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superior responsibility and The Extraordinary Chambers of the Courts of Cambodia, ECCC, ECCC and superior responsibility, Status of Superior Responsibility in International Law before 1975 Specifically discussing the existence, character, and special problems of the doctrine of superior responsibility.

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MEMORANDUM FOR THE EXTRAORDINARY
CHAMBERS IN THE COURTS OF CAMBODIA

ISSUE: STATUS OF SUPERIOR RESPONSIBILITY IN INTERNATIONAL LAW BEFORE 1975

SPECIFICALLY DISCUSSING THE EXISTENCE, CHARACTER, AND SPECIAL PROBLEMS OF THE DOCTRINE OF SUPERIOR RESPONSIBILITY.

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I. INTRODUCTION

A. Scope

The Royal Government of Cambodia established the Extraordinary Chambers in the Courts of Cambodia ("ECCC") to place the senior leaders of Democratic Kampuchea on trial for the atrocities that occurred in their country from 1975 until 1979.[1] The ECCC will prosecute the leaders for serious violations of Cambodian and international humanitarian law, customs, and conventions.[2] Such violations include, but are not limited to, acts of murder, rape, imprisonment, torture, genocide, and religious persecution.[3] However, the senior leaders may not escape liability just by proving that someone else committed these crimes.[4] The senior leaders of the Khmer Rouge may be criminally liable under the doctrine of superior responsibility.[5] This memorandum will examine the existence of superior responsibility in international customary law, its character in 1975, and special problems concerning its application.

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[1] ECCC Statute, art. 1 [reproduced in accompanying notebook at Tab 3].

[2] *Id*. art. 2.

[3] *See id*. art. 3–8.

[4] *Id.* art. 29.

[5] "Superior responsibility" and "command responsibility" are interchangeable, but the latter frequently connotes military commanders. To avoid misconception, this memorandum will use "superior responsibility." It is also worth noting here that superior responsibility is most often considered a crime of omission, such that the superior did not cause a crime but failed to prevent or repress it. A handful of analysts expand the doctrine of superior responsibility to include situations where a superior has issued an order causing his subordinates to commit a crime, calling the former situation "indirect superior responsibility" and the latter "direct superior responsibility." This latter category explicitly codified in all four of the 1949 Geneva Conventions. *See e.g.* Geneva Convention (IV) Relative to the Protection of Civilian Persons in a Time of War art. 146, Aug. 12, 1949 [reproduced in accompanying notebook at Tab 2]. Cambodia signed onto the Geneva Conventions in 1958. Because the ECCC's concern is over *ex post facto* application of law, and "direct superior responsibility" was clearly binding international conventional law, "direct superior responsibility" will not be addressed. Hereafter, "superior responsibility" refers only to the crime of omission.

B. Summary of Conclusions

i. Superior responsibility existed in the international customary law of 1975.

Using international conventions, domestic codifications, expert sponsorship and judicial decisions as evidence, it is clear that superior responsibility existed in international customary law by 1975. The drafting of Additional Protocol I and the cases following World War II showed that an international consensus emerged that a superior could be held criminally liable for the crimes of another if: (1) he had effective control over the perpetrator; (2) he knew or possessed information of the offense; and (3) he failed to take necessary measures within his material ability to prevent the crime or punish the perpetrator.

ii. Both military and civilian leaders can be liable under superior responsibility.

The "superior" in superior responsibility is not limited to military commanders. The Tokyo Tribunal's prosecution of various political leaders and the Nuremberg Tribunal's prosecution of industrial leaders shows that superior responsibility applies to military and civilians alike.

iii. The defendant must first have effective control over the perpetrator of the underlying crime.

Inherent in the idea of superior responsibility is that a superior-subordinate relationship existed between the defendant and those who committed the crimes. The relationship is not based on the defendant's formal position over the perpetrator, but rather his effective control over the perpetrator.

iv. The defendant's knowledge of his subordinate's crime may be determined by direct or circumstantial evidence.

A superior may be liable if he "knew or had reason to know" of his subordinate's crimes. Besides direct evidence, the case of General Yamashita shows that actual knowledge of the crimes can be based on circumstantial evidence. The number, scope, severity and methods of the crimes are all factors that may support a finding of knowledge.

v. If actual knowledge is absent, the prosecution must show that the defendant had information in his possession which provided him with a "reason to know" of the crimes.

The alternative *mens rea* standard of "should have known" emerged from the World War II cases and the drafting of the Additional Protocol I. This standard is not significantly different from "had reason to know" of the ECCC Statute, as the International Criminal Tribunal for the Former Yugoslavia ("ICTY") proved. If the superior had, in his possession, information which enabled him to know that that a crime would be or had been committed he may be criminally liable.

vi. The defendant's criminal failure to act must be determined on a case-by-case basis in light of the defendant's material ability to act.

Again using the lens of the ICTY to view World War II cases, it becomes evident that the third element of superior responsibility is fact-specific and inextricably linked to the defendant's awareness and material ability. His awareness triggers his duty to act, and his material ability determines whether he actually failed in his duty.

vii. International customary law appears to limit superior responsibility to international armed conflicts.

The international customary law of superior responsibility is saturated with the influence of World War II. Because of this, superior responsibility was apparently limited to international armed conflicts in 1975 and may be inapplicable to many of the crimes that occurred under the Khmer Rouge.

viii. Prosecutions for genocide under superior responsibility require a heightened *mens rea* standard to be viable.

The crime of genocide requires that the specific intent to destroy a group of people, which is logically incompatible with the almost negligent standard of "knew or had reason to know." The logical paradox is potentially overcome if superior responsibility's *mens rea* standard is reinterpreted to approach a willful blindness, but support remains lacking.

II. SUPERIOR RESPONSIBILITY IN INTERNATIONAL CUSTOMARY LAW

A. Sources of international customary law

In the decades between the World War II conviction and the rise of the Khmer Rouge in 1975, the sporadic appearance of superior responsibility convictions caused scholars to question whether superior responsibility had any place within international law.[6] Given that the ECCC intends to apply superior responsibility against the senior leaders of the Khmer Rouge,[7] the

[6] Richard L. Lael, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY ix (1982) [reproduced in accompanying notebook at Tab 24].

[7] ECCC Statute, *supra* art. 1 ("The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979."). ECCC Statute, *supra* art. 29 ("The fact that any of the 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

scholars' question must be resolved in the affirmative for the ECCC to proceed. ECCC should not feel threatened by the relatively few judicial applications of superior responsibility, for international customary law may arise with or without judicial proceedings.[8] The generally accepted criteria for determining international law are recorded in Article 38 of the Statute of the International Court of Justice (ICJ).[9] Article 38 holds that international law is found in international conventions, international custom, general principles of law, judicial decisions and teachings of highly qualified publicists across the world.[10] By following the evolution of superior responsibility among these sources, it becomes clear that superior responsibility not only existed as customary international law by 1975, but individuals could be criminally liable under the doctrine.

B. Foundations in international conventions

i. 1907 Hague Conventions

The analysis of superior responsibility in international customary law begins with a look at its foundations in international conventions, starting with the 1907 Hague Peace Conference.[11] Although the Hague Conventions left the question of a leader's criminal liability unresolved,

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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.") [reproduced in accompanying notebook at Tab 3].

[8] *See* William V. O'Brien, *The Law of War, Command Responsibility and Vietnam* 60 Geo. L. J. 605, 611 (1971) (although the discussion is also limited to the laws of war, the analysis applies equally to the law of nations) [reproduced in accompanying notebook at Tab 40].

[9] Francisco Forrest Martin, Stephen J. Schnably, Richard J. Wilson, Jonathan S. Simon & Mark V. Tushnet, INTERNATIONAL HUMAN RIGHTS & HUMANITARIAN LAW: TREATIES, CASES & ANALYSIS 22 (2006) (Article 38 of the ICJ enumerates the "universally recognized" sources of law) [reproduced in accompanying notebook at Tab 16].

[10] Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1005 [reproduced in accompanying notebook at Tab 6].

[11] *See* Ilias Bantekas, PRINCIPLES OF DIRECT AND SUPERIOR RESPONSIBILITY IN INTERNATIONAL HUMANITARIAN LAW 69 (2002) [reproduced in accompanying notebook at Tab 18].

they certainly implied that leaders "shall be answerable" for belligerents.[12] Arguably, Article 1's responsible command requirement, in conjunction Article 43's obligation to guarantee public order and safety, codified the international custom regarding the duties and responsibilities of commanders.[13] The Hague Convention's assignment of general responsibilities to leaders led inevitably the enforcement of criminal liability against those leaders.[14]

ii. 1919 Paris Commission

At the conclusion of World War I, a "Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties" (hereafter "Paris Commission") gathered at the Palace of Versailles. Seeking to individually punish Kaiser Wilhelm II and other German officers for the atrocities that occurred in the war, the majority Report concluded that criminal charges could be brought

> [a]gainst all authorities, civil or military, belonging to enemy countries, however high their position may have been without distinction of rank, including the heads of States, who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war.[15]

The countries which supported this conclusion included Great Britain, France, Italy, Belgium, Greece, Poland, Romania, and Serbia. Only two countries held back, the United States and Japan.

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[12] Shane Darcy, COLLECTIVE RESPONSIBILITY AND ACCOUNTABILITY UNDER INTERNATIONAL LAW 296 (2007) (*quoting* J.M. Spaight, WAR RIGHTS ON LAND (1911)) [reproduced in accompanying notebook at Tab 25].

[13] *See* William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 11 (1973) [reproduced in accompanying notebook at Tab 41].

[14] *See id*. at 2.

[15] Violation of the Laws, *supra* at 24 [reproduced in accompanying notebook at Tab 48].

The United States and Japanese delegations held reservations about the majority's conclusions, specifically the doctrine of superior responsibility.[16] The Japanese delegates hesitated to support criminal liability under superior responsibility because they feared it would not satisfy public opinion.[17] Even so, Japanese delegates were convinced that principle responsibility for the international crimes of World War I rested upon German leadership.[18]

The American delegates raised two concerns, both of which sidestepped direct opposition of the doctrine. First, they were concerned with the uncertainty of the "laws of humanity."[19] As a practical matter, the American delegates did not know how tribunals would determine the appropriate source of international law. Apparently, their fear was that zealous tribunals would improperly tailor law on an *ad hoc* basis from immediate political pressures or isolated precedent. Time has addressed this concern, however, with the authoritative Article 38 of the 1945 ICJ statute.[20] International tribunals have known since then which sources to draw upon so that individual defendants are not arbitrarily prosecuted.

The Americans' second concern was that Heads of State "are not and…should not be made responsible to any other sovereignty."[21] Even though the Americans did not deny the responsibility of Heads of State, the Americans contended that the affirmative defense of

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[16].Darcy, *supra* at 297 [reproduced in accompanying notebook at Tab 25]. The American delegates referred to superior responsibility as "the doctrine of negative criminality." Despite his dissenting opinion, one of the two Americans, James Brown Scott, declared that the procedures of *both* the majority and dissenting Reports should be followed. Violation of the Laws, *supra* at vi [reproduced in accompanying notebook at Tab 48].

[17] Violation of the Laws, *supra* at 80 [reproduced in accompanying notebook at Tab 48].

[18] *Id*. at 80.

[19] *Id*. at 73.

[20] *See* Sheldon Glueck, WAR CRIMINALS: THEIR PROSECUTION & PUNISHMENT 122 (1944) [reproduced in accompanying notebook at Tab 26].

[21] Violation of the Laws, *supra* at 76 [reproduced in accompanying notebook at Tab 48].

sovereign immunity would defeat any possible finding of criminal liability.[22] This argument was one of practicality, not of principle. Shortly after making the argument, the Americans flatly stated that this second concern did not apply at all to Heads of State who abdicated or were repudiated by their people.[23] This signaled that they were not opposed to superior responsibility in its entirety, just insofar as it interacted with the sovereign immunity of acceptable leaders. Even so, the argument was likely misplaced. The only support the Americans provided for their argument was a single, inapplicable case involving the peacetime property rights between friendly sovereigns. [24]

The theory of superior responsibility proposed by the Paris Commission on March 29, 1919 failed to appear three months later in the Treaty of Versailles. Instead, Articles 227 and 228 simply provided for the arraignment of Kaiser Wilhelm II and other officers for violations of international law.[25] While doctrine of superior responsibility can still be inferred from the two articles,[26] the Treaty of Versailles only explicitly supplied the conventional precedent that leaders could be individually prosecuted under international law. The reason the precedent did not gain more international appreciation is because the Netherlands refused to surrender the Kaiser to trial and the political will to pursue justice thereafter quickly dissolved. [27]

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[22] *Id.* at 76.

[23] *Id*. at 66.

[24] The case cited is *Schooner Exchange v. McFaddon*. Professor Glueck also further contends that the case was already out of date by 1919, and that "there is nothing immutable about the ideas of sovereignty…[it] is based on international comity and courtesy." Glueck, *supra* at 122 [reproduced in accompanying notebook at Tab 26].

[25] *See* Violation of the Laws, *supra* at vii [reproduced in accompanying notebook at Tab 48].

[26] Bantekas, *supra* at 69 [reproduced in accompanying notebook at Tab 18].

[27] Glueck, *supra* at 126 [reproduced in accompanying notebook at Tab 26].

iii. Additional Protocols of 1977

Explicit international codification of superior responsibility did not appear until 1977, when the Additional Protocol I to the 1949 Geneva Conventions was adopted. Limited to international armed conflicts, Article 86 provided that:

> The fact the 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 would have enabled them to conclude in the circumstances at the time, that he was committing or was about to commit such a breach and if they did not take all feasible measures within their power to prevent or repress such a breach.[28]

Military commanders are specifically addressed in Article 87, which provides that commanders have obligations to prevent, suppress, and report crimes, an obligation to ensure compliance with the 1949 Geneva Conventions and the Protocols, and an obligation to initiate disciplinary or penal actions against violators.[29]

While Additional Protocol I was not binding on countries in 1975, the principle adopted reflects the international customary law of several years beforehand. When the International Committee of the Red Cross gathered experts and governments together to decide on a rule of omission, the draft proposed in 1973 read:

> The fact that a breach of the Conventions or of the present Protocol was committed by a subordinate does not absolve his superiors from penal responsibility if they knew or should have known that he was committing or would commit such a breach and if they did not take measures within their power to prevent or repress such a breach.[30]

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[28] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 86, adopted June 8, 1977 [hereinafter "Protocol I," reproduced in accompanying notebook at Tab 4].

[29] *Id*. art. 87.

[30] Darcy, *supra* at 330 [reproduced in accompanying notebook at Tab 25].

One can tell at a glance that it is not significantly different from the final Article 86. The original *mens rea* element of "knew or should have known" caused some confusion among the international delegates, and was tweaked.[31] The word "feasible" was added between "take measures." Still, the principle of superior responsibility as a whole remained unchanged. This certainly indicates that superior responsibility existed in international customary law by 1975. Other sources support this contention as well, as will be shown.

C. Domestic codifications

i. Before nineteenth century

Domestic laws and other legal instruments throughout the world recognized superior responsibility for centuries. In 1439, King Charles VII of France ordained criminal responsibility for any officer who failed to prevent or punish the criminal acts of his subordinates "as if he had committed [the crime] himself."[32] In 1621, King Adolphus of Sweden also recognized superior responsibility in his "Articles of Military Lawwes to be observed in the Warres."[33]

The domestic codifications spread to the New World as well. In 1775, the Provisional Congress of Massachusetts Bay adopted the Articles of War, which held that:

> Every Officer commanding, in quarters, or on a march, shall keep good order, and to the utmost of his power, redress all such abuses or disorders which may be committed by any Officer or Soldier under his command; if upon complaint made to him of Officers or Soldiers beating or otherwise ill-treating any person, or committing any kind of riots to the disquieting of the inhabitants of this Continent, he, the said commander, who shall

[31] *Id*. at 331–33.

[32] Bantekas, *supra* at 68 (*citing* L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 Transnational Law & Contemporary Problems 319, 321 (1995)) [reproduced in accompanying notebook at Tab 18].

[33] *See* Parks, *supra* at 5 [reproduced in accompanying notebook at Tab 41].

> refuse to omit to see Justice done to this offender or offenders, and reparation made to the party or parties injured, as soon as the offender's wages shall enable him or them, upon due proof thereof, be punished as ordered by General Court-Martial, in such manner as if he himself had committed the crimes or disorders complained of.[34]

Establishment of superior responsibility was reiterated throughout multiple promulgations of the American Articles of War.[35]

ii. Mid-nineteenth century

Shortly after the start of World War II, nations across the globe promulgated rules which reaffirmed the doctrine of superior responsibility and its application to individuals.[36] On August 28, 1944, France passed an ordinance which applied criminal liability for superiors who organized or tolerated criminal acts of their subordinates.[37] This ordinance applied to all of France's territories and colonies, including Cambodia.[38] Article IX of the October 24, 1946 Chinese Law Governing the Trial of War Criminals provided that:

> Persons who occupy a supervisory or commanding position in relation to war criminals and in this capacity have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as accomplices of the war criminals.[39]

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[34] *Id*. at 5, 11 (citing Articles of War, Provisional Congress of Massachusetts Bay, April 5, 1775) (emphasis omitted).

[35] *See id*. at 5, 11 (referencing the Articles of War (June 30, 1775), Article XII; Articles of War (September 20, 1776), Section IX; and Articles of War (1916), Article 54). *See also* Bantekas, *supra* note 8 at 68 (citing Article 33 of the 1806 Articles of War) [reproduced in accompanying notebook at Tab 18].

[36] LAW REPORTS OF TRIALS OF WAR CRIMINALS Vol. XIV 158 (UN War Crimes Commission: London, 1949) Vol. XIV [hereinafter "LRTWC Vol. XIV," reproduced in accompanying notebook at Tab 23].

[37] *Prosecutor v. Delalic, et al.,* Case No. IT-96-21-T, Trial Judgment (Nov. 16, 1998) ¶ 336 (*quoting* the text of the French ordinance; "Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, [his superiors] shall be considered as accomplices in so far as they have organized or tolerated the criminal acts of their subordinates.") [reproduced in accompanying notebook at Tab 15].

[38] Henry Kamm, CAMBODIA: REPORT FROM A STRICKEN LAND xiv–xv (1998) (France maintained Cambodia as a colony from 1864 until 1953) [reproduced in accompanying notebook at Tab 17].

[39] LRTWC Vol. XIV, *supra* at 158 [reproduced in accompanying notebook at Tab 23].

Likewise, Netherlands East Indies Statute Book Decree No. 45 of 1946 included a provision punishing superiors who tolerated a subordinate's war crime "whilst knowing, or at least must have reasonably supposed, that it was being or would be committed."[40]

The 1956 United States Army Field Manual provides possibly the most detailed domestic codification of the modern doctrine of superior responsibility. Field Manual paragraph 501 states that a military commander is responsible for everyone under his control.[41] The commander may be held criminally liable for his subordinates' atrocities against the civilian population and prisoners of war. First, the commander is directly for the execution of any order the commander passed to his subordinates. Second, he is indirectly liable if

> he has actual knowledge, or should have knowledge, through reports received by him or other means, [that his subordinates] 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.[42]

This paragraph appears in the Field Manual under Section II, appropriately titled "Crimes Under International Law." Thus, superior responsibility was well established as a general principle of law and international custom by 1956.

D. Expert sponsorship

Experts throughout history developed and advocated superior responsibility. Compiled in the 1078 A.D., the *Seven Military Classics* of China provide the earliest recorded foundations. The *Seven Military Classics* were written by famous Chinese generals over the course of several

[40] LAW REPORTS OF TRIALS OF WAR CRIMINALS Vol. XI 100 (UN War Crimes Commission: London, 1949) [reproduced in accompanying notebook at Tab 21].

[41] U.S. Department of Army, Field Manual No. 27-10, Law of Land Warfare (1956) [hereinafter "U.S. Army Manual No. 27-10," reproduced in accompanying notebook at Tab 9].

[42] *Id.*

millennia. The compilation is most well known for Sun Tzu's *Art of War*, but Sun Tzu was not the only one to write on the responsibilities and liabilities of leadership.

In the eleventh century B.C., General T'ai Kung wrote the *Six Secret Teachings*. While teaching King Wen about the Tao of legendary sage emperors, Tai Kung warned that "if you know something is wrong but you sanction it—it is in [this] that the Tao stops."[43] T'ai Kung also stated that the Tao of a King is "like that of a Dragon's Head…if he should get angry but does not, evil subordinates will arise. If he should execute but does not, great thieves will appear."[44] He also believed that punishment should extend all the way to the highest leadership.[45]

In the fifth century B.C., General Sun Tzu famously demonstrated the responsibility of a superior for his or her subordinates. He believed that: "When troops flee, are insubordinate, distressed, collapse in disorder, or are routed, it is the fault of the general. None of these disorders can be attributed to natural causes."[46] When a king asked for a demonstration, Sun Tzu organized the king's three hundred concubines into two companies, each led by the king's favorite concubines.[47] After teaching the companies how to execute military drills, he issued an

[43] THE SEVEN MILITARY CLASSICS OF ANCIENT CHINA 45 (Ralph Sawyer transl., Basic Books 2007) (1993) [reproduced in accompanying notebook at Tab 29] "Tao" literally means "the Path" or "the Way."

[44] *Id*. at 50 Interestingly, T'ai Kung's "Dragon" teachings pertain to military organization and the specialized responsibilities of the command staff. *Id* at 38. The "Dragon" and "Martial" teachings are explicitly separate from the "Civil" teachings concerning the king and other political leadership. T'ai Kung's reference to the "Dragon's Head" may suggest that the highest levels of civil leadership are both superior to and responsible for the actions of nation's military forces.

[45] *Id*. at 33.

[46] Parks, *supra* at 4 (*quoting* Sun Tzu, *The Art of War* 125 (S. Griffith transl. 1963)) [reproduced in accompanying notebook at Tab 41].

[47] THE SEVEN MILITARY CLASSICS OF ANCIENT CHINA, *supra* at 151 [reproduced in accompanying notebook at Tab 29].

order to assemble, advance and deploy.[48] The women laughed, even after Sun Tzu explained and repeated the order.[49] At this Sun Tzu said: "If the words of command are not clear and distinct, if orders are not thoroughly understood, the general is to blame. But if his orders are clear, and the soldiers nevertheless disobey, then it is the fault of their officers."[50] Over the king's protests, Sun Tzu had the two concubine leaders beheaded.[51]

Around the fourth century B.C., Wei Liao-Tzu explicitly added criminal liability to earlier concepts of superior responsibility.[52] In his words:

> All the officers—from the level of the double squad of ten up to the generals of the right and left, superiors and inferiors--are mutually responsible for each other. If someone violates an order or commits an offense, those that report it will be spared from punishment, while those who know about it but do not report it will all share the same offense.[53]

Wei Liao-Tzu believed that, regardless of one's position or wartime conditions, a failure to discover and report another's crime or to prevent another's death may punished as though one had committed the crime himself.[54]

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[48] *Id*. at 151–52.

[49] *Id*. at 152.

[50] Parks, supra at 4 (*quoting* Sun Tzu, *The Art of War* 9 (L. Giles transl. 1944)) [reproduced in accompanying notebook at Tab 41]. THE SEVEN MILITARY CLASSICS OF ANCIENT CHINA, *supra* at 152 (offering an alternative translation that "[i]f the instructions are not clear, if the explanations and orders are not trusted, it is the general's offense. When they have already been instructed three times and the orders explained five times, if the troops still do not perform, it is the fault of the officers.") [reproduced in accompanying notebook at Tab 29].

[51] Parks, *supra* at 4 (Parks goes on to say that Sun Tzu replaced the two beheaded leaders with a member from each company. When Sun Tzu gave the order once more, both companies executed the order flawlessly) [reproduced in accompanying notebook at Tab 41].

[52] Bantekas, supra at 67 (despite Sun Tzu's harsh demonstration, superiors were only *morally* responsible for subordinates before Wei Liao-Tzu) [reproduced in accompanying notebook at Tab 18].

[53] THE SEVEN MILITARY CLASSICS OF ANCIENT CHINA, *supra* at 264 [reproduced in accompanying notebook at Tab 29].

[54] *Id*. at 235.

Nearly two millennia later, Dutchman Hugo Grotius recorded the principle of superior responsibility—including its criminal aspect.[55] Like Wei Liao-tzu, Grotius believed liability could attach to anyone regardless of position. He wrote that:

> [T]hose who order a wicked act, or grant to it the necessary consent, or who aid it, or who furnish asylum, or those who in any other way share in the crime itself; those who give advice, who praise or approve; those who do not forbid such an act although bound by law properly so called to forbid it, or who do not bring aid to the injured although bound to do so by the same law; those who do not dissuade when they out to dissuade; those who conceal the fact which they are bound by some law to make known—all these may be punished, if there is in them evil intent sufficient to deserve punishment.[56]

He also established the criminality of superior responsibility by declaring that "a community, or its rulers, may be held responsible for the crime of a subject if they knew of it and do not prevent it when they could and should prevent it."[57] The lasting and widespread influence of Grotius's writing earned him the title of "the father of international law."[58]

Prominent American speakers advocated for superior responsibility as well. In 1861, Union General George B. McClellan warned his officers that they would "be held responsible for punishing aggression by those under their command."[59] In 1944, Harvard criminal law professor

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[55] Parks, *supra* at 4 [reproduced in accompanying notebook at Tab 41].

[56] Darcy, supra at 294 (*quoting* Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (1646), Book II, Chapter XXI, I, 522–523) [reproduced in accompanying notebook at Tab 25].

[57] Parks, *supra* at 4 [reproduced in accompanying notebook at Tab 41].

[58] Glueck, *supra* at 107 [reproduced in accompanying notebook at Tab 26]. Telford Taylor argues that the title is unwarranted, primarily because Grotius's contributions to international law are heavily derived from Catholic predecessors, but, even so, such arguments further show that the principle of superior responsibility is ancient and widespread. *See* Telford Taylor, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 63 (1970) [reproduced in accompanying notebook at Tab 28].

[59] Taylor, *supra* at 53 [reproduced in accompanying notebook at Tab 28].

Sheldon Glueck strongly argued for the punishment of the senior Axis leaders, for instituting, approving, rewarding, and failing to prevent violations of criminal laws by their subordinates.[60]

The vocal support for superior responsibility increased over time. The International Committee of the Red Cross noted, in 1973, that numerous experts had expressed eagerness to codify superior responsibility into international law.[61] That year, while working on what would later become Article 86 of Protocol I, the ICRC based their draft on the "proposals submitted by experts, particularly by experts in criminal law [and government]."[62] From the earliest recordings of military philosophy to just before the rise of the Khmer Rouge, highly qualified people have voiced their advocacy for the doctrine of superior responsibility.

E. Judicial applications

i. Before World War II

Judicial applications of superior responsibility stretch back to 1474. At that time, a tribunal, composed of twenty-eight judges from the allied states of the Holy Roman Empire, convicted Peter von Hagenbach for failing to prevent his subordinates from committing various crimes including those against "the laws of God and man."[63] Von Hagenbach was stripped of knighthood and executed for his crimes.[64] Attempts to use superior responsibility under

[60] Glueck, *supra* at 123 (Glueck passionately states that, "To say that [a leader like Hitler] is exempt from punishment while the common soldier puppet who obeyed his orders must be punished it to fly in the face of reason, justice and elementary decency; and no interpretation of law that arrived at such a conclusion could or ought to withstand the wrath and the sense of fair play of the civilized peoples of the world.") [reproduced in accompanying notebook at Tab 26].

[61] Commentary to the Additional Protocol ¶ 3526 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds., Martinus Nijoff Publishers 1987) [reproduced in accompanying notebook at Tab 43].

[62] *Id* at ¶ 3526.

[63] Carol T. Fox, *Closing a Loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Known Past Offenses*, 55 CASE W. RES. L. REV. 443, 447 (2004) [reproduced in accompanying notebook at Tab 34].

[64] Id. at 447.

international law were made ever since, but have not always been successful or clear. The *Leipzig* Court, operating under international law just after World War I, convicted Captain Emil Müller to six months for participating in the mistreatment of prisoners of war, including one instance of tolerating mistreatment conducted by subordinates.[65] Kaiser Wilhelm narrowly evaded trial for failing to prevent or punish war crimes only because the Netherlands refused to extradite him.[66] Still, judicial applications of superior responsibility remained sporadic until World War II.

ii. After World War II

As World War II drew to a close, the modern doctrine of superior responsibility had its troublesome birth in the case of General Yamashita.[67] The general charge laid against him by the U.S. Military Commission was:

> [that] between 9 October 1944 and 2 September 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, [General Tomoyuki Yamashita] unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he, General Tomoyuki Yamashita, thereby violated the law of war.[68]

While Japanese forces under his authority had raped, mistreated, and murdered over 32,000 Filipino citizens and captured Americans, no direct link could be established between Yamashita

[65] Cpt. Müller escaped a second similar charge under a theory of superior responsibility because the prosecution failed to show that he knowingly permitted the mistreatment. Darcy, *supra* at 298–99 [reproduced in accompanying notebook at Tab 25].

[66] L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 Transnational Law & Contemporary Problems 319, 323 (1995) [reproduced in accompanying notebook at Tab 38].

[67] Darcy, *supra* at 309 [reproduced in accompanying notebook at Tab 25].

[68] Lael, *supra* at 80 (*citing* "Before the Military Commission Convened by the Commanding General United States Army Forces, Western Pacific: Yamashita, Tomoyuki", AG 000.5 JA, 31) [reproduced in accompanying notebook at Tab 24].

and the atrocities.[69] The case hinged on the prosecution's assertions that Yamashita "should have known" or "must have known" of the widespread atrocities.[70] Defense counsel countered that Yamashita's besieged battle conditions made knowledge impossible.[71] Without addressing the *mens rea* arguments in their opinion, the commission of lay judges found him guilty for failing to provide effective control of his troops as required by the circumstances, and sentenced him to death.[72] The judgment was upheld in the U.S. Supreme Court, six to two.[73]

Although allegations of strict liability hounded the *Yamashita* decision for years,[74] the International Military Tribunal of the Far East applied superior responsibility too. The "Tokyo Tribunal" charged twenty-six Japanese leaders under Count 54 with having ordered, authorized, or permitted the commission of war crimes[75] and under Count 55 for "recklessly disregarding their legal duty by virtue of their offices to take adequate steps to secure the observance and prevent breaches of the laws and customs of war."[76] The tribunal further clarified that leaders could be criminally liable if:

> (1) They had knowledge that crimes were being committed, and having such knowledge they failed to take steps as were within their power to prevent the commission of such crimes in the future, or

[69] *Id*. at 80.

[70] *Id*. at 86.

[71] *Id*. at 86.

[72] *Id*. at 95.

[73] *In Re Yamashita*, 327 U.S. 1 (1946) [reproduced in accompanying notebook at Tab 10].

[74] *See* Parks, *supra* at 37 (Parks also contends that most of the decision's opposition was generated as a result of a highly critical book written by Yamashita's defense counsel) [reproduced in accompanying notebook at Tab 41]. *Id.* at 22.

[75] Trial of Japanese War Criminals 61 (U.S. Government Printing Office 1946) [reproduced in accompanying notebook at Tab 46].

[76] *Id*. at 61–62.

(2) They are at fault in having failed to acquire such knowledge.[77]

Of the eleven international judges,[78] only two dissented from the convictions on political grounds.[79]

The International Military Tribunal at Nuremberg also grappled with superior responsibility. Two of the major cases the Nuremberg tribunal decided were *United States v. Wilhelm von Leeb et al*. and *United States v. Wilhelm List*, better known as the *High Command* and *Hostages* cases, respectively.[80] In the *High Command* case, thirteen high ranking German officers transmitted illegal orders through the chain of command,[81] which caused their subordinates to commit various war crimes, crimes against peace, and crimes against humanity.[82] The *High Command* judges convicted those officers who knew of, but failed to oppose, the illegal orders on the basis that their "personal neglect amount[ed] to a wanton, immoral disregard of the action of [their] subordinates amounting to acquiescence."[83]

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[77] The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East, *reprinted in* R. John Pritchard and Sonia Magbanua Zaide (eds.), The Tokyo War Crimes Trial, vol. 20, 48,445(R. John Pritchard and Sonia Magbanua Zaide, eds. Garland Publishing: New York and London 1981) [hereinafter "IMTFE Transcripts," reproduced in accompanying notebook at Tab 45].

[78] Trials of Japanese War Criminals, *supra* at iv (the countries that supplied judges were: Australia, Canada, China, Great Britain, Netherlands, New Zealand, Soviet Union, United States, France, India and Philippine Islands) [reproduced in accompanying notebook at Tab 46].

[79] Taylor,*supra* at 85 [reproduced in accompanying notebook at Tab 27]. *See also* Darcy, *supra* at 314 (even so, dissenting Justice Roling recognized that power, knowledge, and duty together may lead to criminal responsibility) [reproduced in accompanying notebook at Tab 25].

[80] Parks, *supra* at 38, 58 [reproduced in accompanying notebook at Tab 41].

[81] *See* L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 Transnational Law & Contemporary Problems 319, 323 (1995) (noting also that this is not an issue of direct superior responsibility; none of the officers was accused of issuing the orders, and the court was careful to distinguish between "transmission" and "issuance") [reproduced in accompanying notebook at Tab 38].

[82] Parks, *supra* at 39 [reproduced in accompanying notebook at Tab 41].

[83] TRIALS OF WAR CRIMINALS BEFORE THE NURNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 Vol. XI. 544 (U.S. Govt. Printing Office: Washington 1950) [hereinafter "TWC Vol XI," reproduced in accompanying notebook at Tab 32].

In the *Hostages* case, defendant General von List, commander of occupied territory, received reports of atrocities committed in the area. He denied having authority over the perpetrators and denied having knowledge of the reports. In their judgment, the tribunal went through the three criteria of superior responsibility. First, it found that List's responsibility as a commander of occupied territory extended to "all lawless groups or persons" within the area. Then the court rejected the von List's claims of ignorance, arguing that he should have known of the crimes from the reports sent to them. The court found that von List had done nothing to prevent or punish the offenses, and then found him guilty.

These trials following World War II brought about a great expansion of the principle that individuals may be held criminally liable under international law.[84] What distinguished these trials from prior trials is that the defendants were almost entirely at or near the top of the military or civilian hierarchy.[85] The judgments also met with international approval. During its first session in 1946, the United Nations "affirm[ed] the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal."[86] By 1970, the results of the Tokyo and Nuremberg Tribunals had become the modern corpus of international criminal law.[87] Thus, superior responsibility clearly existed in international customary law well before the rise of the Khmer Rouge.

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[84] Taylor, *supra* at 82 [reproduced in accompanying notebook at Tab 28].

[85] *Id*. at 83.

[86] United Nations Resolution 95(I), December 11, 1946. Retrieved from http://www.un.org/documents/ga/res/1/ares1.htm,on March 24, 2008 [reproduced in accompanying notebook at Tab 47].

[87] Taylor, *supra* at 93 [reproduced in accompanying notebook at Tab 28].

III. CHARACTER OF SUPERIOR RESPONSIBILITY

A. Basis of analysis

Now that the ECCC may safely reaffirm that the doctrine of superior responsibility existed in 1975, the tribunal must examine the character of the doctrine of the time. The following analysis will concern itself off Article 29's three essential elements: (1) a superior-subordinate relationship, (2) a *mens rea* of "knew or had reason to know," and (3) a failure to prevent or punish. As will be discussed, superior responsibility was not well-defined in 1975, especially with regard to the *mens rea* element. The cases before this time can support divergent views of superior responsibility; so for the sake of future judicial integrity, the following retrospective must necessarily be viewed through the lens of the ICTY analysis of the period.

B. Superior-subordinate relationship

i. Scope of "superior"

Inherent in the concept of superior responsibility is that the accused actually be a "superior." Before determining the substance of this first element of superior responsibility, the scope of "superior" must be addressed. The doctrine of superior responsibility appears most often in the context of military commanders. However, civilian or political superiors are also subject to the doctrine. This principle has met approval since the Paris Commission first recommended, in 1919, that "all authorities, civil or military," could be charged with the crimes of their subordinates.[88]

The Tokyo Tribunal relied upon the principle in making its findings of guilt against civilian political leaders charged with having disregarded their duty take adequate steps to secure

[88] *See* Violation of the Laws, *supra* at 24 [reproduced in accompanying notebook at Tab 48].

the observance of the laws and customs of war and to prevent their breach.[89] It found Japanese Foreign Minister Koki Hirota liable for the "Rape of Nanking" because:

> [a]s Foreign Minister he received reports of these atrocities immediately after the entry of the Japanese forces into Nanking. According to the Defense evidence credence was given to these reports and the matter was taken up with the War Ministry. Assurances were accepted from the War Ministry that atrocities would be stopped. After these assurances had been given reports of atrocities continued to come in for at least a month. The Tribunal is of the opinion 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. He 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 negligence.[90]

The Tokyo Tribunal found several other government officials criminally liable for their failures to secure observance of the law or to prevent or punish the criminal acts of Japanese troops.[91]

Contemporaneously, Western civilian leaders were prosecuted for the crimes of their subordinates. In *United States v. Friedrich Flick and others*, the six German industrialists were charged with war crimes and crimes against humanity because they were involved in enslavement of deported citizens, concentration camp inmates, and prisoners of war.[92] Rather than finding that he actively participated in the enslavement, the tribunal found Flick guilty on the sole basis of his "knowledge and approval" of his employee's acts.[93] Similarly, a tribunal found industrialist leader Herman Roechling and three others guilty of "having permitted"

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[89] *Delalic,* Case No. IT-96-21-T, ¶ 357[reproduced in accompanying notebook at Tab 15].

[90] IMTFE Transcripts, *supra* at 49,816 [reproduced in accompanying notebook at Tab 45].

[91] *Id*. at 49,807–49,848 (those found guilty for omissions included: Koki Hirota, Keitaro Kimura, Kuniski Koiso, Iwane Matsui, Akira Muto, Memoru Shigemitsu, and Hideki Tojo).

[92] *Cited in Delalic*, Case No. IT-96-21-T ¶ 359 [reproduced in accompanying notebook at Tab 15].

[93] *Cited in id*. at ¶ 360.

prisoner mistreatment at the Roechling Iron and Steel Works when they all possessed sufficient authority to intervene.[94]

As shown, the inclusive scope of "superior" is long established. It is not surprising that the ECCC Statute uses the generic term "superior"[95] when talking about the individual responsibility of "senior leaders."[96] The juxtaposition of terms indicates acceptance that the applicability of superior responsibility extends beyond military commanders to include political leaders and other civilian superiors in positions of authority.[97]

ii. Standard of effective control

Ultimately, the superior-subordinate relationship is predicated upon the power of the superior to control the acts of his subordinates.[98] Thus, courts may look beyond the *de jure* powers wielded by the accused and consider the *de facto* power or influence he actually exercises.[99] This is a factual question to be determined on a case-by-case basis,[100] but should be viewed broadly in terms of a hierarchy encompassing the concept of control.[101]

An accused does not have a superior-subordinate relationship based solely on his place in a hierarchy. For example, the *High Command* case recognized that a Chief-of-Staff normally

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[94] *See id*. at ¶ 361–2.

[95] ECCC Statute art. 29 [reproduced in accompanying notebook at Tab 3].

[96] *Id*. art. 1–2.

[97] *See Delalic*, Case No. IT-96-21-T ¶ 356 (the scope of the ICTY's equivalent Article 7(3) was interpreted in this fashion) [reproduced in accompanying notebook at Tab 15].

[98] *Id*. at ¶ 377.

[99] Kriangsak Kittichaisaree, INTERNATIONAL CRIMINAL LAW 252 (2001) [reproduced in accompanying notebook at Tab 20].

[100] *Id*. at 252.

[101] Commentary to the Additional Protocols ¶ 3544 [reproduced in accompanying notebook at Tab 43].

occupies a high ranking position in military infrastructure, second only to the commander under whom he serves.[102] "His sphere and personal activities vary according to the nature and interests of his commanding officer and increase in scope dependent upon the position and responsibilities of such commander."[103] Yet this does not necessarily confer actual control over those officially subordinate to him. The *High Command* case found that a Nazi Chief-of-Staff occupied a position essentially amounting to that of a glorified secretary. To wit:

> It is [the Chief-of-Staff's] function to see that the commanding officer is relieved of certain details and routine matters, that a policy having been announced, the methods and procedures for carrying out such policy are properly executed.[104]

Because the *High Command* case declared that a Nazi Chief-of-Staff had "no command authority in the chain of command,"[105] he could not be held criminally responsible on the basis of superior responsibility.[106]

As the influence of the accused increases; however, the more likely he is to have a superior-subordinate relationship. Japanese Chief-of-Staff Akira Muto crossed this threshold. On one hand, Muto knew his army committed the "Rape of Nanking."[107] Like his Nazi counterparts, he was found not guilty because his Chief-of-Staff position under General Matsui gave him no power to stop the crimes.[108] When he became Chief-of-Staff under General

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[102] TWC Vol. XI, *supra* at 513—514 [reproduced in accompanying notebook at Tab 32].

[103] *Id.*

[104] *Id*.

[105] *Id.*

[106] *Id. See also* TWC Vol. XI, *supra* at 1286–-1288 [reproduced in accompanying notebook at Tab 32].

[107] IMTFE Transcripts, *supra* at 49,820 [reproduced in accompanying notebook at Tab 45].

[108] *Id*. at 49,820.

Yamashita, "his position was very different."[109] Even though he still had no formal powers of command, the Tokyo Tribunal convicted him due to his *de facto* position to exert control over the Japanese troops committing atrocities in the Philippines.[110]

An accused may also have a superior-subordinate relationship when he maintains control of perpetrators not formally within his chain-of-command.[111] To illustrate, the *Hostages* and *High Command* cases both agree on the principle that where a commander possesses executive power over occupied territory, he is responsible for acts committed within his area of responsibility whether a unit is subordinated to his command or not.[112] Because the occupying commander bears executive power, he is "charged with maintaining peace and order, punishing crime, and protecting lives and property."[113]

Surveying these and other World War II tribunals led the ICTY to conclude that the necessary test for any superior-subordinate relationship is the "effective control" the superior possessed, "in the sense of having the material ability to prevent and punish" the commission of a crime.[114] It is apparent that the hierarchy and chains of command necessary for the superior-subordinate relationship need not be established in the sense of any formal organization, so long as the fundamental requirement of an effective power to control the subordinate is satisfied.[115]

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[109] *Id*. at 49,820–21.

[110] Kittichaisaree, supra at 253 [reproduced in accompanying notebook at Tab 20].

[111] *Id*. at 253.

[112] Parks, *supra* at 83 [reproduced in accompanying notebook at Tab 41].

[113] TWC Vol. XI, *supra* at 1260. (explaining that subordinate commanders are also responsible to the extent executive authority has been delegated to them) [reproduced in accompanying notebook at Tab 32].

[114] *Delalic*, Case No. IT-96-21-T ¶ 377 [reproduced in accompanying notebook at Tab 15].

[115] *Prosecutor v. Delalic et al.*, Case No. IT-96-21-A, Appeals Chamber Judgment (Feb 20, 2001) ¶ 254 [reproduced in accompanying notebook at Tab 14].

C. *Mens rea* requirement

Superior responsibility requires that the accused have a sufficient level of *mens rea* before he can be criminally liable. This *mens rea* requirement is the most controversial aspect of superior responsibility both in theory and in application.[116] The criticism that superiors have been punished in the absence of the conscious wrongdoing has caused judges, concerned about legitimacy, to repeatedly re-examine the issue.[117] What such an examination uncovers is that the doctrine of superior responsibility has consistently required some degree of knowledge for nearly one hundred years. While there was some confusion about the exact standard during the World War II trials, by their end a tentative consensus had emerged.[118] The consensus, which has been slightly modified over time, was that superiors may be liable for their failure to act against subordinate crimes whether they possessed actual knowledge or information which should have triggered further investigation. [119] In other words, superiors could have been criminally liable in 1975 if they "knew or should have known" from the information available to them that their subordinates were committing crimes. This is not significantly different from the "knew or had reason to know" standard appearing Article 29 of the ECCC Statute.[120]

i. Actual knowledge

As early as 1919, the *mens rea* of superior responsibility has included actual knowledge. At that time the Paris Commission recommended criminal charges could be brought against Kaiser Wilhelm II, who "with knowledge thereof" and the power to intervene, failed to prevent

[116] Martinez, *supra* at 640 [reproduced in accompanying notebook at Tab 36].

[117] *Id*. at 639.

[118] *Id*. at 652.

[119] *Id*. at 652.

[120] *See Delalic*, Case No. IT-96-21-A ¶ 234–35 [reproduced in accompanying notebook at Tab 14].

or repress crimes.[121] Since then, the actual knowledge aspect of superior responsibility has remained relatively straightforward and uncontroversial.[122]

Actual knowledge may be established through direct or circumstantial evidence.[123] Direct evidence exists where a superior personally witnesses the crime or receives reports of it afterwards.[124] Such knowledge existed in the *High Command* case, for example, where the Wilhelm List recognized that a "Commissar Order" passing through his office would result in the violation of international law.[125] In the absence of direct evidence, however, knowledge may not be presumed.[126] Instead, the superior's knowledge may be established constructively through circumstantial evidence. [127]

Circumstantial evidence may be established through a heavily fact-based examination of the features of the subordinate crimes and the circumstances the superior found himself in.[128] The factors that courts should consider include: (1) the number of illegal acts; (2) the type of illegal acts; (3) the scope of illegal acts; (4) the time during which the illegal acts occurred; (5) the number and type of troops involved; (6) the logistics involved, if any; (7) the geographical

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[121] Violation of the Laws, *supra* at 24 [reproduced in accompanying notebook at Tab 48].

[122] Martinez, *supra* at 642 [reproduced in accompanying notebook at Tab 36].

[123] *Delalic*, Case No. IT-96-21-T ¶ 383 [reproduced in accompanying notebook at Tab 15].

[124] Bantekas, *supra* at 108 (citing *United States v. Toyoda* (Official Transcript) 5005–06) [reproduced in accompanying notebook at Tab 18].

[125] *See* Parks, *supra* at 45 [reproduced in accompanying notebook at Tab 41].

[126] *Delalic*, Case No. IT-96-21-T ¶ 386 [reproduced in accompanying notebook at Tab 15].

[127] Note however, that circumstantial evidence may establish *both* that the superior "knew" or that he "should have known". Bantekas, *supra* at 108 (citing *United States v. Toyoda* (Official Transcript) 5005–06) [reproduced in accompanying notebook at Tab 18]. *See also Delalic*, Case No. IT-96-21-T ¶ 384–86 [reproduced in accompanying notebook at Tab 15].This memorandum follows the *Celebici* trial judgment in that circumstantial evidence can establish actual knowledge.

[128] *See* TWC Vol. XI, *supra* at 568 [reproduced in accompanying notebook at Tab 32].

location of the acts; (8) the widespread occurrence of the acts; (9) the tactical tempo of operations; (9) the modus operandi of similar illegal acts; (10) the officers and staff involved; and (11) the location of the commander at the time.[129]

The rationale for such constructive knowledge has its basis in General Yamashita's trial at Manila.[130] At the trial, the court noted that during a single two week period in February 1945, 8,000 citizens were killed and 7,000 were mistreated in Manila under the army and navy officer supervision.[131] While General Yamashita moved his base of operations from Manila in December of 1944, he still communicated with his subordinates in the area.[132] The pattern of execution frequently involved herding victims into a single building pre-rigged with explosives and a collapsible floor, all in order to conserve ammunition.[133] Bodies were burned in the buildings or thrown into the river in an orderly fashion.[134] Similar patterns of war crimes occurred throughout the Philippines in the same two week period.[135] Japanese troops tortured and mistreated 400 American POWs.[136] All told, atrocities like these took place from October 9, 1944 until September 3, 1945.[137] The length of time as well as the severity and widespread

[129] *Delalic*, Case No. IT-96-21-T ¶ 386 [reproduced in accompanying notebook at Tab 15].

[130] Parks, *supra* at 25 [reproduced in accompanying notebook at Tab 41]. Compare the *Delalic* factors to those noted by William Parks in his analysis of *Yamashita*: (1) the number of acts of atrocity; (2) the number of victims; (3) the widespread occurrence of atrocities; (4) the striking similarity in the method of execution; and (5) the vast number of atrocities carried out under the supervision of an officer.

[131] *Id*. at 25.

[132] *Id*. at 25..

[133] *Id*. at 25.

[134] *Id*. at 25.

[135] *Id*. at 26.

[136] *Id*. at 26–27 (1973).

[137] *Delalic*, Case No. IT-96-21-A ¶ 228 [reproduced in accompanying notebook at Tab 14].

nature of atrocities begged the question of how General Yamashita and his staff could be without knowledge.

Apparently, those involved in General Yamashita's trial agreed. "From all the facts and circumstances of record, it is impossible to escape the conclusion that [General Yamashita] knew or had the means to know of the widespread commission of atrocities by members and units of his command."[138] Regrettably for history, the Manila tribunal failed to articulate either any findings regarding General Yamashita's mental state in their judgment.[139] The lack of *mens rea* findings led some critics to conclude that General Yamashita was convicted on the basis of strict liability, but others determine that fairest reading of the case is that the Manila tribunal found that General Yamashita "must have known" about the crimes given the circumstances.[140]

Whether the latter interpretation is true or not, the *Yamashita* case certainly provided the foundation for establishing that knowledge may be established through circumstantial evidence. In the later trial of Admiral Soemu Toyoda, a U.S.-Australian tribunal articulated that knowledge standard of superior responsibility could either be:

> a. Actual, as in the case of an accused who sees their commission or who is informed thereof shortly thereafter; or
> b. Constructive. That is, the commission of such a great number of offenses within his command that a reasonable man could come to no other conclusion than that the accused must have known of the offenses or of the existence of an understood and acknowledged routine for their commission.[141]

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[138] Parks, supra at 32 (quoting the staff advocate general who reviewed the case in December 9, 1945) [reproduced in accompanying notebook at Tab 41].

[139] *See In Re Yamashita*, 327 U.S. 1, 51–52 (1946) (Rutledge, J. dissent) [reproduced in accompanying notebook at Tab 9]. The omission of the *mens rea* element in the Manila court's judgment can be explained by the fact that none of the judges were trained lawyers. Parks, *supra* at 62 [reproduced in accompanying notebook at Tab 41].

[140] *See* Martinez, *supra* at 649 [reproduced in accompanying notebook at Tab 35]. The "must have known" language comes from the prosecution's opening statement. Darcy, *supra* at 303 [reproduced in accompanying notebook at Tab 25].

[141] Parks, *supra* at 72 (citing 19 *United States v. Soemu Toyoda* 5005-5006 (Official transcript of Record of trial)) [reproduced in accompanying notebook at Tab 41].

In more recent history, the *Celebici* case used virtually identical standards to establish knowledge.[142] The consistency of knowledge standards, both before and after 1975, shows that this element of superior responsibility should not be an issue for the ECCC.

ii. "Had reason to know"

The standard of "had reason to know" found in the ECCC Statute is analogous to the "should have known" standard of the World War II cases.[143] The cases following World War II also established that, in the absence of knowledge, a superior could be liable if he should have known of the criminal activity of his subordinates.[144] Unfortunately, the scope of this *mens rea* standard was not clearly elucidated by the cases, and was further complicated by the drafting of the Additional Protocols.[145] The scope of the superior's duty to investigate, the level of awareness necessary to trigger an investigation, and the attitude the superior must have during the failure to investigate—these were all issues left unsettled.[146] In order for courts like the ECCC to clarify the standard, they should follow the ICTY's analysis of the cases and Additional Protocols. If they do, they may be able to conclude that, in 1975, the "should have known" or "had reason to know" standard allows a superior to be criminally liable only if he had information available to him that put him on notice of his subordinate's crimes.[147]

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[142] *See Delalic*, Case No. IT-96-21-T ¶ 386 [reproduced in accompanying notebook at Tab 14].

[143] ECCC Statute art. 29 [reproduced in accompanying notebook at Tab 3].

[144] *See* Martinez, *supra* at 652 [reproduced in accompanying notebook at Tab 36].; Parks, *supra* at 90 [reproduced in accompanying notebook at Tab 40].

[145] *Id*. at 652–53.

[146] *Id*. at 653.

[147] *Delalic*, Case No. IT-96-21-A ¶ 241 [reproduced in accompanying notebook at Tab 14].

The "should have known" standard, like the rest of superior responsibility, was shaped as courts defended the *Yamashita* case and attempted to distance themselves from taint of strict liability.[148] For example, the *Hostages* case found that the knowledge of the German senior officers was less doubtful than General Yamashita's because the officers received reports of crimes occurring under their areas of control.[149] However, the officers denied knowledge of the content of the reports,[150] and the tribunal required "proof of a causative, overt act or omission from which a guilty intent can be inferred."[151] Therefore, as Jenny Martinez notes, the Court "oscillated between resting its decision on disbelief of the defendants' claims of ignorance…and alternative theories of willful blindness or negligent failure to obtain knowledge."[152] As to the latter, the Court decided that a commander of an occupied territory is "charged with notice of occurrences taking place" within the area.[153] The tribunal added that the commander is obligated to require supplemental reports if the reports he has are incomplete or inadequate.[154] "If he fails to require and obtain complete information," his "[w]ant of knowledge…is not a defense."[155]

The tribunal of the *High Command* case also attempted to distance itself from strict liability, but in doing so it differentiated itself than the *Hostages* case. It held that a superior

[148] *See* Martinez, *supra* at 650 (2007) [reproduced in accompanying notebook at Tab 36].; *Delalic*, Case No. IT-96-21-A ¶ 229 [reproduced in accompanying notebook at Tab 14].

[149] *Id*. at 650.

[150] *See* Parks, *supra* at 59 [reproduced in accompanying notebook at Tab 41].

[151] TWC Vol. XI, *supra* at 1261 [reproduced in accompanying notebook at Tab 32].

[152] Martinez, *supra* at 650 [reproduced in accompanying notebook at Tab 36].

[153] TWC Vol. XI, *supra* 1271 [reproduced in accompanying notebook at Tab 32].

[154] *Id.*

[155] *Id.*

cannot keep completely informed of the details of military operations of subordinates.[156] If a superior is to be convicted of his subordinate's crimes, in the absence of knowledge, the superior must "criminally neglect to interfere in [the crime's] commission and that the offenses committed must be patently criminal."[157] Criminal neglect was defined as the "wanton, immoral disregard of the actions of his subordinates amounting to negligence."[158] The tribunal then turned to the defendants, among them General von Kuechler. It found that General von Kuechler had received and transmitted an illegal order which resulted in the summary execution of Soviet commissars.[159] The tribunal found that the order was criminal on its face and that the crimes caused by it "should have been known" to von Kuechler from subordinate reports.[160] Even though von Kuechler privately opposed the order and denied having knowledge of the order's execution, the tribunal stated that "it was his business to know" and subsequently convicted him.[161]

The latter statement also appeared in the *Pohl* case. There, Karl Mummenthey, an SS officer and the business manager of brickworks plants located inside concentration camps, claimed that he was unaware that his plants forcefully employed and mistreated camp inmates.[162] However, the *Pohl* tribunal found that Mummenthey had seen the unfed faces of inmate-

[156] *Id at* 543.

[157] *Id* at 545.

[158] *Id* at 544.

[159] *Id* at 566.

[160] *Id* at 567.

[161] *Id.*

[162] TRIALS OF WAR CRIMINALS BEFORE THE NURNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 Vol. II, 1053 (U.S. Govt. Printing Office: Washington 1950) [reproduced in accompanying notebook at Tab 30].

workers, received reports of 11-hour forced work days, and had visited his plant inside the infamous Auschwitz concentration camp.[163] The tribunal stated:

> Mummenthey's assertions that he did not know what was happening in the labor camps and enterprises under his jurisdiction does not exonerate him. It was his duty to know.[164]

Mummenthey's "naïve" defence having been rejected, the tribunal found him guilty.

Adding to the pile of *mens rea* standards were the tribunals of the Far East. The Tokyo Tribunal stated that superiors could be convicted where they had knowledge of crimes or "failed to acquire such knowledge."[165] The Tokyo Tribunal further explained that "[i]f such a person had, or should, but for negligence or supineness, have had such knowledge, he is not excused for inaction if his office required or permitted him to take any action to prevent such crimes."[166] Upon this standard it judged Foreign Minister Shigemitsu, who had received multiple foreign reports of prisoner mistreatment by Japanese troops.[167] The tribunal opined:

> We do not injustice to SHIGEMITSU when we hold that the circumstances, as he knew them, made him suspicious that the treatment of the prisoners was not as it should have been. … Thereupon he took no adequate steps to have the matter investigated, although he, as a member of the government, bore overhead responsibility for the welfare of the prisoners.[168]

Because Shigimitsu did nothing to press the matter, he was convicted.[169]

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[163] *Id* at 1051-1053.

[164] *Id* at 1055.

[165] Martinez, *supra* at 652 [reproduced in accompanying notebook at Tab 36].

[166] *Id*.

[167] IMTFE Transcripts, *supra* at 49,829-49,830 [reproduced in accompanying notebook at Tab 45].

[168] *Id* at 49,831.

[169] *Id* at 49,831.

The most significant, and most confusing, development in the *mens rea* element of superior responsibility was the promulgation of the Additional Protocol I in the mid-seventies.[170] In its first draft of 1973, the Additional Protocols included the "knew or should have known" standard which appeared in the World War II cases above and in the 1956 U.S. Field Army Manual.[171] The draft was rejected however, because while some approved its greater deterrent effect, several bemoaned its lack of clarity.[172] After a few changes, the *mens rea* standard ultimately adopted in Article 86 became "knew or had information which should have enabled them to conclude in the circumstances at the time."[173] At least, that is the standard that appears in English version. In the original French version, the standard is "des informations leur permettant de conclure" which literally means "had information enabling them to conclude."[174] The commentary to Article 86 states that the difference is not significant, but that the French version should be followed.[175] The most confusion arises from an objection suggesting that the English version amounts to a negligence standard.[176] In response, the commentary states that for the superior to be criminally liable, the "negligence must be so serious that it is tantamount to malicious intent, apart from any link between the conduct in question and the damage that took

[170] Martinez, *supra* at 653 [reproduced in accompanying notebook at Tab 36].

[171] Darcy, *supra* at 330 [reproduced in accompanying notebook at Tab 25].; U.S. Army Manual No. 27-10, *supra* at ¶ 501 [reproduced in accompanying notebook at Tab 9].

[172] Darcy, *supra* at 332-333 [reproduced in accompanying notebook at Tab 25].

[173] Protocol I, art. 86-87 [reproduced in accompanying notebook at Tab 4].

[174] Commentary on the Additional Protocols, *supra* at ¶ 3545 [reproduced in accompanying notebook at Tab 43].

[175] *Id*.

[176] *Id* at ¶ 3541.

place." [177] This explanation is not entirely clear given the vast differences between negligence and malicious intent.[178]

Although superior responsibility's *mens rea* element was ill-defined in 1975, the *Celebici* case provided a working interpretation that would fit well in that time period. While interpreting the ICTY Statute's Article 7(3) standard of "knew or had reason to know,"[179] *Celebici* trial chamber examined the World War II cases and the Additional Protocols. [180] The trial chamber concluded that, in the absence of actual knowledge:

> [a] superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offenses committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offenses were being committed or about to be committed by his subordinates. [181]

On review, the *Celebici* appeals chamber explicitly connected the *mens rea* standards of the ICTY Statute, the Additional Protocols and the World War II cases. It noted that that the ICTY Statute's Article 7(3) phrase, "had reason to know" should be understood as having the same meaning as phrase "had information enabling them to conclude" used in Article 86(2) of Additional Protocol I.[182] The change in language was only meant to stress the objective

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[177] *Id* at ¶ 3541.

[178] Martinez, *supra* at 654 [reproduced in accompanying notebook at Tab 36].

[179] Statute of the International Tribunal for the Former Yugoslavia, May 23, 1993, *amended* November 30, 2000 [reproduced in accompanying notebook at Tab 7].

[180] *Delalic*, Case No. IT-96-21-T ¶ 388-392 [reproduced in accompanying notebook at Tab 15].

[181] *Id* at ¶ 393.

[182] *Delalic*, Case No. IT-96-21-A ¶ 234 [reproduced in accompanying notebook at Tab 14].

interpretation the element.[183] By interpreting "had reason to know" to mean that a superior has a duty to inquire further on the basis of general information he possesses, "there is no material difference between the standard of Article 86(2) of Additional Protocol I and the standard of 'should have known' as upheld by certain cases decided after the Second World War."[184]

The *Celebici* appeals chamber also explained that the information the superior possesses may be written or oral, and it does not need to contain specific information about crimes committed or about to be committed. [185] "For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge." [186] And as the *Hostages* case above shows, the superior does not actually need to acquaint himself with the information, so long as it has been provided to or is available to him.[187]

In short, a superior may be held liable for the acts of his subordinates if it is shown that he "knew or had reason to know" about them. [188] The ICTY's reasoning is fair and based in the law as it appeared to stand in 1975. The tribunal for the ECCC may and should follow the ICTY's reasoning in the *Celebici* case to interpret its own "knew or had reason to know" Article 29.

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[183] *Id*.

[184] *Id* at ¶ 235.

[185] *Id* at ¶ 238.

[186] *Id*.

[187] *Id* at ¶ 239.

[188] *Id*.

D. Failure to prevent or punish

The third and least altered element of superior responsibility is the superior's duty to prevent or punish. If the superior knew or had reason to know that his subordinate was about to commit or had committed a crime, he is liable if it is proven that he failed to take reasonable and necessary measures to prevent the crime or punish the crime's perpetrator.[189] Because the superior's duty to prevent or punish is inextricably linked to the facts of a superior's awareness and effective control,[190] any determination of his culpability must be made on a case-by-case basis in light of the available record of similar judgments.[191]

The superior's awareness is determinative of when his duty is triggered. The test seems straightforward. First, the superior's duty to punish is triggered the moment he first knew, or had reason to know,[192] that his subordinate had committed a crime in the past.[193] This situation also includes those superiors who assume command after the crime has ceased, but learn of it thereafter.[194] Second, his duty to prevent is triggered the moment he knew, or had reason to know, that his subordinate was about to commit a crime.[195] For an example of the latter, a staff judge advocate told General Yamashita that guerilla suspects in his custody would not be given a

[189] *See* ECCC Statute, art. 29 [reproduced in accompanying notebook at Tab 2].

[190] *See Delalic,* Case No. IT-96-21-A ¶ 394 [reproduced in accompanying notebook at Tab 14].

[191] William V. O'Brien, *The Law of War, Command Responsibility and Vietnam* 60 Geo. L. J. 605, 629 (1972) [reproduced in accompanying notebook at Tab 40].

[192] See this memorandum's Section III.C. for an analysis of the standard "knew or had reason to know."

[193] Bantekas, *supra* at 118-119 [reproduced in accompanying notebook at Tab 18].

[194] *Id* at 119. *See also* Carol T. Fox, *Closing a Loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Known Past Offenses*, 55 Case W. Res. L. Rev. 443 (2004) [reproduced in accompanying notebook at Tab 34].

[195] Bantekas, *supra* at 116 [reproduced in accompanying notebook at Tab 18].

trial, yet they would be punished anyway.[196] Given the context, this meant that the guerilla suspects would be summarily executed.[197] General Yamashita simply nodded in apparent approval, and the suspects were subsequently killed in violation of international law.[198]

A little concern may be raised by the vague temporal element of "*about to* commit a crime" which appears in the ECCC Statute.[199] The same language appears in the 1956 U.S Field Army Manual[200] as well as the statutes of the ICTY[201] and ICTR.[202] However, the prerequisite for any superior responsibility prosecution is that an underlying crime was actually committed by someone other than the accused. Had the accused superior fulfilled his duty to prevent the crime at any point in time, he would not be on trial for the crime. Thus, whether the superior's awareness of his subordinate's nascent crime first appeared temporally distant from or proximate to the crime's actual commission is virtually irrelevant if he failed to prevent it.

Once his duty is triggered, the superior's ability to prevent or punish varies with the degree of control he maintains over the subordinate. A superior may only be held criminally responsible for failing to take such measures that are within his powers.[203] This initially requires

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[196] Parks, *supra* at 27 [reproduced in accompanying notebook at Tab 41].

[197] *Id*.

[198] *Id*.

[199] ECCC Statute, art. 29 (emphasis added) [reproduced in accompanying notebook at Tab 3].

[200] U.S. Army Manual No. 27-10, *supra* at¶ 501 [reproduced in accompanying notebook at Tab 9].

[201] Statute of the International Tribunal for the Former Yugoslavia, May 23, 1993, *amended* November 30, 2000, art 7(3) [reproduced in accompanying notebook at Tab 7].

[202] Statute of the International Tribunal for Rwanda, November 8, 1994, art. 6(3) [reproduced in accompanying notebook at Tab 8].

[203] *Delalic et al*., Case No.IT-96-21-A ¶ 395 [reproduced in accompanying notebook at Tab 14].

a test of reasonableness to determine the superior's capacity for control, followed by a determination of whether the superior used the fullest extent of that capacity.

Returning to earlier examples, General von Kuechler knew of the illegal Commissar Order passing through his office from above, and he privately opposed its execution.[204] Though he could not completely override the command because of his rank, he did nothing to voice his opposition to his subordinates and was thereby convicted.[205] This can be compared to General von Leeb, who voiced his opposition "in every way short of open and defiant refusal to obey it" and was acquitted by the very same tribunal.[206] In the Tokyo Tribunal, the court found that Chief-of-Staff Hideki Tojo knew that his junior officers had ordered the "Bataan Death March," which resulted in the deaths of many prisoners of war.[207] Because he did nothing to bring his junior officers to justice, even though an investigation, Tojo was convicted for failing to perform his duty as a superior.[208] After reviewing these cases, Ilias Bantekas provided that where a superior is physically unable to prosecute, arrest, incarcerate, or in any way discipline a subordinate, he still has an obligation to refer the case to the appropriate prosecutorial authorities.[209]

In sum, "a superior should be held responsible for failing to take such measures that are within his material possibility."[210] His formal legal competence is irrelevant.[211] If the superior

[204] TWC Vol. XI, *supra* at 566 [reproduced in accompanying notebook at Tab 32].

[205] *Id* at 567.

[206] *Id* at 555.

[207] IMTFE Transcripts, *supra* at 49,845 [reproduced in accompanying notebook at Tab 45].

[208] *Id* at 49,846.

[209] Bantekas, *supra* at 120 [reproduced in accompanying notebook at Tab 18].

[210] *Delalic et al.*, Case No. IT-96-21-T ¶ 395 [reproduced in accompanying notebook at Tab 15].

has effective control over his subordinates, if he knows or has reason to know that they will or have committed crimes, he must use all reasonable and necessary measures within his power to prevent the crime or punish the subordinates. If the superior fails in this duty, he can be criminally liable. This principle of superior responsibility was sound during the 1940's, it was sound in the 1990's, and it can safely be assumed to be sound in 1975.

IV. SPECIAL PROBLEMS OF SUPERIOR RESPONSIBILITY

A. The problem of international armed conflict

A significant hurdle the ECCC faces is that the international customary law of 1975, as traced above, recognized superior responsibility in the context of international armed conflicts. If superior responsibility is limited to international armed conflicts, then many of the crimes committed under the Khmer Rouge leadership may go unpunished. Not only did armed conflict not begin until 1977,[212] but most of the crimes were committed by Khmer against Khmer.

The application of superior responsibility to internal conflicts was uncertain in 1975.[213] World War II had such a profound effect on the development of superior responsibility that it is virtually impossible to separate the doctrine from the international conflict from whence it came. In theory, there should be no difference between an internal conflict and an international conflict. Several of the experts who helped develop superior responsibility, like Sun Tzu, Wei Liao-Tzu, and General McClellan did not distinguish the two.[214] Superior responsibility *should* apply to

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[211] *Id*.

[212] *See* Steven R. Ratner & Jason S. Abrams, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 291—293 (2ND ED. 2001) [reproduced in accompanying notebook at Tab 27].

[213] John D. Ciorciari, THE KHMER ROUGE TRIBUNAL 59 (2006) [reproduced in accompanying notebook at Tab 19].

[214] See Section III.C. in this memorandum on "Expert sponsorship."

internal conflicts. Yet all of the World War II cases, considered the modern corpus of international criminal law, dealt with defendants who had affected foreign nations.

Moreover, if the Additional Protocols are any indicator of the international customary law of the mid-seventies, superior responsibility is limited to international armed conflicts. Additional Protocol I includes superior responsibility, but concerns "international armed conflicts."[215] Additional Protocol II concerns "internal armed conflicts," but omits superior responsibility entirely.[216] Because the Additional Protocols are strong indicators of the international customary law of 1975, the doctrine of superior responsibility appears to limit itself to international armed conflicts. This being the case, the ECCC may find itself limiting superior responsibility to a select few crimes.

B. The problem of genocide

Assuming that genocide was a crime during period of April 17, 1975 through 1979,[217] the ECCC *may* be capable of prosecuting cases of genocide under the theory of superior responsibility. Article II of the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") defines genocide as:

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

[215] Protocol I, *supra* art. 86-87 [reproduced in accompanying notebook at Tab 4].

[216] *See generally* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted June 8, 1977 [reproduced in accompanying notebook at Tab 5].

[217] Cambodia ratified the Convention on the Prevention and Punishment of the Crime of Genocide on October 14, 1950. The Genocide Convention is also reflected in the ECCC Statute, art. 4 [reproduced in accompanying notebook at Tab 3].

(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.[218]

Besides direct participation in these acts, the Genocide Convention also calls for the punishment of individuals who are complicit in genocide.[219] William Shabas opins that:

> Complicity is sometimes described as secondary participation, but when applied to genocide, there is nothing 'secondary about it. The 'accomplice' is often the real villain, and the 'principle offender' a small cog in the machine. Hitler did not, apparently, physically murder or brutalize anybody; technically, he was 'only' an accomplice to the crime of genocide.[220]

Unfortunately a prosecution on the basis of superior responsibility faces a looming problem. The essence of the Genocide Convention appears to be logically opposite to that of superior responsibility.[221] Article II of the Genocide Convention requires proof of the highest level of specific intent.[222] Where the superior had actual knowledge of acts of genocide but omitted his duty to act, his omission should constitute a form of complicity.[223] Presumably, his knowing failure to prevent or punish his subordinate's heinous conduct evidences his intent for the conduct to continue. Trouble arises, however, because superior responsibility also allows for

[218] Convention on the Prevention and Punishment of the Crime of Genocide, Dec 9, 1948 [reproduced in accompanying notebook at Tab 1].

[219] Article III reads: "The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide." Convention on the Prevention and Punishment of the Crime of Genocide, Dec 9, 1948.

[220] William A. Shabas, GENOCIDE IN INTERNATIONAL LAW 286 (2000) [reproduced in accompanying notebook at Tab 33].

[221] *See id* at 228.

[222] *See id* at 305. In contrast, under direct superior responsibility, it may be presumed that the superior who issues an order intended for the order to be executed, even if the order resulted in an act of genocide.

[223] *See id* at 297.

prosecutions on the low level of "had reason to know." How a specific intent crime may be committed by this near-negligence standard presents a paradox.[224]

Courts may be able to sidestep this paradox by following the example of the ICTY and ICTR *ad hoc* Tribunals. The prosecutor for these *ad hoc* Tribunals favored indictments for genocide committed in the form of superior responsibility,[225] even though the pertinent statutes of the ICTY[226] and ICTR[227] included the same "had reason to know" standard of the ECCC Statute.[228] In the *Celebici* case, the ICTY reinterpreted the *mens rea* standard of "had reason to know" in light of customary norms, particularly those before and during the drafting of Article 86 of the Additional Protocol I.[229] The Tribunal determined that "a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offenses committed by his subordinates."[230] This stricter interpretation of "had reason to know" replaces any inference of pure negligence with a standard approaching willful blindness.[231]

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[224] *Id* at 305.

[225] *Id* at 308.

[226] *See* Statute for the International Tribunal of Former Yugoslavia, art. 7(3) [reproduced in accompanying notebook at Tab 7].

[227] *See* Statute for the International Tribunal of Rwanda, art. 6(3) [reproduced in accompanying notebook at Tab 8].

[228] *See* ECCC Statute, art. 29 [reproduced in accompanying notebook at Tab 3].

[229] Shabas, *supra* at 308 (citing *Delalic et al*, Case No. IT-95-21-A ¶ 390—392) [reproduced in accompanying notebook at Tab 33].

[230] *Delalic et al*, Case No. IT-95-21-A ¶ 393 [reproduced in accompanying notebook at Tab 14].

[231] Shabas, *supra* at 309 [reproduced in accompanying notebook at Tab 33].

The ICTR approved this reasoning, which led to three convictions for genocide under the theory of superior responsibility.[232] William Shabas points out, however, that the defendants in these cases also ordered or participated in the genocide.[233] Thus, the precedential value of these cases is dubious at best.

As one commentator bluntly describes it, courts "are left with the task of forcing the square peg of [superior responsibility] into the round hole of specific intent crimes."[234] Superior responsibility borders on negligence, and it is logically impossible to commit a crime of intent like genocide by negligence.[235] Still, the logical gap and relative lack of support has not stopped prosecutors from attempting to accelerate the morally culpable superior's "moment of reckoning."[236] Whether or not the prosecutors of the ECCC succeed in using superior responsibility for the crime of genocide is something that will have to be decided by the tribunal itself.

VII. SUMMARY AND CONCLUSION

The status of superior responsibility in 1975 is both functional and problematic. Superior responsibility certainly existed as international customary law by that time, for it appears in too many sources both national and international for any other conclusion to be reached. The three essential elements provided by the post-World War II cases were always within certain functional parameters, as the period retrospective taken by the ICTY proves. So long as the defendant is shown to (1) have had effective control over the perpetrator of a crime, (2)

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[232] *Id* at 308. (citing *Prosecutor v. Kambanda*, ICTR-97-23-S, Sentence (1998)*; Prosecutor v. Serushago*, ICTR-98-39-S, Sentence (1999); *Prosecutor v. Kayishema and Ruzindana* ICTR-95-1-T, (1999)).

[233] *Id* at 310-311.

[234] Darcy, *supra* at 354 [reproduced in accompanying notebook at Tab 25].

[235] Shabas, *supra* at 312 [reproduced in accompanying notebook at Tab 33].

[236] *Id*.

possessed knowledge or information on the crime, and (3) failed to act within his material ability to repress the crime, ECCC can safely apply superior responsibility to the senior Khmer Rouge leadership without concern for *ex post facto* and *nullum crimen sine lege* defenses. Unfortunately, the international customary law of 1975 appears to confine superior responsibility to international armed conflicts and resist its application to the crime of genocide. Thus, while the ECCC has the doctrine of superior responsibility as a means of prosecution, the extent to which the tribunal actually uses superior responsibility is probably limited.