SUPERIOR RESPONSIBILITY AND THE PRINCIPLE OF LEGALITY AT THE ECCC

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ABSTRACT

This Article examines two recent decisions of the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) in the broader context of whether it is fair to impose criminal liability on Khmer Rouge leaders for acts committed between 1975 and 1979. Since international criminal law was not as fully developed in the 1970s, some of the accused Khmer Rouge leaders argue that the principle of legality (“nullem crimen sine lege”) bars many of the charges brought against them. In particular, they have argued that superior responsibility—a mode of liability that holds superiors responsible for the criminal acts of their subordinates—had not crystallized into a norm of customary international law by the 1970s.

The Pre-Trial Chamber in two rulings in early 2011 dismissed the defendants’ arguments and held that from 1975 to 1979 international law had recognized superior responsibility as a mode of criminal liability in a form sufficiently developed and accessible to the accused so as to satisfy the principle of legality. These decisions, though correctly decided, are based on a flimsy legal foundation. The Pre-Trial Chamber relied on the jurisprudence of post–World War II tribunals, which are notorious for their lack of clarity. These tribunals have also been plagued with allegations of “victor’s justice,” for finding German and Japanese commanders guilty of capacious, poorly-defined crimes that were arguably only recognized as crimes after the end of the war.

For these reasons, this Article argues that the ECCC should have based its decisions on Additional Protocol I to the Geneva Conventions of 1949 (1977), which more clearly defines superior responsibility and reflects broad consensus on the state of international law in the 1970s. Moreover, Additional Protocol I commenced an evolution in the law of superior responsibility—that has continued through the United Nations ad hoc tribunals and

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the International Criminal Court—toward greater protection of defendants from the sort of arbitrary justice imposed in the post–WWII cases. Counterintuitively, relying on more recent statements of the law of superior responsibility would not only comply with the principle of legality, but would benefit the accused. Going forward, this approach would bolster the ECCC’s legal stature and reputation for reasoned, impartial decision-making in light of persistent allegations of bias and corruption.

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I. INTRODUCTION

A. Background

The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established to hold senior leaders of the Democratic Kampuchea (Khmer Rouge), among others, criminally liable for the most serious violations of Cambodian and international law
that occurred from April 1975 to January 1979. Under the principle of legality or *nullem crimen sine lege* (*nullem crimen*) (“no crime without law”), an individual can only be held responsible for acts that were criminal at the time of their commission. The ECCC has limited temporal jurisdiction; it can only hear cases in which the alleged crimes occurred between 1975 and 1979. The accused at the ECCC can therefore only be held criminally liable for offenses that were both perpetrated and legally cognizable during the Khmer Rouge period (1975-1979).

Article 29 of the Law on the Establishment of Extraordinary Chambers in the Court of Cambodia (ECCC Statute) holds superiors individually responsible for the crimes of their subordinates. The ECCC’s jurisdiction extends only to high-level offenders, and the Khmer Rouge’s rigid hierarchy ensured that senior leaders did not perpetrate any of the alleged crimes themselves. Rather, the Khmer Rouge leaders likely knew, or should have known, that their subordinates were engaged in the most egregious violations of national and international law. ECCC prosecutors have often relied on the principle of superior responsibility to hold the senior leadership of the regime responsible for the criminal acts of their subordinates.

This Article examines the Ieng Sary and Ieng Thirith Closing Order Appeals, and focuses on the ECCC’s legal reasoning and the sources on which it relied. It argues that the ECCC Pre-Trial

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4. *Id.*

5. *Id.* art. 29 (“The fact that any acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.”).

6. *Id.* art. 2 new.

Chamber (PTC) relied too heavily on the incomplete and inconsistent jurisprudence of post–World War II (WWII) tribunals in concluding that superior responsibility was a recognized mode of liability under customary international law during the Khmer Rouge period. This Article argues that the PTC should have instead drawn upon the 1977 Protocol Additional to the Geneva Conventions (Additional Protocol I), which both codified the existing customary international law at the time and clarified ambiguities in the post–WWII jurisprudence. Additional Protocol I would have provided a much stronger legal basis for these two PTC decisions.

The Article proceeds in four parts. Part I describes the PTC decisions on superior responsibility. Part II discusses how the ECCC has interpreted and applied Article 29 of the ECCC Statute in conformity with the Rome Statute of the International Criminal Court (ICC) and recent jurisprudence from the International Tribunal for the Former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR). Despite minor differences, all three tribunals define superior responsibility with three constituent elements that apply to both military and civilian leaders. Article 29 of the ECCC Statute is similar to the corresponding sections of the ICTY and ICTR statutes and the ECCC has adopted a similar three-element formulation of superior responsibility.

Parts III and IV examine the development of the law of superior responsibility until, and during, the period of the ECCC’s temporal jurisdiction (1975-1979), to show that liability under superior responsibility was part of customary international law and held both military and civilian leaders accountable for serious international crimes. Part III draws on jurisprudence from the International Military Tribunal at Nuremberg, the military tribunals created by Control Council Law No. 10, the International Military Tribunal of the Far East (Tokyo Tribunal), and the Additional Protocol I to examine the development of superior responsibility as a

8. See, e.g., Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment ¶ 38 (June 7, 2001) (holding that the “three essential elements of command responsibility” are: “(i) the existence of a superior-subordinate relationship of effective control between the accused and the perpetrator of the crime; and, (ii) the knowledge, or constructive knowledge, of the accused that the crime was about to be, was being, or had been committed; and, (iii) the failure of the accused to take the necessary and reasonable measures to prevent or stop the crime, or to punish the perpetrator”); see also Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-A, Judgment ¶ 839 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004) (reaffirming the three elements of superior responsibility described in the Celebic judgment).

9. See Duch Judgment, supra note 7, ¶ 538.
general mode of liability under customary international law. Part IV then tackles the issue of whether customary international law extended superior responsibility to civilian leaders from 1975 to 1979.

This Article concludes that the ECCC should have relied on Additional Protocol I and broader equitable considerations in concluding that superior responsibility applied to superiors, both civilian and military, during the Khmer Rouge period. From a strategic perspective, if the PTC had issued its judgments based on this more substantial legal foundation, it might have enhanced the legitimacy of the ECCC, which has been criticized for producing low quality, politically influenced judgments.10

B. ECCC Pre-Trial Chamber Decisions

While today superior responsibility is a well-established theory of liability under customary international law, it was a relatively new basis of liability in 1975. In 1975, the scope of superior responsibility, and particularly whether it extended to civilian leaders, was not as clearly settled as it is today.

Former Khmer Rouge leaders Ieng Thirith and Ieng Sary, whose cases are pending before the ECCC, have invoked nullem crimen to challenge some of the charges brought against them.11 They argue that from 1975 to 1979 customary international law did not recognize superior responsibility as a basis of liability and they therefore cannot be held criminally responsible for their subordinates’ actions.12 Ieng Sary and Ieng Thirith further argued that superior responsibility, as it existed from 1975 to 1979, was too nebulous and inaccessible to put them on notice that they might be crimi-


12. *See Ieng Sary Decision*, supra note 11, ¶ 399; *Ieng Thirith Decision*, supra note 11, ¶ 186.
nally prosecuted under this mode of liability.\footnote{See Ieng Sary Decision, \textit{supra} note 11, ¶ 399; Ieng Thirith Decision, \textit{supra} note 11, ¶ 186.} While Ieng Thirith’s appeal did not draw a distinction between civilian and military superiors,\footnote{See Ieng Thirith Decision, \textit{supra} note 11, ¶ 192.} Ieng Sary specifically argued that civilian superior responsibility did not exist under customary international law in 1975 to 1979.\footnote{See Ieng Sary Decision, \textit{supra} note 11, ¶ 402.}

In 2011, the PTC ruled on Ieng Sary and Ieng Thirith’s appeals and concluded that superior responsibility applied to both military and civilian superiors during 1975-1979 as a means of establishing individual criminal liability.\footnote{See id. ¶ 460; Ieng Thirith Decision, \textit{supra} note 11, ¶ 232.} The PTC found that during 1975-1979, superior responsibility had crystallized as a norm of customary international law that was sufficiently specific and accessible to the accused as to make it foreseeable that criminal sanctions could be imposed on them.\footnote{See Ieng Sary Decision, \textit{supra} note 11, ¶ 230.} Previously, in 2010, the ECCC Trial Chamber (Trial Chamber) ruled that Duch—the civilian director of the S-21 Prison Camp—could be found criminally liable for the acts of those under his command, without distinguishing between civilian and military superiors.\footnote{See Duch \textit{Judgment}, \textit{supra} note 7, ¶¶ 548–49.} The Trial Chamber held that Duch was guilty of crimes against humanity and “grave breaches of the Geneva Conventions.”\footnote{Id. ¶ 567.} Though it did not analyze the issue in depth, the Trial Chamber implicitly accepted that superior responsibility for civilian leaders was part of customary international law during 1975-1979.

In the late 1990s, the ICTY and ICTR became the first international tribunals to explicitly extend superior responsibility to civil-

\begin{itemize}
\item \footnote{For a discussion of the requirements to satisfy \textit{nullem crimen}, see Streletz, Kessler & Krenz v. Germany, App. Nos. 34044/96, 35532/97 & 44801/98, 2001-II Eur. Ct. H.R. 230, ¶ 91 (2001) (stating that to satisfy the principle of \textit{nullem crimen}, the proper inquiry is “whether, at the time when they were committed, the applicants’ acts constituted offences defined with sufficient accessibility and foreseeability under international law”); Prosecutor v. Milutinovic, Case No. IT-99-37-AR72, Decision on Dragoljub Odjanic’s Motion Challenging Jurisdiction, ¶ 21 (Int’l Crim. Trib. for the Former Yugoslavia May 21, 2003). The twin inquiries of specificity and accessibility are sometimes grouped as subsets of the requirement that the law was defined with sufficient “clarity” at the relevant time. \textit{See}, e.g., Prosecutor v. Vasiljevic, Case No. IT-98-32-T, Judgment, ¶ 198 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002), www.icty.org/x/cases/vasiljevic/tjug/en/vas021129.pdf (stating that the offense must be defined “with sufficient clarity for it to have been foreseeable and accessible, taking into account the specificity of customary international law”).} See \textit{Ieng Sary Decision}, \textit{supra} note 11, ¶ 458–60; \textit{Ieng Thirith Decision, \textit{supra} note 11, ¶ 250.} For a discussion of the requirements to satisfy \textit{nullem crimen}, see Streletz, Kessler & Krenz v. Germany, App. Nos. 34044/96, 35532/97 & 44801/98, 2001-II Eur. Ct. H.R. 230, ¶ 91 (2001) (stating that to satisfy the principle of \textit{nullem crimen}, the proper inquiry is “whether, at the time when they were committed, the applicants’ acts constituted offences defined with sufficient accessibility and foreseeability under international law”); Prosecutor v. Milutinovic, Case No. IT-99-37-AR72, Decision on Dragoljub Odjanic’s Motion Challenging Jurisdiction, ¶ 21 (Int’l Crim. Trib. for the Former Yugoslavia May 21, 2003). The twin inquiries of specificity and accessibility are sometimes grouped as subsets of the requirement that the law was defined with sufficient “clarity” at the relevant time. \textit{See}, e.g., Prosecutor v. Vasiljevic, Case No. IT-98-32-T, Judgment, ¶ 198 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002), www.icty.org/x/cases/vasiljevic/tjug/en/vas021129.pdf (stating that the offense must be defined “with sufficient clarity for it to have been foreseeable and accessible, taking into account the specificity of customary international law”).
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ian superiors. The Rome Statute, which entered into force in 2002, was the first international legal instrument to clearly separate civilian and military superior responsibility and to institute slightly different elements for each. By contrast, Additional Protocol I and prior case law treated superior responsibility in more general terms, and imposed liability on “superiors” without any distinction between civilian and military leaders.

The recent PTC decisions explicitly ruled that superior responsibility applied to civilian superiors during 1975-1979 and relied primarily on the jurisprudence of the tribunals at Nuremberg (both the International Military Tribunal and the tribunals created by Control Council Law No. 10) and Tokyo (collectively post–WWII tribunals) to conclude that superior responsibility applied to civilian Khmer Rouge leaders. While the post–WWII tribunals found several civilian superiors guilty under superior responsibility, their judgments do not discuss whether superior responsibility was sufficiently established in that era so as to hold civilian leaders criminally responsible for the acts of their subordinates. Moreover, this jurisprudence does not clearly establish the standard of mens

20. See Prosecutor v. Delalic (Celebici), Case No. IT-96-21-T, Trial Judgment, ¶ 377 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) [hereinafter Celebici Trial Judgment] (“[I]t is . . . the Trial Chamber’s conclusion that a superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his de facto position of authority . . . .”); Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 213 (May 21, 1999) [hereinafter Kayishema & Ruzindana Judgment] (“[T]he application of criminal responsibility to those civilians who wield the requisite authority is not a contentious one.”); Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment, ¶ 148 (Jan. 27, 2000) (holding that the “definition of individual criminal responsibility . . . applies not only to the military but also to persons exercising civilian authority as superiors”).

21. See Rome Statute, supra note 2, art. 28.

22. See, e.g., 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(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (“The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.”) (emphasis added).

23. Ieng Sary Decision, supra note 11, ¶ 460; Ieng Thirith Decision, supra note 11, ¶ 232.

rea or the degree of control over subordinates required to hold superiors criminally liable.

In 1977, Additional Protocol I clarified these aspects of superior responsibility and, for the first time, gave the law clear expression. In providing this much-needed clarification, Additional Protocol I did not create new law; it simply codified existing customary international law. This is significant because had new forms of criminal liability emerged in 1977, it would have violated nullem crimen to apply provisions in Additional Protocol I to the actions of the accused during 1975-1979. The accused, in that scenario, would not have been given adequate notice that they might be criminally prosecuted for the acts of their subordinates.

It is surprising that the PTC did not rely on Additional Protocol I in determining whether superior responsibility was part of customary international law in the Khmer Rouge era because Additional Protocol I does not pose the aforementioned nullem crimen issue and because it provided a clearer statement of the law than the post–WWII cases. Neither the Ieng Sary nor the Ieng Thirith Appeals decisions discuss Additional Protocol I in any detail.

This oversight or omission led the PTC to base the Ieng Sary and Ieng Thirith Appeals decisions almost entirely on post–WWII jurisprudence, which is not clearly constitutive of customary international law. The tribunals in Nuremberg and the Tokyo Tribunal were convened at the behest of the Allies of WWII who represented only a handful of states. In contrast, fifty-five states had signed onto the Additional Protocol I by 1978. The Additional Protocol I and its Commentary present much stronger evidence of both

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25. See Celebici Trial Judgment, supra note 20, ¶ 340 (“[T]here can be no doubt that the concept of the individual criminal responsibility of superiors for failure to act is today firmly placed within the corpus of international humanitarian law. Through the adoption of Additional Protocol I, the principle has now been codified and given a clear expression in international conventional law.”).

26. Prosecutor v. Hadzihasanovic, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 29 (Int’l Crim. Trib. for the Former Yugoslavia July 16, 2003) (“[C]ommand responsibility was part of customary international law relating to international armed conflicts before the adoption of Protocol I. Therefore . . . Articles 86 and 87 of Protocol I [the articles that address superior responsibility] were in this respect only declaring the existing position, and not constituting it.”); see also Ieng Sary Decision, supra note 11, ¶ 418 (agreeing with the International Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber that Articles 86 and 87 of Additional Protocol I “were only declaring the existing position”).

27. See Ieng Sary Decision, supra note 11, ¶¶ 413–60; Ieng Thirith Decision, supra note 11, ¶¶ 187–232.

widespread state practice and *opinio juris*—the two requirements for customary international law—than the post–WWII cases. Additional Protocol I also set forth three clear elements of superior responsibility that apply to both civilian and military superiors; whereas the post–WWII cases did not articulate these elements with any clarity.29

Most importantly, where some post–WWII cases held superiors responsible for negligently failing to supervise or punish subordinates under their control, Additional Protocol I provided greater clarity and protection for defendants by requiring a *mens rea* between negligence and recklessness.30 Additional Protocol I actually protects the accused from retroactive criminalization of their actions and the “victor’s justice” that was perhaps inflicted at the Nuremberg and Tokyo Tribunals.

The PTC should have also looked at the broader principles underlying *nullem crimen* in greater detail. At its core, *nullem crimen* is intended to protect those who reasonably believed that their conduct was lawful and who then acted in good faith on that belief.31 The accused at the ECCC are charged with overseeing, ordering, or failing to prevent the most serious offenses against international law; offenses such as crimes against humanity and war crimes that no reasonable superior could have believed were outside the scope of international law in the 1970s. Moreover, the accused were all educated abroad and many travelled abroad extensively before the Khmer Rouge came to power in 1975.32 It is therefore very unlikely that the leaders of the Khmer Rouge acted on a good faith reasonable belief that the egregious crimes of which they are accused were lawful.


31. See Prosecutor v. Stakic, Case No. IT-97-24-A, Judgment, ¶ 67 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006) (“The principle *nullem crimen sine lege* protects persons who reasonably believed that their conduct was *lawful* from retroactive criminalization of their conduct. It does not protect persons who knew that they were committing a crime from being convicted of that crime under a subsequent formulation.”).

32. See David Chandler, *The Land and People of Cambodia* 112 (1991). Many Khmer Rouge leaders enjoyed greater access to education and travel than the general Cambodian population leading up to 1975 and throughout the Khmer Rouge period. See id. For instance, Pol Pot pursued college courses in France prior to 1975. See id. at 138.
II. THE CURRENT LAW OF SUPERIOR RESPONSIBILITY

A. The ECCC Statute

Article 29 of the ECCC Statute states:

The fact that [crimes] were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.33

This articulation of superior responsibility is similar to the corresponding provisions in the statutes of the ICTY and the ICTR.34 The inclusion of the phrases “effective command” and “control over the subordinate” in the ECCC Statute—the only substantive changes from the ICTY’s and the ICTR’s formulations—reflects global jurisprudential developments that made clear that effective control over a subordinate is one of the three elements that must be established to find a superior liable for the acts of a subordinate under superior responsibility.35 The incorporation of these terms in the ECCC Statute indicates that the drafters intended for superior responsibility to be interpreted at the ECCC as it has been in the ICTY and ICTR. As a result, the ECCC requires proof of the three elements articulated in the ICTY’s and ICTR’s jurisprudence to find superiors liable through superior responsibility: (1) a superior-subordinate relationship in which the former has effective control over the latter; (2) a superior’s knowledge, direct or inferred from the circumstances, that a subordinate was about to commit or had committed a criminal act; and (3) a superior’s failure to take

33. ECCC Statute, supra note 1, art. 29.
34. See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/25704, Annex, art. 7(3) (1995), adopted by S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute] (“The fact that any of the acts . . . was [sic] committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”); Statute of the International Tribunal for Rwanda, S.C. Res. 955, Annex, art. 6(3), U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute] (using identical language as the ICTY Statute to articulate the principle of superior responsibility).
35. See ECCC Statute, supra note 1, art. 29.
necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof.\textsuperscript{36}

The remainder of this Section will elaborate upon these elements by drawing on the statutes and case law of the ICTY, ICTR, and ICC. The ICC Rome Statute has slightly altered the elements in the civilian context by requiring a higher standard of \textit{mens rea} and a greater degree of control over subordinates.\textsuperscript{37} The ICTY, by contrast, does not clearly distinguish between military and civilian superiors.\textsuperscript{38}

\section*{B. The Elements of Superior Responsibility}

\subsection*{1. Superior-Subordinate Relationship}

The first element of superior responsibility pertains to the degree of control that a superior exerts over a subordinate. Superiors must have “effective control” over the subordinate, where effective control is defined as “the material ability to prevent and punish the commission of . . . offences.”\textsuperscript{39} This control need not be formalized; both the ICTY and ICTR have applied superior responsibility to leaders with \textit{de facto} control over their subordinates.\textsuperscript{40} The ICTY and ICTR require the same level of control to hold civilian and military superiors liable under superior responsibility.\textsuperscript{41}

The ICC Rome Statute appears to modify the control requirement for civilian leaders. While in the military context the Rome Statute merely states that a commander is responsible for the crimes committed by “forces under his or her effective command
and control,” in the civilian context it adds that the crimes must have “concerned activities that were within the effective responsibility and control of the superior.”42 While this change in language appears to be an additional element that requires proof of a greater degree of control over subordinates to hold civilian leaders liable,43 it more likely clarifies that civilian superiors—particularly heads-of-state and other senior leaders responsible for a great number of activities—must have a similar degree of control as their military counterparts over subordinates to fulfill this element of superior responsibility.44 The Rome Statute explicitly recognizes what ICTY jurisprudence has implied: that civilian leaders cannot be held responsible for every crime perpetrated by individuals under their command, as they tend to have a broader range of responsibilities than their military counterparts. Thus, “effective control” is defined slightly differently with respect to civilian superiors.45

2. Mens Rea

The second element of superior responsibility relates to the necessary mental state of the accused superior. To hold a superior responsible for the crimes of a subordinate, “it must be established that he knew or had reason to know that the subordinate was about to commit or had committed such crimes.”46 This formulation,
which was adopted by the ECCC Statute, imposes criminal liability on two classes of superiors: (1) those who had actual knowledge of their subordinates’ crimes and (2) those that failed to acquire that knowledge when they had reason to know.\textsuperscript{47} Case law more clearly establishes the standard of \textit{mens rea} required for the first class, where the superior had “actual knowledge,” than for the second class, where the superior “had reason to know.”\textsuperscript{48}

When there is proof of a superior’s actual knowledge of the crimes of subordinates, the \textit{mens rea} element is satisfied. Actual knowledge can be established through direct or circumstantial evidence.\textsuperscript{49} The standard of \textit{mens rea} to apply in cases where there is no evidence of superior’s actual knowledge, but by virtue of his position and relationship to a subordinate, he “had reason to know” of the latter’s crimes, is more contentious. On this point, the ICTY diverges from the ICTR and the ICC.\textsuperscript{50}

The ICTY Appeals Chamber (Appeals Chamber) has held that a superior, in this situation, can only be liable if he had information before him that would put him on notice of the crimes of his subordinates.\textsuperscript{51} Under this formulation, a superior has “reason to know” if the information before him justifies a further inquiry into whether one of his subordinates has committed a crime.\textsuperscript{52} The Appeals Chamber has also made clear that there is no affirmative duty to acquire information, and that a superior cannot be respon-

\textsuperscript{47}. See id.

\textsuperscript{48}. See id. ¶ 525 (detailing the complicated standard for “had reason to know”).

\textsuperscript{49}. Id. ¶ 524 (“While a superior’s actual knowledge that his subordinates were committing or were about to commit a crime cannot be presumed, it may be established by circumstantial evidence, including the number, type and scope of illegal acts, time during which the illegal acts occurred, number and types of troops and logistics involved, geographical location, whether the occurrence of the acts is widespread, tactical tempo of operations, modus operandi of similar illegal acts, officers and staff involved, and location of the commander at the time.”).

\textsuperscript{50}. Cf. Bemba Gombo Decision, supra note 43, ¶ 433; Kayishema & Ruzindana Judgment, supra note 20, ¶¶ 227–28 (explaining the \textit{mens rea} standard to apply in “had reason to know” cases in these courts).

\textsuperscript{51}. See Prosecutor v. Blaskic, Case No. IT-95-14-A, Appeals Judgment, ¶ 62 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004), www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf (“The Appeals Chamber considers that the \textit{Celebici} Appeal Judgement has settled the issue of the interpretation of the standard of ‘had reason to know.’ In that judgement, the Appeals Chamber stated that ‘a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates.’”).

\textsuperscript{52}. See Limaj Judgment, supra note 46, ¶ 525 (“It is sufficient that the superior be in possession of sufficient information, even general in nature, to be on notice of the likelihood of illegal acts by his subordinates, i.e., so as to justify further inquiry in order to ascertain whether such acts were indeed being or about to be committed.”).
sible for failing to gather information that would put him on notice of the crimes of his subordinates. The court’s inquiry is limited to whether the information was available to the superior and not whether he actually examined it. Thus, a superior will still be subject to criminal liability if he had access to information and deliberately avoided obtaining it.

The Appeals Chamber in the Blaskic case recently clarified, if not settled, the exact contours of the ICTY mens rea standard for determining when a superior “had reason to know.” Prior to that judgment, the ICTY issued confusing and often contradictory judgments on this point. For instance, the Celebici Trial Chamber noted that the mens rea of superior responsibility is fulfilled when the superior had information that, “by itself was [ins]ufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information. . . .” The Blaskic Trial Judgment seemed to lower the mens rea required of superiors. The Trial Chamber, after “taking into account [the accused’s] particular position of command and the circumstances prevailing at the time,” found that “ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties.” This suggests a mens rea standard closer to simple negligence than that articulated in the Celebici Trial Judgment.

The Appeals Chamber later set aside this interpretation and reaffirmed the original formulation of the “had reason to know” mens rea requirement, where the superior has no affirmative duty to gather information but cannot remain willfully blind to accessible

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53. See Blaskic, Case No. IT-95-14-A, Appeals Judgment, ¶ 62 (“[T]he Appeals Chamber [in Celebici] stated that “[n]eglect of a duty to acquire such knowledge, however, does not feature in the provision [Article 7(3)] as a separate offence, and a superior is not therefore liable under the provision for such failures . . . . There is no reason for the Appeals Chamber to depart from that position.”).

54. See id.

55. See id. ¶ 406 (“The Appeals Chamber emphasizes that responsibility can be imposed for deliberately refraining from finding out but not for negligently failing to find out.”).


57. See Celebici Trial Judgment, supra note 20, ¶ 393.

Superior Responsibility 

The Appeals Chamber in the Blaskic case also expressly endorsed a prior decision that rejected negligence as a basis of liability in the context of superior responsibility. This judgment has clarified the ICTY’s treatment of mens rea to some extent. Essentially, a superior must have a mens rea between negligence and recklessness or willful blindness to be liable under a theory of superior responsibility.

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

In its Decision on the Confirmation of Charges Against Jean-Pierre Bemba Gombo (Bemba Gombo Decision), the ICC Pre-Trial Chamber clarified the meaning of Article 28(a) of the Rome Statute. Article 28(a) states that military leaders may be held responsible for the crimes of their subordinates if they “knew” or “should have known” of the commission or future commission of certain crimes. The ICC Pre-Trial Chamber held that while “knew” imposes a mens rea of knowledge, “the ‘should have known’ standard requires a more active duty on the part of the superior to take the necessary measures to secure the knowledge of the conduct of his troops and to inquire . . . on the commission of the crime.” The ICC Pre-Trial Chamber also made clear that the “should have known” standard for military leaders is more stringent than that

60. Id. ¶ 63.
61. Compare Rome Statute, supra note 2, art. 28(b)(i) (“The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.”) (emphasis added), with id. art. 28(a)(i) (“That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.”) (emphasis added).
62. See id. art. 28(b)(i).
63. See generally Bemba Gombo Decision, supra note 43 (discussing the meaning of the different provisions within article 28(a)).
64. See Rome Statute, supra note 2, art. 28(a).
imposed on civilian superiors. Article 28(b) of the Rome Statute requires that a superior “consciously disregarded” information that would “clearly indicate” that his subordinates were committing or about to commit crimes but the ICC Pre-Trial Chamber has not articulated the precise mens rea required of civilian superiors.

Other tribunals have provided some guidance on what the standard entails. The ICTR, for instance, interpreted the Rome Statute as suggesting that it is inappropriate to require that civilian leaders be apprised of all the actions of their subordinates. Implicitly, this interpretation recognizes that, in comparison to their military counterparts, civilian leaders tend to have many more subordinates under their command in a less structured hierarchy and therefore cannot reasonably be held responsible for each of them.

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

Overall, while the ICTY and ICTR impose on all superiors, whether civilian or military, a mens rea standard that falls between ordinary negligence and recklessness, the Bemba Gombo Decision essentially adopts an ordinary negligence standard for military superiors that “should have known” of the crimes or future crimes of their subordinates. However, the ICC requires a higher standard of fault for civilian superiors. The “consciously disregarded” language in Article 28(b) of the Rome Statute suggests a standard

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66. See id. (“The drafting history of [article 28(a)] reveals that it was the intent of the drafters to take a more stringent approach towards commanders and military-like commanders compared to other superiors that fall within the parameters of article 28(b) of the Statute.”).

67. See Kayishema & Ruzindana Judgment, supra note 20, ¶¶ 227–28 (“[T]he Chamber finds the distinction between military commanders and other superiors embodied in the Rome Statute an instructive one. In the case of the former it imposes a more active duty upon the superior to inform himself of the activities of his subordinates . . . . The Trial Chamber agrees with this view insofar that it does not demand a prima facie duty upon a non-military commander to be seized of every activity of all persons under his or her control.”).

68. See Celebici Appeal Judgment, supra note 40, ¶ 238.

closer to recklessness, but until the ICC issues a judgment interpreting this provision, its exact contours will remain unclear.

3. “Necessary and Reasonable Measures”

The third element of superior responsibility in the ECCC Statute, which is nearly identical to that of the ICTY and ICTR statutes,\(^70\) is the “fail[ure] to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.”\(^71\) The Rome Statute also requires superiors, both civilian and military, to use “necessary and reasonable measures.”\(^72\) Moreover, the Rome Statute elaborates that superiors must take measures “to prevent or repress [the crimes] or to submit the matter to the competent authorities for investigation and prosecution.”\(^73\) In practice, this standard essentially incorporates the duties of a superior expressed in ICTY and ICTR jurisprudence.\(^74\)

The ICTY and ICTR have made clear that a superior’s duties to “prevent” and “punish” crimes are two distinct obligations: a superior must both take measures, if possible, to prevent the commission of crimes \textit{and} punish the perpetrators thereof.\(^75\) The ICTY and ICTR have adopted a case-by-case analysis to determine, based on a superior’s position, what “necessary and reasonable” measures can be expected of him.\(^76\) A superior’s material ability to effec-
tively control his subordinates is central to the inquiry of determining whether he took appropriate measures.\textsuperscript{77} This case-by-case analysis is dependent on the nature of the superior-subordinate relationship—the first element of superior responsibility—and the level of control exerted by a superior over subordinates.\textsuperscript{78} The appropriateness of a superior’s actions varies according to the circumstances of this relationship, and there are several factors to assess if those actions were “necessary and reasonable.”\textsuperscript{79}

The Rome Statute requires that a superior submit reports of subordinate misconduct to the “competent authorities for investigation and prosecution.”\textsuperscript{80} This simply rearticulates the flexible, case-by-case analysis adopted by the ICTY and ICTR.\textsuperscript{81} The “competent authorities” to whom a superior should report the crimes of his subordinates vary, based on the superior’s position within the chain of command.\textsuperscript{82} For instance, the Rome Statute would require a mid-level military commander or civilian bureaucrat to report crimes to a superior—probably to someone with the capacity to sanction the perpetrators. Given the commander’s intermediate position, higher authorities may be required to sanction the commander’s subordinates. The mid-level commander’s reporting of a crime to his superiors would probably constitute “necessary

\begin{footnotes}
77. See Limaj Judgment, supra note 46, ¶ 526 (“The question of whether a superior has failed to take the necessary and reasonable measures to prevent the commission of a crime or punish the perpetrators thereof is connected to his possession of effective control.”); Bagilishema, Case No. ICTR-95-1A-T, ¶ 48 (“A superior may be held responsible for failing to take only such measures that were within his or her powers. Indeed, it is the commander’s degree of effective control – his or her material ability to control subordinates – which will guide the Chamber in determining whether he or she took reasonable measures to prevent, stop, or punish the subordinates’ crimes.”). \\
78. See Limaj Judgment, supra note 46, ¶ 528. \\
79. See id. (“Whether a superior has discharged his duty to prevent the commission of a crime will depend on his material ability to intervene in a specific situation. Factors which may be taken into account in making that determination include the superior’s failure to secure reports that military actions have been carried out in accordance with international law, the failure to issue orders aiming at bringing the relevant practices into accord with the rules of war, the failure to protest against or to criticize criminal action, the failure to take disciplinary measures to prevent the commission of atrocities by the troops under the superior’s command, and the failure to insist before a superior authority that immediate action be taken.”). \\
80. See Rome Statute, supra note 2, arts. 28(a)(ii), (b)(iii). \\
81. See Bemba Gombo Decision, supra note 45, ¶ 441 (“[T]he power of a superior, and thus the punitive measures available to him, will vary according to the circumstances of the case and, in particular, to his position in the chain of command.”). \\
82. See id.
\end{footnotes}
Superior Responsibility

and reasonable” action under the ICTY and ICTR statutes as well. With regard to the most senior leaders, who are accountable to no higher authority, or those individuals within the chain of command who are tasked with punishing offenders, the Rome Statute likely considers these individuals “competent authorities,” and would thus require them to take disciplinary measures against the perpetrators under their direct command. The ICTY Trial Chamber has made clear that reporting to higher authorities is a suitable course of action only if the superior had no power to sanction the offending subordinate himself.

Unlike the mens rea element, this third element—a superior’s duty to prevent crimes and punish the perpetrators—is not disputed under international law. There may be discrepancies in the application of this element because it explicitly sets out a flexible standard—necessary and reasonable measures—that requires a context-specific analysis by a court. Judges may disagree, for instance, over whether a superior’s actions in the relevant circumstances met the “necessary and reasonable” threshold. Under the current law of superior responsibility, a superior has distinct obligations to prevent crimes and to punish subordinates using measures commensurate with the authority granted to him and the effective control he exerts over subordinates.

C. Conclusion

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

83. See Prosecutor v. Blaskic, Case No. IT-95-14-A, Appeals Judgment, ¶ 68 (Intl’l Crim. Trib. for the Former Yugoslavia July 29, 2004) (“With regard to the position of the Trial Chamber that superior responsibility ‘may entail’ the submission of reports to the competent authorities, the Appeals Chamber deems this to be correct.”); see also Prosecutor v. Halilovic, Case No. IT-01-48-T, Trial Judgment, ¶ 100 (Intl’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005) (“The superior does not have to be the person who dispenses the punishment, but he must take an important step in the disciplinary process.”).

84. See Halilovic, Case No. IT-01-48-T, ¶ 100 (“The duty to punish includes at least an obligation to investigate possible crimes, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities.”) (emphasis added).

85. See Limaj Judgment, supra note 46, ¶ 526 (“A superior will be held responsible if he failed to take such measures that are within his material ability.”).
rior failed to take “necessary and reasonable measures” to prevent the commission of those crimes or to punish the perpetrators thereof.86

In articulating these elements, there is some discrepancy between the ICTY and ICTR Tribunals and the ICC. With regard to the first two elements, and particularly the *mens rea* element, the Rome Statute requires a higher standard of proof to hold civilian superiors responsible under this mode of liability.87 Specifically, the ICC requires a closer nexus between a civilian superior and his subordinate to establish a relationship of “effective control”88 and a showing that a civilian superior “consciously disregarded” information that “clearly indicated” his subordinates’ crimes.89 This latter requirement suggests a *mens rea* standard closer to recklessness, which is more demanding than the ICTY standard.90 Thus, while there is a general consensus on the elements of superior responsibility, the exact contours of the doctrine remain unsettled.

Since Article 29 of the ECCC Statute is worded much like the corresponding sections of the ICTY and ICTR statutes, the ECCC Trial Chamber naturally relied on the jurisprudence of these tribunals rather than on the Rome Statute in describing superior responsibility under international law.91 In the Duch Judgment, the ECCC Trial Chamber adopted the three elements of superior responsibility from the ICTY and ICTR to interpret Article 29 of the ECCC Statute.92 The Duch Judgment, however, did not address the more difficult question of whether this law was sufficiently defined from 1975 to 1979 to conform to the *nullem crimen* principle.93 That question was left to the PTC, which relied on post–WWII cases to conclude that, from 1975 to 1979, the law was sufficiently defined and accessible to the accused so that they could

87. See Bemba Gombo Decision, supra note 43, ¶¶ 406, 433.
88. See Rome Statute, supra note 2, art. 28(b)(ii) (requiring, in the civilian context, that “crimes concerned activities that were within the effective responsibility and control of the superior.”) (emphasis added).
89. Id. art. 28(b)(i).
90. See Celebici Appeal Judgment, supra note 40, ¶ 241 (“[A] superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates.”) (emphasis added).
91. See Duch Judgment, supra note 7, ¶¶ 540–41 (relying on Celebici Appeal Judgment; Bagilishema Appeals Judgment, and Halilovic Appeals Judgment to describe superior responsibility).
92. See id. ¶¶ 540–47.
93. See generally id.
reasonably foresee being prosecuted as superiors for the crimes of their subordinates.\footnote{See Ieng Sary Decision, supra note 11, ¶ 460; Ieng Thirith Decision, supra note 11, ¶ 232.}

The next two Sections will survey international law from the early twentieth century to the 1970s to trace the development of superior responsibility as a mode of liability and to address whether it applied to civilians during the Khmer Rouge era. The current formulation of superior responsibility has evolved significantly from the post–WWII jurisprudence, in large part due to Additional Protocol I (1977). By the 1970s, superior responsibility had become a more coherent doctrine with clearly defined elements that actually make the accused at the ECCC less vulnerable to arbitrary or “victor’s” justice. It is therefore surprising that the PTC did not rely on Additional Protocol I in its recent decisions.

III. The Evolution of Superior Responsibility in Customary International Law

Superior responsibility was an established norm of international law by 1975, albeit in a slightly different and more imprecise form than its articulation today. It was not until 1977 that superior responsibility—in something close to the current formulation—was articulated within a multilateral treaty, namely in Additional Protocol I.\footnote{See Additional Protocol I, supra note 22, arts. 86–87.} While Additional Protocol I only came into force during the Khmer Rouge era, it codified the customary international law which existed at the time as reflected in the military codes of several countries and as had been developed by the post–WWII military tribunals.

Prior to the post–WWII judgments, superiors were only responsible for crimes they directly ordered or participated in planning. Under international law, superiors were first held liable for their omissions—for failing to prevent crimes and punish offending subordinates when they knew, or had reason to know of the latter’s crimes—in cases heard before the post–WWII tribunals.\footnote{See infra Part III.B.}

A. The 1907 Hague Conventions

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

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

B. Post–World War II Jurisprudence

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

97. See Ieng Sary Decision, supra note 11, ¶ 430 (discussing the post-WWII High Command Case, which relied on Hague Convention IV to establish a superior’s responsibility for his area of command).


99. Id. art. 43.

100. See O’Reilly, supra note 56, at 129 (noting that while the origins of superior responsibility can be traced back to the seventeenth century, it “matured as a theory of international criminal responsibility in the international tribunals following the Second World War”).

101. Id.

Thus, the Nuremberg and Tokyo Tribunals only provided express authority to hold superiors responsible for crimes that they had played a role in formulating or executing.103 They do not criminalize gross negligence or recklessness where the superior had “reason to know” of or “consciously disregarded” the crimes of his subordinates.104 The United States initially proposed a provision that would criminalize such conduct, but it was not ultimately included in the London Agreement.105 Further, numerous military codes at the time criminalized omissions by superiors. For instance, the French Ordinance Concerning the Suppression of War Crimes (1944), and the Chinese Law Governing the Trial of War Criminals (1946) held superiors liable for failing to prevent the crimes of their subordinates.106

The jurisprudence of the post–WWII tribunals follows this trend of imposing liability on superiors for their omissions instead of restricting liability only to those superiors that were directly involved in serious crimes. The trial of General Tomoyuki Yamashita was the first international law case in which a superior was found guilty without affirmative evidence to link him to the crimes of his subordinates.107 As the Commander of the Fourteenth Army Group of the Imperial Japanese Army in the Philippines, General Yamashita was charged with “failing to discharge his duty as commander to control the acts of members of his com-

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103. See London Agreement, supra note 102, art. 6; IMTFE Charter, supra note 102, art. 5(c).

104. See London Agreement, supra note 102, art. 6; IMTFE Charter, supra note 102, art. 5(c).

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

106. See Ordonnance du 28 août 1944 relative à la répression des crimes de guerre [Ordinance of August 28, 1944, Concerning the Suppression of War Crimes], art. 4, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 30, 1944, p. 780, translated in Celebici Trial Judgment, supra note 20, ¶ 336 (“Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organised or tolerated the criminal acts of their subordinates.”); Chinese Law of 24 October 1946 Governing the Trial of War Criminals, art. 9, translated in Celebici Trial Judgment, supra note 20, ¶ 337 (“Persons who occupy a supervisory or commanding position in relation to war criminals and in their capacity as such have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as the accomplices of such war criminals.”).

107. See O’Reilly, supra note 56, at 130.
mand by permitting them to commit war crimes.” In his defense, Yamashita argued that an aggressive U.S. counter-offensive had cut off his chain of command and rendered him incapable of preventing the crimes committed by his troops. General Yamashita seemed to have a strong argument since the articulation of superior responsibility in the IMTFE Charter was limited to crimes that the commander had actual knowledge of or played a role in planning.

While there was little evidence that Yamashita had any involvement or knowledge of the crimes committed by his troops, the Tokyo Tribunal inferred this knowledge from the fact that the crimes “were not sporadic in nature but in many cases were methodically supervised by Japanese officers and non-commissioned officers.” Given the state of international law, which had barely recognized superior responsibility for a commander’s omissions, the Tokyo Tribunal’s acceptance of negative criminality was dubious. Moreover, the tribunal found Yamashita guilty without precisely defining the constitutive elements of superior responsibility. General Yamashita appealed this decision to the U.S. Supreme Court. The Court denied certiorari review and affirmed the Tokyo Tribunal’s essential holding: that a commander can be responsible for the crimes of his subordinates even if he did not know of their commission.

The Yamashita decision has been widely criticized for its lack of clarity, and particularly for its failure to specify the standard of mens rea required to hold superiors liable under superior responsibility. In an impassioned dissent, Justice Rutledge criticized the

110. See IMTFE Charter, supra note 102, art. 5(c).
111. U.N. War Crimes Comm’n, supra note 108, at 35.
112. O’Reilly, supra note 56, at 132–33.
114. See id. at 15 (“It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent . . . . [T]he law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.”); see also, e.g., Vetter, supra note 45, at 105 (noting that the International Military Tribunal for the Far East (IMTFE) was set up by “proclamation of General Douglas MacArthur”). This suggests that Yamashita tried to appeal his decision to the U.S. Supreme Court because the IMTFE seemed to be a U.S. institution, as it was created by the U.S. military.
Supreme Court’s holding for its general vagueness and its failure to define the elements of superior responsibility. Some commentators have similarly accused the Tokyo Tribunal and the U.S. Supreme Court of imposing on General Yamashita an unfairly low standard of mens rea, tantamount to strict liability, while others have defended the ruling as a precursor to the modern law that imposes a more active duty on superiors to prevent crimes and punish offending subordinates.

Subsequent jurisprudence from Nuremberg and the IMTFE did little to clarify the elements of superior responsibility, including the appropriate standard of mens rea, but superiors were still held criminally responsible without evidence of their actual knowledge of subordinates’ offenses. The Judgment of the Tokyo Tribunal, for instance, essentially reiterated the holding of the Yamashita decision. The Tokyo Tribunal, which delivered guilty verdicts against several senior Japanese leaders, indicted them “by virtue of their respective offices” for having “deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches thereof, and thereby violated the laws of war.” The Judgment contains no further elaboration on the meaning of the terms “deliberately” and “recklessly.” Still, it held superiors responsible by virtue of their position, and not their actual relationship with subordinates, which imposes on superiors the sort of strict liability for which Yamashita has been criticized.

116. See Yamashita, 327 U.S. at 51–52 (Rutledge, J., dissenting) (“This vagueness, if not vacuity, in the findings runs throughout the proceedings, from the charge itself through the proof and the findings, to the conclusion. It affects the very gist of the offense, whether that was willful, informed and intentional omission to restrain and control troops known by petitioner to be committing crimes or was only a negligent failure on his part to discover this and take whatever measures he then could to stop the conduct.”).


118. See supra note 105, at 37–38.

119. See, e.g., United States v. Von Leeb (High Command Case), 11 Trials of War Criminals Before the Nuremberg Military Tribunals 1, 512 (1950).

120. See Tokyo Tribunal Judgment, Verdicts, supra note 24, at 49773–858 (finding most of the accused guilty of war crimes despite there often being no evidence of the defendants’ direct involvement in the crimes).


122. See generally Tokyo Tribunal Judgment, Verdicts, supra note 24.

123. See id. at 49809, 49812–13.

German commanders were likewise found guilty under a poorly-defined version of superior responsibility pursuant to Control Council Law No. 10.125 Much like the London Agreement and IMTFE Charter, Control Council Law No. 10 did not contain an explicit superior responsibility provision.126 In United States v. Brandt (Medical Case), a military tribunal, established under Control Council Law No. 10, articulated a standard of superior responsibility much like that in Yamashita, declaring:

\[
\text{[t]he law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war.127}
\]

The tribunal made similar statements about superior responsibility in United States v. Von Leeb (High Command Case) and emphasized a commander’s duty to prevent crimes from occurring.128

In the High Command Case, the tribunal rejected the near-strict liability standard adopted in the Yamashita judgment.129 The tribunal also held in United States v. List (Hostage Case) that a superior is

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125. Control Council Law No. 10 was the law that governed military trials in Germany after the International Military Tribunal at Nuernberg completed its trials. See Control Council Law No. 10, Dec. 20, 1945, reprinted in TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER COUNCIL LAW NO. 10, App. D, at 250 (1949) [hereinafter Control Council Law No. 10]. The Allied Control Council passed this law on December 20, 1945, and it gave each occupying power (the United States, United Kingdom, France, and the Soviet Union) authority to conduct military trials in their own zone of occupation. See id. art. III. The cases discussed in this Article were tried in American military tribunals in the U.S. zone of occupation. See, e.g., High Command Case, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1, 512 (1950).

126. See Control Council Law No. 10, supra note 125, art. II(2). In stipulating individual criminal liability, the Law states as follows:

\[
\text{[a]ny person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime . . . if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime . . . .}
\]

Id.


128. See High Command Case, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, at 512 ("Certain orders of the Wermacht and the German Army were obviously criminal. . . . Any commanding officer of normal intelligence must see and understand their criminal nature. Any participation in implementing such orders, tacit or otherwise, an silent acquiescence in their enforcement by his subordinates, constitutes a criminal act on his part.").

129. Id. at 542–49.
liable only for acts that he knew or “ought to have known about.” 130

This articulation, at least with regard to the mens rea element, is similar to the current law. 131 The credibility of the tribunal’s holding in the Hostage Case is questionable, however, because it was not based on any existing conventional or customary international law nor on Control Council Law No. 10, which did not provide for liability in cases where the superior ought to have known about the crimes of their subordinates. 132

The Tokyo Tribunal, in its judgment of Admiral Toyoda, put forth what it considered a unified standard that took into account the reasoning and judgments of relevant precedents from the Nuremberg Tribunals created by Control Council Law No. 10. 133 It declared, as follows:

In the simplest language it may be said that this Tribunal believes that the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must be punished. 134

This is the clearest articulation of superior responsibility in the post–WWII tribunals; it clarifies both the mens rea required, namely that the superior “knew, or should by the exercise of ordinary diligence have learned” and the third element, namely the “failure to take any action to punish the perpetrators [and permitting] the atrocities to continue.” 135 The Tokyo Tribunal’s description of the superior-subordinate relationship does not seem to hinge on “effective control” as required under modern international law. 136

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130. United States v. List (Hostage Case), 11 Trials of War Criminals Before the Nuremberg Military Tribunals 757, 1303 (1950) (“[A] corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about.”); see also Vetter, supra note 45, at 106.

131. Cf. ECRC Statute, supra note 1, art. 29 (conferring liability on superiors who “knew or had reason to know”). The ICTY Statute and the ICTR Statute include identical language. See ICTY Statute, supra note 34, art. 7(3); ICTR Statute, supra note 34, art. 6(3).

132. See generally Hostage Case, 11 Trials of War Criminals Before the Nuremberg Military Tribunals 757; Control Council Law No. 10, supra note 125.


134. Id. ¶ 339.

135. Id. ¶ 339 n.355.

136. See supra Part II.
Rather, the Toyoda judgment applied superior responsibility to the crimes of subordinates “immediate or otherwise,” which echoes the U.S. Supreme Court’s controversial holding in Yamashita that did not distinguish between the crimes of those subordinates over whom a commander had “effective control” and others who he did not supervise as closely.137

The post–WWII superior responsibility jurisprudence has been criticized for failing to provide reasoned opinions based on existing law, but instead for imposing “victor’s justice” and punishing their defeated enemies rather than issuing principled legal decisions.138 Moreover, since the tribunals found Japanese and German leaders guilty using different versions of superior responsibility, it is difficult to extract a single, clear standard.139 As a result, at the end of the post–WWII tribunals, the exact contours of superior responsibility in customary international law remained uncertain.140

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

Following the post–WWII era, no international military tribunals were active until the ICTY was established in the early 1990s. International criminal law continued to develop in the interim. In the 1940s and 1950s, prominent states adopted superior responsibility provisions in their military codes. The U.S. Army Field Manual on the Law of Warfare of 1956 (U.S. Army Field Manual) included a section on “Responsibility for Acts of Subordinates,” which defined

137. See In re Yamashita, 327 U.S. 1, 15 (1946) (“It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent.”).

138. See O’Reilly, supra note 56, at 132–33 (arguing that the doctrine of superior responsibility, which was first articulated in the post-WWII tribunals, “began as an instrument of victor’s justice, rather than as a well-considered theory of criminality”).

139. Compare Hostage Case, 11 Trials of War Criminals Before the Nuremberg Military Tribunals 757, 1303 (1950) (finding that “[a] corps commander must be held responsible for the acts . . . which [he] knew or ought to have known about”), with Tokyo Tribunal Judgment, Indictment, supra note 121, at 49773–858 (holding that “by virtue of their respective offices” commanders are liable under superior responsibility if they “deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches thereof, and thereby violated the laws of war”).

140. Customary international law is formed by the combination of (1) widespread state practice and (2) opinio juris—the notion that states follow a certain norm or principle out of a sense of legal obligation. See Restatement (Third) of the Law of Foreign Relations of the United States § 102 cmts. b, c (1986). For additional discussion of opinio juris, see Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.J.C. 14, 97 (June 27, 1986).
superior responsibility in a manner similar to Article 29 of the ECCC Statute.\footnote{141} It included all three constitutive elements of the current law of superior responsibility.\footnote{142} The British Manual of Military Law of 1958 copied the U.S. Army Field Manual, but did not include the section that held superiors responsible when they had or should have had knowledge of a subordinate’s crimes.\footnote{143} The British Manual of Military Law limited liability to situations in which subordinates committed crimes pursuant to a superior’s orders.\footnote{144} In 1946, the Canadian Parliament passed the “Act Respecting War Crimes” which declared that Canadian military leaders were presumptively responsible for the acts of their subordinates.\footnote{145}

Additional Protocol I put forth the most authoritative articulation of superior responsibility.\footnote{146} Article 86 of Additional Protocol I sets out the law of superior responsibility for all superiors (including civilians), while Article 87 applied solely to military commanders.\footnote{147}

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

\begin{quote}

142. See id. at 178 (“In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. . . . The commander is . . . responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.”) (emphasis added).

143. See Prosecutor v. Hadzihasanovic, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, ¶ 80 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 12, 2002).

144. See id.

145. See U.N. War Crimes Comm’n, Canadian Law Concerning Trials of War Criminals by Military Courts, in 4 Law Reports of Trials of War Criminals 125, 128–29 (1948) (referring to regulations, which state: “Where there is evidence that more than one war crime has been committed by members of a formation, unit, body, or group while under the command of a single commander, the court may receive that evidence as prima facie evidence of the responsibility of the commander for those crimes.”).

146. See Additional Protocol I, supra note 22, arts. 86–87. According to the ICTY Trial Chamber in the Celebici Judgment, Additional Protocol I established, without doubt, that the concept was part of international law. See Celebici Trial Judgment, supra note 20, ¶ 340 (“[T]here can be no doubt that the concept of the individual criminal responsibility of superiors for failure to act is today firmly placed within the corpus of international humanitarian law. Through the adoption of Additional Protocol I, the principle has now been codified and given a clear expression in international conventional law. Thus, article 87 of the Protocol gives expression to the duty of commanders to control the acts of their subordinates and to prevent or, where necessary, to repress violations of the Geneva Conventions or the Protocol.”).

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.148

Article 87 of Additional Protocol I added that commanders have a responsibility to inform their troops of the latter’s obligations under Additional Protocol I and to suppress, prevent, and when necessary, report breaches to “competent authorities.”149

While Additional Protocol I codified superior responsibility in conventional law, it also sought to give written expression to the existing customary international law of superior responsibility, rather than to create new law. The Commentary on the Additional Protocols (Commentary) noted that, “[t]he recognition of the responsibility of superiors who, without any excuse, fail to prevent their subordinates from committing breaches of the law of armed conflict is . . . by no means new in treaty law.”150 The Commentary added that the concept of superior responsibility, and by extension, the practice of holding superiors liable for their omissions, is “uncontested nowadays and follows both from State practice and from case-law and legal literature.”151 Many state delegations to Additional Protocol I accepted that Additional Protocol I, and its superior responsibility provisions, “were in conformity with pre-existing law.”152 The ICTY Appeals Chamber has also stated that Additional Protocol I simply confirmed the existence of superior responsibility as a mode of criminal liability existing under international law at the time, rather than creating any new form of liability.153

148. Id. art. 86(2); cf. U.S. Dep’t of the Army, supra note 141, at 178–79.
149. See Additional Protocol I, supra note 22, art. 87.
150. Commentary on Additional Protocol I, supra note 30, ¶ 3540.
151. Id. ¶ 3529.
152. See Celebici Trial Judgment, supra note 20, ¶ 340 (noting that “the travaux préparatoires of [the relevant] provisions reveals that, while their inclusion was not uncontested during the drafting of the Protocol, a number of delegations clearly expressed the view that the principles expressed therein were in conformity with pre-existing law. Thus, the Swedish delegate declared that these articles reaffirmed the principles of international penal responsibility that were developed after the Second World War. Similarly, the Yugoslav delegate expressed the view that the article on the duty of commanders contained provisions which had already been accepted in ‘military codes of all countries.’”).
The Commentary noted that there were objections to this formulation, particularly with regard to the appropriate standard of \textit{mens rea}.\footnote{See Commentary on Additional Protocol I, supra note 150, ¶ 3541.} Some state delegations opposed criminalizing a “failure to act,” arguing that such a provision would hold superiors responsible for mere negligence.\footnote{Id.} The Commentary made clear that Additional Protocol I rejected ordinary negligence as the standard of \textit{mens rea} under Article 86.\footnote{See id. (The strongest objection which could be raised against this provision perhaps consists in the difficulty of establishing intent (mens rea) in case of a failure to act, particularly in the case of negligence. For that matter, this last point gave rise to some controversy during the discussions in the Diplomatic Conference, particularly due to the fact that the Conventions do not contain any provision qualifying negligent conduct as criminal.”). The Commentary also stated that not “every case of negligence may be criminal,” but that “the negligence must be so serious that it is tantamount to malicious intent” for a superior to be criminally liable. \textit{Id.}} Much like the subsequent jurisprudence in the ICTY and ICTR, Additional Protocol I sought to impose a \textit{mens rea} standard between negligence and recklessness that was not too demanding on superiors, while ensuring that superiors did not escape liability for remaining willfully blind to the crimes of their subordinates.\footnote{See id. ¶¶ 3545–46; O’Reilly, supra note 56, at 134 (noting that the drafters of Additional Protocol I intended a \textit{mens rea} standard that approached recklessness or willful blindness, rather than mere negligence).} The debate among the state delegations that preceded the final version of Additional Protocol I demonstrates that this compromise likely reflected the state of customary international law at the time. The superior responsibility provisions of Additional Protocol I (Articles 86 and 87) essentially clarify and improve upon the legal conclusions of the post–WWII tribunals and the national military codes of several states.\footnote{See generally Commentary on Additional Protocol I, supra note 30, ¶¶ 3525–39 (showing that Additional Protocol I bases its articulation of superior responsibility on the 1907 Hague Conventions, post-WWII jurisprudence, and the 1949 Geneva Conventions).} By the end of 1978, fifty-five countries had signed onto Additional Protocol I; by 2011, there were 168 state parties to Additional Protocol I, reflecting its almost universal acceptance a valid instrument of international law.\footnote{See List of States Party to Additional Protocol I, supra note 28.}
D. Conclusion

The evidence suggests that superior responsibility, as a mode of liability, was a part of customary international law when the Khmer Rouge came to power in 1975. The post–WWII tribunals held, in several cases, that superiors could be held responsible for the crimes of their subordinates even when those superiors had no knowledge of the crimes and played no part in their planning.\textsuperscript{160} The principle that superiors could be held criminally responsible for the crimes of their subordinates was also evident in the military manuals and laws of the United States, the United Kingdom, and Canada.\textsuperscript{161}

Most importantly, Additional Protocol I codified and, to a large extent, clarified existing customary international law. It confirmed that superior responsibility has three constitutive elements and explained that the \textit{mens rea} standard, which was not clearly defined by the post–WWII tribunals, fell somewhere between ordinary negligence and recklessness.\textsuperscript{162} All of these developments in international law were widely known and accessible to those accused at the ECCC.\textsuperscript{163} Even in 1975, the law was sufficiently clear to put the leaders of the Khmer Rouge on notice to change their conduct or risk prosecution for the criminal acts of their subordinates.

IV. Did Superior Responsibility Apply to Civilian Leaders from 1975 to 1979?

The ECCC Statute does not distinguish between military and civilian superiors.\textsuperscript{164} The Statute states that “[t]he fact that [crimes] were committed by a subordinate does not relieve the superior of personal criminal responsibility.”\textsuperscript{165} Much like the ECCC Statute, the ICTY statute also refers to a generic “superior,” which the ICTY Trial Chamber found probative as to whether the drafters of the ICTY intended superior responsibility to apply to civilians.\textsuperscript{166} The ICTY Appeals Chamber found that superior responsibility applied to civilian leaders in the 1990s, concluding

\textsuperscript{160} See supra Part III.B.
\textsuperscript{161} See supra Part III.C.
\textsuperscript{162} See Additional Protocol I, supra note 22, arts. 86–87.
\textsuperscript{163} See CHANDLER, supra note 32, at 112 (noting that the Khmer Rouge leadership were educated abroad, many in France).
\textsuperscript{164} See ECCC Statute, supra note 1, art. 29.
\textsuperscript{165} Id.
\textsuperscript{166} See Celebici Trial Judgment, supra note 20, ¶ 356.
that it was part of international law at the time.\footnote{167}{See Celebici Appeal Judgment, \textit{supra} note 40, ¶ 195 (“The principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law.”).} Drawing on the extensive analysis of the ICTY Trial Chamber, the Celebici Appeals Judgment focused exclusively on jurisprudence from the post–WWII tribunals and Additional Protocol I to conclude that superior responsibility in the civilian context was “well-established in conventional and customary law.”\footnote{168}{Id.} Since the Additional Protocol was adopted in 1977 and, given that there were few significant developments in international criminal law from that time and the formation of the ICTY,\footnote{169}{See Prosecutor v. Hadzihasanovic, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, ¶ 77 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 12, 2002). (“Since the early 1950’s developments in the field of international humanitarian law were rather limited. . . . This applies equally to developments relating to the doctrine of command responsibility.”).} the Celebici decision provides valuable analysis in determining the state of international law in the Khmer Rouge period (1975-79).

The following Section will examine the relevant post–WWII cases and Additional Protocol I. It will conclude, much like the Celebici decision and the ECCC Pre-Trial Chamber, that superior responsibility existed under international law as a mode of liability for holding civilian superiors liable for the crimes of their subordinates when the Khmer Rouge came to power in 1975. As in the military context, the law of superior responsibility for civilian leaders was given its first clear articulation in 1977 with the adoption of Additional Protocol I.

\textbf{A. Post–World War II Jurisprudence}

The post–WWII tribunals were the first to hold civilian superiors liable under a theory of superior responsibility. The London Agreement and the IMTFE Charter did not distinguish between civilian and military leaders.\footnote{170}{See London Agreement, \textit{supra} note 102, art. 6 (“Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”). The IMTFE Charter contains the identical provision. See IMTFE Charter, \textit{supra} note 102, art. 5(c).} Thus, under both instruments, civilian leaders were responsible for their subordinates’ crimes only if they had actual knowledge or played a part in planning those crimes.\footnote{171}{See London Agreement, \textit{supra} note 102, art. 6; IMTFE Charter, \textit{supra} note 102, art. 5(c).}
extended responsibility to civilian leaders even if they were only grossly negligent or reckless.172

The Tokyo Tribunal applied this sort of superior responsibility to several Japanese civilian leaders. For instance, Japanese Foreign Minister Hirota was found guilty under a *mens rea* amounting to gross negligence for failing to prevent the atrocities that took place during the “Rape of Nanking.”173 The Tokyo Tribunal found that Hirota was “derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result.”174 It added that “[h]e was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence.”175 The Tokyo Tribunal further found Prime Minister Tojo and Foreign Minister Shigemitsu criminally liable for failing to prevent and to punish the acts of Japanese troops.176

In the German context, six civilian industrialists were accused of war crimes and crimes against humanity in *United States v. Flick* for their participation in a slave labor camp.177 While three of the accused were acquitted, three men, Flick, Steinbrinck, and Weiss, were found guilty.178 Flick was the controlling supervisor of the slave labor camp and was Weiss’ superior.179 Though the final judgment mentioned only that Flick had “knowledge and approval” of Weiss’ acts, the tribunal’s holding was probably based on Flick’s failure as a superior to prevent Weiss’ actions.180

172. See London Agreement, supra note 102, art. 6; IMTFE Charter, supra note 102, art. 5(c).
174. Id. at 49791.
175. Id.
176. See id. at 49828–32, 49843–48 (finding in the case of Shigemitsu that the “circumstances, as he knew them” should have led him to take “adequate steps” to investigate the matter and, more pointedly, that “[h]e should have pressed the matter, if necessary to the point of resigning, in order to quit himself of a responsibility which he suspected was not being discharged”).
177. United States v. Flick (*Flick Case*), 4 Trial of War Criminals Before the Nuernberg Military Tribunals 1, 1 (1952).
178. Id.
179. See id. at 14–16
180. See id. at 1202.
In *Government Commissioner v. Roechling*, five German industrialists were found guilty under a fact pattern similar to the *Flick* case.\(^{181}\) The five accused, who all held senior positions in the Roechling iron and steel firm, were accused of mistreating their laborers, including prisoners of war and deported persons.\(^{182}\) The court noted that “Hermann Roechling and the other accused members of the Directorate of the Voelklingen works are not accused of having ordered this horrible treatment, but of having permitted it; and indeed supported it, and in addition, of not having done their utmost to put an end to these abuses.”\(^{183}\) The accused were found guilty for failing to take measures to improve the treatment of the prisoners and deportees working under their control.\(^{184}\)

These cases show that the post–WWII tribunals found civilian leaders liable through superior responsibility, without establishing a single, clear articulation of this mode of liability. As a result, the post–WWII tribunals have been widely criticized for their lack of clarity, particularly for their failure to articulate the constitutive elements of superior responsibility.\(^{185}\) The aforementioned German cases do not even reference “superior responsibility” in their judgments, but nonetheless found civilian business leaders guilty for their failures to prevent employees from abusing laborers.\(^{186}\) The Tokyo Tribunal Judgment treated civilian leaders much like their military counterparts, finding them guilty under a theory of superior responsibility for not taking appropriate actions to prevent crimes of which they should have known.\(^{187}\) As in the military

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\(^{182}\) See id. at 1072–74.

\(^{183}\) *Roechling* Judgment on Appeal, supra note 24, at 1136.

\(^{184}\) See id. at 1142 (affirming most of the convictions, but setting aside Hermann Roechling’s conviction for crimes against peace, setting aside the charges of economic spoliation, and acquitting Ernst Roechling).

\(^{185}\) See O’Reilly, supra note 56, at 132–33.

\(^{186}\) See generally, e.g., *Roechling* Judgment on Appeal, supra note 24, at 1136; *Flick Case*, 4 Trials of War Criminals Before the Nuremberg Military Tribunals 1, 1 (1952).

\(^{187}\) See, e.g., Celebici Trial Judgment, supra note 20, ¶ 338–39 (quoting United States v. Soemu Toyoda, Official Transcript of Record of Trial, at 5006, as stating that “the principle of command responsibility [requires] that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must be punished”); Tokyo Tribunal Judgment, Verdicts, supra note 24, at 49773, 49791 (finding Foreign Minister Hirota “derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end
context, the exact standards, nor the relevant law applied, to which the accused were held were not clear.

The credibility of these judgments is therefore weakened by their overall vagueness, their reliance on various, questionable formulations of superior responsibility, and their propensity to find the accused guilty on the basis of little evidence. Accusations that these tribunals practiced “victor’s justice” based on retribution rather than principled legal judgments are not unfounded.188

B. Additional Protocol I

Despite their lack of clarity, the post–WWII cases held that civilian superiors were responsible not only for their direct participation, but also for their omissions which allowed their subordinates to commit crimes under international law. Additional Protocol I clarified this mode of liability and articulated it in terms similar to the current law. Article 86 of Additional Protocol I criminalizes the failure to act for all superiors.189 This provision, like the ECCC Statute, includes superior responsibility for generic “superiors,” and makes no distinction between military and civilian leaders.190 This generic reference was intentional, as Article 86 of Additional Protocol I attaches to any superior with de facto effective control over their subordinates, while Article 87 applies only to military commanders.191 The Commentary states that under Article 86 the term “superior” “is not a purely theoretical concept covering any superior in a line of command,” but refers only to an individual “who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control.”192 This is essentially the standard adopted in recent jurisprudence from the ICTY and ICTR.193

to the atrocities, [and] failing any other action open to him to bring about the same result”).

188. See, e.g., O’Reilly, supra note 56, at 192–33.
189. See Additional Protocol I, supra note 22, art. 86.
190. See id. art. 86(2) (“The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.”) (emphasis added); ECCC Statute, supra note 1, art. 29.
192. Commentary on Additional Protocol I, supra note 30, ¶ 3544.
193. See, e.g., Celebici Trial Judgment, supra note 20, ¶ 377 (“[A] superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his de facto position of authority.”); Kayishema & Ruzindana Judgment, supra note
The Commentary also clarified that, for any superior, there are three elements of superior responsibility. It states that “if a superior is to be responsible for an omission relating to an offence committed or about to be committed by a subordinate,” the three conditions that must be fulfilled are as follows:

(a) the superior concerned must be the superior of that subordinate [who committed or is about to commit a crime];
(b) the superior knew, or had information which should have enabled him to conclude that a breach of law was being committed or was going to be committed; [and] (c) he did not take the measures within his power to prevent it.194

These elements are the essence of the current law of superior responsibility, but Additional Protocol I relied on post–WWII jurisprudence and prior treaties, including the 1907 Hague Conventions, to derive them.195 As other tribunals have recognized, Additional Protocol I did not create new law but clarified existing international law.196 Thus, superior responsibility for civilian leaders was part of customary international law throughout the Khmer Rouge period, but was only given clear articulation through Additional Protocol I in 1977.

C. Conclusion: The PTC’s Misguided Reliance on Post–WWII Cases

For the ECCC to accord with nullem crimen, customary international law from 1975 to 1979 must have recognized superior responsibility for the acts or omissions of civilian superiors, in a sufficiently clear and accessible manner to make liability foreseeable to the accused. The ECCC is limited to prosecuting only “senior leaders” or those “most responsible” for the abuses of the Khmer Rouge,197 meaning that superior responsibility is one of the primary modes of liability to hold the accused guilty of serious crimes. Therefore, it is important that the ECCC establishes clearly and with a strong legal foundation that a basis for civilian superior

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20, ¶ 213 (“[T]he application of criminal responsibility to those civilians who wield the requisite authority is not a contentious one.”).
194. Commentary on Additional Protocol I, supra note 30, ¶ 3543.
196. See Prosecutor v. Hadzihasanovic, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 29 (Int’l Crim. Trib. for the Former Yugoslavia July 16, 2003) (“[C]ommand responsibility was part of customary international law relating to international armed conflicts before the adoption of Protocol I. Therefore . . . Articles 86 and 87 of Protocol I were in this respect only declaring the existing position, and not constituting it.”).
197. See ECCC Statute, supra note 1, arts. 1–2.
responsibility existed in customary international law from 1975 to 1979. The PTC, however, chose to rely almost solely on the decisions of the post–WWII tribunals, rather on Additional Protocol I and other equitable considerations.198

To be sure, the stature and notoriety of the post–WWII tribunals, coupled with the growing recognition of superior responsibility in the domestic law of major world powers, should have put the Khmer Rouge on notice that they too could be found criminally responsible for the crimes of their subordinates. Thus, the PTC was correct to dismiss the appeals by Ieng Sary and Ieng Thirith that challenged the application of superior responsibility to their cases.199

The PTC weakened its 2011 decisions regarding superior responsibility by failing to draw on Additional Protocol I in its analysis.200 As discussed, Additional Protocol I came into effect in 1977, in the midst of the Khmer Rouge era, which perhaps concerned the PTC. The ECCC probably grappled with one, or both, of the following concerns: (1) that Additional Protocol I evolved the doctrine of superior responsibility such that it imputed criminal responsibility on the accused without adequate notice; or (2) that relying on an instrument that came into effect in 1977 would conflict with the broader equitable considerations underlying nullem crimen.

The first concern is unlikely to have influenced the ECCC’s decisions, as the PTC itself has recognized that Articles 86 and 87 of Additional Protocol I merely declared the existing law of superior responsibility and did not create a new form of liability.201 Moreover, though superior responsibility evolved slightly during the drafting of Additional Protocol I, this evolution does not violate nullem crimen. International courts have consistently held that clarifications or elaborations on existing law do not pose a nullem crimen problem as long as the conduct in question was illegal at the time of commission.202 The post–WWII cases, despite their flaws, made

198. See Ieng Sary Decision, supra note 11, ¶¶ 413–60; Ieng Thirith Decision, supra note 11, ¶¶ 187–232.
199. See supra Part I.B.
200. See Ieng Sary Decision, supra note 11, ¶¶ 413–60; Ieng Thirith Decision, supra note 11, ¶¶ 187–232.
201. See Ieng Sary Decision, supra note 11, ¶ 418.
202. See, e.g., Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeal Judgment, ¶ 127 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000), www.icty.org/x/cases/aleksowski/acjug/en/ale-asj000324e.pdf (“[Nullem Crimen] does not prevent a court ... from determining an issue through a process of interpretation and clarification as to the elements of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients

clear that superiors, both civilian and military, could be held criminally responsible for the criminal acts of subordinates, particularly for war crimes, crimes against humanity, and other egregious violations of international law.\textsuperscript{203} Given the scale of the Khmer Rouge crimes—including the killing of an estimated 1.6 to 1.8 million Cambodians\textsuperscript{204}—it is clear that the accused before the ECCC are charged with crimes on a scale similar to the accused German and Japanese commanders after World War II. These crimes were therefore recognized under international law thirty years before the Khmer Rouge came to power.

Applying Additional Protocol I to the \textit{nullem crimen} analysis would also not conflict with the equitable considerations that underlie this principle. Superior responsibility today is clearly defined because Additional Protocol I, followed by the ICTY and ICTR, and the ICC, have established and elucidated its three constituent elements. Additional Protocol I also made clear that international law requires a higher standard of proof than some of the post–WWII cases to hold superiors responsible for the crimes of their subordinates.\textsuperscript{205} The ECCC has adopted a \textit{mens rea} standard for superiors that falls between negligence and recklessness, rather than the ordinary negligence standard imposed by the post–WWII tribunals.\textsuperscript{206}

Thus, the law has evolved toward greater protection for defendants, by making the three elements clear and by ensuring that superiors will not be responsible for negligent actions or omissions. This evolution in the law of superior responsibility protects the accused from the sort of “victor’s justice” that was perhaps administered to defeated German and Japanese leaders following WWII. The PTC therefore would not have caused any unfairness to the accused by referring to Additional Protocol I in its \textit{nullem crimen} analysis.

Moreover, \textit{nullem crimen} is intended to protect individuals who acted on the good-faith belief that their conduct was lawful. The

\begin{footnotesize}
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\item \textsuperscript{203} See supra Part II.B.
\item \textsuperscript{204} See Ben Kiernan, \textit{Genocide and resistance in Southeast Asia} 269–72 (2008).
\item \textsuperscript{205} See Additional Protocol I, supra note 22, art. 28(b) (applying a “consciously disregarded” standard of fault on civilian superiors, which appears to be closer to “recklessness” than any prior articulation of the law).
\item \textsuperscript{206} See Duch Judgment, supra note 7, ¶¶ 540–47.
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accused at the ECCC allegedly committed serious crimes under international law, including several counts of crimes against humanity and war crimes. They held civilian leadership posts in the Khmer Rouge regime: Nuon Chea was second in command to Pol Pot, Ieng Sary was the Foreign Minister, and Ieng Thirith was the Minister of Social Affairs. Like most senior Khmer Rouge officials, these individuals had traveled outside Cambodia and were often educated abroad. They were therefore not isolated within Cambodia, but were instead almost certainly aware of the significant developments in international law from 1945 to 1977 that established superior responsibility under customary international law for both military and civilian superiors.

This broader analysis is conspicuously absent from the two PTC decisions, which rely far too heavily on muddled post–WWII jurisprudence. From a legal perspective, the PTC would be on stronger ground if the PTC relied on a broader array of sources, such as Additional Protocol I and the equitable principles underlying nullem crimen. Strategically, too, the ECCC could benefit from stronger legal opinions. The ECCC has been plagued by allegations of corruption, which may lessen if it produces legal opinions of higher quality reasoned on principled legal grounds. These recent PTC decisions provide a cautionary example: the ECCC correctly held that superior responsibility applied to both civilian and military superiors during the period of 1975 to 1979, but the legal basis for its decisions could have been stronger. For these reasons, the PTC would have been well served to look further than the post–WWII judgments in its analyses on this crucial issue. In future decisions, perhaps the PTC or the ECCC Trial or Appeals Chambers will give superior responsibility and the principle of legality the broader and more comprehensive treatment it deserves.

207. See supra Parts LA–B.
209. See Nuon Chea, supra note 208; Ieng Sary, supra note 208; Ieng Thirith, supra note 208.
210. Cf. Ieng Sary Decision, supra note 11, ¶ 411 (noting that Ieng Sary claimed he could not have been aware of the concept of command responsibility because such information was inaccessible in Cambodia in the 1970’s).
211. Cf. Estrada, supra note 10, at 329–31 (referring to political nature of decisions to punish acts of genocide); see also Ryngaert, supra note 10; Bates, supra note 10.