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Unravelling the confusion concerning successor superior responsibility in the ICTY jurisprudence / Barrie Sander

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