3. THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

3.1 Statutory development

The Extraordinary Chambers in the Courts of Cambodia (ECCC) were established in order to bring to trial senior leaders and those most responsible for crimes committed under the Khmer Rouge regime. The ECCC started operated in 2006, following an agreement in 2003 between the Kingdom of Cambodia and the UN. This hybrid judicial organ, with strictly limited time jurisdiction, provides a unique approach to accountability for the mass atrocities committed between 17 April 1975 and 7 January 1979.[164]

The negotiations between the UN and Cambodia to set up a special tribunal took a long time - from 1997 to 2007. The negotiations resulted in two key documents: The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (ECCC Statute) and the UN/Cambodia Agreement.[165] A historical analysis of negotiation and documents prior finalizing the ECCC Statute is necessary.

In 1996, the Special Representative of the UN Secretary General for the Human Rights in Cambodia Thomas Hammarberg, opened up the question on the impunity of Khmer Rouge leaders for crimes committed during the Khmer Rouge.[166] He brought up the issue to the UN Commission on Human Rights session in April 1997. The Commission on Human Rights Report included the "request the Secretary General […] to examine any request by Cambodia for assis-

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[164] MEISENBERG, Simon. STEGMILLER Ignaz. Introduction: An Extraordinary Court. In: MEISENBERG, Simon, STEGMILLER Ignaz (*eds*). *The Extraordinary Chambers in the Courts of Cambodia Assessing their Contribution to International Criminal Law*. The Hague: T.M.C. Asser Press, 2016, pp. 1–2.

[165] Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea was signed by Deputy Prime Minister Sok An and United Nations Under-Secretary-General Hans Corell in Phnom Penh.
HEDER, Steve. *A review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia*. London/Paris, 2011, p. 2.

[166] HAMMARBERG, Thomas. *Efforts to Established a Tribunal Against the Khmer Rouge Leaders: Discussion Between the Cambodian Government and the UN*, May 2001. Cited in BASSIOUNI, M. Cherif. *Introduction to International Criminal Law*. New York: Transnational Publisher, 2003, p. 549.

tance in responding to past serious violations of Cambodian and international law [...]".[167]

In June 1997, a letter from two Co-Prime Ministers (Hun Sen and Norodom Ranariddh) was sent to the Secretary-General asking for the assistance of the UN and the international community in bringing to justice those persons responsible for the crimes committed from 1975 to 1979.[168] This letter and its wording ("similar efforts to respond to the genocide in Rwanda and the former Yugoslavia") were later used as prove that the Co-Prime Ministers had initially requested an international tribunal. However, Hun Sen later backtracked in rejecting such a solution.[169]

In 1997, the UN Third Committee referred to the crimes committed during the Democratic Kampuchea Regime. The following paragraph was included in the 1997 Report of the Third Committee: "[…] Requests the Secretary-General to examine the request by the Cambodian authorities for assistance in responding to past serious violations of Cambodian and international law, including the possibility of the appointment, by the Secretary-General, of a group of experts to evaluate the existing evidence and propose further measures, as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability."[170]

This Report was subsequently adopted by the General Assembly on 27 February 1998. Finally, in February 1998, 19 years after the Khmer Rouge was overthrown, for the first time the General Assembly acknowledged that massive human rights violations had occurred in Cambodia during the Democratic Kampuchea period of 1975–1979.

In 1998, Kofi Annan appointed a Group of Experts to investigate the possibility for setting up special tribunal.[171] After nine months of work, the Group of Experts for Cambodia issued a report detailing, among other issues, extent of in-

[167] UN Doc. E/1997/23 E/CN.4/1997/150, *Commission on human rights report on the fifty-third session,* 11. 3.-18. 4. 1997, p. 27.

[168] UN Doc. A/51/930 S/1997/488 Annex, *Letter dated 21 June 1997 from the First and Second Prime Ministers of Cambodia addressed to the Secretary-General,* 24 June 1997. UN Doc. 52/135, A/53/850 S/1999/231 Annex, *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution*, 16. 3. 1999, §§ 80–83

[169] FAWTHROP, Tom. JARVIS, Helen. *Getting away with genocide*. London: Plutto Press, 2004, pp. 117–118.

[170] UN Doc. A/52/644/Ad., *The report of the Third Committee, Add. 2 on the Situation of Human Rights in Cambodia,* 2, 27. 2. 1998.

[171] *Ibid*.

dividual responsibility.[172] In the Report of the Group of Experts for Cambodia, the issue of superior responsibility was discussed within the scope of personal jurisdiction.[173] The Report emphasized that "international law has long recognized that persons are responsible for acts even if they did not directly commit them."[174] Paragraph 81 states that responsibility should apply not only to military commanders and civilian leaders who ordered atrocities, but also to those who "knew or should have known that atrocities were being committed or about to be committed by their subordinates and failed to prevent, stop or punish them."[175] The wording contains both the terms 'military commander' and 'civilian leaders'. Moreover, it seems that these terms were used as synonyms and probably equal in regard to superior responsibility. Secondly, the suggested requirement for *mens rea* is 'knew or should have known' which is a requirement established for military commanders under the Rome Statute.[176] Nevertheless, in the final text of the ECCC Statute, a lower standard of *mens rea* 'knew or had reason to know' was followed.

R. Zacklin, Assistant Secretary-General for legal affairs, in his note to the Secretary-General Kofi Annan suggested that the personal jurisdiction of the tribunal should be defined to reach the major political and military leaders of the Khmer Rouge, as their responsibility for the crimes committed flows from their position as leaders and the principle of command responsibility.[177] These documents show an intention to apply the superior responsibility towards non-military superiors as well as military commanders. On the other hand, there is absolutely no evidence that during negotiations superior responsibility should not be applied towards civilian leaders. Nevertheless, the question arose whether the application of superior responsibility to civilian superiors (leaders of Democratic Kapuchea) meets the standard of *nullum crimen sine lege*. This question was subjected to the decision of the Court as the *nullum crimen sine lege* challenge was raised in Case 002.[178] This standard ensures that individuals can be held responsible only for acts that were criminal at the time of their commission. The concept of superior responsibility was a relatively new type of liability during the

[172] UN Doc. *A/53/850 S/1999/231 Annex*, *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135,* 16. 3. 1999, §§ 80–83. Hereinafter referred to as UN General Assembly *Report.*

[173] UN General Assembly *Report,* Article 81.

[174] *Ibid*, Article 80.

[175] *Ibid*, Article 81.

[176] *Ibid*.

[177] ZACKLIN, Ralph. *Note to the Secretary-General: A mixed Tribunal for Cambodia*, 18. 7. 1999. Cited in HEDER, S.: *supra*, p. 27.

[178] *Ieng Sary,* ECCC, 002/11-9-09-2007-ECCC/OCIJ(PTC 75), D427/1/6, 25. 10. 2010, §§ 103–135. Hereinafter referred to as *Ieng Sary* Appeal.

Khmer Rouge period, thus it could be argued that superior responsibility applied only to military commanders, not civilian superiors. The ECCC had to deal with this challenge in the very first case - Case 001 - in which the accused possessed only civilian leadership.[179]

In 2001, the Cambodian National Assembly unanimously approved a draft of the ECCC Statute. The ECCC Statute had been approved by the Senate and the Constitutional Council and signed by King Norodom Sihanouk.

In 2003, following more negotiations between Cambodia and the UN, the UN/Cambodia Agreement was signed by both parties. In 2004, an amendment of the ECCC Law was codified, ensuring that the ECCC Statute and the UN/Cambodia Agreement were consistent.[180]

3.2 ECCC Statute

The superior responsibility clause is embodied in Article 29 of The Law on the Establishment of the Extraordinary Chambers, commonly referred as the ECCC Statute. Article 29 of the ECCC Statute states: "[…]The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit 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.[…]."[181] Unlike the *ad hoc* tribunals (especially the ICTY and ICTR), a requirement of effective command and control was encompassed directly in the text of the Statute. This condition is the only substantive change from the ICTY's and the ICTR's formulations. Otherwise, the wording of Article 29 of the ECC Statute is identical to the corresponding provisions of superior responsibility in the statutes of the ICTY and the ICTR. This different approach is explained by consistent jurisprudence on the effective control requirement made by the *ad hoc* tribunals over the years.[182] Regrettable, the Statute does not comprise clarification on applicability of superior responsibility to non-military commanders.

[179] *Kaing Guek Eav alias Duch,* ECCC, 001/18-07-2007- ECCC/TC, E188, 26. 7. 2010, § 549. Hereinafter referred to as *Duch*.

[180] BASSIOUNI, Ch.: *supra*, 2003, pp. 550–552.

[181] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 2001, as amended by NS/RKM/1004/006 (Oct. 27, 2004), Article 29. Hereinafter referred to as the ECCC Statute.

[182] *Ibid*.

Regarding the *mens rea* requirement, the ECCC Statute follows the practice of the *ad hoc* tribunals. Article 29 of the ECCC Statute establishes responsibility for superiors who knew or had reason to know that a subordinate was about to commit a crime or had done so. The wording thus differs from wording of the Rome Statute, which requires a higher standard of *mens rea*. Also, the ECCC Statute does not distinguish a *mens rea* for military commanders and non-military superiors. This approach was taken in the Rome Statute. As it was already indicated in the previous part, the Rome Statute requires two different *mens rea* standards. The first standard applies to military commanders or persons acting as military commanders. To establish responsibility, military commanders or persons acting as military commanders must have known, or, owing to the circumstances at the time, should have known about crimes committed by his/her subordinates. For all other superiors, the Rome Statute requires that the superior knew, or consciously disregarded information which clearly indicated that the subordinates were committing or were about to commit such crimes. The ECCC Statute does not distinguish between *mens rea* and applies only one standard. This may be a result of uncertainty, whereas superior responsibility under the ECCC should be also applied to non-military commanders.

The wording of the ECCC Statute indicates that the drafters intended to use the interpretation of the doctrine provided by the *ad hoc* tribunals, mainly the ICTY and the ICTR, and their recent jurisprudence development.[183] As a result, the ECCC Statute embodies three elements articulated in the ICTY's and ICTR's jurisprudence to find superiors liable through superior responsibility – superior/subordinate relation, defined by effective control, *mens rea* and *actus reus* in the form of a superior's omission to act (to prevent or to punish).

3.3 ECCC Jurisprudence

The ECCC law provided no applicable law, nor a hierarchy of law designed to provide guidance to avoid conflicting interpretations. The applicability of the customary international law has been challenged in Ieng Sary's case. It was argued that the customary international law cannot be directly applicable to the ECCC because the ECCC is a domestic court and the customary international law is not directly applicable in domestic Cambodians courts.[184] The Office of the Co-Investigative Judges decided that the application of customary international

[183] REHAN, Abeyratne. Superior Responsibility and the Principle of Legality at the ECCC. *The George Washington International Review*. 2012, vol. 44, p. 48.

[184] *Ieng Sary,* ECCC, 002/19-09-2007/ECCC/OCIJ, D388, 22. 7. 2010, §§ 2–29.

law at the ECCC is a corollary from the finding that the ECCC contains characteristics of an international court applying international law.[185]

The ECCC has limited personal jurisdiction. Article 1 of the ECCC Statute says that only the "most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia" can be tried at the ECCC.[186]

The ECCC has also limited temporal jurisdiction as it can only hear cases in which the alleged crimes occurred between the period from 17 April 1975 to 6 January 1979.[187] Thus, those accused at the ECCC can only be held responsible for crimes that were both perpetrated and legally recognizable in this period (1975–1979). The main question arises whether superior responsibility, as set up in 1975, was part of the customary law during 1975–1979. The second question is whether the customary international law during 1975–1979 recognized the responsibility of civilian leaders. Nowadays, superior responsibility is well-established under customary international law, but in 1975 it was a relatively new doctrine under international law. The jurisprudence of the ECCC provided an overview on whether, and to what extent, commander responsibility was part of customary international law. Given the limited personal jurisdiction of the ECCC over senior leaders and those most responsible, the doctrine of command responsibility is one of the core parts of the prosecution's case.

3.3.1 Case 001 (Kaing Guek Eav)

On 26 July 2010, the first judgement of the ECCC was rendered. Kaing Guek Eav, also known as 'Duch', was convicted for crimes against humanity and grave breaches of the 1949 Geneva Conventions. He was sentenced by the Trial Chamber to 35 years imprisonment. This sentence was changed to life imprisonment by the Supreme Court Chamber. The Supreme Court Chamber granted the Co-Prosecutor's appeal, stating that the Trial Chamber had erred in the law by attaching insufficient weight to the gravity of Duch's crimes, aggravating circumstances, and that too much weight had been attached to mitigating circumstances.

Duch was the former Chairman of the Khmer Rouge S-21 Security Centre in Phnom Penh. As the chairman of the S-21 security centre, the biggest security centre in Cambodia during the Khmer Rouge period, he was in charge of interrogating perceived opponents of the Communist Party of Kampuchea from 1975

[185] *Ieng Sary*, ECCC, 002/19-09-2007/ECCC/OCIJ (PTC35), D97/13, 8. 12. 2009, § 21.
[186] ECCC Statute, Article 1.
[187] *Ibid.*

to 1979.[188] As the head of the interrogation unit, Dutch supervised interrogations and taught interrogation methods to the staff of the interrogation unit. Consistent evidence showed that Dutch permitted the use of torture during interrogations.[189] Following the completion of an interrogation, most of the time detainees were taken away and "smashed" in the Choeung Ek killing field.[190]

The Trial Chamber found Duch guilty on the basis of direct participation in crimes. Nevertheless, the chamber also dealt with superior responsibility in this case. The Trial Chamber concluded that Duch cannot be convicted pursuant to a direct form of responsibility and superior responsibility at the same time. Instead, the Trial Chamber considered his superior position as an aggravating factor in sentencing.[191]

The Trial Chamber provided an analysis of the conditions for establishing superior responsibility. In the judgement, it was concluded that all conditions needed to establish the superior responsibility of Duch for crimes committed by his subordinates were fulfilled. Duch exercised effective control over the S-21 staff, knew that his subordinates were committing crimes, and failed to take necessary or reasonable measures to prevent their actions or to punish perpetrators.[192] He was found criminally responsible without distinguishing between civilian and military superior responsibility. The TCH, in *Case 001*, accepted superior responsibility for civilian leaders as a part of customary international law during 1975–1979. The main argument supporting this conclusion was made using jurisprudence from the Nuremberg-era tribunals and recent international criminal tribunals. In the view of the TCH in the *Duch* case, this jurisprudence indicates that during the period of 1975 to 1979, superior responsibility under customary international law was not confined to military commanders.[193] The TCH argued that the deciding distinction is the degree of control exercised over subordinates rather than the nature of his or her function.[194] Furthermore, the TCH held that superior responsibility may ensue based on both direct and indirect relationships of subordination, as long as effective control over can be proven.[195] In addition, the TCH ascertained that the principle of legality required forms of respon-

[188] *Duch,* § 125–130.
[189] *Duch*, § 127.
[190] *Ibid,* §§ 127–148. During the Khmer Rouge regime, the code name 'kam kam' was used, which could be translated as smash (*i.e.* executed).
[191] *Ibid*, § 539. This conclusion is in conformity with findings in the *Blaškić* case. *Blaškić,* ICTY, IT-95-14-T, TCH, 3. 3. 2000*,* § 337 (see Chapter 2.1) and *Blaškić* Appeals Chamber Judgment, §§ 91–92.
[192] *Ibid*, § 549.
[193] *Ibid*, §§ 477–478.
[194] *Ibid*, § 477.
[195] *Ibid,* § 542.

sibility to be "sufficiently foreseeable and that the law providing for such liability was sufficiently accessible to the accused at the relevant time."[196] In this case, the TCH concluded that the forms of responsibility were sufficiently foreseeable and accessible to the accused.[197] Surprisingly, the defence did not challenge the application of superior responsibility to non-military superiors, thus the doctrine was not subjected to the appeal judgement in *Case 001*.[198]

Concerning the application of successor superior responsibility (see Chapter 4.2.1.3.1), this issue hasn't been yet raised before the ECCC. However, it might never be raised, as the prosecution in the *Duch* case decided to follow the majority in the Hadžihasanović Decision. The Co-Prosecutors in the Final Trial Submission stated that "[A]an accused may possess either permanent or temporary 'effective control' over the perpetrator(s), but this must have existed at the time of the commission of the crime(s)."[199]

3.3.2 Case 002 (Nuon Chea, Khieu Samphan)

Originally, four former Democratic Kampuchea leaders were part of *Case 002*. The Trial Chamber held the initial hearing in June 2011. Since then, *Case 002* has been severed into separate trials (*Case 002/01* and *Case 002/02*), each addressing a different section of the indictment. The proceedings against Ieng Sary were terminated on 14 March 2013, following his death. Ieng Thirith was indicted but later found unfit to stand trial due to her dementia and was separated from the case in November 2011. Nuon Chea, former Chairman of the Democratic Kampuchea National Assembly and Deputy Secretary of the Communist Party of Kampuchea, and Khieu Samphan, former Head of State of Democratic Kampuchea, are currently on trial in Case 002/02.

In 2010, Ieng Sary, Ieng Thirith and Nuon Chea appealed against the Co-Investigating Judges (OCJI) closing order involving superior responsibility as one of the forms of responsibility. In the closing order, the OCIJ held that superior responsibility existed in customary international law in 1975–1979[200] and that the "criminal responsibility of the superior applies at both military and to civilian

[196] *Ibid*, § 28 (quoting *Milutinović et al.,* ICTY, IT-05-87, ACH, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21. 5. 2003, § 38)

[197] *Ibid*, § 474–476.

[198] The Ieng Thirith Defence mentions the omission of raising this issue in Case 001. *Ieng Thirith,* ECCC, 002/19-09-2007-ECCC/OCIJ(PTCH145), D/427/2/1, 18. 10. 2010, § 83. Hereinafter referred to as *Ieng Thirith* Defence Appeal.

[199] *Kaing Guek Eav alias Duch,* ECCC, 001/18-07-2007- ECCC/TC, E159/9, 11. 11. 2009, § 349.

[200] *Nuon Chea, Khieu Samphan, Ieng Thirith, Ieng Sary,* ECCC, 002/19-09-2007/ECCC/OCIJ, D427, 15. 9. 2010, §§ 1307. Hereinafter referred to as *Nuon Chea*, Closing Order.

superiors."[201] The *nullum crimen sine lege* challenge was made by using the argument that customary international law could not be applied as part of Cambodian law in 1975–1979.[202] Alternatively, the Defence argued that from 1975 to 1979 customary international law did not recognize superior responsibility as a basis of responsibility.[203] Nuon Chea Appeal's also specified that the modes of liability should be applied only in exclusive reference to modes of liability as recognized in the 1956 Penal Code.[204] Ieng Thirith Defence's, in its Appeal, also submitted that superior responsibility between 1975 and 1979 could be prosecuted only in relation to war crimes, as in 1975–1979 there was no rule of customary international law allowing for the prosecution of superior responsibility for crimes against humanity.[205] The Ieng Thirith Defence also argued that the OCIJ failed established the existence of duty to act and its basis in domestic law.[206]

In Ieng Sary's Appeal, the application of command responsibility to internal armed conflict was raised.[207] Only in Ieng Sary's Appeal the applicability to non-military commanders was raised, arguing that command responsibility may only be applied to military commanders.[208] In this appeal, the Defence furthermore argued that command responsibility may only be applied where there is a causal relationship between the superior's actions and the crimes of his subordinates and where the crimes concerned activities for which the superior had a pre-existing legal duty to prevent and punish.[209] Another point raised by the Defence regarded the applicability of the doctrine to specific crimes such as genocide.[210] The Defence argued that superior responsibility is inconsistent with specific intent crimes because a superior may be liable under command responsibility even when he "did not intend a crime to take place and may not have even learned of its occurrence until after the fact".[211] Analysis of the challenges is crucial in understanding the concept of superior responsibility at the ECCC.

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201 *Nuon Chea*, Closing Order, § 1558.

202 *Ieng Sary* Appeal, §§ 111–114.

203 *Ieng Sary* Appeal, §§ 283–302. *Nuon Chea, Khieu Samphan, Ieng Thirith, Ieng Sary*, ECCC, 002/19-09-2007/ECCC/OCIJ, *Ieng Thirith* Defence Appeal, §§ 84–89.

204 *Nuon Chea,* ECCC, 002/19-09-2007-ECCC/OCIJ(PTCH146), D427/3/1, 18. 10. 2010, §§ 26 and 38. Hereinafter referred to as *Nuon Chea* Appeal. All points were raised again in *Nuon Chea,* ECCC, 002/19-09-2007-ECCC/OCIJ(PTCH146), D427/3/11, 6. 12. 2010.

205 *Ieng Thirith* Appeal, §§ 90–92.

206 *Ibid*, § 93.

207 *Ieng Sary* Appeal, §§ 307–313.

208 *Ibid,* §§ 314–315.

209 *Ibid,* §§ 316–322.

210 *Ibid,* §§ 323–324.

211 *Ibid.* The Defence referred to Schabas who explains that "[i]n the case of genocide, for example, it is generally recognized that the mental element of the crime is one of specific intent. It is logically impossible to convict a person who is merely negligent of a crime of

The Pre-Trial Chamber (PTCH), in a reaction to the Defence Appeals, ruled that in order to fall within the subject matter jurisdiction of the ECCC, modes of liability must "be provided for in the [ECCC law], explicitly or implicitly", and have been "recognized under Cambodian or international law between 17 April 1975 and 6 January 1979."[212] Subsequently, the PTCH explicitly ruled that superior responsibility was part of customary law during 1975–1979.[213] Ieng Thirith's Appeal only challenged the customary international law basis in 1975–1979 regarding superior responsibility as a general matter and not whether it also applied to civilian superiors. As such, the PTCH interpreted the Ieng Thirith Appeal to challenge the existence of superior responsibility generally in customary law at the relevant time and not whether it also extended to civilian superiors.[214] According to the PTCH, the *Yamashita* case "serves as precedent" for the notion that a superior may be held criminally responsible under international law with respect to crimes committed by subordinates.[215] Furthermore, the PTCH upheld this conclusion in other post-Second World War cases.[216] The PTCH concluded that an overview of judgments and decisions taken by different tribunals support the view that the doctrine also applied to non-military superiors.[217] Nevertheless, in the Ieng Thirith and the Nuon Chea Decision the PTCH in did not take any position as to whether the doctrine of superior responsibility also applied to civilians as a matter of customary law by 1975.[218] Regarding the applicability of superior responsibility for crimes against humanity, the PTCH concluded that there is a basis in customary international law for superior responsibility for crimes against humanity from 1975–1979. The PTCH used reference to the *High Command* case, the *Hostage* case, the *Medical* case and the *Ministries* case where the accused were held responsible under the command responsibility doctrine not only with respect to war crimes, but also crimes against humanity.[219] In the Ieng Sary Appeal case, the PTCH came to the conclusion that the AP

specific intent." However, for this conclusion we would have to agree that the superior responsibility is a notion of negligence. See Chapter 2.3 and 4.2.1.2.

212 *Nuon Chea, Khieu Samphan, Ieng Thirith, Ieng Sary,* ECCC, 002/19-09-2007/ECCC/OCIJ (PTC 145 and 146), D427/2/15, PTCH, 15. 2. 2011, §§ 87–107. Hereinafter referred to as *Nuon Chea and Ieng Thirith* Decision.

213 *Nuon Chea, Khieu Samphan, Ieng Thirith, Ieng Sary,* ECCC, 002/19-09-2007/ECCC/OCIJ (PTC75), D427/1/30, PTCH, 13. 1. 2011, § 460. Hereinafter referred to as *Ieng Sary* Decision.

214 *Nuon Chea and Ieng Thirith* Decision, §§ 87–107.

215 *Ibid*, § 199.

216 *Ibid*, §§ 188, 200–224.

217 *Ibid*, § 230.

218 *Ibid*.

219 *Ibid*, § 231.

I adopted in 1977 (Articles 86 and 87), was only a declaration of the existing position and that jurisprudence from the Nuremberg-era tribunals also indicated that superior responsibility was not confined to military commanders during the 1975–1979 period. The PTCH did not address the applicability of the doctrine to specific crimes such as genocide.[220] The same conclusion was made by the Trial Chamber in 002/01. It held that superior responsibility, applicable to both military and civilian superiors, was recognized in customary international law by 1975 and that inconsistency between two cases in a single state (inconsistency in the *mens rea* requirement in the *Yamashita* and *Medina*), without more, does not demonstrate that superior responsibility as a form of responsibility is not customary international law.[221]

In the end, the Trial Chamber convicted both Nuon Chea and Khieu Samphan on the basis of their participation in the JCE. Additionally, in relation to Nuon Chea, the Trial Chamber concluded that he (a) ordered the crimes and (b) exercised effective control over the Khmer Rouge cadres in such a way that he was responsible on the basis of superior responsibility. Nevertheless, the Trial Chamber found that it could only consider his superior position in the context of sentencing. In contrast to Nuon Chea, the Trial Chamber did not find that Khieu Samphan (as a member of various important bodies within the CPK and Democratic Kampuchea) had sufficient authority to exercise effective control over the perpetrators of crimes. The Trial Judgment of Case 002/01 therefore distinguished between the superior responsibility of Nuon Chea and Khieu Samphan.[222] The Trial Chamber concluded that Nuon Chea exercised effective control over those members of the CPK and the military who committed crimes.[223] The Trial Chamber concluded that although Khieu Samphan was commander-in-chief of the armed forces, the evidence did not demonstrate that he had effective control over direct perpetrators.[224]

On 23 November 2016, the appeal judgement in the Case 002/01 was rendered. However, given the limited scope of review, the Supreme Court Chambers did not bring any new light to the application of the superior responsibility doctrine at the ECCC.[225]

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[220] *Ieng Sary* decision, §§ 418. It was held by the PTCH that this challenge by Defence is "mixed issues of fact and law and such issues of the contours of modes of liability, as opposed to their very existence, do not represent jurisdictional challenges." *Ieng Sary* decision, §§ 102.

[221] *Nuon Chea, Khieu Samphan,* ECCC, 002/19-09-2007/ECCC/TC, E313, 7. 8. 2014, § 719. Hereinafter referred to as *Nuon Chea, Khieu Samphan,* Trial Chamber Judgement.

[222] *Nuon Chea, Khieu Samphan,* Trial Chamber Judgement, §§ 1079–1080.

[223] *Ibid*, §§ 933–934, 1079.

[224] *Ibid*, §§ 1017–1022

[225] *Nuon Chea, Khieu Samphan,* ECCC, 002/19-09-2007/ECCC/SC, F36, 23. 10. 2016, §§ 1096–1101.

3.4 Summary

The path to justice and the punishment of those responsible for war crimes and crimes against humanity committed during the Khmer Rouge regime was long and complicated. The negotiation between the UN and Cambodia to set up a special tribunal took started in 1997. However, it took another 10 years for the special hybrid judicial organ, with strictly limited time jurisdiction providing a unique approach to accountability for mass atrocities committed between 17 April 1975 and 7 January 1979, to be set up and started to operate.

This was preceded by the Report of the Group of Experts for Cambodia, appointed by K. Annan in 1998. In this Report, the distinction between military and civilian leaders was made and the higher level of *mens rea* "should have known" was recommended. This Report, with a note from Zacklin, served as an interpretational base for the ECCC Statute which was unanimously passed by the Cambodian Senate 2001. Regrettably, Article 29 of the ECCC does not include clarification on the applicability of superior responsibility to non-military commanders, a point which became hotly debated in the case-law of the ECCC.

The existing jurisprudence of the ECCC provided thus far an overview on whether command responsibility was part of customary international law and to what extent. The ECCC case law on superior was formed by different judicial organs of the ECCC, not only by the Chambers but also by Co-investigative Judges, in different stages of the proceedings. In the *Duch* case and also Case 002 (Nuon Chea, Khieu Samphan), it was confirmed that superior responsibility formed part of customary international law in the 1970's. Moreover, it was confirmed that the doctrine of superior responsibility related not only to military commanders but also to non-military superiors. This conclusion was mainly based on the analysis of post-Second World War Tribunals' judgments. Some critiques appeared to the extent that the argumentation should be based on the interpretation of the AP I to the Geneva Conventions of 1949 (1977), which probably more clearly defines superior responsibility and reflects a broad consensus on the state of international law in the 1970s.[226]

Some problematic aspects of superior responsibility haven't been properly raised and discussed yet, such as the successor responsibility doctrine or superior responsibility for special intended crimes, such as genocide. Nevertheless, the investigation in *Case 003* was concluded and in *Case 004/02* and *Case 004/03* the investigation continues. Thus, superior responsibility, as one of the forms of responsibility, may become a role in the future proceedings.

[226] REHAN, A.: *supra*, pp. 75–76.