

Superior responsibility and crimes of specific intent: A disconnect in legal reasoning?

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Abstract

This dissertation examines the nature of superior responsibility, as a mode of criminal responsibility, and its applicability to crimes of specific intent. Specifically, the *mens rea* of superior responsibility is analysed in relation to the *mens rea* of crimes that require specific intent. Thus, the question arises whether a superior may be held accountable, in terms of superior responsibility, for crimes of specific intent. It is argued that a superior cannot be held accountable for specific intent crimes committed by her subordinates because not only does she not share the same specific intent required for the fulfilment of the definitional elements of the offence, but also because the basis of superior responsibility rests on negligence. In other words, a superior who acted negligently cannot be said to have acted with specific intent.

The introduction serves to introduce the issue and provide context to the thesis question at hand. The study commences with an examination of the doctrine of superior responsibility in Chapter 1 – *The nature and application of superior responsibility*. The purpose of this chapter is to establish a thorough understanding of the doctrine and how it has been applied in practice. By doing so the core elements of superior responsibility are identified.

Focus then shifts in Chapter 2 – *Mens rea, the ad hoc Tribunals and the International Criminal Court* - from superior responsibility to the broader concept of *mens rea* within international criminal law. Because of the importance of the subjective element the degrees of intent and negligence are discussed in detail. The purpose of this is to contrast the differing degrees of *mens rea*. Like Chapter 1, Chapter 2 provides a foundation of understanding of the subjective elements in the various statutes; and how it is applied by the *ad hoc* Tribunals and the International Criminal Court.

The previous two chapters act as groundwork to build the argument presented in Chapter 3 – *A superiors fault: the disconnect in reasoning*. It is argued that with a proper understanding of superior responsibility, combined with the nature of *mens rea* applicable to specific crimes, a superior cannot be held criminally responsible for a crime of specific intent by means of the doctrine of superior responsibility. Specifically, it is argued that the two ideas in question are contradictory, and violates the principle of personal culpability.

It is one thing to criticise ideas and concepts, and another to find solutions. Chapter 4 – *The criminal responsibility of a superior: a solution* –proposes a solution. In light of the principle of personal culpability, it is argued that convicting a superior for the crimes of her subordinates is incorrect and rather a superior should be held accountable for what she did wrong, that is, her failure to perform the duties required of her. Thus, she will be charged and convicted for her dereliction of duty. Further, anticipated difficulties that may arise from the solution will also be discussed. Lastly, Chapter 5 provides a summary of the dissertation

Key words: International criminal law; superior responsibility; *mens rea*; negligence; *dolus specialis*; *ad hoc* Tribunals; International Criminal Court; principle of culpability; dereliction of duty.

Table of contents

Introduction	i
1. Research question and thesis statement	i
2. Research objectives	ii
3. Limitations of the study	iii
4. Methodology	iii
5. Significance of study	iii
6. Structure	iv
Chapter 1 – The nature and application of superior responsibility	1
1. Codifying command responsibility	2
1.1. Additional Protocol I	2
1.2. The ICTR, ICTY and SCSL Statute	4
1.3. The ICC Statute	5
2. The elements of superior responsibility	8
2.1. Superior-subordinate relationship	8
2.2. The requirement of knowledge	12
2.3. The duties of the superior	20
3. The nature and scope of application of superior responsibility	23
3.1. Liability for omission	23
3.2. Dereliction of duty	25
3.3. Connection with the underlying offence	27
3.4. Superior responsibility and the issue of causation	30
3.5. Superior responsibility and fault	34
3.6. The guilt of a superior	36
3.7. Complicity, superior responsibility and prosecuting overlapping modes of liability	39
4. Conclusion	44

Chapter 2 – <i>Mens rea</i> , the <i>ad hoc</i> Tribunals, and the International Criminal Court	46
1. The different manifestations of fault	47
1.1. Strict liability	48
1.2. General intent	48
1.3. Specific intent or <i>dolus specialis</i>	50
1.4. Culpa or negligence	51
1.5. Strict liability, general intent, specific intent, and their differences	53
2. <i>Mens rea</i> and the <i>ad hoc</i> Tribunals	54
2.1. Special intent	55
2.2. Direct intent	56
2.3. Indirect intent	57
2.4. Negligence	58
3. <i>Mens rea</i> and the ICC Statute	59
3.1. Intent and knowledge in the ICC Statute	60
3.2. “Unless otherwise provided”	68
4. Conclusion	71
Chapter 3 – A superiors fault: The disconnect in reasoning	74
1. Negligently intentional?	76
2. A superior’s negligence	79
3. Superior responsibility, specific intent crimes and case law	85
4. The inapplicability of a superior’s negligence to specific intent	101
5. The principle of culpability and its applicability to the thesis question	101
6. Conclusion	104
Chapter 4 – The criminal responsibility of a superior: a solution	106
1. Dereliction of duty: A discussion	106
1.1. Narrowing the application of superior responsibility	108
1.2. Why a superior’s liability arises	109

1.3. A bait and switch?	110
2. Challenges to dereliction of duty liability	111
2.1. Contradicting practice?	111
2.2. The creation of a new offence and its availability to international Tribunals	113
3. National provisions on superior responsibility	122
4. Conclusion	123
Chapter 5 – Summary and concluding remarks	124
1. Overview of chapters	124
2. Concluding remarks	127
Bibliography	128

Introduction

Superior responsibility is damaged. Deceptively simple on the face of it, superior responsibility is, in fact, rife with issues that threaten to shake the ground upon which it stands. As a doctrine of international law, superior responsibility maintains that a superior may be criminally responsible for crimes committed by her subordinates if she failed to prevent or punish the commission of such offence. Crimes of the subordinate include all offences that make up the corpus of international criminal law, including specific intent crimes. The latter crimes, such as genocide, are considered amongst the most serious of offences that may be committed. What is specific to these crimes is the nature of the perpetrators state of mind, or *mens rea*. In order to be guilty of such an offence, a perpetrator is required to possess specific intent, or rather *dolus specialis*. Perhaps, it is more effective to describe it as double intent. Genocide provides a good example of this: a perpetrator not only intends to kill another person, she further intends to target a specific, protected, group of people. Examples include Nazi Germany's plan to irradiate people of the Jewish religion and culture during World War II. Crimes of specific intent are therefore considered so serious precisely because of the malicious, and often-time's evil, intent that lies behind the commission of such offences. Thus, crimes of specific intent are punished severely and a conviction in terms of such an offence stigmatizes the perpetrator as an offender of human rights. Therefore, when dealing with cases such as these it is of the utmost importance to correctly apply such punishment and follow the correct procedures while pursuing justice.

1. Research question and thesis statement

It was mentioned above that pursuant to superior responsibility, a superior may be held responsible for offences that form part of international criminal law, crimes that include specific intent crimes. A superior, when charged in terms superior responsibility, is not party to the underlying offence of her subordinates. Liability arises due to the superior's failure to prevent or punish the commission of the offence. Despite liability arising due to a failure of duty, the superior is charged and convicted for the underlying crime. For instance, a superior will be convicted of the crime of genocide and not an omission of duty. A serious flaw arises in the

application of superior responsibility to crimes of specific intent. Superior responsibility is essentially a crime of negligence, yet a superior who technically acted negligently may be held responsible for an offence that requires intent. It may therefore be said that negligence is somehow “transformed” into intent despite the absence of intent on the part of the superior. However, negligence and intent are stark contrasts of one another; notions of *mens rea* that share no common factors and operate at the opposite ends of the spectrum of fault. Hence, this study questions how a superior who acts negligently may be convicted of an offence of specific intent.

It is argued that the situation described above is contradictory and therefore a disconnection in legal reasoning arises. Specifically, it is maintained that a superior who acts negligently may never be convicted for a crime of specific intent. To hold that a superior may be convicted for a crime of specific intent pursuant to superior responsibility is therefore argued to be illogical and inconsistent and if superior responsibility is applied to a crime of specific intent, it is further a violation of the principle of culpability. The reason for adopting this position emerges from an examination of negligence, intent and the principle of culpability. Because negligence and intent are fundamentally incompatible, and in fact contradictory, a superior who acts negligently may never satisfy the elements of a crime of specific intent. That is, the superior can never satisfy the *mens rea* requirement for a crime of specific intent. This position, however, is contrary to current practice which allows for the conviction of a superior for a crime of specific intent pursuant to superior responsibility. Consequently, it is argued that existing practice is inherently wrong in its application of superior responsibility to crimes of specific intent.

2. Research objectives

The objective of this study is two-fold: (i) to establish that there is, in fact, an inconsistency or contradiction in the application of superior responsibility to crimes of specific intent, like genocide, thereby exposing a disconnection in legal reasoning; and (ii) propose a solution to this problem. Thus, this study attempts to root out specific issues within international criminal law in order to achieve a system that is both balanced and rounded.

3. Limitations of the study

The study is restricted to the scope of international criminal law and not national military law and the internal procedures of the military itself. Even though the findings and solution of this study could possibly be incorporated in such settings, this study has not been concerned with such application.

4. Methodology

In arguing for the two main objectives of this dissertation an analytical/critical, and occasionally but limited comparative, mind is employed when discussing statutes dealing with superior responsibility and specific intent crimes. Furthermore, the case law adjudicated by the various international criminal tribunals is examined in such a manner as to root out the issues at hand. Lastly, the plethora of literature produced by the legal academia concerning superior responsibility and/or crimes of specific intent will be pursued in much the same way described above.

By taking this approach, it is believed that a comprehensive and fair account of both superior responsibility and crimes of specific intent has been put forth, which will enable the achievement of the objectives of this study.

5. Significance of study

The significance of this study lies in the identification of conflicting principles within international criminal law and criminal responsibility. It is believed that if such conflicts can be resolved, significant strides can be made in developing a theory that is firmly grounded in reason and justice, which would inevitably lead to an institution that is highly effective in its mandate. Even though the crimes dealt with within international criminal law spark a deep emotional response it is still of the utmost importance to adjudicate such crimes from a rational and justified point of view. The international community should do all it can to achieve such a point of view; without succumbing to prejudice due to the possible emotional shock of the crimes that have been committed. Thus, the significance of this study is an attempt to help achieve such a goal.

6. Structure

In order to understand the discord that is argued to exist in international criminal law, the concepts of superior responsibility and *mens rea* as applied by international criminal law will have to be examined and understood. Thus, the first two chapters of this study serve the purpose of establishing a foundation from which to work.

Chapter 1 introduces the doctrine of superior responsibility with the goal of accounting for what exactly this ‘mode of responsibility’ entails. By the end of the Chapter, the reader should have a clear idea of the wide range of aspects that make up superior responsibility. Chapter 2 deals with the nature of *mens rea*, or the subjective requirement, with precisely that same goal in mind as Chapter 1: to give a rounded account of exactly what *mens rea* is and how it is applied in international law.

Chapter 3 establishes the disconnection in legal reasoning. Briefly, the discussion identifies the conflict between the required *mens rea* for superior responsibility and crimes of specific intent. Case law is then closely examined and it is argued that cases that have dealt with the issue above have incorrectly applied superior responsibility to crimes of specific intent. Lastly, in light of the discussion at hand, the principle of culpability is discussed.

That leaves Chapter 4 with the task of proposing a solution. It is argued that the issue at hand may be resolved, or perhaps avoided, by adopting a ‘causation dependent separate offence’ approach. It is maintained that superior responsibility should rather be seen as something of a separate offence, but not entirely. Lastly, Chapter 5 summarises the dissertation and provides concluding remarks.

1

The nature and application of superior responsibility

Individual criminal responsibility of superiors for the unlawful actions of their subordinates has roots deeply embedded in the grounds of history. The doctrine of superior responsibility, as a mode of criminal responsibility, has itself had a long history; a history that has had a rather turbulent past while on its way to the present. The idea that a superior can be held responsible for offences committed by their subordinates goes back as far as 1439 in an ordinance issued by Charles VII of France.¹ However, it was only in the aftermath of World War II that the doctrine of superior responsibility became prominent. It was used by the Nuremberg and Tokyo tribunals, from which came the controversial case of *Yamashita*² where the accused was found guilty of the acts of his subordinates, despite it never being proved that *Yamashita* possessed a culpable state of mind.³ The doctrine was again used in three other cases by the Nuremberg Tribunals. In *US v Pohl et al.* it was held that a superior has a positive or affirmative duty to prevent those under his command from committing acts which violate the laws of war.⁴ The *Hostage* case held that a superior may be held responsible for failing to control and supervise subordinates.⁵ In the *High Command* case, it was held that a commander must have performed a personal dereliction that is traceable to the commander or the failure to supervise subordinates constitutes criminal negligence.⁶ Even though these judgments received harsh criticism, and no consistent standard of the doctrine was applied, the post war Tribunals made telling strides in the development of superior responsibility.⁷

¹ LC Green 'Command responsibility in International Humanitarian Law' (1995) 5 *Transnational Law and Contemporary Problems* 321.

² *In re Yamashita* 327 US 1 (1945).

³ A Prévost 'Race and war crimes: The 1945 war crimes trial of General Tomoyuki Yamashita' (1992) 14 *Human Rights Quarterly* 337.

⁴ *US v Pohl et al.* (case 4), VTWC, 958-1163, 1011; as cited in K Ambos 'Superior responsibility' in A Cassese, P Gaeta, and J Jones J (eds) *The Rome Statute of the International Criminal Court* (2002) 811.

⁵ *US v von List et al.* (case 7), TWC XI, 1230 *et seq.* 1256-1257; as cited in Ambos (n 4 above) 811.

⁶ *US v von Leeb et al.* 12 TWC XI, S. 462-697, 544; as cited in Ambos (n 4 above) 811.

⁷ For a more in depth historical overview, see W.H. Parks 'Command responsibility for war crimes' (1973) 62 *MLR* 1-20; Green (n 1 above) 320-327; C Meloni *Command responsibility in international criminal law* (2010) 33-74.

This chapter discusses superior responsibility and is split into three sections. The first section concerns the codification of the doctrine starting from Additional Protocol I (AP I) and onwards. Following that, the elements of superior responsibility that must be proven in order to convict a superior in terms of the doctrine is discussed; and lastly, the nature and scope of application of superior responsibility will be discussed. The purpose of this chapter is to establish an understanding of the doctrine of superior responsibility. While there will be the odd disagreement, the doctrine has largely been presented and discussed in a way that represents a mainstream understanding of it.

1. Codifying Command Responsibility

1.1. Additional Protocol I

The application of superior responsibility, as a mode of liability, saw a sharp decline after the post-WWII tribunals. This could be attributed to the lack of codification, or due to State parties not wanting their military personnel held as, or seen as, war criminals.⁸ Together with this, the nature of the conflicts that arose after WWII could be identified as internal or civil conflicts rather than widespread international conflicts and therefore, more decentralized command structures existed rather than strict hierarchical military structures.⁹ Further, no real concern was given to prosecuting offences which occurred in non-international armed conflicts in international tribunals; States considered these conflicts as internal affairs, governed by domestic law.¹⁰ Despite its application by the US Military court in the *Medina* case,¹¹ the first international treaty to codify the doctrine, or at least the possible penal sanctions for superiors who failed to prevent or repress crimes committed by subordinates, was Additional Protocol I of 1977 to the Geneva Conventions on the Protection of Victims of International Armed Conflict of 1949. Article 86 and 87 of AP I, which must be read together, served as the basis of all future codifications of the doctrine. They read as follows

⁸ The doctrine's application in the post-war tribunals could even be seen as controversial and its use only justified as a 'means to an end'.

⁹ A Mitchell 'Failure to halt, prevent or punish: The doctrine of command responsibility for war crimes' (2000) 22 *Sydney Law Review* 381.

¹⁰ M Sassóli *et al.*, *How does law protect in war? Cases, documents and teaching materials on contemporary practice in International Humanitarian Law* (2011) Chapter 12, 2.

¹¹ *United States v Medina*, US Court of Military Appeals, decision of 9 March 1971, 20 USCMA 430. The requirement of knowledge applied by the military court is discussed below.

Article 86(1) The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

Article 86(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(1) The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

(2) In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

(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 this Protocol, and, where appropriate, 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.¹²

The two provisions provide for the failure to act on the part of the superior (Article 86(2)) and the duties of a superior (Article 87). Article 86(2) establishes three conditions which must be fulfilled to hold the superior responsible – (i) the breach was committed by one of the superior’s subordinates; (ii) the superior knew, or had information which should have enabled him or her to conclude that a breach was being committed or was going to be committed; (iii) the superior did not take all feasible measures within his or her power to prevent or repress the breach -¹³ while Article 87 describes the duties of a superior – which are similar to the concept of responsible command - i.e., to prevent, repress or report the commission of a crime(s) by subordinates.

¹² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

¹³ Ambos (n 4 above) 820.

1.2. The ICTR, ICTY and SCSL Statutes

Even with the codification of command responsibility in AP I, the most important contributing factor to the *resurgence*, and resulting analysis and development, of the doctrine was the mass atrocities committed in Croatia, Bosnia and Herzegovina, Rwanda and Sierra Leone in the 1990s. These events led to the establishment of independent *ad hoc* International Criminal Tribunals - The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, and the International Criminal Tribunal for Rwanda;¹⁴ as well as the hybrid tribunal of the Special Court for Sierra Leone,¹⁵ which was jointly established by the Government of Sierra Leone and the United Nations to prosecute those who ‘bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996’ -¹⁶ by the Security Council, in accordance with Chapter VII of the UN Charter.¹⁷ Article 7(3) of Statute of the ICTY, with Article 6(3) of the Statute of the ICTR being materially identical, reads 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.¹⁸

Noticeably, a number of factors incorporated in AP I are not set forth in the Statutes, for instance, a temporal reference is excluded in Article 7(3) and 6(3). Article 86(2) states that a superior should conclude that she, if she had reason to know, ‘*in the*

¹⁴ The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, more commonly referred to as the International Criminal Tribunal for the former Yugoslavia (hereafter referred to as the ICTY) and the International Criminal Tribunal for Rwanda (hereafter referred to as the ICTR).

¹⁵ Hereafter referred to as the SCSL. Together, the ICTR, ICTY and SCSL shall be referred to as the Statutes.

¹⁶ <http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx>.

¹⁷ Resolution 827 and resolution 955 of the United Nations Security Council created the ICTY and ICTR, respectively, while resolution 1315 requested the Secretary-General to start negotiations with the Sierra Leonean government to create the Special Court. An agreement was reached in 2002.

¹⁸ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, (1993).

circumstances at the time that a subordinate was or was going to commit a crime, should intervene and prevent or repress the breach. Articles 7(3)/6(3) on the other hand states that intervention must take place only when the subordinate *'was about to commit'* a crime or *'had done so'*. This affects the *actus reus* of the offence and on what bases the superior will be held liable, i.e., either for failure to prevent the offence or failure to punish the offence.¹⁹

It may be argued that because the provision is not further defined in any of the Statutes mentioned above, it left the parameters of the provisions to be determined by the Tribunals themselves.²⁰ However, throughout its history the doctrine has been applied in an inconsistent fashion resulting in ambiguity and by the time of codification in the *ad hoc* Tribunal Statutes the issues were no less clear. None-the-less, armed with this provision the *ad hoc* Tribunals, much to their credit, has decided on a wide range of issues.²¹ This certainly has helped both to illuminate and build on the understanding of the doctrine. It would be fair to say that without these judgments the final formulation of the doctrine in Article 28 of the ICC Statute would not be of such a comprehensive nature. As a result, a healthy and productive debate has ensued on the issues that come with the doctrine.

1.3. The ICC Statute

The International Criminal Court, which is governed by the Rome Statute and is the first permanent international criminal court, was established to prosecute perpetrators responsible for serious offences that are of concern to the international community.²²

The ICC, as distinct from the *ad hoc* tribunals, have prospective jurisdiction, and a very wide geographical jurisdiction, indeed theoretically the ICC has global

¹⁹ Ambos (n 4) 823.

²⁰ E Langston 'The superior responsibility doctrine in international law: Historical continuities, innovation and criminality: Can East Timor's Special Panels bring militia leaders to justice?' (2004) 4 *International Criminal Law Review* 141.

²¹ ICTY: *Prosecutor v Aleksovski* IT-95-14/1-T, Judgment, 25 June 1999; *Prosecutor v Blaškić* IT-95-14-T, Judgment, 3 March 2000; *Prosecutor v Blaškić* IT-95-14-A, Judgment, 29 July 2004; *Prosecutor v Delalić et al.*, IT-96-21-T, Judgment, 16 November 1998; *Prosecutor v Delalić et al.*, IT-96-21-A, 20 February 2001; *Prosecutor v Hadžihasanović* IT-01-47-T, Judgment, 15 March 2006; *Prosecutor v Halilović* IT-01-48-A, Judgment, 16 October 2007; *Prosecutor v Orić* IT-03-68-T, Judgment, 30 July 2006; *Prosecutor v Strugar* IT-01-42-T, Judgment, 31 January 2005; ICTR: *Prosecutor v Bagilishema* ICTR-95-1A-A, Judgment, 3 July 2002; *Prosecutor v Kayishema and Ruzindana* ICTR-95-1-T, Judgment, 21 May 1999; *Prosecutor v Musema* ICTR-96-13-T, Judgment, 27 January 2000.

²² http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx.

jurisdiction by virtue of Article 13(b) which empowers the Security Council to refer matters to the ICC that would ordinarily fall beyond the Court's jurisdiction. Moreover, the Court enjoys an ever increasing number of state parties.²³

Where the *ad hoc* Tribunals had to determine the nature and scope of superior responsibility, Article 28 - due to a detailed formulation of the doctrine - has left little space for judicial interpretation.²⁴ The constitutive elements of the doctrine are laid down so that, as Mettraux notes 'the greater clarity and certainty resulting from this detailed statutory definition will in turn provide more adequate notice to those to whom the standard may be relevant'.²⁵ Article 28 reads as follows

- (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.

- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

²³ M Nybondas *Command responsibility and its applicability to civilian superiors* (2010) 15-16; according to the ICC, 122 countries are now State Parties to the Rome Statute. See http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

²⁴ Langston (n 20 above) 159.

²⁵ G Mettraux *The law of command responsibility* (2009) 24.

- (iii) The superior 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.²⁶

The ICC Statute defines the doctrine in *positive* terms and not merely as an exclusionary clause. Instead of stating that a superior will not escape liability if an offence is committed by subordinates, Article 28 defines the doctrine as a separate form of liability.²⁷

Whereas the version of superior responsibility applied by the *ad hoc* Tribunals were said to be grounded in customary international law,²⁸ the version of superior responsibility specified in Article 28 appears to be the result of political compromise between the negotiating nations in order to reach a definition that was acceptable for all parties. Therefore, in a sense, Article 28 provides ‘a new command responsibility standard’,²⁹ that undoubtedly plays a role in developing the customary nature of superior responsibility.

Consequently, a number of differences arise in the formulation presented in Article 28 to the previous ones. For instance, an *explicit* distinction between a military and civilian superior is made in Article 28.³⁰ Further, Article 28 also differs from AP I and the *ad hoc* Tribunal Statutes with regard to the requirement of knowledge, or the *mens rea* of superior responsibility. In this regard, a third category of knowledge, “wilful blindness”, is introduced but with application restricted to superiors as defined in Article 28(b) or commonly known as a civilian or non-military superior. These are but a few differences between the various Statutes in relation to superior responsibility. The elements of superior responsibility, as well as the differences, will be discussed below.

²⁶ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002).

²⁷ Mettraux (n 25 above) 25. Contrasted with Ambos, (n 4 above) 851, who suggests that ‘Article 28 is a separate crime of omission’.

²⁸ *Prosecutor v Fofana and Kondewa*, SCSL-04-14-T, Judgment, 2 August 2007, par 233; *Prosecutor v Brima et al.*, SCSL-04-16-T, Judgment, 20 June 2007, par 782; *Prosecutor v Mandic*, X-KR-05/58, Judgment, 18 July 2007, par 151.

²⁹ G Vetter ‘Command responsibility of non-military superiors in the International Criminal Court (ICC)’ 25 (1) *The Yale Journal of International Law* 93.

³⁰ It is worth noting that AP I does intend to include civilian superiors into its definition of a superior due to the awareness that the post-WW II judgments tried civilian superiors for their omissions. Likewise, the *ad hoc* Tribunals have recognised that civilian superiors may be held accountable in terms of superior responsibility. See *Čelebići* Trial Judgment (n 21 above) par 359-363; and *Prosecutor v Kayishema and Ruzindana* Trial Judgment (n 21 above) par 213.

2. The Elements of Superior Responsibility

In order for a conviction pursuant to superior responsibility to be sustained, a number of elements must be established. These elements are somewhat implicit to the nature of the doctrine. However, the case of *Čelebići* established three, more explicit, requirements for superior responsibility: i) a *superior-subordinate relationship* existed; ii) the superior *knew or had reason to know*, based on the surrounding circumstances at the time, that the subordinates were about to commit such acts or had done so; and iii) the superior *failed to take the necessary and reasonable measures* to prevent or punish the commission of the offence.³¹ These requirements are individually discussed below.

2.1. Superior-subordinate relationship

As the name of the doctrine suggests, a relationship of authority needs to exist between a superior and subordinates. This relationship demands a hierarchical structure of command between the superior and her subordinates. Without such a relationship superior responsibility is never triggered. After World War II, international conflicts were not widespread as non-international armed conflicts became more prominent. Due to the lack of military-like structured forces within rebel or paramilitary forces, persons in authority did not fall within the confines of what a superior was defined as. This called for the recognition of such leaders. Therefore, a distinction is made between a *de jure* and *de facto* authority.

In the case of *de jure* authority the superior has been elected or appointed to a position of leadership. As a result, persons under the superior's leadership are considered to be legally her subordinates. A person in *de facto* authority is not formally elected to a position of leadership. All that is required is her capability and position to lead due to factual and personal factors that connect the superior commander to the actions of the subordinates.

The purpose of this distinction is to broaden the scope by which superior responsibility can hold superiors liable. A superior that falls under the spectrum of a *de jure* superior is generally considered to be a member of a military or military-like hierarchy while *de facto* authority was developed by the *ad hoc* Tribunals because

³¹ *Čelebići Appeals Judgment* (n 21 above) pars 189-198, 225-226, 238-239, 256, 263 and 346.

many of the armed forces in these areas arose through self-declared governments, irregular armies and militia groups, whose command structure could be described as obscure.³² Unlike *de jure* authority, *de facto* superiors could not then be seen as being formally and legally in command of troops. Therefore, a distinction between the varying types of superiors allows for superiors of different natures to be recognized in terms of superior responsibility. Thus, superior responsibility can be engaged if it can be proven that a superior had either *de jure* or *de facto* authority and had the ability to exercise control or “effective control” over her subordinates.

The distinction between *de jure* and *de facto* authority often underlies the difference between military or military-like superiors and civilian superiors. Whether a superior has *de jure* or *de facto* authority is dependent on the degree of authority that person exercises over others. A person who was not formally or legally instated as a superior may still be considered a superior if she possessed effective control. Thus, the defining aspect of being a superior is that degree of control. Therefore, a civilian who wields a sufficient degree of authority over others can be regarded as a civilian superior and so she incurs the responsibility entailed in superior responsibility. The ICTR Appeals Chamber thought that the difference between military and civilian superior’s lie with the manner in which the superior’s control is exercised.³³ The Article 28 of the ICC Statute, however, distinguishes between military or military-like superior’s (Article 28(a)) and non-military superiors or civilian superiors (Article 28(b)). The recognition of the different types of superiors is further distinguished by requiring a different *mens rea* for each category of superior.

The ICTY Appeals Chamber in *Čelebići* was of the view that the degree of control exercised by a *de facto* superior must be found to wield *substantially similar powers of control* to that of a *de jure* superior.³⁴ This raises the question regarding *de facto* superiors as to what is the level of authority needed to be prosecuted. If, according to the *Čelebići* trial, a *de facto* superior must exercise ‘substantially similar’ powers of control to that of a *de jure* superior, does that mean a civilian superior can only be found liable on condition that they exercise a military style command authority over alleged subordinates? Would a person, in a community or town under attack, who

³² MC Othman *Accountability for international humanitarian law violations: The case of Rwanda and East Timor* (2005) 260.

³³ *Bagilishema* Appeals Judgment (n 21 above) par 52.

³⁴ *Čelebići* Trial Judgment (n 21 above) par 197.

organizes the defense, be held liable for any crimes by other members of the community?

If a superior has the ability to exercise *effective control* over her subordinates a superior-subordinate relationship has been established. To determine whether a civilian superior had effective control it must be shown that *de facto* authority existed and '[...] the trappings of *de jure* authority are present and similar to those found in a military context'.³⁵ The 'trappings' of authority referred to include: awareness of a chain of command, the issuing and obeying of orders and the expectation that insubordination may lead to disciplinary action.³⁶ Therefore, the superior as well as the subordinate would need to be consciously aware of such position of superiority. The position of superiority need not be formally instated, with only an understanding sufficing, whether explicitly or implicitly, between the superior and subordinate that such relationship exists. Thus, if the parties are not aware of this relationship the 'superior' cannot be held criminally responsible.

The existence of a superior-subordinate relationship is dependent on a hierarchical relationship between a superior and her subordinates and that hierarchical relationship is established if effective control is shown to have existed. Once effective control is established a chain of command can be identified. As the Trial Chamber in *Halilović* noted 'there is no requirement [under international law] that the superior-subordinate relationship be direct or immediate in nature for a commander to be found liable for the acts of his subordinate. What is required is the establishment of the superior's effective control over the subordinate, whether that subordinate is immediately answerable to that superior or more remotely under his command.'³⁷ Thus, no direct subordination needs to be established, only that the superior must be senior in some sort of formal or informal hierarchy to the subordinate.³⁸

The superior's ability to *effectively* control her subordinates indicates that a chain of command exists, as noted in the *Kordić* case

³⁵ *Bagilishema* Appeals Judgment (n 21 above) par 151.

³⁶ *Bagilishema* Appeals Judgment (n 21 above) par 43.

³⁷ *Halilović* (n 36 above) par 63.

³⁸ *Halilović* Trial Judgment (n 21 above) par 59, see also *Čelebići* Appeals Judgment (n 21 above) par 217.

Only those superiors, either *de jure* or *de facto*, military or civilian, who are *clearly part of a chain of command*, either directly or indirectly, with the *actual power to control or punish* the acts of subordinates may incur criminal responsibility.³⁹

The existence of a chain of command, whether formal or informal, is required for both *de jure* and *de facto* superiors. An easier task would be to prove the existence of a chain of command in a military formation, due to the highly organized and structured nature of military armed forces, as opposed to the loosely defined arrangement of civilian or paramilitary forces. Whichever form the chain of command exists the superior's effective control of his subordinates is of the utmost importance in establishing the chain of command.

As such an important cog in the wheel of superior responsibility, to possess effective control means that the accused has 'the *material ability* to prevent offences or punish the principal offenders'.⁴⁰ Without such ability the superior has no effective control, and without effective control a charge of superior responsibility is not sustainable. Effective control is the ability of a superior to prevent or punish the actions of the perpetrators of the offence. This ability imposes the obligation to obey an order for the purpose of preventing and/or punishing an offence. This does not grant a superior the ability to exercise authority over an individual but rather prevent and punish the crimes of these individuals. Thus, an accused that does not have the authority to prevent or punish individuals is unable to be prosecuted on the basis of superior responsibility.⁴¹

In order to establish a superior-subordinate relationship, where effective control is present, the prosecution must identify those individuals over whom the accused exercised effective control. However, no requirement exists that states the subordinates must have been prosecuted for the offences; all that matters with regard to superior responsibility is that a hierarchical relationship existed.

Whether effective control did in fact exist is a matter of evidence. No concise or definitive list of requirements to establish effective control exists which means the court would have to assess the facts and circumstances on a case by case basis.

³⁹ *Prosecutor v Kordić and Cerkez* IT-95-14/2, Judgment, 26 February 2001, par 416.

⁴⁰ *Mettraux* (n 25 above) 156.

⁴¹ This is contrary to the view held in the *Yamashita* case where knowledge was imputed on the accused despite the lack of evidence proving its existence.

Temporal coincidence: Effective control gives rise to the question of whether a superior may be held criminally responsible where she is appointed *after* the offence has occurred. A newly appointed superior acquires the same duties as the previous commander but she did not have effective control over the perpetrators at the time the offence transpired. In the case of *Hadžihasanović*, the court stated that the superior needs to have effective control over his troops at the time the offence is committed implying the need for a temporal coincidence between the authority of the superior and events that occurred. However, a commander's duty is twofold. Once a superior becomes aware – either by way of actual knowledge or having a reason to know – her duty to prevent *or* punish the perpetrators is engaged. A newly appointed superior cannot prevent a crime that has already taken place, but if such a superior becomes aware that an offence has taken place she now has a duty to report these offences to the relevant authorities. If a superior's duty to prevent or punish is activated upon learning of such an offence it would seem reasonable that a superior should fulfill her duties, irrespective of temporal coincidence. If the previous superior failed, for whatever reasons, to punish the perpetrators and the new superior has the opportunity to do so, then surely she would be obliged to do so. If the underlying offence goes unpunished would it not be a grave injustice to the victims of the offence and defy the purpose of international humanitarian law. In his dissenting opinion in the *Hadžihasanović* case, Judge Hunt opined that the position of the majority of the Appeals Chamber - that a perfect temporal coincidence must exist - leaves 'a gaping hole in the protection which international humanitarian law seeks to provide for the victims of the crimes committed contrary to that law'.⁴²

The opinion expressed above is not the position of the *ad hoc* Tribunals, whom agree that a temporal coincidence must be established.⁴³

2.2. The requirement of knowledge

The most contentious requirement of superior responsibility is that of a superior's knowledge in relation to the underlying crime. Uncertainty has surrounded this requirement since its first application in the case of *Yamashita* right through to the

⁴² *Prosecutor v Hadžihasanović* IT-01-47-AR 72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Separate and Partially Dissenting Opinion of Judge David Hunt, par 13.

⁴³ Mettraux (n 25 above) 192.

modern formulations now applicable to the relevant Statutes. Separate standards of knowledge have emerged out of the *ad hoc* Tribunals and the Rome Statute. The *ad hoc* Tribunals hold a “had reason to know” standard as appropriate while the Rome Statute allows a “should have known” standard. The purpose of this section is to gain a clear understanding of the issue and how it applies to the thesis question.

A superior’s knowledge with regard to an offence is essential for a superior’s liability to be engaged. To be criminally responsible of a wrongful act requires a perpetrator to physically act unlawfully with a mental awareness of this unlawfully act. Without fault a person cannot be convicted of any wrong doing. Therefore, a coherent standard of knowledge and its application is very important. A large portion of the debate surrounding a superior’s knowledge revolves around how a superior should acquire information which would allow her to perform her duties of prevention or punishment.

The application of superior responsibility by the post-World War II military Tribunals was, arguably, the first time the doctrine had to be formalised which resulted in conflicting views being expressed. This is truer of the requirement of knowledge than any other. The Tribunal in *Yamashita* imposed a *strict form* of liability, which meant that a superior could be criminally responsible for the acts of her subordinates without proving criminal intent.⁴⁴ It was assumed that a superior, no matter the circumstances, was able to control her troops. This position was rejected by the *High Command* case by its statement that the modern dictates of war resulted in difficulties of a commander to keep informed with all active military operations. Therefore, the court introduced the “*knew or should have known*” test, according to which, if a superior ‘failed to exercise the means available to him to learn of the offence and, under the circumstances, he should have known and such failure to know constitutes criminal dereliction’.⁴⁵

As a result of the *My Lai massacre* in 1968, Captain Ernest Medina was charged on the basis of superior responsibility.⁴⁶ With regard to the standard of knowledge, the military Tribunal stated that ‘[...] a commander is also responsible if he has *actual*

⁴⁴ J Martinez ‘Understanding *mens rea* in command responsibility’ (2007) 5 *Journal of International Criminal Justice* 649.

⁴⁵ R Arnold ‘Article 28’ in O Triffterer (ed) *Commentary on the Rome Statute of the international criminal court: Observers’ notes, article by article* (2008) 828-829.

⁴⁶ *Medina* case (n 11 above).

knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to ensure compliance with the law of war.⁴⁷ The Tribunal had no support for such a statement and contradicted existing jurisprudence as well as the 1956 US Field Manual which adhered to the customary rule of “knew or should have known”.⁴⁸

Textual guidance was provided by Article 86(2) of Additional Protocol I by stating that a commander will not escape liability for the crimes of his subordinates, if he “*knew or had information which should have enabled them to conclude* in the circumstances at the time” that an offence has been or is being committed by her subordinates. A provision which meant to clarify the situation only added to the confusion. Instead of imputing knowledge, as was done in the case of *Yamashita*, a superior was responsible only if information was available to her which would have put her on notice of offences committed by subordinates. Thereafter, the duty to inquire as to the actions of subordinates is engaged.⁴⁹ Therefore, in terms of Article 86(2), the failure to conduct further inquiry, in spite of information, constitutes knowledge of the subordinates’ offences. The establishment of the *ad hoc* Tribunals and the ICC once again divided opinions on which test or formula should be applied in establishing a superior’s knowledge.

The test or standard of knowledge presented in the statutes of the ICTY and ICTR⁵⁰ states that an accused is liable where she “*knew or had reason to know*” that a subordinate was about to or has committed an offence. The term “*knew*” entails actual knowledge, which may not be presumed but may be established through direct evidence of knowledge or circumstantial evidence which infers actual knowledge.⁵¹ The phrase “*had reason to know*” has proven to be difficult to interpret

⁴⁷ S Hendin ‘Command responsibility and superior orders in the twentieth century - A century of evolution’ (2003) 10 *Murdoch University Electronic Journal of Law* par 133.

⁴⁸ US Department of the Army, *Law of Land Warfare, Field Manual, 27-10*, par 501, as cited in R Cryer *Prosecuting international crimes, selectivity and the international criminal law regime* (2005) 321.

⁴⁹ Othman (n 32 above) 254.

⁵⁰ Article 7(3) & Article 6(3), respectfully.

⁵¹ DA Mundis ‘Crimes of the commander: Superior responsibility under Article 7(3) of the ICTY Statute’ in G Boas & W Schabas (eds) *International criminal law developments in the case of the ICTY* (2003) 256.

and apply largely due to leading cases of the ICTY reaching conflicting conclusions.⁵²

According to the Trial Chamber in *Čelebići*, “*had reason to know*” was to be interpreted to mean

[...] a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates.⁵³

Therefore, the superior must have information which would lead to further inquiry. The *Blaškić* Trial Chamber interpreted the phrase differently, stating that

[...] if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute.⁵⁴

The Trial Chamber in *Blaškić* disagreed with the analysis of the Trial Chamber in *Čelebići*. In *Blaškić* the preferred interpretation was that of the case law of World War II, which placed a duty on the superior to investigate the conduct of their subordinates whether or not they had information which provoked suspicion.⁵⁵ The prosecution favoured this interpretation in the appeal trial of *Čelebići* arguing that “had reason to know” equates a “should have known” standard.⁵⁶ However, this was rejected by the Appeals Chamber stating that ‘the Appeals Chamber would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of strict imputed liability’.⁵⁷ The Appeals Chamber

⁵² *Čelebići* Trial Judgment (n 21 above) and *Blaškić* Trial Judgment (n 21 above).

⁵³ *Čelebići* Trial Judgment (n 21 above) par 393

⁵⁴ *Blaškić* Trial Judgment (n 21 above) par 332.

⁵⁵ J Martinez ‘Understanding *mens rea* in command responsibility’ (2007) 5 *Journal of International Criminal Justice* 657.

⁵⁶ Mundis (n 51 above) 258.

⁵⁷ *Čelebići* Appeals Judgment (n 21 above) par 239; see also par 223 and 224. The position held by the Appeal Chamber was also held in the ICTR trial of *Musema* Trial Judgment (n 21 above) par 129-

therefore affirmed the interpretation of the *Čelebići* Trial Chamber,⁵⁸ while further adding that

Article 7(3) of the Statute is concerned with superior liability arising from failure to act in spite of knowledge. Neglect of a duty to acquire such knowledge, however, does not feature in the provision as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or punish. The Appeals Chamber takes it that the Prosecution seeks a finding that “reason to know” exists on the part of a commander if the latter is seriously negligent in his duty to obtain the relevant information. The point here should not be that knowledge may be presumed if a person fails in his *duty* to obtain the relevant information of a crime, but it may be presumed if he had the *means* to obtain the knowledge but deliberately refrained from doing so. The Prosecution’s argument that a breach of a duty of a superior to remain constantly informed of his subordinates actions will necessarily result in *criminal* liability comes close to the imposition of criminal liability on a strict or negligence basis. It is however noted that although a commander’s failure to remain apprised of his subordinate’s action, or to set up a monitoring system may constitute a neglect of duty which results in liability within the military disciplinary framework, it will not necessarily result in criminal liability.⁵⁹

The *Blaškić* Appeals Chamber agreed with this interpretation put forward in *Čelebići* and therefore overturned the Trial Chamber’s judgment.⁶⁰

The information that was in the possession of a superior need not be specific or conclusive proof as to the commission of an offence, but rather, it may be of a general nature; that is, information which simply indicates the need for further investigation.⁶¹

To conclude, if actual knowledge cannot be proven, knowledge is said to have existed if a superior had in her possession information that should have led to further inquiry and failed to do so. Therefore, the Tribunals held that without an evidential basis, albeit circumstantial, knowledge cannot be imputed on the superior and explicitly ‘rejected the view that a superior could be held criminally responsible for the actions of his subordinates based solely on a failure to obtain information of a

130, which stated that command responsibility is not a form of strict liability but the *mens rea* should rather be “at least negligence that is so serious as to be tantamount to acquiescence.”; B Bonafe ‘Finding a proper role for command responsibility’ (2007) 5 *Journal of International Criminal Law* 606.

⁵⁸ *Čelebići* Appeals Judgment (n 21 above) par 236, stating: “...only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates.”

⁵⁹ *Čelebići* Appeals Judgment (n 21 above) par 226.

⁶⁰ Martinez (n 55 above) 658.

⁶¹ Bonafe (n 57 above) 607; Martinez (n 55 above) 656.

general nature within his reasonable access due to a serious dereliction of duty. In other words, the *ad hoc* Tribunals have said that customary law does not recognize a “*should have known*” standard of *mens rea*.⁶²

Knowledge, as contained in Article 28 of the ICC Statute, provides two standards of knowledge which vary depending on the nature of authority exercised by the accused.⁶³ According to Article 28(a), applicable to military superiors and military-like superiors, the accused either “*knew or, owing to the circumstances at the time, should have known*” that their subordinates were about to or have committed an offence. Article 28(b), on the other hand, describes a non-military (civilian) superior who either “*knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes*”. Knowledge with regard to civilian superiors will not be discussed.

According to Pre-Trial Chamber II in *Bemba*, the “should have known” standard requires the superior to ‘have merely been negligent in failing to acquire knowledge’ of his or her subordinates’ illegal conduct, while further adding

[...] it is the Chamber’s view that the ‘should have known’ standard requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime.⁶⁴

Based on this interpretation a superior has a *duty* to obtain information. The failure of such a duty does not constitute a defence, as liability, in terms of Article 28, arises due to the failure to obtain the relevant information and not for failure to prevent or punish despite sufficient knowledge. As with Article 7(3) of the ICTY statute,⁶⁵ Article 28(a)(i) provides for actual knowledge, which may be proven through direct or circumstantial evidence.

The phrase ‘*owing to the circumstances at the time*’ will likely have an effect on a superior’s knowledge and leads one to believe that it means that a superior cannot be held criminally responsible in terms of Article 28(a) if at any time, before or after

⁶² Mettraux (n 25 above) 209.

⁶³ Mettraux (n 25 above) 195.

⁶⁴ *Prosecutor v Jean Pierre Bemba Gombo* (“*Bemba* Pre-Trial Chamber”) ICC-01/05-01/08, Judgment, 10 June 2008, par 433, as cited in W Schabas *The International Criminal Court: A commentary on the Rome Statute* (2010) 462.

⁶⁵ Along with Article 6(3) of both the ICTR statute and Statute for the Special Court of Sierra Leone.

the commission of the offence, she was unable, because of the surrounding circumstances at that particular time, to obtain the necessary information.

The standard envisaged in Article 28(a) appears to have reverted back to interpretations held in the post-World War II trials.⁶⁶ It will be interesting to see how the ICC interprets and applies this standard.

Article 28(b), on the other hand, maintains that a superior must have either “*knew or consciously disregarded information*” which clearly indicated the conduct of the superiors subordinates. Ultimately, this amounts to wilful blindness on the part of the superior which is itself often seen as the equivalent of intent. This is because it will have to be proven that the superior either ‘effectively knew of the crimes or had sufficient information in his possession to conclude that such crimes had been committed or were about to be committed’.⁶⁷ Therefore, this is a stricter standard of knowledge compared to Article 28(a). While Article 28(a) applies to military, or military like, superiors, Article 28(b) applies to non-military superiors.

One thing is clear about the above discussion: no consensus as to a superior’s knowledge exists, resulting in an incoherent application of the doctrine. Which standard benefits superior responsibility the most? Coherence in legal doctrines ensures fair application and therefore the desired reach of justice.

Both “*had reason to know*” and “*should have known*” standards reach opposite conclusions which results in different moments of blame. The former requires information to be present to the superior but this superior need not have acquired it herself. It is only once a superior has knowledge that her duty to prevent or punish is engaged, thereby blameworthiness arises due to her failure of duty in spite of her knowledge. The latter adds another duty to a superior’s obligations, i.e. she *must actively* obtained information as to her subordinate’s actions. The moment of blame has thus been shifted from failure to act despite knowledge, to failure to acquire knowledge. But which of these standards are true to the purpose of superior responsibility? As will be discussed, problems arise for both.

⁶⁶ In *Yamashita* the court, besides imposing actual knowledge on the accused, found that the accused was meant to obtain information as to his troop’s actions.

⁶⁷ Mettraux (n 25 above) 195.

“Had reason to know”: As is known, knowledge in terms of “had reason to know” means liability arises due a failure to take necessary and reasonable measures to prevent or punish an offence while in possession of knowledge. A criticism of a “had reason to know” standard is that it may be too lenient on a superior’s control of her troops. If a superior was aware of her troop’s actions she would possess more control of what they do. With no duty to stay informed a superior has a plausible explanation for her failure to prevent or punish. It seems fair to suggest that a superior can assume her subordinates will not commit an offence. Military, or military-like, operations thrive on obedience and discipline, qualities that are instilled in each subordinate early on in their training. Disobedience is therefore not the norm. If a superior has no reason to suspect otherwise, she will see no reason to keep informed of her subordinates and will assume the only actions they take are those she instructs them to do. Adding another duty to a superior’s workload, as the “should have known” standard does, seems unjustified. While this situation may be different in cases of civilian superior’s, the criticism of leniency looks to be at fault.

While one criticism may be swept aside, another more critical observation should be made. The *ad hoc* Tribunals have stridently held the position that superior responsibility is not a form of strict liability, and rightfully so. But this may only be so in certain analysis. If a superior *knew* of the underlying crime and does not take necessary and reasonable measure to prevent or punish it, she is held responsible for such failure. This seems fair. What if a superior had information in her possession which warranted further investigation, which is done, that leads to the conclusion that an offence will or has taken place? If this was proven, then the superior appears have had actual knowledge and the above applies here. But what if a superior in possession of information which warrants further inquiry fails to inquiry further? The superior would never know of the offence due to her failure to investigate. The ability to take measures to prevent or punish presupposes knowledge of some kind. Had a superior investigated further she would have known of the offence. For this reason knowledge is imposed onto the superior. It is hard to see how knowledge is attributed to a superior when she has none, albeit through her own failures. This seems less like a culpable state of mind and rather like a *negligent* one.

“Should have known”: Mettraux criticises this standard of knowledge by stating that it ‘effectively replaces the requirement of knowledge with a legal fiction of knowledge

whereby a commander is attributed knowledge of a fact which he did not possess. In so doing, the ICC Statute greatly dilutes the principle of personal culpability that underlies the doctrine of superior liability under customary law'.⁶⁸ There seems to be different facets to this standard of knowledge. If a superior fails to acquire knowledge, the knowledge she should have found is imputed onto her. Like a “had reason to know” standard it seems like a *negligent* state of mind. Can knowledge be imposed on such a mind? It is hard to see how. But if a superior *has* acquired the relevant information but then fails to prevent or punish, she will be criminally responsible in what looks like a “had reason to know” standard of knowledge.

The ICTR in *Kayishema and Ruzindana* interpreted the “should have known” standard as the failure to *take notice* of information that may have indicated the occurrence of a crime and not as the failure to obtain information.⁶⁹ The Trial held that the phrase ‘*owing to the circumstances at the time*’ meant the failure to take notice of information in the superior’s possession.⁷⁰

Similarities between standards: Both interpretations create additional duties. “Had reason to know” creates a duty to investigate based on information possessed; “should have known” demands a superior keep herself informed of her subordinates actions. If, on the one hand, a superior has failed to investigate while the other failed to obtain information, then they both seem to create a standard of negligence.

Perhaps the conflict between the two standards is superficial. Pre-Trial Chamber II in the *Bemba* case thought “had reason to know” was useful when applying the “should have known” standard.⁷¹ How the International Criminal Court decides to apply the standards of knowledge will be revealed in time.

2.3. The duties of the superior

A superior’s obligation to act is a dual source of liability. She is obliged to *either*: (i) prevent or repress the commission of an offence; *or* (ii) punish the perpetrator(s) who committed the offence. The duty imposed on a commander to prevent or punish is no longer seen as a unitary requirement for responsibility to be engaged but rather,

⁶⁸ Mettraux (n 25 above) 210.

⁶⁹ *Kayishema and Ruzindana* Trial Judgment (n 21 above) par 225-228.

⁷⁰ Arnold (n 45 above) 830.

⁷¹ *Bemba* (n 64 above) par 434.

as stated in the *Orić* case, '[T]he duty to prevent or punish does not provided the Accused with alternative and equally satisfying options but with two distinct sets of obligations'.⁷² Therefore, the accused may incur liability if she fails to prevent the crime *or* fails to punish the perpetrators of the offence. The distinction of the two duties is within reason as both duties are justifiably seen as different crimes happening at different times. The distinction lies within the time the offence occurred or will occur. Thus, the duty to prevent a crime means that a superior must prevent a *future* crime and the duty to punish is to hold those responsible accountable for their actions which have *already* been committed.

The result of which is that a commander who fails to prevent a crime, despite knowing that such a crime will occur, cannot then punish the perpetrators thinking she has fulfilled her obligations. The superior has failed to perform her duty to prevent or repress the commission of the offence and as such will be criminally responsible for such failure.⁷³ These two requirements, the duty to prevent and the duty to punish, will briefly be discussed.

Duty to prevent: Once a superior acquires sufficient knowledge that her subordinates are prepared or plan to commit an offence, the superior's duty to take *necessary* and *reasonable* measures to prevent the offence is engaged. What constitutes necessary and reasonable will be discussed below as it forms part of the duty to punish as well.

Duty to punish: If the underlying offence is completed and this superior had justifiable reasons for not having knowledge, then she is obliged to take *necessary* and *reasonable* measures to ensure that the matter is reported to the relevant and competent authorities. She is under no obligation to perform the investigation herself and if the authorities who investigated the offence deem it not worthy of pursuing, the superior cannot then be charge in terms of superior responsibility. A superior is charged because she failed to perform her duties, but it should be remembered that criminal responsibility is limited to those duties 'within her powers'. A superior may, therefore, not be held responsible where her powers cannot be exercised. The ICRC emphasizes that international law '[...] reasonably restricts the obligation upon superiors to "feasible" measures. In addition, it is a matter of common sense that the

⁷² *Orić* Trial Judgment (n 21 above) par 332.

⁷³ *Hadžihasanović* Interlocutory Appeal (n 42 above) par 23.

measures concerned are described as those measures “within their power’ and only those’.⁷⁴ The same view was reiterated by the Trial Chamber in the case of *Čelebići*, stating that

[...] a superior may only be held criminally responsible for failing to take such measures that are within his powers [...] we conclude that the superior should be held responsible for failing to take such measures that are within his material possibility.⁷⁵

An objective assessment of the prevailing circumstances at the time must be conducted in order to determine whether a superior had taken both necessary and reasonable steps when trying to prevent, repress or punish an offence. The Appeal Chamber in *Halilović* summarized the concept of a “*necessary*” measure as ‘measures appropriate for the superior to discharge his obligations (showing that he genuinely tried to prevent or punish)’.⁷⁶ The same view was held in the case of *Orić*.⁷⁷ Again, it should be remembered that the superior is only obliged to perform the necessary tasks that are within her powers and if it is outside her authority she cannot be held criminally responsible.

The same can almost be said about “*reasonable*” measures. While assessing her duties and responsibilities a superior must adopt a position that fulfills these duties. What is reasonable of a superior’s duties and responsibilities is a minimum standard of conduct that is required by a superior to prevent or punish an offence. Therefore, if the actions implemented by the superior are shown to be unreasonable in the circumstances, when there were other options available to her, she may be found criminally responsible. Determining whether an action was reasonable in the circumstances is the superior’s decision and not the courts. Courts are fortunate enough to calmly and rationally review the facts after the events had occurred. Such an assessment could unfairly prejudice an accused because it is made without the stress and pressure indigenous to war, thereby allowing for the possibility of unreasonable standards being applied to the accused.

⁷⁴ ICRC Commentary on the Additional Protocols par 3548.

⁷⁵ *Čelebići* Trial Judgment (n 21 above) par 395.

⁷⁶ *Halilović* Appeals Judgment (n 21 above) par 63.

⁷⁷ *Prosecutor v Orić* IT-03-68-A, Judgment, 3 July 2008, par 177.

3. The nature and scope of application of superior responsibility

The origins of superior responsibility, or the reason for its existence, stems from the principle of responsible command. That principle ‘demands of superiors that they should ensure that forces under their command are properly organised, that they are disciplined and that they are capable of complying with humanitarian standards’.⁷⁸ Thus, superiors are under the duty to ensure that they command their troops responsibly. Superior responsibility then is the punishment of a superior who failed to perform specific duties that are required of a superior that ensure that that superior has complied with the principle of responsible command. Despite its seemingly existential validity, superior responsibility can be described as a peculiar form of legal responsibility. Its various elements could easily be confused as part of other forms of responsibility. Despite this, one can never truly “hit the nail on the head” as how to categorise it. Thus, it is often described as a *sui generis* form of criminal responsibility. At first glance it appears to be rather straightforward, but this is deceptive. The purpose, then, of this section is to reduce superior responsibility to its bare essentials and analyse each foundational components upon which it stands, while keeping in mind the thesis question at hand. By doing so, the nature and scope of the doctrine will be revealed.

3.1. Liability for omission

As a form of criminal liability, superior responsibility applies to violations of the laws and customs of war. Not only are war crimes included, but international crimes included in the *ad hoc* Tribunals Statutes and the ICC Statutes as well.⁷⁹ Exactly how superior responsibility applies to these categories of crimes will be discussed to find out how a superior is linked to these offences and what role a superior plays in the commission of the offences.

Superior responsibility is most easily understood as a *sui generis* form of liability for omission. A superior’s liability arises due to her failure to act (the omission) in accordance with the duties required of her by international law. Individuals in a position of authority or superiority are obliged to follow the duties required of them in terms of international law. The failure to perform these duties exposes a superior to

⁷⁸ Mettraux (n 25 above) 53.

⁷⁹ Mettraux (n 25 above) 38.

criminal responsibility. In the case of superior responsibility, liability of the superior is premised on the superior's failure - to take necessary and reasonable measures, as discussed above – to prevent, repress or punish the commission of an offence committed by her subordinates. The authority possessed by the superior triggers her duty to act in terms of binding law. If such authority is absent, no liability arises. It follows that a superior is not charged because of the crimes of her subordinates, or for being a party to the crimes, but for her *failure* to perform her duties. This is an important aspect of superior responsibility as it protects the doctrine against the accusation of being a form of strict liability. In the case of *Krnojelac*, the Appeals Chamber pointed out that 'it cannot be overemphasised that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control'.⁸⁰ As a result, the *ad hoc* Tribunals have explicitly stated that superior responsibility is *not* a form of strict liability.⁸¹ Thus, a superior does not share the same responsibility as her subordinates but rather bears responsibility for her own failure to act.⁸²

Mettraux rightly points out that the proposition that a superior who has failed to perform her legally required duties may incur criminal liability,⁸³ may be interpreted in two ways.⁸⁴ Firstly, a superior without the legal competence to adopt certain preventative, repressive or punishing measures could nevertheless be held responsible. The second interpretation holds that a superior, with the legal competence, failed to adopt measures expressly required by law to adopt.⁸⁵ A contradictory answer was provided by the ICTY in the *Čelebići* case. First it was held that the second interpretation was correct but then changed its position by adopting the first interpretation later on in its judgment.⁸⁶

⁸⁰ *Prosecutor v Krnojelac* IT-97-25-A, Judgment, 17 September 2003, par 171.

⁸¹ *Čelebići* Appeal Judgment (n 21 above) par 239; *Čelebići* Trial Judgment (n 21 above) par 383; *Prosecutor v Halilović* IT-01-48-T, Judgment, 16 November 2005, par 65; *Prosecutor v Boškoski and Tarčulovski* IT-04-82-T, Judgment, 10 July 2008, par 412.

⁸² *Halilović* Trial Judgment (n 81 above) par 54; *Orić* Appeal Judgment (n 77 above) Declaration of Judge Shahabuddeen, par 22-26.

⁸³ *Halilović* Trial Judgment (n 81 above) par 38.

⁸⁴ Mettraux (n 25 above) 47.

⁸⁵ Mettraux (n 25 above) 48.

⁸⁶ *Čelebići* Trial Judgment (n 21 above) par 334 and 395.

Article 12 of the 1991 ILC *Draft Code of Crimes against the Peace and Security of Mankind*, with the 1996 ILC Draft Code adopting a similar position,⁸⁷ held that if she had the legal competence to take measures to prevent or repress the offence *and* the material possibility to take such measures, then she would incur responsibility.⁸⁸ The Appeals Chamber in *Halilović* found that a superior may only incur responsibility if, based on *de jure* authority, i.e. she has the legal competence to adopt the necessary measures required.⁸⁹ Therefore, criminal responsibility is incurred not on the basis of what a superior could or should have done but rather on what competence and authority she has to take such measures.⁹⁰ If a superior must have the competence to take certain measures, it then follows that she must have the material ability to take such measures. When a superior is said to have failed her duties in terms of superior responsibility it is meant that she has failed to take all “necessary” and “reasonable” measures within her power. What is expected of a superior is that she does what her authority allows her to do. The impossible is not expected.

3.2. Dereliction of Duty

The failure of a superior to perform her duties can be described as a dereliction of duty. Her omission of her duties is the conduct, or lack thereof, that the superior performs. It has already been mentioned that international law does not expect the impossible from a superior with regards to her duties. This is true with the duties of a superior to prevent or punish an offence. For instance, a superior may delegate her duties to prevent or investigate an offence.⁹¹ In doing so, the superior is entitled to assume that the task will be properly performed.⁹² Unless a superior is informed that the mechanisms put in place are not working as anticipated, she is not expected to keep up to date with all the steps involved, although she may be expected to intervene when she has become aware of the malfunction.⁹³ If a superior is aware

⁸⁷ International Law Commission Commentary on Article 6 of the 1996 ILC *Draft Code of Crimes Against the Peace and Security of Mankind*.

⁸⁸ International law commission yearbook, 1988, Volume II (part II), 70-71.

⁸⁹ *Halilović* Appeals Judgment (n 21 above) pars 184 and 214.

⁹⁰ Mettraux (n 25 above) 51.

⁹¹ *Aleksovski* Trial Judgment (n 21 above) par 78; *Blaškić* Trial Judgment (n 21 above) par 302.

⁹² *United States v Wilhelm von Leeb et al.*, ('High Command case'), United States Military Tribunal sitting in Nuremberg, *Trials of war criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Volume XI, 558.

⁹³ *Boškoski* Trial Judgment (n 81 above) par 461.

that the subordinate(s) are incompetent and unable to complete the task then her duty has not been fulfilled but if a competent subordinate has inadequately carried out his or her mandate it does not count as evidence against the superior.

In the case of reporting an offence, a superior who has reported an offence to an authority has complied with her obligations.⁹⁴ However, if she is aware that these authorities have no genuine intention of investigating the matter or that the investigatory process is a sham; her obligation to punish has not been fulfilled.⁹⁵ However if the authorities, to whom the superior has reported, has failed in their task to investigate it is them who are then responsible for such failure and not the superior.

Further, the purpose of international law is not to sanction each and every breach of duty; rather it criminalizes only the most serious of such derelictions. Therefore, engaging a superior's responsibility requires the dereliction to be a 'gross breach' of duty from which grave consequences ensued. However, the breach of duty requires that it, the duty, be specifically provided for by international law;⁹⁶ that those failures of duty arose after the superior acquired knowledge;⁹⁷ and the breach of duty is of sufficient gravity. Thus, if the prosecution wishes to convict a superior in terms of superior responsibility, it must ensure compliance with these requirements.

With regards to the thesis, it is asked whether a superior's dereliction of duty, and ultimate conviction, complies with the principle of culpability. This issue is dealt with in more detail in Chapter 3 below but it is worth mentioning now. The ICTY Appeals Chamber in *Tadić* noted that the '[...] foundation of criminal responsibility is the *principle of personal culpability*: nobody may be held criminally responsible for acts or transactions in which he was not personally engaged or in some other way participated [...]'.⁹⁸ Concerning superior responsibility and the principle of culpability, it must be established that the superior had a duty to act and through personal

⁹⁴ *Hadžihasanović* Trial Judgment (n 21 above) par 1005. *Hadžihasanović* fulfilled his duty by reporting the matter to judicial authorities even though there was no evidence about what action, if any, was going to be taken.

⁹⁵ *Mettraux* (n 25 above) 67-8.

⁹⁶ *Halilović* Trial Judgment (n 81 above) pars 79 *et seq*; *Hadžihasanović* Trial Judgment (n 21 above) pars. 145 *et seq*.

⁹⁷ *Hadžihasanović* Trial Judgment (n 21 above) par 145; *Orić* Trial Judgment (n 21 above) par 330; *Strugar* Trial Judgment (n 21 above) par 420.

⁹⁸ *Prosecutor v. Dusko Tadić* IT-94-1-A, Judgment, 15 July 1999, par 186; emphasis added.

dereliction of duty on her part failed to comply with her obligations.⁹⁹ If, in terms of the principle of culpability, a superior incurred responsibility for her dereliction of duty, it would be fair. However, this is not entirely the case. A superior is ultimately held accountable for the underlying crimes of her subordinates. For this reason Damaška finds fault with the relationship the principle of culpability has with superior responsibility. He notes that if a superior's ignorance is self-induced, this person is rightfully convicted for the crimes of the subordinate. The problem starts when a superior has acted recklessly – by way of disregarding a perceived risk – or has acted inadvertently negligent. The most worrying to Damaška is when a 'morally upright but unconsciously negligent superior who does not condone the crime of his subordinates, and who would have opposed their wrongdoing if he were aware of their criminal intentions' and is then convicted for the underlying offence.¹⁰⁰ The problem is expressed as follows

What has taken place here? *Sub silentio*, as it were, a negligent omission has been transformed into intentional criminality of the most serious nature: a superior who may not even have condoned the misdeeds of his subordinates is to be stigmatized in the same way as the intentional perpetrators of those misdeeds. As a result of this dramatic escalation of responsibility, a commander's liability is divorced from his culpability to such a degree that his conviction no longer mirrors his underlying conduct and his actual *mens rea*.¹⁰¹

He further notes that a '[...] conviction for egregious crimes, such as murder or rape, can never result from attribution to a negligent actor of someone else's wrongdoing'.¹⁰² It seems inappropriate to brand a negligent superior with murderers, torturers or those who commit genocide.¹⁰³ In light of the principle of personal culpability, it would seem fair to convict and brand a superior for what she did, i.e. a dereliction of duty.

3.3. Connection with the underlying offence

A superior may be held criminally responsible for failure to prevent, repress or punish an offence committed by a subordinate. Liability arises because the superior failed to take necessary and reasonable steps to prevent, repress or punish those

⁹⁹ *High Command* case (n 92 above) 543-4.

¹⁰⁰ M Damaška 'The shadow side of command responsibility' (2001) 49 *The American Journal of Comparative Law* 463.

¹⁰¹ Damaška (n 100 above) 463-4.

¹⁰² Damaška (n 100 above) 464.

¹⁰³ Damaška (n 100 above) 466.

responsible for the criminal act(s). These are but steps towards criminal responsibility which are founded on an underlying offence. It has been stated that a superior is *not* a party to the crimes of her subordinates and the basis of superior responsibility is the *failure* of a superior to act in accordance with her duties. This could lead one to believe that a superior, in accordance with the principle of personal culpability, is convicted for the separate crime of dereliction of duty. This, however, is not the case. In practice a superior is convicted in relation to the underlying crime which she failed to prevent or punish because of the seemingly close connection between the underlying offence and the failure to prevent or punish it. Hence, it is important to understand the superior's relationship to the offence, especially in light of the thesis question.

Accountability in terms of superior responsibility requires the existence of a relationship of authority between those who committed the offence and the superior who failed to prevent or punish it. A superior with an authoritative relationship must have effective control over the perpetrators; which means she has the material ability, in the circumstances at the time, to prevent or punish the underlying offence.¹⁰⁴ If proved that such a relationship exists, the requirement of effective control directly links the superior to the underlying offence.

Further, the various requirements of knowledge attempt to establish a mental connection to the underlying offence in a second way. A more detailed discussion with regard to knowledge was discussed above, but it is important how knowledge of an offence connects a superior to the offence itself.

Liability and lack of knowledge: If a superior's knowledge, in relation to the offence, cannot be proven, knowledge may not then be imposed on the superior. This is because superior responsibility is not a form of strict liability. At no point may knowledge be presumed.¹⁰⁵ Customary international law does not impose on a superior the duty to acquire knowledge of the offence, due to the "*knew*" or "*had reason to know*" standard of knowledge.¹⁰⁶ Liability does not arise because the

¹⁰⁴ *Bagilishema* Appeals Judgment (n 21 above) par 50; *Čelebići* Appeals Judgment (n 21 above) par 196-8.

¹⁰⁵ *Orić* Trial Judgment (n 21 above) par 319; *Čelebići* Trial Judgment (n 21 above) par 386; *Strugar* Trial Judgment (n 21 above) par 368; *Halilović* Trial Judgment (n 81 above) pars 66 and 69.

¹⁰⁶ *Čelebići* Appeals Judgment (n 21 above) par 226; *Blaškić* Appeals Judgment (n 21 above) pars 62-3; *Halilović* Trial Judgment (n 81 above) par 69; *Strugar* Trial Judgment (n 21 above) par 369.

superior knew or had reason to know of the crime, it is engaged because the superior was in possession of sufficient knowledge about the offence and then failed to take necessary and reasonable measures to prevent, repress or punish the crime. A superior, who has a reasonable and justifiable explanation for not having knowledge nullifies her duty to act and can therefore not be held criminally responsible for “failure” of duty. Thus, in terms of customary international law a superior who has a degree of knowledge of the offence is, in this manner, “connected” to the offence. An issue arises in the case of Article 28(a) of the ICC Statute and the “*should have known*” standard of knowledge. This standard implies that a superior *does* have a duty to acquire information thereby displacing customary international laws approach of engaging a superior’s liability at the time she fails to prevent or punish while already in possession of knowledge. Now, in terms of Article 28(a), liability is engaged at the moment the superior failed to acquire knowledge. On the face of it then, responsibility is no longer an issue of failing to perform ones duty to prevent and punish but rather the failure to acquire knowledge. Consequently, Article 28(a) severs the connection between the superior and the underlying offence. The issues surrounding the standard of knowledge contained in Article 28(a) will be discussed below.

Extent of knowledge: Under customary international law, it is essential to show that a superior “knew” or “had reason to know” that an offence has been or was about to be committed. Without proving knowledge it would be impossible to show that a superior had a duty to prevent or punish, which had been violated, thereby enabling a superior to evade liability. The question then becomes what exactly should a superior have knowledge about. The ICTY Appeals Chamber in the case of *Krnjelac* stated that superior responsibility requires proof that the superior has a “general” awareness of the constitutive elements of the offence with which she is charged.¹⁰⁷ The Appeals Chamber explains its reasoning as followings,

[...], it is not enough that an accused has sufficient information about beatings inflicted by his subordinates; he must also have information – albeit general – which alerts him to the risk of beatings being inflicted for one of the purposes provided for in the prohibition against torture.¹⁰⁸

¹⁰⁷ *Krnjelac* Appeals Judgment (n 80 above) par 155.

¹⁰⁸ *Krnjelac* Appeals Judgment (n 80 above) par 155.

One would assume this would apply to underlying offences that require specific intent. Crimes of specific intention in relation to superior responsibility will be dealt with in Chapter 3.

The volitional element: Once it has been shown that a superior had sufficient knowledge of the potentiality or actuality of the underlying offence, it must further be shown that the superior either deliberately failed to act or was reckless as to the possible consequences of her failure to act.¹⁰⁹

Despite the fact that a superior is not directly involved with the commission of the offence she is inextricably connected to it. Following this reasoning perhaps customary international law is reasonable in convicting a superior in relation to the underlying offence but the same cannot be said for Article 28 of the Rome Statute. Both positions will be discussed in greater lengths below.

Another connection that links a superior to the underlying offence is the fact that superior responsibility requires certain events to have occurred before a superior's criminal responsibility can be "activated", many of which have been discussed. The notion of superior responsibility, like a building, requires a foundation or a reason for its application. This "foundation", or reason, is the *underlying offence* that has been committed by a superior's subordinates. The doctrine presupposes that a crime has been committed and has been *completed*.¹¹⁰ If a superior learns of the plans of her subordinates to commit an offence and she prevents the fulfilment of such plans, superior responsibility will never have been triggered. With the underlying offence averted, a superior cannot then be responsible for the planning, instigation or attempt of her subordinates.¹¹¹ In short, without the completion of an underlying offence a superior cannot incur liability in terms of superior responsibility. The doctrine's application therefore depends on the criminal activities of others. Thus, the notion of superior responsibility may be said to be of a *derivative nature*.

3.4. Superior responsibility and the issue of causation

Criminal law requires a person to be the *cause* of the criminal act she is accused of. So fundamental is this requirement that without it criminal responsibility cannot be

¹⁰⁹ Mettraux (n 25 above) 78-9.

¹¹⁰ *Strugar* Trial Judgment (n 21 above) par 373; *Orić* Trial Judgment (n 21 above) par 577.

¹¹¹ *Hadžihasanović* Interlocutory Appeal (n 42 above) pars 204, 209-210.

established. With such importance, this requirement could justifiably be assumed in cases where superior responsibility is applicable. However, case law has not been clear on this matter.

The ad hoc Tribunals rejection of causality: In the case of *Čelebići*, the ICTY Trial Chamber expressed their view on causation in relation to superior responsibility in contradictory statements. It first held that '[...] a necessary causal nexus may be considered to be inherent in the requirement of crimes committed by the subordinates and the failure to take the measures within his powers to prevent them'.¹¹² It then went on to say that it found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility and,¹¹³ therefore, concluded that 'causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates'.¹¹⁴ Further, it propositioned that customary international law did not require a causal relationship between the actions of the superior and that of her subordinates.¹¹⁵ The view expressed in the *Čelebići* case was then accepted in a number of other cases in the ICTY.¹¹⁶ Mettraux takes issue with this assertion. He convincingly argues that precedent and state practice has historically required a causal relationship between a superior's conduct and that of her subordinate's actions.¹¹⁷ Mettraux quotes the *Hostage* case making note that the Military Tribunal said that liability as a commander required 'proof of a causative, overt act or omission from which a guilty intent can be inferred'. He further quotes the case by adding that '[T]he evidence fails to show the commission of an unlawful act *which was the result of* any action, affirmative or passive, on the part of this defendant'.¹¹⁸

This author agrees with the position taken by Mettraux. Assuming that an offence has not taken place or is in the process of fulfilment, the duties of a superior enable her to have a *substantial effect* on the ensuing crime. Her position of authority allows

¹¹² *Čelebići Appeals Judgment* (n 21 above) par 399.

¹¹³ Mettraux (n 25 above) 82.

¹¹⁴ *Čelebići Appeals Judgment* (n 21 above) par 398.

¹¹⁵ Mettraux (n 21 above) 82.

¹¹⁶ *Hadžihasanović Trial Judgment* (n 21 above) par 187; *Halilović Trial Judgment* (n 81 above) par 78; *Prosecutor v Brdjanin IT-99-36-T, Judgment*, 1 September 2004, par 280 and *Blaškić Appeals Judgment* (n 21 above) par 76 and 77.

¹¹⁷ Mettraux (n 25 above) See pages 83-6 for further sources used in support of his claim.

¹¹⁸ Mettraux (n 25 above) 83.

her the ability to prevent the offence had she known - or had reason to know - of the anticipated offence. It is then reasonable to assert that had the superior obeyed the duties required of her, the offence would not have taken place. The crime takes place because the superior omitted her duties. However, it is unfair to say that the superior is the *sole* reason why the offence took place, clearly she is not; but it is fair to say that a person in a position to prevent a crime but fails has indirectly assisted the outcome. The superior may not have ordered the offence or may not have willed such offence take place but this does not change the fact that a superior may have been a contributing factor to the future of such offence. Therefore, it appears that there is a causal nexus between the omission of the superior and the conduct of his subordinates.

In the eyes of the law causation can take two paths, one positive and the other negative. Generally, causation implies a positive action whereby, for example, the accused is said to have committed murder with the necessary standard of *mens rea*, the result of which is the death of another person. Logically, it can be asserted that a chain of causation exists between the accused's conduct and the result. To determine whether the deed of an accused was in fact the cause of the offence one needs to apply the *conditio sine quo non* formula.¹¹⁹ In terms of superior responsibility, the superior's failure to perform his duties does not set into motion the subordinate's imminent action; it merely allows its completion, thus it is not a positive action. Superior responsibility embodies an omission or *negative* act by the accused. For this reason the *conditio cum quo non* formula should rather be applied.¹²⁰ We then ask if the superior's failure to act allowed the offence to take place. The doctrine of command responsibility appears to answer in the affirmative. Therefore, based on the latter formula causality appears to be a requirement.

¹¹⁹ The *conditio sine quo non* formula asks the following question: if X's actions had not taken place, would the result nevertheless have ensued? If the answer is no, X's actions were the factual cause behind the result but if one were to answer yes, then X's actions was not the factual cause of the result.

¹²⁰ The *conditio cum quo non* is applied as follows: does X's omission (failure to act) allow a specific result? If the answer is no, X is not the cause behind the result. If the answer is yes, then X's omission resulted in the offence; see S Trechsel 'Command responsibility as a separate offence' (2009) 3 *Berkeley Journal of International Law* 30, who criticizes the application of the *conditio cum quo non* formula by stating that it is a purely hypothetical question and therefore it can never answer a question with certitude.

As stated above, we are assuming that the offence has not taken place or is in the process of completion. If a superior could not prevent the offence, she still has the duty to punish the offence. Causation within this second duty of punishing the offence is somewhat trickier. Logic dictates that no causal nexus can exist once the offence has been committed. The superior can no longer affect the outcome of the crime, that is, she can either, prevent the crime if she acted positively and more importantly were she acted negatively, failed to prevent the crime. The duty to prevent has then become meaningless to us. A superior who, perhaps negligently, failed to prevent an offence is still faced with the duty to punish. Like the duty to prevent, she fails to punish the perpetrators of the offence. In this situation, it is submitted that causality would still need to be proved in order for the superior to be held liable. The superior is not obliged to prosecute the offenders herself and is merely required to refer the matter to a competent authority. Therefore, a superior that fails to refer a matter is the reason why the offenders are not prosecuted, which creates a *direct* causal link between the superior and the failure of authorities to prosecute. Causality, in the sense discussed above, is required to be proven when convicting a superior. Moreover, the fact that a superior will not be convicted if she did not intervene and in so doing prevented the crime, but did punish the offenders, indicates well that the superior's criminal accountability is not founded in her contribution to the underlying offence.

Article 28 and causation: The above conclusion that causality is a necessary requirement appears to be supported by the language of Article 28. This is due to the inclusion of the words '*as a result of*'.¹²¹ This statement is reinforced by the Pre-Trial Chamber in the case of *Bemba*.¹²² The court proposed a way to determine the level of causality by applying the "but for test", which states

But for the superior's failure to fulfil his duty to take reasonable and necessary measures to prevent crimes, those crimes would not have been committed by his forces.¹²³

Therefore, in order to prove causality one would need to show that the superior's omission increased the risk of the crimes commission with the court saying that 'to find a military commander or a person acting as a military commander responsible

¹²¹ Cryer (n 48 above) 325; B Moloto 'Command responsibility in international criminal tribunals' (2009) 3 *Berkeley Journal of International Law* 21.

¹²² *Bemba* Pre-Trial Chamber (n 64 above) par 423-425.

¹²³ *Bemba* Pre-Trial Chamber (n 64 above) par 425.

for the crimes committed by his forces, the Prosecutor must demonstrate that his failure to exercise his duty to prevent crimes increased the risk that the forces would commit these crimes'.¹²⁴

In conclusion, causality appears to have a larger role in the conviction of a commander than previously thought. Despite the ICTY rejecting the role causality plays in superior responsibility, it can be argued that customary international law requires it,¹²⁵ and now Article 28, *prima facie*, seems to treat causality as a requirement to be proven.

3.5. Superior responsibility and fault

It is a well-established rule of criminal law that there can be no criminal liability without fault.¹²⁶ An accused must be shown to have been aware of the criminality of her actions. Degrees of fault can vary from intentional conduct to negligent ones. As discussed below, it is generally thought that negligence does not apply to superior responsibility and more broadly to international criminal law. This is because the nature of the crimes dealt with by international criminal law, require a very high degree of fault; that is, intention is usually necessary to satisfy the subjective requirement of the crime. This leaves little room for negligence as the lowest form of fault. The question then is whether negligence does play a role in superior responsibility or not. Thus, the purpose of this section is to find out, in a general sense, what relationship, if any, exists between superior responsibility and negligence.

Knowledge and negligence: In the case of superior responsibility a superior's knowledge of the underlying offence plays an integral part in securing a conviction. Why knowledge is important is because of the implications a certain standard of knowledge has on the nature of this mode of liability. As was discussed above, two different standards have emerged. A "*had reason to know*" standard, as applied by the *ad hoc* Tribunal Statutes, and a "*should have known*" standard, contained in the Article 28 of the ICC Statute. The former standard holds that a superior must have been in possession of information of the possibility of an underlying offence that

¹²⁴ *Bemba* Pre-Trial Chamber (n 64 above) par 426.

¹²⁵ It must be remembered that, as it stands, causation is not a requirement that must be proved. The argument above asserts that it should be seen as a necessary requirement.

¹²⁶ *Mettraux* (n 25 above) 223.

warrants further *investigation*; while the latter standard requires a superior to actively *acquire* information about her subordinate's actions. The *ad hoc* Tribunals Appeals Chamber expressly refused to acknowledge a "*should have known*" standard of knowledge in the case of *Čelebići*, by stating that

Article 7(3) of the Statute is concerned with superior liability arising from failure to act in spite of knowledge. Neglect of a duty to acquire such knowledge does not feature in the provision as a separate offence and a superior is not therefore liable under the provision for such failure [...]. The Prosecution's argument that a breach of the duty to remain constantly informed of his subordinates actions will necessarily result in criminal liability comes close to the imposition of criminal liability on a strict or negligence basis.¹²⁷

The Appeals Chamber appear to see the problem as follows: the liability of a superior is engaged when she fails to prevent or punish an offence despite being in possession of sufficient information. Therefore, she is criminally responsible for failing to take the necessary and reasonable measures to prevent or punish an offence. Consequently, in the eyes of the Appeals Chamber negligence plays no part in the responsibility. But the Appeals Chamber recognised that a "*should have known*" standard will introduce negligence into the frame. How exactly? By maintaining that a superior is obliged to be informed at all times imposes a new duty to do so, failure of which will result in a new standard of negligence. Liability then shifts from a failure to take necessary and reasonable measures to prevent or punish to a failure of duty to acquire information which results from the superior being negligent. So the Appeals Chamber rejected a "*should have known*" standard. But the Appeals Chamber seem to overlook a fact by assuming that a superior complied with her duty to inquire further after being in possession of information. A superior *in possession* of information receives a new duty, to inquire further. If a superior *fails* to inquire further, she may never learn of the underlying offence just like a superior who fails to actively acquire information ("*should have known*"). A superior who fails to make an inquiry has done so *negligently*, i.e. a reasonable superior would have inquired. An implication of this line of thought is that negligence exists in the "*had reason to know*" standard, just as it does in the "*should have known*" standard. Thus, the Appeals Chamber rejection of negligence seems unjustified. This criticism is supported by the Trial Chamber in *Blaškić* by stating that '[...] the absence of

¹²⁷ *Čelebići* Appeals Judgment (n 21 above) par 226.

knowledge is the result of negligence in the discharge of his duties',¹²⁸ even though the *Blaškić* Appeals Chamber ultimately agreed with the *Čelebići* Appeals Chamber. However, the failure of a duty is the foundation of negligence. Hart states

If we say 'He broke it negligently' we are not merely adding...an element of blame and reproach, but something quite specific, *viz.* we are referring to the fact that the agent failed to comply with a standard of conduct with which the ordinary reasonable man [in such circumstances] *could* and *would* have complied: a standard requiring him to take precautions against harm. The word 'negligently', both in legal and non-legal contexts makes an essential reference to an omission to do what is thus required.¹²⁹

The notion is further supported by the Secretary General's commentary on Article 7(3) that the principle is 'imputed responsibility or criminal negligence'.¹³⁰ As discussed, negligence is present in the "*should have known*" standard contained in Article 28(a).

3.6. The guilt of a superior

The ad hoc Tribunals and a superior's guilt: Historically, superior responsibility was interpreted as a mode of liability by which the superior was responsible for the crimes of his subordinates. The superior was, therefore, charged and convicted for the principle crime.¹³¹ The assumption that a superior is responsible for the crime of subordinates originates from the common features superior responsibility shares with other participatory modes of liability, such as aiding and abetting. Superior responsibility was seen as a form of accessorial liability and the superior was therefore held responsible for the acts of her subordinates. The ICTY adopted a similar approach in holding a superior individually responsible for the acts of subordinates. The position was summarized in *Halilović* as follows

[...], whether command responsibility is a mode of liability for the crimes of subordinates or responsibility of a commander for dereliction of duty has not been considered at length in the

¹²⁸ *Blaškić* Trial Judgment (n 21 above) par 332.

¹²⁹ H.L.A. Hart *Punishment and responsibility* (1968) 147-8.

¹³⁰ Report of the Secretary General Pursuant to Paragraph 3 of Security Council Resolution 808, UN Doc S/25704, par 56.

¹³¹ C Meloni 'Command responsibility: Mode of liability for the crimes of subordinates or separate offence of the superior?' (2007) 5 *Journal of International Criminal Justice* 623; W Schabas *An introduction to the International Criminal Court* (2004) 106; W Schabas *The UN international criminal tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (2006) 315.

jurisprudence of the Tribunal. However, the consistent jurisprudence of the Tribunal has found that a *commander is responsible for the crimes* of his subordinates under article 7(3).¹³²

The Trial Chamber noted the judgment of *Čelebići* which held that '[...] military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is well-established of customary and conventional international law'.¹³³ The Trial Chamber further recognised the judgment of the Appeals Chamber in *Čelebići* who also held that where a superior has effective control over his subordinates 'he could be held responsible for the commission of the crimes if he failed to exercise such abilities of control'.¹³⁴

Despite this the Trial Chamber in *Halilović*, quoted with approval, the Partial Dissenting Opinion of Judge Shahabudden in the *Hadžihasanović* Appeals Chamber Decision, stating

The position of the appellants seems to be influenced by their belief that Article 7(3) of the Statute has the effect, as they say, of making the commander "guilty of an offence committed by others even though he neither possessed the applicable *mens rea* nor had any involvement whatsoever in the *actus reus*." No doubt, arguments can be made in support of that reading of the provision, but I prefer to interpret the provision as making the commander is guilty for failing in his supervisory capacity to take the necessary corrective action after he knows or has reason to know that his subordinate was about to commit the act or had done so.¹³⁵

The Trial Chamber concluded by finding that a superior is responsible for an omission and that a superior does not share the same responsibility as her subordinates but that of her failure to act.¹³⁶ The same view was endorsed in a number of other decisions.¹³⁷

¹³² *Halilović* Trial Judgment (n 81 above) par 53.

¹³³ *Čelebići* Trial Judgment (n 21 above) par 333.

¹³⁴ *Čelebići* Appeals Judgment (n 21 above) par 198.

¹³⁵ *Prosecutor Hadžihasanović* IT-01-47-A, Judgment, 22 April 2008, par 32.

¹³⁶ *Halilović* Trial Judgment (n 81 above) par 54.

¹³⁷ *Orić* Trial Judgment (n 21 above) par 292-293. See also *Halilović* Trial Judgment (n 81 above) par 54; *Hadžihasanović* Trial Judgment (n 21 above) par 74-75; *Krnjelac* Appeals Judgment (n 80 above) par 171. The Chamber stated: 'It cannot be overemphasized that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinate but with his failure to carry out his duty as a superior to exercise control.'

Certain authors are of the opinion that a superior may be punished for both failing to perform the duties required of her as well as the criminal acts of their subordinates.¹³⁸ They distinguish between direct responsibility (for the omission of duties) which entails, for example, the ordering of the actions of the subordinates and indirect responsibility (for the criminal acts of subordinates) which produces a kind of vicarious liability. Such interpretation is incorrect. To assert direct responsibility for a criminal action suggests that the superior had a *positive impact* on the offence. If that were the case the superior would be the cause of the crime and would therefore incur liability as a participant of the offence. It would make little sense to pursue a conviction on the basis of command responsibility when it would, evidentially, be easier to prove direct involvement in the offence.¹³⁹ The superior would, thereby, incur the full spectrum of punishment applicable to the various offences. Therefore, the basis for command responsibility lies in the personal failure on the part of the superior to comply with his duties.

Article 28 of the ICC Statute and a superior's guilt: The textual divergence of Article 28(a) of the Rome Statute to that of the Statutes of the *ad hoc* Tribunals has again muddied the water. Article 28(a) now suggests that a superior is in fact guilty of the 'base crime' of her subordinate(s).¹⁴⁰ Article 28(a) states that 'a military commander shall be criminally responsible for crimes [...], as a result of his or her failure to exercise control properly over such forces [...]'.¹⁴¹ This has also been noted in the literature.¹⁴² For this reason some have argued that because Article 28 imputes the crimes of the subordinates to the superior the ICC Statute treats command responsibility as a form of complicity.¹⁴³ Article 28 appears to have reverted back to the historical interpretation of command responsibility. Looking at Article 30 of the ICC Statute may also guide the question as to what a superior's guilt is, even if it is only to gain an idea of how the ICC Statute views the mental requirement and the

¹³⁸ K Ambos 'Joint criminal enterprise and command responsibility' (2007) 5 *Journal of International Criminal Justice* 176; Bonafe (n 57 above) 611; V Nerlich 'Superior responsibility under Article 28 ICC statute' (2007) *Journal of International Criminal Justice* 2-3.

¹³⁹ Schabas (n 64 above) 458.

¹⁴⁰ Moloto (n 121 above) 15; A Duxbury 'Excluding the undesirable: Interpreting article I F(a) of the Refugee Convention in Australia' in DA Blumenthal & T McCormack (eds) *The legacy of Nuremberg: Civilising influence or institutionalised vengeance?* (2008) 279.

¹⁴¹ Emphasis added.

¹⁴² BB Jia 'The doctrine of command responsibility revisited' (2004) *Chinese Journal of International Law* 15; Schabas (n 64 above) 456; Nerlich (n 138 above) 4; for an opposing view see Arnold (n 45 above) 836.

¹⁴³ R Cryer *et al* *An introduction to international criminal law and procedure* (2010) 399.

accompanying guilt of an accused. Article 30 expresses a general definition of the mental element, but allows different standards of knowledge with the phrase “*unless otherwise provided*”.¹⁴⁴ This phrase allows for the standard of knowledge contained in Article 28 to exist and be applicable to the crimes contained in the ICC Statute. Interestingly, Article 30(1) states that a ‘person shall be criminally responsible and liable for punishment *for a crime*’ if that crime is committed with intent and knowledge.¹⁴⁵ Like Article 28, Article 30 also states that an accused’s guilt rests in the crime itself.

The discussion above has important implications on the thesis question. In the case of the *ad hoc* Tribunals where a superior is thought to be responsible for the failure to perform ones duties, she is not charged with the separate crime of ‘dereliction of duty’. Instead, the superior is charged and convicted in relation to the crimes committed by his subordinates.¹⁴⁶ While not sharing the same responsibility as her subordinates, she is found guilty pursuant to Article 7(3)/6(3) for the underlying crime, e.g. murder, torture or genocide. Article 28 simply asserts responsibility for the underlying crime itself, despite never being a party to the offence. Article 28 suggests that a superior would incur the same responsibility as those who committed the offence, as if she were a direct participant. Both these cases raise very interesting issues with regard to specific intent crimes and whether a superior can or should be held responsible for such offences. These issues will be discussed at length in Chapter 3.

3.7. Complicity, superior responsibility and prosecuting overlapping modes of liability

Due to the intricate relationship between individual criminal responsibility and superior responsibility there will be some overlap between the bases of liability imposed by them.¹⁴⁷ At times superior responsibility has been described as a form of accomplice liability, but this will be shown as mistaken. Moreover, a certain set of facts may allow for the conviction of either participation or superior responsibility as the requirements for each mode of responsibility is satisfied. Thus, what mode of responsibility is preferred must be discussed.

¹⁴⁴ Article 30 of the ICC Statute (n 26 above).

¹⁴⁵ Article 30(1) of the ICC Statute (n 26 above); emphasis added.

¹⁴⁶ Moloto (n 121 above) 15.

¹⁴⁷ R May and S Powles ‘Command responsibility – A new basis of criminal liability in English law?’ (2002) *Criminal Law Review* 373.

It is true that international criminal law must provide for a basis for accountability for commanders where their orders, being followed by rank and file soldiers, results in the commission of international crimes. However, command responsibility is not the vehicle through which this is achieved. Criminal responsibility, within an international context, can be divided into: (i) individual criminal responsibility, and (ii) command responsibility, i.e. direct participation and indirect participation. Complicity is seen as a form of participation. Often, aspects of both categories seem to overlap. As a result it is difficult to distinguish which ground of liability a superior should be charged. This confusion is, however, misplaced.

It should first be asked if a superior is an accomplice to the principal offence. An accomplice is a person, irrespective of seniority or superiority, who unlawfully and intentionally engages in conduct that furthers or promotes the commission of an offence. However, this person does *not* satisfy the requirements of a direct perpetrator, but has acted *positively* in furtherance of the offence and as such is treated as if she *were* a principle offender.¹⁴⁸ Command responsibility, on the other hand, rests on *omission liability*, i.e. a failure to perform a certain action(s). An omission, by its very nature, is a *negative* act. If a superior intentionally omitted her duties in order to assist the offence, command responsibility will fall to the way side in order to charge her as an accomplice. Let us look at more specific examples of accomplice liability in relation to command responsibility.

Joint criminal enterprise (JCE) and superior responsibility: The concept of individual criminal responsibility for participating in a common criminal purpose, which came to be known as JCE, was first introduced by the ICTY Tribunals in the *Tadić* case.¹⁴⁹ Ambos explains that a JCE ‘serves to impute certain criminal acts or results to persons for their participation in a collective (‘joint’) criminal enterprise’.¹⁵⁰ He goes on to add that the ‘criminal enterprise’ is defined by a common – explicit or tacit – agreement or understanding to commit certain criminal acts for an *ultimate* criminal

¹⁴⁸ I Bantekas *Principles of direct and superior responsibility in international humanitarian law* (2002) 62.

¹⁴⁹ *Tadić* Appeals Judgment (n 98 above).

¹⁵⁰ Ambos (n 138 above) 167.

objective or *goal*.¹⁵¹ If such a common criminal purpose were to exist, the following objective elements are necessary

- i) A plurality of persons;
- ii) The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute; and
- iii) Participation of the accused in the common design.¹⁵²

Once it is established that a common criminal purpose indeed exists, three categories of collective criminality may be identified

- i) the *basic* form, where the participants act on the basis of a ‘common design’ or ‘common enterprise’ and with a common ‘intention’ (JCE I);
- ii) the *systemic* form, i.e. the so-called concentration camp cases where crimes are committed by members of military or administrative units such as those running concentration or detention camps on the basis of a common plan (JCE II);
- iii) the ‘*extended*’ joint enterprise where one of the co-perpetrators actually engages in acts going beyond the common plan but his or her acts still constitute a ‘natural and foreseeable consequence’ of the realization of the plan (JCE III).¹⁵³

JCE and command responsibility differ in three distinct ways: (i) the *actus reus*; (ii) the *mens rea*; and (iii) the superior-subordinate relationship. The *actus reus* in terms of JCE requires a positive act on the part of the superior whereas command responsibility requires a negative act (the omission). The superior needs to play an active role, which involves awareness, in the furtherance of the common plan. This awareness, or the *mens rea*, of JCE has two separate standards of knowledge. With regard to JCE I, all the participants share the *mens rea* to commit a certain action(s) as well as the purpose or goal of the enterprise. JCE II and III, on the other hand, is a more lenient standard, in that the members of the enterprise should be aware of the purpose of the enterprise and of crimes as a foreseeable consequence of the JCE.¹⁵⁴ Superior responsibility requires that a superior is simply aware, in relation to the underlying offence, of her failure to act in relation to the offence that will come to be, has come to be or has past. Lastly, a superior-subordinate relationship is essential to command responsibility. In contrast, members of JCE I are seen as co-

¹⁵¹ Ambos (n 138 above) 167; original emphasis.

¹⁵² *Tadić* Appeals Judgment (n 98 above) par 227.

¹⁵³ Ambos (n 138 above) 160.

¹⁵⁴ Nybondas (n 23 above) 145.

perpetrators while JCE II and III may resemble a relationship similar that required of command responsibility.

Aiding and abetting and command responsibility: To prove aiding and abetting it must be shown that the accused knowingly contributed to the commission of the offence. This contribution must be *direct* and *substantial* and either a positive act or an omission.¹⁵⁵ According to the ICTY Trial Chamber in *Krstić*, ‘to establish the accused’s responsibility on this basis [i.e. for aiding and abetting], the Prosecutor must establish that he was aware of the intent of the principal offender [...] and that he carried out acts which rendered a substantial contribution to the commission of the intended crime by the principal offender’.¹⁵⁶ With regard to aiding and abetting by omission, the ICTY Appeals Chamber in *Orić* stated that ‘[...] his omission must be directed to assist, encourage or lend moral support to the perpetration of the crime. The aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator and must be aware of the essential elements of the crime which was ultimately committed by the principal’.¹⁵⁷ Since aiding and abetting and command responsibility are, or can be, acts of omission,¹⁵⁸ an overlap with regard to the requirements for conviction arise. When dealing with a superior, aiding and abetting by omission, like command responsibility, requires the existence of a legal duty to act with regard to an underlying offence and this duty has been violated.¹⁵⁹ For instance, in the *Furundžija* case the Trial Chamber found that the defendant’s presence, as a superior who had a duty to take necessary and reasonable measures to prevent an offence, during an interrogation where the victim was subjected to sexual violence was ‘intangible assistance’ in the commission of the crime by means of moral support.¹⁶⁰ However, the similarity of the violation of a duty to act is also a crucial difference between the two modes of responsibility. The accused aider and abettor, while fully aware of the principal offence as well as the *mens rea* of the principal offender, by way of omission *intentionally* violates her duty

¹⁵⁵ *Prosecutor v Charles Taylor* SCSL-03-01-T, Judgment, 18 May 2012, par 6912, where Taylor provided practical assistance to the commission of crimes by the RUF and the RUF/AFRC by facilitating arms and ammunition.

¹⁵⁶ *Prosecutor v Krstić* IT-98-33-T, Judgment, 2 August 2001, par 171.

¹⁵⁷ *Prosecutor v Orić* Appeals Judgment (n 77 above) par 43.

¹⁵⁸ *Taylor* (n 155 above) par 483.

¹⁵⁹ Meloni (n 7 above) 217; see also E van Sliedregt *The criminal responsibility of individuals for violations of international humanitarian law* (2003) 193.

¹⁶⁰ *Prosecutor v Furundžija* IT-95-17/1-T, Judgment, 10 December 1998, par 193-232.

to act *knowing* that her violation will have a significant influence on or assist the offence, i.e. her actions have a casual effect on the commission of the crimes. In contrast, command responsibility is an *unintentional* violation of duty with no requirement of knowledge that her failure to act will assist the principal offence.

It may happen that an accused may satisfy the requirements of direct participation and superior responsibility. In situations like this superior responsibility is treated as an alternative to individual responsibility. The approach taken by the *ad hoc* Tribunals is to favour individual responsibility to that of superior responsibility. In the *Krstić* case the ICTY Trial Chamber held, with regard to crimes against humanity, that

The facts pertaining to the commission of a crime may establish that the requirements for criminal responsibility under both Article 7(1) and Article 7(3) are met. However, the Trial Chamber adheres to the belief that where a commander participates in the commission of a crime through his subordinates, by ‘planning’, ‘instigating’, or ‘ordering’ the commission of the crime, any responsibility under Article 7(3) is subsumed under Article 7(1).¹⁶¹

In the *Krnjelac* case, the Trial Chamber entered a conviction in terms of Article 7(1) on the grounds of aiding and abetting but held that the accused met the requirements of superior responsibility.¹⁶² Although the Trial Chamber favoured a conviction for participation it considered the accused’s position as a superior to be an aggravating factor.¹⁶³

Deciding which ground of responsibility to convict an accused will have to be based on what evidence can prove which element of either mode of responsibility.¹⁶⁴ When elements of different modes of responsibility are shown by the evidence, it seems the decision on what grounds to convict lie with the Tribunals. Perhaps the reason for favouring convictions in terms of participation has to do with the stigma of being labelled a participant in a heinous crime instead of simply being a superior who failed to perform her duties. In this sense the punishment would be more suited to the nature of the crime and is then somewhat understandable.

¹⁶¹ *Krstić* Trial Judgment (n 156 above) par 605.

¹⁶² *Prosecutor v Krnjelac* IT-97-25-T, Judgment, 15 March 2002, par 171-172; van Sliedregt (n 159) 195.

¹⁶³ *Krnjelac* Trial Judgment (n 162 above) par 173.

¹⁶⁴ *Krnjelac* Trial Judgment (n 162 above) par 318.

4. Conclusion

The purpose, and perhaps even the rationale, of superior responsibility was summed up by the in *Kayishema and Ruzindana*, when it stated

The inherent purpose of Article 6(3) [provision providing for superior responsibility] is to ensure that a morally culpable individual is held responsible for those heinous acts committed under his command.¹⁶⁵

It appears to be within our nature as humans to place blame on those who have wronged us. A superior may not have personally violated the rights of another, but her failure to perform duties required of her certainly allowed for the possibility of such a violation to occur. For this reason, we justify imposing criminal responsibility on such people. In relation to what a superior did do, perhaps our condemnation is too harsh. Within the context of this thesis, the latter is argued to be the case.

In this chapter superior responsibility was discussed in some detail and may be briefly summarised as follows. In order to secure a conviction in terms of superior responsibility three requirements must be present, they are: (i) a superior-subordinate relationship must exist; (ii) depending on the applicable statute, a superior must have possessed either actual knowledge or she had reason to know/should have known of the offences of her subordinates; and (iii) she failed to take necessary and reasonable steps to prevent or punish the commission of the offence. While little confusion surrounds requirements (i) and (iii), the requirement of knowledge has produced conflicting opinions as to exactly what is meant by the different standards of knowledge. The divergence in the requirements of knowledge contained in the statutes of the *ad hoc* Tribunals and the ICC Statute has further contributed to the uncertainty.

Together with the three requirements of knowledge, superior responsibility may best be described as liability for the omission of duty. The superior derelicts her duties and for this reason liability arises. Despite no participation in the underlying offence, superior responsibility may still be thought of as being connected to the principal offence. This raises the important question of what exactly a superior is guilty of. Even though the superior is not a party to the underlying offence she will still be

¹⁶⁵ *Kayishema and Ruzindana* Trial Judgment (n 21 above) par 516.

charged and convicted for the underlying offence. Lastly, it was argued, contrary to case law, that negligence lies at the heart of superior responsibility and should be treated as such. As will be seen, this last point has important implications on superior responsibility and how it is applied.

2

Mens rea, the *ad hoc* Tribunals, and the International Criminal Court

The previous chapter gave a detailed account of superior responsibility. The present chapter changes focus and examines the nature of *mens rea*, with emphasis on its application within international law. The purpose of which is to establish an understanding of *mens rea*. Like, and together with, Chapter 1, the present chapter will serve as foundational to the argument presented in the chapter that follows. Thus, this chapter may begin with the assertion that without a guilty state of mind (fault) an accused cannot incur criminal responsibility.¹ The reasoning behind this is straightforward. A person who is not consciously aware of her actions, or does not will these actions into being, cannot be said to be the legal cause of the event. A criminal offence includes two necessary elements: (i) *actus reus*, the material or physical element of a crime, and (ii) *mens rea*, the mental element of the crime. If the latter does not exist in relation to the former, a criminal offence has not been committed. Thus, it is of the utmost importance that knowledge be present in order to satisfy the *mens rea* requirement of an offence. With this understanding the purpose of Chapter 2 is to examine the nature of knowledge, in its different forms, and how it is perceived and applied in international criminal law. The previous chapter already examined knowledge specific to superior responsibility, while the present chapter will cast a wider net on the subject.

This chapter is divided into three sections. The first part will consist of a *general* discussion of the nature of *mens rea*. The purpose of this is to establish an understanding of the various concepts within the mental element. Both the second and third parts will focus specifically on the mental element applicable to the *ad hoc* Tribunals and the Rome Statute, respectively.

¹ Encapsulated by the maxim *actus non facit reum, nisi mens sit rea* (an act does not render the perpetrator culpable unless there is a criminal intent).

1. The different manifestations of fault

An actor's degree of knowledge will determine her degree of fault. The more she is aware of the illegality of the act, or the consequences of such an act, the more she will be at fault. The severity of an actor's punishment will therefore rest on that person's fault. Hence, the notion of fault underlies the rationale of criminal law. Fault is comprised of either intent (*dolus*) or negligence (*culpa*). Succinctly explained by Van der Vyver,

A wrongful act is committed intentionally if the perpetrator contemplated the illegality and/or harmful consequences of the act. Negligence denotes the mental disposition of a person who commits a wrongful act, and although the person who committed the act did not intend to act illegally or to cause the harmful consequences of the act, in doing so he or she deviated from conduct expected of a reasonable person within the same circumstances. While the person who acts intentionally foresees the illegality and harmful consequences of his or her act, the person who acts negligently does not appreciate the illegality or the harmful consequences of his or her action, while the reasonable person would in the prevailing circumstances have foreseen and avoided acting illegally or bringing about the harmful consequences of the act.²

The concepts of intent and negligence, described above, contain within them a number of different layers, with different forms of each concept emerging after close inspection. An actor may intend to perform a certain act or will a certain consequence, but what form of intent did she have? The answer to this question is essential to imposing fault and therefore criminal responsibility. Likewise, a wrongful act committed unintentionally, that is, an actor was negligent, will result in less responsibility.

Within the context of this thesis, that is individual criminal responsibility contained in the ambit of international criminal law, a person's degree of fault will be divided into three categories, namely: (i) *general intent*; (ii) *specific intent*; and (iii) negligence. Each category will be discussed separately.

² J van der Vyver 'The international criminal court and the concept of *mens rea* in international criminal law' (2004) 12 *University of Miami International and Comparative Law Review* 61.

1.1. Strict liability

Before moving onto intent of a general and specific nature, as well as negligence, the idea of strict liability must be quickly discussed. Offences where strict liability is applicable, also known as absolute liability, completely remove the perpetrators mental element from the crime. Put differently, accountability for such an offence renders the presence of a guilty state of mind unnecessary.³ The maxim of *actus non facit reum, nisi mens sit rea* is thus “violated”. However, due to the severity of the crimes dealt with by the international community strict liability has been deemed inappropriate. Thus, in the context of international law it is not applicable and for that reason nothing more shall be said on the matter.⁴

1.2. General intent

M. Cherif Bassiouni describes “general intent” as the ‘general criminal state of mind manifested by the general conduct of the actor which constitutes a deviation from established standards of reasonable care and which implies a certain degree of “foreseeability” that the acts performed are likely to produce certain harmful results’.⁵ By this description two important factors can be identified, namely: (i) a deviation from a standard care in conduct; and (ii) the foreseeability of results. From these two factors we can then identify a further two mutually exclusive subcategories, which are *intent* and *negligence*. In terms of the description above, a person acts with intent when she has fulfilled both factors (i) and (ii); while a person is negligent when she only acts with factor (i). Both intent and negligence will be discussed.

Intent means the *will to bring about a certain result*. For instance, a person wants to kill another. So, to bring about her desire the perpetrator stabs the victim, as a result the victim dies because of the perpetrators actions. For her conduct the perpetrator will be liable for her intentional actions. However, an actor’s intent need only be linked to a certain result and not a certain result brought about by certain conduct,⁶ that is, a perpetrator stabs the victim thinking she has killed her but in actual fact the

³ Ashworth describes the term “strict liability” as ‘those offences of which a person may be convicted without proof of intention, knowledge, recklessness, or negligence’; A Ashworth *Principles of criminal law*, 4th ed (2003) 164.

⁴ It should be noted that the doctrine of superior responsibility has been accused of being a form of strict liability. These matters are dealt with in Chapter 2 above.

⁵ MC Bassiouni *Substantive criminal law* (1978) 179.

⁶ A Cassese *International criminal law* (2003) 162.

victim dies later from exposure to the cold. The fact that the perpetrator failed to kill her victim does not matter because the perpetrator still *intended* to kill the victim. Even though the perpetrator did not kill the victim she would still be guilty of murder because the actions she did commit, the stabbing, led to the victim's exposure to the cold which eventually caused the victim's death. Ultimately, the perpetrator remains the cause or the reason of the death. The examples mentioned allows for a practical understanding of intent, but within the notion of intent are many theoretical complexities which will be spelt out.

Intent consists of two elements: (i) a *cognitive* element; and (ii) a *conative* element. The cognitive element consists in a person's *knowledge* of the act; that is, the person is aware of the definitional elements of the crime and of the unlawfulness of it. The conative element, on the other hand, consists in directing the *will* towards a certain act or result;⁷ that is, physically accomplishing a person's desire. Therefore, intent may be defined as '*the will to commit the act or cause the result set out in the definitional elements of the crime, in the knowledge of the circumstances rendering such act or result unlawful*'.⁸ This definition of intent allows for the notion to take on one of three forms, namely: (i) *dolus directus*; (ii) *dolus indirectus*; and (iii) *dolus eventualis*, each will be discussed below.

Dolus directus (direct intent): Much like the example illustrated above of the person who commits murder, direct intent describes an event in which the perpetrator foresaw and desired the illegality and/or harmful consequences of an action. The act or result is her goal. The perpetrator is *certain* and she does not merely think the result a possibility, that she is committing the illegal act or that she is causing the prohibited result.⁹

Dolus indirectus (indirect intent): Indirect intent describes the circumstance where a perpetrator desires a certain consequence, but as a result of her actions *additional consequences* will follow. Further, these additional consequences were *foreseen* by

⁷ CR Snyman *Criminal law*, 5th ed (2008) 182.

⁸ Snyman (n 7 above) 182; W Roth 'General vs. specific intent: A time for terminological understanding in California' (1979-1980) 7 *Pepperdine Law Review* 68, says a person intends 'a result of his act whether he consciously desires the result or simply knows that it very probably will occur because of his actions'.

⁹ Molan *et al.*, define direct intention as follows: "If a particular consequence prohibited by the law is wanted for its own sake then clearly the consequence is intended by the actor"; Molan *et al.*, *Principles of criminal law*, 4th ed (2000) 61.

the perpetrator as a *certainty*, and although the actor did not desire these consequences she nevertheless committed the act resulting in the occurrence of these additional consequences.

Dolus eventualis: The above forms of intent describe what is generally thought of as intent, but in the case of *dolus eventualis* a deviation from the “normal” occurs. A person acts with intent, in the form of *dolus eventualis*, when she foresees a (secondary) consequence, other than those desired, as a *possibility* but she reconciles herself to the possibility, and nevertheless performs the act. In other words, when committing action, the perpetrator foresees that the undesired result may occur. Despite this knowledge, she (the perpetrator) reconciles herself with the possibility of the undesired result and performs the act anyway. As Snyman notes, ‘[I]n this form of intention the voluntative (cognitive) element consists in the fact that X directs his will (conative element) towards event A, and decides to bring it about even though he realises that a secondary result (event B) may flow from his act’.¹⁰ For this reason, it could be said that the perpetrator had intent to bring about the secondary result, even if she did not wish such event to follow.

Dolus eventualis is often described as recklessness in Anglo/American legal systems and as Van der Vyver has noted, the distinction between *dolus eventualis* and negligence becomes blurred.¹¹ Nevertheless, *dolus eventualis* and negligence are distinguishable concepts. *Dolus eventualis* describes a perpetrator that *foresees* secondary consequences that *may* follow from her wrongful conduct, but in the case of negligence, by definition, the perpetrator *lacks* the necessary foresight.¹²

1.3. Specific intent or *dolus specialis*

Most crimes require any one of the above forms of intent or negligence, and together they account for the *mens rea* of most common perpetrators. However, certain offences require more than “just” intent, that is, intent plus an additional requirement or *specific goal*. Thus, this form of intent is called *specific intent* or *dolus specialis*. This specific goal ‘goes beyond the result of his conduct, with the consequences that

¹⁰ Snyman (n 7 above) 185.

¹¹ Van der Vyver (n 2 above) 64.

¹² Van der Vyver (n 2 above) 63.

attainment of such goal is not necessary for the crime to be consummated'.¹³ Therefore, a person wishes to commit murder, and with this intent to murder she targets a group of people because of their ethnicity. Her specific goal is to destroy a certain ethnicity, to which the victim(s) belong. Thus, it follows that if a person with murderous intent commits these actions against a number of people, who happened to belong to a certain group, but she had no knowledge of such affiliations and she had no intent of isolating her actions to this group alone, she cannot be accused of having *dolus specialis*. As unlikely as it would be, it should only be considered a coincidence.

In international law, this type of intent is commonly seen in the crimes of genocide or crimes against humanity, amongst others. The purpose of *dolus specialis* was identified in the case of *Kordić and Čerkez*. The Trial Chamber III asserted that the conduct of the accused must have been 'aimed at *singling out* and attacking certain individuals on discriminatory grounds',¹⁴ with the aim of 'removal of those persons from the society in which they live alongside the perpetrator, or eventually humanity itself'.¹⁵

Crimes that require *dolus specialis* are often described as events that shake the moral foundation of society and are justifiably considered the most serious of offences. Thus a person guilty of such an offence, has incurred the highest standard of culpability.

1.4. *Culpa* or negligence

Negligence, due to its nature, is generally considered to be the lowest standard of fault or culpability,¹⁶ and is a different concept than intent or *dolus*. This is due to the fact that the perpetrator commits the wrongful act or result *unintentionally*. A person is said to have been negligent when she '(i) acts in disregard of certain elementary standards with which any reasonable man should comply; and (ii) either does not advert at all to the risk of harm to another person involved in her conduct (simple

¹³ Cassese (n 6 above) 167. As Cassese further explains: 'Examples include the goal of destroying the religious, racial, or ethnic group to which the victims of murder belong'.

¹⁴ *Prosecutor v Kordić and Čerkez* IT-95-14/2-T, Judgment, 26 February 2001, par 214; emphasis added.

¹⁵ *Kordić and Čerkez* Trial Judgment (n 14 above) par 220.

¹⁶ Cassese (n 6 above) 172; Bassiouni (n 5 above) 182.

negligence), or is aware of that risk, but is sure that it will not occur (culpable negligence).¹⁷

To say a person acted negligently is to assert two propositions, namely: (i) X's conduct was performed in a certain way; and (ii) that conduct was blameworthy. It has been stressed that an accused may only incur liability if she has acted a certain way and this action was accompanied by a certain state of mind. A negligent person *lacks* an intentional frame of mind; does this mean such a person cannot incur criminal responsibility? The two propositions stated above posit a negative answer to this question. The conduct of the accused must take place in a certain way, that is, in a way that falls short of the degree of care required by the law in those circumstances.¹⁸ If the conduct does indeed fall short of the required standard, this would account for an accused's *actus reus*. But this is not a test of an accused's culpability. To test for culpability, Snyman states that 'only if in the light of all the circumstances the inference can be drawn that he can *personally be blamed* for his failure to comply with the standard of care, and this will be the case only if the legal community could *reasonably have expected* of him to comply with the required standard of care'.¹⁹ An accused that complies with the latter will then be said to have the necessary *mens rea*; and together an accused may be held liable for her negligent conduct.

Looking at the descriptions above, negligence seems far removed from intent and exists at the opposite end of the spectrum of culpability. The purpose of the various Tribunals and Statutes within international criminal law is to prosecute only the most serious of crimes, crimes that attack our fundamental values.²⁰ Crimes of negligence, it would seem, fall short of the offences dealt with by the international community. This would certainly be correct if the conduct of the accused is that she was simply unaware of the risk posed by her actions (simple negligence), but not so in cases where the accused is aware of that risk but thinks it will not occur (culpable negligence). Cassese states that a person is *culpably negligent* when she is,

(i) *expected or required to abide by certain standards of conduct or take certain specific precautions*, and in addition (ii) is aware of the risk of harm and nevertheless takes it, for *he*

¹⁷ Cassese (n 6 above) 171-172.

¹⁸ Snyman (n 7 above) 210.

¹⁹ Snyman (n 7 above) 211; original emphasis.

²⁰ Cassese (n 6 above) 172.

*believes that the risk will not materialise owing to the steps he has taken or will take. [...], it would seem that the mental element just referred to only becomes relevant when, in addition, there exist some specific conditionals relating to the objective elements of the crime, that is, the values attacked are fundamental and the harm caused is serious.*²¹

Therefore, it would seem that negligence may be prosecuted within the context of international law;²² which is to say that a culpably negligent superior may be held accountable for her actions, or lack thereof.

1.5. Strict liability, general intent, specific intent, and their differences

Understanding the different types of *mens rea* and on what set of facts they may apply is essential to achieving justice. Handing down appropriate sentences requires an understanding of the reasons a perpetrator acted the way she did; the various forms of knowledge allow for such an understanding.

Already mentioned, strict liability is not applicable to crimes dealt with by the various Tribunals and Statutes; but the difference between general and specific intent is very important to the blameworthiness of an individual. In short: the higher the standard of intent, the more severe the punishment. With regards to culpability, fault can be identified, from highest to lowest, as follows: (i) *dolus specialis*, (ii) *dolus directus*, (iii) *dolus indirectus*, (iv) *dolus eventualis* and lastly, (v) culpable negligence. Numbers (ii) through (v) have been grouped, in the discussion above, as “general” intent and (i) as “specific” intent. To the present thesis, this distinction is very important. An accused cannot fall into the category of specific intent if she possessed (any) one of the forms within general intent. The distinction is clear: to have a specific intent is to possess a general intent to perform a certain act, such as killing; together with this general intent is an additional state of mind where the perpetrator possesses a specific goal, such as the destruction of an identified and protected group of people. That additional intent, or specific goal, together with the general intent then satisfies the requirements of *dolus specialis*. It then follows that general intent requires the possession of intent but with the exclusion of any specific or additional goal. Lastly, negligence describes the state of mind devoid of intent.

²¹ Cassese (n 6 above) 172; original emphasis.

²² The very notion of criminal responsibility on grounds of negligence may itself be questioned, as done by legal theorists such as Alexander and Ferszan; see L Alexander and K Kessler Ferzan *Crime and culpability: A theory of criminal law* (2009) 69-81. However, for the purposes of the present study it will be assumed that negligence suffices as a reasonable ground to establish criminal responsibility.

With a general understanding of *mens rea* within criminal law, we can proceed to examining how this subjective element is understood by the *ad hoc* Tribunals.

2. *Mens rea* and the *ad hoc* Tribunals

Unlike the ICC Statute, the Statutes of the Yugoslavia and Rwanda Tribunals do not include a general provision for the requirement of *mens rea*.²³ Thus, the unsettled matter of the mental element was left to judges in the Tribunals to determine the requisite *mens rea* for each crime under the subject matter jurisdiction of the Tribunals.²⁴ Without the assistance of a general principle and the need to support their findings on matters both substantive and procedural, the two *ad hoc* Tribunals consistently referred to national approaches to a variety of legal issues and therefore 'based their arguments on a comparison of the world's major criminal law systems and on a systematic analysis of the existing case law'.²⁵ The *ad hoc* Tribunals identified and applied a number of categories of *mens rea*, which are: (i) special intent; (ii) direct intent; and (iii) indirect intent. In general, the offences contained within international criminal law require intent,²⁶ but in exceptional cases negligence will suffice in establishing criminal responsibility.²⁷ One may notice a difference in terminology from the discussion above § 1.2.; however, no substantial difference exists between the two, as will be shown.

Due to the lack of a general provision in the Statutes of the *ad hoc* Tribunals relating to the *mens rea* requirement, it seems appropriate that we examine the jurisprudence of the *ad hoc* Tribunals with the aim of fleshing out the essential elements of *mens rea* as understood by the Tribunals. This examination will be restricted to the constructs of the four categories identified above, hence we will start with special intent, followed by direct intent and indirect intent, and lastly we will look at negligence.

²³ G Werle *Principles of international criminal law*, 2nd ed (2009) 148.

²⁴ ME Badar 'Drawing the boundaries of *mens rea* in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia' (2006) 6 *International Criminal Law Review* 314.

²⁵ ME Badar '*Mens rea* – Mistake of law and mistake of fact in German criminal law: A survey for International Criminal Tribunals' (2005) 5 *International Criminal Law Review* 204-205.

²⁶ Crimes within the jurisdiction of the ICTY and ICTR consist of four core offences: grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity.

²⁷ Werle (n 23 above) 149.

2.1. Special intent

Like above,²⁸ special intent or *dolus specialis*, exists when a general intent exists to commit the material elements of an offence, and in addition, a mental element that goes beyond the general intent. In international law, *dolus specialis* is required for particular classes of crimes, for example genocide.²⁹ But how should we understand the concept of special intent?

According to the ICTR Trial Chamber in the case of *Akayesu*, ‘Specific intention, required as a constructive element of a crime, [...] demands that the perpetrator clearly seeks to produce the act charged’.³⁰ According to this interpretation, special intent is related to the degree or intensity of the requisite *mens rea*.³¹ Badar notes that the Trial Chamber used the term *dol spécial* ‘in the original French passage’ and the term is ‘[...] not unambiguous under French law. To the majority of scholars, it appears to mean [...], the intention to achieve a certain result prohibited by law. Specific intent can thus be equalled with the common law term of purpose or the civil law concept of *dolus directus* in the first degree’.³² Further, Badar suggests that a case may be made that the ICTR referred to ‘special intent’ as understood by French law because of the strong influence the mentioned legal system had on the Tribunal.³³ However, the purpose of international criminal law and the mechanisms established to enforce it seem to contradict the above suggestion. Due to the nature of the crimes dealt with by the various Tribunals, and especially crimes of specific intent, the interpretation of a term should always be used in light of the definition of the crime the accused is charged with. Thus, for example, the Trial Chamber I in *Akayesu* would have used the term in relation to the definition of genocide; the special ‘intent to destroy’ members of the groups of people listed in Article 2 (2) of

²⁸ For a discussion of specific intent, see § 1.3. of the present chapter.

²⁹ Schabas describes *dolus specialis* in relation to genocide as ‘the very high level of intent required of persons charged with the crime of genocide, which is derived from the plain words of the provision. The perpetrator must carry out the act – killing, causing serious bodily harm, etc. – with the intent to destroy the targeted group. It is not enough to intend to kill members of a group, the *mens rea* of killing must be enhanced with a genuinely genocidal *mens rea*’; W Schabas *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (2006) 294-295; The International Law Commission described specific intent in relation to genocide as the ‘distinguishing characteristic of this particular crime’; ‘Report of the International Law Commission on the work of its forty-eighth Session, 6 May-26 July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No.10’, UN Doc. A/51/10, 44.

³⁰ *Prosecutor v Akayesu* ICTR-96-04-T, Judgment, 2 September 1998, par 498.

³¹ Badar (n 25 above) 211.

³² Badar (n 25 above) 211-212.

³³ Badar (n 25 above) 212.

the ICTR Statute.³⁴ In practice, the ICTY Appeals Chamber in the case of *Jelisić* referred to ‘specific intent’ to describe the ‘normative requirement set out in the chapeau of the definition of genocide’.³⁵

Despite not being entirely clear, it is submitted that special or specific intent should be used to describe purpose. This would mean that a person charged with a crime of specific intent, for instance genocide, would intend to commit a prohibited act with the purpose of achieving a specific goal; in the case of genocide, the intent to destroy persons of a specific group.³⁶

2.2. Direct intent

With the exception of negligence, intent is always required to establish criminal responsibility. Direct intent entails purposeful conduct of a perpetrator or a certainty that she fulfils all the material elements of a crime.³⁷ The Appeals Chamber in *Čelebići* asserted that an ‘intentional act or omission [...] is an act which, judged objectively, is deliberate and not accidental’.³⁸ Although vague, this description, and in relation to the discussion in § 1 above, direct intent entails both *dolus directus* and *dolus indirectus*.

In cases of rape, the *Kunarac* Trial Chamber described the *actus reus* of the crime as the sexual penetration of the victim, with the intent to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.³⁹ The perpetrator acts with intent and awareness that her conduct violates a prohibited act and fulfils the definitional elements of the crime. Further, in crimes of “outrages upon personal dignity”, as per Article 3 of the ICTY, a perpetrator must have the intent to act in such a way that it would cause serious humiliation, degradation, or otherwise be a serious attack on human. Yet, in such cases the perpetrator need not know for

³⁴ Statute of the International Criminal Tribunal for Rwanda.

³⁵ Badar (n 25 above) 212, referring to *Prosecutor v Jelisić* IT-95-10-A, Judgment, 5 July 2001, par 51.

³⁶ In *Prosecutor v Kayishema and Ruzindana* ICTR-95-1-T, Judgment, 21 May 1999, the Trial Chamber stated that ‘the act (the genocidal act) should be done in furtherance of the genocidal intent’. This statement implies that the *mens rea* of the perpetrator requires that she intends to commit an act with the purpose of her specific result, that is, to destroy a protected group. See also *Prosecutor v Musema* ICTR-96-13-T, Judgment, 27 January 2000, par 164-165; and *Prosecutor v Rutaganda* ICTR-96-3-T, Judgment, 6 December 1999, par 59.

³⁷ Werle (n 23 above) 149.

³⁸ *Prosecutor v Delalić et al.*, (*Čelebići* Appeal Judgment) IT-96-21-A, 20 February 2001, par 426.

³⁹ *Prosecutor v Kunarac et al.*, IT-98-23 & IT-96-23/1-T, Judgment, 22 February 2001, par 460.

certain that her conduct will result in an outrage of personal dignity; it is only necessary that she is aware of the substantial risk of such a result.⁴⁰ Therefore, the perpetrators first degree of *mens rea*, and the example of direct intent, is the certainty to conduct oneself in a manner that will humiliate, degrade or seriously attack the victim's personal dignity;⁴¹ with the second degree of *mens rea* being that of awareness of the intended result. Liability in terms of murder requires the accused to act with the intent to kill, or to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such an act was likely to cause death.⁴² The will of the actor is to cause death and she acts in such a way as to complete her desired consequence. The accidental causing of death would not qualify as murder,⁴³ nor would negligence.⁴⁴

The above highlights the essentials of "direct intent": the perpetrator conducts herself in such a way as to achieve her desired result. Put differently, the elements that constitute an offence are acted upon with the intent of their fulfilment.

2.3. Indirect intent

In terms of intent, specific and direct intent are not the only basis for criminal responsibility.⁴⁵ A person may be criminally responsible if she acts without purpose or is not certain that a prohibited consequence will occur. Under the category of indirect intent, the *ad hoc* Tribunals have used various formulas to describe the required state of mind. The ICTY Tribunals considered recklessness sufficient for the war crime of wilful killing,⁴⁶ or the likelihood of death as a result of serious injury.⁴⁷ Thus, the certainty of a result is not required. This would imply the acceptance of recklessness or *dolus eventualis*. However, more recent decisions, such as *Strugar*, have been more stringent as to the threshold of *mens rea* in relation to indirect intent, by stating

⁴⁰ *Kunarac* Trial Judgment (n 39 above) par 514.

⁴¹ *Badar* (n 24 above) 330.

⁴² G Mettraux *International crimes and the ad hoc Tribunals* (2005) 104.

⁴³ *Prosecutor v Delalić et al.*, IT-96-21-T, Judgment, 16 November 1998, par 433 and 439.

⁴⁴ *Prosecutor v Stakić* IT-97-24-T, Judgment, 31 July 2003, par 587.

⁴⁵ *Prosecutor v Strugar* IT-01-42-T, Judgment, 31 January 2005, par 235.

⁴⁶ See e.g., *Prosecutor v Mucić et al.*, IT-96-21-T, Judgment, 16 November 1998, par 439; *Prosecutor v Kupreškić* IT-95-16-T, Judgment, 14 January 2000, par 561.

⁴⁷ See e.g., *Prosecutor v Vasiljević* IT-98-32-T, Judgment, 29 November 2002, par 205; *Prosecutor v Blagojević and Jokić* IT-02-60-T, Judgment, 17 January 2005, par 556; *Prosecutor v Hadžihasanović and Kubura* IT-01-47-T, Judgment, 15 March 2006, par 31; *Prosecutor v Krajišnik* IT-00-39-T, Judgment, 27 September 2006, par 715.

[...] knowledge by the accused that his act or omission might *possibly* cause death is not sufficient to establish the necessary *mens rea*. The necessary mental state exists when the accused knows that it is *probable* that his act or omission will cause death.⁴⁸

Consequently, *mens rea* in cases of “indirect intent” appears to have been raised. Talk of probability seems to exclude the idea of *dolus eventualis* grounded in possibility. Perhaps, it could be reasoned, *dolus eventualis* should rather be seen in the light of probability instead of possibility, as the latter term is exceptionally vague. Maybe the Trial Chamber simply wished not to be tied to any particular interpretation of *dolus eventualis* and merely preferred the idea that criminal responsibility may arise in cases where uncertainty exists.⁴⁹

Whatever the reason, the *ad hoc* Tribunals do accept intent without certainty unlike cases of special and direct intent. Thus an accused, who seriously considered a result’s occurrence as more than mere possibility, and she accepts this considered result as a probability, will incur criminal responsibility.

2.4. Negligence

Already mentioned above is that negligence will only be sufficient to establish criminal responsibility in exceptional circumstances.⁵⁰ The prosecution of negligence has so far been restricted to cases dealing with superior responsibility. The ICTR has, however, stated that ‘[r]eference to “negligence” in the context of superior responsibility are likely to lead to confusion of thought’,⁵¹ implying that negligence does not play a role in that mode of responsibility. Nevertheless, the present work argues that negligence *is*, in fact, at the core of superior responsibility. The issue of negligence within superior responsibility is discussed above in Chapter 1.

⁴⁸ *Strugar* Trial Judgment (n 45 above) par 236. The *Strugar* Trial Chamber used the rationale of the Appeal Chambers in *Blaškić* when they stated a person must be aware of the substantial likelihood that a crime will be committed and not a mere possibility; *Prosecutor v Blaškić* IT-95-14-A, Judgment, 29 July 2004, par 41-42.

⁴⁹ This interpretation may be the preferred choice; evidenced by the following statement: ‘[I]n some cases the description of an indirect intent as *dolus eventualis* may have obscured the issue as this could suggest that *dolus eventualis* as understood and applied in a particular legal system had been adopted as the standard in this Tribunal’, *Strugar* (n 45 above) par 235.

⁵⁰ For a discussion of negligence, see § 1.2.2. of the present chapter.

⁵¹ *Prosecutor v Bagilishema* ICTR-95-1A-A, Judgment, 3 July 2002, par 35.

3. *Mens rea* and the ICC Statute

Article 30 of the ICC Statute,⁵² unlike the Statutes of the *ad hoc* Tribunals, defines the standard of *mens rea* applicable to crimes within its jurisdiction, by stating

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, the person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.⁵³

Thus, the conjunctive requirement of intent *and* knowledge is necessary for the prosecution of an accused for crimes contained in the ICC Statute. This requirement is the minimum standard of *mens rea* applicable to all offences,⁵⁴ “unless otherwise provided”. Consequently, allowance is made for liability based on a lesser form of fault,⁵⁵ such as is the case with superior responsibility. Despite such allowance, the mental element is set at an exceptionally high bar.⁵⁶ This makes sense when considering the seriousness of the offences within the Courts jurisdiction.

What will follow is a careful examination of the Article presented above while keeping in mind the different forms of fault discussed in § 1 above.

⁵² Piragoff notes that the purpose of the provision was as follows: ‘A general view was expressed in the Preparatory Committee on the Establishment of an International Criminal Court that “since there could be no criminal responsibility unless *mens rea* was proved, an explicit provision setting out all the elements involved should be included in the Statute”. A clear understanding of the general legal framework in which the court would operate was important for the Court, States Parties and the accused so as to provide guidance, predictability, certainty and promote consistent jurisprudence on fundamental questions, including the issue of moral culpability or *mens rea*’; D Piragoff ‘Article 30 – Mental Element’ in O Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (1999) 528.

⁵³ Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, art 1, July 17, 1998 (entered into force July 1, 2002); hereafter referred to as ICC Statute.

⁵⁴ M Kelt and H von Hebel ‘General principles of criminal law and the elements of crimes’ in RS Lee (ed) *The International Criminal Court: Elements of crimes and rules of procedure and evidence* (2001) 28.

⁵⁵ Van Der Vyver (n 2 above) 66.

⁵⁶ R Cryer *et al.*, *An introduction to international criminal law and procedure*, 2nd ed (2010) 386.

3.1. Intent and knowledge in the ICC Statute

Prima facie, a perpetrator must have both intent and knowledge of the material elements of a crime and the consequence of her conduct.⁵⁷ The conjunction of intent *and* knowledge suggests an exceptionally high standard of culpability; one that is higher than the standard in customary law.⁵⁸ However, Werle suggests that this interpretation is incorrect, by stating

First, Article 30(1) of the ICC Statute cannot be interpreted as requiring that *all* material elements must be committed with intent *and* knowledge. This follows for Subsections (2) and (3); under these provisions, the intent requirement relates to conduct and consequences only. Therefore, the intent of the perpetrator need not cover the circumstances of the crimes, while his or her knowledge need not cover the criminal conduct. The only material element that must be covered by both intent and knowledge is the consequences of a crime.⁵⁹

Werle argues that this interpretation is correct because it follows from the Introduction to the Elements of Crimes which states that where ‘no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e. *intent, knowledge or both*, set out in article 30 applies’.⁶⁰ Therefore, Werle suggests that the mental requirement of Article 30 is not necessarily a conjunction but the phrase “intent and knowledge” should rather encompass both a conjunction *and* a disjunction. This point has also been made by Cassese when he states ‘[...] one ought to note that in international law the standard construction applies that a purely grammatical construction must yield to a logical interpretation whenever this is dictated by the principle of effectiveness and is consonant with the object and purpose of the rule. It is therefore admissible to construe the word ‘and’ as also including the word ‘or’ when this is logically required’.⁶¹ With that being said, we shall proceed to examine the Article in more detail. Intent will be dealt with first, followed by knowledge, general and specific intent as contained in the ICC Statute and lastly we ask the question whether Article 30 excludes lower degrees of fault.

⁵⁷ R Arnold ‘The *mens rea* of genocide under the statute of the international criminal court’ (2003) 14 *Criminal Law Forum* 131.

⁵⁸ Cassese (n 6 above) 176.

⁵⁹ Werle (n 23 above) 151, original emphasis.

⁶⁰ Werle (n 23 above) 151, original emphasis.

⁶¹ Cassese (n 6 above) 176-177.

With reference to Article 30, Clarke states that a person ‘is said to have intent in two different situations, as to *conduct* and as to a *consequence*’.⁶² The term “*conduct*” denotes a positive action but may include certain types of omission. Piragoff notes that ‘[I]t may possibly also include *intentional* omission, where the causal result and moral culpability of the *intentional* omission is equivalent to the achievement of the same result caused by an intentional act’.⁶³ Further, in terms of the phrase “*means to engage in the conduct*” should be understood as conduct that

[...] must be the result of a voluntary action on the part of an accused. It includes the basic consciousness or volition that is necessary to attribute an action as being the product of the voluntary will of a person. [...] Generally, the term “intent” also connotes some element, although even minimal, of desire or willingness to do the action, in light of an awareness of the relevant circumstances.⁶⁴

Hence, intent relating to conduct entails *dolus specialis* (with the additional or specific result in mind), *dolus directus*, *dolus indirectus* and *dolus eventualis*. This is evidenced by the specific talk of intentional conduct and the willingness to engage in such conduct.

On the other hand, knowledge of the crime relates to Article 30(2)(b), in that, the phrase “*means to cause that consequence*” reflects the fact that consequences defined in a crime must causally follow from the accused’s conduct and that this person must have desired such a consequence to occur. Furthermore, the phrase “*aware that it (the consequence) will occur in the ordinary course of events*” means direct desire and knowledge of the caused consequence or a person has knowledge or foresight of ‘such a substantial probability, amounting to virtual certainty, that the consequence will occur’.⁶⁵ Thus, the phrase “*means to cause that consequence*” entails *dolus directus* and *dolus indirectus*, while it is uncertain whether the phrase “*aware that it will occur in the ordinary course of events*” describes *dolus eventualis*. The words “will occur” imply a degree of certainty, while *dolus eventualis* requires a more lenient standard of awareness: the perpetrator need only be aware of an

⁶² R Clark ‘The mental element in international criminal law: The Rome Statute of the International Criminal Court and the elements of offences’ (2001) 12 *Criminal Law Review* 302; emphasis added.

⁶³ Piragoff (n 52 above) 532.

⁶⁴ Piragoff (n 52 above) 533; Werle (n 24 above) 152.

⁶⁵ Piragoff (n 52 above) 533-534.

offences substantial likelihood.⁶⁶ Whether or not *dolus eventualis* is included in the ICC Statute will be discussed in more detail below.

Lastly, Article 30(3) describes wilful blindness in the phrase “*awareness that a circumstance exists*”. This state of knowledge entails the situation where a person is aware of a certain set of circumstances but deliberately ignores these facts.⁶⁷ Consequently, this amounts to actual knowledge. This form of knowledge is required in cases of superior responsibility where the superior is a civilian. In terms of Article 28(b)(i), a superior who consciously disregards relevant information will be criminally responsible for the conduct of her subordinates. This is a much stricter requirement to that of superiors described in Article 28(a), in that persons described in the latter section may be liable on grounds of negligence while a civilian superior may only be liable when she has “actual” knowledge.

The ICC Statute further makes provision for both general and specific intent crimes. This is ensured by the distinction between intent in relation to conduct and intent relating to consequences. The distinction also answers the question posed by Van der Vyver: ‘Can a person be held criminally liable for a crime requiring intent if he or she deliberately committed *the act* with which he or she is being charged, or must the intent of the accused in addition be aimed at *the harmful consequences* which emanated from the wrongful act?’⁶⁸ Crimes within the jurisdiction of the ICC Statute require, as a general rule, intent. As mentioned, there are exceptions but intent remains the point of departure. A person who acts intentionally towards a consequence will have committed a crime of general intent, whereas a person who acts with intent and such intentional conduct results in an additional specific consequence, such as the destruction of a specific group of people, will have committed a crime of specific intent. Therefore, the intent of a certain consequence results in the distinction between a crime of general and specific intent. In cases of specific intent, a mental element must be established for both intent in relation to conduct and intent in relation to consequence of the act. Thus, ‘[...]in relation to the conduct, it must be demonstrated that the accused meant to engage in the conduct;

⁶⁶ Werle (n 23 above) 151-152.

⁶⁷ Van der Vyver describes wilful blindness as ‘the mental disposition of someone who does not want to know that which he already knows or foresees, and fakes ignorance in order to escape liability’; Van der Vyver (n 2 above) 75.

⁶⁸ Van der Vyver (n 2 above) 69.

and in relation to the consequences of the act, it must be proved that the accused meant to cause the consequence or was aware that consequence will occur in the ordinary course of events'.⁶⁹ Intent in relation to conduct therefore entails *dolus directus*, *dolus indirectus* and *dolus eventualis*, while intent in relation to the consequence an act describes *dolus directus* and *dolus indirectus* only.

What, then, of *dolus specialis*? The latter form of intent is a distinct manifestation of fault. If we look at crimes that require *dolus specialis*, for example genocide, we see that an *additional* state of mind is required. It can aptly be described as the perpetrator possessing double intent. A general intent is not enough; a specific intent is also required. In cases of genocide a perpetrator will need the specific intent described above, that is to act in such a way so that a specific consequence is achieved. For instance, the perpetrator intends to kill, but that intent to kill is directed towards *destroying* a 'national, ethnical, racial or religious group'.⁷⁰ Thus, providing an additional intent and when that intent is added to the intent to kill it becomes double intent, or rather *dolus specialis*. Therefore, while Article 30 provides a general framework of *mens rea* in the ICC Statute it does not wholly dictate the required *mens rea* for *dolus specialis*. It achieves this by making provision (due to the phrase "unless otherwise provided") for the *mens rea* for crimes such as genocide; thus, crimes of specific intent and its required *mens rea* is covered by the ICC Statute.

An interesting observation is made by Van der Vyver when he maintains that when 'intent and knowledge', in terms of Article 30, are 'taken together', it does away with the concept of *dolus eventualis*.⁷¹ If the latter concept is excluded then recklessness, as a common law concept somewhere between intent and negligence, must surely also be excluded. Whether lower standards of fault are excluded by the ICC Statute will be discussed by looking at both the positive and negative viewpoints in the discussion.

Article 30(2)(b) of the ICC Statute requires a perpetrator to be aware of consequences that will occur in the ordinary course of events or that the perpetrator meant to cause the consequence.⁷² Thus it follows that the wording of the provision

⁶⁹ Van der Vyver (n 2 above) 101.

⁷⁰ Article 6 of the ICC Statute.

⁷¹ Van der Vyver (n 2 above) 71.

⁷² Article 30(2)(b) of the ICC Statute.

excludes both *dolus eventualis* and recklessness.⁷³ The standard set in Article 30(2)(b) is vastly more definitive than both the concepts in discussion. However, Werle and Jessberger,⁷⁴ as will be discussed below, maintain that these concepts need not be excluded. They reason as follows: The phrase “unless otherwise provided” entails that if a provision within the ICC Statute maintains a different subjective standard to that contained in Article 30; the alternative standard is to be applied as is necessary. Thus, Article 21 of the ICC Statute provides that customary international law may be applied, if necessary. Consequently, a main source of customary international law arises from the jurisprudence of the *ad hoc* Tribunals who have stated that *dolus eventualis* and recklessness is sufficient to meet the requirements of an applicable *mens rea*.⁷⁵ Further, Jescheck suggests that knowledge in terms of Article 30(3) of the ICC Statute means that ‘awareness, that [...] a consequence will occur in the ordinary course of events’ includes *dolus eventualis* as used in ‘continental European legal theory’.⁷⁶ Mantovani reflects on the issue as follows

It (i) does include intent and recklessness (*dolus eventualis*), though (ii) it implicitly excludes liability in cases of *mere* negligence (*culpa*); (iii) it also implicitly excludes criminal liability for recklessness (*dolus eventualis*) when individual crimes require intent or, more precisely, premeditation [...].⁷⁷

Another point of view that supports the inclusion of the concepts in discussion comes from Piragoff’s statement in regards to the phrase “*aware that it will occur in the*

⁷³ Triffterer also suggests that since Article 30(2)(b) states “will occur” and not “might occur”, it would not be enough to prove that the perpetrator is aware of the probability of the consequence and nevertheless carries out the conduct that results in the consequence; O Triffterer ‘The new international criminal law – Its general principles establishing individual criminal responsibility’ in K Koufa (ed) *The new international criminal law* 706.

⁷⁴ G Werle and F Jessberger “Unless otherwise provided’: Article 30 of the ICC Statute and the mental element of crimes under international criminal law’ (2005) 3 *Journal of International Criminal Justice* 53-54.

⁷⁵ In the ICTY case of *Blaskic* Appeals Judgment (n 48 above) par 42, the Appeal Chambers stated in relation to recklessness that: ‘A person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime’. With regards to *dolus eventualis*, the Trial Chamber stated that: ‘both *dolus directus* and a *dolus eventualis* are sufficient to establish the crime of murder under Article 3’; *Stakić* Trial Judgment (n 44 above) par 587. The ICTR stated that: ‘the act(s) or omission(s) may be done with intention, recklessness, or gross negligence’; *Kayishema* (n 37 above) par 146.

⁷⁶ H-H Jescheck ‘The general principles of international criminal law set out in Nuremberg, as mirrored in the ICC Statute’ (2004) 2 *Journal of International Criminal Justice* 45.

⁷⁷ F Mantovani ‘The general principles of international criminal law: The viewpoint of a national criminal lawyer’ (2003) 1 *Journal of International Criminal Justice* 32.

ordinary course of events”, as provided for in Article 30(2)(b), that ‘[...]’, in most legal systems, “intent” does not only include the situation where there is direct desire and knowledge that the consequence will occur or be caused, but also situations where there is knowledge or foresight of such a substantial probability, amounting to virtual certainty, that the consequence will occur’.⁷⁸ The author maintains that people govern their lives in terms of high probabilities of certainty and for this reason is the likely meaning of the phrase in Article 30(2)(b); which equates to the concept of *dolus eventualis*.⁷⁹

The paragraph above paints a positive picture for the inclusion of *dolus eventualis* and recklessness in Article 30. But what are some of the opposing views on the matter? Schabas notes that difficulties arose when attempting to include lower the *mens rea* threshold to concepts like *dolus eventualis*, recklessness and negligence in the ICC Statute. He states that ‘[A] square bracketed text of recklessness was ultimately dropped [...]. There was really little reason to define recklessness, as it is not an element in the definition of any of the offences within the jurisdiction of the Court’.⁸⁰ Ambos views this deletion as problematic.⁸¹ He continues

The same applies for the higher threshold of *dolus eventualis*: this is a kind of “conditional intent” by which a wide range of subjective attitudes towards the result are expressed and, thus, implies a higher threshold than recklessness. The perpetrator may be indifferent to the result or be “reconciled” with the harm as a possible cost of attaining his or her goal. However, the perpetrator is not, as required by article 30(2)(b), aware that a certain result or consequence will occur in the ordinary course of events. He or she only thinks that the result is possible. Thus, the wording of article 30 hardly leaves room for an interpretation which includes *dolus eventualis* within the concept of intent as a kind of “indirect intent”.⁸²

Ambos appears to have a stronger argument, than Piragoff above, that the wording of Article 30 does exclude *dolus eventualis* and recklessness.⁸³ This proposition is

⁷⁸ Piragoff (n 52 above) 533-534.

⁷⁹ Piragoff (n 52 above) 534.

⁸⁰ W Schabas *An introduction to the International Criminal Court*, 2nd ed (2004) 108-109; W Schabas ‘General principles of criminal law in the international criminal court Statute (part III)’ (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 420.

⁸¹ K Ambos ‘General principles of criminal law in the Rome Statute’ (1999) 10 *Criminal Law Forum* 21. Presumably, Ambos thinks that if the drafters thought it unnecessary to define recklessness, but rather actively remove it, implies that recklessness has no part to play in the Statute.

⁸² Ambos (n 81 above) 21-22;

⁸³ See further A Cassese ‘The Statute of the International Criminal Court: Some preliminary reflections’ (1999) 10 *The European Journal of International Law* 154. Cassese states that: ‘[i]t

supported by the *nullum crimen sine lege* principle stated in Article 22 of the ICC Statute. More specifically, Article 22(2) provides that when an ambiguity arises ‘the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted’.⁸⁴ Ambiguity certainly does arise in this discussion. But what of Werle and Jessberger’s argument that the concept of *mens rea* is widened by the phrase “*unless otherwise provided*” which may allow the application of customary international law? This issue is discussed below in § 3.2. However, no *clear* answer is provided for and the phrase itself may have many interpretations, thereby resulting in ambiguity.

In the case of *Bemba*, the Pre-Trial Chamber II held that neither *dolus eventualis*, recklessness or any other lower form of culpability are part of Article 30 of the Statute. The Pre-Trial Chamber II finds support in the language of the phrase “will occur in the ordinary course of events”, ‘which does not accommodate a lower standard than the one requires by *dolus directus in the second degree* (oblique intention)’.⁸⁵ Further, the Pre-Trial Chamber II notes that “will occur” read together with the phrase “in the ordinary course of events” indicates that the required standard of occurrence is close to certainty.⁸⁶ The Pre-Trial Chamber II then says

This standard is undoubtedly higher than the principal standard commonly agreed upon for *dolus eventualis* – namely, foreseeing the occurrence of the undesired consequences as a mere likelihood or possibility. Hence, had the drafters of the Statute intended to include *dolus eventualis* in the text of article 30, they could have used the words “may occur” or “might occur in the ordinary course of events” to convey mere eventuality or possibility, rather than near inevitability or virtual certainty.⁸⁷

Further, the Pre-Trial Chamber II confirms its decision by way of review of the *travaux préparatoires* of the Statute.⁸⁸ In contrast to the Pre-Trial Chamber II in

appears questionable to have excluded recklessness as a culpable *mens rea* under the Statute’. He further suggests that recklessness should be included for certain crimes, such as war crimes.

⁸⁴ Article 22(2) of the ICC Statute.

⁸⁵ *Prosecutor v Jean Pierre Bemba Gombo* (“*Bemba* Pre-Trial Chamber II”) ICC-01/05-01/08, Judgment, 10 June 2008, par 360.

⁸⁶ *Bemba* Pre-Trial Chamber II (n 85 above) par 362.

⁸⁷ *Bemba* Pre-Trial Chamber II (n 85 above) par 363.

⁸⁸ *Bemba* Pre-Trial Chamber II (n 85 above) par 364-367; Ambos, whom agrees that *dolus eventualis* is and should be excluded, criticises the Pre-Trial Chambers use of the *travaux* because while it confirms ‘a restrictive approach as to Article 30, they are only a ‘supplementary means of interpretation’ [...] and thus not decisive in the light of a clear or different literal interpretation’. He further stated that the literal interpretation is predicated on the conceptual understanding of *dolus eventualis* and that there are several cognitive concepts of *dolus eventualis* requiring awareness or

Bemba, the Pre-Trial Chamber I in *Lubanga* held that *dolus eventualis* was included, and stated that it applied in situations in which the suspect '(a) is aware of the risk that the objective elements of the crime *may* result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it'.⁸⁹ The Pre-Trial Chamber I argues that the accused must be aware of a substantial likelihood that her conduct would cause the result and such a person continued her conduct despite her awareness.⁹⁰ This position, however, seems to have been contradicted by the *Lubanga* Trial Chamber I when they agreed with the *Bemba* Pre-Trial Chamber II when it argued that (i) the drafters excluded *dolus eventualis*; and (ii) the language used in Article 30(2)(b) leaves no room for these standards of culpability.⁹¹ The Majority of the Chamber was of the view that

[...] the “awareness that a consequence will occur in the ordinary course of events” means that the participants anticipate, based on their knowledge of how events ordinarily develop, that the consequence *will occur* in the future. [...] As to the degree of risk, and pursuant to the wording of Article 30, it must be *no less than awareness* on the part of the co-perpetrator that the consequence “*will occur* in the ordinary course of events”. *A low risk will not be sufficient*.⁹²

Thus, the implication of the above is that any form of awareness that is below “will occur” will not suffice in establishing intent. Consequently, the *Lubanga* Trial Chamber I excluded the concept of *dolus eventualis*, recklessness and any other standard below that.

Therefore, considering the above more weight seems to be behind the assertion that the wording of Article 30 excludes *dolus eventualis* and recklessness. Despite this, it is possible that the phrase “*unless otherwise provided*” allows for these concepts to be included. However, whether this succeeds, as the discussion below in § 3.2. indicates, is still an open question.

certainty as to the consequence and these may be included in Article 30; K Ambos ‘Critical issues in the *Bemba* confirmation decision’ (2009) 22 *Leiden Journal of International Law* 718.

⁸⁹ ME Badar ‘*Dolus eventualis* and the Rome Statute without it?’ (2009) 12 *New Criminal Law Review* 5.

⁹⁰ Badar (n 89 above) 5.

⁹¹ *Prosecutor v Thomas Lubanga Dyilo* (“*Lubanga* Trial Chamber”) ICC-01/04-01/06, Judgment, 14 March 2012, par 1011.

⁹² *Lubanga* Trial Judgment (n 91 above) par 1012; emphasis added.

Negligence: From the discussion above we can infer that any standard of *mens rea* that falls below *dolus eventualis* or recklessness should therefore be excluded. Negligence is of a lower threshold than the previous concepts; therefore negligence, in principle, should be excluded and consequently it is inappropriate to apply such a standard. However, the phrase “*unless otherwise provided*” ensures the possibility of applying different levels of fault when it is appropriate. In the case of Article 28(a) of the ICC Statute, a negligent superior may be criminally responsible for the acts of her subordinates. Thus, an exceptional case such as superior responsibility, in terms of Article 28(a), will allow for the use of negligence as a basis for responsibility.

3.2. “Unless otherwise provided”

The phrase “*unless otherwise provided*” in Article 30 plays a significant role in deepening the scope and application of what is hoped to be a consistent and coherent subjective requirement within the ICC Statute. Even though its presence raises issues of its own, it can certainly assist in moving the discussion forward. Further, the phrase above may imply a possible way out of the question posed in § 3.1.4., where it was asked whether Article 30 of the ICC Statute excludes lower degrees of fault, such as *dolus eventualis*, recklessness and negligence.

“*Unless otherwise provided*” allows for the confirmation or clarification of certain standards of knowledge, but it may also led to a departure from the general standard provided for in Article 30.⁹³ That is, the phrase “*unless otherwise provided*” may ‘encompass provisions arising from the Statute itself, and [...] from the Elements of Crimes and other sources of international law under Article 21 ICCSt (customary international law in particular)’.⁹⁴ What follows is an examination of the above phrase; the purpose of which is to understand the full scope of *mens rea* in terms of Article 30.

The phrase “*unless otherwise provided*” allows for different Articles in the ICC Statute to supplement or expand on the understanding of *mens rea* within the Statute. The definitions of crimes contained within ICC Statute itself hold different elements as to a perpetrator’s state of mind. Terms such as “intent”, “intentional” and

⁹³ Werle and Jessberger (n 74 above) 43.

⁹⁴ Werle and Jessberger (n 74 above) 43.

“intentionally”,⁹⁵ “wilful”, “wilfully”,⁹⁶ and “wantonly” are often referred too.⁹⁷ However this multiplicity of special rules is less a result of a ‘consciously varying assessment of the subjective requirements for criminality by the creators of the Statute than it is a consequence of the literal incorporation of “parent norms” into the ICC Statute’.⁹⁸ The case of war crimes and the frequent use of these additional elements is the product of the ICC absorbing the corresponding rules of international humanitarian law. Van der Vyver, on the other hand, suggests that the repetitive use of the element of intent is redundant and that ‘this redundancy is entirely attributable to definitions being taken from existing treaties in force and the drafters’ resolve to retain that language as far as possible’.⁹⁹

Additional sources provided by the phrase “*unless otherwise provided*” are stated in Article 21(1) of the ICC Statute which allows the Court to apply, firstly, the law contained in the ICC Statute,¹⁰⁰ and second, customary international law;¹⁰¹ which follows, the principles applied by the *ad hoc* Tribunals.¹⁰² Lastly, if the former as well as the latter fail, the Courts may apply ‘general principles of law [...] from national laws of legal systems of the world [...]’.¹⁰³

It would be difficult to infer from the phrase “*unless otherwise provided*” that only provisions contained within the ICC Statute apply. However, even if one were to accept such an inference it would lead one to Article 21, which states the opposite. Thus, it would appear as if the phrase above allows for the modification of the subjective requirements contained in Article 30. If the above is correct, it would

⁹⁵ “[I]ntent to destroy” (genocide, Article 6 of the ICC Statute); “intentionally causing great suffering” (crimes against humanity of inhumane treatment, Article 7(1)(k) of the ICC Statute); “intentional infliction of conditions of life” (crime against humanity of extermination, Article 7(2)(b) of the ICC Statute); “intentional infliction of severe pain” (crime against humanity of torture, Article 7(2) of the ICC Statute); “intent of affecting the ethnic population” (crime against humanity of forced pregnancy, Article 7(2)(f) of the ICC Statute); “intention of removing them from the protection of law” (crime against humanity of enforced disappearance, Article 7(2)(i) of the ICC Statute); *et al.*

⁹⁶ “[W]ilful killing” (war crime of killing, Article 8(2)(a)(i) of the ICC Statute); “wilfully causing great suffering” (war crime of causing great suffering, Article 8(2)(a)(iii) of the ICC Statute); “wilfully depriving a ...protected person of the rights of a fair and regular trial” (war crime of deprivation of the right to a fair trial, Article 8(2)(a)(vi) of the ICC Statute); “wilfully impeding relief supplies” (war crime of starvation of civilians, Article 8(2)(b)(xxv) of the ICC Statute).

⁹⁷ “[D]estruction [...] carried out unlawfully and wantonly” (war crime of destruction and appropriation of property, Article 8(2)(a)(iv) of the ICC Statute).

⁹⁸ Werle and Jessberger (n 74 above) 44.

⁹⁹ Van der Vyver (n 2 above) 113.

¹⁰⁰ Article 21(1)(a) of the ICC Statute.

¹⁰¹ Article 21(1)(b) of the ICC Statute.

¹⁰² Werle and Jessberger (n 74 above) 45.

¹⁰³ Article 21(1)(c) of the ICC Statute.

suggest that the Courts have an exceptionally broad interpretation of *mens rea* available to them. Yet, such a broad interpretation would have to be within the realm of reasonability and within the rights of the accused. Perhaps the Court, as indicated by the Pre-Trial Chamber I in the *Al Bashir* case, will restrict the use of customary international law and national law. In the aforementioned case, the Court stated that these sources of law ‘can only be resorted to when the following two conditions are met: (i) there is a *lacuna* in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such *lacuna* cannot be filled by the application of the criteria of interpretation provided in articles 31 and 32 of the *Vienna Convention on the Law of the Treaties* and article 21(3) of the Statute’.¹⁰⁴ How the Courts apply other sources will have to be determined in time. But as it stands, no one answer has been provided.

The implications of allowing other provisions within the meaning of Article 30(1) are noted by Werle and Jessberger as: (i) affirmation and clarification; (ii) an expansion of criminal liability; and (iii) a narrowing criminal liability.¹⁰⁵

Firstly, the subjective elements established in Article 30 can be affirmed by the phrase “otherwise provided”. The authors use the example of crimes against humanity in terms of Article 7(1) of the ICC Statute, in that the latter Article provides that a perpetrator must act ‘with knowledge of the attack’ on the civilian population and without this addition to the definition of the crime the requirement of knowledge of the attack would arise from Article 30(3) of the ICC Statute.¹⁰⁶ Secondly, the phrase allows for the expansion of the concept of *mens rea*. It has been mentioned that Article 30 subscribes to a high standard in terms of the subjective requirement. By allowing other standards to apply, the phrase may have contributed to the inclusion of lower standards of *mens rea*, such as recklessness, *dolus eventualis* and negligence. If the ICC is allowed to apply the standards set down by the *ad hoc*

¹⁰⁴ *Prosecutor v Omar Hassan Ahmad Al Bashir* (“*Al Bashir* Arrest Warrant case”) ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, par 44.

¹⁰⁵ Werle and Jessberger (n 74 above) 47-49.

¹⁰⁶ Werle and Jessberger (n 74 above) 47.

Tribunals, for instance, then the recognition of recklessness or *dolus eventualis* in the *Blaskic* case may be utilised.¹⁰⁷ However, Cryer notes that

States Parties at Rome appeared to minimize the chance that the ICC could go outside the Statute and Elements of Crimes to determine, for example, that customary international law set a lower standard than the Statute or the Elements of Crimes. [...]. The early practice of the ICC has been to accept lower *mens rea* standards set out in the Elements of Crimes, but not to look outside the Statute or Elements.¹⁰⁸

The last implication mentioned by Werle and Jessberger is the possible narrowing of criminal liability. The authors note that '[N]umerous provisions of the ICC Statute include additional subjective requirements that, unlike 'intent and knowledge' under Article 30 ICCSt, do not necessarily refer to a material element of the crime, such as conduct, consequence or circumstance'.¹⁰⁹ Thus, these additional subjective requirements restrict the criminal responsibility of a suspect by requiring evidence of such additional states of mind.

Many issues relating to the phrase "unless otherwise provided" still need to be ironed out by the Courts. However, the possible effect or implications of the phrase may allow for a fuller understanding of the subjective requirement. When all is said and done, it certainly allows for a broader scope of application. For instance, a mode of liability like superior responsibility is allowed to exist within the context of the Statute.

4. Conclusion

If asked to sum up *mens rea* in one word, it would be: complicated! This could mostly be because of the impossibility to truly know the mind of another; with this restriction, we can only *infer* from the evidence before us in pursuit of an understanding of a perpetrators mind at a particular moment in time. But whatever restrictions that may befall us, it is critical that we establish the component of a person's conduct that we judge to be deserving of blameworthiness.

¹⁰⁷ In *Blaskić* Appeals Judgment (n 48 above) par 42, the Appeal Chambers stated, in context of ordering crimes: 'A person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime'.

¹⁰⁸ Cryer (n 56 above) 386.

¹⁰⁹ Werle and Jessberger (n 74 above) 48.

In this chapter, we have explored how *mens rea* manifests itself, that is: within *dolus* emerge different degrees of intent; *culpa*, on the other hand, arises due to actions committed unintentionally. From these concepts, and the different understandings within each concept, we can ascribe different levels of culpability: Specific intent the highest, negligence the lowest. From the point of view of *mens rea*, crimes within the jurisdiction of the various mechanisms of international criminal law work much in the same way. That is, intent is the bedrock upon which criminal responsibility is based and lower standards of *mens rea*, such as *dolus eventualis*, recklessness and negligence, the exception. However the previous statement is of a general nature, meaning that not all aspects of international criminal law accept it. The *ad hoc* Tribunals, through their jurisprudence, allow for these lower standards while the ICC Statute, and its Courts so far, has been less accepting to their application in matters within in their jurisdiction. Yet, even the latter may be questioned. Within Article 30 of the ICC Statute, phrases such as “*unless otherwise provided*” allow for the *possibility* of their application. This, however, has not been confirmed by the Courts and without such guidance it remains open to speculation.

Despite the questionable nature of *mens rea*, within the context of international criminal law, the following are submitted to be reasonable conclusions that may be drawn from the above discussion:

- (1) The degree of moral blameworthiness depends on the degree *mens rea*.
- (2) Due to the seriousness of the offences within international criminal law, intent is the rule; negligence the exception.
- (3) Crimes of specific intent, within international law, require general intent with the addition of a specific purpose (or intent).
- (4) As per definition, a person cannot both be intentional (especially specifically intentional) and negligent with regards to the same conduct.
- (5) Lower standards of the subjective requirement (*dolus eventualis*, recklessness and negligence) have found its application in the *ad hoc* Tribunals. However, the *wording* of Article 30 of the ICC Statute leaves no

room for both *dolus eventualis* and recklessness. The phrase “*unless otherwise provided*” may allow for their use, but this is still undecided.

(6) The phrase “*unless otherwise provided*”, provided for by Article 30 of the ICC Statute, allows for the exceptional application of negligence in cases of superior responsibility (Article 28(a) of the ICC Statute).

Hence: We justifiably punish those who are morally blameworthy. The degree of blameworthiness, and therefore the severity of the punishment, depends on a person’s state of mind. Specific intent warrants the highest standard of culpability and negligence the lowest. A person cannot be negligently intentional, and especially not specifically intentional.

3

A superiors fault: The disconnect in reasoning

Chapter 1 and 2 served to establish an understanding of superior responsibility and the nature of *mens rea* as applied within international criminal law. Importantly, the superior's fault is derived from her failure to perform her duties diligently, which in effect amounts to a negligence standard. This notwithstanding, a superior may be successfully prosecuted for a special intent crime, where she not only lacked the special intent required for the prosecution of the direct perpetrator; she also lacked the general intent regarding the commission of the underlying offence. Schabas writes '[B]ut command responsibility is an offence of negligence, and exactly how a specific intent offence can be committed by negligence remains a paradox'.¹ While Schabas correctly identifies the paradoxical nature of superior responsibilities application to crimes of genocide, or generally to specific intent crimes as a whole, it is here argued that this paradox reveals a disconnection in legal reasoning. This disconnection, or illogical reasoning, results in a contradiction whereby conduct that is negligible is punished as if it were intentional. Thus, it is argued that it is impossible for a person who acted negligently to commit a crime of specific intent. Therefore, superior responsibility, as an offence of negligence, cannot be applied to cases where a subordinates underlying crime is one of specific intent.

The contradiction arises between negligence applicable to superior responsibility and *dolus specialis* of crimes of specific intent. In order to convict a person of a crime, it must be demonstrated that the accused complied with all the definitional elements of the alleged crime. However, in cases of superior responsibility and crimes of specific intent the latter does not seem to be necessary. That is, in order for a superior to be convicted of a crime of specific intent pursuant to superior responsibility, the requirement of *dolus specialis* on the part of the superior appears to be an unnecessary requirement. Prevailing jurisprudence suggests that in order to comply with the requirement of *mens rea* for the offence, negligence on the part of the

¹ W Schabas *Genocide in international law* (2003) 305.

superior is somehow equated to the requirement that a perpetrator of a crime of specific intent possess *dolus specialis*. A superior's liability, pursuant to superior responsibility, may arise due to her failure of duties but she is ultimately convicted of the underlying offence. So the conflict arises: negligence and specific intent are mutually exclusive degrees of fault possessing no common factors and, if compared to the other, are in fact at odds with one another. So much so they are contradictory. A person who acts negligently can never do so intentionally; or rather a person cannot be negligently intentional. However, a person can be intentionally negligent which simply amounts to intent. Thus, superior responsibilities standard of negligence is contradictory to a crime of specific intent which requires the highest degree of fault, *dolus specialis*. Therefore, it follows that the application of superior responsibility to crimes of specific intent is contradictory and for this reason a disconnection in legal reasoning. Within the framework of the principle of culpability, this entails that a superior who acts negligently and thus cannot possess specific intent, cannot satisfy the requirements of a crime of specific intent; therefore, as per the principle of culpability such superior cannot incur responsibility for the applicable offence because she does not fulfil the requirements to be considered a participant to the offence. This further reinforces the proposition that pursuant to superior responsibility a superior cannot be held accountable for a crime of specific intent. Consequently, cases that have already applied superior responsibility to crimes of specific intent, or have opined that it is applicable,² have been incorrect in its use and its further application in future cases should not be considered appropriate.

Two possibly contentious points were made above: firstly, that a superior's guilt is that of the underlying offence and secondly, that superior responsibility is an offence of negligence. Both of these points have been elaborated in Chapter 1 of this

² *Prosecutor v Akayesu* ICTR-96-04-T, Judgment, 2 September 1998; *Prosecutor v Serushago* ICTR-98-39-S, Sentence, 5 February 1999; *Prosecutor v Jean Kambanda* ICTR-97-23-S, Judgment and Sentence, 4 September 1998; *Prosecutor v Kayishema and Ruzindana* ICTR-95-1-T, Judgment, 21 May 1999; *Prosecutor v Nahimana et al.*, ICTR-99-52-T, Judgment and Sentence, 3 December 2003; *Prosecutor v Musema* ICTR-96-13-T, Judgment, 27 January 2000; *Prosecutor v Ntagerura et al.*, ICTR-99-46-T, Judgment and Sentence, 25 February 2004; *Prosecutor v Krstić* IT-98-33-T, Judgment, 2 August 2001; *Prosecutor v Krnojelac* IT-97-25-T, Judgment, 15 March 2002; *Prosecutor v Brdanin* ICTY-99-36-T, 1 September 2004; *Prosecutor v Blagojević and Jokić* IT-02-60-T, Judgment, 17 January 2005; *Prosecutor v Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2010.

dissertation.³ Thus, the guilt of a superior for the crimes of her subordinates will not be discussed again because it was comprehensively done so there, but the issue of negligence will be discussed below but in further detail as to *why* negligence is said to be applicable to superior responsibility. Therefore, the remaining chapter will serve to: (i) establish why a person who acts negligently cannot simultaneously possess intent, (ii) exactly why a superior's conduct is negligent, (iii) what the tribunals have ruled on the matter of superior responsibility and crimes of specific intent and lastly, (iv) how the principle of culpability is applicable and beneficial to the current topic.

1. Negligently intentional?

Even though the distinctions between negligence and intent are discussed in Chapter 2, it is here discussed *why* they are distinct and therefore inapplicable to one another in light of the thesis question. The issue above rests on the proposition that a person who is genuinely negligent in the way she conducts herself cannot have simultaneously possessed intent with regards to the same conduct. It was mentioned above that a person may intentionally neglect to perform conduct required of them but then this person is no longer negligent; rather, she possesses intent. These two categories of persons must not be confused: only people who are genuinely negligent are considered in this section. They possessed no intent in their conduct. The question that is asked in this section is whether negligence is at all compatible with intent in the context of the thesis question. Thus, the proposition above is asserted. To think that a person can do so is contradictory because of the nature of both negligence and intent. Within the law, a physical act without the accompaniment of a certain state of mind, such as committing an offence while sleepwalking, amounts to an involuntary action in which no legal repercussions may ensue. Likewise, a state of mind alone without physical conduct cannot be seen as an illegal act or rather, a person's thoughts alone cannot be punished. The conduct associated with either negligence or intent is itself a deviation from a certain standard of behaviour, but what makes the conduct blameworthy is the fact that the agent is at fault. She either intended a certain consequence to happen (intent) or she did not intend the consequence but she should have been aware that her conduct would have resulted in the consequence (negligence). Thus, intent may then be

³ See Chapter 1, §3.5 for a discussion of superior responsibility and negligence, and § 3.6., for an account of a superior's guilt.

defined as the will to commit the act or cause the result set out in the definitional elements of the crime, in the knowledge of the circumstances rendering such act or result unlawful.⁴ Negligence on the other hand may be defined as a person who (i) acts in disregard of certain elementary standards with which any reasonable person should comply; and (ii) either does not advert at all to the risk of harm to another person involved in her conduct (simple negligence), or is aware of that risk, but is sure that it will not occur (culpable negligence).⁵ Therefore, the distinction lies in the *awareness* that a certain action may lead to a certain result.

The above definition of intent describes the different forms of general intent as discussed in Chapter 2 which include *dolus directus*, *dolus indirectus* and *dolus eventualis*. Thus, a person who acts negligently and therefore lacks awareness of the consequences of her actions cannot possess any form of general intent. However, *dolus specialis* is a different (higher) degree of intent which can best be described as double intent: a general intent is necessary in addition to possessing a further requirement of a specific purpose or goal, together forming specific intent. From the discussion on general intent above, the applicability of negligence to specific intent collapses very quickly. A person who is negligent cannot possess general intent, the first requirement of possessing specific intent. If such person cannot possess general intent, she cannot possess specific intent. Therefore, a person who is negligent cannot possess specific intent. Consequently, a person cannot be negligently intentional, no matter the degree of intent.

As clear as the distinction between negligence and intent is, admittedly, the above discussion addresses a rather simple notion of negligence. Generally speaking, this simple form of negligence has no place as a ground of culpability in international law. However, understanding the difference between these forms of *mens rea* is still important. Cassese makes a distinction between simple and culpable negligence, concluding that *culpable* negligence may indeed be prosecuted in international law. As understood by Cassese, culpable negligence requires that a person is firstly, expected or required to abide by certain standards of conduct or take certain specific precautions, and secondly, be aware of the risk of harm but nevertheless takes it; believing that the risk will not materialise because of the steps she has taken or will

⁴ CR Snyman *Criminal law*, 5th ed (2008) 182.

⁵ A Cassese *International criminal law* (2003) 171-172.

take.⁶ In a sense, this transforms the notion of negligence described above. The material element of negligence more or less remains the same, that is, a failure to abide to a certain required standard, but the subjective element changes. This characterisation by Cassese's of culpable negligence resembles the notion of recklessness, as used in American criminal law. However, Cassese's description of recklessness refutes any attempt to equate culpable negligence with recklessness. He describes recklessness as 'a state of mind where *the person foresees that his action is likely to produce its prohibited consequences, and nevertheless takes the risk of so acting*'.⁷ Cassese identifies the difference between culpable negligence and recklessness by saying that 'in cases of recklessness the agent *deliberately* runs the risk regardless of any step he may have taken to forestall the ensuing harm'.⁸ A reckless person, therefore, foresees the risk and acts regardless of it, while a culpably negligent person is aware of a risk but does not think the consequence will happen. Ambos agrees that the negligence being dealt with by superior responsibility is not mere negligence but negligence that is 'on equal footing with intent'.⁹ This is an interesting consideration and it will be discussed in greater detail below when discussing the ICTR case of *Akayesu* as it maintains a similar opinion that negligence relating to superior responsibility is tantamount to intent,¹⁰ but for now it is maintained that negligence does indeed underlie superior responsibility and if intent is a part of the equation, superior responsibility becomes irrelevant and the guilt of such a superior would best be described as a form of complicity. Ambos does however correctly observe that

It must not be overlooked, however, that intent and negligence are very different states of mind which only in the exceptional case of 'weak' intent (*dolus eventualis*) and 'strong' (gross, conscious) negligence *approach* each other.¹¹

The key word in the quote above is "*approach*". They may well be heading towards one another but they never meet. It would be incorrect to classify recklessness and culpable negligence as one and the same. If culpable negligence (as a "higher"

⁶ Cassese (n 5 above) 172.

⁷ Cassese (n 5 above) 168.

⁸ Cassese (n 5 above) 172.

⁹ K Ambos 'Superior responsibility' in A Cassese, P Gaeta and J Jones (eds) *The Rome Statute of the International Criminal Court: A commentary, Volume I* (2002) 846.

¹⁰ *Prosecutor v Akayesu* ICTR-96-04-T, Judgment, 2 September 1998.

¹¹ Ambos (n 9 above) 846-847.

degree of negligence) remains a lesser degree of fault than recklessness, it follows that culpable negligence remains a far cry from any higher form of intent. Thus, based on the discussion above, the lack of any form of general intent instantaneously eliminates the chance of specific intent. Hence, culpable negligence remains a lesser degree of fault than recklessness which is to say a culpably negligent person cannot, simultaneously, possess specific intent. It follows that a person who acts negligently cannot therefore be convicted of a crime that requires specific intent.

2. A superior's negligence

In § 3.5. of Chapter 1 it was argued generally that negligence lies at the heart of both standards of knowledge applicable to superior responsibility.¹² That is, a superior acts negligently with regards to her duties. Here it is specifically argued in greater detail why negligence is applicable to superior responsibility. Thus, it is not for want of repetition that negligence is discussed again but rather to further the general proposition that negligence is applicable to superior responsibility and therefore superior responsibility should have no application in cases involving crimes of specific intent.

The ad hoc Tribunals: A standard of negligence relating to superior responsibility has been rejected by the *ad hoc* Tribunals. The Appeals Chamber maintained that because a superior's liability arises from a failure to act in spite of knowledge, negligence can have no role in establishing responsibility.¹³ This position hinges on the standard of knowledge "*had reason to know*", as per Article 7(3) of the ICTY Statute. In terms of this standard of knowledge, a superior must have been in possession of information indicating that her subordinates were in the process of committing, or having already completed, an offence. This information need not be specific in nature but it should allow for the superior to conclude that an offence is being or has been committed, and if not of such specificity then it should allow the superior to conduct a further inquiry or investigation. Upon learning of the offence by way of the information or by investigation the superior must take necessary and

¹² "*Had reason to know*" and "*should have known*".

¹³ *Prosecutor v Delalić et al. (Čelebići Appeal Judgment)* IT-96-21-A, 20 February 2001, par 226; *Prosecutor v Bagilishema* ICTR-95-1A-A, Judgment, 3 July 2002, par 35 and 37.

reasonable measures to prevent or punish the offence.¹⁴ Thus, responsibility, as traditionally maintained, arises for the failure to take necessary and reasonable steps to prevent or punish those subordinates who have committed an offence. A “*had reason to know*” standard of knowledge, therefore, does not require a superior to actively seek information applicable to superior responsibility; only the imposition to act appropriately upon learning of the relevant information. As a result, negligence is said to be inapplicable. Perhaps negligence does not play a role in the situation where actual knowledge exists when a superior has the necessary information, inquires further, learns of the offence or of a plan to commit an offence, and *deliberately* does not comply with her obligations. If sufficient evidence is proffered, the “*had reason to know*” standard of knowledge ceases to apply. Instead, actual knowledge will have existed. What then would be the culpability of a superior in this situation? Cassese writes

[...] The superior knows that crimes are about to be or are being committed by his subordinates and nonetheless takes no action. Here international rules, which consider that the superior *in some way takes part in the crime of his subordinates*, require, for culpability, (i) *knowledge*, that is awareness that the crimes are being or are about to be committed; and (ii) *intent*, that is the will not to act, or at least *recklessness*, that is awareness that failure to prevent the action of subordinates risks bringing about certain harmful consequences (commission of the crimes), and nevertheless ignoring this risk.¹⁵

Damaška agrees with Cassese, in that a superior who, with actual knowledge, intentionally omits her duties acts as an aid.¹⁶ What is clear from the above is that a “*had reason to know*” standard of knowledge no longer applies. Consequently, the scope of this examination has been restricted to “*had reason to know*” and “*should have known*” standards of knowledge, thus eliminating actual knowledge.

Disregarding actual knowledge, it is then argued that within the framework of “*had reason to know*”, a superior in possession of information relating to an offence acquires a new duty. This newly imposed duty requires that a superior inquire, or investigate, further. A superior who fails to inquire further never learns of the reality of the underlying offence, and more importantly, the failure of this superior to inquire

¹⁴ *Prosecutor v Delalić et al. (Čelebići Trial Judgment)* IT-96-21-T, 16 November 1998, par 393.

¹⁵ Cassese (n 5 above) 210.

¹⁶ M Damaška ‘The shadow side of command responsibility’ (2001) 49 *The American Journal of Comparative Law* 462.

further amounts to negligence. Specifically, the superior was culpably negligent by: (i) failing to abide by a certain standard of conduct; and (ii) failing to take precautions despite being aware of a risk of harm. Thus, negligence is applicable to a “*had reason to know*” standard of knowledge. Let us call this interpretation of the “*had reason to know*”, interpretation α . A problem that may present itself for the above interpretation of the “*had reason to know*” standard of knowledge is that it runs parallel to a traditional interpretation of the latter standard. Conventionally, a superior is charged with a failure to prevent or punish an offence because she “*had reason to know*” of her subordinates conduct. She had reason to know of the underlying offence because she was in possession of information. Thus, she is charged *as if she had knowledge* because of the information in her possession. Therefore, treating the accused as if she had knowledge allows for the accusation of a failure to prevent or punish. Let us call the traditional interpretation, interpretation β .¹⁷

Interpretation α requires further justification, especially because it conflicts with the traditional interpretation β . The reason behind favouring interpretation α , and therefore establishing a standard of negligence, rests with *how* the various Tribunals have ruled on the matter of the information in the possession of a superior. Interpretation β is based on the idea that a superior in possession of the necessary information allows for the tribunals to proceed *as if she had knowledge*. However, by describing the nature of the information the tribunals have undermined their preferred interpretation, that of interpretation β . The issue here lies with the *purpose* of the information. The ICTY opined in the *Čelebići* Trial Chamber that

[...] where he [the superior] had in his possession information of a nature, which at least, would put him on notice of the risk of such offences by *indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed* by his subordinates.¹⁸

The Trial Chamber in *Kordić and Čerkez* agreed with the interpretation above stating that a ‘superior may be regarded as having “reason to know” if he is in possession of sufficient information to be on notice of the likelihood of subordinate illegal acts, i.e.,

¹⁷ The names and symbols used are simply to avoid confusion when discussing the two interpretations and represent no deeper significance.

¹⁸ *Čelebići* Trial Judgment (n 13 above) par 383 and par 393, emphasis added; see also *Prosecutor v Strugar* IT-01-42-T, Judgment, 31 January 2005, par 369-370, in which the Chamber agreed with the interpretation in *Čelebići*.

if the information available is sufficient to *justify further inquiry*.¹⁹ The Appeals Chamber in *Hadžihasanović* also stated that

[...] in order to demonstrate that a superior had the *mens rea* required under Article 7(3) of the Statute, it must be established whether, in the circumstances of the case, he possessed information sufficiently alarming to *justify further inquiry*.²⁰

Likewise, the ICTR followed suit. The Trial Chamber in *Kayishema and Ruzindana* agreed with the *Čelebići* case stating that the accused must have been put on notice of the offence and would then require further investigation.²¹ Not to be left behind, the SCSL noted in the *Brima* case that a superior in the possession of alarming information should either conclude that an offence has been or will be committed or she should conduct additional inquiries.²² Additionally, in the *Fofana and Kondewa* case, the Trial Chamber ruled that information must

[...] be sufficiently alarming so as to alert the superior to the risk of the crimes being committed or about to be committed, and to *justify further inquiry* in order to ascertain whether indeed such crimes were committed or were about to be committed by his subordinates.²³

It seems that in situations where the superior has information in her possession and this information is of such a nature that it requires further investigation, this need for an investigation becomes a new duty. Excluding a superior who intentionally fails to initiate this investigation, the superior has neglected her duty of investigation.

Perhaps the argument above is nothing more than nit picking, while simply missing the point of superior responsibility. But a superior who is treated as if she had knowledge has this knowledge imputed upon her. Evidently, the question as to *why* the superior failed to conclude from the information in her possession that crimes are or were being committed and, more importantly, *why* she failed to investigate further, is never asked. While the superior may have failed her duty to prevent or punish an

¹⁹ *Prosecutor v Kordić and Čerkez* IT-95-14/2-T, Judgment, 26 February 2001 par 437, emphasis added; see also *Prosecutor v Halilović* IT-01-48-T, Judgment, 16 November 2005, par 68, in which the Chambers agreed with the *Kordić* Trial Chambers by stating: “A superior may be regarded as having “reason to know” if he is in possession of sufficient information to be on notice of the likelihood of illegal acts by his subordinates, that is, if the information available is sufficient to *justify further inquiry*”.

²⁰ *Prosecutor v Hadžihasanović* IT-01-47-A, Judgment, 22 April 2008, par 28; emphasis added.

²¹ *Prosecutor v Kayishema and Ruzindana* ICTR-95-1-T, Judgment, 21 May 1999, par 226.

²² *Prosecutor v Brima et al.*, SCSL-04-16-T, Judgment, 20 June 2007, par 794.

²³ *Prosecutor v Fofana and Kondewa*, SCSL-04-14-T, Judgment, 2 August 2007, par 244; emphasis added.

offence, she failed her duties long before she reached the latter mentioned duty. The possibilities of negligence based “first failed duties” seem to arise quite easily, yet these duties are simply ignored when assessing the situation after the fact. If the *ad hoc* Tribunals are adamant that superior responsibility does not impute knowledge onto a superior in one way or another,²⁴ and they wish to apply a standard of consistency, then perhaps it would be sensible to consider the above. It may be retorted that it is only absolute knowledge that may not be imputed onto an accused. But without a subjective element, conduct alone cannot fulfil both the *actus reus* and *mens rea* of a perpetrator. A superior, who is genuinely negligent and lacks any real degree of knowledge even though she was in the possession of information, is treated as if she did have some degree of knowledge; all the while no certainty exists as to what extent the superior possessed knowledge. Therefore, on interpretation β knowledge is imputed onto a superior to a certain extent.

Interpretation α avoids the above complications: a superior who, in the possession of information, failed to conclude that an offence has been or is being committed, or failed to investigate further, will be treated as having neglected her duties. This avoids any troubles with imputed knowledge and punishes the accused for the offences she committed.

The Tribunal’s application of superior responsibility appears to be somewhat short sighted in its failure to recognise the differing degrees of this mode of responsibility. It is argued, when viewed with a broader lens, that negligence does play an important role in superior responsibility. It is also argued that this broad interpretation (interpretation α) is better suited to achieving justice in a way that is fair. However, difficulties may arise in situations where an accused does have intent but the evidence may not show that. Such an accused may use interpretation α to disguise higher degrees of knowledge in favour of the lesser standard of culpability in negligence. This would undoubtedly be a matter of what can be proven with the evidence available. It is unlikely that this difficulty is enough to undermine the validity of the argument above, but it is certainly a valid challenge to how we should administer justice.

²⁴ See Chapter 2 above, pg 15 and 28.

Article 28 of the ICC Statute: The ICC Statute provides for a “*should have known*” standard of knowledge. From the outset a superior’s responsibility may be based on negligence,²⁵ but exactly how? Where a “*had reason to know*” standard does not require a superior to stay informed at all times, a “*should have known*” standard of knowledge requires a superior to *stay actively informed* by obtaining the relevant information. Failure to do so is regarded as a neglect of duty. Unlike the “*had reason to know*” standard, where the superior is culpably negligent because she is aware of risk of harm because she was in possession of information, a superior who is charged pursuant to Article 28(1)(a) may never have been in the possession of information because of her failure of duty. If her duty was to acquire information but failed to do so, she was never aware of the underlying offence; therefore she was never aware of any risk. Consequently, a superior in this position did not even act culpably negligent; rather she was “simply” negligent. As discussed above in § 1.4 of Chapter 2, simple negligence is not applicable within an international law context. One could therefore call into question the validity of Article 28(1)(a). However, that question is outside the scope of this dissertation. Therefore, it will be assumed that the application of superior responsibility, within the context of the ICC Statute, is justified. The most important point is that negligence, in whatever form, underlies Article 28(1)(a).

To conclude, negligence does indeed exist within the doctrine of superior responsibility. The denial of negligence within superior responsibility by the *ad hoc* Tribunals appears to be unsound, while Article 28 look as if it endorses negligence, albeit implicitly, in its application.

Thus far it has been argued that: (i) a person cannot both have negligence and specific intent, and because of this, to convict a person on the basis of these two concepts is illogical; (ii) although a superior’s liability arises due to her failure of duty, she is held responsible for the crimes of her subordinates; and lastly (iii) that a superior, with regards to superior responsibility, acts negligently, therefore negligence applies to superior responsibility. Thus, we may conclude that a

²⁵ A Eser ‘Mental elements – mistake of fact and mistake of law’ in A Cassese, P Gaeta and J Jones (eds) *The Rome Statute of the International Criminal Court: A commentary, Volume I* (2002) 899; J van der Vyver ‘The international criminal court and the concept of *mens rea* in international criminal law’ (2004) 12 *University of Miami International and Comparative Law Review* 85; R Cryer *et al.*, *An introduction to international criminal law and procedure* (2010) 394.

superior's *mens rea* contradicts the *mens rea* of the crime she may be held accountable for. Because of this it may be asserted: It would be contradictory to convict a negligent superior of a crime of specific intent, in terms of superior responsibility. Consequently, superior responsibility and crimes of specific intent are incompatible. It is argued that the above line of reasoning, and the specific content contained in the individual propositions, is correct and the above proposition is therefore a reasonable position to adopt. The question now becomes whether people in superior positions have in fact been held accountable for crimes of specific intent, pursuant to superior responsibility. This question will now be examined.

3. Superior responsibility, specific intent crimes, and case law

So far the arguments, and the conclusion, have been of a theoretical nature. In reality both theory and practice have an effect on one another. This then begs the question as to how this dilemma presents itself in practice. That is, this dilemma needs to be examined within the context of how the international tribunals have approach this matter to ascertain if they allow for the conviction of a superior for the crimes of specific intent and if so, their reasoning for such allowance. Several judgments have addressed the issue of superior responsibility and the crime of genocide; most of which have been, but not limited to, adjudicated by the ICTR. Thus, the existing case law will be discussed to determine the various courts and tribunals position of this issue.

Case law of the ICTR: With regards to participation in terms of Article 6(1) of the ICTR Statute, a Trial Chamber observed that an individual acting unknowingly cannot be liable for the crime of genocide, even 'where he should have had such knowledge'.²⁶ Therefore, knowledge, and by implication intent, cannot be imputed onto a person who acted without the necessary *mens rea*. In terms of individual criminal responsibility this is as far as the *Akayesu* Trial Chamber was willing to extend such thought. Although the accused was not convicted in terms of Article 6(3),²⁷ the Trial Chamber maintained that the latter Article differs from Article 6(1) because a superior need not act knowingly to render her criminally liable because of

²⁶ *Akayesu* Trial Judgment (n 10 above) par 479.

²⁷ *Akayesu* Trial Judgment (n 10 above) par 691.

the standard of *mens rea* applicable to the doctrine of superior responsibility.²⁸ It seems confusing why the Trial Chamber would not stretch their view on participation to that of superior responsibility. The reason, however, becomes apparent when the Trial Chamber opines on the *mens rea* of a superior. The Trial Chamber stated that it must be shown that ‘there has been malicious intent, or, at least, [...] that negligence was so serious as to be tantamount to acquiescence or even malicious intent’.²⁹ Schabas notes that these comments indicate a rigorous and demanding vision of the *mens rea* for superior responsibility.³⁰ If the superior had ‘malicious intent’ and such intent was provable, then it would be more likely to say that the proper basis of guilt was some form of participation. However, the Trial Chamber adopted interpretation of ‘negligence so serious’ that it should be seen as intent amounts to nothing more than an equivocation. Exactly how negligence can ever amount to intent, and especially specific intent, was not discussed by the Trial Chamber. Perhaps the Trial Chamber meant that the superior intentionally neglected her duties in order to assist the commission of the offence. This would entail that the superior “*knew*” of the offence and therefore the “*had reason to know*” standard would not be applicable. It would further mean, if the evidence allowed for it, that the proper basis of guilty would be a form of complicity and not superior responsibility.

In the case of *Serushago* the ICTR found the accused guilty pursuant to Article 6(3) of its Statute for various crimes, including genocide. However, the ruling seems confused in its application of individual responsibility, evidenced by the following paragraph.

He was a *de facto* leader of the Interahamwe in Gisenyi. Within the scope of the activities of these militiamen, he gave orders which were followed. Omar Serushgo admitted that several victims were executed on his orders while he was manning a roadblock erected near the border between Rwanda and the Democratic Republic of Congo. As stated *supra*, thirty-three persons were killed by people placed under his authority. The accused admitted that all these crimes were committed because their victims were Tutsi or because, being moderate Hutu, they were considered accomplices.³¹

²⁸ *Akayesu* Trial Judgment (n 10 above) par 479.

²⁹ *Akayesu* Trial Judgment (n 10 above) par 489.

³⁰ Schabas (n 1 above) 309-310.

³¹ *Serushago* Sentence (n 2 above) par 29.

It is clear from the paragraph above that *Serushago* was guilty as a principal offender or accomplice in terms of Article 6(1) of the Statute, for the orders he gave to, and admitted too, execute people. Thus, the charge of command responsibility was redundant and unnecessary.³² Similar to the case of *Serushago*, the Tribunals accepted the guilty plea of *Kambanda* for genocide containing elements of superior responsibility. Again it may be said that because *Kambanda*, then the prime minister of Rwanda, admitted to participation in the organisation and implementation of the genocidal plans, the charge of superior responsibility was unnecessary.³³

Despite the unclear nature of the two cases discussed above, the ICTR again ruled that a superior may be found guilty of genocide pursuant to Article 6(3) in the case of *Kayishema and Ruzindana*. The Trial Chamber were convinced that *Kayishema* was not only a superior but also that he knew or had reason to know of the imminent large-scale massacre,³⁴ and he failed to prevent the offences.³⁵ With regards to Counts 1, 7, 13 and 19, the charges relating to the genocidal acts, the Trial Chamber found that *Kayishema* was personally involved in the attacks. He ordered the beginning of the attacks and therefore knew of them;³⁶ further he led and directed the massacre.³⁷ While *Kayishema* was directly involved in the offence he was convicted as both a perpetrator and superior for the same crimes. But as Nybondas notes, '[T]his case, [...], is one of the earlier cases decided by the *ad hoc* Tribunals. Judgments of a later date have rejected cumulative convictions under Article 6(1)/7(1) and 6(3)/7(3)'.³⁸ While in agreement with the latter statement, it also seems that the proper basis of responsibility was direct involvement and not superior responsibility. The fact that *Kayishema's* personal involvement was established should remove superior responsibility as a possible mode of responsibility; a conviction of direct participation would have been more appropriate as it accurately describes an accused's guilt.

In the so-called '*Media case*' one of the accused, *Barayagwiza*, was charged and convicted for genocide pursuant to Article 6(3). The Tribunal found that

³² Schabas (n 1 above) 310.

³³ *Kambanda* Judgment and Sentence (n 2 above) par 39.

³⁴ *Kayishema and Ruzindana* Trial Judgment (n 21 above) par 509.

³⁵ *Kayishema and Ruzindana* Trial Judgment (n 21 above) par 513.

³⁶ *Kayishema and Ruzindana* Trial Judgment (n 21 above) par 552 and 555.

³⁷ *Kayishema and Ruzindana* Trial Judgment (n 21 above) par 559 and 569.

³⁸ M Nybondas *Command responsibility and its applicability to civilian superiors* (2010) 172.

[...] Barayagwiza had superior responsibility over members of the CDR and its militia, the *Impuzamugambi*, as President of CDR at Gisenyi Prefecture and from February 1994 as President of CDR at the national level. He promoted the policy of CDR for the extermination of the Tutsi population and supervised his subordinates, the CDR members and *Impuzamugambi* militia, in carrying out the killings and other violent acts. For his active engagement in CDR, and his failure to take necessary and reasonable measures to prevent the killing of Tutsi civilians by CDR members and *Impuzamugambi*, the Chamber finds Barayagwiza guilty of genocide pursuant to Article 6(3) of its Statute.³⁹

An interesting point in this case was that the Appeals Chamber found that *Barayagwiza* possessed genocidal intent.⁴⁰ The conduct and subjective state of mind of the accused lead to the Trial Chamber conviction under both Article 6(1) and 6(3). This decision was however overturned by the Appeals Chamber because an accused 'cannot be convicted under Article 6(1) and (3) of the Statute for one and the same conduct under one and the same count'.⁴¹ Thus, the conviction pursuant to Article 6(3) was not considered by the Appeals Chamber. However, if the prosecution was unable to prove direct participation, the requirements for superior responsibility were met and therefore *Barayagwiza* would have been found guilty pursuant to superior responsibility for a crime of specific intent.

In the case of *Musema* the Trial Chamber proclaimed that it

[i]s satisfied beyond a reasonable doubt that: *firstly*, Musema incurs individual criminal responsibility for the above-mentioned acts, which are constituent elements of the crime of genocide; *secondly*, that said acts were committed by Musema with the specific intent to destroy the Tutsi group, as such, [...]. Musema incurs individual criminal responsibility under Article 6(1) and (3) of the Statute for the crime of genocide, a crime punishable under Article 2(3)(a) of the Statute.⁴²

Thus, like the *Media case* above, *Musema* was found guilty of genocide for direct participation and as a superior. The cumulative charge pursuant to Article 6(1) and (3) was never questioned by the Appeals Chamber; only the matter of whether an accused could be convicted of both genocide and extermination.⁴³ To which the

³⁹ *Nahimana et al.* Judgment and Sentence (n 2 above) par 977.

⁴⁰ *Nahimana et al.* Judgment and Sentence (n 2 above) par 967 and 1034.

⁴¹ *Prosecutor v Nahimana et al.*, ICTR-99-52-A, Judgment, 28 November 2007, par 667.

⁴² *Musema* Trial Judgment (n 2 above) par 936.

⁴³ *Prosecutor v Musema* ICTR-96-13-A, Judgment, 16 November 2001, par 346-369.

Appeals Chamber ruled in the affirmative.⁴⁴ On the occasions where the offence of genocide was committed, and for which *Musema* was found guilty of in terms of Article 6(1) and (3), *Musema* was present and often led and participated in the attacks.⁴⁵ Further, his presence, participation and the chanting of anti-Tutsi slogans,⁴⁶ allowed the Trial Chamber to deduce that *Musema* had genocidal intent. These facts taken together, it can reasonably be concluded that *Musema* had *actual* knowledge of the offences of his subordinates. *Musema* may have omitted his duties in terms of superior responsibility, but he did so intentionally; the purpose of which was to commit and complete the offences. Thus the proper basis of guilt was direct participation; superior responsibility should never have been applied. Even though *Musema* was charged and convicted for participation, the charge and conviction pursuant to superior responsibility was unnecessary. *Musema's* accountability lay only in his personal involvement and not superior responsibility.

In the case of *Ntagerura et al* (hereafter referred as *Imanishimwe*), the Trial Chamber found the accused *Imanishimwe* guilty of genocide pursuant of Article 6(3) of its Statute. *Imanishimwe* was found to have both *de jure* authority and effective control of the soldiers of the Karambo military camp in Cyangugu.⁴⁷ Despite superiority, the Trial Chamber failed to find sufficient evidence that *Imanishimwe* ordered the killing of refugees at the Gashirabwoba football field.⁴⁸ But the Trial Chamber held that the accused “knew or should have known” of the offence, because: (i) he was aware of the refugees’ presence at the field and of their plight, (ii) the size of the camp was relatively small; (iii) the accused’s control over his soldiers; and (iv) the accused was in ‘regular contact with his soldiers stationed away from the camp’.⁴⁹ Together, these reasons led the Trial Chamber to conclude that the subordinates would not have attacked the refugees without the knowledge of *Imanishimwe*.⁵⁰ Therefore, the Trial Chamber ruled that

Imanishimwe has been convicted pursuant to Article 6(3) of the Statute for the killings perpetrated by soldiers under his authority and effective control at the Gashirabwoba football

⁴⁴ *Musema* Appeals Judgment (n 43 above) par 370.

⁴⁵ *Musema* Trial Judgment (n 2 above) par 894, 896, 902, 910, 914, 919, *etc.*

⁴⁶ *Musema* Trial Judgment (n 2 above) par 932 and 936.

⁴⁷ *Ntagerura et al.* (hereafter referred to as *Imanishimwe*) Judgment and Sentence (n 2 above) par 652.

⁴⁸ *Imanishimwe* Judgment and Sentence (n 2 above) par 653-654.

⁴⁹ *Imanishimwe* Judgment and Sentence (n 2 above) par 654.

⁵⁰ *Imanishimwe* Judgment and Sentence (n 2 above) par 654.

field on 12 April 1994. For this massacre, the Chamber entered convictions against Imanishimwe for genocide (Count 7) and extermination as a crime against humanity (Count 10).⁵¹

Of the cases discussed so far, only the present case failed to establish *actual* knowledge. The Trial Chamber inferred from the evidence available that *Imanishimwe* “*knew or should have known*” of the offences of his subordinates. It does not seem farfetched to suggest that *Imanishimwe*’s subordinates acted without his knowledge even though the Trial Chamber decided otherwise. Admittedly, it would be difficult to imagine how *Imanishimwe* was unaware of the situation in Rwanda and the plan to destroy the Tutsi population when he was in fact a Lieutenant in the Rwandan Armed Forces and acting commander of the Cyangugu military camp.⁵² However, it does not necessarily follow that, despite his position and the considerations of the Trial Chamber above, he “*should have known*” of the offences committed at the Gashirabwoba football field, unlikely as it may be. It is worth noting that the Trial Chamber used a “*should have known*” standard of knowledge and not the “*had reason to know*” standard, as per its Statute. The Trial Chamber never considers the difference between the two, and one can only assume that the former standard of knowledge was used in the same way as the latter standard. Perhaps the reasons given above for the Trial Chamber’s assessment that *Imanishimwe* “*knew or should have known*” was an attempt to establish actual knowledge and not a “*should have known*” standard. If it is actual knowledge, or “*knew*”, that the Trial Chamber tried to establish then it would seem a rather weak formulation which balanced on a very fine line between imposing knowledge and having established actual knowledge. Within the context of the situation in Rwanda at the time, and the other crimes *Imanishimwe* was found guilty of, – such as murder, torture and imprisonment *etc.*, although those are not considered in this section - perhaps the Trial Chamber was justified in their assessment.

A pattern emerges from the cases discussed above: a superior may be held accountable for crimes of specific intent pursuant to superior responsibility. However in all the cases, with the possible exception of *Imanishimwe*, the accused person was shown to have actively participated in the offences, thus proving actual

⁵¹ *Imanishimwe* Judgment and Sentence (n 2 above) par 821.

⁵² *Imanishimwe* Judgment and Sentence (n 2 above) par 182.

knowledge on the part of the superior. It was, therefore, maintained that a conviction in terms of superior responsibility was incorrect and the appropriate conviction of complicity more accurately captured the superior's guilt.

Case law in the ICTY: Like the ICTR, the ICTY have ruled on important aspects of the issue between superior responsibility and crimes of specific intent; much like the ICTR, the ICTY has also found that a superior may be responsible for specific intent crimes, pursuant to Article 7(3) of its Statute.

The Trial Chamber, in the case of *Krstić*, held that the accused was guilty of participating in a joint criminal enterprise,⁵³ and therefore guilty of genocide pursuant to Article 7(1) of its Statute. Further, the Trial Chamber found that the accused had also fulfilled the elements of Article 7(3), but stated that it would not enter a conviction in terms of superior responsibility because of the finding of guilt under Article 7(1).⁵⁴ Of importance is the fact that had *Krstić* somehow escaped liability pursuant to participation, he would have been guilty of the crime of genocide under Article 7(3). With regards to *Krstić's* state of mind the Trial Chamber found that “[H]is intent to kill the men thus amounts to a genocidal intent to destroy the group in part”.⁵⁵ It was also held that *Krstić* fulfilled the *mens rea* necessary to prove superior responsibility by stating the “Drina Corps (and Main Staff) officers and troops involved in conducting the executions had to have been aware of the genocidal objectives”.⁵⁶ *Krstić* was not personally involved in the killings but he co-ordinated the implementation of the killing campaign.⁵⁷ The Trial Chamber correctly rejected the conviction for concurrent changers; superior responsibility need not have been entertained at all based on the accused's role, and accompanying intent or knowledge, in the attempted annihilation of the Bosnian Muslim community. While *Krstić's* guilt was properly identified, and even though he was not convicted pursuant to Article 7(3), the possible consideration of applying superior responsibility was seemingly incorrect.

⁵³ *Krstić* Trial Judgment (n 2 above) par 644.

⁵⁴ *Krstić* Trial Judgment (n 2 above) par 652.

⁵⁵ *Krstić* Trial Judgment (n 2 above) par 644.

⁵⁶ *Krstić* Trial Judgment (n 2 above) par 648.

⁵⁷ *Krstić* Trial Judgment (n 2 above) par 644.

The cases so far have all dealt with genocide, but in the case against *Krnojelac* the Trial Chamber dealt with superior responsibility and torture. The accused, a prison warden, was charged for his failure to prevent or punish the mistreatment of detainees whom were said to have been tortured.⁵⁸ The Trial Chamber found that *Krnojelac* was aware of the torture of a detainee who tried to escape and was consequently punished for doing so, but because the indictment never specified that particular offence, it was unable to conclude that *Krnojelac* was aware that *other* detainees were being tortured.⁵⁹ Thus, the charge of torture pursuant to Article 7(3) was unsuccessful. Despite being *aware* of the torture of *Zeković* (the detainee who attempted to escape), the Trial Chamber was of the opinion that that event ‘did not oblige him to investigate the incident in such a way as would have put him on notice that others were being *tortured* in the KP Dom’.⁶⁰ Because the Trial Chamber found that *Krnojelac* had no obligation to investigate further he had no reason to know of the other offences. Hence, superior responsibility had not been established. Many would think, as the Appeals Chamber did – as discussed below -, that *Krnojelac’s* knowledge of the torture of *Zeković* would be enough to cause an investigation into the possibility of other offences. Further, it would be easy to speculate that the accused was aware of other offences given the offence he was aware of. But if a superior has no reason to believe - such as the possession of information - that an offence has been or will be committed, she has no reason to investigate further. Strictly speaking, it does not follow that because one offence has been committed that other offences will be or have been committed. The accused could reasonably have thought this offence to be isolated, given that the victim had been punished for attempting to escape, albeit he should have prevented or punished that offence in terms of his duties. A superior would need to have information as to the possibility of other offences. Without evidence to suggest otherwise one cannot assume another person’s state of mind.

As constructed above, the Trial Chamber would have been correct. However, this was not the end of the story. On appeal the Prosecution asserted that the Trial Chamber erred in its conclusion by maintaining that the accused “knew or had reason to know” of the maltreatment by his subordinates inflicted on detainees at his

⁵⁸ *Krnojelac* Trial Judgment (n 2 above) par 312.

⁵⁹ *Krnojelac* Trial Judgment (n 2 above) par 313.

⁶⁰ *Krnojelac* Trial Judgment (n 2 above) par 313; original emphasis.

prison.⁶¹ The point of contention was whether *Krnojelac* had information in his possession, and the nature thereof, that allowed him to be put on notice of the risk of crimes being committed.⁶² The Trial Chamber thought *Krnojelac's* awareness of the mistreatment of *Zeković* was not enough to warrant further investigation. On the other hand, the Appeals Chamber agreed with previous case law that the information possessed by the superior need not be of a specific nature, but it should be sufficiently alarming to

[...] alert him to the risk of acts of torture being committed, [...]. Thus, it is not enough that an accused has sufficient information about beatings inflicted by his subordinates; he must also have information – albeit general – which alerts him to the risk of beatings being inflicted for one of the purposes provided for in the prohibition against torture.⁶³

Thus, the Appeals Chamber thought the question to be decided was as follows: is the Trial Chamber's finding that *Krnojelac* neither knew nor had reason to know that his subordinates had inflicted or were about to inflict beatings for one of the purposes mentioned in the prohibition against torture unreasonable? If so, did this error occasion a miscarriage of justice?⁶⁴ The Appeals Chamber found that (i) the beatings were committed and of a widespread nature: *Krnojelac* was aware of the beating of *Zeković*; he also heard about such incidents;⁶⁵ (ii) that *Krnojelac* had jurisdiction, as a superior, over his subordinates;⁶⁶ and (iii) the interrogations of detainees involved beatings and were of a frequent nature.⁶⁷ Taken together, the Appeals Chamber opined that these facts established *Krnojelac's* possession of sufficient and alarming information; concluding that he was in a position to investigate whether acts of torture had been committed and had failed to do so. Thus, the Appeals Chamber agreed with the Prosecution that the Trial Chamber committed an error of fact and therefore held *Krnojelac* responsible pursuant to Article 7(3) of the Statute.⁶⁸

⁶¹ *Prosecutor v Krnojelac* IT-97-25-A, Judgment, 17 September 2003, par 146.

⁶² *Krnojelac* Appeal Judgment (n 61 above) par 151-155.

⁶³ *Krnojelac* Appeal Judgment (n 61 above) par 155.

⁶⁴ *Krnojelac* Appeal Judgment (n 61 above) par 161.

⁶⁵ *Krnojelac* Appeal Judgment (n 61 above) par 163.

⁶⁶ *Krnojelac* Appeal Judgment (n 61 above) par 164.

⁶⁷ *Krnojelac* Appeal Judgment (n 61 above) par 165.

⁶⁸ *Krnojelac* Appeal Judgment (n 61 above) par 171.

The Appeals Chamber seems to have a stronger case for knowledge on the part of the accused than the Trial Chamber decided on. Generally speaking, one could correctly assert that the existence of one incidence does not necessarily mean the existence of others, but specifically to the nature of superior responsibility that would seem an understatement. If the information in the possession of a superior need only be of a general nature, actual knowledge of one incident would more likely qualify for further investigation than not; coupled with the Appeals Chamber's finding that *Krnojelac* heard of the mistreatment of detainees and that they were frequent in nature, it seems reasonable to conclude that *Krnojelac* "had reason to know" of the mistreatment of various detainees by his subordinates. Thus, the Appeals Chamber's judgment reflects a more probable version of superior responsibility than the Trial Chamber's. Because *Krnojelac* was found to possess information he was in a position to 'investigate whether acts of torture were being committed [...]'.⁶⁹

How, then, do these findings play into the scope of this thesis? Without evidence that indicates intent, *Krnojelac* conduct could be described as culpable negligence, that is: (i) he was expected to abide a certain standard of conduct; and (ii) he was aware of the risk of harm and nevertheless takes it. Firstly, he failed to investigate further which would have determined the existence, or not, of offences which would have enabled him to prevent or punish the acts committed by his subordinates. So, he did not abide to a certain standard of conduct. Secondly, he was aware of the risk of other offences happening, as defined by a "had reason to know" standard of knowledge. The fact that he heard of the mistreatment of detainees, and especially the fact that he was fully aware of the torture of *Zeković*, would indicate the *risk of other cases* of mistreatment of detainees. As per the discussion so far, *Krnojelac* would qualify as a culpably negligent superior. Thus, in light of the argument of this thesis *Krnojelac* did not possess specific intent, but he did satisfy the requirements for a culpably negligent superior, which means that it was incorrect to convict him for a crime of specific intent.

The ICTY again considered charges of superior responsibility involving genocide in its Rule 98bis motion of acquittal in the case of *Stakić*. The Trial Chamber thought that

⁶⁹ *Krnojelac* Appeal Judgment (n 61 above) par 171.

It follows from Article 4 and the unique nature of genocide that the *dolus specialis* is required for responsibility under Article 7(3) as well. The Trial Chamber notes the legal problems and the difficulty in proving genocide by way of an omission [...].⁷⁰

In its judgment the Trial Chamber found, with regards to joint criminal enterprise as the applicable mode of liability, that a mode of liability cannot replace a core element of a crime, and ‘the Trial Chamber finds that in order to “commit” genocide, the elements of that crime, including the *dolus specialis* must be met’.⁷¹ The Trial Chamber extended this idea to superior responsibility. Thus, in order to incur liability for the crime of genocide pursuant to Article 7(3), the superior’s *dolus specialis* must be proven. Consequently, the Trial Chamber ruled

Since the Trial Chamber is not satisfied beyond a reasonable doubt that anyone, including any subordinates of Dr. *Stakić* in the Municipality of Prijedor, had *dolus specialis*, there is no room for the application of Article 7(3) in relation to Count 1 [genocide].⁷²

The ruling above, although rather vague, seems to imply that in order to convict a superior for the crime of genocide the superior must himself possess specific intent *and/or* he must be aware of the specific intent of his subordinates. It is not clear whether a superior should both possess specific intent himself *and* be aware of his subordinate’s specific intent or rather, the superior must possess specific intent *or* have knowledge of his subordinate’s specific intent. The fact that the Trial Chamber was not satisfied that *Stakić*’s subordinates possessed *dolus specialis*, together with the statement that an accused’s *dolus specialis* must be proved when charged in terms of a mode of responsibility, allows one to infer that the conjunction (“and”) of the *and/or* option is more likely to be the correct interpretation. Therefore, if the “and” interpretation is correct, the “had reason to know” standard of knowledge is not enough. The existence of *dolus specialis* does not amount to actual knowledge as to the offences of a superior’s subordinates. A superior may possess specific intent and be completely oblivious to actions of his subordinates. It may, however, increase the likelihood that a superior would not abide to his obligations because he shared the purpose attached to specific intent, but it does not imply actual knowledge. If a superior possessed specific intent and was fully aware of the conduct of his

⁷⁰ *Prosecutor v Stakić* IT-97-24-T, Decision on Rule 98 *bis* motion for judgment of acquittal, 31 October 2002, par 92.

⁷¹ *Prosecutor v Stakić* IT-97-24-T, Judgment, 31 July 2003, par 530.

⁷² *Stakić* Trial Judgment (n 71 above) par 559.

subordinates, a charge of complicity would seem better suited. But, if a superior does not share the specific intent but “*had reason to know*” of the crimes of his subordinates, he cannot be convicted for a crime that requires specific intent. Either way, the Trial Chamber in *Stakić* ruled that a superior’s specific intent must be proven if he were to be held accountable for a crime of specific intent pursuant to superior responsibility.

The ICTY stated its position clearly in the case of *Brdanin* when it held that it is

[...] satisfied that it reasonably falls within the application of the doctrine of superior criminal responsibility for superiors to be held liable if they knew or had reason to know that their subordinates were about to commit genocide or had done so and failed to take the necessary and reasonable measures to prevent the crimes of punish the perpetrators thereof.⁷³

The Trial Chamber also held that Article 7(3) of its Statute allows for superior responsibility for crimes of genocide because the latter mentioned Article ‘explicitly refers to all the crimes within the jurisdiction of the Tribunal, including genocide [...]’.⁷⁴ Whereas the Trial Chamber in *Stakić* thought that a superior must herself possess specific intent, even in the case of superior responsibility, the *Brdanin* Trial Chamber disagreed and maintained that a superior need not possess specific intent.⁷⁵ The following discussion will look at the reasons why the Trial Chamber adopted this position.

Three reasons were put forward in support of the assertion that a superior need not possess specific intent to be found guilty of genocide pursuant to Article 7(3); they are: (i) having verified that Article 7(3) applies to genocide, as a matter of statutory interpretation there is no inherent reason why Article 7(3) should be applied differently to the crime of genocide than to any other crime in the Statute;⁷⁶ (ii) the Appeals Chamber in the *Brdanin* Rule 98*bis* Appeal Decision, observed that a superior need only know or have reason to have known of the criminality of her subordinates,⁷⁷ therefore, she must have known or had reason to know of her

⁷³ *Brdanin* Trial Judgment (n 2 above) par 715.

⁷⁴ *Brdanin* Trial Judgment (n 2 above) par 716.

⁷⁵ *Brdanin* Trial Judgment (n 2 above) par 719.

⁷⁶ *Brdanin* Trial Judgment (n 2 above) par 720.

⁷⁷ *Prosecutor v Brdanin* IT-99-36-A, Decision on interlocutory appeal (Rule 98*bis* Appeal Decision), 19 March 2004, par 7.

subordinate's specific intent;⁷⁸ and (iii) the Appeals Chamber held that superior criminal responsibility is a form of criminal liability that does not require proof of intent to commit a crime on the part of a superior before criminal liability can attach, therefore 'It is [...] necessary to distinguish between the *mens rea* required for the crimes perpetrated by the subordinates and that required for the superior'.⁷⁹ Thus, if all the elements of superior responsibility have been met – where the necessary degree of knowledge is an awareness of specific intent on the part of the subordinates – an accused superior may be held accountable for the crime of genocide pursuant to Article 7(3).⁸⁰ This interpretation was endorsed by another Trial Chamber in *Blagojević and Jokić*.⁸¹ Within the context of the argument at hand, is this interpretation justified?

The Appeals Chamber maintained that there is no reason why, because Article 7(3) applies to the crimes contained in the Statute, superior responsibility should be applied differently to the crime of genocide. Arguably, the most defining aspect of genocide is a perpetrator's specific intent; she targets a specified group of people and intends to destroy them. Without this intent a person cannot commit a crime like genocide. However, a superior who may not have such specific intent can nevertheless be convicted, as a superior, for such an offence without fulfilling the necessary definitional elements required to convict an accused. As the case law above shows, a superior is convicted *for the crime* of her subordinates pursuant to superior responsibility. Consequently, both legal and moral blameworthiness of the crime is attached to this person. However, problems arise when considering the principle of personal culpability. As noted in the *Tadić* case the '[...] foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he was not personally engaged or in some other way participated [...]'.⁸² If a superior who does not fulfil the requirements of an offence is convicted for that crime, the principle of personal culpability is violated. Superior responsibility maintains that liability arises because of a superior's failure to perform her duties, but that person is held accountable for the crimes of others. How liability arises is largely irrelevant to how and what offence the

⁷⁸ *Brdanin* Trial Judgment (n 2 above) par 720.

⁷⁹ *Brdanin* Trial Judgment (n 2 above) par 720.

⁸⁰ *Brdanin* Trial Judgment (n 2 above) par 720 and 721.

⁸¹ *Blagojević and Jokić* Trial Judgment (n 2 above) par 686.

⁸² *Prosecutor v Dusko Tadić* IT-94-1-A, Judgment, 15 July 1999, par 186.

superior is ultimately held responsible for. In terms of the principle of culpability, if a person is charge of an offence, she must have actually performed that unlawful act, or omission, that satisfies the definitional elements of the offence. If a superior failed her duties, for reasons that were unintentional, her responsibility is transformed from one of failure of duty to that of genocide, crimes which are enormously different in relation to legal and moral blameworthiness. While this line of thought may be extended to other crimes a superior may be responsible for, crimes of specific intent are singled out because it aptly demonstrates the discord that exists. In the interests of fairness and justice a person convicted of a crime as serious as genocide, described as the 'crime of crimes',⁸³ must deserve the punishment and stigma accompanied with such a conviction; which in the case of superior responsibility is unwarranted.

The Appeals Chamber summarized its position on the issue of *mens rea* when it said that 'It is [...] necessary to distinguish between the *mens rea* required for the crimes perpetrated by the subordinates and that required for the superior'.⁸⁴ Although this has already been mentioned above, it is of importance as it justifies the second and third reasons the Court gave in support of the assertion that a superior need not possess specific intent to be guilty for genocide, pursuant to Article 7(3). This also launches a formidable challenge to the central argument of this thesis that it is contradictory to convict a superior for a crime of specific intent because of the conflicting nature of the *mens rea* required for a crime of specific intent and that of the doctrine of superior responsibility. What does the Appeals Chamber position assert? A superior need not share, or possess, the same *mens rea* as those committing the offence, which is specific intent. This position certainly gains credence due to the fact that Article 7(3) and Article 4 of the ICTY Statute maintain different standards of knowledge (or intent) all the while Article 7(3) applies itself to those crimes, despite the requirement of a different degree of knowledge. However, this is precisely the issue. Article 7(3) allows for the conviction of a superior *for the crimes* of her subordinates, crimes which require a higher degree of intent or knowledge. In essence, the *mens rea* of the crime charged with is disposed of in favour of a lower standard of knowledge. Therefore, one can be convicted of

⁸³ *Kambanda* Judgment and Sentence (n 2 above) par 16.

⁸⁴ *Brdanin* Trial Judgment (n 2 above) par 720.

genocide on the basis of negligence; this contradicts the very nature, and certainly the definition, of a crime like genocide. Hence, if a person is charged and convicted for a crime, such as one of specific intent, and that person does not satisfy the requirements of that crime - in that that person does not possess specific intent - a violation of the culpability principle has occurred. If a superior was not charged for the offence committed by her subordinates but, for instance, only a dereliction of duty, the principle of culpability remains intact and the superior's guilt is properly identified. For these reasons the position of the Appeals Chamber is not justified and the argument central to this thesis remains intact.

Other Tribunals and the International Criminal Court: To date, and unlike the ICTY and ICTR Tribunals, the issue of superior responsibility and genocide have not been dealt with in much detail, or not at all, by other international Tribunals and the International Criminal Court. The only ruling on the matter came from the Extraordinary Chamber in the Courts of Cambodia when they decided, in the case of *Chea et al.*, that *Chea, Sary and Samphan* were responsible for the crimes of their subordinates, which included genocide.⁸⁵ With regards to *mens rea*, the Tribunal stated that the co-accused “*knew or had reason to know*” of their subordinates crimes and they failed to fulfil their obligation to punish the perpetrators of these crimes.⁸⁶ Without further elaboration on the nature of knowledge within superior responsibility or on the compatibility of the differing standards of knowledge required for superior responsibility and specific intent crimes, one could only speculate as to what the Chamber intended to mean. Presumably, the ECCC adopted a traditional understanding of superior responsibility: a superior need not possess specific intent to be held accountable for the specific intent crimes of her subordinates. Thus, the ECCC's judgment incurs the same criticisms mentioned above and therefore further examination is of little value.

Realities of case law and the research question at hand: If the discussion above tells us anything it is that: (i) the various Tribunals have had no issue with applying superior responsibility to crimes of specific intent, especially genocide; and (ii) no consensus exists as to *how* superior responsibility can be applied to crimes of specific intent. Nybondas remarks that “[R]egrettably, thorough reasoning as to the

⁸⁵ *Chea et al.* (n 2 above) par 1559.

⁸⁶ *Chea et al.* (n 2 above) par 1560.

applicability of the command responsibility doctrine in relation to the crime of genocide is still lacking'.⁸⁷ This is certainly true. Many cases dealt with situations where the superior participated in the killing of persons, or was shown to have had genocidal intent, yet the Tribunals thought superior responsibility was applicable. As Schabas notes '[I]f the issue shifts to the commander's genocidal intent, [...], then complicity, not command responsibility, is the proper basis of guilt'.⁸⁸ Quoting Schabas again, '[T]he real test of the command responsibility provisions will be a finding of guilt where, as in the case of Yamashita, it is not proven beyond a reasonable doubt that the commander or superior had knowledge of the predicate crimes'.⁸⁹ Doubt was expressed as to whether the ICTR was justified in convicting *Imanishimwe* for the events that happened at the Gashirabwoba football field because of the Trial Chamber inability to prove actual knowledge or direct participation. Whether the reasons given by the Chamber was enough to warrant the fulfilment of "*had reason to know*", in that he was in the possession of the necessary information, is again questionable specific to the offence at the football fields. Admittedly, the analysis of the *Krnjelac* case was rather lenient in how the accused's actual knowledge of the mistreatment of the detainee *Zeković* should be interpreted; it nevertheless proved more fruitful to this study. But the question was whether *Krnjelac* knew or had reason to know of *other* cases of torture, and it was not necessarily limited to the matter of *Zeković*. Nonetheless, the accused was found to be in possession of information and failed to investigate further which could have led to the prevention or punishment of the relevant offences. It was argued that *Krnjelac* was a culpably negligent superior and for this reason he should not have been convicted for the crime of torture, in terms of superior responsibility. Although varied, the judgments were clear: a superior may incur responsibility for crimes of specific intent, pursuant to the doctrine of superior responsibility.

With that in mind, two propositions are put forth: (i) superior responsibility, as a mode of responsibility, has been incorrectly applied to cases where the accused's specific intent has been proven; and (ii) the reasons provided for the possibility of a conviction of a superior for crimes of specific intent are unpersuasive.

⁸⁷ Nybondas (n 38 above) 172.

⁸⁸ Schabas (n 1 above) 312.

⁸⁹ Schabas (n 1 above) 311.

4. The inapplicability of a superior's negligence to specific intent

So, if the reasoning behind applying superior responsibility to crimes of specific intent is inadequate, we must conclude that it is incorrect to use this particular mode of responsibility in cases that require the highest form of intent. Negligence and specific intent share no common factors, so for a negligent person to incur the legal and moral responsibility for acts that require specific intent is nonsensical. Is a superior always negligent in cases of superior responsibility? It is suggested that it is more likely that it would. If a superior acts with intent or knowledge with regards to her subordinate's offences, in that she intentionally omits her duties so that the offence may be committed or not punished, that sounds more like a person who aids and abets the offence. If a superior knew of the crimes, but did not intentionally omit her duties to further the offence, then one should ask why she failed to adhere to her responsibilities. Certainly, the crimes dealt with by the international community are usually of a widespread, systematic violation of the laws of war and human rights but that does not allow one to assume that an accused immediately falls within a particular category. What then of a superior who "*had reason to know*" of the crimes of her subordinates, i.e. she was in possession of information, but failed to investigate further? Again, we need to ask *why* she failed her duties. If the answer lacks intent, that person acted negligently and therefore cannot incur responsibility for a crime that requires specific intent. Thus, with no coherent model emerging from the Tribunals as to how the two concepts work in relation to one another, and the improbability of developing one where negligence and specific intent do not contradict one another, it can only be concluded that it is incorrect to apply superior responsibility to crimes of specific intent.

5. The principle of culpability and its applicability to the thesis question

In the introductory paragraphs to this chapter it was mentioned that the principle of culpability reinforces the proposition that it is contradictory to apply superior responsibility, as an offence of negligence, to offences that involve specific intent. Here it is discussed in more detail why this is the case. However, the use of the principle of culpability must be justified and such justification will be dealt with first followed by how it is applicable to the research question and why it is beneficial.

O'Reilly is of the opinion that

A community, whether it is local, national, or international, develops norms that reflect some conception of good. Society criminalizes behaviour in order to announce these norms, to punish conduct that it deems reprehensible, and to discourage socially unacceptable behaviour.⁹⁰

One such “conception of good”, when punishing offenders, is the idea that only people who have conducted themselves in a wrongful and blameworthy manner, may be held accountable. This idea is called the *principle of culpability*. The culpability principle has objective aspects (a personal connection to the offence), subjective aspects (a blameworthy mental state) and is personal in nature; thus we cannot punish a person for the crimes of others in which she was not involved.⁹¹ The importance of the culpability principle is well borne out by commentators, Damaska remarks that

For if one were to catalogue general principles of law so widely recognised by the community of nations that they constitute a subsidiary source of public international law, the culpability principle would be one of the most serious candidates for inclusion in the list.⁹²

Danner and Martinez ascribes such importance to this principle that they trace the legitimacy of international criminal law to it.⁹³ In particular, they note that

At a deeper level, international criminal law has adopted key philosophical commitments of national criminal justice systems. The most important of these is the focus on individual wrongdoing as a necessary prerequisite to the imposition of criminal punishment. International criminal law, like most municipal criminal law systems, maintains that punishment may not justly be imposed where the person is not blameworthy. Indeed, underlying the great bulk of the doctrines of the criminal law is the conception of personal responsibility.⁹⁴

⁹⁰ A O'Reilly 'Command responsibility: A call to realign doctrine with principles' (2004-2005) 20 *American University International Law Review* 88.

⁹¹ D Robinson 'How command responsibility got so complicated: A culpability contradiction, its obfuscation, and an elegant solution' (2011) *Melbourne Journal of International Law*, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=1950770> or <http://dx.doi.org/10.2139/ssrn.1950770>.

⁹² Damaška (n 16 above) 470.

⁹³ A Danner and J Martinez 'Guilty associations: Joint criminal enterprise, command responsibility, and the development of international criminal law' (2005) 93 *California Law Review* 97.

⁹⁴ Danner and Martinez (n 93 above) 82-83.

The culpability principle has been accepted by the ICTY, describing it as foundational to criminal responsibility.⁹⁵ Certainly, the language of the Statutes of the *ad hoc* Tribunals and the Rome Statute would suggest that the culpability principle applies by stating that a person who contravenes the Statutes will be responsible individually for her conduct. Thus, with its acceptance at both national and international level it is both applicable to the thesis at hand and its application to cases involving superior responsibility is essential to achieving justice; a violating of such a principle would be contrary to international criminal justices 'humanistic orientation'.⁹⁶ Not only should the culpability principle apply, but it does apply to the adjudication of crimes within international criminal law.

Exactly how the underlying principle of culpability contributes to the argument may be summarized as follows: The role the principle of culpability plays within the present argument is that superior responsibility, as it is applied, contradicts the subjective aspect of the principle. Stated briefly, implicit in the requirement of specific intent is the necessity of a general intent. That is, in order to comply with the definition of the specific intent the person must have acted, either positively or negatively, with a general intent that is aimed at the completion of the additional specific intent. For example, a person performs the act of killing (general intent) while targeting a specific group of identified people with the purpose of destroying them (specific intent). The conduct of an accused may either be some form of participation or omission. In the case of superior responsibility the conduct is that of an omission. The question is then whether a superior had a blameworthy state of mind that accompanied her omission. Here it is argued that a superior does not have the necessary blameworthy state of mind, and therefore fails the subjective aspect of the principle of culpability. As a result, a superior should not incur criminal responsibility because she does not satisfy the necessary requirements and if she does, it is a violation of the principle.

The stringent application of the culpability principle implies that for a person to incur criminal responsibility, she must fulfil all the definitional elements of the offence in question. The various Statutes have almost dogmatically identified and meticulously

⁹⁵ *Tadić* Appeal Judgment (n 82 above) par 186; *Kayishema and Ruzindana* Trial Judgment (n 2 above) par 199.

⁹⁶ *Damaška* (n 4 above) 456.

defined all the elements of an offence to which the conduct of an accused is compared.⁹⁷ This can be seen in the application of the three requirements of superior responsibility. If one such requirement is missing, the superior will escape liability. Certainly, the ICC Statute has set out to delimit judicial discretion and ‘directs the Court on such issues as criminal participation, the mental element of crimes and the availability of various defences’.⁹⁸ In terms of this thesis the fulfilment of the definitional elements of crime is taken seriously. How can a superior, who does not satisfy the requirements of that crime, be convicted for that? It is argued that because the subjective requirement of superior responsibility and that of the specific intent crime contradict one another, a conviction for a crime of specific intent pursuant to superior responsibility is contradictory and a violation of the principle of culpability. With the wide acceptance of the culpability principle, both nationally and internationally, its application to modes of responsibility is essential.

6. Conclusion

Examining the notion that the nature of superior responsibility allows for the conviction of a superior for a crime of specific intent has been shown to be problematic. More than that, it is reasonable to state that the application of this mode of responsibility to crimes of specific intent is inconsistent and contradictory in nature. It was shown that a person who acts in a (genuinely) negligent manner cannot simultaneously possess intent, which includes both general intent and specific intent. Although cases of superior responsibility involve culpable negligence and not simple or mere negligence, this higher degree of negligence still falls short of either general or specific intent. With a study of a number of cases, it was clear to see that international criminal tribunals had or have no problem applying superior responsibility to cases involving specific intent. After examining those cases it was found that the Tribunals reasoning for allowing superior responsibility’s application to crimes of specific intent was problematic and unconvincing. Lastly, the principle of culpability was discussed in relation to the argument that was presented. It was found that because negligence and specific intent cannot be applied with regards to one another, a superior charged in terms of a crime of specific intent can never satisfy the requirements of such crime. Therefore, in terms of the principle of

⁹⁷ Van der Vyver (n 25 above) 58.

⁹⁸ W Schabas *An introduction to the International Criminal Court*, 2nd ed (2004) 90.

culpability a superior can never incur criminal responsibility for crimes of specific intent, pursuant to superior responsibility.

If we are to strive for logical consistency to allow for the maximal achievement of justice, occasions of faulty reasoning should be actively avoided. In the present case it is submitted that it is in fact reasonable to assert that a disconnection in legal reasoning has occurred, and more specifically a superior may not be convicted of a crime of specific intent, pursuant to superior responsibility.

4

The criminal responsibility of a superior: A solution

Until now, the purpose of this dissertation has been to establish the concepts and nature of superior responsibility and *mens rea* within international criminal law. The goal in mind was to identify the underlying conflicts that arise when applying one along with the other. Consequently, we have analysed and criticised to the point where we can finally say: so far, case law has misapplied specific intent crimes with regards to superior responsibility and at a fundamental level it is contradictory to convict a superior for a crime of specific intent, pursuant to superior responsibility. Exposing incoherence within our pursuit of justice is all good and well, but what now? The purpose of this Chapter is to propose a solution to the “what now” question. At no point has it been maintained that a superior should *completely* evade liability; it has only been argued that, when superior responsibility and crimes of specific intent are applied to one another, an unnecessary disconnect in legal reasoning arises. This certainly does not mean that a superior should rest easy. In fact, that superior *is* guilty of something: she failed to perform the duties required of her. Thus, she is guilty of a dereliction of duty: legal blameworthiness arises for the inaction of the superior, not for the crimes of her subordinates.

The present chapter is divided into two sections. Firstly, a more detailed or comprehensive account of this proposed form of criminal responsibility is presented. This is then followed by possible objections that may be made and a defence of the position against such objections.

1. Dereliction of duty: A discussion

In a simpler world the mere suggestion of a preferred position would suffice. Unfortunately, or perhaps fortunately, we do not live in such a world, thus, a proposal must be argued for and stock must be taken as to what this position entails. This will then serve as the purpose of this section.

The discussion of the subjective requirement of superior responsibility and that of crimes of specific intent showed that it is illogical to convict a superior for such a crime because of the contradiction between negligence and specific intent. Within the previous sentence is the implication that due to the contradiction between the different standards of *mens rea* a superior can never satisfy the requirements of a crime of specific intent. The foundation upon which this statement is asserted is that the principle of culpability is fundamental to the administration of (international) criminal law. In terms of the aforementioned principle, a person cannot incur criminal responsibility for conduct she did not perform. A part of that conduct is the connection between the physical act itself and the accompanying mental state of mind that wills the performance of that physical act and the consequences that follow. Chapter 3 looked at the various degrees of knowledge and intent which allowed for the conclusion that a person may incur criminal responsibility for acts, or consequences, she may not have intended to occur. With that unintended consequence, however, comes a severe restriction on what such a negligent person may be held accountable for. It was argued that a negligent person may not be held accountable for a crime of specific intent, as is the case when superior responsibility is applied to crimes of specific intent. Because a superior cannot possess the required state of mind for a crime of specific intent, she cannot incur responsibility for such a crime; she does not comply with the principle of culpability. So far the application of the culpability principle has been treated as immutable, and to preserve consistency, the further application of the culpability principle to a superior's accountability must be upheld.

No controversy exists in the statement that a superior, with regards to superior responsibility, omitted her duties: her failure to act was a dereliction of duty. It is rather more contentious to assert that only this dereliction of duty should be the applicable liability that a superior should incur. However contentious the latter sentence may in fact be, not only does it pass the principle of culpability "test" but it also follows from the principle itself. Formally then, the position may be stated as follows

- (1) Pursuant to superior responsibility, a superior's wrongful conduct rests in her dereliction of duty.

(2) The principle of culpability states that liability and criminal responsibility is only to be applied to the conduct the accused performed herself; the conduct of others may not be imposed on another uninvolved party.

(3) It follows that in terms of the principle of culpability, a superior who fails to perform her duties incurs criminal responsibility only for such failure of duty.

There is not much wrong when reading the syllogism above, except for one crucial point that is not mentioned: this is not the preferred route taken by the international tribunals when convicting an accused pursuant to superior responsibility. Instead, a superior is charged and convicted *for the crimes* of her subordinates. The position advocated here, that a superior should only be responsible for a dereliction of duty, must therefore be discussed in more detail. Firstly, what this position entails must be discussed and secondly, the benefits of such a position will also be laid out to show that a proper application of superior responsibility entails responsibility for a superior's failure to act.

1.1. Narrowing the application of superior responsibility

It may be argued that a superior's liability only for her dereliction of duty is restrictive to the application of superior responsibility. That is, the different degrees of knowledge within superior responsibility can surely justify a more severe standard of accountability. As interesting an objection as that may be, it does not succeed. Chapter 4 argued that superior responsibility is best applied when it is seen from a point of view of negligence. That is, negligence has a far more active role to play in the understanding of superior responsibility than is commonly thought. That alone would indeed be a restriction on the application of the doctrine, but a restriction that is argued to be justified.

The reason behind this, and the answer to the objection above, is as follows: If a superior acts with intent or knowledge with regards to her subordinate's crimes - in that she learns of the offence but intentionally omits her duties so that the offence may be committed or not punished - that indicates a person who was complicit to the offence; superior responsibility does not then apply. If a superior knew of the crimes, but did not intentionally omit her duties to further the offence, then one should ask why she failed to adhere to her responsibilities. If the answer lacks intent her failure

will still amount to a dereliction of duty, whether she possessed actual knowledge or not. The fact that she knew of the offence does not entail that she possessed the required state of mind to be convicted of a crime of specific intent. Despite knowledge, her unintentional failure to act may still amount to negligence and possibly recklessness. On the scales of intent and blameworthiness, reckless remains substantially distant to that of specific intent. What then of a superior who “*had reason to know*” of the crimes of her subordinates, i.e. she was in possession of information, but failed to investigate further? Again, we need ask *why* she failed her duties. If the answer lacks intent, that person acted only negligently and therefore cannot incur responsibility for a crime that requires specific intent.

So if the above is correct, the most we can hope for is a reckless superior. But on a “*had reason to know*” standard of knowledge, negligence seems to be the order of the day. With that understanding, both (possible) recklessness and negligence fail to be an adequate basis of accountability for crimes of specific intent. Thus, superior responsibility is justifiably restricted.

1.2. Why a superior’s liability arises

We already know that superior responsibility is a form of omission liability, that is, a superior failed her to perform certain acts that she was expected to act upon. This failure of duty is exactly why a superior is exposed to criminal responsibility. Superior responsibility originates due to two reasons: (i) the subordinates underlying crimes, and (ii) the superior’s failure to act in relation to the underlying crimes. Traditionally, superior responsibility requires a superior to take all necessary and reasonable measures to prevent or punish the conduct of her subordinates. It was argued in Chapter 4 that a failure of duty arises a lot sooner than the prevention or punishment of a subordinate’s offence; based on both the “*had reason to know*” and “*should have known*”, albeit slightly varied, standards of knowledge, the superior failed to investigate the possible commission of offences by those subordinate to her. A superior only need investigate, or prevent or punish conduct, because of her position of authority and such authority comes with the obligations to abide by certain international standards and rules.¹ As the *Halilović* Trial Chamber held

¹ G Mettraux *The law of command responsibility* (2009) 44.

[...], international humanitarian law entrusts commanders with a role of guarantors of laws dealing with humanitarian protection and war crimes, and for this reason are placed in a position of control over the acts of their subordinates, and it is this position which generates a responsibility for failure to act.²

In terms of this thesis, there is no quarrel to be had on this point. In fact, this point provides a very good place to start. Further, liability of this kind adheres to the principle of culpability because it correctly identifies the wrongful conduct of the accused. Hence, liability correctly arises due to the superior's dereliction of duty.

1.3. A bait and switch?

Although it is recognised by the *ad hoc* Tribunals that liability arises due to a dereliction of duty, the possible conviction of a superior is not that of a dereliction. Instead, a superior incurs the blameworthiness of the underlying crime of her subordinates. This was discussed in both Chapters 2 and 4,³ and will not be repeated in this Chapter. However, two points may be summarised: (i) the ICTY, ICTR and ICC have recognised that a superior is responsible for the prohibited conduct of her subordinates;⁴ and (ii) while Article 7(3)/6(3) of the ICTY and ICTR Statutes may not explicitly make such a pronouncement, the judgments have allowed for an interpretation of criminal responsibility for the offences of a superior's subordinates; textually, Article 28(a) of the ICC Statute explicitly states that a superior 'shall be criminally responsible for crimes within the jurisdiction the Court'.⁵

With that being said, an issue becomes clear: if the liability of a superior arises due to a failure to act, how does she ultimately become responsible for the prohibited offence(s) of her subordinates? Speaking metaphorically, you are lured in with one bag of responsibility and you may leave with an entirely different bag. Thus, superior responsibility could rhetorically be described as a "bait and switch". But this may be a wider level of criticism of superior responsibility as a whole than to the one that has been advanced throughout this dissertation. Specifically to the thesis question, a

² *Prosecutor v Halilović* IT-01-48-T, Judgment, 16 November 2005, par 87.

³ Please refer to Chapter 2, § 2.5., and Chapter 4, § 2.3., for a more in depth discussion.

⁴ *Prosecutor v Delalić et al. (Čelebići Appeal Judgment)* IT-96-21-A, 20 February 2001, par 198; *Prosecutor v Kayishema and Ruzindana* ICTR-95-1-T, Judgment, 21 May 1999, par 506 and 516; *Prosecutor v Jean-Pierre Bemba Gombo* (hereafter referred to as *Bemba*) ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, par 405.

⁵ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), Article 28.

superior who acts negligently, and therefore cannot possess specific intent, may nevertheless be held accountable for a crime of specific intent. As hard to believe as it is, this is the current state of affairs. However, the proposal of liability for only a dereliction of duty solves the dilemma altogether: a superior who does not possess specific intent does not incur responsibility for such crime, but rather for her dereliction itself. Not only does it resolve the issue at hand, but it also follows from the reason why liability itself arises. Keeping the principle of culpability in mind, this form of liability does not violate any aspect of it and that alone presents the proposal as an attractive alternative to the norm.

A noticeable implication of the suggestion that superior responsibility should rather be applied in a dereliction of duty fashion is the idea that a new separate offence is created. This, as it will be shown, may present a problem for this approach. But is a new separate offence actually created? The answer to this is both yes and no. As contradictory as that answer is, it is argued below that it need not be described in such a way. This issue will not be dealt with in any more detail here and will be addressed below in conjunction with the reply to the second challenge to this proposed solution.

2. Challenges to dereliction of duty liability

Unfortunately it is not all smooth sailing for the proposed solution above. Two challenges can be put forth: (i) the application of a dereliction of duty, as a separate offence, has, for the most part, not been followed by the Tribunals; and (ii) the separate offence of dereliction of duty is not available to the international Tribunals. These challenges will be discussed.

2.1. Contradicting practice?

While it is certainly true that superior responsibility has, for the most part, been applied as a mode of liability by the *ad hoc* Tribunals,⁶ certain judgments have differed in that opinion. In the case of *Halilović* the Trial Chamber was of the opinion that

[...] under Article 7(3) command responsibility is responsibility for an omission. The commander is responsible for the failure to perform an act required by international law. This

⁶ Please refer to Chapter 2, § 2.5., and Chapter 4, § 2.3., for a more in depth discussion.

omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates. Thus “for acts of his subordinates” as generally referred to in the jurisprudence of the Tribunal does not mean that the commander shares responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act. The imposition of responsibility upon a commander for breach of his duty is to be weighed against the crimes of his subordinates; a commander is responsible not as though he had committed the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed. The Trial Chamber considers that this is still in keeping with the logic of the weight which international humanitarian law places on protection values.⁷

The Trial Chamber in *Hadžihasanović* agreed with the interpretation above saying

The Chamber subscribes to the findings of the *Halilović* Chamber. Since command responsibility under Article 7(3) of the Statute is the corollary of a commander’s obligation to act, that responsibility is responsibility for an omission to prevent or punish crimes committed by his subordinates.⁸

Further, in the case of *Orić* the Trial Chamber stated that a superior does not share the same responsibility as the subordinate who committed the crime but that ‘the superior bears responsibility for his own omission in failing to act’.⁹ In this case, the accused was sentenced to two years imprisonment for his omission.¹⁰ On appeal, the dissenting judgments of Judges Shomburg and Liu agreed that superior responsibility was not liability for the underlying offences.¹¹

What is important about the above is the fact that no absolute certainty exists as to what the nature of superior responsibility actually is. Judgments have allowed for a varied interpretation. So as to the question of whether a separate offence approach contradicts practice, the answer would have to be both yes and no. Yes, it disagrees with a large portion of the judgments handed down, and no because judgments have allowed such an interpretation. The fact that the majority of judgments have been of the view that superior responsibility is a mode of liability for the crimes of subordinates does not necessarily entail that that view is correct. As

⁷ *Halilović* Trial Judgment (n 2 above) par 54.

⁸ *Prosecutor v Hadžihasanović* IT-01-47-T, Judgment, 15 March 2006, par75.

⁹ *Prosecutor v Orić* IT-03-68-T, Judgment, 30 July 2006, par 292-293.

¹⁰ *Orić* Trial Judgment (n 9 above) par 783.

¹¹ *Prosecutor v Orić* IT-03-68-A, Judgment, 3 July 2008, Separate and Partially Dissenting Opinion of Judge Shomburg, par 12; and Separate and Partially Dissenting Opinion of Judge Liu, par 27.

Chapter 3 showed, the Tribunals have failed to correct the contradiction that exists between the nature of superior responsibility and crimes of specific intent. With such a failure and certain judgments allowing for a dereliction of duty approach to responsibility, the charge of a contradiction of practice is somewhat empty as it does not eliminate the use of a separate offence approach. Thus, the separate offence approach is a viable solution to the thesis question.

2.2. The creation of a new offence and its availability to international Tribunals

As briefly discussed above, the proposal of liability for a superior's dereliction of duty can almost be seen as the creation of a separate offence. Because of this an attack may be launched against this approach by pointing to the possibility that such a separate offence is not available to the international Tribunals.

Essentially, the following question needs to be answered: is it (superior responsibility) a mode of liability for the crimes committed by subordinates or rather a separate offence of the superior for failure to discharge her duties of control pursuant to international law?¹² With that in mind, we can see how well this approach fares in light of the Statutes of the ICTY/R and the ICC Statute.

The Statutes of the ad hoc Tribunals: The Statutes of the ICTY, which was followed by the ICTR, was influenced by Article 86(2) of the Additional Protocol. Unfortunately, the ambiguity of Article 86(2) also found its way into Article 7/6(3) of the Statutes of the ICTY/R, in that, the formulation, like Article 86(2) of AP I, of Article 7/6(3) does not favour either responsibility for the crimes of a superior's subordinates or for a separate offence of dereliction of duty. But as it has been shown, the practical application has favoured responsibility for the crimes of the subordinates. Despite this, the UN Secretary-General's Report stated that 'a commander should be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates'.¹³ But then the UN Commission of Experts, in its Final Report on the ICTY Statute, affirmed that superiors are 'individually responsible for a war crime

¹² C Meloni 'Command responsibility: Mode of liability for the crimes of subordinates or separate offence of the superior?' (2007) 5 *Journal of International Criminal Justice* 620.

¹³ Report of the Secretary General Pursuant to Paragraph 3 of Security Council Resolution 808, UN Doc S/25704, par 56.

or crime against humanity committed by a subordinate’;¹⁴ thereby implying the superior is guilty of the crime of a subordinate.

While it seems increasingly confusing, and in spite of a perceived opportunity for various interpretations, perhaps the Statutes of the ICTY/R have already, implicitly, answered the question of what form of liability superior responsibility actually is. Articles 2-5 deal with the *crimes* that are applicable to the Tribunals, while superior responsibility is dealt with separately in Article 7 as a *mode of responsibility*; put together with the fact that the Statutes of the ICTY/R have, for the most part, been interpreted by the Tribunals to mean responsibility lies with the crimes of a subordinate and not as a separate offence has settled the supposed issue at hand. This is not surprising as the ICTY Statute ‘purports to reflect customary law, and customary law precedent treats command responsibility as a mode of liability’.¹⁵

On the other hand, Schabas thinks that ‘superior responsibility, as defined by the *ad hoc* Tribunals, is presented as a form of participation by a superior in an act committed by another person, a subordinate. To this extent it resembles complicity, [...]’.¹⁶ But not entirely, that is. He later notes that, superior responsibility can take the form of an autonomous offence, as countries, like Canada and Germany, who have incorporated it into their national legal systems, have done.¹⁷

Even with considerable disagreement as to what form of liability superior responsibility actually is, for the sake of argument it will be assumed – with a somewhat disjointed backing by the Tribunals – that superior responsibility, as described by the Statutes of the *ad hoc* Tribunals, is a mode of responsibility; therefore, superior responsibility as a separate offence is unavailable to the international Tribunals. Before responding to this rather forceful challenge, the position of the ICC Statute will first be considered.

¹⁴ Final Report of the Commission of Experts, UN Doc. S/1994/674, 27 May 1994, 16.

¹⁵ D Robinson ‘How command responsibility got so complicated: A culpability contradiction, its obfuscation, and an elegant solution’ (2011) *Melbourne Journal of International Law*, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=1950770> or <http://dx.doi.org/10.2139/ssrn.1950770>. 48. For a treatment on the position of customary see BB Jia ‘The doctrine of command responsibility revisited’ (2004) 3 *Chinese Journal of International Law* 13-35.

¹⁶ W Schabas *The UN international criminal tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (2006) 315.

¹⁷ Schabas (n 16 above) 319.

The International Criminal Court: Similarly, in the ICC Statute, definitions of crimes appear in Part II, whereas superior responsibility appears in Part III (General Principles of Criminal Law”). In addition, Article 28(a) explicitly states that a commander shall be criminally responsible for the crimes of her subordinates.

Related to the present challenge is the wording of the Preamble of the ICC Statute which states that it has ‘[...] jurisdiction over the most serious crimes of concern in the international community as a whole’.¹⁸ With the view that superior responsibility is a mode of liability, the crimes for which a superior may be held accountable conform to the wording of the Preamble. To suggest that superior responsibility is a separate offence of “negligent duty” reduces the superior’s blameworthiness well below the seriousness of the offences contained in the ICC Statute, therefore the “less serious” offence is not within the jurisdiction of the Court. Consequently, the separate offence approach is not available to ICC. All of this then assists the criticism being dealt with and answers the question above by stating that superior responsibility is a mode of liability and not a separate offence.

If the above is correct, the issue becomes one of legality. How is it that Tribunals can prosecute a crime, when that crime possibly does not exist within their jurisdiction? This is the (daunting) question that will now be addressed.

Responding to the challenge: In response to the challenge above, two approaches will be adopted: (i) the issue of legality is avoided if one accepts the view that superior responsibility is a separate offence, but causation is required; and (ii) due to the uncertainty that exists from judgments on the matter (see “*Contradicting practice?*” above) various interpretations exist on the nature of responsibility of superior responsibility, as has been discussed in the literature. This would show that superior responsibility is not only a mode of responsibility but it can be read from a different point of view. We begin with the first approach.

Robinson states that this form of liability, or separate crime, can be defined in two ways

First, the dereliction itself can be conceived as the entirety of the offence and punished as such. On this approach, the definition of the crimes need not require that the dereliction

¹⁸ Preamble of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002).

contributed to core crimes by others or even that core crimes occurred at all. Alternatively, one could regard breach of command responsibility as a separate offence and yet still require causation; thus the crime would be concerned with derelictions that contribute to core crimes by others.¹⁹

This seems to be a fair description of the ‘separate’ offence approach. The two options above differ with regards to causation, with the first definition completely disregarding causation. By doing so, one could complain that the notion of a separate offence has completely severed the connection to the underlying crime of a superior’s subordinates. This fact weakens the first definition considerably. Although this may be consistent with finding of the ICTY in the *Čelebići* Trial Chamber – that causation was not a requirement to prove superior responsibility - it was argued that the Trial Chamber erred in its judgment, ultimately finding that causation does indeed play a role in superior responsibility.²⁰ Article 28 of the ICC Statute, on the other hand, certainly implies that causation is a necessary requirement with the wording ‘*as a result of*’. Therefore, the first definitions lack of a requirement of causation renders it untenable. Consequently, it may be ignored. Within the course of this dissertation, the requirement of causation has been argued for, that is, it is an important component of superior responsibility. Because of this the second definition will be defended.

Even though the purpose of this dissertation has been to show that a dysfunctional relationship exists between superior responsibility and crimes of specific intent, the underlying offence, and a superior can therefore not incur criminal responsibility for that offence, it has nevertheless been argued that the superior’s omission is inextricably linked to the underlying offence.²¹ Superior responsibility, by its very nature, has always been derivative: as a doctrine it is predicated on the crimes of a subordinate. Without these offences a superior’s duty to act would never have been required. By maintaining that superior responsibility is dependent on the underlying offence it resolves the issue of availability, or rather the issue of legality. It would then, however, not be entirely correct to consider this solution as a “separate” offence, but rather a derivative offence of those crimes within the jurisdiction of the international Tribunals, with the added benefit that a superior’s guilt is accurately

¹⁹ Robinson (n 15 above) 44-45.

²⁰ See Chapter 2, § 2.3.4.

²¹ See Chapter 2, § 2.3.

addressed. Perhaps, it would be more correct to say that this ‘causation dependent separate offence’ is a hybrid of both a mode of responsibility and a separate offence. This certainly captures the bizarre nature of superior responsibility. With regards to this strange nature of responsibility, Meloni writes

On one hand, it is not consistent with any form of complicity, since there is no need to prove the causal link with the underlying crime committed by the subordinate and since the *mens rea* threshold is lower than the one required for complicity. On the other hand, it is hardly conceivable as a separate offence of failure to act since the liability of the superior is strictly and necessarily dependent from the commission of the crime of the subordinate.²²

Meloni does indeed describe a peculiar form of responsibility, but her inability to conceive a ‘causation dependent separate offence’ is misplaced. From the quote above, Meloni describes a superior’s liability as being necessarily dependent of the underlying offence and therefore a separate offence is not possible. This interpretation has been argued to be incorrect: the liability of a superior certainly arises because of the underlying offence but because the application of superior responsibility and crimes of specific intent are incompatible and a violation of the culpability principle, a superior’s guilt cannot lie with the underlying offence itself. But once it is established that causation is necessary for superior responsibility, that fact bridges the gap between the underlying offence and the separate offence; the result of which is the availability of the offence to the international Tribunals and a solution to the thesis question because it addresses the superior’s conduct. Thus, it is a perfectly conceivable, and certainly a reasonable, position to adopt.

The ‘causation dependent separate offence’ approach does explicitly rest on the notion that causation applies to superior responsibility. Thus, a critic may reject this approach by rejecting the applicability of causation to superior responsibility. However, this rejection may not be justified for two reasons: (i) as has already been argued, causation does play a role in superior responsibility; and (ii) more fatal to the rejection is that it too violates the principle of culpability. Turning, once more, to the work of Robinson, it is persuasively argued that the *ad hoc* Tribunals rejection of a causal contribution to a crime is contradictory to the Tribunals recognition of a culpability principle that itself requires a causal contribution. Robinson’s argument is as follows: (1) International criminal law claims to comply with the fundamental

²² Meloni (n 12 above) 632.

principles of a liberal system of criminal justice; (2) Those fundamental principles include the principle of personal culpability; (3) The principle of personal culpability requires that persons only be held liable for crimes to which they contributed; (4) Under the doctrine of command responsibility, the Tribunals and ICC hold the commander liable as a party (accessory) to the crimes of the subordinates, and charge, convict and sentence the commander as such; (5) Therefore, to comply with our stated principles, command responsibility as a mode of liability must require that commander's dereliction contributed to the crimes of subordinates.²³ While the proposed solution and Robinsons argument part way as to whether superior responsibility is mode of liability or not – Robinson thinks it is a mode of accessory liability - ²⁴ the point to take is that the rejection of a causal requirement is a violation of the principle of culpability. The 'causation dependent separate offence' approach satisfies this internal requirement of the principle of culpability perfectly: causation is a required element of superior responsibility and necessary for a possible conviction of a superior, pursuant to superior responsibility.

Thus, it may be concluded that the 'causation dependent separate offence' approach deals with the legality issue quite well and the 'separate' offence, at least in the form discussed here, is available to the international Tribunals. Further, as shown above in § 2.1., the ICTY Trial Chamber had no issue with applying a separate offence approach, albeit not explicitly a 'causation dependent separate offence' approach as described above, in the case of *Orić*.²⁵ The second approach to dealing with the issue of legality will now be discussed.

The second response to the challenge may be stated as follows: the question as to whether superior responsibility is a mode of liability or a separate offence has not been given a definite answer and uncertainty still exists. This uncertainty has allowed authors the freedom to propose different interpretations. A few such interpretations will be discussed.

²³ Robinson (n 15 above) 5.

²⁴ Robinson (n 15 above) 1.

²⁵ *Orić* Trial Judgment (n 9 above).

Nerlich is of the opinion that superior responsibility, as described under Article 28 of the ICC Statute, can be viewed in four different forms,²⁶ which are: (i) knowledge superior responsibility before the fact,²⁷ which entails that actual knowledge is required by the superior of the base crime and she does not act to prevent the offence; (ii) lack-of-knowledge superior responsibility before the fact.²⁸ This describes situations where the “*should have known*” standard of knowledge would be applicable; (iii) knowledge superior responsibility after the fact.²⁹ As described by Nerlich, ‘[...], the superior cannot be blamed for the criminal conduct of the subordinates but only for the wrongful consequences caused by that conduct. Since the superior did not know that the failure to exercise control properly resulted in the commission of the base crime, the superior can only be blamed for negligent behaviour in that respect’.³⁰ Lastly, (iv) lack-of-knowledge superior responsibility after the fact,³¹ which, to Nerlich, describes that ‘whenever the superior ‘should have known’ of the crimes of his or her subordinates, the superior had knowledge of circumstances that established the suspicion that a crimes *might* have been committed. For that reason, it suffices if it can be established that the superior had knowledge of the ‘matter’ and meant to fail to submit it to the competent authorities’.³² The main point Nerlich argues in his paper is that only the first account of superior responsibility, that is knowledge superior responsibility before the fact, justifies blame for *both* the criminal conduct of the subordinate and the wrongful consequences caused by it, while the other three accounts only allow blame for the superior’s failure to exercise proper control.³³

To Meloni, already quoted above, superior responsibility – as described the Statutes for the *ad hoc* Tribunals - can only be seen as a *sui generis* crime where it does not satisfy either the categories of a mode of responsibility or separate offence. Therefore, it is theoretically possible to read both interpretations in the text.³⁴ With regards to Article 28, Meloni, like Nerlich, states that superior responsibility ‘is a

²⁶ V Nerlich ‘Superior responsibility under Article 28 ICC Statute: For what exactly is the superior held responsible?’ (2007) 5 *Journal of International Criminal Justice* 1.

²⁷ Nerlich (n 26 above) 7-10.

²⁸ Nerlich (n 26 above) 10-13.

²⁹ Nerlich (n 26 above) 13-18.

³⁰ Nerlich (n 26 above) 16.

³¹ Nerlich (n 26 above) 17.

³² Nerlich (n 26 above) 17.

³³ Nerlich (n 26 above) 1.

³⁴ Meloni (n 12 above) 632-633.

mode of criminal liability for international offences that presents different aspects depending on the facts in each case',³⁵ or rather 'the basis of their different objective and subjective requirements as provided for in Article 28'.³⁶ Depending on the circumstances, a superior can either be seen as a negligent agent or an accomplice by omission.³⁷

van Sliedregt comments, with regards to the *ad hoc* Tribunals, that superior responsibility is a mode of liability, 'a mode of participating in subordinate crimes'.³⁸ She goes on to state that recent judgments have loosened the link between superiors and subordinate crimes by regarding superior responsibility as separate crime of failure to act or dereliction of duty.³⁹ So the *ad hoc* Tribunals have allowed different interpretations. Speaking in terms of Article 28, van Sliedregt says that the wording of the Article – criminalising a "failure to exercise control properly – 'allows superior responsibility to be interpreted as a separate crime of omission'.⁴⁰ The reasoning behind this is as follows

A superior is punished for his or her own failure, not for the crimes of the subordinate. The superior under Article 28 is still linked to the subordinates' crimes but differently than at the ICTR/Y. Crimes committed by subordinates "trigger" a superior's liability. Instead of an extension of *subordinate* liability, superior responsibility in Article 28 is phrased as resulting from a subordinate's *act*. Subordinate liability is still the starting point, however, not through the person but through the acts. This allows the requirement of a less specific link to subordinate crimes and again affirms the "separate offence" interpretation.⁴¹

After all of this, Article 28 also contains elements which indicate that it is a mode of liability rather than a separate offence of dereliction of duty.⁴² As the author says 'Article 28 stipulates that a superior "shall be criminally responsible for crimes within the jurisdiction of the Court" committed by his subordinates "as a result" of his "failure to exercise control"'.⁴³ Further, the wording of the Article allows for the causation

³⁵ Meloni (n 12 above) 633.

³⁶ Meloni (n 12 above) 634.

³⁷ Meloni (n 12 above) 634-636.

³⁸ E van Sliedregt 'Article 28 of the ICC Statute: Mode of liability and/or separate offence?' (2009) 12 *New Criminal Law Review* 425.

³⁹ van Sliedregt (n 38 above) 426.

⁴⁰ van Sliedregt (n 38 above) 429.

⁴¹ van Sliedregt (n 38 above) 429.

⁴² van Sliedregt (n 38 above) 430.

⁴³ van Sliedregt (n 38 above) 430.

requirement, therefore it links the subordinate to the crimes of a subordinate.⁴⁴ van Sliedregt's solution to this all is to provide for a "conceptual distinction" between an intentional mode of liability and a separate crime of negligence. Thus, three concepts of superior responsibility emerge: (i) intentionally permitting the commission of crimes by subordinates, (ii) intentionally failing to report crimes, and (iii) negligently failing to supervise subordinates.⁴⁵

The last position that will be discussed is that of Kai Ambos. Speaking only in terms of Article 28, Ambos writes

Article 28 can be characterized as a genuine offence or separate crime of omission, since it makes the superior liable only for a failure of proper supervision and control of his or her subordinates but not, at least not directly', for the crimes they commit. These crimes are 'directly' imputed to the subordinates, the superior is only responsible for the failure to prevent them from occurring; that means that the superior is *not* liable for an improper omission or [...] a commission by omission.⁴⁶

Thus, the underlying offence is not an element of the offence but only a point of reference of the superior's failure of supervision.⁴⁷ To Ambos superior responsibility in terms of the ICC Statute is only a dereliction of duty and not a mode of responsibility for the crimes of a subordinate. He further notes that because the underlying offence is the point of reference that entails that a causal relationship between the failure of duty and the occurrence of the crimes must exist.⁴⁸ In essence, Ambos is describing the 'causation dependent separate offence' argued for above.

The various opinions of the authors above cumulate into the point of this section: no consensus, judicially or in the literature, exists as to whether a superior is guilty in terms of a mode of liability for the crimes of subordinates or whether superior responsibility describes a separate offence. It may then be concluded that the challenges to the proposed solution have both been shown to be incorrect or, at the very least, been avoided. Thus, it may reasonably be said that the 'causation

⁴⁴ van Sliedregt (n 38 above) 431.

⁴⁵ van Sliedregt (n 38 above) 432.

⁴⁶ K Ambos 'Superior responsibility' in A Cassese, P Gaeta and J Jones (eds) *The Rome Statute of the International Criminal Court* (2002) 833.

⁴⁷ Ambos (n 46 above) 833.

⁴⁸ Ambos (n 46 above) 833.

dependent separate offence' has remained stable in the face of the challenges presented.

3. National provisions on superior responsibility

As a side note, it would be instructive to see how some national provisions have interpreted superior responsibility. The German Code of Crimes against International Law contains three provisions relating to superior criminal responsibility. Firstly, Section 4(1) of the Criminal Code states that a superior who omits to prevent her subordinate from committing an offence shall be punished in the same way as a perpetrator of the offence committed by that subordinate.⁴⁹ Section 13(1)-(4), on the other hand, states that in cases where the superior has failed to properly supervise her subordinate and/or report crimes – Section 14 – are seen as a separate crime of omission.⁵⁰ The Dutch International Crimes Act provides for a splitting type of interpretation with the intentional failure to perform ones duties in Section 9(1) acting as a mode of responsibility for the crimes of a superiors subordinates;⁵¹ Section 9(2) deals with culpably negligent superiors who fails to act and treats such a case a separate offence.⁵²

The United Kingdom International Criminal Court Act of 2001 regards superior responsibility as a mode of liability. Section 65 states that a superior is 'responsible for offences committed by forces under his effective command and control, or (as the case may be) his effective authority and control, as a result of his failure to exercise control properly over such forces [...]'.⁵³ Lastly, Section 5 of Canada's Crimes against Humanity and War Crimes Act 2000 describes superior responsibility as an 'indictable offence'.⁵⁴ This could be seen as a distinct offence.

Thus, even at a national level there exists no consensus as to what exactly is the nature of responsibility that superior responsibility entails.

⁴⁹ Act to Introduce the Code of Crimes Against International Law of June 26, 2002; available at <http://www.mpicc.de/shared/data/pdf/vstgbleng2.pdf>. Accessed January 04, 2013.

⁵⁰ Code of Crimes (n 49 above) Section 13 and 14.

⁵¹ International Crimes Act 9 June 2003, Stb 2003, 270, Section 9(1). Available at <http://www.iccnw.org/documents/NL.IntCrAct.pdf>. Accessed January 04, 2013.

⁵² International Crimes Act (n 51 above) Section 9(2).

⁵³ International Criminal Court Act 2001, Section 65. Available at http://www.legislation.gov.uk/ukpga/2001/17/pdfs/ukpga_20010017_en.pdf. Accessed January 04, 2013.

⁵⁴ Crimes against Humanity and War Crimes Act 2000, Section 5. Available at <http://www.iccnw.org/documents/Canada.CrAgH.WcrEng.pdf>. Accessed January 04, 2013.

4. Conclusion

The benefits of the proposed form of liability – a superior incurs criminal responsibility only for her dereliction of duty and not for the underlying offence of her subordinates - may then be summarised in three points: (i) it *follows* from the principle of culpability; (ii) it *adheres* to, and does not violate or challenge, the principle of culpability; and (iii) it *resolves* the “bait and switch” problem, presented above. More specifically, it resolves the thesis question at hand: pursuant to superior responsibility, how can a negligent superior be accountable for crimes of specific intent? The answer is she cannot. Instead she is liable for her dereliction of duty, so the issue of conflicting standards of *mens rea* is avoided altogether, as liability is concentrated on the conduct of those involved.

After considering possible challenges or critics of the position argued for, the ‘causation dependent separate offence’ handles those challenges presented in § 2.2., above exceptionally well. So much so that it may be said that the challenges presented above are refuted, only leaving behind a position that may be reasonably adopted. While other notable solutions, or interpretations, exist, the present solution is argued for as the preferred interpretation precisely because of the benefits stated above.

With regards to the central question or concern of this thesis - that is, how can a negligent superior be convicted of a crime of specific intent, pursuant to superior responsibility – it may be concluded that the ‘causation dependent separate offence’ resolves this issue with some confidence.

5

Summary and concluding remarks

1. Overview of chapters

Has the objectives of this dissertation posed in the introduction been achieved? Just to remind the reader, they are: (i) to establish that there is, in fact, an inconsistency or contradiction in the application of superior responsibility to crimes of specific intent, like genocide, thereby exposing a disconnection in legal reasoning; and (ii) propose a solution to this problem.

To answer the above question it will be helpful to give a brief summary of the chapters of this dissertation.

Chapter 1 set out to both introduce and discuss the doctrine of superior responsibility, with the goal of establishing a good understanding of everything that superior responsibility implies. The Chapter found that the following can be said for the doctrine: superior responsibility is said to be a form of omission liability due to the superior's failure to perform the duties required of her; duties which are imposed onto superiors by international law. Thus, liability arises because of the failure to perform ones duty to act, in relation to crimes of a superiors subordinate. Such failure to act is said to be connected to the underlying crime, despite the fact that the superior was not a part of the offence. For this reason, it was argued, contrary to the ICTY, that causation does indeed play a role in superior responsibility. Further, the superiors failure to perform her duties was argued to essentially be an act of negligence; again, contrary to the rulings of the *ad hoc* Tribunals. With regards to the guilt of a superior, it was shown that a superior has traditionally been held accountable for the underlying crimes of the subordinates. Lastly, in order to be convicted pursuant to superior responsibility three requirements must be satisfied: (i) a superior-subordinate relationship must exist; (ii) the superior must have a certain standard of knowledge ("*knew*", "*had reason to know*", and "*should have known*", the standard of knowledge depends of the Statute applicable to that set of facts); and (iii) a superior failed to take necessary and reasonable steps to either prevent or punish

the offence of her subordinates. All of these requirements were discussed, with special attention given to the requirement of knowledge because of its uncertainty and confusion that surrounds it.

This then gives a much summarised view of superior responsibility. As a doctrine of international criminal law, it remains contentious on a number of points. Despite the odd disagreement, superior responsibility was presented in such a way that could be considered “mainstream”, or rather, in a way that best represents its application so far.

Chapter 2 investigated how *mens rea* has been approached by international criminal law and what the different degrees of knowledge and intent are. After the concept was evaluated the following conclusions were made: (i) the degree of moral blameworthiness depends on the degree *mens rea*; (ii) due to the seriousness of the offences within international criminal law, intent is the rule; negligence the exception; (iii) crimes of specific intent, within international law, require general intent with the addition of a specific purpose (or intent); (iv) as per definition, a person cannot both be intentional (especially specifically intentional) and negligent with regards to the same conduct; (v) lower standards of the subjective requirement (*dolus eventualis*, recklessness and negligence) have found its application in the *ad hoc* Tribunals. However, the *wording* of Article 30 of the ICC Statute leaves no room for both *dolus eventualis* and recklessness. The phrase “*unless otherwise provided*” may allow for their use, but this is still undecided; and (vi) the phrase “*unless otherwise provided*”, provided for by Article 30 of the ICC Statute, allows for the exceptional application of negligence in cases of superior responsibility (Article 28(a) of the ICC Statute).

Chapter 1 and 2 established the framework from which Chapter 3 could then follow. Understanding both superior responsibility and *mens rea* within international criminal law, Chapter 3 discussed how it is contradictory to apply the aforementioned concepts together. The argument exposing the conflicting *mens rea* was structured to demonstrate that it is contradictory to convict a superior for a crime of specific intent. Because of this the principle of culpability tells us that such a conviction is unwarranted. The natures of both the specific offence and that of superior responsibility were examined to determine whether they are compatible. Further it was argued that because of this existing contradiction, case law has either

incorrectly applied superior responsibility or has been unjustified in its adopted positions. A justification and defence of the position argued for was then provided.

Lastly, Chapter 4 proposed a solution to the problem of superior responsibility and its relationship with crimes of specific intent. Adopting the principle of culpability and causation within superior responsibility, a ‘causation dependent separate offence’ approach was put forth and defended. This approach entails that because the nature of superior responsibility is contradictory to the nature of crimes of specific intent, a superior should not be held liable for the underlying specific intent crime of her subordinates but rather for her dereliction of duty. When challenged on the points that such an approach is not available to the international courts, and that it is contradictory to current practice, it was shown that: (i) by incorporating causation as a requirement for superior responsibility, the superior’s dereliction of duty remain connected to the underlying crimes. Thus, the ‘causation dependent separate offence’ approach is dependent on the offences within the jurisdiction of the international courts and therefore can be adjudicated by such courts; (ii) there remains no consensus as what form of liability superior responsibility actually is, both in practice and in the literature. The benefits of such an approach were said to be: (i) it *follows* from the principle of culpability; (ii) it *adheres* to, and does not violate or challenge, the principle of culpability; and (iii) it *resolves* the “bait and switch” problem, presented above. More specifically, it resolves the thesis question at hand: pursuant to superior responsibility, how can a negligent superior be accountable for crimes of specific intent? The answer is she cannot. Instead she is liable for her dereliction of duty, so the issue of conflicting standards of *mens rea* is avoided altogether, as liability is concentrated on the conduct of those involved.

Thus, the ‘causation dependent separate offence’ approach is seen as a viable, and theoretically justified, form of liability for superior responsibility.

Therefore, it would seem that the objectives of this dissertation have been met. It was shown that an inconsistency/contradiction exists between superior responsibility and crimes of specific intent, thereby exposing a disconnection in legal reasoning, and further, a worthy solution was proposed in response to the said inconsistency.

2. Concluding remarks

As one doctrine of criminal responsibility, superior responsibility could be argued to be incomplete. In other words, the edges remain rough. It has sparked controversy since its application after the Second World War and, even though it has since made great strides forward, it remains controversial to this day. Certainly, it has attracted the attention of most international criminal law scholars because of this very fact.

As this dissertation has demonstrated, there lies a great deal of discord or disconnect in the way superior responsibility is reasoned. Without a complete, and logically possible, theory of superior responsibility it will remain controversial. While this dissertation argued for a specific problem at the heart of superior responsibility, it could be said that some of the criticisms may apply to the doctrine as a whole. That is not to say that superior responsibility should be abandoned, but rather it should be fixed. By identifying points of contention and trying to find solutions to the problems, steps have been made to achieving a coherent model of superior responsibility from which to work. It is believed that superior responsibility has yet to reach its full potential and if applied in a uniform and fair manner, it can undoubtedly assist the achievement of justice.

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