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President Obama and the International Criminal Law of Successor Liability

Keywords

Criminal Law, International Criminal Law, Liability, Successor Liability, Crimes, Human Rights Law, Military, War and Peace

PRESIDENT OBAMA AND THE INTERNATIONAL CRIMINAL LAW OF SUCCESSOR LIABILITY

DAVID AKERSON* AND NATALIE KNOWLTON**

I. INTRODUCTION

The last fifteen years have seen the dramatic expansion of international criminal law and the use of international criminal tribunals to prosecute senior leaders for their role in war crimes, crimes against humanity and genocide (international criminal law or ICL). An important development at the tribunals has been the law of command responsibility.¹ While its history can be traced as far back as 500 B.C., the modern doctrine draws from the jurisprudence that emerged from the military tribunals established after World War II – the International Military Tribunal (IMT) that tried Nazi Germany’s war criminals and the International Military Tribunal for the Far East (IMTFE) that prosecuted Japanese officials.

Decades later, in the early 1990s, scenes of concentration camps eerily reminiscent of the Nazi Holocaust began to come out of the former Yugoslavia. The outrage over those images spurred the United Nations Security Council in 1993 to utilize its broad Chapter VII powers² in a novel way – with the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY).³ Within a year, that decision spawned the creation of the International Criminal Tribunal for Rwanda (ICTR). Thus began the inexorable trend toward the deployment of tribunals as a tool in post-conflict resolution. By 2008, there were seven international or quasi-international tribunals, including the ICTY and ICTR, The Special Court for Sierra Leone (SCSL), The Extraordinary Chambers in the Courts of Cambodia (ECCC), The Special Tribunal for Lebanon (Lebanon Tribunal), The Ad-Hoc Court for East Timor (East Timor Tribunal) and the International Criminal Court (ICC). These institutions (collectively The Tribunals) are focused on and mandated to indict high-level political and military leaders who orchestrate

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1. Command responsibility is also referred to as “superior responsibility,” a term that denotes the application of command responsibility to a broader civilian context. For the purposes of this article it will be referred to as command responsibility.

2. See U.N. Charter ch. 7 (addressing Action with Respect to the Threats of Peace, Breaches of Peace, and Acts of Aggression).

3. Julia Preston, *U.N. Moves to Create Balkan War Crimes Panel*, WASH. POST, Feb. 19, 1993, at A24.

atrocities. To date, the Tribunals' indictments include Yugoslavian President Slobodan Milošević, Rwandan Prime Minister Jean Kambanda, two Presidents of the self-declared Republic of Srpska Radovan Karadzic and Biljana Plavsic, Liberian President Charles Taylor and Sudanese President Omar al-Bashir.

The Tribunals exercise jurisdiction over three categories of core international crimes: war crimes, crimes against humanity and genocide.⁴ The direct perpetrators of these crimes are typically lower-ranking subordinated field soldiers, militia or paramilitary members. One of the significant challenges of the tribunals is to link crimes committed by subordinates to the military or political superiors. To this end, the tribunals have two alternatives. The first alternative is to charge commanders with "individual criminal liability" for their direct involvement in the crimes, such as ordering, instigating or planning.⁵ The second alternative, command or superior responsibility, is an indirect form of responsibility based on an omission: the commander's failure to fulfill a duty with regard to subordinates to prevent crimes where possible, or to punish the commission of offenses after the fact.⁶

While the doctrine of command responsibility is firmly entrenched in ICL, new issues have arisen in the doctrine's application. In 2001, the ICTY indicted Bosnian military officers Enver Hadžihasanović, Mehmed Alagić and Amir Kabura (the Accused) on charges of war crimes and crimes against humanity based on a command responsibility theory for failing to punish his subordinates who had committed those crimes.⁷ These charges were contentious because for certain acts Kabura was not the subordinates' commander at the time of the commission of the crime, rather he had assumed command after the fact. For the purposes of this article, we refer to this form of command responsibility as successor liability. Before trial, the Accused moved to strike successor liability in the indictment.⁸ The Trial Chamber rejected their argument, but on interlocutory appeal the Appeals Chamber reversed the lower court and invalidated successor liability.⁹

4. In the case of the quasi-international tribunals, such as the SCSL and the ECCC, they include domestic crimes as well. Statute of the Special Court for Sierra Leone art. 5, Jan. 16, 2002, 2178 U.N.T.S. 137 [hereinafter Statute of the SCSL]; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea art. 3, NS/RKM/1004/006, Oct. 27, 2004 [hereinafter ECCC Statute].

5. See, e.g., The Secretary-General, Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, Annex 1, art. 7(1), U.N. Doc. S/25704 (May 3, 1993) [hereinafter ICTY Statute]; S.C. Res. 955, Annex 1, art. 6(1), U.N. Doc. S/RES/955 (July 1, 1994) [hereinafter ICTR Statute].

6. See, e.g., ICTY Statute, *supra* note 5, at art. 7(3); ICTR Statute, *supra* note 5, at art. 6(3).

7. Prosecutor v. Hadžihasanović, Alagić & Kubura, Case No. IT-01-47, Indictment, ¶ 18 (July 13, 2001). The ICTY amended this initial indictment two times. See also discussion *infra* Part II.B.1.

8. Prosecutor v. Hadžihasanović, Alagić & Kubura, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, ¶ 1 (Nov. 12, 2002).

9. Prosecutor v. Hadžihasanović, Alagić & Kubura, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶¶ 3(2), 57 (July 16, 2003).

The Appeal Chamber decision issued its decision in the form of a three-two majority opinion with two strong dissents.¹⁰

At the time the ICTY was litigating successor liability in *Hadžihasanović*, President George W. Bush, was commander-in-chief of U.S. armed forces, and had implemented controversial policies of water-boarding, harsh interrogation and indefinite detention at Guantanamo Bay. These policies were widely-publicized and openly acknowledged by the Bush administration.¹¹ The implementation of these policies involved the issuing of orders at a command level and the execution of orders by subordinates. On January 20, 2009, President Barack Obama succeeded President Bush as commander-in-chief and inherited authority over many subordinates who are alleged to have participated in the execution of these policies. Successor liability would mandate that Obama has a duty to punish known subordinate offenders, and a failure to do so would subject him to liability.

As international law becomes more comfortable holding senior leaders liable for mass crimes, it will be confronted on reoccurring basis with the criminal subordinates who remain in their positions in successive regimes. Do the new regime leaders, such as Obama and Prime Minister Gordon Brown of the United Kingdom, each of who may have had no involvement in the crimes or opposed the criminal policies of their predecessors (hereinafter referred to as successor regimes), have a duty to root out and punish subordinate offenders to the extent that a failure to discharge that duty subjects them to criminal liability for acts they may have opposed?

This article examines the law and policies of successor liability in light of President Obama and clamor for him to appoint a special prosecutor to investigate possible war crimes and crimes against humanity committed by the Bush administration. Section II will analyze the branch of successor liability as it currently stands in international law. Section III will then view successor liability with respect to President Obama and his role as a commander of subordinates in the armed forces who may have committed crimes. The section will first set forth the alleged crimes committed under the prior Presidential administration and then discusses President Obama's duty to respond to those crimes. Various policy arguments militating for and against establishing successor liability are explored in Section IV.

II. COMMAND RESPONSIBILITY AND THE SUCCESSOR LIABILITY BRANCH

A. Codification

The body of case law that came out of the World War II tribunals established and developed command responsibility as a form of individual criminal responsibility; however, the operating statutes of the IMT and IMTFE did not expressly provide for command responsibility. Likewise, the four Geneva Conventions are largely silent on the issue.¹² The first codification of the doctrine

10. *Id.* ¶ 57.

11. See discussion *infra* Part III.B.2.

12. See Convention (III) Relative to the Treatment of Prisoners of War art. 39, Aug. 12, 1949, 75

in international humanitarian law is in Articles 86 and 87 of Additional Protocol I to the Geneva Convention of 1977 – applicable to international armed conflicts – which establishes superior liability for failures to act and places a duty on commanders to prevent, suppress or punish breaches of the Geneva Conventions.¹³

Since then, the doctrine of command responsibility as a form of individual criminal liability has been expressly recognized by all of the international tribunals. It is set forth in Articles 6(3) and 7(3) of the Statute of the ICTR and ICTY, respectively, Article 6 of the Statute of the SCSL, Section 16 of the constitutive document of the Special Panels for Serious Crimes, and in Article 29 of the ECCC.¹⁴ All of these tribunals generally reference command responsibility as follows:¹⁵

The fact that any of the acts referred to in the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.¹⁶

While the expression of the command responsibility doctrine may vary from jurisdiction to jurisdiction, the *ad hoc* jurisdictions, beginning with the *Čelebići* Trial Chamber, have generally recognized three elements necessary to a finding of superior liability: the existence of a superior-subordinate relationship; the commander's knowledge of the subordinate's crime; and the commander's failure to act either in the form of preventing the criminal acts or if learned of after the fact, punishing the offenders.¹⁷ Successor liability is concerned with this latter duty to punish, in the case of a new commander who inherits subordinates who have previously committed criminal acts under a previous commander.

B. Successor Liability

1. Current State of the Law

The successor liability branch of command responsibility has to date been litigated only at the ICTY. It was first discussed in the case of *Prosecutor v. Kordić and Čerkez*.¹⁸ Dario Kordić was a high-ranking political figure in the Bosnian Croat separatist movement who exercised substantial influence over its

U.N.T.S. 135 [hereinafter Geneva Convention III].

13. See discussion *infra* Part II.B.2.a.

14. ICTR Statute, *supra* note 5, at art. 6(3); ICTY Statute, *supra* note 5, at art. 7(3); Statute of the SCSL, *supra* note 4, at art. 6; U.N. Transitional Admin. in East Timor, *Regulation on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, § 16, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000) [hereinafter Statute of East Timor Tribunal]; ECCC Statute, *supra* note 4, at art. 29.

15. With slight variations.

16. ICTY Statute, *supra* note 5, at art. 7(3).

17. *Prosecutor v. Delalić, Mucić, Delić & Landžo*, Case No. IT-96-21, Judgment, ¶ 346 (Nov. 16, 1998). The three elements of command responsibility are discussed in more detail in Section III (B), *infra*.

18. *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-T, Judgment (Feb. 26, 2001).

military and paramilitary operations.¹⁹ Mario Čerkez was the commander of a Bosnian Croat Brigade.²⁰ While the issue of successor liability was not specifically challenged at the pre-trial stage, the Trial Chamber in convicting the two Accused did address the issue. In *obiter dicta*, the Trial Chamber affirmed that

The duty to punish naturally arises after a crime has been committed. Persons who assume command after the commission are under the same duty to punish. This duty includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself. Civilian superiors would be under similar obligations.²¹

The issue of successor liability next came up in the ICTY case of *Prosecutor v. Hadžihasanović and Kabura*.²² Enver Hadžihasanović and Amir Kabura were professional military officers in the Yugoslavian army of the SFRY prior to its dissolution. When Bosnia-Herzegovina declared its independence, Hadžihasanović and Kabura migrated from the Yugoslavian Army to the newly-formed Army of the Republic of Bosnia-Herzegovina (ABiH). Both served as high-ranking officers in the Army of Bosnia-Herzegovina during the ensuing armed conflicts.²³ In several indictments, the ICTY alleged that the ABiH committed a range of war crimes and crimes against humanity. Hadžihasanović was initially a Commander of the ABiH 3rd Corps, then later promoted to the Chief of the Supreme Command.²⁴ Kabura was initially commissioned as the Deputy Commander of a detachment in the Bosnian city of Kakanj.²⁵ He rose steadily through the ranks of the ABiH, becoming the 3rd Corps 7th Muslim Mountain Brigade Chief of Staff on January 1, 1993.²⁶ Between April and July of that year, Kabura effectively served as Commander of the Mountain Brigade, as its *de jure* Commander Asim Koricic was absent. The ICTY indicted Hadžihasanović and Kabura in a joint amended indictment on September 26, 2003.²⁷ The indictment alleged that 3rd Corps committed a range of war crimes, including attacking civilians causing death and serious injury, unlawful imprisonment of Croatian and

19. See *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2, Amended Indictment, ¶ 9-10 (Sept. 30, 1998).

20. See *id.* ¶ 12.

21. *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-T, Judgment, ¶ 446 (Feb. 26, 2001) (citation omitted).

22. *Prosecutor v. Hadžihasanović, Alagić & Kubura*, Case No. IT-01-47, Indictment (July 13, 2001). Alagić died before trial commenced and the action against him was terminated by the Trial Chamber on March 21, 2003. An amended indictment without Alagić was issued on September 26, 2003. *Prosecutor v. Hadžihasanović & Kubura*, Case No. IT-01-47-PT, Third Amended Indictment (Sept. 26, 2003).

23. *Prosecutor v. Hadžihasanović, Alagić & Kubura*, Case No. IT-01-47-PT, Amended Indictment, ¶ 2-6 (Jan. 11, 2002).

24. *Id.* ¶ 2-3.

25. *Id.* ¶ 9.

26. *Id.*

27. *Prosecutor v. Hadžihasanović & Kubura*, Case No. IT-01-47-PT, Third Amended Indictment (Sept. 26, 2003).

Serbians who were subjected to physical and psychological abuse, inhumane treatment, and deprivations of basic necessities.²⁸ The indictment charged Kabura with criminal responsibility for acts committed by his subordinates, the 3rd Corps, based on the command responsibility provision of the ICTY statute.²⁹ The indictment indicated that liability would attach to Kabura if the superior knew or had reason to know” of acts his subordinates were about to commit “*or had done so* and the superior failed to take the necessary and reasonable measures to . . . punish the perpetrators thereof.”³⁰ The indictment charged that Kabura had assumed command over the Mountain Brigade in the midst of a military campaign in which war crimes and crimes against humanity were alleged to have already been committed.³¹ The indictment included the allegation that Kabura was responsible for subordinates who had committed crimes two months before his assumption of command.³² Thus, for the first time in international criminal law an indictment had explicitly charged an accused with successor liability.

The Accused challenged the successor liability aspects of the indictment in a pre-trial motion.³³ The Accused argued that “Article 7(3) may apply when the superior learns after the event of the offence, but that the superior-subordinate relationship must [also have existed] at the time of the offence.”³⁴ The Defense argument was comprised of both legal and policy components. The legal argument turned on the notion that command responsibility required a commander to have effective control of his subordinates at the time of the commission of the acts and thus be in a position to prevent the breach.³⁵ Kabura argued that he did not have effective control of subordinates during their commission because he was not yet their commander, and thus he was not liable under command responsibility. In support of this position, the Accused relied on language from the ICTY case of *Prosecutor v. Delalić and Delić*. The *Delalić and Delić* case (sometimes referred to as the *Čelebići* case) trial judgment stated in a general discussion of command responsibility that a commander must have effective control over subordinates for command responsibility to attach.³⁶ The Defense extracted this argument and put it forward as support for their position. They then buttressed that assertion with the policy argument that the “aim of command responsibility [is] to ensure that commanders will guarantee that troops over whom they have effective control will

28. *Prosecutor v. Hadžihasanović, Alagić & Kubura*, Case No. IT-01-47-PT, Amended Indictment, ¶ 41-42 (Jan. 11, 2002).

29. *Id.* ¶ 13 (citing ICTY Statute Article 7(3)).

30. *Id.* (emphasis added).

31. See *id.* ¶ 58.

32. *Id.*; see also *Prosecutor v. Hadžihasanović, Alagić & Kubura*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, ¶ 180 (Nov. 12, 2002).

33. *Prosecutor v. Hadžihasanović, Alagić & Kubura*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction (Nov. 12, 2002).

34. *Id.* ¶ 185 (citing the written submissions of Hadžihasanović).

35. See *id.*

36. *Prosecutor v. Delalić, Mucić, Delić & Landžo*, Case No. IT-96-21, Judgment, ¶ 378 (Nov. 16, 1998) (citing the International Law Commission Draft Code).

conduct operations in accordance with the law, thereby preventing crimes from being committed.”³⁷

The Prosecution responded that the operative fact is who the commander was with effective control over subordinates when knowledge of the past commissions of criminal acts is attained.³⁸ The Prosecution also asserted that the Accused’s position would create a lacuna in the law, effectively allowing militaries to swap commanders when breaches were committed thus eliminating the new commander’s duty to punish.³⁹

The three-judge Trial Chamber sided with the Prosecution and denied the Defense’s motion. The Chamber found that “in principle a commander could be liable under the doctrine of command responsibility for crimes committed prior to the moment that the commander assumed command.”⁴⁰

They reasoned that the purpose of the doctrine of command responsibility was “to require commanders to fulfill their duty to ensure that their subordinates comply with the principles of international humanitarian law”⁴¹ and successor liability helped satisfy that purpose of command responsibility by pressuring subsequent commanders to investigate allegations.⁴²

The Defense filed an interlocutory appeal on November 27, 2002 challenging the Trial Chamber’s decision.⁴³ On appeal the Accused again argued that “the express terms” of Article 7(3) of the [ICTY] Statute precluded successor liability in that it required a superior-subordinate relationship at the time of the commission of the offense.⁴⁴ “The proper person,” the Defense offered, “to be prosecuted is the commander who had effective control . . . at the time the offences were committed.”⁴⁵ The Accused also asserted that there was no basis in conventional or customary law for successor liability.⁴⁶ And finally, the Accused argued that by affirming successor liability, the Appeals Chamber would undesirably extend liability for years after the offenses were committed.⁴⁷

The Prosecution relied on the *obiter* in the *Kordić* Trial Judgment, discussed *supra*. But it also conceded the paucity of precedent, arguing that “the lack of a known precedent for a finding of guilt for failing to punish subordinates for

37. Prosecutor v. Hadžihasanović, Alagić & Kubura, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, ¶ 185 (Nov. 12, 2002) (emphasis omitted).

38. *Id.* ¶ 191.

39. *See id.* ¶ 192-94.

40. Prosecutor v. Hadžihasanović, Alagić & Kubura, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, ¶ 202 (Nov. 12, 2002).

41. *Id.* ¶ 197.

42. *Id.* ¶ 200.

43. Prosecutor v. Hadžihasanović, Alagić & Kubura, Case No. IT-01-47-PT, Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction, ¶¶ 12, 120-23 (Nov. 27, 2002).

44. Prosecutor v. Hadžihasanović, Alagić & Kubura, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 41 (July 16, 2003).

45. *Id.*

46. *Id.*

47. *Id.*

offences committed before assuming command cannot prevent charging an accused in this manner.”⁴⁸ In effect, the prosecution was arguing that the issue of a successor commander was not new law but rather an unforeseen factual circumstance that the Appeals Chamber could decide fell within the scopes of command responsibility.

The five-judge Appeals Chamber issued its three-two decision on the appeal on July 16, 2003.⁴⁹ The three judge majority overruled the Trial Chamber’s decision (as well as the obiter in the earlier *Kordić* and *Čerkez* trial judgments)⁵⁰ while Judges Hunt and Shahabadeen dissented.

The majority opinion offered that

[i]n considering the issue of whether command responsibility exists in relation to crimes committed by a subordinate prior to an accused’s assumption of command over that subordinate, the Appeals Chamber observes that it has always been the approach of this Tribunal not to rely merely on a construction of the Statute to establish the applicable law on criminal responsibility, but to ascertain the state of customary law in force at the time the crimes were committed.⁵¹

In analyzing customary international law as it stood at the time of the commission of the crimes, the majority found that

[i]n this particular case, no practice can be found, nor is there any evidence of *opinio juris* that would sustain 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.⁵²

The majority did conclude that what precedent existed militated against successor liability. Two primary sources that it relied on were a definition of command responsibility as set forth in the Rome Statute’s Article 28, and Article 86 of the 1977 Additional Protocols I, both of which will be discussed *infra*.

While a three-two Appeal Chamber decision is binding authority on the Trial Chambers at the Yugoslavia and Rwanda Tribunals, even Judge Meron (one of the majority judges) acknowledged that the narrowness of a three-two majority “and the cogency of [the] dissent may suggest that the jury is still out on this question.”⁵³

48. *Id.* ¶ 43.

49. *Id.* ¶ 57.

50. Gideon Boas et al., *Forms of Responsibility in International Criminal Law* 233 (2007).

51. *Prosecutor v. Hadžihasanović, Alagić & Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 44 (July 16, 2003).

52. *Id.* ¶ 45.

53. THEODOR MERON, *WAR CRIMES LAW COMES OF AGE* 89 (1998) (referring to the *Erdemović* Appeals Chamber Judgment, ruling “that duress does not afford a complete defense to a soldier charged with a crime against humanity and/or ... killing of innocent human beings.”).

Both dissenting judges seized on the argument of the majority that it was required that successor liability be part of customary international law in order.

Judge Shahabuddeen in his dissent acknowledged that there were no clear authorities one way or the other on the successor liability issue.⁵⁴ But in such a circumstance, he offered, the Tribunal has the competence to interpret established principles of law (such as superior responsibility) and to determine whether a particular situation falls within the principle.⁵⁵ He argued that this wasn't creating law, but rather interpreting and applying one of its existing principles; a proper function of Judges.⁵⁶

In his dissent, Judge Hunt similarly submitted that the proper analysis of successor liability is not whether it "clearly" existed as custom at the time of the commission of the crimes, but whether successor liability is a new situation that reasonably falls within the principle of command responsibility.⁵⁷ Judge Hunt pointed out the paradox of the majority's position, that

[s]urely it is the purpose of the relevant principle of customary international law which dictates the scope of its application, not the facts of the situation to which the principle is sought to be applied. And, if that scope or purpose is not sufficiently rigorous or precise, it may be defined by reference to the 'principles of humanity' and 'dictates of the public conscience' as provided for in the Martens Clause. If the view of the majority is correct, no principle of customary international law could ever be applied to a new situation, simply because it is a new situation.⁵⁸

Judge Hunt also pointed out the irony in the reasoning of the majority itself on a different issue in the appeal. Here, the majority found that where it can be shown a principle exists "it is not an objection to the application of the principle to a particular situation to say that . . . it reasonably falls within the application of the principle."⁵⁹

Other tribunal decisions have examined "new" situations and validated them as situations reasonably falling within the established custom. In *Prosecutor v. Karamera*, an ICTR Appeals Chambers held that the imposition of liability for participation in enterprises that are not limited in size or scope is a new situation that reasonably fell within the broader parameters of Joint Criminal Enterprise – a principle with a clear basis in customary international law.⁶⁰ The *Brđanin* Trial Chamber approved an unprecedented aspect of superior responsibility when it

54. See *Prosecutor v. Hadžihasanović, Alagić & Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 8 (July 16, 2003) (Shahabuddeen, J., dissenting) (partial dissenting opinion).

55. *Id.* ¶ 9.

56. See *id.* ¶ 9-10.

57. See *id.* ¶ 38 (Hunt, J. dissenting) (separate and partially dissenting opinion).

58. *Id.* ¶ 40 (emphasis omitted).

59. *Id.* ¶ 37 (citing the majority opinion) (emphasis omitted).

60. *Karamera et al*, Joint Criminal Enterprise Appeal Decision, (ICTR) paras. 15-16.

satisfied itself that the principle reasonably fell within the application of the general doctrine of superior criminal responsibility.⁶¹

The *Hadžihasanović* majority position was criticized in subsequent judgments although followed on the grounds of *stare decisis*. The Trial Chamber in *Hadžihasanović*, after the case had been remanded to them after the interlocutory appeal, lamented in its judgment that the Appeals Chambers had in fact created gap in the law:

Since the commanders of troops change on a regular basis in times of war, there is a serious risk that a gap in the line of responsibilities will be created as the changes occur . . . [I]f the superior in command at the time a crime is committed is replaced very soon after its commission, it is very likely that the perpetrators of that crime will go unpunished and that no commander will be held criminally responsible under the principles of command responsibility. It must be recognised that in such case military practice, whose purpose is to establish the internal order and discipline necessary to run the armed forces, and from which the power to punish flows, falls short of achieving its objective.⁶²

The issue reached the Appeals Chamber again in the *Prosecutor v. Oric* case, a panel that again included Judge Shahabuddeen. The *Oric* Trial Chamber had offered that while it too disagreed with the position taken by the *Hadžihasanović* majority, it was legally bound to follow it.⁶³ Since the duty to punish *only* becomes relevant when the crime is discovered, not when it is committed, often a superior would be obligated to take punitive measures even when he or she had no ability to prevent the crimes due to his lack of awareness. Therefore, the Trial Chamber suggested that “it seems only logical that such an obligation [to punish] would also extend to the situation wherein there has been a change of command following the commission of a crime by a subordinate.”⁶⁴

The issue was raised on appeal. This time, a three-two majority, including Judge Shahabuddeen, was positioned to reverse *Hadžihasanović*.⁶⁵ But curiously, Judge Shahabuddeen declined the opportunity to do so. He acknowledged justifications for the reversal. He explained that one Appeals Chamber could, even in a three-two decision, reverse the previous Appeal Chamber position.⁶⁶ He referenced the support that a reversal would have, mentioning that fourteen ICTY judges had expressed opposition to the *Hadžihasanović* decision in subsequent cases.⁶⁷ But notwithstanding this, he deferred to a cryptic judicial code wherein a dissenting judge should not form part of a subsequent overturning three-two

61. *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment, ¶ 715 (Sept. 1, 2004).

62. *Prosecutor v. Hadžihasanović & Kubura*, Case No. IT-01-47-T, Judgment, ¶ 199 (Mar. 15, 2006).

63. *Prosecutor v. Orić*, Case No. IT-03,68-T, Judgment, ¶ 335 (June 30, 2006).

64. *Id.*

65. *See Prosecutor v. Orić*, Case No. IT-03-68A, Judgment, ¶ 3 (July 3, 2008) (Shahabuddeen, J., declaration).

66. *Id.* ¶¶ 8, 11-13.

67. *Id.* ¶ 12.

majority, or at least he should do so with economy.⁶⁸ In Shahabuddeen's view, decorum commended that an incorrect expression of law shall remain in place until "such time when a more solid majority shares the views of those two judges."⁶⁹

The irony of this puzzling stand is highlighted by the dissents by Judges Liu and Schomburg, both of which now take up the position so persuasively argued by Shahabuddeen himself in his *Hadžihasanović* dissent.⁷⁰ Judge Liu issues a particularly spirited dissent. He submits that the Appeals Chamber should have reversed the *Hadžihasanović* decision for many reasons. First, its failure to do "gives the impression . . . that [it] considers such [a] challenge unfounded" or "disagrees with the challenge."⁷¹ Its refusal to reverse avoids its responsibility to address legal challenges to its own decisions, he submits. To Judge Liu, the issue is an important one. "The exceptional nature and general significance of the question whether a commander can be held responsible under Article 7(3) of the Statute for failing to punish the crimes of which he had knowledge, but were perpetrated before he assumed command" Judge Liu offers, "is undoubtedly of fundamental importance to our jurisprudence."⁷² He explains that the failure to correct such an erroneous decision will only serve to generate uncertainty, and cause confusion in the determination of the law by parties to cases before the International Tribunal.

Thus, the *Hadžihasanović* decision continues to represent the law of the ICTY and ICTR despite the tenuous grounds on which it currently rests. It is therefore worthwhile to amplify two of the bases of the *Hadžihasanović* majority that continue the successor liability debate: Article 86 of Additional Protocol I and Article 28 of the Rome Statute.

2. Appeals Chamber's flawed reliance on Articles 86 of Additional Protocol I and Article 28 of the Rome Statute as evidence of custom

a. Article 86 of Protocol I

The source of the debate over successor liability can be traced to the modern codification of command responsibility in the 1970s that is, in part, represented by Article 86 of the 1977 Protocol I to the Geneva Conventions.⁷³ This Protocol and Protocol II came about after increasing dissatisfaction among nations throughout the 1950s and 1960s with the definitional rigidity of the original Geneva Conventions passed in 1949. Nations convened the Diplomatic Conference of Geneva in 1974 with the aim of issuing an amending treaty to modernize the 1949 Convention's strict view of armed conflict that was oriented to conflicts between

68. *Id.* ¶ 14.

69. *Id.* ¶ 15.

70. *See id.* ¶ 1-2 (Liu, J., dissenting) (partially dissenting opinion and declaration); *see, e.g., id.* ¶ 12-13 (Schomburg, J., dissenting) (separate and partially dissenting opinion).

71. *Id.* ¶ 3 (Liu, J., dissenting) (partially dissenting opinion and declaration).

72. *Id.* ¶ 5.

73. *See* Prosecutor v. Hadžihasanović, Alagić & Kubura, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 22 (July 16, 2003) (Shahabuddeen, J., dissenting) (partial dissenting opinion).

states deploying uniformed armed forces.⁷⁴ These definitions increasingly did not adequately reflect modern armed conflicts that emerged after World War II. The post WWII-era conflicts often had less to do with territorial conquest and more to do with political issues such as the liberation of colonies in Africa and Asia, the foreign occupation of states in the cold war, and racist regimes such as apartheid in South Africa. The Geneva conference sought to broaden the 1949 definitions to extend protections to these new kinds of conflicts. In addition, the conference sought to more adequately protect the victims in such conflicts. With these broad aspirations in mind, in 1977 the conference issued its results after three years of labor with a new convention that became known as Additional Protocol I.⁷⁵

While the *Hadžihasanović* majority focused exclusively on Article 86, two provisions of Additional Protocol I codified the responsibility of commanders: Articles 86 and 87. Article 86 provides:

Failure to act

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he *was committing or was going to commit* such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.⁷⁶

Article 87 set forth the duty of commanders. It provides

Duty of commanders

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

74. See generally George H. Aldrich, *New Life for the Laws of War*, 75 AM. J. INT'L L. 764 (1981) (detailing the major changes made by the Protocols based on the changing nature of modern warfare).

75. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 16 I.L.M. 1391 [hereinafter Protocol I].

76. *Id.* at art. 86 (emphasis added).

3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are *going to commit or have committed* a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.⁷⁷

The crux of the problem, of course, lies in inconsistency in the tenses in Articles 86 and 87. Article 86 uses the present tense, referring to a commander's liability where a subordinate was committing or about to commit a breach whereas Article 87 uses the past tense, requiring a commander to act where subordinates have committed breaches. Article 86 seemingly precludes successor liability, Article 87 supports it.

Whether or not this discrepancy between Articles 86 and 87 was intentional is dubious. It would seem doubtful that the drafters of the Articles would have preferred the present inconsistent language and the inevitable ensuing ambiguities. Moreover, the official commentaries on the articles do not seem to grasp the significance of the language. In its explanation of Article 86, the commentary uses the past tense (i.e. the language of Article 87) stating that a commander "is to be responsible for an omission relating to an offence *committed* or about to be committed by a subordinate."⁷⁸ If the tense had been a critical issue in the drafting of the article, one would presume that the commentary would have been more sensitive to the nuances of the language and the commentators would have been more precise.

How does one reconcile Articles 86 and 87? When attempting to clarify an inherent ambiguity in a statute, the Vienna Convention on the Law of Treaties provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."⁷⁹

The plain language of Article 86 suggests that its principal purpose was to criminalize the superior's omission, an idea that the original Geneva Conventions did not adequately address. The commentary on the provision confirms its purpose was to close this loophole.⁸⁰ The commentary does not discuss the relevance of the use of the present tense only. Article 87, aptly entitled "Duty of Commanders," elaborates on those duties of omission and enjoins states to enact enabling legislation.⁸¹ A good faith interpretation of the two Articles would be that the two Articles should be read together. In that vein, the *Hadžihasanović* majority's selective reliance only on Article 86 is unfounded.

77. *Id.* at art. 87 (emphasis added).

78. Protocol I, *supra* note 75, at art. 86 cmt. ¶ 3543 (emphasis added).

79. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

80. Protocol I, *supra* note 75, at 86 cmt. ¶ 3525-26.

81. *See id.* ¶ 3549-51.

The Article 86 and 87 commentaries support this view. Paragraph 3541 of the Commentaries explicitly states that Article 86 “should be read in conjunction with paragraph 1 and Article 87 . . . which lays down the duties of commanders.”⁸² This is supported by a later provision that explains that

[t]his rule [Article 86] concerns both the immediate commander and his superiors. However, the specific duties of commanders are further dealt with in the detailed provisions which will be examined under Article 87 ‘(Duties of commanders).’ The present provision merely poses the principle of the indictment of superiors who have tolerated breaches of the law of armed conflict.⁸³

Therefore, if the two Articles were meant to be read together, a collective interpretation must be deduced. Moreover, it is clear from the commentaries that the envisioned scope of the duty was expansive and should include past breaches. An insightful passage can be found in paragraph 3555 which says

[T]he text [of Article 87] does not limit the obligation of commanders to apply only with respect to members of the armed forces under their command; it is further extended to apply with respect to ‘other persons under their control.’ It is particularly, though not exclusively, (9) in occupied territory that this concept of indirect subordination may arise, in contrast with the link of direct subordination which relates the tactical commander to his troops. Territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised. (10) Consequently the commander on the spot must consider that the local population entrusted to him is subject to his authority in the sense of Article 87, for example, in the case where some of the inhabitants were to undertake some sort of pogrom (11) against minority groups. He is responsible for restoring and ensuring public order and safety as far as possible, (12) and shall take all measures in his power to achieve this, (13) even with regard to troops which are not directly subordinate to him, if these are operating in his sector. (14) A fortiori he must consider them to be under his authority if they commit, or threaten to commit, any breaches of the rules of the Conventions against persons for whom he is responsible. As regards the commander who, *without being invested with responsibility in the sector concerned*, discovers that breaches *have been committed* or are about to be committed, he is obliged to do everything in his power to deal with this, particularly by informing the responsible commander.

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The relevance of paragraph 3555 is that it takes a liberal view of a commander’s responsibility toward breaches. In the example cited in the

82. *Id.* ¶ 3541.

83. *Id.* ¶ 3547.

84. *Id.* ¶ 3555 (emphasis added).

paragraph, the commentator suggests that commanders have a responsibility to not only their subordinates but a range of other persons who fall under the control. It goes on to argue that a commander's reporting responsibility even extends to situations where he learns of breaches *outside his geographic area of responsibility*. The operative issue for the commentator is not whether or not the commander had the ability to control subordinates and an ability to prevent the breaches, but only whether he learned of their commission at some point.

Under this view, a good faith interpretation of the two Articles read together would be that they intended to create a broad obligation for commanders to pursue known breaches including those that would constitute successor liability.

The *Hadžihasanović* majority relies on two supplemental resources to support its parochial interpretation: the Report of the International Law Commission and Article 6 of the Draft Code of Crimes against Peace and Security of Mankind. Judge Liu in his dissent takes issue with this reliance, deftly pointing out the imprecision of language that was pervasive.⁸⁵

As Judge Liu surmises, the *Hadžihasanović* majority's "error in the interpretation of Articles 86 and 87 of Additional Protocol I . . . represents a cogent reason" to reverse.⁸⁶

b. Article 28 of the Rome Statute

The *Hadžihasanović* majority also relied upon the command responsibility provision contained in Article 28 of the Rome Statute⁸⁷ which mirrors the language of Article 86 and by its terms seemingly excludes successor liability. The majority argued that this was evidence of an international custom that weighed against successor liability.⁸⁸

The Rome Treaty's version of command responsibility provides that

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces *were committing or about to commit such crimes*; and

85. Prosecutor v. Orić, Case No. IT-03-68A, Judgment, ¶¶ 13, 18-24 (July 3, 2008) (Liu, J., dissenting) (partially dissenting opinion and declaration).

86. *Id.* ¶ 28.

87. Rome Statute of the International Criminal Court art. 28, July 17, 1998, 37 I.L.M. 999 [hereinafter Rome Statute].

88. See Prosecutor v. Hadžihasanović, Alagić & Kubura, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 46 (July 16, 2003).

- (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.⁸⁹

On its face, Article 28 seems to preclude successor liability when it followed the Article 86 language but this interpretation is problematic. Paragraphs (i) and (ii) are not easily reconcilable. On the one hand, paragraph (i) limits a commander's criminal responsibility to situations where forces were committing or about to commit crimes. On the other hand, paragraph (ii) obligates a commander to submit these situations to competent authorities for investigation and prosecution. Because neither war crimes nor crimes against humanity include inchoate crimes, the underlying act needs to be completed in order for a war crime or crime against humanity to exist. Logically, it is inconsistent for a commander to submit a war crime or crime against humanity *that was about to be committed* for investigation, when legally they would not exist in that inchoate state. It would not make much sense in the Rome Statute, principally concerned with war crimes and crimes against humanity, to have included Article 28 a provision with such obvious importance that would not pertain to a significant number of its provisions.⁹⁰

Notwithstanding that, the reliance on Article 28 as evidence of custom is a poor argument. The drafting of the Rome Statute can easily be seen as an exercise in compromise rather than an attempt to articulate custom. More importantly, as discussed *supra*, every other tribunal enacted – before and after the Rome Statute – has a statute with command responsibility provisions that reflect Article 87.⁹¹ Because these statutes use the Article 87 language, if one were to attempt to derive a custom based on the statutes of all of the tribunals, even including the ICC, the evidence would support a custom of command responsibility based on Article 87.

Judge Liu in his dissent also points out an obvious flaw in Article 28, that under its clear terms, Article 28 wouldn't cover past crimes, even for a superior who had effective control over subordinates at the time of commission.⁹² Ample jurisprudence from the tribunals establishes that a duty to punish arises after the superior acquires knowledge of the commission, contrary to Article 28.⁹³

89. Rome Statute, *supra* note 87, at art. 28(a) (emphasis added). Note that Article 28(b) pertaining to civilian commanders has a different *mens rea*, but the operative language for the purposes of this discussion is the same.

90. The only inchoate offense recognized by the Rome Statute as a general principle is the offense of criminal attempt. With regard to Genocide only, the Rome Statute includes the inchoate offense of direct and public indictment to commit genocide. *Id.* at art. 25(3)(e)-(f).

91. The ICTY codified commander responsibility in 1993 using the Article 87 terminology. The ICTR followed suit with identical language to that of ICTY in 1994. The SCSL adopted its statute in 2000, also with Article 87 language. In 2004, the ECCC enacted its command responsibility statute that also followed the Article 87 language. *See infra* note 14 and accompanying text.

92. *See* Prosecutor v. Orić, Case No. IT-03-68A, Judgment, ¶ 25 (July 3, 2008) (Liu, J., dissenting) (partially dissenting opinion and declaration).

93. *See* Prosecutor v. Hadžihasanović, Alagić & Kubura, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 19-21 (July

Even though the *Hadžihasanović* decision remains the law, it rests on perilously tenuous grounds and there is reason to believe that a future Appeals Chamber will give due consideration to overturning *Hadžihasanović*. Despite the fact that it is unlikely to be litigated at the ICC because of Article 28,⁹⁴ command responsibility is now being litigated in more numerous and diverse fora, including domestic prosecutions invoking universal jurisdiction⁹⁵ and civil suits in the United States applying the alien tort claims statute and the torture victims protection act⁹⁶ that present more opportunity for legal challenges.

That successor liability sits on the precipice begs the question as to whether successor liability is a desirable development or not. The election of Barack Obama presents just such an opportunity to examine successor liability as a principle of customary international law in application.⁹⁷ And the Obama scenario presents an interesting juxtaposition to *Hadžihasanović*: Kabura was a successor commander who shared the intent of his predecessor and perpetuated his criminal policies and practices. On the one hand, the application of successor liability in the case of Kabura poses no significant moral issue since Kabura participated in the criminal enterprise to some extent. On the other hand, President Obama is a successor commander who vigorously opposed his predecessor's policies and to potentially incur criminal liability for their commission presents a moral dilemma.

III. SUCCESSOR LIABILITY & CLEAN-HANDS REGIMES: THE OBAMA ADMINISTRATION

Before delving into an analysis of successor liability as applied to successor regimes using President Obama as the example, it is helpful to discuss briefly some of the alleged commission of crimes committed by subordinates that he has inherited.⁹⁸ It is important to preface this discussion with the observation that Obama's duty under command responsibility is triggered upon a showing that he had some general information in his possession which would put him on notice of possible unlawful acts by his subordinates.⁹⁹ It is not necessary that the

16, 2003) (Shahabuddeen, J., dissenting) (partial dissenting opinion).

94. Because the Rome Treaty has, at the moment, 131 signatories and so changing the language of Article 28 would require a vote of two-thirds of the States Parties per Article 121 of the Rome Statute. The Rome Statute has a provision for "elements of crimes" supplemental definitions that help interpret the Statute. Member States can propose elements that require a two-thirds majority of the Assembly of States Parties to be adopted, but this applies only to the core crimes and not modes of liability. Rome Statute, *supra* note 87, at art. 9.

95. Marlise Simons, *Mother Superior's Role in Rwanda Horror is Weighed*, N.Y. TIMES, June 6, 2001, at A3; *Spain to Investigate Guatemalan Abuses*, N.Y. TIMES, Mar. 23, 2000, at A4.

96. Alien Tort Claims Act, 28 U.S.C. § 1350 (2009); Torture Victim Protection Act of 1991, 106 Stat. 73 (1992).

97. It is important to note that we could have easily based this section of the article on President Sir-Leaf Johnson, Prime Minister Gordon or another recently elected leader who opposed the impugned policies of his predecessor and assumed command over common subordinates.

98. This is by no means an assertion of the legal or substantive merit of these claims and the authors do not take a position one way or the other on their validity, but rather view them in light only of their relevance as triggering mechanisms of a duty to punish.

99. *Prosecutor v. Delalić, Mucić, Delić & Landžo*, Case No. IT-96-21-A, Judgment, ¶ 222-41 (Feb. 20, 2001).

information available to Obama amounts to proof sufficient for a criminal conviction. The triggering information need not be about specific acts, but can be of a general criminal character.¹⁰⁰ And although the allegations below have been subject of vigorous public debate including numerous comments by President Obama himself during his presidential campaign that clearly show knowledge,¹⁰¹ it is theoretically not necessary to show that Obama acquainted himself with the available information for the triggering to occur, but merely that it had been provided to him, made available to him or was in his possession.

A. Allegations of Crimes Committed the Bush Administration

1. Torture

The most high-profile allegation leveled against the Bush administration since the beginning of the wars in Iraq and Afghanistan has been the torture of al Qaeda and Taliban detainees. In late 2002, the first reports began to surface of the alleged torture of suspected al Qaeda detainees at the Bagram air base in Afghanistan.¹⁰² Interviews with unnamed intelligence officials revealed the use of stress techniques, water-boarding and extraordinary rendition of terrorist suspects to foreign countries whose use of torture was well-known, e.g., Jordan, Saudi Arabia and Egypt. In 2004, pictures surfaced showing U.S. Army officials engaged in torture and abuse of detainees at the Abu Ghraib prison in Baghdad. While several military personnel were court-martialed for their involvement in the scandal, the use of tortuous interrogation techniques did not end there. On October 24, 2008, Vice President Cheney issued the administration's first public endorsement of water-boarding; a position that ran contrary to that of the U.S. Pentagon which, two years prior, had issued a Field Manual on Intelligence Interrogation that explicitly prohibited water-boarding.¹⁰³

Torture committed during an international armed conflict is a violation of the law of war. Under the Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), torture of prisoners of war (POWs) during questioning is specifically prohibited¹⁰⁴ and "[a]ny unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach" of the Convention.¹⁰⁵ Furthermore, Common Article 3 to the Geneva Conventions prohibits "[v]iolence to life and person, in particular . . . cruel treatment and torture" against a number of persons, including those taking no part in the

100. *Id.* ¶ 238.

101. See The Associated Press, Obama: U.S. Will Not Torture, MSNBC.com (Jan. 9, 2009), <http://www.msnbc.msn.com/id/28574408>; Leonard Doyle, *Obama Would 'Immediately Review' Torture Crimes*, THE INDEPENDENT, Apr. 16, 2008, available at http://blogs.independent.co.uk/the_campaign_trailers/2008/04/obama-would-imm.html.

102. Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1.

103. *U.S.: Vice President Endorses Torture*, HUMAN RIGHTS WATCH, Oct. 25, 2006, available at <http://www.hrw.org/en/news/2006/10/25/us-vice-president-endorses-torture>.

104. Geneva Convention III, *supra* note 12, at arts. 17, 87.

105. *Id.* at art. 13.

hostilities and members of armed forces who have been taken out of the theatre of war as a result of detention or any other cause.¹⁰⁶

The generally accepted definition of torture is that which is set forth in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention). According to this definition, torture is any

act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹⁰⁷

Under international law, torture is proscribed as a crime against humanity and a war crime.¹⁰⁸ Neither proscription follows the Torture Convention in requiring that the torture be carried out by public official, or with his acquiescence.¹⁰⁹

With respect to the prohibition against torture in the Third Geneva Convention, the initial argument of the Bush administration was not that the techniques used by U.S. interrogators were not torture but rather that the individuals supposedly subjected to these techniques were not protected by the Geneva Convention.¹¹⁰ A prisoner of war is defined as a member of armed forces or member of other militia or volunteer corps that fulfill a number of conditions: they are commanded by a person responsible for subordinates; they have a distinctive sign recognizable at a distance; they carry arms openly; and they conduct their operations in accordance with the laws and customs of war.¹¹¹ Because Taliban and al Qaeda fighters, and terrorists in general, do not wage war in accordance with the recognized laws and customs of war – e.g. they do not identify themselves or carry arms openly – the Bush administration deemed them “enemy combatants” – an undefined and distinct third category of individuals who were not entitled to the protections under the Geneva Conventions.¹¹²

In the alternative, the Bush administration also argued that the techniques used in the interrogation of detainees – water-boarding in particular – did not fall within the definition of torture; despite an extensive historical treatment of water-

106. *Id.* at art. 3(1)(a).

107. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention].

108. See Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 147 (Sept. 17, 2003).

109. Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 148 (June 12, 2002).

110. E.g., Lionel Beehner, *Background: Torture, the United States, and Laws of War*, COUNCIL ON FOREIGN RELATIONS, Nov. 11, 2005.

111. Geneva Convention III, *supra* note 12, at art. 4(2).

112. Beehner, *supra* note 110.

boarding directly contradicting this assertion.¹¹³ In a 2002 memo written by Jay Bybee, then-Assistant Attorney General for the Office of Legal Counsel to Alberto Gonzales, Counsel to the President, the administration redefined torture as

[p]hysical pain . . . equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture . . . it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.¹¹⁴

Under this definition, the administration argued that the pain caused by water-boarding did not rise to a level of intensity that would constitute torture. In a second memo – also authored by Bybee but that remains classified – a list of interrogation techniques were analyzed and approved – including water-boarding.¹¹⁵

Related to the issue of torture is the Bush administration's use of "extraordinary rendition" – the practice whereby detainees and suspected terrorists are transferred to other countries where they are usually detained indefinitely with a high possibility that they will be tortured.¹¹⁶ This practice violates Article 3 of the Torture Convention which prohibits the expulsion, return or extradition of an individual "to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."¹¹⁷

2. Unlawful Detainment

In addition to the crimes of torture and cruel, inhuman and degrading treatment perpetrated against detainees, the very circumstances under which many of these individuals have been detained – indefinitely and without due process – arguably violates the Geneva Conventions. Under the Third Geneva Convention, an individual falls into one of two legal classifications – combatants or civilians

113. The United States has historically treated water-boarding as torture. In 1901, Major Edwin Glenn was convicted for subjecting a suspected Philippine insurgent to the technique and in 1968 a U.S. army officer was court-martialed for his assistance in water-boarding a Vietnamese prisoner of war. The International Military Tribunal for the Far East found several Japanese soldiers guilty of war crimes for water-boarding U.S. prisoners. HUMAN RIGHTS WATCH, *supra* note 103.

114. Memorandum from the Office of the Assistant Attorney General to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *available at* http://www.washingtonpost.com/wp-srv/politics/documents/cheney/torture_memo_aug2002.pdf.

115. The approval of water-boarding in the memo was garnered from a publicly released CIA document. The full list remains classified. U.S. SENATE ARMED SERVICES COMM., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY xvi (Nov. 20, 2008), *available at* <http://graphics8.nytimes.com/packages/images/nytint/docs/report-by-the-senate-armed-services-committee-on-detainee-treatment/original.pdf>.

116. As a legal term, extraordinary rendition does not exist. The practice of rendition generally describes the practice of forcibly abducting individuals from a state unwilling to prosecute them in order to bring them to trial in a state willing to prosecute. The term "extraordinary rendition" has since evolved to reflect the extraordinary nature of the process "in the sense that it has bypassed all judicial processes." J. Troy Lavers, *Extraordinary Rendition and the Self-Defense Justification: Time to Face the Music*, 16 MICH. ST. J. INT'L L. 385, 386-87 (2007).

117. Torture Convention, *supra* note 107, at art. 3(1).

(non-combatants) – and each group is afforded protections based upon their classification. With respect to detainment, once captured, combatants become prisoners of war. The Convention authorizes a Party to detain prisoners of war until the cessation of active hostilities, at which point prisoners of war must be released and repatriated, without delay.¹¹⁸

If the detainee does not qualify under the Third Geneva Convention as a prisoner of war, the ICTY has held that the person qualifies as a civilian under the Fourth Geneva Convention. Under international law, there is no intermediate status.¹¹⁹ This is supported by The Commentary to the Fourth Geneva Convention which asserts that:

[e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that this is a satisfactory solution – not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.¹²⁰

Where there is doubt as to whether an individual meets the legal classification as a prisoner of war, the detainee's status must be determined by a competent tribunal and until this determination they are afforded the protections of the Convention.

B. Obama's Liability as Bush's Successor

On January 20, 2009, Barack Obama was sworn into office as the 45th president of the United States. Concurrently with the inauguration, the former president of Liberia Charles Taylor was on trial for war crimes and crimes against humanity, and the ICC had indicted the president of Sudan Omar al-Bashir. With sovereign immunity in retreat, President Obama assumed his role as Commander-in-Chief of the U.S. Armed Forces with its many military subordinates, many of whom also served under President Bush. Under successor liability, Obama would be liable for those subordinates' crimes – discussed above – if three elements are satisfied: a superior-subordinate relationship exists between Obama and the subordinates, Obama has an awareness of the subordinates' alleged criminal acts, and Obama subsequently fails to punish those subordinates.

118. Geneva Convention III, *supra* note 12, at art. 118.

119. Prosecutor v. Delalić, Mucić, Delić & Landžo, Case No. IT-96-21, Judgment, ¶ 271 (Nov. 16, 1998) (noting there “is no gap between the Third and the Fourth Geneva Conventions. If an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV, provided that its article 4 requirements are satisfied.”)

120. Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 4 cmt. ¶ 4, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

1. Existence of a Superior-Subordinate Relationship

The superior-subordinate relationship exists where a commander has effective control over the subordinates, which in turn is said to exist when the superior has the material ability to prevent subordinates from committing breaches or the material ability to punish them.¹²¹ The superior-subordinate relationship can occur in either *de jure* or *de facto* circumstances and it is also well-established that a civilian head of state who wields the requisite effective control over military subordinates qualifies as a requisite superior – subordinate relationship.¹²² For both types of commanders, the *ad hoc* tribunals have recognized a number of situations that would support a finding of effective control, including: *de jure* authority to issue binding orders; *de jure* or *de facto* authority to order disciplinary measures against subordinates and to detain alleged subordinates; *de jure* or *de facto* authority to remove subordinate commanders from duty; and where the accused commander held himself out as commander in title and behavior and the subordinate respected and acted in accordance with such a superior-subordinate relationship.¹²³ With respect to a civilian superior, a finding of effective control would be supported where the civilian exercised control in a military fashion or similar form.¹²⁴ Further, two or more superiors may be held responsible for the same crime perpetrated by the same individual if it is established that the principal offender was under the command of both superiors at the relevant time.¹²⁵

The constitution of the United States establishes the President's *de jure* command over the armed forces, providing that the President "shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several states."¹²⁶ The National Security Act of 1947 extended this authority over the Air Force.¹²⁷ The President's authority over all U.S. armed forces was consolidated even further with the Goldwater-Nichols Department of Defense Reorganization Act of 1986.¹²⁸ This act streamlined the military chain-of-command so that commanders of the armed forces responded directly to the President and the Secretary of Defense through the Joint Chiefs of Staff.¹²⁹ In addition, Title 10 of the United States Code provides the legal basis for the President's role as *de jure* commander in chief.¹³⁰

121. Prosecutor v. Delalić, Mucić, Delić & Landžo, Case No. IT-96-21, Judgment, ¶ 378 (Nov. 16, 1998).

122. See, e.g., Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-A, Judgment, ¶ 87 (May 23, 2005).

123. Boas et al., *supra* note 50, at 199.

124. Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-A, Judgment, ¶ 87 (May 23, 2005).

125. Prosecutor v. Krnojelac, Case No. IT-97-25, Judgment, ¶ 93 (Mar. 15, 2002).

126. U.S. CONST. art. II, § 2.

127. National Security Act of 1947, 50 U.S.C.S. § 401 (2008).

128. Goldwater-Nichols Department of Defense Reorganization Act of 1986, 10 U.S.C.S. § 111 (2008).

129. National Defense University Library, Goldwater Nichols Department of Defense Reorganization Act of 1986, <http://www.ndu.edu/library/goldnich/goldnich.html> (last visited Apr. 15, 2009).

130. See 10 U.S.C.S. § 111.

However, the *de jure* position is only the starting point of the analysis; actual authority is not decided by the existence of a formal position.¹³¹ Whether or not Obama is a superior must be determined based upon the reality of his authority.¹³²

This authority of U.S. Presidents over the military is not ceremonial. U.S. Presidents have traditionally exercised a direct, involved and public role as the Commander-in-Chief, deciding when and where to engage in armed conflict, setting budgets and policy, and generally signing off on all key issues regarding the war. As a matter of course, U.S. Presidents get daily intelligence briefings on military matters.¹³³ In the case of the Iraq war, President Bush met personally with General Tommy Ray Franks to plan the invasion of Iraq shortly after the September 11 attacks on the World Trade Towers¹³⁴ – General Franks was Commander of the United States Central Command, overseeing U.S. Armed Forces operations in a twenty five-country region including the Middle East – and Bush was integrally involved in the decision to invade Iraq.¹³⁵ Bush also personally made key tactical decisions that resulted in the implementation of the policies of torture and indefinite detention.¹³⁶

On January 20, 2009, all of the armed forces previously subordinated to Bush became subordinated to Obama. In his first two months, Obama was no less involved in exercising effective control over the armed forces than Bush had been. In fact, he was aggressive in implementing key military decisions, including a decision setting a date to withdraw combat forces from Iraq,¹³⁷ a decision to close the detention facility at Guantanamo Bay¹³⁸ and the decision to cease the use of the term of “enemy combatants.”¹³⁹

The clear leadership in the form of policy decisions and orders issued by both Presidents Bush and Obama to the armed forces, as well as the subordinate’s compliance with those orders, is a strong indication of a superior – subordinate relationship.¹⁴⁰ The key factor is the commander’s material ability to prevent or punish acts.¹⁴¹ Being able to implement quick decisions to conclude detention at

131. *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-T, Judgment, ¶ 418 (Feb. 26, 2001).

132. *See id.*

133. *See* Walter Pincus, *Under Bush, the Briefing Gets Briefer*, WASH. POST, May 24, 2002, at A33.

134. William Hamilton, *Bush Began to Plan War Three Months after 9/11*, WASH. POST, Apr. 17, 2004, at A01.

135. Sarah Baxter, *Powell Tried to Talk Bush out of War*, SUNDAY TIMES, July 8, 2007, available at http://www.timesonline.co.uk/tol/news/world/us_and_americas/article2042072.ece.

136. Interview by Brit Hume with President George W. Bush, President, United States (Jan. 11, 2009), available at <http://thinkprogress.org/2009/01/11/bush-authorized-torture>.

137. Peter Baker & Elisabeth Bumiller, *Obama Favoring Mid-2010 Pullout in Iraq, Aides Say*, N.Y. TIMES, Feb. 25, 2009, at A1.

138. Peter Finn, *Guantanamo Closure Called Obama Priority*, WASH. POST, Nov. 12, 2008, at A01.

139. *Obama to End Use of Term ‘Enemy Combatant’*, ASSOCIATED PRESS, Mar. 12, 2009.

140. *See* *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 397 (Feb. 22, 2001).

141. *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, ¶ 302 (Mar. 3, 2000).

Guantanamo is but one example of President Obama's material ability to prevent commissions and consequently evidence of his effective control.

President Obama cannot claim attenuation from the subordinates as a defense. Under international law, the superior-subordinate relationship is based upon the notion of control within a hierarchy, not necessary control based on the personal relationship.¹⁴² The hierarchy can be quite broad. The ICTY indicted President Slobodan Milošević of Serbia under a command responsibility for crimes committed by Bosnian-Serb forces – a different country's armed forces – committed in the neighboring country of Bosnian.¹⁴³ The ICC similarly indicted Omar al-Bashir for crimes committed by *janjaweed* militia forces. The operative fact is the commander's effective control over his subordinates reflected in his ability to exert control. In a professional military such as the U.S. armed forces, with clear hierarchies, with Obama sitting at the apex as Commander-in-Chief, his effective control over all of the impugned subordinates is clear.

Effective control is the key determination in command responsibility, but when that effective control exists is crucial to successor liability. Under the current law, it is necessary that the effective control existed at the time of the commission of the offenses. Under successor liability, effective control must exist when the knowledge of the offenses is obtained.

2. Knowledge

While some tribunals have considered the argument that command responsibility should be a strict liability offense,¹⁴⁴ such a reading has been rejected and, in order for a superior to incur liability for the crimes committed by a subordinate, he must have known about the crimes.¹⁴⁵

Two types of knowledge are recognized in this context: actual and constructive. Actual knowledge is, as its name suggests, actual knowledge – established through either direct or circumstantial evidence – the superior has of the crimes committed by the subordinate or actual knowledge of the crimes that the subordinate plans to commit. Actual knowledge may also be inferred through circumstantial evidence, for example, by a commander's superior position and the existence of an organized military structure with established and functioning reporting systems.¹⁴⁶ The *Blaskic* Appeals Chamber considered the superior's physical proximity to the subordinate when the latter committed the crimes.¹⁴⁷

Constructive knowledge, on the other hand, applies to situations where a superior does not have actual knowledge but knowledge should nevertheless be

142. Prosecutor v. Delalić, Mucić, Delić & Landžo Case No. IT-96-21-A, Judgment, ¶ 248-54 (Feb. 20, 2001).

143. Prosecutor v. Milošević, Case No. IT-01-51-I, Initial Indictment "Bosnia and Herzegovina," Indictment, ¶ 27-31 (Nov. 22, 2001).

144. See, e.g., Prosecutor v. Delalić, Mucić, Delić & Landžo, Case No. IT-96-21, Judgment, ¶ 353 (Nov. 16, 1998).

145. Prosecutor v. Blagojević & Jokić, Case No. IT-02-60, Judgment, ¶ 686 (Jan. 17, 2005).

146. Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47, Judgment, ¶ 94 (Mar. 15, 2006).

147. See *id.*

imputed to the superior because the circumstances of the situation are such that the superior should have known. Knowledge may be imputed where the superior turns a blind eye to the crimes that were about to be, or had been, committed or where the superior's negligence in performing his duties precluded him from learning of the crimes.¹⁴⁸

Knowledge may also be imputed where information was available that the crimes were either about to be committed or had been committed, and that the information was sufficiently available and credible so that the superior was put on notice of the need for further investigation.¹⁴⁹ A number of cases have cited the following factors as examples of the type of information that is sufficient to trigger a duty to investigate: reports addressed to the commander that draw his attention to 1) the behavior of the subordinates alleged to have committed the crimes; 2) the tactical situation; 3) the level and training and instruction of the subordinates; and 4) known character and behavioral traits of the subordinates.¹⁵⁰

In the case of Obama, his knowledge of offenses potentially committed by the Bush administration is irrefutable. The Bush policies, discussed *supra*, were public, front-page news and widely-debated. Knowledge would certainly be imputed to a presidential candidate presumed to have been briefed on relevant campaign issues. Regardless, in this instance Obama made the aforementioned crimes key issues in his campaign platform, clearly establishing his actual knowledge. In numerous Senate and presidential campaign statements, Obama publically challenged, in detail, the Bush administration on its military policies including torture and indefinite detention.¹⁵¹ In one example, Obama reacted to newspaper stories about the Bush administration's authorization of brutal interrogation techniques by issuing the following statement:

The secret authorization of brutal interrogations is an outrageous betrayal of our core values, and a grave danger to our security. We must do whatever it takes to track down and capture or kill terrorists, but torture is not a part of the answer – it is a fundamental part of the problem with this administration's approach. Torture is how you create enemies, not how you defeat them. Torture is how you get bad information, not good intelligence. Torture is how you set back America's standing in the world, not how you strengthen it. It's time to tell the world that America rejects torture without exception or equivocation. It's time to stop telling the American people one thing in public while doing something else in the shadows. No more secret authorization of methods like simulated drowning. When I am president America will once again be the country that stands up to these

148. Prosecutor v. Blaškić, Case No. IT-95-14, Judgment, ¶ 332 (Mar. 3, 2000).

149. Prosecutor v. Delalić, Mucić, Delić & Landžo, Case No. IT-96-21-A, Judgment, ¶ 383 (Nov. 16, 1998).

150. Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47-T, Judgment, ¶ 99 (Mar. 15, 2006).

151. Senator Barack Obama, Statement on the Military Commissions Legislation (Sept. 28, 2006), available at <http://obamaspeeches.com/092-Military-Commission-Legislation-Obama-Speech.htm>.

deplorable tactics. When I am president we won't work in secret to avoid honoring our laws and Constitution, we will be straight with the American people and true to our values.¹⁵²

In another official statement, Obama decried the "low road" taken by the Bush administration, mentioning the Abu Ghraib and Guantanamo detention facilities as deviations from international norms:

This brings me to the fourth step in my strategy: I will make clear that the days of compromising our values are over.

...

When I am President, America will reject torture without exception. America is the country that stood against that kind of behavior, and we will do so again.

I also will reject a legal framework that does not work . . . As President, I will close Guantanamo, reject the Military Commissions Act, and adhere to the Geneva Conventions. Our Constitution and our Uniform Code of Military Justice provide a framework for dealing with the terrorists.¹⁵³

Again, the key consideration here is not whether President Obama has knowledge that crimes were potentially committed in the Bush regime, but that he has information that *his current* subordinates have committed crimes. It is the latter information that invokes his responsibility to punish as their superior. And while many of the high-level operatives in the Bush administration responsible for drafting and implementing the policies of torture and detention did not carry over into Obama's administration, many lower-level subordinates did.¹⁵⁴ And given the extent of the crimes across several agencies, involving hundreds if not thousands of personnel, committed in several regions of the world, Obama would have reason to know that some of these subordinates remain in the military.

3. Failure to Punish

The third and final element of the successor liability analysis is the failure to punish subordinates, a two-prong analysis centering on whether a commander took those measures "necessary and reasonable" to punish crimes. Successor liability, therefore, would dictate that President Obama take all necessary and reasonable measures to punish his current subordinates who he knows, or has information that suggests, may have committed crimes.

152. Obama News and Speeches, *Torture and Secrecy Betray Core American Values*, http://www.barackobama.com/2007/10/04/obama_torture_and_secrecy_betr.php.

153. Senator Barack Obama, Speech at the Woodrow Wilson International Center (Aug. 1, 2007) (transcript available through the Council on Foreign Relations).

154. The most interesting subordinate may be Secretary of Defense Robert Gates who continued in that position after having succeeded Secretary Donald Rumsfeld in the same position in the Bush Administration. See Peter Banker & Thom Shanker, *Obama Planning to Retain Gates as Defense Chief*, N.Y. TIMES, Nov. 26, 2008, at A23.

A commander's duty to prevent is triggered when he either learns of the subordinate's plans to commit the crimes or when he has reason to know, based on information available to him. Similarly, the duty to punish arises when the commander learns – after the fact – that the crimes had been committed by the subordinate or when he has reason to know of their commission.

With respect to whether the punishment is sufficient to satisfy the duty, a commander must take “necessary and reasonable” measures to prevent or punish.¹⁵⁵ “Necessary” has been defined as those measures required to discharge the obligation to punish in the circumstances prevailing at the time¹⁵⁶ and those measures which the commander was in a position to take in the circumstances.¹⁵⁷ What constitutes a reasonable measure depends on the relationship between the superior and the subordinate.¹⁵⁸ Thus, in the theatre of war, a battlefield commander who is a direct superior to a soldier (such as Hadžihasanović) would have different obligations than one farther up the command chain, residing far from any theatre of conflict, and having a very indirect relationship with most subordinates. One consideration regarding reasonable measures is effective control:

[I]t is a commander's degree of effective control, his material ability, which will guide the Trial Chamber in determining whether he reasonably took the measures required either to prevent the crime or to punish the perpetrator . . . [T]his implies that, under some circumstances, a commander may discharge his obligation to prevent or punish by reporting the matter to the competent authorities.¹⁵⁹

Thus, unlike a heat of battle situation where a commander may be the person obligated to dispense immediate punishment, in other circumstances the obligation could be discharged simply by referring the matter to competent authorities for investigation.¹⁶⁰ A commander is not obligated to perform the impossible, but they must use every means in their power.¹⁶¹ What is clear is that whatever steps are taken, a commander needs to be an important step in the disciplinary process.¹⁶²

What constitutes a reasonable measure depends on the relationship between the superior and subordinate. While a battlefield commander may have limited disciplinary options, President Obama has few restrictions in this regard. He sets the policy, budgets and strategy for the armed forces.¹⁶³ He has ample resources at

155. *Prosecutor v. Delalić, Mucić, Delić & Landžo*, Case No. IT-96-21, Judgment, ¶ 346(iii) (Nov. 16, 1998).

156. *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgment, ¶ 47 (June 7, 2001).

157. *Id.*

158. *See Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-T, Judgment, ¶ 441-45 (Feb. 26, 2001).

159. *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, ¶ 335 (Mar. 3, 2000).

160. *See Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Judgment, ¶ 316 (Nov. 2, 2001).

161. *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, ¶ 95 (Mar. 15, 2002).

162. *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Judgment, ¶ 316 (Nov. 2, 2001).

163. *See* 10 U.S.C.S. at §111(a).

his disposal.¹⁶⁴ He meets regularly with his Secretary of Defense, Joint Chiefs of Staff and other high-ranking military leaders who could and would give effect to his orders regarding discipline. And he has a high degree of effective control over the military and all those who are subordinated to him. Among these options, President Obama has the power to create independent commissions or he can refer the matter to his Secretary of Defense for investigation by the Judge Advocates General Corp or to his Attorney General for investigation by the Department of Justice. Therefore, while Obama is only obligated to do what is feasible, there are virtually no measures outside his logistical realm of feasibility.

On the other hand, President Obama's obligations could arguably be limited by the "necessary" prong, a subjective assessment. Many view an investigation as necessary. The call for a truth commission – i.e. an investigation – into the use of torture and other abuses of power by the Bush administration is the subject of a growing national debate.¹⁶⁵ Others argue that the United States military is competent to conduct its own internal investigations.¹⁶⁶ However, President Obama is obligated to make his determination not on political considerations alone, but also on his treaty obligation under the Geneva Conventions and the Additional Protocols of 1977.¹⁶⁷

To discharge these obligations, President Obama is required to act and this action needs to be an "important step."¹⁶⁸ Obama could arguably discharge his duty within the minimal act of referring the matter in good faith to the relevant authorities directing that any criminal acts be investigated.¹⁶⁹ But in the initial days of his administration, the clamor for Obama to take action was loud and strong.¹⁷⁰ On one occasion soon after taking office, the issue of investigating crimes was put directly to President Obama: "Will you appoint a Special Prosecutor (ideally Patrick Fitzgerald) to independently investigate the gravest crimes of the Bush Administration, including torture . . . ?"¹⁷¹ Obama responded that, "My view is also that nobody is above the law, and if there are clear instances of wrongdoing, that people should be prosecuted just like any ordinary citizen; but

164. See Thom Shanker, *Proposed Military Spending is Highest Since WWII*, N.Y. TIMES, February 4, 2008.

165. See Nicholas D. Kristof, *The Truth Commission*, N.Y. TIMES, July 6, 2008, at 12.

166. See *inter alia*, Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004.

167. Under Article VI of the U.S. Constitution "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." Because of the U.S. has signed and ratified the Geneva Conventions, the U.S. is bound by their provisions. U.S. CONST. art. VI, § 2.

168. See *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Judgment, ¶ 316 (Nov. 2, 2001).

169. However, given the fact that Bush administration military policies emanated from Bush himself in consultation with his key advisers, it may be that a referral to the military to investigate may present a conflict of interest particularly since Minister Gates could himself be scrutinized as a commander with command responsibility liability. In that view, the situation may require a referral to an impartial investigation body outside of the entity to be scrutinized.

170. See Glenn Greenwald, *The Effects of Obama's Refusal to Investigate Bush Crimes*, Salon.com (Jan. 20, 2007), <http://www.salon.com/opinion/greenwald/2009/01/20/turley/index.html>.

171. Scott Horton, *Investigating Bush's Crimes*, THE NATION, Mar. 9, 2009, available at <http://www.thenation.com/doc/20090309/horton>.

that generally speaking, I'm more interested in looking forward than I am in looking backwards."¹⁷²

Appointing a Special Prosecutor would almost certainly qualify as a reasonable and necessary measure thus discharging his successor liability duty to punish. But the "looking forward" phrase has been a familiar Obama refrain, and some commentators have taken this to mean that accountability is not part of Obama's agenda, or it is at least not a priority given the economic crisis with which he is confronted.¹⁷³ Time will tell whether the "looking forward" policy is an indication of Obama's unwillingness to address the crimes, or it is simply a public relations tactic that doesn't reflect actual, behind-the-scenes policy. Ultimately, his actions – not just his words – would be measured against the reasonable and necessary standard. And the vagueness of this guideline makes it difficult to assess when he would be reasonably expected to act given his other pressing demands. What is clear is that to discharge the duty, successor liability would dictate that Obama, at some point, take an important step in the disciplinary process; at a minimum delegating the matter to competent authorities. This would be true even if that step occurred several years hence.

Obama would involve the novel circumstance of examining the duty to punish *contemporaneously* with that duty. The *Hadžihasanović* case litigated the issue nearly ten years after the fact. Perhaps the failure to punish can ultimately only be fully assessed in a retroactive examination. But the polemic raises an important policy debate about the whether human rights and humanitarian law schemes benefit from the pressure successor liability would apply to Obama and other successor regimes to look backward.

IV. POLICY ARGUMENTS IN FAVOR OF SUCCESSOR LIABILITY

A. Successor liability serves the goal of ending impunity

After the atrocities committed during World War II, the international community set out to develop international legal obligations, designed to ensure the world would never see such horrors repeated. The victors of World War II brought German and Japanese war criminals to justice, building important jurisprudence in international criminal law, the Fourth Geneva Convention was drafted to protect civilians in times of armed conflict, the Convention on the Prevention and Punishment of the Crime of Genocide was developed and the Torture Convention was enacted.¹⁷⁴ Each development represented an important step forward in the international community's resolve to prevent and punish international crimes. Despite these advances, however, there was a disconnect in the development of international legal obligations and the willingness of the international community to enforce them. In the decades that followed the judgments of the Tokyo and Nuremberg Tribunals, very few of the legal

172. *Id.*

173. *See id.*

174. *See* Mark S. Ellis, *Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability: The Role of International War Crimes Tribunals*, 2 J. NAT'L SECURITY L. & POL'Y 111, 114-15 (2006).

obligations that the international community zealously crafted were enforced. The absence of enforcement was not due to an absence of crimes warranting punishment, but rather the international community had fallen into a culture of impunity, in which war crimes, genocide, torture, and grave breaches of the Geneva Convention went unpunished.¹⁷⁵

The longest civil war in the region's history began in 1960 in Guatemala after a military revolt that led to a long-standing conflict between the government and the Guatemalan National Revolutionary Unity; an organization composed of a number of leftist guerrilla groups.¹⁷⁶ It is estimated that approximately 200,000 people were killed or disappeared between 1960 and the conflict's end in 1996.¹⁷⁷ A Commission was established to document the human rights violations and war crimes committed during the conflict; however, of the more than 600 massacres identified by the Commission, the perpetrators of all but one have yet to be held accountable.¹⁷⁸

Shortly after the Guatemalan civil war broke out in the mid-1960s, Colombia became embroiled in a long-standing armed conflict between the government United Self-Defense Forces of Colombia (AUC) and the Revolutionary Armed Forces of Colombia (FARC) guerrilla group, later becoming the National Liberation Army (ELN). The conflict lasted for almost half a century (there is debate whether it is even over), during which time both the government and guerrilla organizations committed massive atrocities against civilian populations.¹⁷⁹ These atrocities went largely unpunished and the 2005 Justice and Peace Law essentially guaranteed crimes committed by government forces will continue to go unpunished.¹⁸⁰

On the other side of the world from the conflicts raging in the Americas, the Khmer Rouge regime in Cambodia killed one-third of the Cambodian population – approximately two million people – between 1975 and 1979.¹⁸¹ Rather than prosecute those in the regime responsible for genocide, war crimes and crimes against humanity, many were granted amnesty by the Cambodian government and attempts to bring these individuals to justice were repeatedly thwarted.¹⁸²

Numerous other examples exist of this culture of impunity that stunted the enforcement of international humanitarian and criminal law; however, in the last few decades there has been a noticeable shift away from this attitude. Such a shift is evident in the increasing number of international tribunals charged with holding accountable those charged with serious crimes in addition to the increasingly

175. See generally *id.* (detailing the experiences in East Timor, Cambodia, Colombia, Guatemala, Liberia, and Afghanistan).

176. *Id.* at 133-34.

177. *Id.*

178. *Id.* at 134-36.

179. See *id.* at 129, 130-32.

180. See *id.* at 129-31.

181. *Id.* at 125.

182. *Id.* at 126-28.

willingness of governments, such as the Cambodian government, to bring perpetrators of crimes to justice; after decades of delay.

Therefore, after decades of impunity, governments individually – and the international community as a whole – have begun to finally implement the goals of the Geneva Conventions and the other international agreements designed to ensure enforcement; if not prevention as well. To this end, command responsibility is an important tool in ending the attitude of impunity; the importance of which is evidence in the codification of the theory and development of command liability jurisprudence in the tribunals. Given the overarching purpose of the Geneva Conventions, requiring Parties to “undertake to respect and to ensure respect for the present Convention *in all circumstances*,”¹⁸³ successor liability is arguably an equally important component in ending impunity. As one commentator offered:

Clearly there is an ethical imperative [to intervene to prevent war crimes], and it is recognized by many commentators, both military and legal. That principle supports enforcement of successor commanders’ duty to punish; the international humanitarian law community should therefore take steps to close the current loophole through which individuals who should be held responsible can now escape that enforcement.¹⁸⁴

The absence of successor liability creates a gap that allows “wrongdoers to escape reproach by the immediate superiors whenever the person in charge at the time of the misconduct has been replaced by someone else.”¹⁸⁵ Commentators (and Judge Shahabuddeen in the *Hadžihasanović* dissent) argue that by rejecting successor liability, a successor commander is able to evade responsibility – an outcome tantamount to condoning or concealing the crimes.¹⁸⁶

Some commentators fear that the *Hadžihasanović* successor “gap” could prove to be massive. The *Hadžihasanović* majority inferred that the Article 87 past tense language “have committed” was not customary law.¹⁸⁷ By logical extension, that would mean that command responsibility did not impose a duty to punish crimes that “had been committed” even by the commander who had command at the time of commission.¹⁸⁸ In other words, should that interpretation prevail a commander may be under no duty to punish acts of subordinates that were previously committed.¹⁸⁹

183. Geneva Convention III, *supra* note 12, at art. 1.

184. Carol T. Fox, Closing a Loophole in Accountability for War Crimes: Successor Commanders’ Duty to Punish Known Past Offenses, 55 CASE W. RES. 443, 500 (2004).

185. Boas et al., *supra* note 50, at 235.

186. See Fox, *supra* note 184, at 457-59.

187. See Prosecutor v. Hadžihasanović, Alagić & Kubura, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 44-47 (July 16, 2003).

188. Boas et al., *supra* note 50, at 236-37.

189. *Id.*

B. Successor liability reflects the nature of combat

There are a number of circumstances unique to situations of war and military structure that make a shift from command responsibility to successor liability a rational step. First, given the inherently chaotic nature of warfare, there is no guarantee that one's commander at the beginning of a conflict will be his commander in the middle or at the end of the conflict. Commanders can be killed or reassigned – after which the dynamics of the superior-subordinate relationship and the previous commander's ability to prevent or punish have been altered. Furthermore, unique to the U.S. military structure is a civilian commander whose authority is inherently limited and expires within four to eight years after assuming the position. It is characteristic with the U.S. system that when the Presidency changes, so too do the political appointments in the administration, including military commanders. Because command changes repeatedly in times of war, there would be a serious gap in the system of protection if command responsibility only applied to the person in command at the time at which the offence was committed.¹⁹⁰ Judge Schomburg in his dissent echoes this, stating that “given the rapid succession of military commanders in armed conflicts, the result of such an interpretation would be to grant impunity to those who committed war crimes under a predecessor.”¹⁹¹ Commentators further point out that it is often difficult to discipline contemporaneously in the theatre of war, so more often than not a successor commander will be in place when an investigation is possible.¹⁹²

C. Successor liability would have a positive effect on sovereignty

A benefit of successor liability is to encourage a policy and practice that promotes domestic accountability and militates against the imposition of international jurisdiction. As set forth above, historically there has been little incentive for successor regimes to look backward. They risk incurring the wrath within tenuous political coalitions and weakening their own constituencies. The political capital expended by initiating legitimate punitive processes may be considered to be too costly for little domestic return. And many of the political operatives in a former regime remain in politics and continue to wield substantial influence.

With the advent of the ICC, however, that paradigm may change. The ICC has jurisdiction over war crimes, genocide and crimes against humanity¹⁹³ for acts occurring on or after July, 2002, committed by nationals from state parties or occurring in their territory.¹⁹⁴ It was conceived to assert itself where states are

190. See *Prosecutor v. Hadžihasanović, Alagić & Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 14 (July 16, 2003) (Shahabuddeen, J., dissenting) (partial dissenting opinion).

191. *Prosecutor v. Orić*, Case No. IT-03-68A, Judgment, ¶17 (July 3, 2008) (Schomburg, J., dissenting) (separate and partially dissenting opinion).

192. Fox, *supra* note 184, at 457.

193. Rome Statute, *supra* note 87, at art. 5.

194. *Id.* at art. 12.

unwilling or unable to proceed with their own domestic proceedings. However, per the Rome Statute the ICC must yield its jurisdiction to states who conduct their own investigations and/or prosecutions. This principle, known as complementarity, is set forth in Article 17 which provides that a case is inadmissible before the ICC where

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3.¹⁹⁵

Sub-paragraphs (a) and (b) both recognize the primacy of local, legitimate state investigations. Sub-paragraph (c) codifies the doctrine of double-jeopardy. Complementarity aims to spur domestic justice¹⁹⁶ and recognizes the integrity of sovereignty. However, in a more practical sense, complementarity was a political compromise during the Rome Treaty convention sought and obtained by state parties who were concerned about undue encroachment of the sovereignty from an overly-aggressive ICC.¹⁹⁷ This concern is a persistent criticism by opponents of the ICC.¹⁹⁸

The concern about sovereignty, raised in particular by opponents of the ICC, whether warranted or not, is bound to be amplified by the recent trend of the use of universal jurisdiction. Increasingly, domestic courts pursue criminal charges against perpetrators of crimes occurring in foreign territories under the principal.¹⁹⁹ Belgium, France, and Spain have all actively pursued criminal prosecutions based on universal jurisdiction.²⁰⁰ In these venues as well a customary law version of complementarity is emerging. In 2003, a case against President Alberto Fujimori and other high-ranking Peruvian officials was initiated in the Spanish Supreme

195. *Id.* at art. 17(1).

196. Dickinson, Laura, *Complementarity in Practice: Interactions Among Domestic, International, and Transnational Human Rights Prosecutions*, Paper presented at the annual meeting of the The Law and Society Association, Renaissance Hotel, Chicago, Illinois, May 27, 2004, http://www.allacademic.com/meta/p117112_index.html

197. See Federica Gioia, *State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principles of Complementarity in the International Criminal Court*, 19 LEIDEN J. INT'L L. 1095, 1101 (2006).

198. See Henry Kissinger, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, FOREIGN AFFAIRS, July/August 2001.

199. Kenneth Roth, *The Case for Universal Jurisdiction*, FOREIGN AFFAIRS, Sept./Oct. 2001.

200. See, e.g., Naomi Roht-Arriaza, *Universal Jurisdiction: Steps Forward, Steps Back*, 17 LEIDEN J. INT'L L. 375, 375-76 (2004). In December 1999, Rigoberta Menchu Tum and others initiated a criminal case in Spain as *parties civiles* against Guatemalan government officials including Efraim Rios Montt. *Id.* at 378.

Court under universal jurisdiction.²⁰¹ The Supreme Court, however, invoked a version of complementarity, termed the “effective jurisdiction test” in rejecting the case on jurisdictional grounds.²⁰² Under this test, Spain would defer to the domestic court if the matter is the subject of kind domestic prosecution.²⁰³ The issue is currently relevant; a Spanish Court initiated proceedings against six former high-level Bush administration officials for implementing the policy of torture.²⁰⁴ Under the Fujimori effective jurisdiction test, if the U.S. initiated an investigation against these officials, Spain would defer to those proceedings.

To be sure, universal jurisdiction – not to mention the customary law version of complementarity – is in its infancy and remains a fluid concept. But it remains nonetheless an issue that administrations like the Obama administration must grapple with. Successor liability, by applying pressure on successor regimes to look backward and initiate legitimate investigations, serves a useful role in controlling jurisdiction domestically through complementarity.

D. Successor liability would promote fact-finding

The current scheme of international law is designed to have the international tribunals and the ICC prosecute perpetrators only at the highest levels of culpability. At the first two modern tribunals, the ICTY and ICTR, this was given an expansive interpretation. The ICTY indicted nearly 165 suspects in its fifteen years,²⁰⁵ and the ICTR nearly eighty.²⁰⁶ This tribunal model, indicting a range of suspects including high-, mid- and even low-level accused, proved to be costly and slow, and it opened the tribunals up to criticism.²⁰⁷ As a result, the subsequent trend has been to limit the scope of indictees at the international tribunals to a handful of high-level targets. Accordingly, the SCSL indicted only thirteen suspects and the ECCC only five.²⁰⁸ The ICC to date has been even more

201. BETH VAN SCHAAK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS 131 (2007).

202. *Id.*

203. *Id.*

204. The complaint names former Attorney General Alberto Gonzalez, Justice Department lawyer John C. Yoo, William J. Haynes II, former general counsel for the Department of Defense, Jay S. Bybee – Mr. Yoo’s former boss at the Justice Department’s Office of Legal Counsel – and David S. Addington, who was the chief of staff and legal adviser to Vice President Dick Cheney. Marlise Simons, *Spanish Court Weighs Criminal Inquiry on Torture for 6 Bush-Era Officials*, N.Y. TIMES, March 28, 2009, at A6.

205. See U.N. ICTY Key Figures of ICTY Cases, <http://www.icty.org/sections/TheCases/KeyFigures> (last visited Apr. 23, 2009).

206. See U.N. ICTR Detainees – Status on 22 April 2009, <http://69.94.11.53/default.htm> (last visited Apr. 23, 2009).

207. See Virginia Law, *Wald Sees International Tribunals Evolving Toward “Hybrid” Courts* (Apr. 15, 2005), http://www.law.virginia.edu/html/news/2005_spr/wald.htm (reporting Wald as having stated that “[t]he hybrid court is the likely wave of the future ... ‘We’ll not ever see another court modeled after the ICTY and ITCR. They’ve proven just too expensive, slow and bureaucratic.’” The two courts together cost \$250 million annually and have more than 2,000 employees.”) (last visited Apr. 23, 2009).

208. Although there was an internal dispute within the Office of the Co-Prosecutors about whether to indict six additional suspects. See Seth Mydans, *Efforts to Limit Khmer Rouge Trials Decried*, N.Y. TIMES, Jan 31, 2009, at A8.

selective, indicting only three suspects in their Sudan (Darfur) case, four suspects in the Congo case, five in the Uganda case, and one suspect in their Central African Republic case.²⁰⁹

Under this trend, the tribunals leave prosecutions of all of the other suspects in these cases, often numbering in the hundreds, to domestic systems (or other domestic jurisdictions exercising universal jurisdiction). Those systems are better equipped to investigate low-level indictees, but there are practical impediments to mid-level targets.

By way of example, during the Viet Nam conflict the U.S. Army 1st Battalion committed the now infamous My Lai massacre on March 16, 1968.²¹⁰ The army disciplined two persons but both were of a low military rank (captain) despite evidence that orders came from higher up.²¹¹ There was also evidence that suggested a subsequent cover-up of the incident had occurred at much higher levels.²¹² In the Iraq war prison-abuse scandal at Abu Ghraib, the U.S. Army court-martialed only one person, Lieutenant Colonel Steven Jordon, for a failure to supervise subordinates and for his role in a subsequent cover-up.²¹³ His lone conviction – based only on the cover-up – was overturned by the commander of the Military District of Washington.²¹⁴

These cases illustrate that in practice, politics and power in the military and political hierarchies often are inclined to punish comparatively low-level perpetrators. Thus, there tends to be a gap between international tribunals and domestic prosecutions. Kabura, for example, was first a Deputy Commander and the Brigade Chief of Staff.²¹⁵ His stature might well fall outside the scope of a new tribunal as being not serious enough, and the connections of his rank may also protect him from domestic accountability.

Successor liability applies pressure for every commander in the chain of command to take legitimate measures to insure that every participant in criminal acts is brought to justice. Moreover, to the extent that prosecutions have an important fact-finding function, and successor liability facilitates prosecutions of middle commanders, successor liability promotes a more comprehensive and complete factual inquiry. The middle commanders often possess key information about who plans and issues orders at the highest levels. Successor liability would

209. International Criminal Court, <http://www.icc-cpi.int/Menus/ICC?lan=en-GB>.

210. Public Broadcasting Service, Vietnam Online: The My Lai Massacre, http://www.pbs.org/wgbh/amex/vietnam/trenches/my_lai.html (last visited Apr. 23, 2009).

211. See *My Lai: A Question of Orders*, TIME MAGAZINE, Jan 25, 1971, available at <http://www.time.com/time/magazine/article/0,9171,904643-1,00.html> (last visited Apr. 23, 2009).

212. University of Missouri at Kansas City, General William R. Peers Report on the My Lai Incident: A Summary, http://www.law.umkc.edu/faculty/projects/ftrials/mylai/summary_rpt.html (last visited Apr. 23, 2009).

213. Ben Nuckols, *Military Prosecution in Abu Ghraib Scandal Ends*, BOSTON GLOBE, Jan 11, 2008.

214. *Id.*

215. See *Prosecutor v. Hadžihasanović, Alagić & Kubura*, Case No. IT-01-47-PT, Amended Indictment, ¶ 2-6 (Jan. 11, 2002).

help to flush out information holders in order to piece together often complicated theories of liability both during the criminal acts and in subsequent cover-ups.

V. POLICY ARGUMENTS AGAINST SUCCESSOR LIABILITY

A. The attribution of the subordinates' crimes to the successor, rather than a dereliction of duty offense, is a disproportionate result in the case of successors who did share in the predecessor policies

If a court or tribunal prosecuted Obama criminally under successor liability, the indictment would indicate he was charged with the underlying subordinates' crimes, under the theory of criminal responsibility. For example, a hypothetical indictment would charge Obama with responsibility for torture as a crime against humanity, for the act of a military subordinate committed during the Bush administration that continued to serve in the Obama administration. It may be little solace to either Obama (and his supporters) or international criminal law that the charge of torture is misleading in that Obama in actuality is only responsible for his failure to carry out his duty as a superior to the torturer, not torture itself.²¹⁶

The problem illustrated in this example is the incongruity of the optics of the law. Superior commander convictions at the tribunals do appear as though the commander is convicted of the subordinates' crimes.²¹⁷ It is a subtle distinction that may placate academics but few others. For Obama to be charged with alleged Bush administration torture crimes would be unpalatable and would probably do more harm than good. Successor liability applied to Gordon Brown would no doubt occasion similar reactions. Of course, prosecutorial discretion could operate to preclude instances of injustice that the valid application of laws may sometimes produce. But successor liability does have the potential to produce this unpleasant and arguably unjust result. As was said by the United States Military Commission in *Yamashita*, "[i]t is absurd to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape."²¹⁸ But the Obama hypothetical demonstrates that this absurdity would appear to have occurred.

B. Successor liability would have a chilling effect on the U.S. military's ability to change commanders

If a high-level commander learned that a subordinate battalion had been committing crimes, he not only has a duty to punish but to prevent future crimes. One option available to that commander would be to replace the immediate officer-in-charge of the units committing the crimes. So, a four-star general upon learning that crimes against humanity had been committed in the theatre of war by a particular battalion, may issue an order detaining the battalion commander, typically a lieutenant colonel, for investigation along with an order replacing him with a new lieutenant colonel. The impugned lieutenant colonel may inherit three captains subordinated to him and the military hierarchies beneath those captains.

216. Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 171 (Sept. 17, 2003).

217. Prosecutor v. Orić, Case No. IT-03-68A, Judgment, ¶ 25 (July 3, 2008) (Shahabuddeen, J., declaration).

218. *Id.* ¶ 22.

Successor liability would mandate that the new lieutenant colonel, once he learns of the criminal allegations previously committed by his predecessor and subordinates, would have the duty to investigate and punish the offenders lest he be held responsible himself. This creates a difficult scenario for a new commander particularly in difficult command situations such as the theatre of war where the esprit de corps would already be at issue.

Successor liability, in such situations, may induce a nominated replacement commander to decline the command to avoid the liability inherent in the situation. In the case of a renegade unit, the inability of high-level command to quickly emplace new commanders to restore order and lawfulness could arguably facilitate the continuation of criminality.

VI. CONCLUSION

The *Hadžihasanović* and *Oric* decisions right now operate to keep successor liability at bay. But those decisions rest on shaky ground and coupled with the growing number of venues that are litigating superior responsibility, successor liability could be revisited.

The call on President Obama to appoint a special prosecutor to investigate alleged crimes committed during the Bush presidency, and the myriad pressures incumbent on him not to heed those calls, spotlights the relevance of successor liability.

Successor liability can lead to uncomfortable and perhaps damaging results in the case of a superior who opposed the criminal behavior of his predecessor. What if President Obama was held legally responsible for the policy of torture effectuated by the Bush administration that he opposed? What if Nelson Mandela had been charged with crimes of apartheid for failing to punish known offenders? One can scarcely imagine the fallout from that.

But at the same time, history is replete with examples of mass crimes going unpunished because there is no interest in the successor regimes dredging up the past or because immunity has been implicitly or explicitly traded for political gain. Moreover, there has been no mechanism by which political outsiders could bring pressure to bear on the powerful.

In the end, the international community must wrestle with whether pressuring successor regimes to address the crimes committed by their predecessors is a fundamentally fair trade-off for ending impunity.

