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The applicability of command responsibility to the successor commander

Examining whether successor commander responsibility exists in customary international law

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1 Introduction

1.1 Presentation of the topic and the research question

Imagine during wartime that a colonel takes over command of a brigade because its *de jure* commander is absent. A month prior to this, combat activities took place in which the brigade participated. During, or after, the combat activities, civilians were killed by soldiers of the brigade while trying to escape. In some instances, members of the opposing forces were killed after surrendering as well. These crimes had not been punished by the previous commander. After assuming command, the new colonel gains knowledge of these crimes, but decides to do nothing about it since it did not happen on his watch. Can the colonel be held criminally responsible for this omission? This is the issue of "successor commander responsibility" or "successor liability".

The provided example is based on Amir Kubura, a high-ranking military officer in the Army of Bosnia-Herzegovina during the Bosnian war that took place between 1992 and 1995. The concept of successor liability was addressed for the first time in international criminal law by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Hadžihasanović and Kubura*. The diverging opinions on the issue within the ICTY have led to a state of uncertainty within international criminal law. It is unclear whether successor liability exists as a branch of the command responsibility doctrine within customary international law. Under this doctrine, commanders and other superiors can be held criminally responsible for crimes committed by their subordinates. According to *Delalić et al.,* commonly known as *Čelebići,* command responsibility is "a well-established norm of customary and conventional international law."[1] Through analysis of relevant international legal documents, domestic legislation, and military manuals, this thesis seeks to examine the potential existence of successor liability within customary international law.

1.2 Why the research question is topical

Examining whether successor liability exists in customary international law is topical and relevant for two reasons. Firstly, despite the closure of some of the international courts, most notably the ICTY and the International Criminal Tribunal for Rwanda (ICTR), also known as the *ad hoc* tribunals, the issue is still relevant for the residual institutions mandated to finish the task of the courts. The Mechanism for International Criminal Tribunals ("Mechanism") is

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[1] *Delalić et al*. (*Čelebići)* Trial Judgement, para. 333.

mandated to finish several functions of the *ad hoc* tribunals, including the appeal of former Bosnian Serb leader Radovan Karadžić.[2] The jurisprudence of the *ad hoc* tribunals is applicable to the Mechanism and will undeniably be highly important. Thus, the issue of command responsibility might be addressed and further elaborated upon. The same argument applies to the Residual Special Court of Sierra Leone which is mandated to finish the operations of the Special Court Sierra Leone (SCSL). It is also warranted in relation to the International Criminal Court (ICC) and other internationalized courts that are still operating, and which might have to apply command responsibility, such as the Extraordinary Chambers in the Courts of Cambodia (ECCC).

Secondly, there is a possibility that future international courts might have to apply customary international law if their statutes are ambiguous or mute on the issue of successor liability as a branch of command responsibility. According to Article 21 of the Rome Statute, the ICC may apply customary international law in its proceedings. Even though the Statute is the primary applicable law, one cannot rule out the possibility that the ICC may have to apply customary international law at some point in the future.[3] Besides, the ICC has only jurisdiction with respect to crimes committed after the statute's entry into force.[4] Hence, there is a possibility that new international, or internationalized tribunals, so-called hybrid tribunals, are established to deal with crimes that happened before 2002, as was the case of the ECCC. Such new tribunals might choose to include successor liability explicitly in its regulation of command responsibility, adopt the language of the Rome Statute, or adopt the language of the *ad hoc* tribunals. The specific wording of these instruments will be examined below, but for now it is worth noting that the Kosovo Specialist Chambers is the most recent example of such a newly established internationalized court. It has jurisdiction over crimes within its subject matter jurisdiction which occurred between 1 January 1998 and 31 December 2000.[5] Article 16 (1) (c) of the law establishing the Specialist Chamber adopts the language of the *ad hoc* tribunals, and the court may apply customary international law. In determining the content of customary international law, sources such as the jurisprudence of the *ad hoc* tribunals may be utilized.[6]

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[2] United Nations Mechanism for International Criminal Tribunals.

[3] See *inter alia* Meron (2005) p. 832.

[4] Article 11 (1) of the Rome Statute.

[5] Law on the Specialist Chambers and Specialist Prosecutor's Office Article 7.

[6] *Ibid.,* Article 16 (1) (c), Article 3 (2) (d), and Article 3 (3).

Hence, exploring whether successor liability exists within customary international law is warranted.

1.3 Scope and structure

The doctrine of command responsibility applies to both military and civilian superiors.[7] Given that command responsibility more often occurs within the military context, and due to quantitative restrictions, the subject-matter of this thesis limits itself to the military context. Furthermore, as will be explained below, the question of successor liability is essentially a question of whether the scope of command responsibility is temporal, i.e. time-related, or not. This has implications not only in terms of successor liability, but also on the possibility of holding an outgoing commander responsible for crimes committed by his subordinates after the cessation of his command. Again, because of quantitative restrictions, this component falls outside the scope of the thesis.

The thesis proceeds in six chapters. Chapter 2 touches briefly on some methodological issues and gives an overview of applicable sources when identifying customary international law. With emphasis on international legal instruments, Chapter 3 presents the doctrine of command responsibility and the elements required to establish it. Chapter 4 addresses the important question of the nature of command responsibility. The implications of this question are critical in relation to the question of successor liability. Chapter 5 includes the examination and analysis of customary international law. It examines first the provisions in statutes and legislation establishing international(ized) courts. Further, it scrutinizes relevant conventions, before studying selected domestic legislation and military manuals. The thesis proceeds in Chapter 6 to look at successor liability from a *de lege ferenda* view, focusing on arguments for and against the concept, before offering some concluding remarks in Chapter 7.

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[7] See *inter alia* Article 28 (b) of the Rome Statute; Article 3 (2) of the STL Statute; *Čelebići* Trial Judgement, paras. 355-363; *Sesay et al.* Trial Judgement, para. 282.

2 Methodological issues and applicable sources when examining customary international law

2.1 Briefly on the identification of customary international law

When determining whether a rule has the status of customary international law, one must look to evidence of widespread practice, and *opinio juris*.[8] The two elements are closely intertwined. The first element is fairly easy to understand. The relevant practice in question is the action or inaction of States in relation to each other, or in relation to other recognized international actors.[9] It does not have to be the practice of every State, but it must be sufficiently widespread, uniform, and consistent.[10] This will be assessed in Chapter 5 by examining the applicable sources listed in this chapter.

The element of *opinio juris*, deserves some further elaboration. *Opinio juris* is the belief that the practice in question is required by international law. It is this element that distinguishes mere practice from custom.[11] Since *opinio juris* is a state of mind, it is inherently difficult to attribute it to an entity such as a State. Thus, it must be deduced from the State's actions and omissions.[12] The way in which *opinio juris* may be expressed differs depending on the character of the issue.[13] For instance, if the rule in questions provides an obligation, which the rule successor commander responsibility would do, practice establishing the existence of such obligation can be found primarily in behavior in conformity with such a requirement.[14] The clearest evidence of *opinio juris* is naturally when a State explicitly expresses an obligation as customary international law through domestic legislation, domestic jurisprudence, participation in treaties and military manuals, as well as other instruments such as diplomatic correspondence.[15]

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8 *North Sea Continental Shelf, Judgement I.C.J. Reports 1969,* p. 3, para. 77.

9 Thirlway (2014) p. 98.

10 Crawford (2012) pp. 24-25.

11 *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 120 (Dissenting Opinion of Judge Chagla, referring to local custom, but relies in this context on the general language of Article 38 (1) (b) of the Statute of the International Court).

12 Thirlway (2014) p. 99.

13 Crawford (2012) p. 27; Henckaerts and Doswald-Beck (2005) p. xlv.

14 Henckaerts and Doswald-Beck (2005) p. xlvi.

15 United Nations General Assembly [Michael Wood, Special Rapporteur] (2014) pp. 59-67.

When identifying customary international law, international courts have, on some occasions, proven that a rule of customary international law exists when it is desirable for international peace and security or for the protection of the human person, provided that there is no important contrary *opinio juris*.[16] Nevertheless, in some instances it is difficult to find a rule of customary international law, despite widespread practice and desirability of such rule.[17] There exists a well-known theory that the two elements are operating on a "gliding scale" in relation to how much practice and *opinio juris* is required to establish a rule of customary international law. The main proponent of the theory, Frederic Kirgis, believes that a greater existence of practice requires less *opinio juris*, and *vice versa.*[18] However, this is controversial within judicial literature, and some commentators believe it overemphasizes one element over the other.[19] Whichever theory one adheres to, it is widely accepted that where there is sufficiently widespread, uniform, and consistent practice, *opinio juris* is generally contained within that practice, and it is usually not necessary to demonstrate separately the existence of an *opinio juris*.[20] Only when state practice is unclear, will *opinio juris* play a crucial role, in deciding whether or not the practice counts as custom.

2.2 Conventions

It is widely accepted that conventions are evidence of customary international law since they are expressions of State practice. It is therefore relevant to examine Articles 86 and 87 of the Additional Protocol I of 1997 to the Geneva Conventions (AP I). The articles were the first to expressly codify the doctrine of command responsibility. Even though there were traces of command responsibility in older legal instruments, such as Article 19 of The Hague Convention of 1907, and Article 26 of the Geneva Convention of 1929, they only established a general duty for commanders to ensure that their forces acted in conformity with the conventions. It is therefore highly relevant to examine AP I. The International Convention for the Protection of all Persons from Enforced Disappearance also provides for command responsibility in its Article 6, which warrants a closer examination.

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[16] Kirgis (1987) p. 147.

[17] Henckaerts and Doswald-Beck (2005) p. xlviii.

[18] Kirgis (1987) p. 149.

[19] See *inter alia* Roberts (2001) pp. 773-774.

[20] Henckaerts and Doswald-Beck (2005) p. xlvi.

2.3 The Statutes of international criminal courts

Article 28 of the Rome Statute provides for criminal responsibility of military commanders and other superiors. Due to the immense importance of the ICC within international criminal law, it is only natural to examine this provision. Article 7 (3) of the ICTY Statute and 6 (3) of the ICTR Statute, and the statutes of other international(ized) courts are also vital sources of law. The Special Court of Sierra Leone (SCSL), the Special Panel for Serious Crimes in East Timor (SPSC), and the Kosovo Specialist Chambers adopt the same substantive text as that of the *ad hoc* tribunals.[21] The text of the Law of the Extraordinary Chambers in the Courts of Cambodia is also heavily influenced by the *ad hoc* tribunals, but includes some elements from the Rome Statute.[22] The Special Tribunal for Lebanon (STL) bases its wording almost entirely on Article 28 (b) of the Rome Statute, but in respect of military superiors. In other words, most of statutes of the international(ized) courts are nearly identical.

It is worth pointing out that this thesis does not consider the War Crimes Chamber for Bosnia and Herzegovina (WCC) and the Iraqi High Tribunal (IHT) to be internationalize tribunals, as perhaps many authors have in the past. Given the lack of international involvement in their current operations and the fact that the tribunals are not comprised by internationally-appointed judges, they cannot be characterized as internationalized tribunals any further. This view is also supported by certain commentators, such as Sarah Williams.[23] Therefore, the relevant provisions regarding command responsibility will be examined as domestic legislation. Additionally, this thesis excludes the examination of the Extraordinary African Chambers in the Senegalese Courts (EAC). The EAC is indeed considered a hybrid tribunal.[24] However, since the working language of the EAC is French, its Statute and decisions are naturally written in French. I have not managed to find any official English translation of these documents. Human Rights Watch has published an unofficial translation of the Statute.[25] However, for the sake of accuracy, this thesis will not include the EAC because of the unavailability of an English translation of the judgement.

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[21] Article 6 (3) of the Statute of the SCSL; Section 16 of the Regulation on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (hereby: SPSC Regulation); Law on the Specialist Chambers and Specialist Prosecutor's Office Article 16 (1) (c).

[22] Article 29 (3) of Law of the Establishment of the ECCC.

[23] Williams (2012) pp. 288-293.

[24] Williams (2013) p. 1159.

[25] Human Rights Watch (2013).

The statutes have a distinctive role as a source of law. Some of them have the status of conventions, such as the statutes of the ICC and SCSL. They could have been mentioned in 2.2, but for the sake of order they will be examined along with the statutes of the other tribunals. The *ad hoc* tribunals and the STL are established by the Security Council and thus their legal bases lie within their respective resolutions.[26] The ECCC, SPSC, and the Kosovo Specialist Chambers are tribunals established under national law, with international elements.[27] The ECCC is a national judicial institution, operating with participation and assistance from the UN. The SPSC was created under the UN Transitional Administration in East Timor, while the Kosovo Specialist Chambers are financed by the European Union and includes international judges.[28] All the statutes are fundamental when assessing command responsibility because they are evidence of customary international law, even though not all of them are a formal source in line with Article 38 of the ICJ statute. Particularly the statutes of the *ad hoc* tribunals, which the ICTY has stated reflect customary international law, have significant value.[29]

There is some debate amongst commentators as to whether, and to what extent, the rules of treaty interpretation found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) are applicable to the interpretation of statutes.[30] Nevertheless, the case law of the abovementioned tribunals is full of references to these Articles, suggesting that the applicability is unproblematic.[31] Considering the fact that some statutes have entered into force on the basis of Security Council resolutions, it is also worth noting that the International Court of Justice (ICJ) has confirmed the applicability of the VCLT when interpreting the resolutions

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[26] ICTY: *UN Security Council Resolution* 827; ICTR: *UN Security Council Resolution 955*; STL: *UN Security Council Resolution 1757*.

[27] Williams (2012) pp. 282-300

[28] *Ibid.,* p. 284; Kosovo Specialist Chambers and Specialist Prosecutor's Office.

[29] *Hadžihasanović* Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (hereby: *Hadžihasanović* Interlocutory Appeal) paras. 55, 35, 44-46.

[30] See *inter alia* Jacobs (2014) pp. 468-470; Akande (2009) pp. 44-45.

[31] See *inter alia Bemba* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (hereby: *Bemba* Decision), para. 361; *Čelebići* Trial Judgement, para. 1161; *Semanza* Trial Judgement, para. 336; *Brima* Trial Judgement, para. 650; *Ayyash et al.,* Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, para. 26.

as well.[32] For this reason, the thesis adopts the approach of the tribunals and employs the rules of the VCLT when interpreting the statutes throughout the thesis.

2.4 Judicial decisions

Even though judicial decisions are classified as subsidiary sources within the hierarchy of norms according to Article 38 of the Statute of the International Court of Justice (ICJ), they are nevertheless regarded as evidence of the state of the law in many cases.[33] Thus, case law from the international courts is highly valuable to the examination of command responsibility. Especially case law from the *ad hoc* tribunals is important. Guénaël Mettraux writes that the *ad hoc* tribunals have "generally sought to anchor their rulings in existing precedents thereby cultivating a sense of legal continuity and endowing their decisions with a degree of judicial legitimacy."[34] For the purposes of the research question at hand, particular importance will be attached to the *Hadžihasanović and Kubura* (hereby *Hadžihasanović)* and *Orić* cases, but also jurisprudence from the ICC and other international criminal courts will be of importance. Relevant domestic case law will also be examined.

2.5 Additional sources – judicial literature and domestic sources

In addition to the abovementioned sources, this thesis utilizes other international legal documents, such as the ILC Draft Code of Crimes against the Peace and Security of Mankind. Furthermore, judicial literature is an important source to examine. Despite being considered a subsidiary source; judicial literature is invaluable when discussing the present research question. Of all the applicable sources, judicial literature is the one source where the issue has been discussed the most. Given that the courts have addressed the issue in a limited number of cases, it is only natural to examine the different views of several commentators who have written at length about the topic at hand. Beyond the list of applicable sources in international law, several domestic sources are of interest to the research question at hand as well. Military manuals and domestic criminal legislation also deal with command responsibility. Many domestic provisions on command responsibility adopt the Rome Statute's definition as the basis for incurring command responsibility. However, some States have adopted different wordings, and it is useful to examine them closer.

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32 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, para. 94.

33 Crawford (2012) p. 37.

34 Mettraux (2009) p. 22.

3 The elements of command responsibility

3.1 General remarks

Before addressing the concrete issue of successor liability, it is necessary to give an account of the doctrine of command responsibility in general. The purpose of the doctrine is to ensure the effective compliance and enforcement of international humanitarian law.[35] It is widely accepted in international criminal law that the following three main elements must be satisfied to establish command responsibility:

i) the existence of a superior-subordinate relationship;
ii) the accused superior's actual knowledge or constructive knowledge of the crimes committed by his subordinates; and
iii) the superior's failure to prevent or punish his subordinates' crimes.[36]

Article 28 of the Rome Statute includes the additional element of causation, which will be addressed as well. To avoid confusion, it is important to reiterate and emphasize that the question of successor liability is governed by the doctrine of command responsibility. There is no other distinct rule governing the successor commander.

3.2 Existence of a superior-subordinate relationship

The superior-subordinate relationship is a fundamental requirement for the establishment of command responsibility. However, there are limits to the doctrine of superior responsibility, and not all superiors can incur criminal liability. There are several layers of authority from the soldier on the ground, to the military high command, and further on to civilian leaders. If a military unit consisting of 15 soldiers committed wanton destruction of a village, their closest superior would be held responsible for not preventing or punishing the unlawful act. In most cases, it would be unreasonable if the general of the army was to automatically incur criminal liability in such situations. Hence, it is required in international criminal law that the superior has "effective control" over the subordinates. This notion is developed through jurisprudence

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35 See *inter alia Bemba* Trial Judgement, para. 172; *Halilović* Trial Judgement, para. 39; Mettraux (2009) p. 18.

36 See *inter alia* Boas (2007) p. 181; Cassese (2013) p. 18; *Čelebići* Trial Judgement, para. 346; *Sesay et al.* Trial Judgement, para. 285.

and often attributed to the *Čelebići* case.[37] The "effective control" test is now undeniably settled in international criminal law.[38]

When does a superior have effective control? According to the *Čelebići* Appeal Judgement, a superior has effective control over the subordinate if he has "the material ability to prevent and punish criminal conduct."[39] This means that the control does not have to be formal, the *ad hoc* tribunals have applied command responsibility to *de facto* commanders as well.[40] Thus, establishing whether a commander has effective control is a question of evidence. Once effective control is established, all superiors within the chain of command who exercise effective control, can be held criminally responsible under the doctrine.[41] In other words, if a general is proven to exercise effective control over a platoon of 15 soldiers, the fact that he is higher in the chain of command does not preclude his command responsibility. The doctrine of command responsibility also extends to civilian superiors and is explicitly provided for in Article 28 (b) of the Rome Statute.[42] As this thesis is limited to military commanders, examining this branch falls outside the scope of the thesis.

The important question with regards to successor liability is the timing of the effective control requirement. Must the commander have been in command at the time of the commission of the crimes, or does it suffice that he was in control at any time before or after the crimes happened? Some tribunals have taken the view that the commander must have been in control at the time when the crimes were committed, while others have yet to decide on the issue. This is essentially what the thesis seeks to explore below.

3.3 Requirement of knowledge

3.3.1 Knowledge of what?

To establish the commander's responsibility for failure to prevent or punish, the prosecution must prove that he possessed the required criminal intent. Under customary international law,

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37 *Čelebići* Trial Judgement, para. 378.

38 See *inter alia* Article 28 of the Rome Statute; Article 3 (2) of the statute of the STL; Article 29 (3) of the ECCC Statute; See also its application in *Bemba* Decision, para. 409; *Sesay et al*., Appeal Judgement, para. 498.

39 *Čelebići* Appeal Judgement, para. 256.

40 See *inter alia*, *Halilović* Appeal Judgement, para. 85, cf. *Kunarac et al.* Trial Judgement, para. 396.

41 *Čelebići* Appeal Judgement, para. 252.

42 *Čelebići* Trial Judgement, paras. 355-363.

the commander must possess either actual or constructive knowledge of the subordinate's crimes.[43] The details of this will be explained in 3.3.2. A plain reading of the different provisions does not give much guidance as to what the commander needs to have knowledge of. However, it is widely accepted that the commander does not need to know all the details of the crimes committed.[44] This does not mean that a general knowledge is sufficient. According to the *Naletilić and Martinović* Appeal Judgement, "the principle of individual guilt requires that an accused can only be convicted for crimes *if his mens rea comprises the actus reus of the crime*."[45] For instance, if the underlying offence is the war crime of attacking civilians, the commander must know all the following elements:

- The perpetrator directed an attack.
- The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
- The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.
- The conduct took place in the context of and was associated with an international armed conflict.
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[46]

Additionally, the commander must also be aware that his own conduct, i.e. the omission to act, was illegal and criminal and, with that knowledge, he must have persisted.[47]

3.3.2 Actual or constructive knowledge

The requirement of actual knowledge is not complicated and does not require much explanation. The fact that the superior "knew" that his subordinates were committing or about to commit crimes, may be established through direct or circumstantial evidence.[48] Such knowledge can be inferred from several indicia, such as the number, type and scope of illegal

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[43] See Article 7 (3) of the ICTY Statute; Article 6 (3) of the ICTR Statute; Article 6 (3) of the SCSL Statute; Article 16 of the SPSC Regulation; Article 29 (3) of the Law on the ECCC; Mettraux (2009) p. 195.

[44] See *inter alia Galić* Trial Judgement, para. 700; *Bemba* Trial Judgement, para. 194.

[45] *Naletilić and Martinović* Appeal Judgement, para. 114 (emphasis added).

[46] ICC Elements of Crimes, Article 8 (2) (b) (i) - War crime of attacking civilians.

[47] *Naletilić and Martinović* Appeal Judgement, para. 117.

[48] *Čelebići*, Trial Judgement, para. 383.

acts, the time during which the illegal acts occurred, the number and type of troops involved and several other factors.[49]

The issue of constructive knowledge is more complex. It is useful to distinguish between the standard in customary international law as expressed by the *ad hoc* and international(ized) tribunals, and the standard provided for by the Rome Statute. The Appeals Chamber of the *ad hoc* tribunals has defined constructive knowledge as "showing that a superior had *some general information in his possession, which would put him on notice of possible unlawful acts* by his subordinates."[50] The information must be sufficiently clear and alarming to indicate strong likelihood of the offences in order to trigger the commander's duty to act, and can be either written or oral.[51] Hence, a general knowledge of crimes being committed, or a general knowledge of the context or environment in which they are committed is insufficient.[52]

As mentioned, Article 28 of the ICC Statute provides for a different standard. Besides providing for a differentiated knowledge requirement between civilian and military superiors, which is superfluous to discuss in this thesis, it introduces a "should have known" standard for military commanders. In *Bemba*, the Pre-Trial Chamber described the "should have known" standard as a type of negligence, something which the "had reason to know" standard is not.[53] The Pre-Trial Chamber also noted that the standard imposes an "active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, *regardless of the availability of information at the time on the commission of the crime*."[54] This shows that threshold for incurring criminal responsibility is lower than in the statutes of the *ad hoc* tribunals. For present purposes, it suffices to note that this standard is not part of customary international law, according to the ICTY.[55]

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49 *Ibid.*, para. 386

50 *Čelebići* Appeal Judgement, para. 238 (emphasis added).

51 *Čelebići* Appeal Judgement, para. 238; *Kordić and Čerkez* Trial Judgement, para. 437.

52 See *inter alia Bagilishema* Appeal Judgement para. 42.

53 *Bemba* Decision, para. 429, cf. *Čelebići* Appeal Judgement, para. 332.

54 *Bemba* Decision, para. 433 (emphasis added).

55 *Čelebići* Appeal Judgement, paras. 216-239.

3.4 Failure to prevent or punish

3.4.1 Separate duties

The last of the three main elements is the superior's failure to prevent or punish the crimes of his subordinates. Article 28 of the Rome Statute adopts the word "repress", instead of "punish". The duty to repress includes both a duty to stop ongoing crimes, as well as punishing the forces after the commission of the crimes.[56] This thesis applies the established word "punish", since there is no significant material difference between them. The two requirements are separate, in that the superior must have failed to prevent the crimes *or* failed to punish his subordinates after the commission of the crimes. Naturally, the superior can also incur criminal responsibility if he failed to perform both duties. If a commander learns of the crimes prior to their commission, he cannot avoid responsibility by simply punishing the subordinates after the fact.[57] Furthermore, Article 28 includes an additional duty, namely that of submitting the matter to the competent authorities. It requires that the commander takes active steps to ensure that the perpetrators are brought to justice.[58] Like the duty to punish, it arises after the commission of the crime. Logically, the duty to prevent a crime arises before or during the commission of the crime. The duties are triggered when the *mens rea* element is satisfied, which is also logical as it is difficult to prevent or punish something one does not have knowledge of.

3.4.2 Necessary and reasonable

The mere dereliction of duty is, however, insufficient to incur criminal responsibility. It is preconditioned on the commander's failure to take "necessary and reasonable" measures. The statutes of all international(ized) criminal courts adopt this wording, whereas AP I Article 86 (2) adopts "feasible" instead, without being substantially different. A plain reading of "necessary" suggests that the commander must take measures which are sufficient to prevent the crimes from being committed, or which adequately punish the subordinates after the fact. This is supported by the *ad hoc* tribunals, describing it on one occasion as "[m]easures appropriate for the superior to discharge his obligation (showing that he genuinely tried to prevent or punish)."[59]

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[56] *Bemba* Trial Judgment, para. 206.

[57] *Semanza* Trial Judgement, para. 407; *Bemba* Trial Judgement, para. 201.

[58] *Bemba* Decision, para. 442.

[59] *Halilović* Appeal Judgement, para. 63.

A plain reading of the word "reasonably" suggests that the commander's actions must be proportionate. This interpretation is supported by the *Hadžihasanović* Trial Judgement, in which the Chamber found that disciplinary sanctions were inadequate to the commission of murders.[60] In *Blaškić,* the ICTY further describes it as measures "reasonably falling within the material powers of the superior."[61] Hence, a commander cannot be held responsible for failing to take measures outside of his competence. Mettraux states that under international law, "reasonable" consists of measures which are legal, feasible, proportionate and timely.[62] Based on this it is evident that assessing what is necessary and reasonable will depend greatly on the circumstances of each situation, as is also pointed out in *Blaškić*.[63]

3.5 The requirement of causation

Article 28 of the Rome Statute, and Article 3 (2) of the STL Statute, require causation between the superior's failure to prevent or punish, and the commission of the crimes. None of the other international(ized) tribunals include such an explicit requirement, and the *ad hoc* tribunals have held that causality does not have to be established to prove command responsibility.[64] Yet, Article 28 and Article 3 (2) require that the crimes occur "*as a result of his or her failure to exercise control properly* over such forces".[65] Proving causality is logically a difficult task which involves counterfactual exercises. The Trial Chamber in *Bemba* found that the link would be satisfied when "it is established that the crimes would not have been committed, in *the circumstances in which they were*, had the commander *exercised control properly*, or the commander exercising control properly would have prevented the crimes."[66] It is worth noting that this threshold and the scope of the causality element is disputed, given that two of the judges dissented on this issue.[67] The thesis will return to the implications of this below. With this description of the main elements of command responsibility as a baseline, the thesis now turns to examining the specific research question at hand.

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[60] *Hadžihasanović* Trial Judgement, para. 1777.

[61] *Blaškić* Appeal Judgement, para. 72.

[62] Mettraux (2009) pp. 240-241.

[63] *Blaškić* Appeal Judgement, para. 417.

[64] See *inter alia Čelebići* Trial Judgement, paras. 398-399; *Blaškić* Appeal Judgement, para. 77.

[65] Rome Statute Article 28; STL Statute Article 3 (2).

[66] *Bemba* Trial Judgment, para. 213 (emphasis added).

[67] Separate Opinion of Judge Steiner in *Bemba* Trial Judgement, paras. 10-24; Separate Opinion of Judge Ozaki in *Bemba* Trial Judgement, paras. 8-23.

4 The nature of command responsibility – crime *per se*, mode of liability, or a combination?

4.1 General remarks about the issue

There is an uncertainty within international criminal law as to the nature of command responsibility. Is the commander held criminally responsible for the separate crime of omission, or is he held responsible as a participant in the underlying offence committed by the subordinates, e.g. the killing of civilians? In other words, the question is whether command responsibility is a crime *per se* or a mode of liability. The question also has certain implications for the successor commander, as will be examined in 4.3. There has been a great deal of disagreement about the nature of command responsibility within ICTY jurisprudence, which in turn has generated debate within academic literature. A combination of the two approaches has been proposed by a few commentators as a possible solution to the question. This will be explored below in 4.5. This chapter does not endeavor to unveil the true nature of command responsibility; such a task is too voluminous to set out on. However, it is necessary for the analysis of successor liability to explore some of the views briefly.

4.2 Examining the issue in light of customary international law

It is difficult to unequivocally state whether command responsibility is a mode of liability or a crime *per se* in customary international law. Case law post-WWII shows that the "mode of liability" approach was favored, although the jurisprudence was not uniform in its determination.[68] In the same period, national legislation enacted in countries such as Canada, France, and the United Kingdom also favored the "mode of liability" approach, considering it to be a form of accomplice liability.[69] As for international legal instruments, Article 86 (2) of AP I states that "the fact that a breach of the Convention or of this Protocol was committed by a subordinate *does not absolve his superiors from penal or disciplinary responsibility*".[70] A plain text interpretation of the Article shows that it does not indicate favoring either approach. Such an interpretation is supported by the ICTY.[71]

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[68] *Halilović* Trial Judgement, paras. 44-48.

[69] *Ibid.,* para. 43.

[70] Article 86 (2) of AP I (emphasis added).

[71] *Halilović* Trial Judgement, para. 49.

The wording of Article 7 (3) of the ICTY Statute is also ambiguous as to the nature of command responsibility: "The fact that any of the acts referred to in Articles 2 to 5 of the present Statute was committed by a subordinate *does not relieve his superior of criminal responsibility…*"[72] Article 6 (3) of the ICTR Statute and Article 6 (3) of the SCSL Statute are virtually identical to the ICTY provision. The wording in all these three statutes is similar to that of AP I Article 86 (2). In other words, the wording allows for both approaches, as has been argued by some commentators.[73] Darryl Robinson has put forth a "structural" argument in support of the "mode of liability" approach. Since the *ad hoc* Statutes do not include command responsibility among the definitions of crimes, but instead include it among the "general principles", command responsibility must be seen as a mode of liability and not a crime *per se*.[74] Yet, the SCSL has utilized the "crime *per se*" approach, stating that command responsibility is a dereliction of duty offence.[75] The *ad hoc* tribunals, on the other hand, have consistently interpreted command responsibility as a mode of liability in several cases.[76] In *Orić*, however, the ICTY explicitly moved to a "crime *per se*" approach and labelled it a responsibility "*sui generis,*" meaning that the superior is "merely [responsible] for his neglect of duty with regard to crimes committed by subordinates."[77] Consequently, the accused Naser Orić was convicted for the crime of failing to prevent murder and cruel treatment, rather than the crimes of murder and cruel treatment themselves. Hence, the current view of the *ad hoc* tribunals is seemingly that command responsibility is a crime *per se*, i.e. a crime of omission. Nevertheless, Barrie Sander believes that the ICTY has failed to address the issue directly and sufficiently precise, which has left the law uncertain and unsound. He defines this as the root cause of the doubt of the successor commander issue.[78]

In contrast, the question seems less complicated before the ICC. Firstly, Article 28 talks about "crimes within the jurisdiction of the Court". This is a reference to Article 5, which does not list command responsibility as a crime within the ICC's jurisdiction. A logical result of this interpretation is that the Rome Statute adopts the "mode of liability" approach. This interpre-

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72 Article 7 (3) of the ICTY Statute (emphasis added); see also Article 6 (3) of the ICTR Statute.

73 Meloni (2010) p. 132.

74 Robinson (2012) p. 32.

75 *Brima et al*. Trial Judgement, para. 783; *Sesay et al*. Trial Judgement, para. 283.

76 *Halilović* Trial Judgement, para. 53.

77 *Orić* Trial Judgement, para. 293.

78 Sander (2010) pp. 111-113.

tation is also supported by Roberta Arnold, stating that "the ICC Statute considers it only as a form of *participation* to the crimes enlisted under article 5."[79] Secondly, the express causality requirement in Article 28 also suggests that the "mode of liability" approach has been adopted. According to Article 28, the commander shall be held criminally responsible for crimes within the jurisdiction of the Court committed by his subordinates "as a result of his…failure to exercise control properly". This provides a sufficiently strong link between the subordinates' crimes and the superior in such a way that the doctrine must be understood as a mode of liability. This has in fact been determined authoritatively by the ICC. The *Bemba* Trial Chamber took this approach, acknowledging that Article 28 is "intended to provide a distinct mode of liability."[80] However, the responsibility of the commander is not same as that of the person who commits the crime and is consequently described as a form of *sui generis* responsibility.[81]

From past similar analyses in academic literature, it has been asserted that the international criminal law supports the characterization of the doctrine of command responsibility as a mode of liability within customary international law.[82] However, these analyses have not been able to consider the most recent developments, especially the ICC's determination on the nature of command responsibility within its own statute. Based on the updated brief overview presented above, it can now be concluded that there is no uniform view of the nature of command responsibility within customary international law.

4.3 The implications of the culpability principle and the legality principle

It is important to determine the nature of command responsibility because it might impact the principle of culpability. Briefly explained, the principle means that no one can be punished without personally exhibiting fault. This in turn impacts the existence of successor liability. In terms of the failure to prevent, a commander who had the chance to prevent a crime and failed to do so, could be considered an accomplice to the underlying crime. Sander describes the liability as imputed and derivative.[83] As he puts it, it is imputed in the sense that the commander is held liable for the crimes of his subordinates even though he has not fulfilled the

79 Arnold (2008) p. 827 (emphasis in original).

80 *Bemba* Trial Judgment, para. 173.

81 *Ibid.,* para. 174.

82 See *inter alia* Sander (2010) p. 120; Robinson (2012) p. 33.

83 Sander (2010) pp. 114-115.

actus reus of the underlying crimes. It is derivative in the sense that the imputation of liability is linked to the acts of subordinates, whose crimes constitute the point of reference of the superior's failure of supervision in the sense that one or more of the offences' definitional elements have not been fulfilled.[84] Thus, in the case of the duty to prevent, the mode of liability characterization is appropriate because one could say the commander participated and exhibited fault. This does not infringe the principle of culpability.

However, in terms of failure to punish, one cannot say that the commander participated, or exhibited any fault, in the crime. After all, he might have learned of the crimes after they were committed. A broader argument could be made, that since the commander refrains from punishing, he creates an environment of lawlessness and impunity within the unit. However, this can hardly be described as participation. It would closer resemble instigation or psychological complicity, but to maintain this also feels strained. In these cases, a mitigation of the sentence should be granted to avoid stigmatization and equation of the commander who knew crimes were going to be committed and did not prevent them, and the commander who simply did not punish them.[85] In any event, it would be incompatible with the principle of culpability to hold that a commander who does not punish his subordinates, participates in the crime.

Under the "mode of liability approach", this issue of successor liability is even more at odds with the culpability principle. Successor liability is predicated on the incoming commander's failure to punish his new subordinates for crimes they committed before he assumed command. It would be an even more manifest infringement of the principle of culpability to hold the incoming commander responsible for the crimes of his subordinates when he had no knowledge of and nothing to do with the commission of the crimes. The "mode of liability" approach, requires the existence of a temporal superior-subordinate relationship for attributing responsibility to the commander. Logically, this does not exist when the crimes took place before the commander assumed control. Therefore, the "mode of liability" approach does not fit with successor commander responsibility.

As a solution to this incompatibility with the duty to punish, the "crime *per se*" approach has been proposed. It avoids the culpability problem altogether since the commander is held re-

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[84] *Ibid.*

[85] See *inter alia* Cassese (2013) p. 192; Meloni (2010) p. 204.

sponsible for his own conduct, and not that of his subordinates. However, this approach might be at odds with the legality principle. The essence of the legality principle is that a norm must have existed at the time the acts were committed, and that the criminality of the conduct was sufficiently foreseeable and accessible. The legality argument put forth by Robinson, is that since the *ad hoc* and ICC statutes do not include command responsibility among the definitions of crimes, but instead include it among the 'general principles', the statutes do not establish command responsibility as a crime. Thus, one cannot say that the commander is being convicted of the crime of failure to prevent or punish, because this would infringe the legality principle. Therefore, command responsibility can only be characterized as a mode of liability.[86] Whether the relevant legal instruments can be interpreted this way, is precisely what chapter 5 seeks to examine.

4.4 Implications for sentencing

The nature of command responsibility also affects sentencing. If command responsibility is conceived as a crime *per se*, more lenient sentences should be expected because the crime of omission is in general deemed less worthy of punishment than if command responsibility is viewed as participation in the underlying crime. According to Mettraux, the starting point should be the seriousness of the omission. The accused's own, personal, dereliction and the extent to which his conduct deviated from the legal standard required of him in the circumstances are the most relevant factors. The underlying offence is still a factor in the sentencing, which will be measured against his conduct.[87] Additionally, attention must be given to the difference between the commander's duties, since the failure to prevent, in most cases, is more serious than the failure to punish. However, if command responsibility is viewed as participation, one should expect sentences that more closely resemble the sentence of the principal perpetrator. For instance, if the underlying offence is the killing of civilians, the starting point of the sentencing would presumably be high since it is an atrocious crime. Antonio Cassese believes that if a failure to prevent is viewed as participation, the underlying offence should be the starting point of the sentencing analysis. Furthermore, depending on the circumstances, the failure to prevent could warrant a higher sentence than that of the subordinates.[88] On the other hand, in relation to the duty to punish, the starting point should be the serious-

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86 Robinson (2012) p. 32.

87 Mettraux (2009) p. 90.

88 Cassese (2013) p. 192.

ness of the omission. The gravity of the underlying offence is still a factor in the sentencing, but does not play the same integral part.[89]

4.5 A dual approach preferred

Applying one holistic characterization on the entire doctrine seems impossible. Under the "mode of liability" approach, the failure to prevent is seemingly compatible with the culpability principle, but the failure to punish is not. Under the "crime *per se*" approach, the failure to punish is compatible with the culpability principle, but might infringe the legality principle. Several different ways of solving the problem of the nature of command responsibility have been proposed in academic literature.[90] Because of the commander's two different duties, command responsibility is best viewed as dual natured. Determining the nature of command responsibility will thus depend on the duty in question. The ICC has indeed indicated such an approach, at least implicitly, by finding that the causality requirement is limited to the duty to prevent crimes only.[91] Such a dual view is also supported by some commentators; such as Elies van Sliedregt, calling it "parallel liability", and Maria Nybondas, calling it a "bifurcated approach".[92] Nybondas argues that, where the *mens rea* of the commander is at the level of negligence (should have known), either at the "prevent" stage or the "punish" stage, the commander is only responsible for the dereliction of duty. In this sense, command responsibility is a crime *per se*. Where the *mens rea* is higher than negligence, i.e. intentional, he would be held responsible for aggravated command responsibility, a form of participation.[93] In this sense, command responsibility is a mode of liability.

This approach is commendable. It is no doubt necessary to distinguish between the two duties because of their different temporal natures. However, the distinction cannot be based on the *mens rea* exhibited by the accused. Nybondas' proposal still remains at odds with the culpability principle. Therefore, a blanket distinction between the two duties is preferred. In relation to the duty to prevent, command responsibility is a mode of liability, and in relation to the duty to punish, command responsibility is a crime *per se*. By viewing command responsibility as dual natured, one ensures that important principles of criminal law are respected. It would

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89 *Ibid.*

90 See *inter alia* Sander (2010) pp. 125-135; Robinson (2012) pp. 40-51.

91 *Bemba* Decision, paras. 421-423.

92 van Sliedregt (2011) p. 398; Nybondas (2010) p. 136.

93 Nybondas (2010) p. 136.

also ease the sentencing issue. Failure to prevent as a mode of liability would incur harsher sentences, while failure to punish as a crime *per se* would incur more lenient sentences. This solution better reflects the act's worthiness of punishment as well. With the issue of infringing the culpability principle avoided, the thesis now turns to the concrete examination of whether successor liability exists in customary international law.

5 Does successor liability exist in customary international law?

As mentioned in 2.1, when identifying a rule as customary international law, this chapter analyzes the statutes of international(ized) tribunals and relevant case law. Relevant conventions are also examined, since they are evidence of customary international law, as well as domestic legislation, and military manuals.

5.1 Analysis of relevant statutes and jurisprudence

5.1.1 ICC and STL

Article 28 (a) of the Rome Statute, and Article 3 (2) of the STL Statute, are almost identical. Therefore, the examination of both provisions can be united into one joint analysis. Article 28 (a) stipulates that:

> "In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
>
> > (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
> >
> > > (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
> > >
> > > (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their

> commission or to submit the matter to the competent authorities for investigation and prosecution."[94]

There are three possible ways to assess whether this provision supports successor liability or not. The first approach is to look at the words "were committing or about to commit". They are phrased in present and future tense, seemingly excluding the possibility of punishing past crimes, i.e. crimes that have already been committed. The majority in the *Hadžihasanović* Interlocutory Appeal relied on this approach when concluding that the Rome Statute requires temporal coincidence and that successor liability is precluded.[95] This approach was heavily criticized by the dissenting judges and subsequently by commentators.[96] Judge Shahabuddeen pointed out in that "[t]hese words would seem to exclude crimes of subordinates even if committed after the commencement of the commander's command where the commander knew, or should have known, of the commission of the crimes but only after they were committed…"[97] Such a reasoning would be inconsistent with the purpose of command responsibility. It is therefore not a preferable approach.

The second approach is to examine the causality element. It is reflected in the words "as a result of…failure to exercise control properly". The term "as a result" relates to the commission of the crime - in other words, command responsibility attaches where crimes have been committed as a result of the commander's omission.[98] One might believe that the causality element precludes successor liability. However, the causality element only relates to the duty to prevent, because it is illogical to say that a failure to punish can retroactively cause the commission of crimes.[99] This state of law is somewhat contentious. In *Bemba,* the Trial Chamber did not address this particular issue, implicitly denoting that the Chamber maintained the Pre-Trial Chambers holding. However, Judge Steiner and Judge Ozaki disagreed on

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94 Article 28 (a) of the Rome Statute.

95 *Hadžihasanović* Interlocutory Appeal, para. 46.

96 Separate and Partially Dissenting Opinion of Judge Hunt (hereby: Dissenting Opinion of Judge Hunt) in *Hadžihasanović* Interlocutory Appeal, paras. 30-33; Partial Dissenting Opinion of Judge Shahabuddeen (hereby: Dissenting Opinion of Judge Shahabuddeen) in *Hadžihasanović* Interlocutory Appeal, para. 20; Dungel and Ghadiri (2010) pp. 33-34; Boas (2007) pp. 234-237.

97 Dissenting Opinion of Judge Shahabuddeen in *Hadžihasanović* Interlocutory Appeal*,* para. 20.

98 *Bemba* Trial Judgement, para. 213.

99 *Bemba* Decision, para. 424.

the issue and stated that the causality element also relates to the duty to punish.[100] Neverthe-less, based on the current state of the law, which precludes the causality element in relation to the duty to punish, one cannot say that the causality element *per se* precludes successor liabil-ity. This approach is therefore not preferred either.

The third approach to assessing successor liability is to look at the requirement of effective control. According to the Pre-Trial Chamber in *Bemba,* it is necessary to establish the exact time frame at which the effective control existed and not simply conclude that effective con-trol existed at some point or another.[101] After considering the positions taken by the *ad hoc* tribunals and the SCSL, the Pre-Trial Chamber noted that "the suspect must have had effec-tive control *at least* when the crimes were about to be committed."[102] This suggests that the commander cannot be held responsible for not punishing crimes which happened before the commander assumed his new post. It should be noted that some commentators have argued that the words "at least" allow for responsibility in respect of crimes after the end of com-mander's control.[103] However, pursuing this assertion further falls outside the scope of the thesis.

What is curious about the Pre-Trial Chamber's interpretation is that it reached its decision based on the language of the causality element in the chapeau of Article 28 (a):

> "419. Having considered the above, the Chamber is of the view that according to arti-cle 28(a) of the Statute, the suspect must have had effective control at least when the crimes were about to be committed. *This finding is supported by the language of the chapeau of article 28(a)* of the Statute, which states in the relevant part that a military commander or a person effectively acting as such shall be criminally responsible for the crimes committed by forces under his effective control "as a result of his or her failure to exercise control properly over such forces [...]". *The reference to the phrase*

[100] Separate Opinion of Judge Steiner in *Bemba* Trial Judgement, para. 14; Separate Opinion of Judge Ozaki in *Bemba* Trial Judgement, para. 17.

[101] *Bemba* Decision, para. 418.

[102] *Ibid.,* para. 419 (emphasis added).

[103] Dungel and Ghadiri (2011) pp. 28-30.

"failure to exercise control properly" suggests that the superior was already in control over the forces before the crimes were committed.[104]

The fact that the Pre-Trial Chamber refers to the phrase "as a result of his or her failure to exercise control properly over such forces" suggests that the wording of the causality element is decisive in the preclusion of successor liability. It arguably seems odd that the Pre-Trial Chamber rejects the causality element in relation to the duty to punish in paragraph 424, while essentially applying the same logic when determining that effective control requires temporal coincidence in paragraph 419. Given the diverging views within the ICC on the issue of the causality element and its complexity, it is difficult to assert with certainty just what the court actually means by this.

One way to reconcile this apparent discrepancy in the Pre-Trial Chamber's logic, is to read it as rejecting the notion that the causality element *per se* precludes successor liability, but that the underlying wording is the decisive factor which precludes successor liability in relation to the effective control requirement. The other possible way to reconcile the divergence is to accept that the view of the minority is the correct one. This means that the causality element encompasses a duty to punish as well. Hence one can say that the causality element bars successor liability. This thesis advocates the latter approach. That way, one avoids the logical acrobatics of saying that it is not the causality element *per se* which bars successor liability, but the words that make up the element.

In any event, the fact that the Trial Chamber did not rebut the Pre-Trial Chamber on this issue implicitly indicates that the Pre-Trial Chamber's interpretation of precluding successor liability is correct. Because the ICC did not discuss the words "were committing or about to commit", but opted for the approach of interpreting the effective control requirement instead, this approach is preferable in determining that successor liability is precluded within the Statute. Furthermore, since this argument was discussed in *Bemba* at the ICC, it must be deemed more authoritative than the interpretation provided for by the ICTY. It is the ICC who has the final authority on the correct interpretation of the Rome Statute. The Statute is the Court's primary source of law, and thus the ICC is most competent to interpret its provisions. Moreover, the

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[104] *Bemba* Decision, para. 419 (emphasis added).

Bemba Decision was rendered three years after the *Hadžihasanović* case and thus carries more weight as a newer source of law. Finally, the Pre-Trial Chamber was aware of the interpretation provided for by the majority in the *Hadžihasanović* Interlocutory Appeal and the surrounding disagreements about the case, yet decided not to apply that reasoning. Based on this, one can conclude that that successor liability is precluded before the ICC and the STL by Article 28 of the Rome Statute, and Article 3 (2) of the STL Statute, respectively. Though one cannot be entirely certain that successor liability is precluded at the STL before a case arises, the outcome is likely to be nearly identical at both the STL and the ICC given their nearly identical provisions.

5.1.2 ICTY and ICTR

Article 7 (3) of the ICTY Statute and Article 6 (3) of the ICTR Statute are also almost identical. Given that successor liability has been discussed at the ICTY, this chapter will focus on the ICTY provision. Nevertheless, it is important to emphasize that the comments on the interpretation of Article 7 (3) applies identically to the corresponding provision in the ICTR Statute.

Command responsibility in Article 7 (3) of the ICTY Statute is expressed as follows:

> "The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts *or had done so* and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[105]

The provision does not explicitly embrace successor liability. However, a plain reading of the text based on the phrase "or had done so", suggests that successor liability is included. There is no reason to include the past tense of the word unless past crimes are intended to be covered. This interpretation would be consistent a good faith interpretation in accordance with the ordinary meaning given to terms in the context of the light and purpose of the treaty, cf. Article 31 of the VCLT. To reiterate, the purpose of command responsibility is ensuring compliance and enforcement of international humanitarian law. Accepting successor liability as a

[105] Article 7 (3) of the ICTY Statute (emphasis added).

component of this would further strengthen this purpose. Yet, the current state of law is that Article 7 (3) does not allow for successor liability following the *Hadžihasanović* and *Orić* cases. They will be explored in the following.

5.1.2.1 The curious cases of Hadžihasanović and Orić

The current state of law is highly contentious. In *Kordić and Čerkez,* the Trial Chamber noted that temporal coincidence between the commission of the crimes and the commander's control was not required. The Trial Chamber found that "[t]he duty to punish naturally arises after a crime has been committed. Persons who assume command after the commission are under the same duty to punish."[106] This was followed up by the Pre-Trial Chamber in *Hadžihasanović.*[107] The Accused appealed the decision. The Appeals Chamber split 3:2 in the *Hadžihasanović* Interlocutory Appeal and decided that Article 7 (3) does require temporal coincidence between the commission of the crime and the commander's control. After presenting the different views of the parties, the majority immediately began examining the status of customary international law, without interpreting the wording of Article 7 (3).[108] This suggests that no conclusions can be drawn from a plain interpretation of the wording of the provision. As will be seen below in the minority's interpretation, this is not as unequivocal as the majority indicates. As a result, after examining a case from the Nuremberg Military Tribunal, the Rome Statute, Article 86 (2) of AP I, and Article 6 of the ILC's 1996 Draft Code of Crimes against the Peace and Security of Mankind, the majority held that there was no evidence that successor liability existed in customary international law. Hence, successor liability was precluded in Article 7 (3) as well.[109] In his dissent, Judge Shahabuddeen strongly opposed the majority. He engaged in a more thorough interpretation of the wording:

> "…the provision speaks of a case in which the subordinate "*had done*" the act…In such a case, *there may but need not be a coincidence of the superior/subordinate relationship with the commission of the act*. What, however, has to be simultaneous is the

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[106] *Kordić and Čerkez* Trial Judgement, para. 446.

[107] *Hadžihasanović* Decision on Joint Challenge to Jurisdiction, para. 202.

[108] *Hadžihasanović* Interlocutory Appeal, para. 44.

[109] *Hadžihasanović* Interlocutory Appeal, para. 51.

discovery by the commander and the existence of the superior/subordinate relationship."[110]

By further referring to the fact that this interpretation is supported by the Report of the Secretary-General,[111] and viewing command responsibility as a crime *per se,*[112] Judge Shahabuddeen concluded that Article 7 (3) supported successor liability.

The question of successor liability was revisited in the *Orić* Appeal Judgement a few years later. Once more, the panel of judges included Judge Shahabuddeen. The Appeals Chamber acquitted Orić on the relevant counts in question. Hence, the majority decided that it was not necessary to pronounce on the issue of successor liability directly. The minority, consisting of two judges, was joined by Judge Shahabuddeen on this issue, and disagreed strongly. The two dissenting judges, Judge Liu and Judge Schomburg, relied on the same interpretation of the wording as the minority in *Hadžihasanović*. Judge Liu noted that the majority in *Hadžihasanović* placed too little weight on the wording,[113] while Judge Schomburg stated that the wording of Article 7(3) of the Statute was clear and that "the phrasing 'was about to commit such acts or had done so' expresses that a superior can be held responsible regardless of when the crimes were committed by his subordinate, i.e. before or after the superior assumed command."[114] Additionally, Judge Shahabuddeen appended a curious declaration explaining his position. While agreeing on the merits with the dissenting judges, and noting that fourteen ICTY judges opposed the views of the majority in *Hadžihasanović*, he nevertheless declined to reverse the earlier ruling. Believing in a practice for judges to observe restraint in upholding their own dissent, he felt a reversal should await a time when a more solid majority shared the view of the two dissenting judges.[115] Consequently, despite resting on fragile ground, the current state of the law is that a commander cannot be charged under Article 7 (3) for crimes committed by subordinates before he assumed command over the subordinates.

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[110] Dissenting Opinion of Judge Shahabuddeen in *Hadžihasanović* Interlocutory Appeal, para. 28 (emphasis added).

[111] *Ibid.*, para. 29.

[112] Dissenting Opinion of Judge Shahabuddeen in *Hadžihasanović* Interlocutory Appeal, para. 32.

[113] Partially Dissenting Opinion and Declaration of Judge Liu (hereby: Dissenting Opinion of Judge Liu) in *Orić* Appeal Judgement, paras. 28-29.

[114] Separate and Partially Dissenting Opinion of Judge Schomburg (hereby: Dissenting Opinion of Judge Schomburg) in *Orić* Appeal Judgement, para. 13.

[115] Declaration of Judge Shahabuddeen in *Orić* Appeal Judgement, paras. 14-15.

5.1.2.2 A critical look at Hadžihasanović

To understand why the current state of law within the *ad hoc* tribunals is contentious, it is necessary to scrutinize the majority's reasoning in *Hadžihasanović.* As mentioned, the majority relied upon a handful of legal instruments when it found that there was no practice or evidence of *opinio juris* that supported successor liability.[116] The majority further added that "the Appeals Chamber holds the view that this Tribunal can impose criminal responsibility only if the crime charged was *clearly established under customary law* at the time the events in issue occurred."[117] The holding has been criticized for various reasons, including the flawed reliance of these instruments as evidence of State practice which forms custom.[118] It also attracted criticism for applying an incorrect test for determining whether customary international law allows for successor liability.[119]

The reliance on Article 28 as evidence of State practice is debatable. Firstly, as David Akerson and Natalie Knowlton point out, the Statute can be seen as "an exercise in compromise rather than attempt to articulate custom."[120] The drafting of the Rome Statute was a long and complex process which necessitated a lot of give-and-take between the parties. This point was in fact made by the ICTY as well, two years earlier in *Kunarac et al*. In a footnote, the Trial Chamber noted that:

> "[a]lthough the ICC Statute does not necessarily represent the represent status of international customary law, it is a useful instrument in confirming the content of customary international law. These provisions obviously *do not necessarily indicate what the state of the relevant law was at the time* relevant to this case. However they do provide some *evidence of state opinio juris* as to the relevant customary international law at the time at which the recommendations were adopted."[121]

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[116] *Hadžihasanović* Interlocutory Appeal, paras. 45-51.

[117] *Ibid.,* para. 51 (emphasis added).

[118] See *inter alia* Dissenting Opinion of Judge Liu in *Orić* Appeal Judgement, paras. 22-28.; Akerson and Knowlton (2009) pp. 625-631.

[119] See *inter alia* Dissenting Opinion of Judge Hunt in *Hadžihasanović* Interlocutory Appeal, paras. 10, 38, 40; Declaration of Judge Shahabuddeen in *Orić* Appeal Judgement, para. 17; Dungel and Ghadiri (2011) pp. 30-31; Boas (2007) pp. 236-237.

[120] Akerson and Knowlton (2009) p. 630.

[121] *Kunarac et al*. Trial Judgement, footnote 1210 (emphasis added).

This paints a nuanced image on the application of the Rome Statute in this context. If the majority applied the Rome Statute as evidence of *opinio juris*, rather than evidence of State practice, the reliance could be considered sound. However, the majority expressly rejected that there was any evidence of *opinio juris* sustaining successor liability.[122] Instead the majority seemingly applied the Statute as evidence of State practice, stating that: "In fact, there are indications that militate against the existence of a customary rule establishing such criminal responsibility. For example, Article 28 of the Rome Statute provides that…"[123] As noted, this is a debatable application.

The majority was also criticized for applying an incorrect test for determining the content of customary international law. The majority required that the crime of successor liability be "clearly established" under customary international law to impose criminal responsibility in such cases.[124] In other words, unless there already existed a clear norm of customary international law that explicitly supported successor liability, the majority would not recognize successor liability. What makes the approach so contentious is that the approach contradicts the unanimous approach applied by the panel earlier in the same decision. On the question of whether command responsibility existed in internal armed conflicts, the chamber unanimously applied a test of reasonability:

> "[W]here a principle can be shown to have been so 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*."[125]

It makes no sense to apply two different approaches for determining the content of customary international law in the same decision, as was also pointed out by Judge Hunt in his dissent.[126] The correct approach should have been applying the reasonability test and asking whether successor liability reasonably falls within the doctrine of command responsibility already established under customary international law, which has also been pointed out by certain

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[122] *Hadžihasanović* Interlocutory Appeal, para. 45.

[123] *Ibid*., para. 46.

[124] *Ibid*., para. 51.

[125] *Hadžihasanović* Interlocutory Appeal, para. 12 (emphasis added).

[126] Dissenting Opinion of Judge Hunt in *Hadžihasanović* Interlocutory Appeal, para. 10.

commentators.[127] This approach has indeed been applied several times by the *ad hoc* tribunals and described as a "well-established approach in international law."[128] If this approach was taken, as argued above, a plain interpretation of Article 7 (3) could have led to successor liability reasonably falling within the doctrine of command responsibility. Nevertheless, due to the inexplicable double standard applied in *Hadžihasanović,* successor liability is precluded *de lege lata* in the statutes of the *ad hoc* tribunals.

5.1.3 The most prominent international(ized) tribunals

5.1.3.1 SCSL

As noted, Article 6 (3) of the SCSL Statute mirrors that of the *ad hoc* tribunals. Therefore, for the same reasons as above, the wording "or had done so" suggest that successor liability is included. However, this is not the case *de lege lata* before the SCSL either. Referring to the ICTY and the controversial *Hadžihasanović* case, the SCSL Trial Chamber in *Brima* held that the Statute does not support successor liability.[129] This was followed up by the Appeals Chamber in *Fofana and Kandewa.*[130] For a short while, there seemed to be a shift in the SCSL's jurisprudence when the Trial Chamber in *Sesay et al.* endorsed the view of the minority in *Hadžihasanović*.[131] However, the case did not concern the successor commander, but the outgoing commander. The Chamber convicted one of the accused, Morris Kallon, for the crime of enslavement and held him responsible for the crime for the entire period between February and December 1998, even though his effective command ended in August 1998.[132] Nonetheless, this was reversed on appeal because the Appeals Chamber found that the Trial Chamber had not given sufficient reasoning for such an interpretation other than the fact that enslavement is a continuing crime.[133] Consequently, successor liability is precluded at the SCSL based on the same tenuous ground as at the *ad hoc* tribunals.

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[127] Dungel and Ghadiri (2009) pp. 30-31.

[128] *Karemera et al*. Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Édouard Karemera, André Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, para. 37; *Brđanin* Trial Judgement, para. 715.

[129] *Brima* Trial Judgement, para. 799.

[130] *Fofana and Kandewa* Appeal Judgement, para. 181.

[131] *Sesay et al.* Trial Judgement, para. 306.

[132] *Ibid*., para. 2146.

[133] *Sesay et al.* Appeal Judgement, para. 874.

5.1.3.2 ECCC

The ECCC also mainly adopts the wording of the *ad hoc* tribunals, but incorporates the ICC's alternative command/authority differentiation and it is therefore unnecessary to reproduce the provision. The divergence in question is not problematic in terms of successor liability. Like the provisions of the *ad hoc* tribunals, and the provision of the SCSL, the words "or had done so" in Article 29 (3) of the ECCC suggest that successor liability is included as a branch of the command responsibility doctrine. Having in mind the purpose of command responsibility, further strengthens this interpretation. The ECCC has adjudicated two cases relating to command responsibility.[134] Yet, the specific question of a temporal scope has not been put before the court. In general, the court's legal analysis on command responsibility seems to be in line with previous international practice, judging by the frequent references to ICTY case law.[135] Based on this, the possibility of successor liability remains open at the ECCC, but it is not possible to draw definite conclusions *de lege lata*.

5.1.3.3 SPSC

The SPSC also adopted the *ad hoc* wording, consequently the same arguments in favor of successor liability apply. However, as noted by Gideon Boas, very few cases involving command responsibility were adjudicated, and the results were varied.[136] The issue of the temporal scope of command responsibility did not arise before the SPSC during the time it was open. Thus, for the exact reasons as the ECCC, it is not possible to conclude definitively whether the SPSC supported successor liability *de lege lata*.

5.1.3.4 Kosovo Specialist Chambers

Article 16 (1) (c) of the law governing the Specialist Chambers in Kosovo adopts the wording of the *ad hoc* tribunals almost verbatim as well. Likewise, the phrase "or had done so" suggests that successor liability is included in the provision. However, it is too early to draw any conclusions from this internationalized court since proceedings have yet to start. The Rules of Procedure and Evidence were only adopted in March 2017.[137] It is impossible to understand how this court will apply the command responsibility doctrine until proceedings commence.

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[134] *Case 002/1 Nuon Chea and Khieu Samphan* Judgement, and *Case 001 Kaing Guek Eav* Judgement.

[135] *Case 001 Kaing Guek Eav* Judgement, paras. 538-549.

[136] Boas (2007) pp. 269-270.

[137] Kosovo Specialist Chambers and Prosecutor's Office (2017).

5.2 Analysis of relevant conventions and international legal instruments

5.2.1 Additional Protocol I, Articles 86 and 87

The crucial provisions regarding command responsibility in AP I are laid down in Article 86 (2) and Article 87 (3):

> "Article 86 – Failure to act
>
> 2. 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, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he *was committing or was going to commit* such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.
>
> Article 87 – Duty of commanders
>
> 3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are *going to commit or have committed* a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof."[138]

Article 86 (1) establishes a general obligation on States to repress or suppress breaches of the Geneva Conventions, or the Protocol, which result from a failure to act. Article 86 (2) deals with the concrete responsibility of superiors. On the face of it, Article 86 (2) precludes successor liability based on the same "grammatical tense argument" as the ICTY opted for when it interpreted Article 28 of the Rome Statute.[139] Article 86 (2) contains the phrase "was committing or was going to commit". The absence of a past tense alternative seemingly precludes successor liability. This reasoning, supported by the majority in *Hadžihasanović*, has been heavily criticized in both case law and literature. Most of the criticism is not directed at the isolated grammatical tense argument itself, rather the fact that the majority interpreted the provision in a vacuum and not together with Article 87, as well as the lack of taking the object

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[138] Articles 86 and 87 of AP I (emphasis added).

[139] *Hadžihasanović* Interlocutory Appeal, para. 47.

and purpose of the treaty into account during the interpretation.[140] But if one were to only interpret Article 86 (2) textually and in a vacuum, it would still be problematic because such an interpretation would seem to exclude the possibility to punish past crimes altogether, regardless of whether there is a change of commander.

In any event, one must examine Article 87 as well when examining whether AP I supports successor liability. Given that the heading of Article 87 is "Duty of commanders", it is only natural to look at this provision too. Article 87 (1) lays down the responsibility of commanders, and obliges the relevant parties to require military commanders to prevent, suppress and report breaches. The second paragraph concerns the duty to disseminate information amongst the members of the armed forces about the obligations under the Convention and the Protocol. They are not problematic in terms of the present discussion. It is paragraph three which plays the pivotal role regarding the possibility of successor liability. The provision does not explicitly embrace successor liability, but the paragraph includes the phrase "going to commit or have committed". A plain reading of this indicates that successor liability is covered by the provision, due to the inclusion of past crimes, alluded to by the word "committed". The same reasoning and interpretation is afforded as with the phrase "or had done so" found in most of the statutes. Having the object and purpose of command responsibility in mind. further strengthens this interpretation. The result of this plain interpretation is that Article 87 supports successor liability, while Article 86 remains more uncertain.

What does the discrepancy between Article 86 (2) and 87 (3) entail? It seems instinctively wrong that such interconnected provisions are supposed to contradict each other. Akerson and Knowlton doubt that the discrepancy is intentional, because the Commentary does not address the issue.[141] Furthermore, the Commentary uses both the past tense and the present tense when explaining the three main elements of command responsibility.[142] This indicates that the discrepancy is not intentional and consequently that they are not to be interpreted differently. The assumption seems logical given the interconnectivity between the provisions. However, it leads to the question of how to reconcile the discrepancy.

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140 See *inter alia* Dissenting Opinion of Judge Hunt in *Hadžihasanović* Interlocutory Appeal, paras. 21-24; Akerson and Knowlton (2009) pp. 626-629.

141 Akerson and Knowlton (2009) p. 627.

142 Sandoz (1987), p. 1013, para. 3543.

One way to reconcile the differences between Article 86 (2) and Article 87 (3) is to read them together. According to the Commentary, the Articles should indeed be read in conjunction.[143] As Judge Liu points out in his dissent in the *Orić* Appeal Judgement: "There is…no authority or indication that Article 86 should be read in isolation."[144] The majority in the *Hadžihasanović* Interlocutory Appeal addressed the minority's point of interpreting the articles in conjunction and dismissed it by pointing out that it is Article 86 (2) that explicitly addresses the individual responsibility of superiors, while Article 87 merely speaks of the obligation of States parties.[145] This conclusion is ill-considered. As has been pointed out by Judge Liu, and other commentators; both Article 86 and Article 87 contain the words "High Contracting Parties and the Parties to the Conflict."[146] This cannot therefore be taken to suggest that one provision addresses States, while the other addresses commanders. Furthermore, the heading of Article 87 is "Duty of commanders". Hence, there is both logical and strong support in the form of the Commentary, for reading the provisions together.

Furthermore, Article 31 (1) of the VCLT states that treaties should be interpreted in good faith and in the light of the object and purpose.[147] As noted by the Commentary, it is the third paragraph of the Preamble which provides the "*raison d'être* of the two aspects of the entire undertaking to reaffirm and develop humanitarian law."[148] According to the third paragraph of the Preamble, the object and purpose of AP I is to "reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application."[149] Interpreting article 86 and 87 to include successor liability would further this purpose and the general purpose of command responsibility. Allowing for successor liability is a step towards ending impunity and discouraging the commission of future crimes, which in turn ensures compliance with international humanitarian law. Support for this assertion is found in the dissenting opinions of Judge Hunt in *Hadžihasanović* and Judge Schomburg in

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[143] *Ibid.,* p. 1011, para. 3541.

[144] Dissenting Opinion of Judge Liu in *Orić* Appeal Judgement, para. 21.

[145] *Hadžihasanović* Interlocutory Appeal, para. 53.

[146] Dissenting Opinion of Judge Liu in *Orić* Appeal Judgement, para. 17; Fox (2004) p. 470.

[147] Vienna Convention on the Law of Treaties Article 31 (1).

[148] Sandoz (1987) p. 28, para. 26.

[149] Preamble to AP I, para. 3.

Orić.[150] Commentators, such as Akerson and Knowlton, and Dungel and Ghadiri, also endorse this interpretation.[151]

However, opposition to this approach has been voiced. Christopher Greenwood, currently a judge at the ICJ, acknowledges in the first place that "[i]f the exercise in which the Appeals Chamber was engaged had been one of applying [AP I and the Rome Statute] as such, that would…have been entirely correct."[152] He further points out that the Chamber was not engaged in applying the two treaties, but sought to discover the content of customary international law. According to Greenwood, this is an entirely different matter because it "give[s] the treaty provision a broader meaning than its wording might suggest and then read[s] that back into customary law."[153] Greenwood's argument is questionable. When examining the content of customary international law, one must interpret the relevant legal instruments. In doing so, there is no difference between the interpretation of a treaty for the purposes of applying that specific treaty and the interpretation of a treaty for the purposes of determining customary international law. By applying the purposive interpretation, one seeks to do this. This is in line with the principles of interpretation in the Vienna Convention on the Law of Treaties, which itself is part of customary international law.[154] Therefore, it is both natural and necessary to utilize purposive interpretation.

In conclusion, reading Article 86 and 87 together, and having in mind the object and the purpose of AP I, suggests that successor liability is allowed for by AP I. The fact that the commentary does not problematize the difference of the grammatical tenses further supports the interpretation that the discrepancy between Article 86 and 87 is non-intentional.

5.2.2 The ILC Draft Code

Article 12 and Article 6 of the 1991 and 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind are almost verbatim the same and will therefore be examined as one.

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150 Dissenting Opinion of Judge Hunt in *Hadžihasanović* Interlocutory Appeal para. 22; Dissenting Opinion of Judge Schomburg in *Orić* Appeal Judgement, para. 19.

151 Akerson and Knowlton (2009) p. 627; Dungel and Ghadiri (2010) p. 17.

152 Greenwood (2004) p. 604.

153 *Ibid*. p. 605.

154 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008,* p. 177, para. 112.

The provisions echo Article 86 (2) of AP I. For present purposes, it suffices to reproduce Article 6, titled "Responsibility of the superior":

> "The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, *in the circumstances at the time*, that the subordinate *was committing or was going to commit* such a crime and if they did not take all necessary measures within their power to prevent or repress the crime."[155]

On the face of it, the provision neither excludes nor includes successor liability explicitly. However, the phrases "in the circumstances at the time" and "was committing or was going to commit" indicate that past crimes committed prior to the assumption of a commanders control, are precluded. This was indeed how the majority in *Hadžihasanović* interpreted Article 6.[156] The dissenting judges in both *Hadžihasanović* and *Orić* vehemently opposed this interpretation because, once again, it would preclude punishing any past crimes. They also opposed the premise of utilizing the Draft Code as evidence of State practice for purpose of identifying customary international law.[157] There are cogent reasons to adhere to this argument. The ILC's members are elected in their individual capacity and not as representatives of their Governments.[158] Yet, the Draft Code is not void of value as a legal source. As Judge Liu points out in his dissent in *Orić*, it has an authoritative nature as judicial literature.[159] However, since its interpretation is highly contentious it is difficult to draw any conclusions from it regarding the successor commander issue.

5.2.3 Convention on Enforced Disappearance

Command responsibility is laid down in Article 6 of the Convention. Its relevant part reads as follows:

> "1. Each State Party shall take the necessary measures to hold criminally responsible at least:
>
> …

[155] Article 6 of the 1996 ILC Draft Code (emphasis added).

[156] *Hadžihasanović* Interlocutory Appeal, para. 49.

[157] Dissenting Opinion of Judge Shahabuddeen in *Hadžihasanović* Interlocutory Appeal, para. 20; Dissenting Opinion of Judge Hunt in *Hadžihasanović* Interlocutory Appeal, para. 26; Dissenting Opinion of Judge Liu in *Orić* Appeal Judgement, para. 22; Dissenting Opinion of Judge Schomburg in *Orić* Appeal Judgement, para. 20.

[158] International Law Commission (2017).

[159] Dissenting Opinion of Judge Liu in *Orić* Appeal Judgement, para. 22.

(b) A superior who:

(i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control *were committing or about to commit* a crime of enforced disappearance;

(ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and

(iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;

(c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander."[160]

The provision seemingly does not include past crimes, cf. the words "were committing or about to commit". It echoes AP I Article 86 (2) and the Draft Code provisions. Hence, it could be interpreted along the same lines as the two previous texts. As mentioned earlier, such an interpretation is contentious. To reiterate Judge Shahabuddeen's point in *Hadžihasanović*, the wording would suggest excluding crimes committed by the subordinates even if they were done after the commencement of the new commander's command where he had the required knowledge of the commission, but only after they were committed.[161] Such a reasoning would be inconsistent with the purpose of command responsibility. Consequently, it cannot be definitively concluded whether the Convention on Enforced Disappearance supports successor liability *de lege lata*.

5.3 Selected military manuals and domestic legislation

There is some debate about whether military manuals are evidence of customary international law.[162] For present purposes, it is sufficient to note and adhere to the fact that the ICTY has used military manuals as a tool in identifying military practice, and thereby State practice.[163] To correctly determine State practice, one would have to analyze all the various military man-

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[160] Article 6 of the Convention on Enforced Disappearance (emphasis added).

[161] Dissenting Opinion of Judge Shahabuddeen in *Hadžihasanović* Interlocutory Appeal, para. 20.

[162] See *inter alia* Turns (2010) p. 77, *contra* Crawford (2012) p. 24.

[163] *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 99.

uals and domestic legislation and jurisprudence around the world. Such a task is too extensive for a thesis like this. This subchapter is therefore largely limited to legislation which *could* be interpreted as including successor liability. The vast majority of military manuals and domestic legislation appears to not give any indication regarding successor liability. However, there are several provisions that include past crimes in the wording. The basis of this examination is the ICRC's customary international law database which is regularly updated.[164] From this database, it is evident that the military manuals of countries such as Australia, Burundi, Canada, Sierra Leone, South Africa, Spain, and Sweden all include a variation of the alternative "have committed", suggesting that past crimes are covered.[165] For instance, Sweden's International Humanitarian Law Manual provides:

> "The fact that a breach of the [1949 Geneva] Conventions or of [the 1977 Additional Protocol I] was committed by a subordinate does not absolve his superior from penal or disciplinary responsibility. This applies, however, only if the superiors knew, or had received intelligence enabling them to deduce, that the subordinate *had committed* or was about to commit such a breach, and if they had not taken all feasible steps in their power to prevent or punish the breach."[166]

The US Manual for Military Commissions corresponds verbatim with the US Military Commissions Act of 2009 and utilizes the phrase "or had done so" to indicate that past crimes are covered:

> "Principals
> Any person punishable under this chapter who—
> (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission;
> (2) causes an act to be done which if directly performed by him would be punishable by this chapter; or

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164 International Committee of the Red Cross.

165 Australia's Law of Armed Conflict Manual (2006) § 13.5; Burundi's Regulations on International Humanitarian Law (2007), part I *bis,* p 66; Canada's Law of Armed Conflict Manual (2001), para. 1621; Sierra Leone's Instructor Manual (2007), p 66; South Africa's Revised Civic Education Manual (2004), Chapter 4, para. 58; Spain's Law of Armed Conflict Manual (2007), para. 2.2.d; Sweden's International Humanitarian Law Manual (1991), section 4.2 p. 94.

166 Sweden's International Humanitarian Law Manual (1991), Section 4.2 p. 94 (emphasis added).

(3) is a superior commander who, with regard to acts punishable under this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts *or had done* so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof is a principal."[167]

Furthermore, in addition to Cambodia and Kosovo and the United States of America, which, several other States employ a variation of the phrase "have committed" or "had done so" in their relevant domestic legislation. The Criminal Code of Bosnia and Herzegovina, Iraq's Law of the Supreme Iraqi Criminal Tribunal, the International Crimes Act of the Netherlands, Peru's Decree on the Use of Force by the Armed Forces, Finland's Criminal Code, and Rwanda's Law Repressing the Crime of Genocide, Crimes against Humanity and War Crimes all include one the abovementioned phrases.[168] For instance, the Bosnian provision echoes that of the *ad hoc* tribunals and reads:

"The fact that any of the criminal offences referred to in Article 171 through 175 and Article 177 through 179 of this Code was perpetrated by a subordinate does not relieve his superior of culpability if he knew or had reason to know that the subordinate was about to commit such acts *or had done so* and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[169]

The Court of Bosnia and Herzegovina has adjudicated several cases involving command responsibility. In *Stupar*, the court had the opportunity to tackle the issue of the temporal scope directly. Relying heavily on the contentious *Hadžihasanović* case, the Court held that effective control must be proved to have existed at the time of commission of the crimes.[170] Given that the Criminal Code adopts the wording of the ICTY, and given that Bosnia and Herzegovina is one of the countries which the ICTY has jurisdiction over, it is not surprising that

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[167] The US Manual for Military Commissions (2010), para. 2, p IV-2; US Military Commissions Act (2009), para. 950q (emphasis added).

[168] Bosnia and Herzegovina's Criminal Code (2003), Article 180; Iraq's Law of the Supreme Iraqi Criminal Tribunal (2005), Article 15 (4); The International Crimes Act of the Netherlands (2003), Article 9; Peru's Decree on the Use of Force by the Armed Forces (2010), Article 29; Criminal Code of Finland (1989) as amended in 2008, Section 13; Rwanda's Law Repressing the Crime of Genocide, Crimes against Humanity and War Crimes (2003), Article 18.

[169] Bosnia and Herzegovina's Criminal Code (2003), Article 180 (2) (emphasis added).

[170] *Strupar* Second Verdict, paras. 80-83.

the Court followed the ICTY's jurisprudence. Some commentators have questioned whether the decision in *Stupar* reflects State practice because of the Court's internationalized bench and exclusive reliance on international criminal law.[171] One counterargument to this is that the internationalized composition of the bench does not change the fact that the Court still is a domestic institution. Furthermore, two of the three judges in the panel, a majority, were Bosnian. Additionally, the Court's reliance on international criminal law does not diminish its reflection on State practice. The court applied the doctrine of command responsibility as expressed in domestic legislation. It is only natural to rely on international jurisprudence in interpreting this legislation, considering this is where the doctrine has been elaborated upon the most. Consequently, successor liability seems to be precluded in Bosnia and Herzegovina.

It is worth pointing out that some States have command responsibility provisions that do not include the dichotomy of past, present, and future crimes, such as Azerbaijan, Belarus, and Yemen, amongst others.[172] These provisions simply express a duty to prevent violations of international humanitarian law. Interpreting them in light of the object and purpose of command responsibility as to include successor liability would be a step to strengthen efforts in ensuring compliance with international humanitarian law. However, this could infringe the principle of legality, which would arguably impede such an interpretation. Nevertheless, the possibility of such an interpretation is worth mentioning.

Finally, what is evident from these instruments, is that there is no uniform practice among States on successor commanders. As noted above, the absence of explicit language supporting successor liability does not mean that it does not exist. Having the object and purpose of command responsibility in mind, i.e. ending impunity, there are cogent reasons for interpreting the various instruments as including successor liability. As expressed by Judge Hunt in his dissent in *Hadžihasanović*, a reason for the lack of explicitness may be that the situation is so obvious that no one has ever seen the need to refer to it expressly.[173]. To draw the conclusion, as the majority in *Hadžihasanović* did, that there is no evidence in State practice which clearly establishes successor liability might be correct. However, as argued above, this is not the cor-

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[171] Dungel and Ghadiri (2011) p. 23, footnote 93.

[172] Criminal Code of Azerbaijan (1990), Article 117 (1); Criminal Code of Belarus (1999), Article 137 (1); Yemen's Military Criminal Code (1998), Article 23.

[173] Dissenting Opinion of Judge Hunt in *Hadžihasanović* Interlocutory Appeal, para. 12.

rect test. The correct test is one of reasonability. Therefore, the only conclusions one can make without analyzing the various manuals and domestic legislation in depth, is that there is no uniform standard among the States.

5.4 Summary: Successor liability in a state of uncertainty

In summary, successor liability within customary international law remains draped in a shroud of uncertainty. The statutes of the international(ized) criminal courts contain phrases which could be interpreted as allowing for successor liability. The question of the temporal scope of command responsibility has only been addressed directly and settled definitively *de lege lata* the ICTY and the SCSL. The jurisprudence of these tribunals reject the notion of successor liability. Admittedly, the reasoning behind the result rests on tenuous ground. The ICC has not addressed the issue directly, but given its decision in *Bemba* that effective control requires temporal coincidence, successor liability is precluded. The statutes of the other international(ized) tribunals remain uncertain given the lack of direct application. Successor liability remains unresolved and disputed within other international legal instruments as well. Finally, the possibility of successor liability within State practice diverges significantly. Based on this, there is insufficient evidence to conclude that successor liability is a widespread, uniform and consistent practice among States. What remains, if one applies a purposive interpretation of the relevant provisions, and a test of reasonability, is the *possibility* of successor liability. This mere possibility, however, is insufficient, not only as evidence of State practice, but also as evidence of *opinio juris.* Given that *opinio juris* is the belief that the practice in question is required by international law, one can hardly establish *opinio juris* if no practice exists.

6 A *de lege ferenda* view on successor liability

This chapter examines arguments for and against successor liability from the perspectives of criminal law, and humanitarian law, as well as policy and military perspectives.

6.1 Arguments in favor and against of successor liability

6.1.1 Ensuring enforcement of international humanitarian law

Is the successor commander’s failure to punish his subordinates for crimes in and of itself worthy of punishment? In other words, is it necessary, appropriate, and proportionate to punish the omission? It is arguably necessary because successor liability seeks to end impunity and deter future crimes, thereby ensuring enforcement of international humanitarian law. Because of the atrocious character of international crimes, the respect and dignity of human life demand that such acts do not go unpunished. When fundamental values are at stake, they must

be protected. The function of criminal law in general is to protect fundamental legal goods such as life and bodily integrity, freedom, and property. International criminal law aims to protect fundamental legal values of individuals and mankind and to prevent harm to these fundamental legal goods.[174] Since international crimes typically are large scale crimes, they affect not only the victims and their closest relatives, but also the broader international community. Thus, justice is not only needed by those closest affected by the crimes, but by a larger audience as well. It is also necessary in order to avoid the creation of a loophole, wherein neither the outgoing commander, nor the successor commander is held responsible.[175] This argument has spurred some criticism from commentators such as Greenwood, arguing that there is no "loophole". He argues that the belligerent state has a duty to punish crimes by its armed forces, irrespective of whether changes have been made.[176] Firstly, the point is not that the responsible persons within the system avoid the risk of prosecution, but whether command responsibility remains intact when replacing commanders. Secondly, Greenwood's point rests on the assumption that there is domestic legislation in place which allows for this. As seen in chapter 5.3, however, this is not always the case. Thus, the possibility of a "loophole" remains.

It also seems appropriate to criminalize successor liability because it is arguably the most effective way to ensure that the duty – which clearly exists – is fulfilled. Retribution and deterrence are considered the primary purposes of punishment in international criminal law.[177] It is the latter which is most relevant in terms of successor liability. A criminal liability for omitting to punish subordinates would motivate commanders to fulfill their duties. Successor liability would also reflect the serious commitment to protecting the fundamental legal interests involved, as mentioned above. Furthermore, for the same reasons of protecting fundamental legal values and ensuring enforcement of international humanitarian law, successor liability would be a proportionate response to the commander's dereliction of duty. It is important to note that the overall worthiness of punishment, and particularly its proportionality, depends on how one view the nature of command responsibility. Punishment is more proportionate if it is a response to a crime of omission, i.e. if command responsibility is a crime *per se*. As noted in Chapter 4, it is difficult to reconcile successor liability with the mode of liability approach. Punishing the successor for crimes he had no connection to, would be disproportionate.

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[174] Ambos (2013) pp. 65-66.

[175] Dissenting Opinion of Judge Shahabuddeen in *Hadžihasanović* Interlocutory Appeal, para. 14; Akerson and Knowlton (2009) p. 645; Fox (2004) p. 443.

[176] Greenwood (2004) p. 604.

[177] See *inter alia Bemba* Decision on Sentence pursuant to Article 76 of the Statute (*Bemba* Sentence), para. 10; *Čelebići* Appeal Judgement, para. 806; *Kambanda* Judgement and Sentence, para. 28.

6.1.2 Positive effect on sovereignty

Akerson and Knowlton argue that successor liability has positive effect on sovereignty.[178] The argument is on an institutional level, premised on successor liability as part of command responsibility which applies to civilian leaders as well. In this paradigm, the successor superior would be the successor administration with the head of government/head of state as the responsible superior. Even though this thesis examines the military component of command responsibility and successor liability specifically, the argument is of general value and is worth pondering on. The argument rests on the premise that the current paradigm of prosecuting international crimes mainly lies within the ICC. There are concerns among some states that have a critical view of the ICC that trusting so much power onto an international organ infringes the sovereignty of a State.[179] Seeking to address this, the Rome Statute includes the mechanism of "complementarity", whereby the State in question has the priority to prosecute cases which it has jurisdiction over. The jurisdiction of the ICC kicks in when the State in question is "unwilling or unable".[180] Akerson and Knowlton argue that successor liability applies pressure on the State to make sure domestic investigations and prosecutions are initiated. This serves as a useful way to control jurisdiction domestically through complementarity.[181] This way, the State retains its sovereignty. As an overarching argument in the broader doctrine of command responsibility, it also serves in favor of successor liability within the military paradigm.

6.1.3 Promoting fact finding

Armed conflict is chaotic. Commanders may die, get reassigned, promoted or demoted. This is an argument in and of itself. Commanders may often be replaced rapidly. This means that the problem easily occurs in practice and therefore should have a practical solution. Furthermore, successor liability may act as an incentive for the new commander to act to establish what happened prior to his command and subsequently take appropriate action. Akerson and Knowlton point out the fact that most international criminal courts have limited amount of resources and therefore prioritize the most senior perpetrators only.[182] Successor liability promotes a more comprehensive inquiry in the facts because the "middle commanders" often possess key information about who plans and issues orders. This way, one can obtain valuable information vital to criminal proceedings.

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[178] Akerson and Knowlton (2009) pp. 646-648

[179] See *inter alia* Kissinger (2001) pp. 92-95.

[180] Rome Statute Article 17

[181] Akerson and Knowlton (2009) p. 648.

[182] Akerson and Knowlton (2009) pp. 648-651.

6.1.4 Avoiding cynical abuse of power

Carol T. Fox furthers an argument connected to the disadvantages of a loophole. She believes that successor liability has a potential positive effect on command assignment strategies and military professionalism.[183] Imagine a general promoting one of the subordinates, within the unit that committed crimes, to the post of commander of that very unit. Such promotions would limit the new commander's motivation to investigate and punish crimes he previously was implicated in, according to Fox. Furthermore, commanders who want to make sure their troops avoid punishment could also frequently reassign commanders to different posts to avoid responsibility.[184] By accepting the successor liability branch of command responsibility, one would hamper this cynical abuse of power.

6.1.5 Restricting the military's ability to change commanders

On the other hand, successor liability might impede the military's ability to change commanders. If a high-ranking commander, for instance a general, learns that the members of a company have committed crimes, he has a duty to prevent and repress future crimes. As part of these duties, the general can initiate investigations against the commanding officer of the unit, and replace him with another. Successor liability would put an obligation on the new commander to punish his subordinates, once he learns of their crimes. Akerson and Knowlton believe that in such situations, successor liability may induce the nominated replacement to decline the command to avoid liability.[185] In cases of renegade units, this could be a highly dangerous impediment, one which could arguably facilitate the continuation of criminality. One must weigh the desire to avoid cynical abuse of power against the consequences of impeding the military's ability to change commanders. Yet again, as a means of ensuring compliance and enforcement of international humanitarian law, this thesis believes the weight of the former is more substantial.

7 Concluding remarks

As noted, a rule attains the status of customary international law if there exists a widespread practice of that rule amongst States, and if there exists a conviction that the practice is required by international law. Based on the foregoing examination of international legal instruments and jurisprudence as evidence of customary international law, as well as domestic leg-

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[183] Fox (2004) pp. 457-458.

[184] *Ibid.*

[185] Akerson and Knowlton (2009) pp. 650-651.

islation and jurisprudence, this thesis concludes that the rule of successor liability does not satisfy the two required elements. There are very few instances in which the issue has been addressed directly. In these cases, successor liability has been explicitly precluded, albeit on tenuous ground. However, as this thesis has argued, there are cogent reasons for accepting successor liability as a branch of the command responsibility doctrine from a *de lege ferenda* perspective, if command responsibility is perceived as a crime of omission in relation to the commander's duty to punish crimes, and as a mode of liability in relation to his duty to prevent crimes. This thesis supports this dual natured view of command responsibility. It is a more practical and workable standard then the current one, which is draped in a shroud of uncertainty. It has been said that doctrine of command responsibility "lies at the frontier between the high hopes that diligent leadership may prevent the commission of international crimes and the dark realities of command and leadership."[186] Accepting successor liability as a branch of command responsibility would contribute to the high hopes that the conduct of warfare is in accordance with international humanitarian law.

[186] Mettraux (2009) p. 271.

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