Exploring justice in extreme cases: Criminal law theory and international criminal law

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Chapter 6

A Culpability Contradiction: How Command Responsibility Got So Complicated

OVERVIEW

In this chapter, I illustrate the themes of this thesis by exploring a particular contradiction in Tribunal jurisprudence, and the resulting controversy. The contradiction is that Tribunal jurisprudence: (*a*) recognizes the principle of personal culpability, pursuant to which a person must contribute to a crime to be party to it; and yet (*b*) uses command responsibility to declare persons party to international crimes without a causal contribution. Many readers will promptly protest against the claim I have just made, but I will examine each of the major counter-arguments to demonstrate the contradiction.

The contradiction first emerged due to surface-level doctrinal reasoning that did not adequately consider the deontic dimension. I will show how the subsequent twists and turns to deny, obscure, evade, or resolve this contradiction have led to increasingly convoluted claims about command responsibility. Jurists now disagree about basic requirements of the doctrine and even its very nature: is it a mode of liability, a separate offence, or a mysterious new category, or does it perhaps even vacillate between both?

The analysis will show the problems of inadequate attention to deontic limits, and the clarity that can be furnished by more careful deontic analysis. Sensitivity to deontic constraints can shed new light on ongoing debates and can generate prescriptions. I will argue that a relatively simple solution is available, that relies on established concepts of criminal law. Regardless of whether you agree with my specific solution, however, my examination here should help clear out the most fallacious arguments, map out the defensible options, and pave the way for a simpler, clearer debate that engages with personal culpability.

6.1 ARGUMENT AND OBJECTIVES

6.1.1. The Structure of the Argument (and the Trajectory of the Debate)

The syllogism which is at the core of my argument is essentially as follows:

(1) ICL claims to comply with the fundamental principles of justice, including the principle of personal culpability.

(2) The principle of personal culpability requires that persons can only be held liable as party to crimes to which they *contributed*.

(3) Under the doctrine of command responsibility, the Tribunals explicitly hold the commander liable as a party to the crimes of the subordinates.[1]

(4) Therefore, to comply with the system's principles, command responsibility as a mode of liability must require that commander's dereliction *contributed* to the crimes of subordinates.

This syllogism is quite straightforward and demonstrates a contradiction. However, that contradiction has been thoroughly obscured by several arguments and ambiguities in the jurisprudence. I will explore in turn each of the counter-arguments that have been advanced to resist this syllogism, in order to expose the problem more clearly. As a helpful byproduct, in discussing each of the counter-strategies, I will also trace for you the trajectory of the command responsibility debate, so that you can see how and why it became increasingly mystified and disputed.

Strategy 1 – Doctrinal Sidestep: The first strategy to avoid the contradiction has been to employ doctrinal arguments to side-step fundamental principles. I will show below (§6.5) that doctrinal arguments are the wrong *type* of arguments, as they do not even *attempt* to answer the culpability contradiction.

[1] This premise may be particularly controversial for many readers, but as I will elaborate in §6.6, the Tribunals explicitly charge, convict, and sentence the commander as party to the underlying crimes.

Strategy 2 – Separate Offence: The second strategy is to characterize command responsibility as a separate offence. However, the Appeals Chamber has explicitly rejected the separate offence characterization, and the Tribunals expressly charge, convict, and sentence the commanders as parties to the underlying offences (see §6.6). The Tribunals cannot answer culpability challenges by claiming that they do not hold the commander liable as party to the underlying crime, when they in fact do precisely that.

Strategy 3 – '*Sui Generis*': A third strategy has been to declare that command responsibility is a '*sui generis*' mode of liability, exempt from the contribution requirement. However, simply invoking the adjective 'sui generis' does not even attempt to provide a deontic justification for liability without contribution (§6.7).

Strategy 4 – Retreat to Obscurity: A fourth move in Tribunal jurisprudence is to offer muddled and contradictory claims about whether the commander is or is not liable in relation to the acts of the subordinates. I will show that such vagueness is not a suitable solution (§6.7).[2]

Proposed Solution – Respect the Contribution Requirement: I will argue that the best solution is the simplest: to go back and untie the first knot that led to all of the subsequent knots. If we undo the first mis-step, in which causal contribution was rejected for inadequate reasons, we immediately discover an elegant solution. Command responsibility in international courts remains a mode of accessory liability, as it has long been recognized. As such, it requires causal contribution. This requirement is not burdensome, because it can be satisfied by showing that the commander's dereliction aggravated the risk of subsequent crimes. The solution reconciles (a) the ICC Statute, (b) the early case law, and (c) fundamental principles of criminal justice.

6.1.2 Resulting Insights

[2] There are two other possible, more radical, counter-strategies. The first is to reject fundamental principles. For example, one could adopt a purely instrumentalist approach that is focused only on crime prevention. I address such arguments in Chapters 3 and 4. Here I proceed on the assumption that we agree that personal culpability matters.

Another strategy – the most ambitious and sophisticated strategy – is to construct a new account of culpability, in which causal contribution is not required. I examine that proposed solution with more care in another work (D Robinson, 'How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution', (2012) 13 *Melbourne J Int Law* 1). I argue that even on an open-minded, coherentist account, such arguments are as yet too undeveloped to be relied on for punishment of human beings.

This dissection of a command responsibility controversy offers several rewards for our broader inquiry about criminal law theory and ICL.

Insights about reasoning

My main concern in this chapter is with reasoning and internal contradictions. I will show how better engagement with deontic constraints can clarify and improve the law. Attentiveness to reasoning also help us better understand the trajectory by which command responsibility discourse became so complicated. I argue that Tribunal jurisprudence took an early wrong turn when it rejected the fundamental requirement of causal contribution, due to hasty reasoning. Subsequent twists and turns to escape the contradiction led to further convolutions. Literature and jurisprudence have now fractured into claims that command responsibility is a separate offence, a new *sui generis* form of liability (whose nature is never explained), neither-mode-nor-offence, or sometimes-mode-sometimes-offence. Descriptions of command responsibility in Tribunal jurisprudence became vague and even contradictory[3] – necessarily so, because any clarity would immediately reveal the contradiction. Tools of criminal law theory can help us to notice such problems and to resolve them with more surgical care.

Insights about law

My analysis sheds light on ongoing debates. First, the mainstream Tribunal approach remains problematic and in need of justification. Second, whereas the ICTY majority decision in *Hadžihasanović* on successor commanders has been vehemently criticized, I place it in a more favourable light: it is best supported by a deontic analysis.[4] Third, many criticisms of a contribution requirement as an 'arbitrary' barrier to prosecution are too simplistic: the debate must recognize that if command responsibility is indeed a mode of liability, then causal contribution is an established requirement to prevent arbitrariness. Fourth, several of the complexities from Tribunal jurisprudence need not and should not be imported to other jurisdictions: clearer and more principled

[3] For example, Tribunal judgments describe it as responsibility for the act and also as *not* responsibility for the act: see §6.7.2.
[4] In that case, a majority of the ICTY Appeals Chamber declined to create 'successor commander liability'. That decision has been condemned as 'arbitrary', but it should instead be commended as reducing the culpability gap. See §6.4.2.

paths are available. Whatever solution one prefers, a better debate must integrate the culpability principle.

Terms

In these chapters, I use the term '**command responsibility'**, and I will focus on the situation of military commanders. Of course, the doctrine – more accurately and inclusively known as 'superior responsibility' – covers a broader set of relationships. In order not to further complicate an already intricate subject, I will focus specifically on command responsibility and military relationships. The arguments for requiring causal contribution apply with equal or indeed greater force in non-military relationships. I use terms such as **'doctrinal'**[5] and **'deontic'** in the manner explained earlier in this thesis. As a counterbalance to the widespread use of the masculine pronoun, these chapters will use the feminine pronoun, especially in relation to commanders.

Scope and Disclaimers

My inquiry here is not about possible legislative reforms, but rather the legal reasoning applied by the Tribunals and in surrounding discourse, with the aim of improving on such reasoning in future.

These chapters bring together ICL scholarship and criminal law theory scholarship. While this work is one of the most detailed examinations of the doctrine to date from a deontic and criminal law theory perspective, there are countless issues that could and should be explored in more detail. For reasons of space, it is simply impossible to provide a complete treatment of both bodies of work. I delve into the vast literature and jurisprudence only to the extent needed to illustrate the culpability issues; numerous other issues are untouched. This work is simply an initial foray, and it is my hope that a longer and broader conversation will continue.

My discussion of command responsibility and causal contribution is unavoidably lengthy. First, I am offering observations at quite different levels: about reasoning, about doctrine, and about criminal theory. Second, the collective understanding of command responsibility has splintered, so that there are now many conflicting conceptions of it. While my core points are fairly simple, it takes time to address them when so many points

[5] In particular, I use '**doctrinal**' in the common law sense (which is very different from for example the German usage) to refer to source-based and teleological legal arguments, as opposed to arguments engaging with deontic principles or deeper theoretical coherence.

of reference are disputed. Each reader will have different priorities that they would wish to see addressed first. When all is untangled, I hope to persuade you that there is a contradiction, that it has been obscured by the discourse, and that more elegant solutions are available.

6.2 THE NOVEL REACH OF COMMAND RESPONSIBILITY

The command responsibility doctrine, as articulated in the statutes and jurisprudence of the Tribunals, imposes liability where:

(1) there is a superior-subordinate relationship;

(2) the superior knew or had reason to know that a subordinate was about to commit crimes or had done so; and

(3) the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[6]

The ICC Statute takes a very similar approach,[7] with two notable differences. First, and most importantly for present purposes, the ICC Statute expressly requires that the commander's dereliction causally contributed to the crimes.[8] Second, the ICC Statute also handles the mental element differently; I will discuss the mental element in Chapter 7.

I refer here to command responsibility as a mode of accessory liability, because that is how it was generally been understood and applied over the history of ICL, with controversy arising only relatively recently. I will address below the contention that command responsibility might constitute an entirely separate offence (§6.6).

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[6] ICTY Statute, Article 7(3); ICTR Statute, Article 6(3); *Prosecutor v Kordić and Čerkez,* Judgement, ICTY A.Ch, IT-95-14/2-A, 17 December 2004 ('*Kordić and Čerkez,* Appeals Judgement') at para 839.

[7] Article 28(a) of the ICC Statute provides that '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. (Emphasis added.)

[8] The ICC Statute requires that the crimes were 'a result of his or her failure to exercise control properly over such forces'. As I will discuss below,n the culpability principle does not require that this be interpreted as a 'but for' causation; the principle is satisfied by contributions that aggravated the risk of the resulting crimes.

In order to assess command responsibility, we must ask: what is distinctive about it? In what way does command responsibility reach *beyond* other modes of liability, doing something that other modes do not, thereby warranting its separate existence? First, if a commander actually *orders* or instigates a crime, then she is already liable by virtue of other modes of liability (such as ordering, instigating, or joint commission). Second, where a commander does not initiate the crimes, but she *knows* of the crimes and contributes to them, then she may still be liable through 'aiding and abetting' or other complicity doctrines.[9] Third, where the commander *knows* of the pending or ongoing crimes but nonetheless *omits to prevent* them, she can still be found complicit: for example, aiding and abetting by omission has been recognized where the person is under a duty to prevent crimes and is in a position to act yet fails to do so.[10]

Accordingly, the distinctive reach of command responsibility is that it captures the commander who 'had reason to know' or 'should have known' of the crimes and failed to prevent or punish them.[11] Other modes of liability in ICL, such as aiding and abetting by omission, require *knowledge* of the crimes. It is the modified mental element that gives command responsibility its additional substantive reach. As I will argue in Chapter 7, command responsibility signals that, given the seriousness of the commander's duties and the dangerousness of the activity of supervising troops, a deliberate or criminally negligent failure to fulfil the duty to control troops can be a basis for accessory liability in any crimes resulting from that failure.

Tribunal jurisprudence claims that there is an additional difference: that command responsibility is a special mode of liability that does not require any contribution to the charged core crimes. It is this claim (and the lack of any attempt at deontic justification) that I examine here.

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[9] Other complicity doctrines include 'joint criminal enterprise' before the Tribunals and contribution to a 'common purpose' before the ICC; see e.g. Article 25 ICC Statute.

[10] *Prosecutor v Orić,* Judgement, ICTY T.Ch, IT-03-68-T, 30 June 2006 ('*Orić* Trial Judgement') at para 283; *Prosecutor v Orić,* Judgement, ICTY A.Ch, IT-03-68-A, 3 July 2008 ('*Orić* Appeal Judgement') at para 43; *Prosecutor v Halilović,* Judgement, ICTY T.Ch, IT-01-48-T, 16 November 2005, at para 303-304 ('*Halilović* Trial Judgement'); *Prosecutor v Kvočka,* Judgement, ICTY A.Ch, IT-98-30/1-A, 28 February 2005 at para 187 ('*Kvočka* Appeals Judgement'). For a similar approach in the common law, see A P Simester & G R Sullivan, *Criminal Law: Theory and Doctrine*, 3d ed (Hart Publishing, 2007) at 204-207; A Ashworth, *Principles of Criminal Law*, 5th ed (OUP, 2006) at 410.

[11] Of course, beyond this additional *substantive* reach, command responsibility also has an *expressive* or pedagogic value. It helps reinforce the message that superiors must take steps to prevent and repress crimes by subordinates. Thus, cases where commanders had actual knowledge – which technically could be prosecuted as aiding and abetting by omission – can be prosecuted under command responsibility. My point in this section is simply that, in terms of substantive reach, command responsibility is distinct from other modes by virtue of its modified mental element.

6.3 THE CULPABILITY CONTRADICTION

In this section, I aim to demonstrate a contradiction between Tribunal jurisprudence and the fundamental principle of personal culpability, as recognized by the Tribunals.

6.3.1. Tribunal Jurisprudence Recognizes the Culpability Principle, including the Contribution Requirement

Tribunal jurisprudence declares its compliance with fundamental principles, including the culpability principle.[12] For example, in *Tadic* it was recognized 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 has not personally engaged or in some other way participated...[13]

The principle means that we punish people only for deeds for which they are personally culpable. The principle of personal culpability has an objective aspect (a connection to the crime) and a subjective aspect (a blameworthy mental state). My focus in this chapter is the objective aspect, i.e. that we hold persons responsible only for their own conduct and the consequences thereof. Culpability is personal, hence we cannot punish a person for crimes in which she was not involved.

An individual may of course share liability relating to acts physically perpetrated by others, provided that the individual *contributed* to the acts and did so with a mental state sufficient for accessory liability. Criminality often involves multiple actors, each contributing to a crime in different ways and in differing degrees. As criminal law theorist John Gardner has noted,

> I am responsible for what I do and you are responsible for what you do. But... [t]he truism 'I am responsible for my actions' cannot mean that I am responsible for my

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[12] UN Secretary General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), UN Doc S/25704 (1993), at paras 34 & 106; *Prosecutor v Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY A.Ch, IT-94-1-A, 2 October 1995 at paras 42, 45 & 62 ('*Tadić*, Interlocutory Appeal'); J Pejic, 'The International Criminal Court Statute: An Appraisal of the Rome Package' (2000) 34 *Intl Lawyer* 65 at 69.

[13] *Prosecutor v Tadić,* Judgement, ICTY A.Ch, IT-94-1-A, 15 July 1999*,* para. 186 ('*Tadić* Appeal Judgement'); see also *Judgment of the International Military Tribunal (Nuremberg)*, *reproduced in* (1947) 41 *AJIL* (supplement) 172 at 251: 'criminal guilt is personal'.

> actions, never mind your actions. For my own actions inevitably include my actions of contributing to your actions.[14]

The commitment to punish persons only for their own wrongdoing means that the accused must contribute in some way to a crime to be liable for it. ICL scholars Guénaël Mettraux and Ilias Bantekas have respectively observed that the requirement that the accused be 'causally linked to the crime itself is a general and fundamental requirement of criminal law'[15] and that 'in all criminal justice systems, some form of causality is required.'[16]

ICL jurisprudence recognizes that, for personal culpability, accessory liability requires some contribution to the underlying crime. For example, the ICTR in *Kayishema* affirmed that it is 'firmly established that for the accused to be criminally culpable his conduct must…have contributed to, or have had an effect on, the commission of the crime.'[17]. Tribunal jurisprudence has also recognized that conduct *after* the completion of crime cannot be regarded as contributing to the commission of the crime.[18]

Those parties to a crime who are most directly responsible are liable as *principals*, and more indirect contributors are liable as *accessories*.[19] I will discuss the principal-accessory distinction at greater length in Chapter 7.[20] For the present purpose of demonstrating an internal contradiction, it suffices to work with the distinction on the terms recognized in ICL. [21]

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[14] J Gardner, 'Complicity and Causality' (2007) 1 *Crim Law & Philos* 127 at 132.
[15] G Mettraux, *The Law of Command Responsibility* (OUP, 2009) at 82. Mettraux suggests however that causal contribution can be satisfied by contributing to impunity for the crime (p. 43, p. 80). This position differs from the generally recognized conception of culpability, which requires a contribution to the crime itself, and is reminiscent of earlier doctrines such as 'accessory after the fact'.
[16] I Bantekas, 'On Stretching the Boundaries of Responsible Command' (2009) 7 *JICJ* 1197 at 1199.
[17] *Prosecutor v Kayishema,* Judgement, ICTR T.Ch, ICTR-95-1T, 21 May 1999 ('*Kayishema* Trial Judgement') at para 199. Similarly, ICTY jurisprudence has held that 'rendering a substantial contribution to the commission of a crime is indeed expressing a feature which is common to all forms of participation'. *Orić* Trial Judgement, above, at para 280.
[18] Tribunal jurisprudence indicates that the only 'exception', in which conduct after the crime can be regarded as contributing to the commission of the crime, is where there is a prior agreement to subsequently aid or abet: *Prosecutor v Blagojević and Jokić,* Judgement, ICT T.Ch, IT-02-60-T, 17 January 2005 ('*Blagojević* Trial Judgement'), at para 731. However, this is not really an exception, given that there is a *prior* agreement, and it is the agreement that can facilitate, encourage or have an effect on the crime.
[19] See e.g. H Olásolo, 'Developments in the distinction between principal and accessory liability in light of the first case law of the International Criminal Court' in C Stahn & G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill, 2009) at 339.
[20] For an argument for a unitary model, see J Stewart, 'The End of 'Modes of Liability' for International Crimes' (2011) 25 *LJIL* 165.
[21] This accords with the coherentist approach, as outlined in Chapter 4. Because the distinction is so well established in ICL and in most national systems, we can at least adopt it as a starting hypothesis or point

Whereas principals 'cause' the crime (or make an 'essential' contribution, often expressed as *sine qua non* or 'but for' causation of some aspect of the crime), accessories need only 'contribute' in a more peripheral way.[22] A principal brings about the *actus reus* through her own acts (direct perpetration) or otherwise makes an essential contribution, including by acting through others while still having 'control' over the crimes. By contrast, the contribution of an accessory may be more indirect: the accessory's actions either *influence* or *assist* the voluntary acts and choices of the principal(s).[23] Thus, principals cause the crime, whereas accessories influence or assist the principals.[24]

Importantly, to 'contribute' to a crime is a less demanding standard than to 'cause' the crime.[25] Merely contributing requires only that one's conduct was of a nature that would facilitate or encourage the crime. After all, accessories are liable for assisting and encouraging others, and 'causation' can rarely be traced through the voluntary and informed acts of other human beings. Accordingly, it is not required that an accessory 'cause' the crime in the sense of a *sine qua non* causal relation; all that is required is some 'contribution'.[26]

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of departure. As I will discuss in Chapter 8, some scholars do not support the distinction. However, in my view the arguments against do not displace the weight of extensive practice and normative argument in favour of the distinction.

[22] There are different possible ways to distinguish between accessories and principals; for present purposes I focus on the essential contribution, which has support in ICL jurisprudence and ICL literature. See for example *Prosecutor v Katanga and Chui,* Decision on Confirmation of Charges, ICC PTC, ICC-01/04-01/07, 30 September 2008 at para 480-486; *Prosecutor v Lubanga,* Decision on the Confirmation of Charges, ICC PTC, ICC-01/04-01/06, 29 January 2007 at paras 322-340. See also H Olásolo, above; M Dubber, 'Criminalizing Complicity: A Comparative Analysis' (2007) 5:4 *JICJ* 977. It also has support in scholarship on normative underpinnings of criminal law. To take some prominent examples from the English-language literature, Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine' (1985) 73 *Calif L Rev* 323, explains in a seminal article how principals make a *sine qua non* (but for) contribution, whereas the accomplice aids or influences the principal; the consequence of her act is the influence on the choices and actions of others. See also M S Moore, 'Causing, Aiding, and the Superfluity of Accomplice Liability' (2007) 156 *U Pa L Rev* 395 at 401; J Dressler, 'Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem' (1985) 37 *Hastings L J* 91 at 99-102.

[23] Kadish, 'Complicity, Cause and Blame' above, at 328 and 343-346; Dressler, above, at 139.

[24] As Gardner, 'Complicity and Causality' above, at 128 explains, 'Both principals and accomplices make a difference, change the world, have an influence…. [A]ccomplices make their difference through principals, in other words, by making a difference to the difference that principals make'. See also I Bantekas, 'The Contemporary Law of Superior Responsibility' (1999) 93 *AJIL* 573 at 577; Kadish, 'Complicity, Cause and Blame' above, at 337-342; Simester & Sullivan, *Theory and Doctrine* above, at 193-196.

[25] See eg Gardner, 'Complicity and Causality' above, at 128; I Bantekas, 'The Contemporary Law of Superior Responsibility' (1999) 93 *AJIL* 573 at 577; Kadish, 'Complicity, Cause and Blame' above, at 337-342; Simester & Sullivan, *Theory and Doctrine* above, at 193-196.

[26] Elsewhere, I explore the outer limits of causal contribution, i.e. the minimum level of involvement entailed by the culpability principle for any form of accessory liability. Robinson, 'Complicated', above.

A typical and plausible elaboration on the contribution requirement in Tribunal jurisprudence is that it is 'enough to make the performance of the crime *possible or at least easier*'[27] and that the contribution can be any assistance or support, whether present or removed in place and time, *furthering or facilitating* the performance of the crime, provided that it is 'prior to the full completion of the crime'.[28] The requirement is not onerous: it can be satisfied by conduct of a nature that would encourage or facilitate the crime (elevating the risk).

Furthermore, the contribution may be in the form of an omission, if the accused was under an obligation to prevent the crime.[29] It is sometimes argued that omissions cannot make contributions. I omitted my analysis of several comparatively philosophical questions from this chapter in the interests of brevity; however, for readers who are interested, I make my analysis available in Annex 1, below. In short, ICL jurisprudence – like national jurisprudence - follows the 'normative conception' of causation, which recognizes that our failures can indeed have consequences. For example, failing to feed prisoners leads to their starvation; failure to lock a door facilitates escape through that door.[30]

I should address two possible points of confusion. First, a surprisingly common misperception in ICL jurisprudence and literature is that the accessory liability model entails 'pretending' or 'deeming' the accessory to have 'committed' the crime.[31] Accessory liability is not deemed commission; the accessory is held responsible for his or her own role in contributing to the crime with the requisite level of fault. Second, one might think of attempts, incitement, or 'accessory after the fact' as possible examples of non-contributory modes of liability. Those, however, are actually separate offences. The common law concept of 'accessory after the fact' was rejected in modern times as a form of accessory liability, specifically because it is considered unsound to hold someone as accessory to a crime on which they had no effect or contribution.[32]

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[27] *Orić* Trial Judgement, above, at para 282 (emphasis added).
[28] *Ibid* at para 282 (emphasis added). The *Orić* case also confirms that the contribution standard is not 'but for' causation; it simply requires a significant effect that furthers or facilitates the crime: *ibid* at para 338.
[29] *Ibid* at para 283.
[30] Tribunal jurisprudence has followed the mainstream position, that the 'substantial effect' requirement, when applied to omissions, requires that 'had the accused acted the commission of the crime would have been substantially less likely': *Prosecutor v Popović,* Judgement, ICTY A.Ch, IT-05-88-A, 30 January 2015 at para 1741.
[31] For examples of this misunderstanding, see discussion in §8.3.2.
[32] See §7.2.1.

6.3.2. Yet Tribunal Jurisprudence Rejects Contribution in Command Responsibility

Despite affirming the culpability principle and the contribution requirement entailed therein, Tribunal jurisprudence nonetheless goes on to assert that the requirement does not apply to command responsibility. For example, the Tribunal's decision in *Oric* acknowledges that modes of liability require a causal contribution, and thus that superior responsibility 'would require a causal contribution to the principal crime', yet asserts that causal contribution is not required, 'for good reasons'.[33] I will scrutinize the quality of those reasons below (§6.5). First, I will outline how the anti-contribution position emerged, and show the implications of that position.

The doctrine of command responsibility provides two distinct ways to prove the dereliction by the commander: (a) failure to *prevent* crimes and (b) failure to *punish* crimes.[34] The first branch is satisfied where that the commander 'failed to take the necessary and reasonable measures' to try to *prevent* the crimes.[35] The 'failure to *prevent*' branch does not pose culpability problems. Given that the commander has a duty to provide training and establish preventive systems, the failure to do so facilitates crimes, in comparison with the situation that would exist had she met her duty.[36]

It is the second branch, the 'failure to *punish*' crimes, that has caused confusion and difficulty. This branch refers to the failure of the commander to take the reasonable and necessary measures to investigate and punish or to refer the matter to competent authorities for investigation and prosecution.[37] Obviously, a commander's failure to punish in relation to a particular crime can only occur *after* that crime. Hence it cannot

[33] *Orić Trial Judgement* at para 338.
[34] The ICTY and ICTR Statutes refer to failures to prevent and failures to punish. The ICC Statute actually splits the possible derelictions into three categories: failures to prevent, to repress, and to submit the matter to other authorities for punishment. While the three-prong ICC approach may be useful for highlighting different obligations of commanders, I will, for simplicity, continue to refer to the two conceptually different stages: failures to prevent (referring to actions required prior to a particular crime) and failures to punish (referring to actions required after a particular crime). The three options in the ICC Statute ultimately collapse into these two conceptual categories.
[35] ICTY Statute, Art. 7(3); ICTR Statute, Art 6(3); a similar requirement appears in ICC Statute, Art. 28(a)(ii) and 28(b)(iii). The obligation is one means and not results; the mere fact that crimes nonetheless occurred does not mean that the commander failed to meet her duty to take reasonable preventive steps.
[36] Some may argue that a failure to prevent, being an omission, cannot be regarded as 'contributing' to any events; this argument is discussed in Annex 1.
[37] ICTY Statute, Art 7(3); ICTR Statute, Art 6(3); ICC Statute, Art 28(a)(ii) and 28(b)(iii).

causally contribute to that particular crime. For this reason, Tribunal jurisprudence has declared that it is 'illogical'[38] and 'would make no sense'[39] to require that the failure to punish the crime contribute to that same crime. From this observation, the Tribunal reasoned that 'the very existence' of the failure to punish branch in Article 7(3) 'demonstrates the absence of a requirement of causality'.[40] Accordingly, the ICTY rejected the contribution requirement.[41]

It is true that a failure to punish a crime cannot retroactively causally contribute to that same crime. However, this does not demonstrate that the 'failure to punish' branch is incompatible with the contribution requirement. It only seems incompatible if we fail to consider the possibility of a *series* of crimes.

Fig 1. If we conceive only of the one-crime scenario, there would seem to be a contradiction between the 'failure to *prevent*' branch and requiring causal contribution

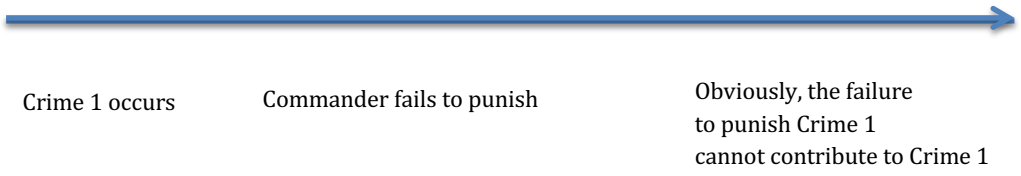

Fig 2. However, if we conceive of multiple crimes, the seeming paradox is solved

Consider the scenario where subordinates commit not one crime but a *series* of crimes, which is indeed the typical situation in ICL. The first crime or crimes are

[38] *Prosecutor v Blaškić,* Judgement, ICTY A.Ch, IT-95-14-A, 29 July 2004 ('*Blaškić* Appeal Judgement').
[39] *Orić* Trial Judgement, above at para 338.
[40] *Prosecutor v Delalić et al. (Čelebići),* Judgement, ICTY T.Ch, IT-96-21-T, 16 November 1998 ('*Čelebići* Trial Judgement'), at para 400. The Prosecution similarly rejected the possibility of causal nexus 'as a matter of logic' (ibid, para 397).
[41] *Čelebići* Trial Judgement *ibid* at paras 396-40; endorsed in *Blaškić* Appeal Judgement above at para 76.

committed. At some point the commander either learns of the crimes or has enough information that she 'should have known' or 'had reason to know' of the crimes. The commander fails to take reasonable steps to have the crimes investigated and prosecuted, and crimes continue to occur. Although this failure of the commander cannot retroactively contribute to the *initial* crimes, it can and does contribute to each *subsequent* crime. Her failure to punish the prior crimes facilitates the subsequent crimes, in comparison to the legally expected baseline of her diligent response to crimes of subordinates. If the subordinates know of the lack of punishment, they may perceive a reduced risk of punishment or a signal of punishment. But we do not even need a showing of such knowledge, because the commander has failed to deliver a deterrent and repudiative signal that she was obliged to give, and thus she has elevated the risk in comparison to the situation that would exist had she met her obligation. The commander can properly share in accessory liability for the subsequent crimes, because her failure to punish prior crimes is a culpable omission which facilitated the subsequent crimes.

Once we consider the scenario of multiple crimes, which is actually the most common scenario in ICL, we see that actually the 'failure to punish' branch can indeed be reconciled with a requirement of causal contribution. Hence, there was no incompatibility or contradiction that would require, or even permit, the Tribunal to reject a requirement of the fundamental principle of personal culpability.

I believe that the Tribunal's reasoning in those cases is an example of hurried doctrinal reasoning that did not engage adequately with deontic constraints. The Tribunal abandoned the culpability principle all too insouciantly, because of a relatively superficial doctrinal argument (textual construction). Indeed, the seeds of confusion can be traced even further back, to the drafters of the ICTY Statute, who blithely merged criminal and non-criminal provisions of Additional Protocol I, without considering the culpability principle.[42] Had the chambers approached the provision with the culpability principle more carefully in mind, the provision could readily have been interpreted compatibly with the requirement.

[42] See discussion above §2.3.2.

6.4 THE STAKES

To illuminate the implications of allowing convictions without contributions, I will outline two scenarios of 'non-contributory' failures to punish. (By 'non-contributory', I mean that the failures were not followed by any subsequent crimes and thus did not facilitate or encourage any crimes by subordinates). One scenario is the problem of the isolated crime and the other is the problem of the successor commander.

6.4.1 The Problem of the Isolated Crime

The first problem arises where a crime occurs, the commander fails to punish, and yet no other crimes occur. The problematic scenario only arises where the commander has adequately met her 'preventive' duties (otherwise, the failure to prevent could facilitate or encourage crimes, and there is no problem with causal contribution). On my account – i.e. on an account that respects the contribution requirement – she cannot be retroactively liable as party to the isolated crime, because she did not contribute to it. She could be held liable for subsequent crimes following that failure to punish, but not for the isolated crime to which she did not contribute.[43]

In the isolated crime scenario, the commander has clearly failed in her responsibilities, and she may face various consequences for her dereliction, including domestic criminal liability for dereliction of duty offences. But, I argue, we cannot convict her as a party to that core crime. She has done something wrong, but 'party to genocide' is not an accurate or just description of her wrong. By contrast, Tribunal jurisprudence would allow her conviction as a party to that initial crime by virtue of command responsibility, in the absence of any contribution, in violation of the culpability principle.

[43] A variation on this scenario is what we may call the "problem of the initial crime". In this variation, following the commander's failure to punish, further crimes do indeed occur. The commander may be properly liable for the subsequent crimes, because her failure to punish prior crimes facilitated or encouraged those crimes. However, she should not be liable for the initial crime or crimes (the crimes prior to the time at which she knew or had reason to know that crimes were occurring), because she made no culpable contribution, by act or omission, to those crimes.

6.4.2 The Problem of the Successor Commander

An even more glaring problem of non-contributory dereliction arises in the scenario of the 'successor commander'. This scenario arose in *Hadžihasanović*, in which a commander, Kubura, had taken up his command position *after* certain crimes were committed.[44] Kubura was nonetheless charged with crimes committed *prior to his assignment*, by virtue of command responsibility and his failure to punish those crimes once he took up the post.

The prosecution, the Trial Chamber, and the two dissenting judges in the Appeals Chamber took the proposition that causal contribution is not required and pushed it to its furthest extension. If no causal contribution is required, then it follows that the accused need not even have been in command or involved in the outfit at the time of the crimes. Indeed, it would equally follow that the accused need not even have been *born* at the time of the crimes. All that would matter is that the accused at some point assumed command, became aware of past crimes or had reason to know of them, and failed to punish the persons responsible. If we apply the doctrine mechanistically and without any concern for fundamental principles, this approach would meet all of the formal requirements of Article 7(3) of the ICTY Statute.

On appeal, a bare 3-2 majority of the Appeals Chamber recoiled from successor commander liability, over some strong dissents and with some heated judicial language on all sides.[45] The majority held that the commander must at least have been in command at the time of the crimes. The reasoning of the majority was not explicitly based on concern for the culpability principle, but rather on the doctrinal grounds that prior sources and authorities did not seem to support successor commander liability for past crimes.[46] Judges Shahabuddeen and Hunt, in dissent, would have allowed successor commander liability.

The *Hadžihasanović* decision generated major controversy and has spawned a large literature on successor commander liability. Rather than receiving applause for its restraint, the majority position has come under vehement criticism. Much of the

[44] *Hadžihasinović*, Interlocutory Appeal above. Appended to the decision are the dissenting opinions of Judge Shahabuddeen ('Shahabuddeen Opinion') and Judge Hunt ('Hunt Opinion').
[45] Ibid.
[46] Ibid at paras 37-56. See also T Meron, 'Revival of Customary Humanitarian Law' (2005) 99 *AJIL* 817 at 824-826. While the approach does not directly reference the culpability principle, it does reflect concern for the legality principle.

discourse illustrates the reasoning habits discussed above in Chapter 2, focusing on IHL sources and the goal of maximizing deterrence, but neglecting the deontic constraint of culpability. Many scholars argue that the majority position creates a 'loophole', an 'arbitrary limitation' and a 'gaping hole' through which perpetrators will 'escape liability'.[47] Within the ICTY, trial chambers have openly expressed their discontent and disapproval of the majority decision.[48] A trial chamber of the Sierra Leone Special Court declined to follow the majority approach and instead adopted the dissent approach.[49] The ICTY Appeals Chamber itself almost overturned the majority position in a later decision (*Orić*). Separate opinions in the *Orić* decision described the *Hadžihasanović* majority decision as an 'erroneous decision', 'highly questionable' and an 'arbitrary limitation'[50] and noted that there 'is a new majority of appellate thought'.[51] The Appeals Chamber narrowly declined to overturn *Hadžihasanović* on the grounds that the facts in *Orić* did not squarely require a determination on that issue.[52]

The judicial debate was largely framed in terms of precedents and teleological arguments. What is largely missing from the conversation is the deontic dimension: that convicting a person as party to crimes completed before she even joined the unit would be a startling departure from the culpability principle, at least as hitherto understood. If

[47] See e.g. C Fox, 'Closing a Loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Known Past Offences' (2004) 55 *Case W Res L Rev* 443; D Akerson & N Knowlton, 'President Obama and the International Criminal Law of Successor Liability' (2009) 37 *Denv J Intl L & Pol'y* 615; Mettraux, *Command Responsibility* above, and the declarations of Judges Shahabuddeen, Liu and Schomburg in *Orić* Appeal Judgement, above, as well as further examples in Chapter 6.

[48] *Orić* Trial Judgement, above at para 335 ('…it should be immaterial whether he or she had assumed control over the relevant subordinates prior to their committing the crime. Since the Appeals Chamber, however, has taken a different view for reasons which will not be questioned here, the Trial Chamber finds itself bound…'); *Halilović* Trial Judgement above at para 53.

[49] *Prosecutor v Sesay, Kallon and Gbao*, Judgement, SCSL T.Ch, SCSL-04-15-T, 2 March 2009 ('RUF Case') at para 306 ('…this Chamber is satisfied that the principle of superior responsibility as it exists in customary international law does include the situation in which a Commander can be held liable for a failure to punish subordinates for a crime that occurred before he assumed effective control.'). But see c*ontra Prosecutor v Brima, Kamara and Kanu,* Judgement, SCSL T.Ch, SCLC-04-16-T, 20 June 2007 ('AFRC Case') at para 799 ('…there is no support in customary international law for the proposition that a commander can be held responsible for crimes committed by a subordinate prior to the commander's assumption of command over that subordinate.'); *Prosecutor v Fofana and Kondewa,* Judgement, SCSL T.Ch, SCSL-04-14-T, 2 August 2007 ('CDF Case') at para 240 ('The Chamber further endorses the finding of the ICTY Appeals Chamber that an Accused could not be held liable under Article 6(3) of the Statute for crimes committed by a subordinate before the said Accused assumed command over that subordinate.')

[50] *Orić* Appeal Judgement above, Liu Declaration, paras 5 and 8; *Orić*, ibid, Schomberg Declaration at para 2.

[51] *Orić*, ibid, Shahabuddeen Declaration at para 3; see also ibid at para 12.

[52] *Orić*, ibid at para 167 ('The Appeals Chamber, Judge Liu and Judge Schomburg dissenting, declines to address the *ratio decidendi* of the *Hadžihasanović* Appeal Decision on Jurisdiction, which, in light of the conclusion in the previous paragraph, could not have an impact on the outcome of the present case.')

such a proposition is to be entertained at all, it would require a new understanding of culpability, backed by some meticulous deontological justification.[53]

The culpability problem was not entirely overlooked. Judge Shahabuddeen, dissenting in *Hadžihasanović,* acknowledged that modes of liability require causal contribution;[54] his solution to the impasse was that he 'prefers' to characterize command responsibility as a separate offence. This was the origin of the 'separate offence' versus 'mode of liability' controversy that still burns today. While that characterization would indeed solve the problem, I argue below (§6.6) that it is not available to the judges of the Tribunals and the ICC. . In any case, Tribunal jurisprudence is explicit that it is a mode of liability, and hence the unresolved contradiction persists.

The position taken by the Prosecution[55] and by most of the jurisprudence[56] is the greater puzzle, because it involves a stark contradiction. That position (*a*) regards command responsibility a mode of accessory liability, (*b*) rejects the contribution requirement, and yet (*c*) proclaims compliance with the culpability principle. Such a position could only be defended with a new deontic account of personal culpability, which the Tribunals have not offered or even attempted.

This culpability contradiction is not immediately evident, because several arguments have obscured it. The remaining sections (§6.5 to §6.7) examine the evolution of the legal argumentation, showing how the culpability contradiction was long obscured from view.

6.4.3 Common Objections to the Contribution Requirement

The most common objection to requiring contribution is that it would create a 'gap' that will allow commanders to 'escape justice' for the isolated or initial crimes.[57] Such arguments are an illustration of one of the problematic structures of argument that I discussed in Chapter 2. They adopt a purely utilitarian approach focussing on the single variable of maximizing deterrence, and they fail to engage with the deontic question of whether conviction in such circumstances would constitute '*justice*'. If the commander is

[53] Possible alternative understandings of culpability, including an intriguing argument advanced by Amy Sepinwall, are touched upon below §6.8.3.
[54] *Orić* Appeal Judgement, above, Shahabuddeen Declaration, para 17.
[55] As discussed e.g. in *Orić*, ibid Shahabudden Opinion, para 18.
[56] The ambiguities of the jurisprudence are discussed in §6.7.
[57] Examples of such arguments in the command responsibility debate are discussed in the next section.

not culpable for the core crime, then our inability to convict her does not mean she is 'escaping justice'. On the contrary, our inability to convict constitutes 'justice'.

The second most common objection is that that the scope of criminal liability would be narrower than the full scope of the humanitarian law duty.[58] This objection illustrates another of the problematic structures of argument that I discussed in Chapter 2. The objection assumes that ICL norms must be co-extensive with human rights or humanitarian law norms. The humanitarian law duty certainly does require the commander to punish all past crimes, regardless of whether she contributed to them.[59] Thus, any failure to punish would breach *humanitarian* law. It is however an entirely different question whether we can hold her retroactively *personally criminally liable* as an accessory to those crimes. Before transplanting the humanitarian law rules into ICL prohibitions, we must pause and reflect on limits of personal criminal culpability. The personal criminal liability of the individual may rightly be narrower than the civil obligation of her state or armed group; that is not necessarily a 'lacuna'.

Respecting the culpability principle does not mean that commanders will be free to ignore past crimes. First, a failure to punish would mean that the state or armed group has breached *humanitarian* law, triggering any relevant remedies under that law. Second, the commander may also personally face *criminal* law repercussions, if a lawmaker with jurisdiction has criminalized non-contributory derelictions of duty. But what it does preclude is holding the commander liable as an accessory, via command responsibility, for past crimes on which her derelictions had no influence.

6.5 FIRST STRATEGY: DOCTRINAL ARGUMENTS TO CIRCUMVENT THE CONTRIBUTION REQUIREMENT

The initial responses to complaints about the culpability contradiction were technical doctrinal arguments. I will argue that these doctrinal arguments are not only wrong on their own terms, but they are also wrong *type* of answer. They do not even

[58] See e.g. *Prosecutor v Hadžihasinović,* Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ICTY A.Ch, IT-01-47-AR72, 16 July 2003 and in particular the opinion of Judge Hunt at para 21-22 and the opinion of Judge Shahabuddeen at para 23, 25 and 38 ('*Hadžihasinović*, Interlocutory Appeal'). See also *Orić* Appeal Judgement, above, and in particular the declaration of Judge Liu at para 19-21 and 30-31 and the declaration of Judge Schomberg at paras 8 & 18-19.

[59] See e.g. Article 87(3), Additional Protocol I to the Geneva Conventions ("AP I").

attempt to address the concern that the system is contradicting its recognized fundamental principles.

My aim here is not to criticize the Tribunals. The Tribunals operated in a pioneering phase of ICL. They were engaged in a fast-paced, massive, and complex task of constructing doctrine from diverse authorities. They had to resolve countless legal questions, and they could not give detailed consideration to every fine point. My aim here is to take a step back and critically assess the reasoning and the law, in order to improve upon them in future.

6.5.1. The Perceived Incompatibility with 'Failure to Punish'

As explained in §6.3, the contribution requirement was initially waved away on the grounds that it cannot be reconciled with the 'failure to punish' branch of command responsibility. In *Čelebići*, the defence argued that a 'failure to punish' should give rise to accessory liability only if that failure is 'the cause of *future offences*'.[60] The Chamber appears to have missed the subtlety of the defence argument, and instead considered whether a failure to punish a crime can cause that *same crime*. The Chamber held that 'no such causal link can possibly exist' between a failure to punish an offence and 'that same offence'.[61] The Chamber opined that 'the very existence' of the failure to punish branch in Article 7(3) 'demonstrates the absence of a requirement of causality'.[62] The Prosecution similarly rejected the possibility of causal nexus 'as a matter of logic'.[63] In *Blaškić*, the defence again argued that a contribution to crimes must be shown even under the 'failure to punish' branch, and the Appeals Chamber found the defence argument to be 'illogical', because 'disciplinary and penal action can only be initiated after a violation is discovered'.[64]

The chambers' reasoning is sound as far as it goes, but it is too simplistic. The defence was not arguing that a failure to punish a crime could retroactively cause that same crime. Rather, the defence argument – consistent with the culpability principle – was that a failure to punish can create accessory liability only with respect to *subsequent*

[60] *Čelebići* Trial Judgement' above at para. 396.
[61] Ibid at 400.
[62] Ibid at 400.
[63] Ibid at 397.
[64] *Blaškić* Appeal Judgement above at para 83.

crimes encouraged or facilitated by that failure.[65] There is nothing 'illogical' about recognizing the 'failure to prevent' branch while also respecting the contribution requirement.

It is often argued that recognizing the contribution requirement would render the 'failure to punish' branch redundant.[66] However, the two branches ('failure to prevent' and 'failure to punish') offer two distinct ways to prove the failure of the commander. A prosecutor may prove *either* a failure to take adequate preventative measures *or* inadequate efforts to investigate and prosecute crimes. Either provides the dereliction that, if accompanied by a blameworthy state of mind and a contribution to crimes, can ground accomplice liability for resulting crimes.

6.5.2. The Claim that Precedents did not Require Contribution

The second doctrinal response is the claim past precedent did not require causal contribution for command responsibility. For example, in *Čelebići*, the defence argued that the commander's failure to punish must contribute to the commission of criminal acts.[67] The Trial Chamber acknowledged 'the central place assumed by the principle of causation in criminal law',[68] but nonetheless asserted that a causal contribution '*has not traditionally been postulated*' as a condition for liability under command responsibility.[69] In a one-sentence analysis, the Chamber asserted that it '*found no support*' for a requirement of causal contribution for command responsibility in the case law, treaty law or (with one exception) the literature.[70] Similar defence arguments were advanced in a later case, but the Appeals Chamber rejected them, citing with approval the analysis in *Čelebići.*[71]

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[65] *Čelebići* Trial Judgement above at 396.
[66] For this form of argument see e.g. *Orić* Trial Judgement above at para 335; *Orić* Appeal Judgement above, Liu Declaration at para 7; *Orić* Appeal Judgement, ibid, Schomberg Declaration at para 8, all in the context of successor commander liability.
[67] *Čelebići* Trial Judgement, above, para. 345 and 396
[68] Ibid para. 398.
[69] Ibid para 398 (emph added).
[70] Ibid para 398 (emph added). The exception which the Chamber noted was the work of Cherif Bassiouni, arguing that causal contribution was an essential element.
[71] *Blaškić* Appeal Judgement, above, paras. 73-85. Subsequent cases regard the matter as settled; see e.g. *Halilović* Trial Judgement, above; *Prosecutor v Brdjanin*, Judgement, ICTY T.Ch, IT-99-36-T, 1 September 2004, para. 280.

The problem with responses pointing to past authority is that they are the wrong *type* of answer. These responses give a technical, mechanical, 'source-based' analysis.[72] But a culpability challenge requires a deontic analysis: one must actually assess compatibility with the fundamental principles that limit our license to punish individuals. This deontic task requires an assessment of whether the rules are *just.*[73]

Interestingly, in addition to being the wrong *type* of response, the precedent argument was inaccurate even as a doctrinal argument. Numerous scholars have shown that past cases and authorities actually do provide ample authority for a contribution requirement.[74] My concern here is not with source-based doctrinal analysis but rather with the culpability principle and with reasoning, and hence I will not repeat those efforts by embarking here on a doctrinal review of the past authorities. We can however glean from this example a fantastic lesson about reasoning. What I find fascinating is that the *Čelebići* Chamber somehow managed to detect 'no support' for a contribution requirement, even though the *Čelebići* decision itself *directly quoted* passages from authorities that *explicitly* support the requirement. To give two examples, *Čelebići* cites the post-World War II *Toyoda* decision, which described the principle as covering the commander who 'by his failure to take any action to punish the perpetrators, permitted the atrocities to continue'.[75] *Čelebići* also cites legislation of the former Yugoslavia which states that 'a military commander is responsible as a participant or an instigator if, by not taking measures against subordinates who violate the law of war, he allows his subordinate units to continue to commit the acts'.[76] These and other authorities show the understanding on the part of other courts and lawmakers that, *even for failures to*

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[72] §1.3.1.

[73] Of course precedent would matter where there is a formally binding or discursively persuasive precedent that specifically considers and rules on compatibility with the culpability principle.

In fairness to the precedent-based reasoning in the *Čelebići* and *Blaškić* decisions, the defence lawyers in those cases primarily characterized their challenge as one based on the principle of legality (*nullum crimen sine lege*). Hence, reference to doctrine was an appropriate response to address that challenge. The problem is that subsequent chambers have regarded *Čelebići* and *Blaškić* as conclusively settling all debate on the issue, and hence they did not engage seriously with the distinct problem of culpability.

[74] O Triffterer, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?' (2002) 15 *LJIL* 179; Mettraux, *Command Responsibility* above, at 82-86 & 236; A Cassese, *International Criminal Law*, 2nd ed (OUP, 2008) at 236-242; C Greenwood 'Command Responsibility and the *Hadžihasanović* Decision' (2004) 2 *JICJ* 598; Bantekas 'Stretching the Boundaries' above; V Nerlich 'Superior Responsibility under Article 28 ICC Statute: For What Exactly is the Superior Held Responsible?' (2007) 5 *JICJ* 665 at 672-673.

[75] *Čelebići* Trial Judgement at para 339 (emphasis added).

[76] *Čelebići* Trial Judgement at para 341 (emphasis added).

punish, liability arises when the commander's failure *permitted other crimes* to continue. The clues were there, for those attuned to see them. The lesson I draw from this is that, even in source-based analysis, what we see – and what we overlook – is influenced by our sensitivities. If we are mindful of fundamental principles, we are more likely to see the patterns in authorities that are consistent with those principles; if we are not mindful, we may miss those patterns.

6.5.3. The Argument that Respecting the Contribution Requirement Would Render Command Responsibility Superfluous

The third major doctrinal argument against a contribution requirement is that it would render command responsibility 'redundant' with other modes of liability. The *Halilović* and *Oric* decisions argued that, if causal contribution were required, then the 'borderline between article 7(3) [command responsibility] and… 7(1) [the other modes]…would be transgressed and, thus, superior criminal responsibility would become superfluous'.[77]

This argument overlooks that command responsibility is already distinct from other modes of liability by virtue of the modified mental element. Command responsibility allows conviction based on a 'had reason to know' or 'should have known' standard.[78] Hence, it is not true that recognizing the contribution requirement – and hence respecting the culpability principle – would render command responsibility superfluous.

A related argument is that '[i]f a causal link were required this would change the basis of command responsibility' because 'it would practically require involvement on the part of the commander…thus altering the very nature of the liability imposed under Article 7(3).'[79] This argument is also incorrect: the essence of command responsibility remains the *failure to become involved* where there was a duty to do so. The failure to intervene facilitates the crime in comparison with the situation that would have existed if the commander had met her duty.[80]

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[77] *Orić* Trial Judgement, ibid, para 338. See also *Halilović* Trial Judgement above, para 78
[78] See Chapter 7.
[79] *Halilović* Trial Judgement above, para 79.
[80] This crime-facilitating effect of the commander's failure satisfies the contribution requirement. On omissions and causation, see Annex 1.

In conclusion, each of the doctrinal responses is problematic on two levels. First, they are incorrect even as doctrinal arguments, because their premises (alleged incompatibility with text, absence of precedent, or redundancy with other modes) are false. Second, and more fundamentally, these arguments engage at entirely the wrong *level*. They do not even *attempt* to engage with the deontic problem: the violation of the fundamental principle of culpability. ICL claims to respect the culpability principle as 'the foundation of criminal responsibility' and thus to only hold persons responsible for transactions in which they 'personally engaged or in some other way participated'.[81] Technical doctrinal arguments, such as reconciling one provision with another, are no answer to the challenge that one is contradicting one's stated fundamental principles. To answer such a challenge, one has to look up from the black-letter tools of textual construction, and consider conformity with the stated deontic principles.[82]

6.6 SECOND STRATEGY: CHARACTERIZATION AS A SEPARATE OFFENCE

Emergence of the 'separate offence' characterization

We now arrive at the next twist in the discourse on command responsibility. In *Hadžihasanović*, the Appeals Chamber confronted the scenario of the 'successor commander', which places the problems of not requiring causation in particularly stark relief. Faced with defence objections to liability in the absence of 'any involvement whatsoever in the *actus reus*',[83] Judge Shahabuddeen, one of the dissenting judges, advanced an innovative solution. He asserted that:

> I prefer to interpret the provision as making the commander guilty for failing in his supervisory capacity to take the necessary corrective action…. Reading the provision reasonably, it could not have been designed to make the commander a party to the particular crime committed by his subordinate.[84]

[81] *Tadić* Appeal Judgement above, at para 186.
[82] One might be able to uphold the no-contribution approach by re-conceptualizing the principle of culpability, but this would require careful deontological justification (see §6.8.3), not technical doctrinal arguments.
[83] *Hadžihasinović*, Interlocutory Appeal' above, Shahabuddeen Opinion, para 32.
[84] Ibid, para. 32.

Several subsequent trial-level decisions seized on this approach,[85] giving birth to a new and vigorous controversy over the very nature of command responsibility.[86]

The 'separate offence' approach would avoid the culpability problem

The 'separate offence' approach is preferable to the doctrinal arguments canvassed in the previous section, because it does not simply ignore the culpability

[85] *Orić* Trial Judgement, above, at para 335 ('…it should be immaterial whether he or she had assumed control over the relevant subordinates prior to their committing the crime. Since the Appeals Chamber, however, has taken a different view for reasons which will not be questioned here, the Trial Chamber finds itself bound…'); *Halilović* Trial Judgement, above, at para 53; RUF Case at para. 306 ('…this Chamber is satisfied that the principle of superior responsibility as it exists in customary international law does include the situation in which a Commander can be held liable for a failure to punish subordinates for a crime that occurred before he assumed effective control.'); *Prosecutor v Ndindiliyiman*, Judgement, ICTR T.Ch, ICTR-00-56-T, 17 May 2011, para 1960-1961.

But see c*ontra* AFRC Case at para 799 ('…there is no support in customary international law for the proposition that a commander can be held responsible for crimes committed by a subordinate prior to the commander's assumption of command over that subordinate.'); CDF Case at para 240 ('The Chamber further endorses the finding of the ICTY Appeals Chamber that an Accused could not be held liable under Article 6(3) of the Statute for crimes committed by a subordinate before the said Accused assumed command over that subordinate.')

[86] See, e.g. C Fox, 'Closing a Loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Known Past Offences' (2004) 55 *Case W Res L Rev* 443; Greenwood, 'Command Responsibility and the *Hadžihasanović* Decision' above; B B Jia, 'The Doctrine of Command Responsibility Revisited' (2004) 3 *Chinese J Intl L* 1; Mettraux, *Command Responsibility*, above, 190–2; Nerlich, 'Superior Responsibility under Article 28 ICC Statute' above; C Meloni, 'Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?' (2007) 5 *JICJ* 619; R Arnold and O Triffterer, 'Article 28: Responsibility of Commanders and Other Superiors' in O Triffterer (ed), *Commentary on the* Rome Statute of the International Criminal Court: *Observers' Notes, Article by Article*, 2nd ed (Beck, 2008) 795; Akerson & Knowlton, 'President Obama and the International Criminal Law of Successor Liability', above, at 627; A J Sepinwall, 'Failures to Punish: Command Responsibility in Domestic and International Law' (2009) 30 *Mich J Intl L* 251; E van Sliedregt, 'Article 28 of the ICC Statute: Mode of Liability and/or Separate Offence?' (2009) 12 *New Crim L Rev* 420; Bakone Justice Moloto, 'Command Responsibility in International Criminal Tribunals' (2009) 3 *Publicist* 12; S Trechsel, 'Command Responsibility as a Separate Offence' (2009) 3 *Publicist* 26; B Sander, 'Unravelling the Confusion concerning Successor Superior Responsibility in the ICTY Jurisprudence' (2010) 23 *LJIL* 105; R Cryer, 'The Ad Hoc Tribunals and the Law of Command Responsibility: A Quiet Earthquake' in S Darcy and J Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (OUP, 2010) 159; J Dungel and S Ghadiri, 'The Temporal Scope of Command Responsibility Revisited: Why Commanders Have a Duty to Prevent Crimes Committed after the Cessation of Effective Control' (2010) 17 *U C Davis J Intl L & Pol'y* 1; T Weigend, 'Superior Responsibility: Complicity, Omission or Over-Extension of the Criminal Law?' in C Burchard, O Triffterer and J Vogel, eds, *The Review Conference and the Future of International Criminal Law* (Kluwer, 2010); N Tsagourias, 'Command Responsibility and the Principle of Individual Criminal Responsibility: A Critical Analysis of International Jurisprudence', in C Eboe-Osuji, ed, *Essays in International Law and Policy in Honour of Navanethem Pillay* (Martinus Nijhoff, 2010); C Meloni, *Command Responsibility in International Criminal Law* (TMC Asser, 2010); E van Sliedregt, 'Command Responsibility at the ICTY - Three Generations of Case Law and Still Ambiguity' in A H Swart et al (eds), *The Legacy of the ICTY* (OUP, 2011); E van Sliedregt, *Individual Criminal Responsibility in International Law* (OUP, 2012); K Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part* (OUP, 2012) at 219-226; J Root, 'Some Other Mens Rea? The Nature of Command Responsibility in the Rome Statute', (2013) 23 *Transnat'l L & Policy* 119; M Jackson, *Complicity in International Law* (OUP, 2015).

principle. If breach of command responsibility were legally established as a separate offence, the concerns about culpability would be resolved. The commander would not be held liable as a party to crimes to which she in no way contributed. Instead, she would be held directly liable for her own dereliction.

However, I believe that the option of declaring a new offence of breach of command responsibility is not legally available to the Tribunals, for reasons I will explain in a moment. To be clear, in this case study I am looking at the plausible interpretive options for the Tribunals (and by extension the ICC); I am not engaged in the policy debate of which approach would be preferable for a national legislator or treaty drafter. I have no objection to 'separate offence' legislation.[87] Indeed, national legislation or a treaty amendment could even posit *both* concepts, recognizing command responsibility as a mode of liability and also establishing a separate offence for non-contributory derelictions. The German and Korean legislation are commendable models.[88] My case study here however focuses on deontic analysis in the interpretation of the existing ICL statutes.

The legality problem: departure from applicable law

In my view, the difficulty with the 'separate offence' approach is that it is an implausible departure from the applicable law of the Tribunals (and the ICC), and hence a change that should not be made by judicial fiat, but rather by law-makers (legislators or treaty drafters), if it must be made.

The Tribunal Statutes (and the ICC Statute) appear to recognize command responsibility as a mode of liability, not as a crime. For example, Article 28 of the ICC Statute is *explicit* that the commander is held 'criminally responsible *for crimes... committed by forces* under his or her effective command and control'.[89] The ICTY Statute is not as explicit. However, as noted by Robert Cryer, we should not lightly conclude that command responsibility has an entirely different nature in different Statutes, to avoid

[87] Indeed, I helped draft the Canadian legislation, which for domestic legal reasons was one of the first to establish 'breach of command responsibility' as a separate offence.Kimberly Prost & Darryl Robinson, "Canada" in Claus Kress et al, (eds.), *The Rome Statute and Domestic Legal Orders*, vol. 2 (Baden-Baden: Nomos; Ripa di Fagnano Alto [Italy]: Il sirente, 2000-2005), 52 at 54-55.
[88] Tae Hyun Choi & Sangkul Kim, "Nationalized International Criminal Law: Genocidal Intent, Command Responsibility, and an Overview of the South Korean Implementing Legislation of the ICC Statute" (2011) 19 Mich. St. J. Int'l L. 589 at 616-21.
[89] ICC Statute Article 28(1)(a), see similarly Article 28(1)(b).

unnecessary fragmentation between instruments that purport to reflect customary law.[90] Furthermore, command responsibility is listed among the general principles of liability,[91] and in the ICTY Statute, inchoate offences are not listed among the principles of liability; they are all listed in the definitions of crimes (attempt, conspiracy, and incitement are listed only in the definition of crimes, attached to the crime of genocide).[92]

More importantly, the ICTY Statute purports to reflect customary law, and customary law precedent was consistent that command responsibility is a mode of liability. The consistent understanding is seen in jurisprudence, from Nuremberg up to the Tribunals, in national legislation, and in State practice; for example, in the negotiation of the Rome Statute it was uncontroversial that command responsibility is a mode of liability.[93] I will not embark here on a lengthy review of the doctrinal precedents; to do so would require an additional chapter of this thesis, and my topic here is not to recount earlier precedents, but to explore the Tribunal's handling of the culpability principle. Other scholars have admirably canvassed the precedents showing that it was a mode of liability.[94]

Indeed, Tribunal jurisprudence itself acknowledges that previous customary law authorities regarded command responsibility as accessory liability.[95] Even the *Halilović* decision, in which an ICTY Trial Chamber creatively advocated for the separate offence interpretation, actually demonstrates the long consistency of the 'mode' approach. Although the *Halilović* decision attempted to characterize post-World War II jurisprudence as 'divergent', in fact every authority it cited adopted the 'mode' approach,

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[90] Cryer, 'A Quiet Earthquake' above at 182 (also warning against judicial adoption of a separate offence approach which would be a 'legislative move, fundamentally altering the basis of command responsibility'.)

[91] For example, in the ICTY Statute, the crimes are listed in Articles 2-5, whereas command responsibility appears in Article 7, which contains principles of 'individual criminal responsibility', including the other modes of liability, such as planning, instigating, ordering and aiding and abetting. Similarly, in the ICC Statute, definitions of crimes appear in Part II, whereas command responsibility appears in Part III, 'General Principles of Criminal Law'.

[92] Article 4(3) ICTY Statute; Article 2(3) ICTR Statute.

[93] See eg UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, Official Records, A/CONF.183/13 (Vol.2) at 136-138 (responsibility for acts of subordinates).

[94] Sepinwall, 'Failures to Punish' above at 265-269; Sander, 'Unravelling the Confusion' above; Meloni, 'Command Responsibility' above; Cryer, 'A Quiet Earthquake' above; Sliedregt, *Individual Criminal Responsibility*, above at 192-96.

[95] For examples cited in Tribunal jurisprudence, see for example the *Čelebići* Trial Judgement above, citing French law ('accomplices') ibid at para 336; citing Chinese law ('accomplices') ibid at 337; citing Yugoslav law ('participant') ibid at 341; citing the *Hostages (List)* case ('held responsible for the acts of his subordinates') ibid at 338.

with the exception of only one passage from one case that only arguably supported a separate dereliction offence. The *Halilović* decision also acknowledged that national legislation treated command responsibility as a mode of accomplice liability, and that the jurisprudence of the Tribunal itself had consistently done so.[96] Thus, even the *Halilović* decision could not find contrary precedents. Prior to the *Hadžihasanović* controversy, academic literature had long 'overwhelmingly' recognized command responsibility as a mode of liability.[97] The mode-versus-offence controversy only arose out of an effort to square the Tribunals' refusal to recognize a contribution requirement with the culpability principle.

My position about the applicable law is not rooted in a rigid formalistic approach. I would allow judges latitude to reinterpret provisions of their respective Statutes, especially given that ICL is a nascent discipline which is being developed each day. But the starting point for the discussion of applicable law has to be that the precedents support a mode of liability approach. As Barrie Sander notes, we must have some wariness where the proposal is to judicially recognize a new crime, because of the implications for the principle of legality.[98] In any event, Appeal Chamber jurisprudence

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[96] *Halilović* Trial Judgement above, para 42-53.

[97] See e.g. Sepinwall, 'Failures to Punish' above at 267 (doctrinal history gives 'overwhelming support for the mode of liability view'); Nerlich, 'Command Responsibility and the *Hadžihasanović* Decision' above at 603-604 (punished for the subordinate's act); Cryer, 'A Quiet Earthquake' above at 171-182 (form of liability for the underlying offence); Bantekas 'Stretching the Boundaries' above at 577 (imputed liability); Cassese, *International Criminal Law* above at 206; Triffterer, 'Causality, a Separate Element' above at 229 (mode of participation); Arnold & Triffterer, 'Article 28' above at 843; D L Nersessian, 'Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes' (2006) 30 *Fletcher Forum of World Affairs* 81at 89; Meloni, 'Command Responsibility' above at 621-625; Darcy & Powderly (eds), *Judicial Creativity* above at 391; W J Fenrick, 'Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the former Yugoslavia' (1995) 6 *Duke J Comp & Intl L* 103 at 111-12 (party to offence, not a separate offence); W H Parks, 'Command Responsibility for War Crime' (1973) 62 *Mil L Rev* 1 at 113-114; Y Shany & K R Michaeli, 'The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility' (2001-2002) 34 *NYU J Intl L & Pol* 797 at 803 & 829-831; A Zahar, 'Command Responsibility of Civilian Superiors for Genocide' (2001) 14 *LJIL* 591, 596 (mode of participation, not a crime); M Smidt, 'Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations' (2000) 164 *Mil L Rev* 155, 168-69; K J Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP, 2011) 271. But see Jia, 'The Doctrine of Command Responsibility Revisited' above at 34; Trechsel, 'Command Responsibility' above; K Ambos, 'Superior Responsibility' in A Cassese, P Gaeta, J R W D Jones, eds, *The Rome Statute of the International Criminal Court: A Commentary,* vol 3 (OUP, 2002) at 823 (separate offence). Ambos suggests a separate offence approach not because of precedents, but on principled grounds that it is the only way to comply with deontic principles, given the 'should have known' standard. This argument is more convincing than other arguments, but in Chapter 9 I map out the argument that this route is not necessary, and thus precedent and principles can be reconciled.

[98] Sander, "Unravelling the Confusion" above note 29 at 122.

has expressly rejected the 'separate offence' characterization and affirmed that command responsibility is a mode of liability.[99]

Explicit contradiction with actual practice

There is another problem with the often-repeated claim that the Tribunals do not charge the commander with the underlying crimes: namely, that it is demonstrably untrue. When we look at the actual charges, convictions, and sentences entered by the Tribunal, we see that the commanders are *expressly* charged, convicted, and sentenced for the underlying offences of genocide, crimes against humanity, and war crimes.

Judges and scholars who argue that the commander is not charged with the underlying crime often cite an 'entirely unreasoned' and 'throwaway'[100] line in the *Krnojelac* case, which states that '[i]t cannot be overemphasized 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.'[101] This passage is sound insofar as it emphasizes that the commander's liability is not vicarious but rather rooted in fault, or that she is not charged with *perpetrating* the crimes. However, if the passage is to be construed as meaning that the commander is literally not charged as a party to the underlying core crime, but rather is charged for a distinct crime of 'failure to exercise her duty to exercise control', then the passage is plainly factually untrue. For example, in that very case, Krnojelac was in fact charged with 'crimes against humanity and violations of the laws and customs of war', including torture, murder, persecution, unlawful confinement, and enslavement – i.e. the core crimes carried out by his subordinates.[102] He was also *convicted* for those crimes.[103] For example, he was found 'guilty of … murder as a crime against humanity and murder as a violation of the laws or customs of war)' pursuant to Article 7(3) (command responsibility), and 'guilty of … torture as a crime against humanity and a violation of the laws or customs of war' pursuant to Article 7(3). Other cases follow the same pattern: by virtue of command

[99] *Prosecutor v Ntabakuze,* Judgement, ICTR A.Ch, ICTR-98-4-A, May 8, 2012 ('*Ntabakuze* Appeal Judgement').
[100] Robert Cryer, "A Quiet Earthquake" above note 29 at 177-179.
[101] *Prosecutor v Krnojelac*, Judgement, ICTR A.Ch, IT-97-25-A, 17 September 2003, para. 171 ('*Krnojelac* Appeal Judgement').
[102] *Prosecutor v Krnojelac* Third Amended Indictment, ICTY T.Ch, IT-27-95-I, 25 June 2001.
[103] *Krnojelac,* Appeal Judgement, above, Part VI, Disposition.

responsibility, commanders are not charged with a separate dereliction offence, but with the underlying crimes of subordinates, and sentenced as parties to those crimes.[104]

One cannot deflect a culpability challenge by claiming that the commander is not held responsible as a party to the core crime, when in reality the charges and convictions do precisely that. In the actual command responsibility practice of the Tribunals, commanders are explicitly charged with the underlying crimes and sentenced as parties to the underlying crimes.

Principled revisionist arguments for separate offence interpretation

There are alternative and more sophisticated argument for a separate offence approach. Some scholars have argued for a separate offence interpretation, based not on disingenuous claims about applicable law, nor as an expedient device to enable convictions of successor commanders, but for the principled reason that it is the only way to comply with fundamental principles.[105] I would endorse such an approach, for example, if it were the only way to comply with fundamental principles: in that case, canons of construction could allow a strained textual reading and a departure from precedents to avoid violating fundamental principles.[106] A coherentist legal interpretation can endorse a creative re-reading, if it is the best way to make sense of all considerations. However, in my view, that route is not necessary, because the precedents and principles can be reconciled, and hence a creative judicial re-characterization (creating a new crime) is not warranted.[107]

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[104] Sander, 'Unravelling the Confusion' above at 116 provides additional examples. In one trial decision, *Orić* Trial Judgement, above, the trial chamber purported to convict the accused for a separate offence of 'failing to discharge his duty to prevent'. The Prosecution appealed on the grounds that this was a mischaracterization of command responsibility, which is a mode of liability, and that the sentence failed to reflect its gravity as a mode of liability. The Appeals Chamber found that the factual findings for a command responsibility conviction had not been made and thus that the issue was moot: *Orić* Appeal Judgement, above at para. 79.

[105] Ambos, 'Superior Responsibility' above at 825, 851-852, Meloni, 'Command Responsibility' above at 637.

[106] One could argue that the 'context' includes fundamental principles of justice, or that the object and purpose includes compliance with fundamental principles of justice.

[107] A remaining issue however will be to ensure that the 'should have known' standard is justified: see Chapter 7.

6.7 Other Responses (And the Mystification of Command Responsibility)

Subsequent efforts to deny or obscure the contradiction have led command responsibility discourse to become even more fractured and convoluted. Positions on the nature of command responsibility have proliferated: mode of liability; separate offence; neither-mode-nor-offence; sort-of-mode-sort-of-offence; sometimes-mode-sometimes offence. In the resulting climate of uncertainty, judgments began issuing very muddled and self-contradictory statements about the nature of command responsibility.

6.7.1 Invoking 'Sui Generis' Nature

One of the later lines of response in Tribunal jurisprudence was to assert that command responsibility is a '*sui generis*' mode of liability, to which the contribution requirement simply does not apply. For example, the *Halilović* decision declares, 'the nature of command responsibility itself, as a *sui generis* form of liability, which is distinct from the modes of individual responsibility set out in Article 7(1), does not require a causal link.' [108]

Simply invoking the label *sui generis,* and declaring *per definitionem* that this new mode does not require causal contribution, does not even attempt to address the culpability problem. It is a hand-waving gesture, not a deontic justification.[109]

6.7.2 The Retreat to Obscurity (Neither Mode Nor Offence)

Some scholars and some decisions appear to argue that command responsibility is *neither* a mode of liability *nor* a separate offence, and is instead some hitherto unknown

[108] *Halilović* Trial Judgement above at para 78.

[109] There is nothing wrong per se in describing command responsibility as '*sui generis',* in the sense that it has differences from other modes. Indeed any mode must be distinct from other modes in some way; otherwise it would not need to exist. However, each mode must still be justified in accordance with fundamental principles

category altogether.[110] Such arguments are intriguing. One of the themes of this thesis is that ICL might raise new problems that lead to new thinking for general criminal law theory. Certainly the discovery of a new category of liability, falling outside any known category (i.e. separate offence, principal liability, accessory liability), would be a remarkable example.

My concern however is that this particular claim simply creates a shroud of obscurity in order to evade the culpability problem. This vagueness about the nature of command responsibility enables a kind of 'shell game'. It allows jurists to downplay the 'mode' nature of command responsibility whenever the culpability problem is raised, and then shift back to treating it as a mode of liability at conviction and sentencing. James Stewart has aptly described such arguments as 'more of a smokescreen to ward off conceptual criticisms than a marked normative change'.[111]

Tribunal jurisprudence has tied itself into increasingly tortuous knots trying to deny the contradiction between a mode that does not require contribution and the accepted principle that modes require contribution. An illustration of this convolution is the equivocation and self-contradiction over whether responsibility 'for' the crimes means responsibility 'for' the crimes.[112] Some judgments seek to downplay the culpability problem by insisting that the commander is not held responsible 'for' the crimes committed by subordinates, but ironically those very same judgements slip and contradict themselves, acknowledging it as responsibility for the acts.[113]

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[110] See e.g. A M M Orie, 'Stare Decisis in the ICTY Appeal System: Successor Responsibility in the *Hadžihasanović* Case', (2012) 10 *JICJ* 635 at 636: 'Superior responsibility is increasingly considered to be of a *sui generis* character rather than a mode of liability'. See also Mettraux, *Command Responsibility* above at 37-47 & 80-8, which also appears to suggest this. Mettraux rejects accessory liability as the appropriate category, *inter alia* on the grounds that accessory liability requires knowledge. However, as I argue in Chapter 7, a subjective knowledge requirement does not appear to be a fundamental defining feature of accessory liability. Accordingly, command responsibility can be a mode of accessory liability.

[111] J Stewart, 'The End of 'Modes of Liability' for International Crimes' (2011) 25 *LJIL* 165 at 25.

[112] Early jurisprudence acknowledged that the commander is held responsible for the crimes of the subordinates. See e.g. *Celibici* Trial Judgement, above at para 333: that commanders are 'held criminally responsible for the unlawful conduct of their subordinates'. Later cases, seeking to downplay the culpability problem, struggle to clarify that responsibility 'for' the crimes does not actually mean responsibility 'for' the crimes, but rather 'because of' the crimes.

[113] See e.g. *Prosecutor v Aleksovski*, Judgement, ICTY T.Ch, IT-95-14/1-T, 25 June 1999, para. 72 ('*Aleksovski* Trial Judgement'): 'superior responsibility … must *not be seen as responsibility for the act of another person*'. Yet *ibid* at para 67: 'A superior is *held responsible for the acts of his subordinates* if he did not prevent the perpetration of the crimes of his subordinates or punish them for the crimes' (emphasis added). Similarly, *Halilović* Trial Judgement, above, para 54 emphasizes that the commander is not held liable '*for*' the crimes but 'because of' the crimes. Then at para 95 the same judgement asserts that failure to punish is so 'grave that international law imposes upon him *responsibility for those crimes*' (emphasis added).

Frequently, the judges struggle to describe an indirect liability that is neither personal commission nor a separate offence.[114] However, the indirect liability that these passages struggle to describe is already elegantly captured by an existing concept: *accessory liability*. This terminological and conceptual lack of clarity might be a sign that ICL is still a relatively young field. Criminal law theory has helpful tools to offer ICL.

If there is indeed a new category that is neither a mode nor an offence, its proponents should clarify what this new twilight category *is.* Once we are told what this purported new category signifies, we can try to discern the appropriate deontic requirements. Conceptually, however, the existing options – direct or indirect liability in the subordinate crimes, or a separate offence – appear to exhaust the logical universe of alternatives. If the claim is to be made that another category is possible, the gap should be explained. Applying Occam's razor, it is for now more parsimonious to work with the known categories, which appear to be mutually exclusive and jointly exhaustive.

6.7.3 The Variegated Approach (Sometimes Mode, Sometimes Offence)

The final alternative solution that I will review in this chapter is what I will call the 'variegated' approach. Some scholars suggest a variegated account, in which command responsibility operates sometimes as a mode and sometimes as a separate offence. Its nature in each case depends on variables such as failure to prevent versus failure to

[114] Consider the following attempt to square the circle in *Halilović*:

> 'For the acts of his subordinates' as generally referred to the in the jurisprudence of the Tribunal does not mean that the commander shares the same responsibility as the subordinates which committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act... [A] commander is responsible not as though he committed the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed.

The passage is sound in insisting that the commander is not deemed to be a perpetrator, nor even principal of the crimes ('not a direct responsibility'; not the 'same responsibility'). Often such passages emphasize the commander's dereliction and fault, rightly distinguishing command responsibility from vicarious liability (i.e. he is not liable by virtue of the relationship alone). These features – that the commander is not deemed a perpetrator, and that she is held responsible for her fault in relation to the crime – are already elegantly reflected in an existing concept: accessory liability. We do not need to fabricate an entire new category to capture these features of command responsibility.

punish, knowledge versus should have known, or contributory versus non-contributory.[115]

The variegated approach is preferable to the two previous approaches: it does not rely on obscurity. It recognizes the indirect liability of the commander where she contributed to crimes, it avoids the over-reach of a non-causal mode of liability, and it still responds to failure-to-punish derelictions. Lawmakers could certainly adopt the variegated approach, for example, by recognizing contributory derelictions as a mode of liability and non-contributory derelictions as a separate offence.

Nonetheless, I have two concerns with reading existing texts (eg Tribunal statutes) as supporting the variegated approach. First, such a reading injects a level of complexity that is textually implausible and unnecessarily complicated. The relevant texts do not suggest on their face that command responsibility operates completely differently in different instances, switching from mode to separate offence. Second, it is not *necessary* to impose such a facially implausible on the texts. As I will explain in the next section (§6.8) , non-contributory derelictions have consumed an inordinate amount of attention in the discourse. The contribution requirement is not onerous: a non-contributory dereliction arises only where the dereliction did not even increase the risk of any crimes that occurred.[116] International courts and tribunals should focus on persons bearing greater responsibility in relation to core crimes. The lacuna is not grave enough to warrant excessively creative departures from the text, and the resulting tension with the legality principle.

6.8 IMPLICATIONS

6.8.1 Toward A Better Debate with Deontic Engagement

[115] Some sophisticated examples of works that draw distinctions between different forms of command responsibility include Meloni, 'Command Responsibility' above and Nerlich, 'Superior Responsibility under Article 28 ICC Statute' above. Both plausibly distinguish between contributory and non-contributory derelictions and between those with and without subjective knowledge. These approaches are an advance over other approaches, because they grapple with culpability and acknowledge significant distinctions. My suggestion however is that simpler solutions can be found. Nerlich's solution does not refer expressly to a separate offence, but would distinguish between holding the commander responsible for the *crime* and holding the commander responsible for the *consequences of the crime* (see ibid at 680-682).

[116] I discuss the requisite extent of causal contribution elsewhere, see Robinson, 'Complicated', above.

My main objective in this chapter was to unpack the often-problematic reasoning on this topic and show how it triggered a cascade of problems, and to demonstrate more careful deontic engagement. Even if my prescription is not universally embraced, I hope I have established the following points about reasoning and the need for a better debate:

(1) The Tribunal's initial rejection of causal contribution, in what was then clearly understood to be a mode of liability, was based on hasty and inadequate doctrinal reasoning which did not adequately consider the culpability principle.

(2) A lot of the argumentation on this topic (in judicial decisions and surrounding literature) has featured the types of reasoning discussed in Chapter 2, such as simply maximizing crime control or attempted transplants from IHL without considering the context shift.[117]

(3) Several of the main responses (the doctrinal responses, or simply invoking the adjective 'sui generis' without any further attempt at justification) do not even *attempt* to address the violation of a stated fundamental principle.

(4) Many of the objections to the *Hadžihasanović* decision, or the contribution requirement in Article 28, as an 'arbitrary' barrier to prosecution[118] fail to consider that the contribution requirement is a principled requirement for accessory culpability, in order to prevent arbitrary punishment. Thus, arguments against causal contribution must either overcome the extensive authority that command responsibility is a mode of liability, or alternatively advance a new conception of retroactive culpability.

(5) The debate over the *Hadžihasanović* decision largely centered on doctrinal and teleological arguments; I argue that the *better* basis to support the majority decision is the deontic argument: the need to respect the culpability principle.

(6) The contradiction still persists unsolved in Tribunal jurisprudence, which recognizes command responsibility as a mode of liability, and yet rejects the contribution requirement.[119]

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[117] See eg at §6.4.3.

[118] See e.g. Akerson & Knowlton, 'President Obama and the International Criminal Law of Successor Liability', above, at 360 ('obvious flaw'); C Fox, 'Closing a Loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Known Past Offences' (2004) 55 *Case W Res L Rev* 443 at 480 ('weaknesses and limitations'); E Langston, 'The Superior Responsibility Doctrine in International Law' (2004) 4 *Int Crim L Rev* 141 at 161 ('retreat').

[119] The *Hadžihasanović* decision removes the problem of retroactively punishing successor commanders for crimes in which they were not involved, but it still allows retroactive culpability for 'isolated' or 'initial' crimes to which a commander in no way contributed. §6.4.1.

(7) Any legal systems that draw from Tribunal jurisprudence should carefully examine these particular aspects of the jurisprudence before importing them.[120]
(8) A better debate on these issues can at least set aside the most fallacious arguments (eg. those which fail to consider culpability at all), and focus on the deontically tenable options.

6.8.2. The Way(s) Forward

In this chapter, I also suggested a prescription to resolve these problems. The prescription has implications for other institutions with similar statutes or who consult Tribunal jurisprudence.

My prescription is to undo the first mis-step that triggered the entire cascade of complexities. By repairing the initial contradiction, we can restore command responsibility to relative simplicity. Command responsibility can remain, simply and elegantly, a mode of accessory liability. The proposed approach instantly reconciles the pre-Tribunal authorities and cases, the ICC Statute, and the culpability principle. The solution has the advantage of clarity, because it relies on an established concept of criminal law (accessory liability).

There are several possible legitimate concerns about this proposed solution. First, one might fear that proving the 'contribution' to a subsequent crime might be unacceptably difficult, posing a barrier to meritorious cases. I argue, however, that the contribution requirement, properly understood (§6.3.1), is satisfied by conduct of a nature that elevated the risk of the ensuing crimes – a standard which is generally obviously met by failures to prevent or punish.[121]

Another legitimate concern is that the solution partly restricts the utility of the 'failure to punish' branch, because such a failure must be followed by subsequent crimes. Erasmus Mayr rightly voices the concern that 'on Robinson's reading, responsibility from failure to punish begins to appear redundant, because it is reduced to one case of failure

[120] Many of the convoluted claims (eg. 'neither mode nor offence') were generated by a particular problem, which may not arise at other institutions. For example, the ICC Statute expressly requires causal contribution; hence the contradiction that necessitated those complex claims is entirely sidestepped.

[121] I unpack the extent of the requirement in more detail in another work: Robinson, 'Complicated', above.

to prevent'.[122] I must concede that the interpretation I advocate does restrict the role of the 'failure to punish' branch, because we cannot convict the commander for past crimes to which she did not contribute. However, this does not quite render the 'failure to punish' branch a dead letter; it still provides the prosecutor with an alternative route to prove a dereliction. The prosecutor can show a failure to establish preventive systems or a failure to punish (or both). Furthermore, there is no interpretation that perfectly reconciles the various puzzle pieces. In the ICC Statute, this partial limitation on one branch of one element is necessary not only to comply with the culpability principle, but also to comply with the *explicit* contribution requirement in Article 28. The alternatives are either to partly restrict the application of this one branch of one element, or else to ignore an explicit statutory requirement; I believe the former is the more plausible.

The remaining concern is that the proposed approach does not allow prosecution of non-contributory derelictions (eg the isolated crime or successor commander scenario). If one is adamant successor commanders must be punished before international courts and tribunals, even without any statute amendments, then one might well embrace a 'separate offence' interpretation. However, this approach means ignoring the explicit statement in Article 28 that the commander is held 'criminally responsible for crimes committed by' subordinates. It also means disregarding the explicit statutory requirement of causal contribution in Article 28. There are legality problems with ignoring explicit statutory conditions for liability. I am unconvinced that this limited problem (non-contributory derelictions) warrants that degree of creativity and straining, and the attendant credibility and legitimacy costs.

In my view, the inability to punish non-contributory derelictions before international courts is an acceptable price – and the only apparent way – to reconcile the applicable law (mode of liability) with fundamental principles (culpability). International courts and tribunals should devote their limited resources to persons most responsible for the most serious core crimes. In the debate over non-contributory derelictions, we are fixating on commanders who did not contribute to even one single

[122] E Mayr, 'International Criminal Law, Causation and Responsibility', (2014) 14 International Criminal Law Review 855. Similar, Miles Jackson has objected, 'Robinson's interpretation would render criminal responsibility based on the well-established customary law obligation of commanders to punish the crimes of their subordinates a dead letter.' M Jackson, *Complicity in International Law* (OUP, 2015) at p 119. I agree that the obligation is well-established *in humanitarian law*; the question here however is the proper role of that obligation in a criminal law mode of liability.

core crime.[123] If we want to add separate dereliction crimes to the ICC Statute, then it can be done through amendment. In the meanwhile, national systems can continue to prosecute non-contributory derelictions, just as they prosecute almost all serious crimes in the world.[124]

As for the ICC, it is too early to say whether the ICC will adopt the prescriptions advanced here. The early considerations of command responsibility were in the *Bemba* case.[125] At confirmation of charges and at trial, the chambers generally adopted the position advocated here. For example, these early decisions avoided opacity about the nature of command responsibility and forthrightly recognized it as a mode of liability.[126] They also affirmed the requirement of causal contribution, and did so not only for technical doctrinal reasons but also out of respect for the culpability principle.[127]

Matters were left less clear after the Appeals Chamber decision. Despite a unanimous conviction by the Trial Chamber, the Appeals Chamber substituted an acquittal, by a 3-2 majority. The Appeals Chamber majority decision did not address the specific controversies I am discussing in this thesis; instead the decision was based on the commander's duty to take measures.[128] However, if we count up the separate opinions, we see that three out of five judges expressly recognized command

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[123] I could conceive of prosecuting persons who contributed to no crime, if they committed an inchoate offence such as attempts or incitement, because for those crimes the person at least has the highest level of mental culpability: *purpose*. In attempt or incitement cases, the person is acting purposively with the *aim* of producing core crimes, so we at least have high moral culpability and deliberate risk-creation. But with mere non-contributory failures to punish, we have *neither* that highest standard of culpability (purpose) *nor* any material contribution.

[124] I would have less objection to a 'separate offence' interpretation if it were adopted transparently and applied consistently. My strongest objections in this chapter are to: (1) treating command responsibility as a mode of liability and simply ignoring the contradiction, (2) claiming it is not a mode of liability while in fact charging and convicting persons as party to the subordinates' core crimes, or (3) creating a 'smokescreen' category by which the 'mode' nature is downplayed whenever the culpability principle is raised, but then emphasized at the time of conviction and sentencing. My main concern is that the debate should better engage with deontic principles.

[125] ICC jurisprudence has considered command responsibility in the *Bemba* case, at confirmation of charges, at trial, and at appeal. *Prosecutor v Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(8)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC PTC, ICC-01/05-01/0815 June 2009 ('B*emba* Confirmation Decision'); *Prosecutor v Jean-Pierre Bemba Gombo*, Judgment Pursuant to Article 74, ICC T.Ch, ICC-01/05-01/08, 21 March 2016 ('*Bemba* Trial Judgment'); *Prosecutor v Jean-Pierre Bemba Gombo*, Judgement on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgement pursuant to Article 74 of the Statute', ICC A.Ch, ICC-01/05-01/08 A, 8 June 2018 ('*Bemba* Appeal Judgment').

[126] *Bemba* Trial Judgment at para 171, concurring with *Bemba* Confirmation Decision at para 341.

[127] See e.g. *Bemba* Trial Judgment above, para 211'[i]t is a core principle of criminal law that a person should not be found individually criminally responsible for a crime in the absence of some form of personal nexus to it.'

[128] *Bemba* Appeal Judgment, above.

responsibility as a mode of accessory liability, and expressly recognized the causal contribution requirement, again consistent with the analysis advanced here.[129] I should also add that, whether one agrees or disagrees with particular decisions,[130] ICC jurisprudence on command responsibility has been doing a commendable job in engaging with deontic analysis, which may be a sign of the maturation of ICL.

6.8.3 Future Questions about Causal Contribution

My analysis in this particular case study has been purely *analytical*: I have simply sought to prove the internal contradiction between rejecting the contribution requirement in a mode of liability, while declaring adherence to a culpability principle that requires contribution in modes of liability. To do that, I had to untangle numerous legal arguments and responses. Once that position is accepted, the next step in the analysis would be to proceed to the *normative* analysis of what the culpability principle entails. I engaged in the deontic analysis of the contribution requirement in earlier works,[131] and I will expand on it in more detail in the book-length continuation of this thesis. I have excised that analysis from this thesis in the interest of brevity, as my purpose in the current chapters is simply to provide a few manageable illustrations of the coherentist methodology at work.

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[129] The *Bemba* Appeal Judgment, ibid, took no view on the mode-versus-offence debate, but the 'mode of liability' understanding was supported by three of the five Appeal Chamber judges (separate opinion of Judge Eboe-Osuji at paras 194-215 and separate dissenting opinion of Judges Monageng and Hofmanski at para 333.) The *Bemba* Appeal Judgment took no view on the contribution requirement, but three of the five Appeal Chambers judges upheld the contribution requirement both for textual reasons and out of respect for the culpability principle (separate opinion of Judge Eboe-Osuji at para 202; separate dissenting opinion of Judges Monageng and Hofmanski at para 333.) But see contra separate opinion of Judges Van den Wyngaert and Morrison at para 51-56.

[130] The Appeals Chamber decision has been criticized as possibly being even *too* generous to commanders, and adopting interpretations on various issues (other than those canvassed in this case study) more restrictive than what deontic principles actually require. L N Sadat, 'Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in Prosecutor v Jean-Pierre Bemba Gombo', (12 June 2018) *EJIL Talk* (blog), www.ejiltalk.org/author/leilansadat; D M Amann, 'Bemba', above. M Jackson, 'Commanders' Motivations in Bemba', (15 June 2018) *EJIL Talk* (blog), www.ejiltalk.org/author/mjackson; S SáCouto, 'The Impact of the Appeals Chamber Decision in Bemba: Impunity for Sexual and Gender-Based Crimes?', (22 June 2018) *IJ Monitor* (blog), www.ijmonitor.org/2018/06/the-impact-of-the-appeals-chamber-decision-in-bemba-impunity-for-sexual-and-gender-based-crimes; J Powderly and N Hayes, 'The Bemba Appeal: A Fragmented Appeals Chamber Destablises the Law and Practice of the ICC', (26 June 2018), *Human Rights Doctorate* (blog), humanrightsdoctorate.blogspot.com/2018/06/the-bemba-appeal-fragmented-appeals.html; F F Taffo, Analysis of Jean-Pierre Bemba's Acquittal by the International Criminal Court, (13 Dec 2018), *Conflict Trends* (blog), www.accord.org.za/conflict-trends/analysis-of-jean-pierre-bembas-acquittal-by-the-international-criminal-court.

[131] Robinson, 'Complicated', above.

Nonetheless, I outline the following very brief points about the subsequent deontic questions, because those questions must be faced in future jurisprudence, and because it will help the reader appreciate the prescription I have advanced. The questions in the next step of analysis would be:

- What is the nature and extent of the causal contribution required by the principle?
- What about the common objection that omissions cannot make causal contributions?[132]
- More radically, can we develop plausible new accounts of personal culpability that contemplate liability without causal contributions?

As for the extent of contribution, as I discuss elsewhere,[133] on a coherentist methodology, the best-supported standard is that the accused's conduct must encourage or facilitate the crimes, including by rendering them easier or more likely (risk aggravation). This inclusive standard is well supported in juridical practice as well as by the weight of normative arguments.[134] Early ICC jurisprudence has not yet been conclusive about the requisite extent of contribution, but most decisions have been indicating that it suffices if the dereliction increased the risk of the resulting crimes occurring,[135] which matches the prescription I advance. That conclusion is consistent with domestic patterns of juridical practice based on extensive experience with crimes, and is also supported by mainstream normative theories on the meaning of accessory liability.[136] It is therefore also consistent with a coherentist deontic methodology.

An additional ingredient is needed for my proposed solution: a deontic justification of the 'should have known' standard. I will address that question in the next chapter (Chapter 7).

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[132] For readers who are interested, I discuss this question in Annex 1.

[133] Robinson, 'Complicated', above.

[134] See e.g. Robinson, 'Complicated', above, and see K Ambos, 'The ICC and Common Purpose: What Contribution is Required?', in C Stahn (ed), *The Law and Practice of the ICC: A Critical Account of Challenges and Achievements* (OUP, 2015) 592 at 603.

[135] *Bemba* Confirmation Decision, above, at para 425; *Bemba* Trial Judgment, above, at paras 211-213. The Bemba Appeal Judgment above did not address the matter, but three of the five Appeals Chamber judges endorsed similar standards (separate opinion of Judge Eboe-Osuji at para 166, 184 and 212-13; separate dissenting opinion of Judges Monageng and Hofmanski at para 337-39).

[136] See also discussion in K Ambos, 'Critical Issues in the Bemba Confirmation Decision', (2009) 22 *LJIL* 715.