, *supra* note 3, Separate and Partially Dissenting Opinion of Judge Shahabuddeen, at para. 32.

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of the Secretary-General's report concerning Article 7(3);[96] second, on the basis of prior ICTY jurisprudence, including the *Halilović* Trial Chamber judgment;[97] and, finally, on the basis that any case which has previously suggested that the superior himself committed the crime of the subordinate must be construed 'so as to reconcile it . . . with common sense'.[98] In this latter regard, Judge Shahabuddeen argues that the punishment rendered in these cases is 'only the measure of punishment of the commander for his failure to control the subordinate' rather than punishment for the actual crimes committed by a superior's subordinates.[99]

Each of these arguments is unconvincing. First, the Secretary-General's report merely distinguishes Article 7(1) and Article 7(3), avoiding any definitive statement as to the nature of responsibility under Article 7(3). In fact, to the extent that the report does give an indication as to the nature of superior responsibility, it refers to Article 7(3) as a form of 'imputed' responsibility rather than as a distinct dereliction of duty offence.[100] Second, Judge Shahabuddeen's reliance on the conclusions in *Halilović* is misplaced in the light of the Trial Chamber's dubious analysis of the jurisprudence;[101] all other cases relied on by Judge Shahabuddeen merely assert the conclusion that superior responsibility is a dereliction of duty offence without substantiation. Third, Judge Shahabuddeen's attempt to interpret past cases, which in their natural meaning indicate that superiors are responsible for the same crimes as their subordinates, as instead supporting the dereliction of duty approach is a manipulation of what the law *is* to suit his own preference as to what the law *should be*. While Judge Shahabuddeen asserts that his interpretation accords with 'common sense',[102] it is in fact better characterized by Meron as 'a proposition characteristic of the common law in its early development, when the criminal law was essentially judge-made law'.[103] Judges can no longer change the law at will, but must substantiate their claims in accordance with the *nullum crimen sine lege* principle. As analysed above, the dereliction of duty offence is not reflected in the international criminal law jurisprudence and no attempt has been made to bring such an offence within it.[104] Indeed, it could be argued that Judge Shahabuddeen's approach is in fact illogical in the context of the ICTY Statute. When read in its context, Article 7(3) cannot be intended to create a new offence since it sits under the

96 Ibid., at para. 33.
97 *Orić* Appeals Chamber Judgement, *supra* note 8, Separate Opinion of Judge Shahabuddeen, at paras. 19–23.
98 Ibid., at para. 25.
99 Ibid., at para. 25. In a similar vein, Mettraux has recently tried to explain that 'superior responsibility is not a case of the superior being held "responsible for the crimes of" subordinates, but responsibility "in respect of" crimes committed by subordinates' (Mettraux, *supra* note 6, at 81, citing, *inter alia*, *Čelebići* Appeals Chamber Judgement, *supra* note 6, at para. 225).
100 See *supra* note 78 and accompanying text.
101 See *supra* notes 90–92 and accompanying text.
102 *Orić* Appeals Chamber Judgement, *supra* note 8, Separate Opinion of Judge Shahabuddeen, at para. 25.
103 Meron, *supra* note 15, at 825.
104 See Greenwood, *supra* note 15, at 604; C. H. B. Garraway, 'Responsibility of Command – A Poisoned Chalice?', in R. Arnold and P.A. Hildbrand (eds.), *International Humanitarian Law and the 21st Century's Conflicts: Changes and Challenges* (2005), 135; Darcy, *supra* note 45, at 144; Robinson, *supra* note 84, at 952; Sepinwall, *supra* note 84, at 269.

heading to Article 7 as a whole, 'Individual Responsibility', which deals exclusively with modes of liability and denials of defences.[105]

3.3.2. Justifying the dereliction of duty approach using rudimentary notions of justice

Given the difficulties in finding a customary international law basis for the dereliction of duty approach, advocates of this approach usually resort to pleas to common sense and to what they consider reasonable to achieve justice.[106] In fact, it is far easier to justify the dereliction of duty approach by attacking the harshness of the mode of liability approach, in particular by highlighting its incompatibility with the principle of personal culpability.[107] This principle stands for the proposition that 'nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated'.[108] In this light, compatibility with the principle of personal culpability depends on the degree to which a nexus exists between a superior's omission and the crimes of his subordinates. In the context of the *duty to punish* form of the doctrine of superior responsibility relevant to our discussion, it is clear that the nexus between a superior's inaction and the underlying crimes of his subordinates is extremely tenuous. Applying the mode of liability approach, a superior is held responsible for the *same* crimes as his subordinates for the sole reason of failing to punish them after the fact; the superior is held responsible for the criminal conduct of others committed in the past, to which he has in no way contributed.[109] A superior's failure to punish

105 Eboe-Osuji, *supra* note 39, at 321. See also Robinson, *supra* note 84, at 952, noting that 'the tribunals have no jurisdiction over any crime of "failure to exercise control". They only have jurisdiction over genocide, crimes against humanity, and war crimes, and those are the crimes of which they find people guilty and enter convictions'.

106 See *Orić* Appeals Chamber Judgement, *supra* note 8, Separate Opinion of Judge Shahabuddeen, at para 25.

107 The principle of personal culpability has been recognized as a general principle of international criminal law: see *Prosecutor v. Duško Tadić*, Case No. IT-94–1-A, Judgement, A.Ch., 15 July 1999 (hereinafter *Tadić* Appeals Chamber Judgement), para. 186, where it was held that '[t]he basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability'; *Kordić* Trial Chamber Judgement, *supra* note 61, at para. 364; Damaška, *supra* note 45, at 470, noting that 'if one were to catalog general principles of law so widely recognized by the community of nations that they constitute a subsidiary source of public international law, the culpability principle would be one of the most serious candidates for inclusion in the list'; Ambos, *supra* note 6, at 847, noting that '[f]rom the perspective of an international criminal law compatible with general principles of human rights and criminal law, respect for this principle is of the utmost importance and cannot be underestimated'; Danner and Martinez, *supra* note 44, at 82, noting that the principle ensures that 'individual wrongdoing' is a 'necessary prerequisite' for the imposition of criminal sanctions; and Cassese, *supra* note 6, at 33, noting that '[i]n ICL the general principle applies that no one may be held accountable for an act he has not performed or in the commission of which he has not in some way participated, or for an omission that cannot be attributed to him'. A related domestic notion is the principle of fair labelling, which, although not a general principle of international criminal law, may be considered a useful principle of justice (G. Williams, 'Convictions and Fair Labelling', (1983) 42 *Cambridge Law Journal* 85, at 86). The principle is, in essence, an aspect of the principle of personal culpability, ensuring that the law is defined with precision and communicating to both the wrongdoer and society the precise nature and gravity of the transgression (Simester and Sullivan, *supra* note 53, at 45; Nersessian, *supra* note 47, at 16–18).

108 *Tadić* Appeals Chamber Judgement, *supra* note 107, at para. 186.

109 Damaška, *supra* note 45, at 468. See also *Čelebići* Trial Chamber Judgement, *supra* note 3, at para. 397, referring to the necessary lack of a causal nexus between a superior's failure to punish and the crimes of his subordinates: '[A] causation requirement would undermine the "failure to punish" component of superior responsibility, which . . . can only arise after the commission of the offence . . . as a matter of logic a superior could not be held responsible for prior violations committed by subordinates if a causal nexus was required between such violations and the superior's failure to punish those who committed them.'

the commission of crimes by his subordinates, of which he had no knowledge until after the fact, is equated in terms of personal fault with the commission of the offences themselves.[110] In this way, the weak causal nexus between a superior's inaction and the crimes of his subordinates results in 'a huge disproportion . . . on the one hand, between the stigmatization to which [. . . a superior] is subjected, and, on the other, the conduct in which he actually engaged and the blame he really deserves'.[111] The superior's responsibility and personal fault are spread so widely apart that the mode of liability approach not only tests the basic tenets of the principle of personal culpability,[112] it effectively acts as an exception to it.[113]

Against such criticism, several attempts have been made to defend the application of the mode of liability approach. First, it has been pointed out that this head of superior responsibility is similar to a form of aiding and abetting by a superior under Article 7(1) of the ICTY Statute, the only significant difference being that 'the failure to punish does not need the coming into effect of a "result"'.[114] This has effectively been acknowledged by the Appeals Chamber in *Hadžihasanović*, which stressed the following:

> [A] superior's failure to punish a crime of which he has actual knowledge is likely to be understood by his subordinates at least as acceptance, if not encouragement, of such conduct with the effect of increasing the risk of new crimes being committed.[115]

In addition, in several cases the failure of a superior to punish the past crimes of his subordinates has been interpreted under Article 7(1) as a basis for aiding and abetting or instigating new crimes.[116] While these observations are undoubtedly true, they fail to support the mode of liability approach in this context. The nexus between a superior's failure to punish and (potential) *future* crimes supports the imposition of *some form* of responsibility but cannot be used to justify the imposition of the same label on the superior as the *past* crimes of his subordinates. It is the nexus between

110 Nersessian, *supra* note 47, at 94. See also Damaška, *supra* note 45, at 480; Cassese, *supra* note 6, at 245–6, characterizing such cases as instances of the specific crime of failure to report.

111 Damaška, *supra* note 45, at 479.

112 Darcy, *supra* note 44, at 391.

113 See Damaška, *supra* note 45, at 464; Shany and Michaeli, *supra* note 52, at 829–30; Eboe-Osuji, *supra* note 39, at 317; and *Prosecutor v. Jean Mpambara*, Judgement, Case No. ICTR-01–65-T, T.Ch., 11 September 2006, para. 26.

114 R. Arnold, 'Command Responsibility: A Case Study of Alleged Violations of the Laws of War at Khiam Detention Centre', (2002) 7 *Journal of Conflict & Security Law* 191, at 208, comparing this head of superior responsibility with the analogous Swiss doctrine of the *abstrakte Gefahrdungsdelikte* according to which 'there are some acts which need not effectively result in injury, harm, death or damage in order to imply liability, since they are prosecutable for the mere fact of creating a danger (inchoate endangerment)'. See also C. A. Hessler, 'Command Responsibility for War Crimes', (1973) 82 *Yale Law Journal* 1274, at 1283, arguing that the military commission and Supreme Court in *Yamashita* held that '[a superior's] total ignorance, and the complete delegation of authority associated with it, themselves raised unacceptable general risks of future subordinate criminality'; and Langston, *supra* note 67, at 146, portraying superior responsibility as 'an exercise in risk management'.

115 *Hadžihasanović* Appeals Chamber Judgement, *supra* note 87, at para. 30. See also Shany and Michaeli, *supra* note 52, at 830–1, noting that 'where the commander wilfully refused to punish the offender, it can be said that she in effect has embraced the criminal conduct and thereby has encouraged the commission of additional crimes in the future'.

116 *Prosecutor v. Tihomir Blaškić*, Judgement, Case No. IT-95–14-T, T.Ch., 3 March 2000 (hereinafter *Blaškić* Trial Chamber Judgement), para. 337 (cited by *Blaškić* Appeals Chamber Judgement, *supra* note 49, at para. 89); *Kordić* Trial Chamber Judgement, *supra* note 61, at para. 371. See also Van Sliedregt, *supra* note 4, at 172–3.

the superior's inaction and the *past* crimes of his subordinates that is important for assessing the appropriateness of imputing liability on a superior *for those same past crimes*. Viewed from this perspective, it is clear that only a very weak nexus exists, since the failure to punish is necessarily after the fact.

Second, the mode of liability approach has been defended by Greenwood on the basis that, although a superior lacks knowledge of the crimes of his subordinate at the time of their commission,

> it can be argued that, had he run his command properly, the members of that command would not have behaved in this way. In such a case, there is a causal connection (albeit, perhaps a tenuous one) between the commander's actions and inaction, and the commission of the offences by his subordinates.[117]

Again, while this argument may justify the imposition of *some* responsibility, it does not justify the imposition of responsibility *for the same crimes as his subordinates*,[118] especially since the causal connection between the superior's inaction and the subordinate crimes is merely 'a tenuous one'.

Against this background, the dereliction of duty approach is clearly preferable, since it ensures that the crime of the superior is defined by reference to his omission rather than the consequences of his omission. By interpreting the doctrine of superior responsibility as a separate crime of omission, the problems associated with the mode of liability approach are effectively side-stepped.[119] The superior is charged with a specific offence that clearly matches the level of his wrongdoing, thereby reinforcing the principle of personal culpability rather than acting as an exception to it.

4. Reconciling the approaches

The preceding analysis has revealed two distinct approaches to the doctrine of superior responsibility: the mode of liability approach and the dereliction of duty approach. While the mode of liability approach has been justified by recourse to customary international law, advocates of the dereliction of duty approach have tended to rely on appeals to common sense and justice. The difference between the justifications of the two approaches is illustrative of the inherent dilemma that underlies international criminal law: the need to apply individualized notions of criminal law to the collective context of public international law.[120] While crimes of an international nature normally 'constitute manifestations of collective criminality',[121] it is the aim of criminal law 'to individualize responsibility associated with [their] commission'.[122] This dichotomy between the collective international crime and the

117 Greenwood, *supra* note 15, at 603.
118 Greenwood even admits that to do so is a 'harsh rule'. Ibid., at 603.
119 Wu and Kang, *supra* note 56, at 18. For an alternative view, see Sepinwall, *supra* note 84, at 298 ff.
120 See B. I. Bonafé, 'Finding a Proper Role for Command Responsibility', (2007) 5 *Journal of International Criminal Justice* 599, at 600: 'International criminal law is characterized by the dilemma of being an individual-oriented body of law, which, however, must generally deal with collective – if not state – criminal phenomena.'
121 *Tadić* Appeals Chamber Judgement, *supra* note 107, at para. 191.
122 A. Bogdan, 'Individual Criminal Responsibility in the Execution of a "Joint Criminal Enterprise" in the Jurisprudence of the Ad Hoc International Tribunal for the Former Yugoslavia', (2006) 6 *International Criminal Law Review* 63, at 64.

individual defendant is particularly problematic in respect of the doctrine of superior responsibility, which, in essence, acts as 'a conceptual and practical bridge between state and individual responsibility [regimes]'.[123] Against this background it is clear that the mode of liability approach emphasizes the public international law aspect of international criminal law, relying on traditional notions of customary international law for justification. By contrast, the dereliction of duty approach emphasizes the criminal law aspect of international criminal law, relying on traditional criminal law principles for justification.

An interesting analysis of this dilemma has recently been provided by Drumbl, who challenges 'the suitability' of applying domestic criminal law principles such as the principle of personal culpability, which are 'premised on the construction of the individual as the central unit of action',[124] to the context of international crimes.[125] In particular, Drumbl finds it paradoxical that 'even though international criminal law responds to conduct that is much *more* collective in nature than that faced by ordinary criminal law, it evokes a *similar* rhetorical archetype of individual agency'.[126] While Drumbl offers an insightful critique of international criminal law, even he concedes that there is still a place for international criminal law 'within the justice matrix'.[127] In this light, this paper disagrees with Professor Drumbl's dismissal of domestic criminal law principles and instead argues that '[o]nce a criminal court like the ICTY, ICTR, or ICC has been established, the culpability principle is necessarily implicated'.[128] Such a view is supported by the dissenting opinion of Justice Murphy, in the *Yamashita* proceedings before the US Supreme Court, who emphasized the importance of the culpability principle to the future legitimacy of international criminal law:[129]

> [H]atred and ill-will . . . [have] been the inevitable effect of every method of punishment disregarding the element of personal culpability. The effect in this instance, unfortunately, will be magnified infinitely, for here we are dealing with the rights of man on an international level. To subject an enemy belligerent to an unfair trial, to charge him with an unrecognized crime, or to vent on him our retributive emotions only

123 N. L. Reid, 'Bridging the Conceptual Chasm: Superior Responsibility as the Missing Link between State and Individual Responsibility under International Law', (2005) 18 LJIL 795, at 824. See also L. S. Sunga, 'The Celebici Case: A Comment on the Main Legal Issues in the ICTY's Trial Chamber Judgement', (2000) 13 LJIL 105, at 122: 'In the Nuremberg Charter, the dilemma between the unfairness of collective responsibility, and the unfairness for direct perpetrators only, finds resolution in the doctrine of . . . superior responsibility'.

124 M. A. Drumbl, *Atrocity, Punishment, and International Law* (2007), 5. See also L. E. Fletcher, 'From Indifference to Engagement: Bystanders and International Criminal Justice', (2005) 26 *Michigan Journal of International Law* 1013, at 1031, noting international criminal law's tendency to 'locate the individual as the central unit of analysis for purposes of sanctioning violations'; G. P. Fletcher, 'Collective Guilt and Collective Punishment', (2004) 5 *Theoretical Inquiries Law* 163, at 163, noting 'the liberal idea that the only true units of action in the world are individuals, not groups'.

125 Drumbl, *supra* note 124, at 9.

126 Ibid., at 9 (emphasis in original).

127 Ibid., at 21.

128 Danner and Martinez, *supra* note 44, at 139.

129 On the legitimacy of international criminal law, see generally ibid., at 96–102, noting that '[a]t this point in the development of the field, establishing the legitimacy of international criminal proceedings poses the most critical challenge for international tribunals'.

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antagonizes the enemy nation and hinders the reconciliation necessary to a peaceful world.[130]

Against this background, this paper takes the view that the mode of liability approach is overly reliant on traditional notions of customary international law. Recourse to principles of criminal law ought to be prioritized in the context of international criminal law to ensure the protection of the individuals subjected to it. International criminal law should be viewed as the application of criminal law to an international law context rather than the application of international law to a criminal law context. In this light, the ICTY's *methodology* for determining the precise content of customary international law is questionable. In particular, the tribunal has become preoccupied with expanding the scope of international criminal law to fill purported legal loopholes and gaps.[131] This has resulted in two consequences, both of which have negatively impacted on the tribunal's interpretation of the superior responsibility doctrine.

4.1. The conflation of international humanitarian and international criminal legal concepts

First, the ICTY has conflated international humanitarian law and international criminal law concepts when determining the duties of superiors under customary international law.[132] This can be clearly illustrated by the interpretation accorded to Additional Protocol I to the Geneva Conventions. Article 86(2) of Additional Protocol I is limited to imposing on commanders a duty to *prevent or repress* crimes, encompassing only present or future crimes of subordinates. By contrast, Article 87(3) additionally imposes on commanders a duty to *punish* crimes that 'have [been] committed', encompassing past crimes of subordinates.[133] Crucially, whereas Article 86(2) refers to the responsibility of superiors, Article 87(3) is addressed to the 'High Contracting Parties and Parties to the conflict'.[134] The question that has divided both the ICTY and scholars is whether Article 86(2) and Article 87(3) of Additional Protocol I ought to be interpreted in conjunction.[135]

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130 *In Re Yamashita*, 327 US 1, 28–9 (1946). See also Darcy, *supra* note 44, at 392, explaining how '[t]he potential achievement of goals such as the maintenance of peace or contributing to reconciliation may be jeopardized' by the employment of imputed modes of liability which undermine the principle of personal culpability.

131 For an overview of scholars who fear such lacunae in the law see Robinson, *supra* note 84, at 955, n. 176. See also Garraway, *supra* note 104, at 132, noting that attempts to fill purported gaps in the law may have the opposite effect and in fact lead to the creation of new gaps. In respect of the question of successor superior responsibility, Garraway asks, 'What of the case where the commander knows of the crimes before he takes command, but then takes no action when he is in a position to do so? Should his position be any different from the commander who only discovers the crimes after he has taken command?'

132 Robinson, *supra* note 84, at 953.

133 Additional Protocol I, *supra* note 74, Art. 87(3).

134 Ibid.

135 For scholars who argue that the provisions should be interpreted together see, e.g., Lippman, *supra* note 6, at 54; and Fox, *supra* note 15, at 466. For judicial opinions which support the provisions being interpreted together see *Hadžihasanović* Interlocutory Appeal Decision, *supra* note 3, Partially Dissenting Opinion of Judge Shahabuddeen, at para. 25; ibid., Separate and Partially Dissenting Opinion of Judge Hunt, at para. 43; *Orić* Appeals Chamber Judgement, *supra* note 8, Partially Dissenting Opinion and Declaration of Judge Liu, at para. 16; ibid., Separate and Partially Dissenting Opinion of Judge Schomburg, at para. 19. For scholars who argue that the provisions should be kept distinct see, e.g., Shany and Michaeli, *supra* note 52, at 840–1; Garraway, *supra* note 104, at 134; and Robinson, *supra* note 84, at 953–4. For judicial opinions which support

Proponents of interpreting the provisions together argue that the direction of Article 87(3) towards states should not affect the admissibility of using it to interpret the scope of Article 86(2).[136] In particular, five arguments have been put forward in support of this position. First, the ICRC Commentary to Article 86(2) states that Article 86(2) 'should be read in conjunction with ... Article 87 (Duties of commanders)'.[137] Second, a failure to read the two provisions together would leave a 'gaping hole' in the protection accorded to victims of armed conflict.[138] Third, even if Article 87(3) relates to the obligations of states, the 'imperative tone' provides evidence in support of state practice.[139] Fourth, the ILC Commentary to its 1996 Draft Code of Crimes declares that '[t]he duty of commanders with respect to the conduct of their subordinates is set forth in article 87 of Additional Protocol I'.[140] Finally, in the practice of the ICTY, Article 87 has been relied on for the purpose of interpreting superior responsibility, not the obligations of states.[141]

Despite the above arguments, the stronger conclusion is that Article 86(2) and Article 87(3) should be kept separate. None of the arguments raised by proponents of interpreting the provisions together are able to withstand scrutiny. First, the ICRC Commentary to Article 86(2) merely refers to the need to take note of both provisions since they are related, rather than supporting any argument that the substantive content of Article 86(2) ought to be interpreted in line with Article 87(3). Second, the fear of leaving a legal loophole should be discarded, since it is still possible, under the principle of complementarity, for a superior to be held responsible for a failure to punish under *national* military law;[142] indeed, this appears to be the intention of Additional Protocol I, since Article 87(3) directs states 'to initiate such steps as are necessary' and 'where appropriate, to initiate disciplinary or penal action' against superiors in breach of their duties.[143] Third, if Article 87(3) represents state practice, it merely evidences state deference to domestic legal systems to determine the appropriate measures for punishing superiors who breach their duty to punish. Fourth, the ILC Commentary to its 1996 Draft Code of Crimes merely states that

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the provisions being interpreted together see *Hadžihasanović* Interlocutory Appeal Decision, *supra* note 3, at para. 53.

136 *Hadžihasanović* Interlocutory Appeal Decision, *supra* note 3, Partial Dissenting Opinion of Judge Shahabuddeen, at para. 25; ibid., Separate and Partially Dissenting Opinion of Judge Hunt, at para. 43; *Orić* Appeals Chamber Judgement, *supra* note 8, Partially Dissenting Opinion and Declaration of Judge Liu, at para. 16; and ibid., Separate and Partially Dissenting Opinion of Judge Schomburg, at para. 19.

137 ICRC Commentary on the Additional Protocols, *supra* note 49, at para. 3541.

138 *Hadžihasanović* Interlocutory Appeal Decision, *supra* note 3, Partially Dissenting Opinion of Judge Shahabuddeen, at para. 14; ibid., Separate and Partially Dissenting Opinion of Judge Hunt, at para. 22; and *Orić* Appeals Chamber Judgement, *supra* note 8, Partially Dissenting Opinion and Declaration of Judge Liu, at para. 30.

139 *Orić* Appeals Chamber Judgement, *supra* note 8, Partially Dissenting Opinion and Declaration of Judge Liu, at para. 17.

140 ILC Commentary to the 1996 ILC Draft Code of Crimes, *supra* note 82, at 25.

141 See *Orić* Appeals Chamber Judgement, *supra* note 8, Partially Dissenting Opinion and Declaration of Judge Liu, at para. 20.

142 On this point see Greenwood, *supra* note 15, at 604, noting that '[u]ntil the establishment of the ICTY in the early 1990s, the enforcement of the law through criminal liability was the exception rather than the rule. The changes brought about by the creation of the ad hoc criminal tribunals ... should not lead to the conclusion that a proper system of enforcement must always be dependent upon the criminal liability of an individual'. See also Damaška, *supra* note 45, at 475; Van Sliedregt, *supra* note 4, at 173; and Darcy, *supra* note 44, at 392.

143 Additional Protocol I, *supra* note 74, Art. 86(2).

the duties of commanders are set out in Article 87; it does not go further and state that the scope of Article 86(2) ought to be interpreted in line with Article 87. In fact the ILC specifically notes that '[t]he principle of individual criminal responsibility [under the superior responsibility doctrine] is elaborated in article 86 of Protocol I'.[144] Finally, while it is true that some ICTY judgments support interpreting Articles 86 and 87 in conjunction, a more accurate observation is that the ICTY is divided on this question; for example, in *Čelebići*, the Appeals Chamber held that the 'criminal offence based on command responsibility is defined in Article 86(2) only'.[145]

In the light of these arguments, the safer conclusion is that there is a clear distinction between Article 86(2), which imposes a form of international criminal responsibility on superiors, and Article 87(3), which imposes a form of responsibility to be determined under domestic law, most likely for a separate crime of dereliction of duty to punish.[146] Robinson has summarized the failure of the ICTY to distinguish these provisions as a misguided conflation 'between the humanitarian law procedural duties of commanders and the distinct question of assigning criminal liability for the acts of another'.[147]

4.2. An uncritical approach to past case law and treaties

The second negative consequence of the ICTY's preoccupation with expanding the scope of international criminal law has been its uncritical reliance on judicial decisions, most notably those rendered by the post-Second World War military courts, regardless of the standards they put forth.[148] While the vast majority of past jurisprudence indicates that the doctrine of superior responsibility is a mode of derivative imputed liability,[149] as Damaška has forcefully argued, the legitimacy of this proposition is undermined by the fact that the legal standards set out in such decisions have generally been regarded as 'deficient in terms of our current understanding of criminal law with humanitarian aspirations'.[150] The ICTY's preoccupation with finding authorities to fill perceived lacunae in the law has allowed the doctrine of superior responsibility to be defined *regardless* of its compatibility with general principles of international criminal law.[151]

Against this background, the ICTY must remember that its mandate is to hold *individuals*, and not states, responsible. As the Nuremberg Tribunal once declared, 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions

144 ILC Commentary to the 1996 ILC Draft Code of Crimes, *supra* note 82, at 25.
145 *Čelebići* Appeals Chamber Judgement, *supra* note 6, at para. 237.
146 Garraway, *supra* note 104, at 134.
147 Robinson, *supra* note 84, at 953.
148 See Damaška, *supra* note 45, at 489, criticizing the ICTY for 'stop[ping] deferentially before each decision as if it were a station in a pilgrimage, and treat[ing] each rule discerned in the decision as if it were unarguable as a papal bull'. See also Darcy, *supra* note 44, at 392–5.
149 See *supra* note 58 ff. and accompanying text.
150 Damaška, *supra* note 45, at 487.
151 See H. Olasolo, 'A Note on the Evolution of the Principle of Legality in International Criminal Law', (2007) 18 *Criminal Law Forum* 301, at 318, hoping that the ICTY jurisprudence marks 'the final tremors of a traditional conception of international criminal law preoccupied with the central role played by international customary law as a source of international criminal law'.

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of international law be enforced'.[152] Although the Report of the Secretary-General requires the ICTY to apply only those rules of international humanitarian law which are 'beyond any doubt part of customary law',[153] custom as a source of law was never intended to govern the relationship between the state and individuals; moreover, custom was never intended to govern *criminal* responsibility at the international level in any form, whether for states or for individuals.

4.3. A new, principled approach to customary international law

In the light of the preceding analysis, a new approach to customary international law in the context of the ICTY is justified. Such an approach should entail two aspects. First, a clear distinction must be made between international humanitarian law and international criminal law concepts. Second, when interpreting a doctrine under customary international law in the context of ascribing international criminal responsibility to an individual, the uniqueness of the international criminal law context justifies the ICTY placing a heightened emphasis on the general principles of international criminal law, and in particular the principle of individual culpability: before personal guilt may be assigned, criminal law demands conformity with its fundamental principles.[154] In this regard, the ICTY should use the culpability principle as a tool with which to scrutinize previous judicial decisions and as a standard against which to interpret ambiguous treaty provisions. Applying such an approach to the doctrine of superior responsibility would have the effect of minimizing the relevance of the (at times) deficient standards set forth by the post-Second World War tribunals, as well as interpreting the relevant provisions in Additional Protocol I and the Statute of the ICTY in accordance with the culpability principle.

The basis for the ICTY utilizing the culpability principle as a scrutinizing tool is threefold. First, the ICTY could simply invoke its own statute, the principle of individual culpability being enshrined in Article 7(1), as well as the vast jurisprudence of the tribunal which has upheld the principle as 'the foundation of criminal responsibility'.[155] Second, in relation to treaties, the ICTY could invoke Article 31 of the Vienna Convention on the Law of Treaties 1969.[156] It could be argued that the object and purpose of international criminal law provisions in relevant international treaties would always implicitly include ensuring that the principle of individual culpability is upheld in the determination of any duties and responsibilities set out therein. Finally, recourse could also be had to the approach adopted by the European Court of Human Rights in its interpretation of the European Convention on

152 'Judgment of the Nuremberg International Military Tribunal' (Goering), (1946) 41 AJIL 172, at 221.
153 Report of the Secretary-General, *supra* note 7, at para. 34.
154 Robinson, *supra* note 84, at 953.
155 *Tadić* Appeals Chamber Judgement, *supra* note 107, at para. 186.
156 See Vienna Convention on the Law of Treaties (23 May 1969), 1155 UNTS 331, Art. 31: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. For an example of the ICTY relying on Art. 31 of the Vienna Convention on the Law of Treaties 1969 in interpreting Art. 86(2), see *Blaškić* Trial Chamber Judgement, *supra* note 116, at para. 327.

Human Rights: the Convention is considered a 'living instrument' which should be interpreted so as to reflect 'societal changes and to remain in line with present-day conditions'.[157] Such an approach is justified by the unique context of human rights law. In a similar vein, the unique context of international criminal law could be used to justify the ICTY interpreting the doctrines set out in the ICTY Statute in conformity with modern-day notions of the culpability principle.

Earlier in this paper,[158] criticism was made of Judge Shahabuddeen's recent attempt to justify the dereliction of duty approach to the superior responsibility doctrine on the basis of a subjective appeal to his own preferences as to what the law *should* be: his aim was simply to reconcile the law with 'common sense'.[159] By appealing instead to general principles of international criminal law, the ICTY can reconcile the law with the fundamental principle of individual culpability and thereby achieve a similar result but by a more objective route. Such an approach also has the further advantage of satisfying the ICTY's need to reconcile customary international law with the *nullum crimen sine lege* principle.[160] By relying on general principles in its scrutiny of authorities evidencing custom, the ICTY is able to offer individuals a further layer of protection against arbitrary interference by inter-state authorities.[161]

4.4. Resolving the question of successor superior responsibility under Article 7(3) of the ICTY Statute

It has been a fundamental premise of this paper that by identifying the underlying nature of the doctrine of superior responsibility in its duty to punish form, the issue of whether a successor superior can be held responsible for the crimes committed by his subordinates prior to taking command would be resolved. Since Article 7(3) of the ICTY Statute provides no indication as to whether successor superiors may be held responsible, and in the light of the lack of state practice and *opinio juris* on this issue, the pertinent question in the context of the ICTY becomes whether the 'situation' of successor superiors falls within the wider 'principle' of superior responsibility. As the ICTY Appeals Chamber has confirmed,

157 See, among the many authorities, ECHR, *Cossey v. UK*, Case No. 16/1989/176/232, 29 August 1990, para. 35.
158 See *supra* note 93 and accompanying text.
159 *Orić* Appeals Chamber Judgement, *supra* note 8, Separate Opinion of Judge Shahabuddeen, at para. 25.
160 The *nullum crimen* principle aims to protect individuals against arbitrary interference by state or inter-state authorities, principally by ensuring that criminal law doctrines are defined with sufficient specificity and not applied retroactively. See W. A. Schabas, 'The General Principles of the Rome Statute', (1998) 6 *European Journal for Crime, Criminal Law, and Criminal Justice* 84, at 90; S. Lamb, '*Nullum Crimen, Nulla Poena Sine Lege* in International Criminal Law', in Cassese, Gaeta, and Jones, *supra* note 6, at 734; M. Catenacci, 'The Principle of Legality', in F. Lattanzi and W. A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (2004), 85, at 86–7; G. Werle, *Principles of International Criminal Law* (2005), at 33; J. Nilsson, 'The Principle *Nullum Crimen Sine Lege*', in O. Olusanya (ed.), *Rethinking International Criminal Law: the Substantive Part* (2007), 35, at 40–1 and 62; Olasolo, *supra* note 151, at 301; Cassese, *supra* note 6, at 38 and 41–51.
161 See Olasolo, *supra* note 151, at 318, arguing that 'the more generic and less demanding the requirements of the legality principle are, the less protective of the individual such principle becomes and the less effective the preventive function of criminal norms is'.

> [W]here a principle can be shown to have been . . . established, it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle.[162]

In order to determine whether the responsibility of successor superiors (the new situation) reasonably falls within the application of the doctrine of superior responsibility (the established principle), this paper has submitted that the underlying nature of that doctrine had to be identified. In this regard, it will be recalled that if the mode of liability approach were adopted, successor superior responsibility would not be possible since such an approach demands coincidence between the timing of a superior's effective control and the timing of the commission of crimes by his subordinates; by contrast, if the dereliction of duty approach were adopted, successor superior responsibility would be possible since such an approach does not demand coincidence between the timing of a superior's effective control and the timing of his subordinates' crimes.

In this light, if the dereliction of duty approach were adopted by the ICTY on the basis of the principled approach to customary international law advocated above, it is likely that successor superior responsibility would be held to fall reasonably within the application of the doctrine of superior responsibility. It must be emphasized that, following the principled approach outlined above, this would be perfectly in line with traditional criminal law principles, since the superior would be held responsible only for his own omissions and not the crimes that result from them.

4.5. Beyond the ICTY: Article 28 of the ICC Statute

Looking beyond the context of the ICTY, it is interesting to note that scholars are equally divided over the question of the nature of the doctrine of superior responsibility under Article 28 of the ICC Statute.

Some scholars argue that a literal interpretation of Article 28 indicates that the doctrine of superior responsibility is a mode of liability.[163] Two arguments have been advanced in support of this view. First, as observed by Otto Triffterer,

> The common *chapeau* for all alternatives contained in Article 28, explicitly mentions that superior responsibility for acts of their subordinates should be '[i]n addition to other grounds of criminal responsibility under the Statute'. It, therefore, does not substitute, but supplements all forms of participation as listed in Article 25(3) *sub* a–f. Article 28 thus extends the scope of individual criminal responsibility for perpetrators in the position of superiors.[164]

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162 *Hadžihasanović* Interlocutory Appeal Decision, *supra* note 3, at para. 12. See also ibid., Separate and Partly Dissenting Opinion of Judge Shahabuddeen, at para. 10; ibid., Separate and Partly Dissenting Opinion of Judge Hunt, at para. 8.

163 See Arnold and Triffterer, *supra* note 6, at 843 ('following . . . the ICC Statute command responsibility is conceived as a form of participation into the crimes enlisted under article 5, and not as a crime per se'); O. Triffterer, '"Command Responsibility" – *crimen sui generis* or participation as "otherwise provided" in Article 28 Rome Statute?', in J. Arnold, B. Burkhardt, W. Gropp, G. Heine, H.-G. Koch, O. Lagodny, W. Perron, and S. Walther (eds.), *Menschengerechtes Strafrecht: Festschrift fur Albin Eser* (2005), at 905 ('Command responsibility is one of the modes of individual criminal responsibility . . . and not a definition of a crime, separate of [*sic*] and additional to those listed in Article 5 and defined and acknowledged in Articles 6–8').

164 O. Triffterer, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?', (2002) 15 LJIL 179, at 186.

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Second, it is argued that the doctrine of superior responsibility is a principle contained in Part III of the ICC Statute on 'general principles of criminal law' under Article 28, and not in Part II on 'Jurisdiction, Admissibility and Applicable Law' under Article 5, which effectively limits the jurisdiction of the Court to genocide, crimes against humanity, war crimes, and the crime of aggression. From this perspective, Article 28 cannot extend the number of crimes within the jurisdiction of the Court, since to do so is incompatible with the structure of the ICC Statute.[165]

By contrast, other scholars have submitted that the nature of superior responsibility is better characterized as a separate dereliction of duty offence.[166] Again, two arguments are made in support of this view. First, it is submitted that the text of Article 28 indicates that a superior is liable for 'the failure to exercise control properly over such forces' or 'subordinates'.[167] As van Sliedregt has argued,

> In the end, superior responsibility is about a dereliction of duty. This is clear in the structure of Article 28, in which the cognitive and operational elements are formulated as conditions of a superior's failure to control. Even if a superior has failed to control properly and his failure has resulted in the commission of a crime, he cannot be punished unless these two conditions are met.[168]

In this way, Article 28 generates *direct* criminal responsibility of a superior because of his failure to act, rather than *imputed* criminal responsibility for the crimes of his subordinates.[169] Second, in response to the alleged limitation on the jurisdiction of the Court under Article 5 of the ICC Statute, a close textual reading of Article 5 reveals that the Court has jurisdiction 'with respect to' the crimes listed therein. Therefore the dereliction of duty approach is reconcilable with the jurisdiction of the Court since the offence of dereliction of duty may be interpreted as an offence 'with respect to' the crimes listed in Article 5; as Ambos has pointed out, under a dereliction of duty offence, the crimes listed in Article 5 always act as a 'point of reference of the superior's failure of supervision'.[170]

It is not the purpose of this paper to reconcile these opposing views. However, what is most striking about Article 28 of the ICC Statute is that, in complete contrast to the ICTY, it is unnecessary to identify the underlying nature of the doctrine of superior responsibility in order to determine whether a successor superior may be held responsible for the crimes of his subordinates committed prior to his taking command. Unlike Article 7(3) of the ICTY Statute, Article 28 of the ICC Statute

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165 Triffterer, *supra* note 163, at 907–8; Arnold and Triffterer, *supra* note 6, at 827.

166 Ambos, *supra* note 6, at 851 ('Article 28 can be characterized as a genuine offence or separate crime of omission . . . since it makes the superior liable only for a failure of proper supervision and control of his or her subordinates, but not, at least not "directly", for crimes they commit'); Van Sliedregt, *supra* note 4, at 190–1 ('Article 28 . . . qualifies, more clearly than any of its codified predecessors, as a genuine offence, or separate crime of omission'); Meloni, *supra* note 65, at 637 ('The nature of superior responsibility in these cases should thus be more conveniently found in the mere failure to act under a duty to do so'); V. Nerlich, 'Superior Responsibility under Article 28 ICC Statute: For What Exactly Is the Superior Held Responsible?', (2007) 5 *Journal of International Criminal Justice* 665, at 682 ('Structurally, the superior can be blamed only for the wrongful consequence that was caused by the base crime, but not for the criminal conduct of his or her subordinates that constituted the base crime').

167 Van Sliedregt, *supra* note 4, at 190–1.

168 Ibid., at 190.

169 Ibid., at 191.

170 Ambos, *supra* note 6, at 851.

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specifically excludes the possibility of successor superior responsibility by adopting what may be termed the 'double omission' approach.[171] Under Article 28, there are two omissions which must be established for a superior to be held responsible for failing to punish the crimes of his subordinates: first, his failure to exercise control properly and, second, his failure to punish the underlying crimes of his subordinates.[172] Like the approach under the ICTY, the second omission does not demand a causal connection between the omission and the underlying subordinate crime, since by definition a superior's failure to punish occurs after the commission of the crimes of his subordinates.[173] However, in respect of the first omission, according to the wording of Article 28, a superior will only be responsible for the crimes of his subordinates which have been committed 'as a result of his or her failure to exercise control properly over such subordinates'.[174] This requirement of a causal connection between a superior's failure to exercise control properly and his subordinates' underlying crimes excludes the possibility of successor superior responsibility:[175] under Article 28, a superior cannot be responsible for failing to punish the crimes of his subordinates unless it can also be established that his prior failure to exercise effective control *caused* the subordinate crimes in question.[176] In this way, as has been confirmed by the Pre-Trial Chamber at the ICC itself,[177] the question of successor superior responsibility is incompatible with the wording of Article 28 of the ICC Statute.

5. Conclusion: successor superior responsibility clarified

This paper has sought to show that the current division of judicial opinion concerning successor superior responsibility is rooted in the failure of the ICTY Appeals Chamber to provide an authoritative determination of the underlying nature of the doctrine of superior responsibility. By identifying the relationship between

171 The approach was first advocated by Otto Triffterer, on which see generally Triffterer, *supra* notes 163 and 164. See also Nerlich, *supra* note 166, at 678.

172 Triffterer, *supra* note 163, at 912; Triffterer, *supra* note 164, at 191 ff.; Nerlich, *supra* note 166, at 678.

173 See *supra* note 109.

174 This causation requirement has recently been upheld by Pre-Trial Chamber II of the ICC: see *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, Case No. ICC-01/05–01/08, P.T.Ch. II (hereinafter Bemba Pre-Trial Chamber Decision), 15 June 2009, at para. 420, stating that '[t]he third element to be satisfied for the purpose of article 28(a) of the Statute is to prove that crimes committed by the suspect's forces resulted from his failure to exercise control properly over them'. For the opposite view, see the *amicus curiae* brief of Amnesty International: *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05–01/08, Amnesty International, Amicus Curiae Observations on Superior Responsibility Submitted Pursuant to Rule 103 of the Rules of Procedure and Evidence, 20 April 2009, at paras. 38–44, approved by the Prosecutor of the ICC in *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Office of the Prosecutor, Prosecution's Position Statement re: Amnesty International's Amicus Curiae Observations on Superior Responsibility filed on 27 April 2009, at para. 4.

175 Nerlich, *supra* note 166, at 678, n. 62.

176 See Bemba Pre-Trial Chamber Decision, *supra* note 174, at para. 419; Triffterer, *supra* note 163, at 912; and Nerlich, *supra* note 166, at 678.

177 Bemba Pre-Trial Chamber Decision, *supra* note 174, at para. 419, stating that 'the Chamber is of the view that according to article 28(a) of the Statute, the suspect must have had effective control *at least* when the crimes were about to be committed' (emphasis in original).

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successor superior responsibility and the different conceptions of the failure to punish form of the doctrine of superior responsibility, this paper has sought to broaden the scope of the ICTY's analysis. While the mode of liability approach inherently denies any conception of successor superior responsibility, the dereliction of duty approach is permissive.

In order to gain a better understanding of the relative strengths and weaknesses of the mode of liability and dereliction of duty approaches, this paper conducted an assessment of each approach. Despite the attractiveness of the dereliction of duty approach in terms of its conformity with international criminal law principles, only the mode of liability approach appears to be rooted in customary international law as traditionally formulated.

In an effort to reconcile the dereliction of duty approach with customary international law, this paper has suggested a more principled approach to the determination of custom, an approach justified by the context of international criminal law. By distinguishing international humanitarian and international criminal legal concepts as well as utilizing the principle of culpability as a standard against which to scrutinize previous judicial decisions and treaty texts, it is hoped that it will be possible for judges to justify the dereliction of duty approach in more objective terms rather than appealing to subjective opinions as to what they would prefer the law to be.

Should the ICTY adopt the dereliction of duty approach in the terms advocated by this paper, it has been illustrated that the issue of successor superior responsibility would be resolved: a superior *could* be held responsible for failing to punish crimes committed by his subordinates prior to taking command, however he would only be charged with a separate dereliction of duty offence rather than for the same crimes committed by his subordinates.