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Superior Responsibility and the Principle of Legality at the ECCC

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Table of Contents

Abstract

This paper examines two recent decisions of the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) in the broader context of whether it is fair to impute criminal liability on Khmer Rouge leaders for acts committed between 1975-79. Since international criminal law was not as fully developed in the 1970s, some accused leaders argue that the principle of legality ("nullem crimen sine lege") bars many of the charges brought against them. In particular, they have argued that superior responsibility – a mode of liability that holds superiors responsible for the criminal acts of their subordinates – had not crystallized into a norm of customary international law by the 1970s.

The Pre-Trial Chamber in two early-2011 rulings dismissed the defendants' arguments and held that international law from 1975-79 recognized superior responsibility as a mode of criminal liability in a form sufficiently developed and accessible to the accused so as to satisfy the principle of legality. However, these decisions, though correctly decided, are based on a flimsy legal foundation. The Pre-Trial Chamber relied on the jurisprudence of the post-World War II tribunals, which is notorious for its lack of clarity. These tribunals have also been plagued by allegations of "victor's justice", as they found German and Japanese commanders guilty of capacious, poorly defined crimes that were arguably created after the end of the war.

For these reasons, this paper argues that the Chamber should have instead based its decisions on Additional Protocol I to the Geneva Conventions of 1949 (1977), which more clearly defines superior responsibility and reflects broad consensus on the state of international law in the 1970s. Moreover, Additional Protocol I commenced an evolution in the law of superior responsibility – that has continued through the U.N. ad hoc tribunals and the ICC Rome Statute – towards greater protection of defendants from the sort of arbitrary justice imputed to the post-WWII cases. Counterintuitively, relying on more recent statements of the law of superior responsibility would not only comply with the principle of legality, but would benefit the accused. Going forward, this approach would bolster the Court's legal stature and reputation for reasoned, impartial decision-making in light of persistent allegations of bias and corruption.

Introduction

A. Background

The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established to hold criminally responsible senior leaders of Democratic Kampuchea ("Khmer Rouge") and those most responsible for the most serious violations of Cambodian penal law and international law from April 1975 to January 1979.[1] Article 29 of the ECCC Law, among other modes of liability,

[1] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments (NS/RKM/1004/006), Chapter X, art. 1 (27 October 2004) [hereinafter "ECCC Law"].

holds superiors individually responsible for the crimes of their subordinates.[2] The ECCC's jurisdiction extends only to high-level offenders and the rigid hierarchy of the Khmer Rouge regime ensured that senior leaders did not perpetrate many of the alleged crimes themselves, but are instead accused of knowing, or should have known that their subordinates were engaged in the most egregious violations of national and international law. Thus, the prosecution has often relied on the principle of superior responsibility to attach guilt to the senior leadership of the regime for the criminal acts of their subordinates.

Under the principle of legality or *nullem crimen sine lege* ("no crime without law") [hereinafter "*nullem crimen*"], the ECCC can only hold individuals responsible for acts that were criminal at the time of their commission.[3] In addition, the ECCC has limited temporal jurisdiction: it can only hear cases in which the alleged crimes occurred between 1975 and 1979. The accused at the ECCC can therefore only be held criminally liable for offenses that were both perpetrated and legally cognizable during the Khmer Rouge period (1975-79).

While superior responsibility is today a well-established mode of liability in customary international law, it was a relatively new mode of liability in 1975. It was not as clearly defined as it is today, and its scope at that time—particularly whether it extended to civilian leaders—is not beyond dispute.

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[2] ECCC Law, *supra* note 1, art. 29 ("The fact that any acts referred to in Articles 3 new, 4,5,6,7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior 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.").

[3] *Nullem crimen* is included in three major multilateral treaties. Rome Statute of the International Criminal Court, art. 22, *entered into force*, 1 July 2002, 2187 U.N.T.S. 90 [hereinafter "Rome Statute"]; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 7, *entered into force*, 3 September 1953, 213 U.N.T.S. 221 (as amended by Protocol 11) *entered into force*, 1 November 1998, E.T.S No. 155 [hereinafter "European Convention"]; International Covenant on Civil and Political Rights, art. 15, *entered into force*, 23 March 1976, 999 U.N.T.S. 171 [hereinafter "ICCPR"].

B. ECCC Pre-Trial Chamber Decisions

Former Khmer Rouge leaders Ieng Thirith and Ieng Sary, whose cases are pending before the ECCC, have invoked *nullem crimen* to challenge some of the charges brought against them. They argue that superior responsibility did not attach to their actions because it was not recognized under customary international law in 1975-79. In response, the ECCC Pre-Trial Chamber ("PTC") ruled in two recent decisions that superior responsibility applied to both military and civilian superiors in the relevant period (1975-79) as a mode of individual criminal liability. In other words, it found that superior responsibility had crystallized as a norm of customary international law that was (1) sufficiently specific and (2) accessible to the accused to make foreseeable the imposition of criminal sanctions.[4]

This article examines these two PTC decisions, focusing on Court's legal reasoning and the sources on which it relied. It argues that the PTC relied too heavily on the incomplete and inconsistent jurisprudence of post-World War II tribunals to conclude that superior responsibility was a recognized mode of liability under customary international law during the Khmer Rouge period. The PTC should have instead drawn upon the 1977 Protocol Additional to the Geneva Conventions ("Additional Protocol I"), which both codified existing customary international law and clarified ambiguities in the post-WWII jurisprudence. The article therefore argues that Additional Protocol I would have provided a much stronger legal basis for the PTC's decisions.

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[4] *See Case of Ieng Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on Ieng Sary's Appeal Against the Closing Order, D427/1/30, PTC. For a discussion of the requirements to satisfy *nullem crimen*, see generally *Case of Streletz, Kessler and Krenz v. Germany*, App. Nos. 34044/96, 35532/97 and 44801/98, Eur. Ct. H.R. Judgment, ¶ 91 (22 March 2001) (stating that to satisfy the principle of *nullem crimen*, the proper inquiry is "whether, at the time when they were committed, the applicants' acts constituted offences defined with sufficient accessibility and foreseeability under international law."); *Prosecutor v. Milutinovic et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Odjanic's Motion Challenging Jurisdiction, ¶ 21. The twin inquiries of specificity and accessibility are sometimes grouped as subsets of the requirement that the law was defined with sufficient "clarity" at the relevant time. *See, e.g.*, *Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, Judgment, ¶ 198 (Nov. 29, 2002) (stating that the offense must be defined "with sufficient clarity for taking into account the specificity of customary international law.").

The article proceeds in three parts. Part I discusses how the ECCC has interpreted and applied Article 29 of the ECCC Law in conformity with the Rome Statute of the International Criminal Court (ICC) and recent jurisprudence from the International Tribunal for the Former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR). Despite minor differences, all three tribunals define superior responsibility with three constituent elements, which apply to both military and civilian leaders.[5] Since Article 29 of the ECCC statute is similar to the corresponding sections of the ICTY and ICTR statutes, it is no surprise that the ECCC has adopted a similar formulation of superior responsibility, including the three elements.[6]

Parts II and III examine the development of the law of superior responsibility until and during the period of the Court's temporal jurisdiction (1975-79) to show that it was part of customary international law and held both military and civilian leaders accountable for serious international crimes. Drawing on jurisprudence from the International Military Tribunal ("Nuremberg Tribunal"), the International Military Tribunal of the Far East ("Tokyo Tribunal"), and particularly Additional Protocol I, Part II examines the development of superior responsibility as a general mode of liability under customary international law.

Part III then tackles the more disputed issue of whether customary international law extended superior responsibility to *civilian* leaders in 1975-79. In the late 1990s, the ICTY and ICTR became the first international tribunals to explicitly extend this mode of criminal liability

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[5] *See e.g.*, *Prosecutor v. Baglishema,* Case No. ICTR-95-1A-T, Judgment, ¶ 38 (June 7, 2001) [hereinafter "*Baglishema* Trial Judgment"] (The Chamber held that the "three essential elements of command responsibility" are: "(i) the existence of a superior-subordinate relationship of effective control between the accused and the perpetrator of the crime; and, (ii) the knowledge, or constructive knowledge, of the accused that the crime was about to be, was being, or had been committed; and, (iii) the failure of the accused to take the necessary and reasonable measures to prevent or stop the crime, or to punish the perpetrator.") (quoting *Prosecutor v. Delialic et al.*, Case No. IT-96-21-T, Judgment, ¶ 346 (Nov. 19, 1998) [hereinafter "*Celebici* Trial Judgment"]); *see also*, *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-A, Judgment, ¶ 839 (Dec. 17, 2004) [hereinafter "*Kordic and Cerkez* Appeals Judgment] (Reaffirming the three elements of superior responsibility described in the *Celebici* Trial Judgment).

[6] *See Prosecutor v. Duch*, Case No. 001/18-07-2007/ECCC/TC, Trial Judgment, ¶ 538 (July 26, 2010) [hereinafter "*Duch* Trial Judgment"].

to civilian superiors.[7] The Rome Statute, which entered into force in 2002, was the first international legal instrument to clearly separate civilian and military superior responsibility and to institute slightly different elements for each.[8] By contrast, Additional Protocol I and prior case law treated superior responsibility in more general terms, where liability was imposed on "superiors" without any distinction between civilian and military leaders.[9]

In the same vein, the ECCC Trial Chamber ruled that Duch – the civilian director of the S-21 Prison Camp – could be found criminally liable for the acts of those under his command, without distinguishing between civilian and military superiors.[10] The Trial Chamber eventually held that was Duch guilty of crimes against humanity and "grave breaches of the Geneva Conventions."[11] Thus, though it did not analyze the issue in depth, the Trial Chamber implicitly accepted that superior responsibility for civilian leaders was part of customary international law in 1975-79.

The recent PTC decisions, however, explicitly ruled that superior responsibility applied to civilian superiors in this period. The Court dismissed appeals by former Khmer Rouge Foreign Minister Ieng Sary and Minister of Social Action Ieng Thirith which argued that superior

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[7] *See Celebici* Trial Judgment, *supra* note 5, ¶ 377 ("[I]t is . . . the Trial Chamber's conclusion that a superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his de facto position of authority."); *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgment, ¶ 213 (May 21, 1999) [hereinafter "*Kayishema* Trial Judgment"] ("[T]he application of criminal responsibility to those civilians who wield the requisite authority is not a contentious one."); *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment, ¶ 148 (Jan. 27, 2000) (The Chamber held that the "definition of individual criminal responsibility . . . applies not only to the military but also to persons exercising civilian authority as superiors."); Rome Statute, *supra* note 3, art. 28.

[8] *See* Rome Statute, *supra* note 3, art. 28.

[9] *See, e.g.*, Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: Protocols I to the Geneva Conventions, U.N. Doc. A/32/144 (1977)) [hereinafter "Additional Protocol I"], art. 86 (2) ("The fact that a breach of the Conventions or of this Protocol was committed by a *subordinate* does not absolve his *superiors* from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.") (emphasis added).

[10] *See Duch* Trial Judgement, *supra* note 7, ¶ 548-549.

[11] *Id*., ¶ 567.

responsibility, as it existed in 1975-79, was too nebulous and inaccessible to put them on notice that they might be criminally prosecuted under this mode of liability.[12] While Ieng Thirith's appeal did not draw a distinction between civilian and military superiors,[13] Ieng Sary specifically argued that *civilian* superior responsibility did not exist under customary international law in 1975-79.[14]

In dismissing these appeals, the PTC relied primarily on the jurisprudence of the post-WWII tribunals to conclude that superior responsibility applied to civilian Khmer Rouge leaders.[15] While the post-WWII tribunals found several civilian superiors guilty under superior responsibility, their judgments do not discuss whether superior responsibility was sufficiently established in that era to hold civilian leaders criminally responsible for the acts of their subordinates.[16] Moreover, this jurisprudence does not clearly establish the standard of *mens rea* or the degree of control over subordinates required to hold superiors criminally liable.

In 1977, Additional Protocol I clarified these aspects of superior responsibility and, for the first time, gave the law clear expression.[17] In providing this much-needed clarification, Additional Protocol I did not create new law: it simply codified existing customary international

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[12] *See Case of Ieng Sary, supra* note 4, ¶ 460; *Case of Ieng Thirith et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146), Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, D427/3/15, PTC, ¶ 232.

[13] *Case of Ieng Thirith et al.*, *supra*, ¶ 192.

[14] *Case of Ieng Sary, supra* note 4, ¶ 402.

[15] *Case of Ieng Sary, supra* note 4, ¶ 460; *Case of Ieng Thirith et al, supra* note 13, ¶ 232.

[16] *See The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Roechling et. al*., Judgment on Appeal to the Superior Military Government Court of the French Occupation Zone in Germany, reprinted in Trials of War Criminals Before the Nuremberg Military Tribunals under Council Control Law No. 10, Vol. XIV, Appendix. B [hereinafter "*Roechling* Case"] as cited in *Case of Ieng Sary, supra* note 4, ¶ 442.
See also, International Military Tribunal for the Far East, Judgment, [hereinafter "Tokyo Tribunal Judgment"], *available at*: http://ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-10.html. The Tokyo Tribunal found, among other civilian leaders, Foreign Minister Hirota and Prime Minister Tojo guilty of various crimes under a theory of superior responsibility.

[17] *See Celebici* Trial Judgment, *supra* note 5, at ¶ 340 ("…there can be no doubt that the concept of the individual criminal responsibility of superiors for failure to act is today firmly placed within the corpus of international humanitarian law. Through the adoption of Additional Protocol I, the principle has now been codified and given a clear expression in international conventional law.").

law.[18] This is significant because had new forms of criminal liability emerged in 1977, it would violate *nullem crimen* to apply provisions in the Protocol to the actions of the accused. The accused, in this scenario, would not have been given adequate notice that they might be criminally prosecuted for the acts of their subordinates.

However, since Additional Protocol I does not pose this *nullem crimen* issue and provided a clearer statement of the law than the post-WWII cases, it is surprising that the PTC did not rely on this instrument in determining whether superior responsibility was part of customary international law in the Khmer Rouge era. In fact, neither of the PTC decisions discusses Additional Protocol I in any detail.

This oversight or omission led the PTC to base its decisions almost entirely on post-WWII jurisprudence, which is not clearly constitutive of customary international law. The tribunals in Nuremberg and the Far East were convened at the behest of a handful of states (the victorious Allies). By contrast, fifty-five states had signed onto Additional Protocol I by 1978.[19] The Protocol (and its Commentary) therefore presents much stronger evidence of both widespread state practice and *opinio juris* – the two requirements for customary international law – than the post-WWII cases. Additional Protocol I also set forth three clear elements of superior responsibility that apply to both civilian and military superiors, whereas the post-WWII cases did not articulate these elements with any clarity.

Most importantly, where some post-WWII cases held superiors responsible for

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[18] *Prosecutor v. Hadzihasanovic et al.* Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 29 (July 16, 2003) [hereinafter "*Hadzihasanovic* Appeals Decision on Jurisdiction"] ("[C]ommand responsibility was part of customary international law relating to international armed conflicts before the adoption of Protocol I. Therefore…Articles 86 and 87 of Protocol I [the articles that address superior responsibility] were in this respect only declaring the existing position, and not constituting it."). *See also* Case of Ieng Sary, *supra* note 4, at ¶ 418 (agreeing with the ICTY Appeals Chamber that Articles 86 and 87 of Additional Protocol I "were only declaring the existing position.").

[19] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, State Parties/Signatories, *available at*: http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P.

negligently failing to supervise or punish subordinates under their control, Additional Protocol I provided greater clarity and protection for defendants by requiring *mens rea* between negligence and recklessness. Thus, the modifications that it provided actually protect the accused from retroactive criminalization of their actions and the "victor's justice" that was perhaps inflicted at Nuremberg and Tokyo.

The PTC should have also looked at the broader principles underlying *nullem crimen* in greater detail. At its core, *nullem crimen* is intended to protect those who reasonably believed that their conduct was lawful and acted in good faith on that belief.[20] The accused at the ECCC are charged with overseeing, ordering or failing to prevent the most serious offenses – offenses such as crimes against humanity and war crimes that no reasonable superior could believe were outside the scope of international law in the 1970s. Moreover, the accused were all educated abroad and many travelled abroad extensively before the Khmer Rouge came to power in 1975.[21] It is therefore very unlikely that they acted in good faith, relying on a reasonable belief that egregious crimes of which they are accused were lawful.

For these reasons, the ECCC would be on stronger footing if it had relied on Additional Protocol I and broader equitable considerations to conclude that superior responsibility applied to superiors, both civilian and military, in the Khmer Rouge period. Also, from a strategic perspective, if the PTC issued judgments based on this more substantial legal foundation, it might have enhanced the legitimacy of the ECCC, which has been criticized for producing low

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[20] *See Prosecutor v. Stakic*, Case No. IT-97-24-A, Judgment, ¶ 67 (March 22, 2006) ("The principle *nullem crimen sine lege* protects persons who reasonably believed that their conduct was *lawful* from retroactive criminalization of their conduct. It does not protect persons who knew that they were committing a crime from being convicted of that crime under a subsequent formulation.") (emphasis in original).

[21] *See generally,* David Chandler, THE LAND AND PEOPLE OF CAMBODIA (HarperCollins Publishers) (1991). Many Khmer Rouge leaders including Nuon Chea, Ieng Sary, Khieu Samphan, and Ieng Thirith enjoyed greater access to education and travel than the general Cambodian population leading up to 1975 and throughout the Khmer Rouge period. For instance, Pol Pot, Ieng Sary, and Khieu Samphan pursued advanced degrees in France prior to 1975.

quality, politically influenced judgments.[22]

[22] *See* Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide? Elusive Justice and the Khmer Rouge Tribunal,* (2008) Publication Review, Criminal Law Forum. *See also,* Cedric Ryngaert, *The Cambodian Pre-Trial Chamber's Decisions In the Case Against Nuon Chea on Victims' Participation and Bias: A Commentary* (2008) Hague Justice Portal, *available at* http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Ryngaert_NuonChea_EN.pdf ; Alex Bates, *Transitional Justice in Cambodia: Analytical Report* (2010), Atlas Project, *available at* http://projetatlas.univ-paris1.fr/IMG/pdf/ATLAS_Cambodia_Report_FINAL_EDITS_Feb2011.pdf.

I. The Current Law of Superior Responsibility

A. The ECCC Law

Article 29 of the ECCC Law states, "The fact that [crimes]….were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior 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."[23] This articulation of superior responsibility is similar to the corresponding provisions in the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR).[24]

The inclusion of the phrases "effective command" and "control over the subordinate" in the ECCC—the only substantive changes from the ICTY and ICTR formulation—reflects jurisprudential developments in these tribunals that made clear that effective control over a subordinate is one of the three elements that need to be established to find a superior liable under superior responsibility. Their incorporation in the ECCC Law indicates that the drafters intended superior responsibility to be interpreted as it has been in the other tribunals. As a result, the ECCC has required proof of the three elements articulated in the ICTY and ICTR jurisprudence to find superiors liable through superior responsibility: (1) a superior-subordinate relationship in

[23] ECCC Law, *supra* note 1, art. 29.
[24] *See* Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. SCOR, 48th Sess., Annex, art. 1, U.N. Doc. S/25704 (1993)[hereinafter ICTY Statute], art. 7(3) ("The fact that any of the acts…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."); Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., Annex, art. 4, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute], Article 6(3) (using identical language as the ICTY Statute to articulate the principle of superior responsibility).

which the former has effective control over the latter; (2) a superior's knowledge, direct or inferred from the circumstances, that a subordinate was about to commit or had committed a criminal act; and (3) a superior's failure to take necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[25]

The remainder of this section will elaborate upon these elements by drawing on the statutes and case law of the ICTY, ICTR and ICC. The ICC Rome Statute has slightly altered the elements in the civilian context, requiring a higher standard of *mens rea* and a greater degree of control over subordinates. The ICTY, by contrast, does not clearly distinguish between military and civilian superiors.

B. The Elements of Superior Responsibility

1. Superior-Subordinate Relationship

The first element of superior responsibility pertains to the degree of control that a superior has over a subordinate. Superiors must have "effective control" over the subordinate, which refers to "the material ability to prevent and punish the commission of these offences."[26] This control need not be formalized, as both the ICTY and ICTR have applied superior responsibility to leaders with *de facto* control over their subordinates. Thus, formal title or *de jure* control over subordinates is not necessary to establish a superior-subordinate relationship.[27] Moreover, at the ICTY and ICTR, the same level of "control" must be shown to hold civilian

[25] *See Duch* Trial Judgement, s*upra* note 7. *See also Kordic and Cerkez* Appeals Judgment, *supra* note 6, at ¶ 839.
[26] *Id.* at ¶ 840 (quoting *Celebici* Trial Judgment, *supra* note 5).
[27] *See Prosecutor v. Delialic et al.*, Case No. IT-96-21-A, Judgment, ¶ 192-193 (Feb. 20, 2001) [hereinafter "*Celebici* Appeals Judgment"] ("Under Article 7(3), a commander or superior is…the one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed…The power or authority to prevent or to punish does not solely arise from de jure authority conferred through official appointment."); *Kayishema* Trial Judgment, *supra* note 8, at ¶ 218 ("The Chamber must be prepared to look beyond the *de jure* powers enjoyed by the accused and consider the *de facto* authority he exercised.").

superiors liable under superior responsibility.[28]

The ICC Rome Statute may modify this requirement for civilian leaders. While in the military context the Rome Statute merely states that a commander is responsible for the crimes committed by "forces under his or her effective command and control", in the civilian context it adds that the crimes must have "concerned *activities* that were within the effective responsibility and control of the superior" (emphasis added).[29] This appears to be an additional element—a nexus or causation element—that requires proof of a greater degree of control over subordinates to hold civilian leaders liable.[30] However, in keeping with the seminal ICTY *Celebici* Trial Judgment, it more likely clarifies that civilian superiors (particularly heads-of-state and other senior leaders responsible for a great number of activities) must be shown to have a similar degree of control as their military counterparts over subordinates to fulfill this element of superior responsibility.[31] In other words, the Rome Statute explicitly recognizes what ICTY jurisprudence has implied: that civilian leaders cannot be held responsible for every crime perpetrated by individuals under their command, as they tend to have a broader range of responsibilities than their military counterparts. Thus, "effective control" is characterized slightly differently with respect to civilian superiors.[32]

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[28] *See Celebici* Trial Judgment, *supra* note 5, at ¶ 377 (A superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his de facto position of authority."); *Kayishema* Trial Chamber Judgment, *supra* note 8, at ¶ 213 ("The Chamber finds that the application of criminal responsibility to those civilians who wield the requisite authority is not a contentious one.").

[29] Rome Statute, *supra* note 3, art. 28(a) and 28(b)(ii).

[30] *See Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 406 (June 15, 2009) (stating that art. 28(b) applies to civilian leaders who "fall short" of the standard applied to military leaders).

[31] *See Celebici* Trial Judgment, *supra* note 5, at ¶ 378 ("The doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.").

[32] *See Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Judgment, ¶ 281 (Sept. 1, 2004) [hereinafter "*Brdjanin* Trial Judgment"] ("The concept of effective control for civilian superiors is different in that a civilian superior's sanctioning power must be interpreted broadly. It cannot be expected that civilian superiors will have disciplinary power over their subordinates equivalent to that of military superiors in an analogous command position. For a finding that civilian superiors have effective control over their subordinates, it suffices that civilian superiors,

2. *Mens Rea*

The second element of superior responsibility relates to the mental state of the accused superior. To hold a superior responsible for the crimes of a subordinate, "it must be established that he knew or had reason to know that the subordinate was about to commit or had committed such crimes."[33] This formulation, which was adopted in the ECCC Law, imposes criminal liability on two classes of superiors: (1) those who had actual knowledge of their subordinates' crimes and (2) those that failed to acquire that knowledge when they had reason to know. Recent case law more clearly establishes the standard of *mens rea* for the first class (where the superior had "actual knowledge") than for the second (where he "had reason to know").

Where there is proof of a superior's actual knowledge of the crimes of subordinates, the *mens rea* element is satisfied. In the absence of direct evidence of such knowledge, it can be established through circumstantial evidence.[34] The standard of *mens rea* to apply in cases where there is no evidence of superior's actual knowledge, but by virtue of his position and relationship to a subordinate, he "had reason to know" of the latter's crimes, is more contentious. On this point, the ICTY diverges from the ICTR and the ICC.

The ICTY Appeals Chamber has held that a superior, in this situation, can only be liable

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through their position in the hierarchy, have the duty to report whenever crimes are committed, and that, in light of their position, the likelihood that those reports will trigger an investigation or initiate disciplinary or criminal measures is extant."). For a discussion of this aspect of the ICC Rome Statute and its implications, *see* Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 Yale J. Int'l L. 89 (Winter 2000).

[33] *See Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgment, ¶ 523 (Nov. 30, 2005) [hereinafter "*Limaj* Trial Judgment"].

[34] *Id*., at ¶ 524 ("While a superior's actual knowledge that his subordinates were committing or were about to commit a crime cannot be presumed, it may be established by circumstantial evidence, including the number, type and scope of illegal acts, time during which the illegal acts occurred, number and types of troops and logistics involved, geographical location, whether the occurrence of the acts is widespread, tactical tempo of operations, modus operandi of similar illegal acts, officers and staff involved, and location of the commander at the time.") (quoting *Celebici* Trial Judgment, *supra* note 5, at ¶ 386).

if he had information before him that would put him on notice of the crimes of his subordinates.[35] Under this formulation, a superior has "reason to know" if this information justifies a further inquiry into the matter.[36] Still, the Appeals Chamber has also made clear there is no affirmative duty to acquire information, and a superior cannot be responsible for failing to gather information that would put him on notice of the crimes of his subordinates.[37] However, the inquiry is limited to whether the information is available to the superior and does not consider whether he actually examines it. Thus, a superior will not be absolved from criminal responsibility if he had access to information and deliberately avoided obtaining it.[38]

The exact contours of the ICTY *mens rea* standard for determining when a superior "had reason to know" have only recently been clarified, if not settled by the Appeals Chamber in the *Blaskic* Case.[39] Prior to that judgment, the ICTY issued confusing and often contradictory judgments on this point For instance, the *Celebici* Trial Chamber noted that the *mens rea* element is fulfilled by information that, "by itself was [in]sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information."[40] The *Blaskic* Trial Judgment, though, seemed to lower the *mens rea* required of

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[35] *See Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgment, ¶ 62 (July 29, 2004) [hereinafter "*Blaskic* Appeals Judgment"] ("The Appeals Chamber considers that the *Celebici* [a/k/a *Delalic*] Appeal Judgement has settled the issue of the interpretation of the standard of 'had reason to know'. In that judgement, the Appeals Chamber stated that 'a superior will be criminally responsible through the principles of superior responsibility *only if information was available to him* which would have put him on notice of offences committed by subordinates.'") (emphasis in original).

[36] *See Limaj* Trial Judgment, *supra* note 33, at ¶ 525 ("It is sufficient that the superior be in possession of sufficient information, even general in nature, to be on notice of the likelihood of illegal acts by his subordinates, *i.e.*, so as to justify further inquiry in order to ascertain whether such acts were indeed being or about to be committed.").

[37] *See Blaskic* Appeals Judgment, *supra* note 35, at ¶ 62 ("[T]he Appeals Chamber [in *Celebici* a/k/a *Delalic*] stated that '[n]eglect of a duty to acquire such knowledge, however, does not feature in the provision [Article 7(3)] as a separate offence, and a superior is not therefore liable under the provision for such failures'…There is no reason for the Appeals Chamber to depart from that position.").

[38] *See Id*., at ¶ 406 ("The Appeals Chamber emphasizes that responsibility can be imposed for *deliberately* refraining from finding out but not for negligently failing to find out.") (emphasis in original).

[39] *See* Arthur T. O'Reilly, *Command Responsibility: A Call to Realign the Doctrine with Principles of Individual Accountability and Retributive Justice*, 40 GONZ. L. REV. 127 at 135-36 (2004-05).

[40] *See Celebici* Trial Judgment, *supra* note 5, at ¶ 393.

superiors. The Trial Chamber, after "taking into account [the accused's] particular position of command and the circumstances prevailing at the time", found that "ignorance cannot be a defense where the absence of knowledge is the result of negligence in the discharge of his duties."[41] This suggests a *mens rea* standard closer to simple negligence than that articulated in the *Celebici* Trial Judgment.

The Appeals Chamber, however, later set aside this interpretation and reaffirmed the original formulation of the "had reason to know" *mens rea* requirement, where the superior has no affirmative duty to gather information but cannot remain willfully blind to accessible information.[42] The Appeals Chamber in the *Blaskic* Judgment also expressly endorsed a prior decision that rejected negligence as a basis of liability in the context of superior responsibility.[43] This judgment has clarified the ICTY's treatment of *mens rea* to some extent. Essentially, a superior must have a *mens rea* between negligence and recklessness/willful blindness to be liable under superior responsibility.

However, the ICTY does not distinguish between military and civilian superiors' *mens rea*. The ICC Rome Statute, by contrast, seems to impose a *mens rea* standard of recklessness/willful blindness for civilian superiors and a lower standard for military superiors.[44] It diverges from the ICTY's standard—evidence of information that put the accused "on notice"—by requiring proof that a superior "consciously disregarded" information that would "clearly indicate" that his subordinates were committing or about to commit crimes.

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[41] *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment, ¶ 332 (March 3, 2000) [hereinafter "*Blaskic* Trial Judgment"].
[42] *See Blaskic* Appeals Judgment, *supra* note 35, at ¶ 62.
[43] *Id.*, at ¶ 63.
[44] *Cf.* Rome Statute, *supra* note 3, art. 28 (b)(i) ("The superior either knew, or *consciously disregarded* information which clearly indicated, that the subordinates were committing or about to commit such crimes.") (emphasis added); *with* Rome Statute, *supra* note 3, art. 28 (a)(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.") (emphasis added).

In its "Decision on the Confirmation of Charges Against Jean-Pierre Bemba-Gombo", the ICC Pre-Trial Chamber clarified the meaning of Art. 28(a) of the Rome Statute. Art. 28(a) states that military leaders may be held responsible for the crimes of their subordinates if they "knew" or "should have known" of the commission or future commission of said crimes.[45] The Pre-Trial Chamber held that while "knew" imposes a *mens rea* of knowledge, "the 'should have known' standard requires a more active duty on the part of the superior to take the necessary measures to secure the knowledge of the conduct of his troops and to inquire…on the commission of the crime."[46] This latter *mens rea* is essentially the negligence standard adopted by the ICTY Trial Chamber in the *Blaskic* case, which was later rejected by the *Blaskic* Appeals Chamber.[47]

The ICC Pre-Trial Chamber also made clear that the "should have known" standard is more stringent than that imposed on civilian superiors.[48] However, it did not articulate the precise *mens rea* required of civilian superiors under Article 28(b), which requires that a superior "consciously disregarded" information that would "clearly indicate" that his subordinates were committing or about to commit crimes. There are indications from other tribunals, though, about what the standard entails. The ICTR, for instance, interpreted the Rome Statute to suggest that it is inappropriate to require that civilian leaders be apprised of all the actions of their subordinates.[49] Implicitly, this interpretation recognizes that, in comparison to their military counterparts, civilian leaders tend to have many more subordinates under their command in a

[45] *See* Rome Statute, *supra* note 3, art. 28(a).
[46] *Bemba Gombo*, *supra* note 30, at ¶ 433.
[47] *See id.* at ¶ 432 (citing with approval the *Blaskic* Trial Judgement).
[48] *See id.* at ¶ 433 ("The drafting history of [article 28(a)]…reveals that it was the intent of the drafters towards commanders and military-like commanders compared to other superiors that fall within the parameters of article 28(b) of the Statute.").
[49] *See Kayishema* Trial Judgment, *supra* note 8, at ¶ 227-228 ("The Chamber finds the distinction between military commanders and other superiors embodied in the Rome Statute an instructive one. In the case of the former it imposes a more active duty upon the superior to inform himself of the activities of his subordinates…The Trial Chamber agrees with this view insofar that it does not demand a *prima facie* duty upon a non-military commander to be seized of every activity of all persons under his or her control.").

less structured hierarchy and therefore cannot reasonably be held responsible for all of them.

In effect, the ICTR Trial Chamber construed the ICC formulation more closely to the standard articulated by the ICTY *Celebici* Appeals Chamber Judgment, which held that all superiors, whether civilian or military, were only liable under superior responsibility if they had the means to access information that would them put on notice of crimes of their subordinates.[50] Given that they tend to oversee a greater range of responsibilities and a larger number of subordinates, civilian superiors are less likely than military commanders to have such access.

Overall, then, while the ICTY and ICTR impose on all superiors, either civilian or military, a *mens rea* standard that falls between ordinary negligence and recklessness, the *Bemba Gombo* Decision on the Confirmation of Charges essentially adopts an ordinary negligence standard for military superiors that "should have known" of the crimes or future crimes of their subordinates. However, the ICC requires a higher standard of fault for civilian superiors. The "consciously disregarded" language in Article 28(b) of the Rome Statute suggests a standard closer to recklessness, but until the ICC issues a judgment interpreting this provision, its exact contours will remain unclear.

3. "Necessary and Reasonable Measures"

The third element of superior responsibility in the ECCC law is the "fail[ure] to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators."[51] The ECCC's articulation of this final element—the failure to take "necessary and reasonable measures"—is practically identical to that of the ICTY and ICTR statutes.[52] The Rome Statute,

[50] *See Celebici* Appeals Judgment, *supra* note 27, at ¶ 238.
[51] ECCC Law, *supra* note 1, art. 29.
[52] ICTY Statute, *supra* note 24, art 7(3) ("…the superior failed to take the *necessary and reasonable measures* to prevent such acts or to punish the perpetrators thereof.") (emphasis added). The ICTR statute, article 6(3) includes the same language. The only difference in the ECCC Law is the exclusion of the word "thereof", which merely clarifies that the superior has a duty to punish his subordinates for crimes perpetrated by the latter.

too, requires superiors, either civilian or military, to use "necessary and reasonable measures." Moreover, it elaborates that these measures must be used "to prevent or repress [the crimes] or to submit the matter to the competent authorities for investigation and prosecution."[53] In practice, this standard essentially incorporates the duties of a superior expressed in ICTY and ICTR jurisprudence.[54]

The ICTY and ICTR make clear that a superior's duties to "prevent" and "punish" crimes are two distinct obligations, not merely alternative choices. Thus, a superior must both take measures, if possible, to prevent the commission of crimes *and* punish the perpetrators thereof (emphasis added).[55] In terms of what constitutes "necessary and reasonable" measures, the *ad hoc* tribunals (the ICTY and ICTR) have adopted a case-by-case analysis to determine, based on a superior's position, the punitive measures that can be expected of him.[56] In particular, a superior's material ability to effectively control his subordinates is central to the inquiry of determining whether he took appropriate measures.[57] In other words, the case-by-case analysis is dependent on the nature of the superior-subordinate relationship—the first element of superior responsibility—and, specifically, the level of control exerted by a superior over subordinates.

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[53] Rome Statute, *supra* note 3, art. 28(a)(ii) and 28(b)(iii).
[54] *See Bemba Gombo*, *supra* note 30, at ¶ 435-43.
[55] *See Limaj* Trial Judgment, *supra* note 33, at ¶ 527 ("…the superior has a duty both to prevent the commission of the offence and punish the perpetrators. These are not alternative obligations…His obligations to prevent will not be met by simply waiting and punishing afterwards."); *Baglishema* Trial Judgment, *supra* note 5, at ¶ 49 ("..the Chamber notes that the obligation to prevent or punish does not provide the Accused with alternative options.").
[56] *See Blaskic* Appeals Judgment, *supra* note 35, at ¶ 417 ("The Appeals Chamber considers that even though a determination of the necessary and reasonable measures that a commander is required to take in order to prevent or punish the commission of crimes, is dependent on the circumstances surrounding each particular situation, it generally concurs with the *Celebici* [a/k/a *Delalic*] Trial Chamber which held: '[i]t must, however, be recognised that international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers.'").
[57] *See Limaj* Trial Judgment, *supra* note 33, at ¶ 526 ("The question of whether a superior has failed to take the necessary and reasonable measures to prevent the commission of a crime or punish the perpetrators thereof is connected to his possession of effective control."); *Baglishema* Trial Judgment, *supra* note 5, at ¶ 48 ("A superior may be held responsible for failing to take only such measures that were within his or her powers. Indeed, it is the commander's degree of effective control – his or her material ability to control subordinates – which will guide the Chamber in determining whether he or she took reasonable measures to prevent, stop, or punish the subordinates' crimes.").

The appropriateness of a superior's actions, then, varies according to the circumstances of this relationship, and there are several factors to assess if those actions, in their context, were "necessary and reasonable".[58]

The Rome Statute, which requires that a superior submit this sort of matter to the "competent authorities for investigation and prosecution" simply rearticulates the flexible, case-by-case analysis adopted by the ICTY and ICTR.[59] The "competent authorities", to whom a superior should report the crimes of his subordinates, vary based on the superior's position within the chain of command.[60] For instance, a mid-level military commander or civilian bureaucrat would be expected under the Rome Statute to report crimes to a superior—probably to someone with the capacity to sanction the perpetrators. Given the commander's intermediate position, higher authorities may be required to sanction his subordinates. Thus, his reporting to those authorities would probably constitute "necessary and reasonable" action under the ICTY and ICTR statutes as well.[61] With regard to the most senior leaders, who are accountable to no higher authority, or those individuals within the chain of command who are tasked with punishing offenders, the Rome Statute will likely be construed to require those superiors to take disciplinary measures themselves against the perpetrators under their direct command, since they

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[58] *See Limaj* Trial Judgment, *supra* note 33, at ¶ 528 ("Whether a superior has discharged his duty to prevent the commission of a crime will depend on his material ability to intervene in a specific situation. Factors which may be taken into account in making that determination include the superior's failure to secure reports that military actions have been carried out in accordance with international law, the failure to issue orders aiming at bringing the relevant practices into accord with the rules of war, the failure to protest against or to criticize criminal action, the failure to take disciplinary measures to prevent the commission of atrocities by the troops under the superior's command, and the failure to insist before a superior authority that immediate action be taken.").

[59] *See Bemba Gombo*, *supra* note 30, at ¶ 441 ("[T]he power of a superior, and thus the punitive measures available to him, will vary according to the circumstances of the case and, in particular, to his position in the chain of command.").

[60] *See id.*

[61] *See Blaskic* Appeals Judgment, *supra* note 35, at ¶ 68 ("With regard to the position of the Trial Chamber that superior responsibility 'may entail' the submission of reports to the competent authorities, the Appeals Chamber deems this to be correct."); *see also Prosecutor v. Halilovic*, Case No. IT-01-48-T, Judgment, ¶ 100 (Nov. 16, 2005) [hereinafter "*Halilovic* Trial Judgment"] ("The superior does not have to be the person who dispenses the punishment, but he must take an important step in the disciplinary process.").

would be, in effect, the "competent authorities". As the ICTY Trial Chamber made clear, reporting to higher authorities is a suitable course of action only if the superior had no power to sanction the offending subordinate himself.[62]

Thus, unlike with the *mens rea* element, this third element—a superior's duty to prevent crimes and punish the perpetrators—is not contested. However, because this element explicitly sets out a flexible standard ("necessary and reasonable measures) that requires a context-specific analysis by a court, there may be discrepancies in application. Judges may disagree, for instance, over whether a particular superior's actions in the relevant circumstances meets the "necessary and reasonable" threshold. Still, despite this potential unpredictability, the legal standard is not in dispute. Under the current law of superior responsibility, a superior has distinct obligations to prevent and to punish, using measures commensurate with the authority granted to him and the effective control he exerts over subordinates.[63]

C. Conclusion

Overall, then, superior responsibility is a well-established mode of liability in modern international criminal jurisprudence, and applies to both military and civilian leaders. The current formulation includes three elements that the prosecution must prove in order to obtain a conviction: (1) the existence of a "superior-subordinate relationship" characterized by "effective control" in which (2) the superior "knew or had reason to know" that his subordinates were committing or had committed crimes, and for which (3) the superior failed to take "necessary and reasonable measures" to prevent the commission of those crimes or to punish the

[62] *See Halilovic* Trial Judgment, *supra* note 61, at ¶ 100 ("The duty to punish includes at least an obligation to investigate possible crimes, to establish the facts, *and if the superior has no power to sanction, to report them to the competent authorities*.") (emphasis added).
[63] *See Limaj* Trial Judgment, *supra* note 33, at ¶ 526 ("A superior will be held responsible if he failed to take such measures that are within his material ability.").

perpetrators thereof.[64]

In articulating these elements, there is some discrepancy between the *ad hoc* tribunals and the ICC. With regard to the first two elements, particularly the second (*mens rea*), the Rome Statute requires a higher standard of proof to hold civilian superiors responsible under this mode of liability.[65] Specifically, it requires a closer nexus between superior and subordinate to establish a relationship of "effective control"[66] and a showing that a civilian superior "consciously disregarded" information that "clearly indicated" his subordinates' crimes.[67] This suggests a *mens rea* standard closer to recklessness, which is more demanding than the ICTY standard.[68] Thus, while there is general consensus on the elements of superior responsibility, the exact contours of the doctrine are still not settled.

In the Duch Judgment, the ECCC Trial Chamber adopted the same three elements for superior responsibility under Article 29 of the ECCC Law.[69] Since Article 29 is worded much like the corresponding sections of the ICTY and ICTR statutes, the Chamber naturally relied on the jurisprudence of these tribunals rather than the Rome Statute in describing superior responsibility under international law.[70]

The Duch Judgment, however, did not address the more difficult question of whether this law was sufficiently defined in 1975-79 to conform to the *nullem crimen* principle. That question was left to the PTC, which relied on post-WWII cases to conclude that, from 1975-79, the law

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[64] *See Kordic and Cerkez* Appeals Judgment, *supra* note 6, at ¶ 839.
[65] *See Bemba Gombo*, *supra* note 30, at ¶ 406, 433.
[66] *See* Rome Statute, *supra* note 3, art. 28(b)(ii) (requiring, in the civilian context, that "crimes *concerned activities* that were within the effective responsibility and control of the superior.") (emphasis added).
[67] Rome Statute, *supra* note 3, art. 28(b)(i).
[68] *See Celebici* Appeals Judgment, *supra* note 27, at ¶ 241, ("…a superior will be criminally responsible through the principles of superior responsibility *only if information was available to him which would have put him on notice* of offences committed by subordinates.") (emphasis added).
[69] *See Duch* Trial Judgement, *supra* note 7, ¶ 540 – 547.
[70] *See Celebici* Appeals Judgment, *supra* note 27; *Prosecutor v. Bagilishema*, ICTR-95-1A-A, Appeals Judgment (July 3, 2002) [hereinafter "*Bagilishema* Appeal Judgement"]; *Prosecutor v. Halilovic*, IT-01-48-A, Appeals Judgment, (Oct 16, 2007) [hereinafter "*Halilovic* Appeal Judgment"], as cited in *Duch* Trial Judgement, *supra* note 7, ¶ 540- 41.

was sufficiently defined and accessible to the accused so that they could reasonably foresee being prosecuted as superiors for the crimes of their subordinates.[71]

The next two sections will survey international law from the early twentieth century to the 1970s to trace the development of superior responsibility as a mode of liability and address whether it applied to civilians during the Khmer Rouge era. The current formulation of superior responsibility adopted by the ECCC builds on post-WWII jurisprudence and particularly on Additional Protocol I. While the law has evolved since the 1970s, it has developed into a more coherent doctrine with clearly defined elements that actually make the accused at the ECCC less vulnerable to arbitrary or "victor's" justice. As we shall see, it is therefore surprising that the PTC did not rely on Additional Protocol I in its recent decisions.

II. The Evolution of Superior Responsibility in Customary International Law

Superior responsibility was an established norm of international law by 1975, albeit in a slightly different and more imprecise form. It was not until 1977 that superior responsibility (in something close to the current formulation) was articulated within a multilateral treaty: Additional Protocol I. While it only came into force during the Khmer Rouge era, Additional Protocol I codified existing customary international law, which was reflected in the military codes of several countries and had been developed by the post-WWII military tribunals.

Under international law, superiors were first held liable for their omissions—for failing to prevent crimes and punish offending subordinates when they knew, or had reason to know of the latter's crimes—in cases before the post-WWII tribunals. Prior to those judgments, superiors were only responsible for crimes they directly ordered or participated in planning.

[71] *Case of Ieng Sary, supra* note 4, ¶ 460. *See also Case of Ieng Thirith et al, supra* note 13, ¶ 232.

A. The 1907 Hague Conventions

As a general principle, superior responsibility can be traced back to the 1907 Hague Conventions, which were some of the first international treaties to codify the laws of war and to criminalize war crimes. Hague Convention IV provided the precursor to the modern law of superior responsibility. Article 1 of the Annex to the Convention IV states, "The laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: To be commanded by a person responsible for his subordinates…"[72] Article 43 of the Annex further requires that those in positions of authority "take all the measures in his power to restore, and ensure, as far as possible, public order and safety…"[73]

Hague Convention IV therefore stipulates that a military superior has certain, general, responsibilities, but does not establish superior responsibility as a mode of individual criminal liability. It was not until the end of the Second World War that superior responsibility was used to hold high-level commanders responsible for the crimes of their subordinates.

B. Post-World War II Jurisprudence

The post-World War II tribunals were the first international courts to apply superior responsibility to prosecute senior leaders for serious crimes. The constitutive laws of the Nuremberg and Tokyo Tribunals—the London Agreement and the International Military Tribunal for the Far East (IMTFE) Charter, respectively—did not contain explicit superior responsibility provisions. Instead, they both included the following language: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts

[72] Annex to the Regulations Respecting the Laws and Customs of War on Land, art. 1, *entered into force*, 26 January 1910 [hereinafter "Annex to Hague Convention IV"], *available at* http://avalon.law.yale.edu/20th_century/hague04.asp#art1.
[73] *Id.*, art. 43.

performed by any persons in execution of such plan."[74]

The above provision only provided express authority to hold superiors responsible for crimes that they had played a role in formulating or executing. It did not criminalize gross negligence or recklessness where the superior had "reason to know" of or "consciously disregarded" the crimes of his subordinates. The United States tried to insert a provision into the London Agreement that would criminalize such conduct, but it was rejected in the final version.[75]

It is also worth noting that numerous military codes at the time criminalized omissions by superiors. For instance, the French Ordinance Concerning the Suppression of War Crimes (1944), and the Chinese Law Governing the Trial of War Criminals (1946) held superiors liable for failing to prevent the crimes of their subordinates.[76]

The jurisprudence of the post-WWII tribunals follows this trend rather than restricting liability only to those superiors that were directly involved in serious crimes. The trial of General Tomoyuki Yamashita was the first international law case in which a superior was found guilty for failing to prevent his subordinates' crimes. As the Commander of the Fourteenth Army Group of the Imperial Japanese Army in the Philippines, General Yamashita was charged with

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[74] Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, art. 6*, concluded* and *entered into force*, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter "London Agreement"]; Charter of the International Military Tribunal for the Far East, art. 5 [hereinafter "IMTFE Charter"], *available at*: http://www.icwc.de/fileadmin/media/IMTFEC.pdf.

[75] *See* William H. Parks, *Command Responsibility for War Crimes*, 62 Mil. L. Rev. 1, 17 (1973) (noting that the U.S proposed a definition of superior responsibility, which included liability for the "'omission of a superior officer to prevent war crimes when he knows of, or is on notice as to their commission or contemplated commission and is in a position to prevent them.'").

[76] *See* French Ordinance of 28 August 1944, Concerning the Suppression of War Crimes, art. 4, *reprinted in Celebici* Trial Judgment, *supra* note 5, at ¶ 336 ("Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organised or tolerated the criminal acts of their subordinates."); Chinese Law of 24 October 1946, Governing the Trial of War Criminals, *reprinted in Celebici* Trial Judgment, *supra* note 5, at ¶ 337 ("Persons who occupy a supervisory or commanding position in relation to war criminals and in their capacity as such have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as the accomplices of such war criminals.").

"fail[ing] to provide effective control of [his] troops as required by the circumstances."[77] In his defense, Yamashita argued that an aggressive American counter-offensive had cut off his chain of command and rendered him incapable of preventing the crimes committed by his troops. He seemed to have a strong argument since the articulation of superior responsibility in the IMTFE Charter was limited to crimes of which the commander had actual knowledge or played a role in planning.

While there was little evidence that Yamashita had any involvement or knowledge of the crimes committed by his troops, the tribunal inferred this knowledge from the fact that the crimes "were not sporadic in nature but in many cases were methodically supervised by Japanese officers and non-commissioned officers".[78] Given the state of international law, which had hitherto barely recognized superior responsibility for commander's omissions, the Tokyo Tribunal's acceptance of negative criminality was dubious. Moreover, the tribunal found Yamashita guilty without precisely defining or applying the evidence to constitutive elements of superior responsibility.[79]

Yamashita appealed this decision to the U.S. Supreme Court. The Court denied certiorari review, but upheld the Tokyo Tribunal's essential holding: that a commander can be responsible for the crimes of his subordinates even if he did not know of their commission.[80]

The *Yamashita* decision has been widely criticized for its lack of clarity, particularly its

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[77] United Nations War Crimes Commission, Trial of General Tomoyuki Yamashita, 4 Law Reports of Trials of War Criminals 1 (1949).
[78] *Id.*
[79] *See* O'Reilly, *supra* note 39, at 132.
[80] *See In Re Yamashita*, 327 U.S. 1, 15 (1946) ("It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent…the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates."). *See generally*, Vetter, *supra* note 32, at 105 (noting that the IMFTE was set up by "proclamation of General Douglas MacArthur…"). This suggests that Yamashita tried to appeal his decision to the U.S. Supreme Court because the IMFTE was so American in nature—it was created by the U.S. military.

failure to specify the standard of *mens rea* required to hold superiors liable under superior responsibility.[81] In an impassioned dissent, Justice Rutledge of the U.S. Supreme Court criticized the Court's decision for the general vagueness of its holding, and its failure to define the elements of superior responsibility.[82] Some commentators have similarly accused the Tokyo Tribunal and the Supreme Court of imposing on General Yamashita an unfairly low standard of *mens rea*, tantamount to strict liability,[83] while others have defended the ruling as a precursor to the modern law that imposes a more active duty on superiors to prevent crimes and punish offending subordinates.[84]

Subsequent post-WWII jurisprudence did little to clarify the elements of superior responsibility, including the appropriate standard of *mens rea*, but the IMFTE and the Nuremberg Tribunal continued to hold superiors liable without evidence of their actual knowledge of subordinates' offenses. The Judgment of the Tokyo Tribunal, for instance, essentially reiterated the holding of the *Yamashita* Judgment. The Tribunal, which delivered guilty verdicts against several senior Japanese leaders, held many of them criminally responsible "by virtue of their respective offices" for having "deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches thereof, and thereby violated the laws of war."[85] The judgment contains no further elaboration on the meaning of the terms "deliberately" and "recklessly", but by holding superiors responsible by virtue of

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[81] *See e.g.*, Allison Martson Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 124 (2005).
[82] *See Yamashita*, *supra* note 80, at 51-52 (Rutledge, J., dissenting) ("This vagueness, if not vacuity, in the findings runs throughout the proceedings, from the charge itself through the proof and the findings, to the conclusion. It affects the very gist of the offense, whether that was willful, informed and intentional omission to restrain and control troops known by petitioner to be committing crimes or was only a negligent failure on his part to discover this and take whatever measures he then could to stop the conduct.").
[83] *See generally*, W.J. Fenrick, *Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia*, 6 Duke J. Comp. & Int'l L. 103, 114 (1995).
[84] *See* Parks, *supra* note 75, at 37-38.
[85] Tokyo Tribunal Judgment, *supra* note 17.

their position, not their actual relationship with subordinates, it imposes on them the sort of strict liability that was criticized in *Yamashita*.

German commanders were likewise found guilty under a poorly defined version of superior responsibility, pursuant to Control Council Law No. 10. Much like the London Agreement and IMTFE Charter, Control Council Law No. 10 did not contain an explicit superior responsibility provision.[86] Still, in *United States v. Karl Brandt et al.* ("*Medical Case*") the tribunal articulated a standard of superior responsibility much like that in *Yamashita*, declaring that "the law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war."[87] The tribunal made similar statements about superior responsibility in *United States v Wilhelm von Leeb et al.* ("*High Command Case*"), emphasizing a commander's duty to prevent crimes from occurring even when he has no knowledge of them.[88]

In *United States v Wilhelm List et al.* ("*Hostage Case*"),[89] the tribunal rejected the near-strict liability standard adopted in the *Yamashita* judgment, and further held that a superior is

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[86] *See* Control Council Law No. 10, art. II (2), *available at*: http://avalon.law.yale.edu/imt/imt10.asp. In stipulating individual criminal liability, the Law states that "[a]ny person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime…if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime…").

[87] *United States v. Karl Brandt et al. (Medical Case)*, Vol. II, Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10, *quoted in Celebici* Trial Judgment, *supra* note 5, at ¶ 338.

[88] *See United States v. Wilhelm von Leeb et al.* (*High Command Case*), Vol. XI, Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10, *quoted in Celebici* Trial Judgment, *supra* note 5, at ¶ 338 ("Under basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal violates a moral obligation under international law. By doing nothing he cannot wash his hands of international responsibility.").

[89] *United States v Wilhelm List et al.* (*Hostage Case*), Vol. XI, Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10 *quoted in Celebici* Trial Judgment, *supra* note 5, at ¶ 338 ("A corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about.").

liable only for acts that he knew about or "ought to have known about."[90] This articulation, at least with regard to the *mens rea* element, is similar to the current law.[91] Still, its credibility is questionable since the tribunal did not base this formulation on any existing conventional or customary international law or on Control Council Law No. 10, which did not provide for liability in cases where the superior "ought to have known about" the crimes of their subordinates.

The Tokyo Tribunal, in its judgment of Admiral Toyoda, put forth what it considered a unified standard that took into account the reasoning and judgments of relevant precedents from the tribunals. It declared:

> "In the simplest language it may be said that this Tribunal believes that the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must be punished."[92]

This is the clearest articulation of superior responsibility in the post-WWII jurisprudence, highlighting both the *mens rea* ("knew, or should be the exercise of ordinary diligence have learned") and the third element (the "failure to take any action to punish the perpetrators [and] permitting the atrocities to continue"). Its description of the superior-subordinate relationship, though, does not seem to hinge on "effective control" as is required by the current law. Rather, the Toyoda Judgment applied superior responsibility to the crimes of subordinates "immediate or otherwise", which echoes the Supreme

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[90] *Id*. *See also*, Vetter, *supra* note 32, at 106.
[91] *Cf.* ECCC Law, *supra* note 1, art. 29 (conferring liability on superiors who "knew or had reason to know"). The ICTY Statute and the ICTR Statute include identical language.
[92] *United States v. Soemu Toyoda*, Official Transcript of Record of Trial, p. 5006, *quoted in Celebici* Trial Judgment, *supra* note 5, ¶ 339.

Court's controversial holding in *Yamashita* that did not discriminate between the crimes of those subordinates over whom a commander had "effective control" and others who were not supervised as closely.[93]

The post-WWII jurisprudence, generally, has been criticized for failing to provide reasoned opinions based on existing law. This has led to accusations of the tribunals imposing "victor's justice" to punish their defeated enemies rather than issuing principled legal decisions.[94] Moreover, since the tribunals found several Japanese and German leaders guilty using different versions of superior responsibility, it is difficult to extract a single, clear standard.[95] As a result, when the post-WWII tribunals were drawn to a close, the exact contours of superior responsibility in customary international law were uncertain.[96] Nevertheless, these judgments initiated the principle of holding superiors responsible for their omissions, which crystallized into customary international law and was later codified in Additional Protocol I.

Following the post-WWII era, there were no international military tribunals until the ICTY in the early 1990s. However, international criminal law continued to develop in the interim. The United States and United Kingdom, for instance, adopted superior responsibility in their military codes between 1950-75. More importantly, Additional Protocol I (1977) explicitly recognized superior responsibility in a form similar to the current law. This provided

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[93] *See Yamashita, supra* note 80, at 15 ("It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent.").

[94] *See* O'Reilly, *supra* note 39, at 132 (arguing that the doctrine of superior responsibility, which was first articulated in the post-WWII tribunals, "began as an instrument of victor's justice, rather than as a well-considered theory of criminality.").

[95] *Cf. Hostage Case, supra* note 89, (finding that "[a] corps commander must be held responsible for the acts…which [he] knew or ought to have known about.") *with* Tokyo Tribunal Judgment, *supra* note 17, (holding that "by virtue of their respective offices" commanders are liable under superior responsibility if they "deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches thereof, and thereby violated the laws of war.").

[96] Customary international law is formed by the combination of (1) widespread state practice and (2) *opinio juris*—the notion that states follow a certain norm or principle out of a sense of legal obligation. *See* International Court of Justice (ICJ) Statute, art. 38. For a discussion of *opinio juris*, *see Nicaragua v. United States*, (Merits), I.C.J. Reports 1986, ¶ 14.

conventional recognition to a norm that had gained customary international law status by 1977.

C. Additional Protocol I (1977) and Other Developments Prior to the Khmer Rouge Period (1975-79)

In the 1940s and 1950s, prominent states adopted superior responsibility provisions in their military codes. The U.S. Army Field Manual on the Law of Warfare of 1956 included a section on "Responsibility for Acts of Subordinates", which defined superior responsibility in manner similar to Article 29 of the ECCC Law. It included all three elements all three constitutive elements of the current law of superior responsibility.[97] The British Manual of Military Law of 1958 copied the American Field Manual, but removed the section that held superiors responsible when they had "actual knowledge, should have knowledge…"It therefore limited liability to situations in which subordinates committed crimes pursuant to a superior's orders.[98] In Canada, the Parliament passed the 'Act Respecting War Crimes' in 1946, which declared that Canadian military leaders were presumptively responsible for the acts of their subordinates.[99]

Additional Protocol I of 1977 put forth the most authoritative articulation of superior responsibility. According to the ICTY Trial Chamber in the *Celebici* judgment, it established, without doubt, that the concept was part of international law.[100] Article 86 of the Protocol set out

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[97] *See* United States Army Field Manual on the Law of Warfare of 1956, *quoted in Prosecutor v. Hadzihasanovic et al.*, Case No. IT-47-01-PT, Decision on Joint Challenge to Jurisdiction, ¶ 79 (Nov. 12, 2002) [hereinafter "*Hadzihasanovic* Pre-Trial Jurisdiction Decision"] ("In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces or other persons subject to their control…The commander is…responsible *if he has actual knowledge, or should have knowledge, through reports received by him or though other means*, that *troops or other persons subject to his control* are about to commit or have committed a war crime and he fails to take the *necessary and reasonable steps* to insure compliance with the law of war or *to punish violators thereof*.") (emphasis added).

[98] *Hadzihasanovic*, *supra*, at ¶ 80.

[99] *See* Act Respecting War Crimes, Regulations 10(4) - 10 (5) (1946) (Can.). Regulation 10 (4) states "Where there is evidence that more than one war crime has been committed by members of a formation, unit, body, or group while under the command of a single commander, the court may receive that evidence as *prima facie* evidence of the responsibility of the commander for those crimes."

[100] *See Celebici* Trial Judgment, *supra* note 5, at ¶ 340 ("…there can be no doubt that the concept of the individual criminal responsibility of superiors for failure to act is today firmly placed within the corpus of international

the law of superior responsibility for all superiors (including civilians), while Article 87 applied solely to military commanders.

Though broader in scope, Article 86 draws from the 1958 U.S. Army Field Manual. It states:

> "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."[101]

Art. 87 added that commanders have a responsibility to inform their troops of the their obligations under the Protocol and to suppress, prevent, and when necessary, report breaches to "competent authorities".[102]

While it codified superior responsibility in conventional law, Additional Protocol I sought to give written expression to the existing customary international law of superior responsibility, rather than creating new law. The Commentary on the Additional Protocols noted, "The recognition of the responsibility of superiors who, without any excuse, fail to prevent their subordinates from committing breaches of the law of armed conflict is…by no means new in treaty law."[103] The Commentary added that this formulation of superior responsibility—holding superiors liable for their omissions—is "uncontested nowadays and follows both from State

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humanitarian law. Through the adoption of Additional Protocol I, the principle has now been codified and given a clear expression in international conventional law. Thus, article 87 of the Protocol gives expression to the duty of commanders to control the acts of their subordinates and to prevent or, where necessary, to repress violations of the Geneva Conventions or the Protocol.").

[101] Additional Protocol I, *supra* note 10, art. 86 (2).

[102] *See* Additional Protocol I, *supra* note 10, art. 87.

[103] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Commentary, ¶ 3540 [hereinafter "Commentary on Additional Protocol I"], *available at*: http://www.icrc.org/ihl.nsf/COM/470-750112?OpenDocument.

practice and from case-law and legal literature."[104] Many state delegations to the Protocol accepted that much of Additional Protocol I, including the superior responsibility provisions, "were in conformity with pre-existing law."[105] The ICTY Appeals Chamber has also stated that Additional Protocol I simply confirmed the existence of superior responsibility as a mode of criminal liability under international law, rather than creating any new form of liability.[106]

The Commentary on the Additional Protocols noted, however, there were objections to this formulation, particularly with regard to the appropriate standard of *mens rea*. Some state delegations opposed the criminalizing the "failure to act", arguing that it held superiors responsible for mere negligence. The Commentary therefore made clear that the Additional Protocol rejected ordinary negligence as the standard of *mens rea* under Article 86.[107] Much like the subsequent jurisprudence in the ICTY and ICTR, the Additional Protocol sought to impose a *mens rea* between negligence and recklessness that was not too demanding on superiors, while ensuring that they did not escape liability for remaining willfully blind to the crimes of their subordinates.[108]

Given the debate and discussion among state delegations that preceded the final version,

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[104] *Id.*, at 3529.

[105] *See Celebici* Trial Judgment, *supra* note 5, at, ¶ 340 (noting that "the travaux préparatoires of [the relevant] provisions reveals that, while their inclusion was not uncontested during the drafting of the Protocol, a number of delegations clearly expressed the view that the principles expressed therein were in conformity with pre-existing law. Thus, the Swedish delegate declared that these articles reaffirmed the principles of international penal responsibility that were developed after the Second World War. Similarly, the Yugoslav delegate expressed the view that the article on the duty of commanders contained provisions which had already been accepted in 'military codes of all countries.'").

[106] *See Hadzihasanovic* Appeals Decision on Jurisdiction, *supra* note 19, at ¶ 29 ("The Appeals Chamber affirms the view of the Trial Chamber that command responsibility was part of customary international law relating to international armed conflicts before the adoption of Protocol I. Therefore, as the Trial Chamber considered, Articles 86 and 87 of Protocol I were in this respect only declaring the existing position, and not constituting it.").

[107] *See* Commentary on Additional Protocol I, *supra* note 103, at ¶ 3541 ("The strongest objection which could be raised against this provision perhaps consists in the difficulty of establishing intent ' (mens rea) ' in case of a failure to act, particularly in the case of negligence. For that matter, this last point gave rise to some controversy during the discussions in the Diplomatic Conference, particularly due to the fact that the Conventions do not contain any provision qualifying negligent conduct as criminal."). It also stated that not "every case of negligence may be criminal", but that the negligence "must be so serious that it is tantamount to malicious intent" for a superior to be criminally liable.

[108] *See Id.*, at ¶ 3545-46. *See also*, O'Reilly, *supra* note 39, at 134.

this compromise probably reflected the existing state of customary international law. Moreover, the superior responsibility provisions (Articles 86 and 87) essentially reiterated the legal conclusions of the post-WWII tribunals and the national military codes of several states.[109] Fifty-five countries signed onto Additional Protocol I by the end of 1978; today, there are 168 state parties to the Protocol, reflecting its almost universal acceptance a valid instrument of international law.[110]

D. Conclusion

The evidence suggests that superior responsibility, as a mode of liability, was a part of customary international law when the Khmer Rouge came to power in 1975. The military tribunals in Nuremberg and the Far East held, in several cases, that superiors could be held responsible for the crimes of their subordinates even when those superiors had no knowledge of the crimes and played no part in their planning. The principle that superiors could be held criminally responsible for the crimes of their subordinates also found its way into the military manuals and laws of the United States, United Kingdom and Canada.

Most importantly, the Additional Protocols of 1977 codified and, to a large extent, clarified existing customary international law. It confirmed that superior responsibility has three constitutive elements and explained that the *mens rea* standard, which was not clearly defined by the post-WWII tribunals, fell somewhere between ordinary negligence and recklessness. All these developments in international law were widely known and accessible to the accused before the ECCC. Even in 1975, the law was sufficiently clear to put them on notice to change their

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[109] *See generally,* Commentary on Additional Protocol I, *supra* note 103, at ¶ 3525-39 (showing that Protocol I bases its articulation of superior responsibility on the 1907 Hague Conventions, post-WWII jurisprudence, and the 1949 Geneva Conventions).

[110] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, State Parties/Signatories, *available at*: http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P.

conduct or risk prosecution for the criminal acts of their subordinates.

III. Did Superior Responsibility Apply to Civilian Leaders from 1975-79?

The ECCC Law does not distinguish between military and civilian superiors. The Law states that "[t]he fact that [crimes]….were committed by a *subordinate* does not relieve the *superior* of personal criminal responsibility" (emphasis added).[111]

The ICTY statute also referred to a generic "superior", which the ICTY Trial Chamber found probative as to whether the drafters of the Statute intended superior responsibility to apply to civilians.[112] The ICTY Appeals Chamber found that superior responsibility applied to civilian leaders in the 1990s, concluding that it was part of international law at the time.[113] Drawing on the extensive analysis of the Trial Chamber, the *Celebici* Appeals Judgment focused exclusively on jurisprudence from the post-WWII tribunals and Additional Protocol I to the Geneva Conventions to conclude that superior responsibility in the civilian context was "well-established in conventional and customary law."[114] Since the Additional Protocol was adopted in 1977, and given that there were few significant developments in international criminal law from that time and the formation of the ICTY,[115] the *Celebici* decision provides valuable analysis in determining the state of international law in the Khmer Rouge period (1975-79).

The following section will examine the relevant post-WWII cases and Additional Protocol I. It will conclude, much like the *Celebici* Judgment and the ECCC Pre-Trial Chamber,

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[111] ECCC Law, *supra* note 1, art. 29.
[112] *See Celebici* Trial Judgment, *supra* note 5, at ¶ 356.
[113] *See Celebici* Appeals Judgment, *supra* note 27, at ¶ 195 ("The principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law.").
[114] *Celebici* Appeals Judgment, *supra* note 27, at ¶ 195.
[115] *See Hadzihasanovic* Pre-Trial Jurisdiction Decision, *supra* note 97, at ¶ 77 ("Since the early 1950's developments in the field of international humanitarian law were rather limited…This applies equally to developments relating to the doctrine of command responsibility.").

that superior responsibility as a mode of liability for holding civilian superiors liable for the crimes of their subordinates was established under international law when the Khmer Rouge came to power in 1975. As in the military context, the law of superior responsibility for civilian leaders was given its first clear articulation in 1977 with the adoption of Additional Protocol I.

A. Post-World War II Jurisprudence

The post-WWII tribunals were the first to hold civilian superiors liable under a theory of superior responsibility. The London Agreement and the IMFTE Charter did not distinguish between civilian and military leaders.[116] Thus, under both instruments, civilian leaders were responsible for their subordinates' crimes only if they had actual knowledge or played a part in planning those crimes.[117] Much as in the military context, though, the tribunals in practice extended responsibility to civilian leaders even if they were only grossly negligent or reckless with regard to such offences.

The Tokyo Tribunal applied this sort of superior responsibility to several Japanese civilian leaders. For instance, Foreign Minister Hirota was found guilty under a *mens rea* amounting to gross negligence for failing to prevent the atrocities that took place during the "Rape of Nanking". The Tribunal found that Hirota was "derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result."[118] It added that "[h]e was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal

[116] *See* London Agreement, *supra* note 74, art. 6 ("Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."). The IMFTE contains the identical provision.
[117] *See Id.*
[118] Tokyo Tribunal Judgment, *supra* note 17.

negligence."[119] The Tribunal further found Prime Minister Tojo and Foreign Minister Shigemitsu criminally liable for failing to prevent and to punish the acts of Japanese troops.[120]

In the German context, six civilian industrialists were accused of war crimes and crimes against humanity in *United States v. Friedrich Flick et al.* for participating in a slave labor camp.[121] While four of the accused were acquitted, the other two (Flick and Weiss) were found guilty. Flick was the controlling supervisor of the slave labor camp and was Weiss' superior. Though the final judgment mentioned only that he had "knowledge and approval" of Weiss' acts, the tribunal's holding was probably based on Flick's failure as a superior to prevent Weiss' actions.[122]

In the *Roechling* case, German industrialists were also found guilty under a similar fact pattern. The five accused, who all held senior positions in Roechling Iron and Steel Works, were accused of mistreating their labor, including prisoners of war and deported persons. The Court noted that "Herman Roechling and the other accused members of the Directorate of the Voelklingen works are not accused of having ordered this horrible treatment, but of having permitted it; and indeed supported it, and in addition, of not having done their utmost to put an end to these abuses."[123] They were found guilty for failing to take measures to improve the treatment of these prisoners and deportees.

These cases show that the post-WWII tribunals found civilian leaders liable through superior responsibility, without establishing a single, clear articulation of this mode of liability.

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[119] *Id.*
[120] *See Id.* (finding in the case of Shigemitsu that the "circumstances, as he knew them" should have led him to take "adequate steps" to investigate the matter. More pointedly, the Tribunal felt that "[h]e should have pressed the matter, if necessary to the point of resigning, in order to quit himself of a responsibility which he suspected was not being discharged.").
[121] *United States v. Friedrich Flick et al.*, *quoted in Celebici* Trial Judgment, *supra note* 5, at ¶ 359.
[122] *Id.* at ¶ 360.
[123] *The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Herman Roechling and Others*, *quoted in Celebici* Trial Judgment, *supra* note 5, at ¶ 361.

In general, the post-WWII jurisprudence has been widely criticized for its lack of clarity, particularly for its failure to articulate the constitutive elements of superior responsibility. The German cases do not even reference "superior responsibility" in their judgments, but were willing to find civilian business leaders guilty for their failure to prevent employees from abusing laborers. The Tokyo Tribunal Judgment treated civilian leaders much like their military counterparts, finding them guilty under a theory of superior responsibility for not taking appropriate actions to prevent crimes of which they should have known.[124] As in the military context, the exact standards, or indeed the relevant law to which the accused were held liable, are not clear.

The credibility of these judgments is therefore weakened by their overall vagueness, their reliance on various, questionable formulations of superior responsibility and their propensity to find the accused guilty on the basis of little evidence. In other words, accusations that these tribunals practiced "victor's justice" based on retribution rather than principled legal judgments are not unfounded.[125]

B. Additional Protocol I

Despite their lack of clarity, the post-WWII cases held that civilian superiors too were responsible not only for their direct participation, but for omissions that led to their subordinates committing crimes under international law. Additional Protocol I clarified this mode of liability and articulated it in terms similar to the current law.

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[124] *Cf. United States v. Soemu Toyoda*, Official Transcript of Record of Trial, p. 5006, *quoted in Celebici* Trial Judgment, *supra* note 5, ¶ 339 ("[T]he principle of command responsibility… [requires] that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must be punished.") *with* Tokyo Tribunal Judgment, *supra* note 17, (finding Foreign Minister Hirota "derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, [and]failing any other action open to him to bring about the same result."

[125] *See e.g.*, O'Reilly, *supra* note 39, at 132-133.

Article 86 of Additional Protocol I criminalizes the failure to act for all superiors. This provision, like the ECCC Law, includes superior responsibility for generic "superiors", making no distinction between military and civilian leaders.[126] This generic reference was intentional, as Art. 86 attaches to any superior with *de facto* effective control over their subordinates, while Art. 87 applies only to military commanders. The Commentary to the Protocol makes this clear, as it stated that under Art. 86, "superior…is not a purely theoretical concept covering any superior in a line of command", but refers only to an individual "who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control."[127] This is essentially the standard adopted in recent jurisprudence from the ICTY and ICTR.[128]

The Commentary also clarified that, for any superior, there are three elements of superior responsibility. It stated that "if a superior is to be responsible for an omission relating to an offence committed to about to be committed by a subordinate", the three conditions that must be fulfilled are: "a) the superior concerned must be the superior of that subordinate ("his superiors"); b) he knew, or had information which should have enabled him to conclude that a breach was being committed or was going to be committed; c) he did not take the measures within his power to prevent it."[129]

These elements are the essence of the current law of superior responsibility, but the

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[126] *See* Additional Protocol I, *supra* note 10, art. 86(2) ("The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his *superiors* from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.") (emphasis added).
[127] Commentary on Additional Protocol I, *supra* note 79, at ¶ 3544.
[128] *Cf. Celebici* Trial Judgment, *supra* note 5, ¶ 377 ("…a superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his de facto position of authority."); *Kayishema* Trial Judgment, *supra* note 6, at ¶ 213 ("[T]he application of criminal responsibility to those civilians who wield the requisite authority is not a contentious one.").
[129] Commentary on Additional Protocol I, *supra* note 79, at ¶ 3543.

Additional Protocol I relied on post-WWII jurisprudence and prior treaties, including the 1907 Hague Conventions, to derive them.[130] As other tribunals have recognized, Additional Protocol I therefore did not create new law but clarified existing international law.[131] Thus, superior responsibility for civilian leaders was part of customary international law throughout the Khmer Rouge period (1975-79), but was only given clear articulation through Additional Protocol I in 1977.

C. Conclusion: The PTC's Misguided Reliance on Post-WWII Cases

For the ECCC to accord with *nullem crimen*, customary international law from 1975-79 must have recognized superior responsibility for the acts or omissions of civilian superiors, in a sufficiently clear and accessible form to make liability foreseeable to the accused.

The ECCC is limited to prosecuting only "senior leaders" or those "most responsible" for the abuses of the Khmer Rouge, meaning that superior responsibility is one of the primary modes of liability to hold the accused guilty of serious crimes. Therefore, it is important that the Court establishes clearly and with strong legal arguments a basis for civilian superior responsibility in customary international law from 1975-79. The ECCC Pre-Trial Chamber, however, chose to rely almost solely on the decisions of the post-WWII tribunals, rather on Additional Protocol I and equitable considerations.

To be sure, the stature (and notoriety) of the post-WWII tribunals coupled with the growing recognition of superior responsibility in the domestic law of major world powers should have put the accused on notice that they too could be found criminally responsible for the crimes

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[130] *See generally,* Commentary on Additional Protocol I, *supra* note 79, at ¶ 3525-39 (showing that Protocol I bases its articulation of superior responsibility on the 1907 Hague Conventions, post-WWII jurisprudence, and the 1949 Geneva Conventions).

[131] *See Hadzihasanovic* Appeals Decision on Jurisdiction , *supra* note 19, at ¶ 29 (…"command responsibility was part of customary international law relating to international armed conflicts before the adoption of Protocol I. Therefore… Articles 86 and 87 of Protocol I were in this respect only declaring the existing position, and not constituting it.").

of their subordinates. Thus, the PTC was correct to dismiss the appeals by Ieng Sary and Ieng Thirith that challenged the application of superior responsibility to their cases.

But the PTC weakened its decisions by failing to draw on Additional Protocol I in its analysis. As discussed, Additional Protocol I came into affect in 1977, in the midst of the Khmer Rouge era, which perhaps concerned the PTC. The Court probably grappled with one (or both) of the following concerns: (1) that Additional Protocol I evolved the doctrine of superior responsibility such that it imputed criminal responsibility on the accused without adequate notice; or (2), that relying on an instrument that came into effect in 1977 would conflict with the broader equitable considerations underlying *nullem crimen*.

The first concern is unlikely to have influenced the Court's decisions, as the PTC itself has recognized that Articles 86 and 87 of Additional Protocol I merely declared the existing law of superior responsibility and did not constitute any new form of liability.[132] Moreover, though superior responsibility evolved slightly during the drafting of Additional Protocol I, this evolution does not violate *nullem crimen*. International courts have consistently held that clarifications or elaborations on existing law do not pose a *nullem crimen* problem as long as the *conduct* in question was illegal at the time of commission.[133] The post-WWII cases, despite their flaws, made clear that superiors, both civilian and military, could be held criminally responsible for the criminal acts of subordinates, particularly for war crimes, crimes against humanity and other egregious violations of international law. Given the scale of the Khmer Rouge crimes –

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[132] *See Case of Ieng Sary*, *supra* note 4 at ¶ 418; *Hadzihasanovic* Appeals Decision on Jurisdiction, *supra* note 19, at ¶ 29.

[133] *See, e.g.*, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, ¶ 127 (March 24, 2000) ("[*Nullem Crimen*] does not prevent a court…from determining an issue through a process of interpretation and clarification as to the elements of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients of a crime."); *C.R. v. United Kingdom*, App. No. 20190/92, Judgment, Eur. Ct. H.R., ¶ 41 (Nov. 22, 1995) ("…courts are [not] barred from refining and elaborating upon, by way of construction, existing rules"; Rome Statute, *supra* note 3, art. 22 ("A person shall not be criminally responsible…unless the *conduct* in question constitutes, at the time it takes place, a crime…" (emphasis added).

including the killing of an estimated 1.6 to 1.8 million Cambodians[134] – it is clear that the accused before the ECCC are charged with crimes on a scale similar to the accused German and Japanese commanders after World War II. These crimes were therefore recognized under international law thirty years before the Khmer Rouge came to power.

Applying Additional Protocol I to the *nullem crimen* analysis would also not conflict with the equitable considerations that underlie this principle. Superior responsibility today is clearly defined because Additional Protocol I, followed by the *ad hoc* tribunals and the ICC, have established and elucidated its three constituent elements. Additional Protocol I also made clear that international law requires a higher standard of proof than some of the post-WWII cases to hold superiors responsible for the crimes of their subordinates.[135] The ECCC has adopted a *mens rea* standard for superiors that falls between negligence and recklessness, rather than the ordinary negligence standard imposed by the post-WWII tribunals.

Thus, the law has evolved towards greater protection for defendants, by making the three elements clear and by ensuring that superiors will not be responsible for negligent actions or omissions. The PTC would therefore not have caused any unfairness to the accused by referring to Additional Protocol I in its *nullem crimen* analysis. On the contrary, the evolution in the law of superior responsibility protects the accused from the sort of "victor's justice" that was perhaps administered to defeated German and Japanese leaders following the Second World War.

Moreover, *nullem crimen* at its heart is intended to protect individuals who acted on the good-faith belief that their conduct was lawful. The accused allegedly committed serious crimes under international law, including several counts of crimes against humanity and war crimes.

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[134] *See* Ben Kiernan, GENOCIDE AND RESISTANCE IN SOUTHEAST ASIA: DOCUMENTATION, DENIAL & JUSTICE IN CAMBODIA & EAST TIMOR 269-272 (2008).

[135] *See* Additional Protocol I, *supra* note 10, art. 86 (2). *See also*, Rome Statute, *supra* note 3, art. 28(b) (applying a "consciously disregarded" standard of fault on civilian superiors, which appears to be closer to 'recklessness' than any prior articulation of the law).

They held civilian leadership posts in the Khmer Rouge regime: Nuon Chea was second in command to Pol Pot, Ieng Sary was the Foreign Minister and Ieng Thirith was the Minister of Social Action. Like most seniors Khmer Rouge officials, these individuals had traveled outside Cambodia and were often educated abroad.[136] They were therefore not isolated within Cambodia,[137] but were instead almost certainly aware of the significant developments in international law from 1945-77 – described in this paper – that established superior responsibility under customary international law for both military and civilian superiors.

This broader analysis is conspicuously absent from the two PTC decisions, which rely far too heavily on muddled post-WWII jurisprudence. From a legal perspective, then, the PTC would be on stronger ground if they relied on a broader array of sources, such as Additional Protocol I and principles underlying *nullem crimen*.

Strategically, too, the ECCC could benefit from stronger legal opinions. The Tribunal has been plagued by allegations of corruption, which will perhaps lessen if it produces legal opinions of higher quality, which leave no room for doubt that they were decided on principled, legal grounds. These recent PTC decisions provide a cautionary example: the Court correctly held that superior responsibility applied to both civilian and military superiors in 1975-79, but the legal basis for its decisions was questionable.

For these reasons, the PTC would have been well served to look further than the post-WWII judgments in its analyses on this crucial issue. In future decisions, perhaps this Chamber or the ECCC Trial or Appeals Chambers will give superior responsibility and the principle of legality the broader and more comprehensive treatment it deserves.

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[136] *See generally,* David Chandler, THE LAND AND PEOPLE OF CAMBODIA (HarperCollins Publishers) (1991) (stating that several Khmer Rouge leaders were educated abroad, many in France).
[137] *See Case of Ieng Sary, supra* note 4, ¶ 411.