WRITTEN COMMENTS
ON THE CASE OF
LAS DOS ERRES MASSACRE
V. THE REPUBLIC OF GUATEMALA

A Submission from the International Human Rights Law Institute to the
Inter-American Court of Human Rights

July 2009

Table of Authorities

STATUTES AND CONVENTIONS

Inter-American System

UN System

CASES

Inter-American System of Human Rights

International Criminal Tribunal for the Former Yugoslavia

Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, 15 March 2002

Prosecutor v. Obrenovic, Case No. IT-02-60/2-S, Sentencing Judgment, 10 December 2003

Prosecutor v. Orić, Case No. IT-03-68-T, Trial Judgment, 30 June 2006

International Criminal Tribunal for Rwanda

Prosecutor v. Akayesu, Case ICTR-96-4-T, Judgment, 2 September 1998

Prosecutor v. Baglishema, Case No. ICTR-95-1A-T, Judgment, 7 June 2001

Prosecutor v. Kambanda, Case ICTR-97-23-S, Judgment and Sentence, 4 September 1998

Prosecutor v. Kamuhanda, Case No. ICTR-99-54-T, Judgment, 22 January 2004

Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgment, 21 May 1999

Prosecutor v. Musema, Case ICTR-96-13-A, Judgment and Sentence, 27 January 2000

Special Court for Sierra Leone

Prosecutor v. Brima, et al., No. SCSL-04-16-T, Judgment, 20 June 2007

Prosecutor v. Fofana and Kondewa, Case No. SCSL-04-14-T, Judgment, 2 August 2007

East Timor Special Panels for Serious Crimes

The Prosecutor v. Jose Cardoso Ferreira, Case No. 04/2001, Judgment 5 April 2003

The Prosecutor v. Joao Franco de Silva, Case No. 04a/2001, Judgment, 5 December 2002

State Court of Bosnia and Herzegovina

Prosecutor v. Alic, Case No. X-KR-06/294, Verdict, 11 April 2008

Prosecutor v. Strupar et al., Case No. X-KR-05/24, Verdict of 29 July 2008

Introduction

The International Human Rights Law Institute (hereafter "IHRLI") as *amicus curiae* respectfully submits this brief to the Inter-American Court of Human Rights (hereafter "the Court") in accordance with Article 41 of the Court's Rules of Procedure.[1]

This case presents an opportunity for the development and application of legal norms concerning the doctrine of superior responsibility. The doctrine of superior responsibility holds that individuals in leadership positions – members of the military, as well as political leaders – can be held legally responsible for the crimes committed by those acting under their control.[2]

The case of Dos Erres involves the 1982 killing of over 250 unarmed civilians by members of the Guatemalan armed forces. In a friendly settlement designed to resolve a case brought before the Inter-American Commission of Human Rights (hereafter "the Commission"), the Guatemalan government admitted "institutional responsibility of the State" for the Dos Erres massacre as well as for a failure to investigate the event and punish those responsible.[3] One of the central components of the friendly settlement was a commitment on the part of the Guatemalan government to, "Engage in a serious and effective investigation that leads to a criminal trial that names and condemns all of those who were materially and intellectually responsible for

---

[1] This amicus brief was prepared with the invaluable research, writing, editing and technical assistance of: Alexander Konetzki, IHRLI Research Fellow and Ben Sandahl, IHRLI PILI Fellow. Professor Victor Rescia Rodriguez assisted with important reviews of the Inter-American Human Rights System and valuable comments were provided by Dean Lydia Lazar and Professor Bartram Brown and other colleagues.

[2] The term "superior responsibility" is used here to reference both "superior responsibility" and "command responsibility", two interrelated legal doctrines that are often used interchangeably. For many, the term "command responsibility" suggests the legal responsibility of superiors within a command structure, generally understood to be a military system of control while "superior responsibility" suggests legal responsibility that exists within a broader class of superior/subordinate relations, particularly those that include both military and civilian leaders. The use of "superior responsibility" here denotes a broad understanding of the legal responsibility of superiors for crime committed by those acting under their control.

[3] Acuerdo de Solución Amistosa Masacre de las Dos Erres. Caso No. 11.681, 1 April 2000.

the massacre as well as those responsible for the delay in justice."[4] The Commission presented the case to this Honorable Court because of the Guatemalan government's numerous failures to adhere to the friendly settlement, including a failure to investigate and punish those responsible for the massacre.

This submission suggests that as regards the case of Dos Erres, this Honorable Court should do the following: First, the Court should affirm that the doctrine of superior responsibility is an established principle of international law; Second, the Court should use the doctrine of superior responsibility in its analysis and judgment of the Dos Erres case because it is the most appropriate legal term for interpreting responsibility in this case and others like it; and, Third, the Court should require that Guatemala use the doctrine of superior responsibility rather than less coherent terms such as "institutional responsibility of the Guatemalan State for…the identification of those materially and intellectually responsible for what occurred…" in honoring its legal commitment to investigate and punish those responsible for the Dos Erres massacre under the friendly settlement.

By adopting the doctrine of superior responsibility in reference to this case, this Honorable Court will situate the Guatemalan government's existing obligation within the established norms and standards of international law. In this way, the Court will combat impunity, defend human rights and link the jurisprudence of the Americas more closely to that of the world.

It is important to note that this submission does not make claims regarding which civilian and military leaders should be investigated and prosecuted in Guatemala. That task must be left to the appropriate Guatemalan authorities. The doctrine of superior responsibility does not guarantee a finding of culpability as evidenced by numerous acquittals in cases that used the doctrine. Instead, the doctrine provides a legal guide for assembling and analyzing relevant information during an investigation and prosecution.

---

[4] "El estado de Guatemala se compromete a…Realizar una investigación seria y efectiva que culmine en llevar a cabo un juicio penal que individualice y condene a todos los responsables materiales e intelectuales de la masacre así como las responsables de por el retardo de la justicia." *Ibid.*

Superior responsibility is an established doctrine in international law. This is evidenced in the longstanding evocation of the concept in regulating armed conflict as well as the use of the concept in international and mixed-model tribunals. With increasing certitude, vigor and focus, international and domestic courts have used the doctrine of superior responsibility to hold military and civilian leaders responsible for the unlawful actions of their subordinates, particularly in cases involving gross violations of human rights. In particular, the doctrine of superior responsibility has played a central role in the International Criminal Tribunal for the Former Yugoslavia (hereinafter "ICTY"), and the International Criminal Tribunal for Rwanda (hereinafter "ICTR"), the mixed tribunals and courts for Sierra Leone, East Timor, Bosnia and Herzegovina and Cambodia and the Rome Statute[5] that created the International Criminal Court (hereinafter "ICC"). These legal bodies focus on investigating and prosecuting high-level civilian and military leaders for massacres and other serious violations of international human rights and humanitarian law rather than the material authors based on the doctrine of superior responsibility. Collectively, these courts and tribunals represent one of the most significant innovations in international justice and the struggle to combat impunity and protect human rights.

However, to date, this Honorable Court has not addressed the doctrine of superior responsibility or required any national government over which it exercises jurisdiction to apply the doctrine in investigating and prosecuting individuals accused of gross violations of human rights, war crimes or crimes against humanity.

Section I of this submission provides an overview of the doctrine of superior responsibility as an established doctrine of international law. It examines the doctrine's status within customary international law, within juridical decisions (with a special focus on the large number of cases arising out of ad-hoc and mixed tribunals) and within treaty law. Section II demonstrates that the doctrine of superior responsibility is the most appropriate legal principle for addressing the case of Dos Erres and for implementing the terms of the friendly settlement. This section briefly reviews the three

[5] Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT'L L. 86, 95 (2000) (recognizing that all of the then-existing international courts had a statute on command responsibility in their charters). The Rome Statute establishing the ICC addresses command responsibility in Article 28. Rome Statute art. 28, 17 July 1998, 2187 U.N.T.S. 90.

elements of the doctrine of superior responsibility (existence of a superior/subordinate relationship; knowledge of the crime; and actions or failure to prevent and/or punish the crime) as they relate to the Dos Erres case. Section III builds on this Honorable Court's commitment to upholding the norms and standards of international law, and argues that recognizing and applying the doctrine of superior responsibility in the Dos Erres case will combat impunity and support the defense and protection of human rights throughout the Americas.

Statement of Interest

IHRLI is an academic organization at DePaul University College of Law in Chicago, Illinois, USA that seeks to promote human rights and the rule of law worldwide through research, training and advocacy.[6]

Since its founding in 1990, IHRLI has worked extensively in Latin America and throughout the world. Within the region, IHRLI has trained judges and legal professionals, provided capacity building for public defenders, managed clinics to assist marginalized groups such as indigenous peoples and assisted individuals and groups bringing cases through the Inter-American Human Rights System. IHRLI has established cooperation agreements with the Inter-American Institute of Human Rights (hereafter "IIDH") and the Court and has been involved in numerous cooperative scholarly, educational and advocacy programs. IHRLI staff members have worked on the truth commissions in El Salvador and Guatemala and participated in numerous programs to promote and defend human rights and the rule of law throughout the region.

Institutionalized impunity is one of the greatest obstacles to justice in the Americas. Despite the severity of human rights violations committed in Guatemala there have been no prosecutions of high-level civilian or military leaders during the internal armed conflict (1960-1996) or since a formal peace was negotiated (1996-present). The institutionalization of impunity in Guatemala represents a major challenge for the defense and protection of human rights and the promotion of democracy and the rule of law.

Justice is necessary to promote a culture in which human rights are respected. IHRLI is committed to reducing impunity and asserts that this Honorable Court's recognition of the doctrine of superior responsibility regarding the Dos Erres case represents an important step in this process.

[6] International Human Rights Law Institute, About Us, www.ihrli.org (last visited 28 July 2009).

Summary of Facts

In December 1982, members of the Guatemalan armed forces massacred hundreds of people in the village of Las Dos Erres in the municipality of La Libertad in department of Petén, Guatemala (hereafter "Dos Erres massacre").[7] The events occurred between December 6 and 8 during the military campaign named "Victory 82".[8] During that time, the village was occupied by the *kaibiles*, the special forces of Guatemala, who proceeded to torture, rape, and kill more than 250 people.[9] They had accused the men, women, and children of the village of being guerrillas and/or guerrilla sympathizers hostile to the Guatemalan government.[10]

This massacre was not an isolated incident. It was one of over 626 documented massacres that occurred within the context of a thirty-six-year internal armed conflict in Guatemalan and carried out as part of a governmental policy that included the systematic commission of gross human rights violations.[11]

According to the Guatemalan Commission on Historical Clarification (hereafter "CEH) an estimated 200,000 people were killed in the conflict.[12] While the conflict involved a struggle between the Guatemalan government and an armed insurrection, the overwhelming majority of violations—ninety-seven percent—were committed by the state or by actors operating under the control of the State, while only three percent were attributed to the guerrillas.[13] In addition, the CEH found that ninety-one of serious violations were committed between 1978 and 1983.[14]

---

[7] This summary is based upon the *Application to the Inter-American Court of Human Rights in the case of The Las Dos Erres Massacre (Case 11.681) against The Republic Of Guatemala*, Inter-Am. C.H.R. (30 July 2008) [hereinafter "Commission Application"].
[8] *Id.* ¶ 81.
[9] *Id.* ¶ 96.
[10] *Id.* ¶¶ 98-103.
[11] See CEH *Guatemala Memory of Silence: Report of the Commission for Historical Clarification, Conclusions and Recommendations*. 1999. ¶ 85 "These massacres and the so-called scorched earth operations, as planned by the State, resulted in the complete extermination of many Maya communities, along with their homes, cattle, crops and other elements essential to survival. The CEH registered 626 massacres attributable to these forces."
[12] *Id.* ¶ 2.
[13] Commission Application ¶ 69.
[14] *Id.* ¶ 70.

The Dos Erres massacre was committed by the elements of the Guatemalan army during the most violent period of the internal armed conflict as one action within an overall strategy commonly referenced as a "scorched earth" policy. The Dos Erres massacre was not an isolated act committed independently by a small group of rogue actors within the Guatemalan military. Instead, all available evidence suggests that the Dos Erres massacre was one element of a large-scale strategy of indiscriminate repression of civilians that included hundreds of other massacres, as well as systematic torture, forced disappearance, extrajudicial execution, rape, and other severe human rights violations. All of this occurred within the context of the general militarization of Guatemalan society, the establishment of mechanisms of surveillance and control that transformed daily life, and the gross neglect of human rights protections and basic rule of law principles. The Dos Erres massacre was one component of general governmental policy of mass violence directed from the highest levels of State authority, as the CEH concluded, "The majority of human rights violations occurred with the knowledge or by the order of the highest authorities of the State."[15], and "The responsibility for a large part of these violations, with respect to the chain of military command as well as the political and administrative responsibility, reaches the highest levels of the Army and successive governments."[16]

In 1994, the Office of Human Rights of the Archdiocese of Guatemala City filed a complaint with the Inter-American Commission on Human Rights regarding the Dos Erres massacre.[17] This complaint was voided, but the same Office along with the Center for Justice and International Law (hereafter "CEJIL") filed another complaint on behalf of the victims' representatives in September 1996. Throughout the late 1990s, Guatemala sought to avoid hearings in the Commission by arguing that it was engaging in a duplication of procedures.[18]

Thus, it was not until April 1, 2000 that Guatemala finally reached a friendly settlement with the representatives of the victims, almost twenty-eight years after the

[15] CEH report ¶ 105.
[16] CEH report ¶ 106.
[17] Comission Application ¶ 17.
[18] *Id.* ¶¶ 22-26.

massacre. In the friendly settlement, the Guatemalan government accepted responsibility for the massacre:

> The Government of Guatemala accepts the institutional responsibility of the state for the events that occurred between December 6 and 8 in 1982 in the township Las Dos Erres, Las Cruces village located in the municipality of La Libertad in the department of El Petén (hereafter the "township Las Dos Erres") in which members of the Guatemalan Army massacred approximately 300 people, residents of the township, men, children, the elderly and women. The Government of Guatemala also accepts the institutional responsibility of the Guatemalan State for the delay in justice regarding an investigation of the events related to the massacre, the identification of those materially and intellectually responsible for what occurred and the application of corresponding sanctions.[19]

Guatemala then promised to "Engage in a serious and effective investigation that leads to a criminal trial that names and condemns all of those who were materially and intellectually responsible for the massacre as well as those responsible for the delay in justice."[20]

Guatemala has failed to comply with the terms of this agreement. The Guatemalan government acknowledges that it has not duly investigated the Dos Erres massacre and engaged in prosecutions as outlined in the friendly settlement.[21] On 30 July 2008, the Commission referred this case to this Honorable Court, requesting that it find Guatemala "responsible for violating the rights to a fair trial and to judicial protection, established at Articles 8 and 25 of the American Convention"[22] for its failure to comply with the agreement.

---

[19] "El Gobierno de Guatemala reconoce la responsabilidad institucional del estado por los hechos ocurridos entre el 6 y el 8 de diciembre en 1982 en el Parcelamiento Las Dos Erres, Aldea Las Cruces ubicado en el municipio La Libertad en el departamento de El Peten (en adelante el Parcelamiento Las Dos Erres) donde miembros del Ejercito de Guatemala masacraron aproximadamente 300 personas, pobladores del Parcelamiento, hombres, niños, ancianos y mujeres. El gobierno de Guatemala reconoce también la responsabilidad institucional del Estado Guatemalteco por el retardo de la justicia para investigar a los hechos relativos a la masacre, identificar a los responsables materiales e intelectuales de los mismos y aplicar las sanciones correspondientes." Friendly settlement. *Supra note 2*.

[20] *Id.*

"Realizar una investigación seria y efectiva que culmine en llevar a cabo un juicio penal que individualice y condene a todos los responsables materiales e intelectuales de la masacre así como los responsables por el retardo de la justicia." Comission Application ¶ 57.

[21] *Id.* ¶ 291.

[22] *Id.* ¶ 7.

Discussion

I. Superior Responsibility is an Established Doctrine of International Law

From the birth of the modern human rights movement in the wake of the Second World War to the present, superior responsibility has evolved to become an established doctrine grounded in the accepted sources of international law—treaties and conventions, customary international law, general principles of law, and judicial decisions and juristic writings.[23]

The concept has its roots in the centuries-old law of armed conflict and evolved to become an element of customary international law. Over the past several decades superior responsibility has served as the motivating legal doctrine for transformative domestic and international legal actions around the world. It has played a central role in defining the structure and jurisprudence of the ad-hoc tribunals of the ICTY and the ICTR, and the mixed tribunals of Sierra Leone, East Timor, Bosnia-Herzegovina and Cambodia. In addition, it one of the key elements of the Rome Statute of the ICC that established the world's first permanent legal body whose mission is to investigate and prosecute those responsible for the most severe forms of politically motivated violence—genocide, crimes against humanity, and serious war crimes.

This submission provides an overview of the ways in which superior responsibility represents an established doctrine of international law by reviewing its status as customary international law, juridical decisions (*opinio juris*) and international conventions. The doctrine of superior responsibility has served to motivate, define and structure many of the most significant legal advances in the struggle to combat impunity and ensure accountability for past violations.

---

[23] Article 38(1) of the Statute of the International Court of Justice is generally recognizes as a definitive statement on the sources of international law: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." Statute of the International Court of Justice, art. 38, 26 June 1945, 3 Bevans 1153.

A. Superior Responsibility is an Element of Customary International Law

Customary international law is derived from the consistent practice and conduct of States operating out of a general understanding of a legal requirement for those actions. The defining feature of customary international law is consensus among States. The doctrine of superior responsibility is widely acknowledged to constitute customary international law.

The doctrine arose out of the law of armed conflict. Superior responsibility lies at the heart of universally accepted treaties on the laws of war that have been in effect since the dawn of the modern legal era. From the earliest presentations of the law of armed conflict to The Hague Conventions of 1899 to the Rome Statute, international law has repeatedly affirmed the basic principle that the State and its commanders have a duty to exercise control over their armed forces, in order to prevent violations of the laws of war and the abuse of power. Thus, the doctrine of superior responsibility resulted from a longstanding historical precedent regarding the responsibility of commanding officers in military actions to control the actions of their subordinates. The roots of the doctrine have been traced as far back as far as 500 B.C.E. [24] and are repeated in many early works on international law and the rules of armed conflict, from the writings of Grotius to the Lieber Code.

Over the course of the nineteenth century, the laws of warfare were increasingly formalized and codified.[25] As military law continued to evolve, it consistently moved in the direction a formal recognition to the doctrine of superior responsibility. This trend is evidenced by The 1899 Hague Conventions, which required that a State's forces "be commanded by a person responsible for his subordinates"[26]. This, coupled with the

---

[24] Writing in China, in approximately 500 BCE, in the *Art of War,* Sun Tzu wrote, "When troops flee, are insubordinate, distressed, collapse in disorder, or are routed, it is the fault of the general. None of these disorders can be attributed to natural causes." SUN TZU, THE ART OF WAR 125 (Samuel B. Griffith trans., 1963); Centuries later, in 1625, Grotius noted that "rulers may be held responsible for the crime of a subject if they knew it and do not prevent it when they could and should prevent it." HUGO GROTIUS, 2 DE JURE BELLI AC PACIS 523 (Francis W. Kelsey trans., 1925) (On the Law of War and Peace).

[25] *See, e.g.,* Declaration Respecting Maritime Law, Paris, 16 April 1856, 115 Parry 1, 1 Am. J. Int'l L. (Supp.) 89, *reprinted in* Schindler & Toman 699 ("The Paris Declaration"); The Declaration of St. Petersburg, 1 A.J.I.L. (Supp.) 95-96, Nov. 29, 1868; Hague Conventions of 1899.

[26] Regulations Respecting the Laws and Customs of War on Land, Annex to Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899, Art. 1(1).

corresponding restrictions on the methods of acceptable warfare, created a legal framework by which superiors could bear responsibility for failing to properly exercise command over their subordinates. When these agreements were revisited in 1907, the responsibility of superiors for the actions of their subordinates was made more explicit. The 1907 Hague Convention (IV) bound the "Contracting Powers [to] issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land."[27] It held a signatory "responsible for all acts committed by persons forming part of its armed forces,"[28] and in doing so, it established the nexus between the responsibility of the State under the treaty and the actions by subordinate actors which could violate the treaty. Without the doctrine of superior responsibility, the rules in the Convention would be unenforceable.

Following World War I, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties called upon the delegates at Versailles to prosecute Kaiser Wilhelm and various other high-ranking German military officers in international tribunals for crimes relating to the actions of their subordinates.[29] In the wake of World War II, during the Allied tribunals established for Europe and the Far East. The international community affirmed the idea that "[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit…crimes are responsible for all acts performed by any persons in execution of such plan"[30], and that the command structure on which the law of war had become premised could be an effective tool in its enforcement.

The first codification of the doctrine of superior responsibility (at an international level) came in 1977 in Articles 86 ("Failure to Act") and 87 ("Duty of

---

[27] Annex to the Convention, Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Art. 1, 36 Stat. 2277, 205 Consol. T.S. 277.
[28] *Id.,* Art. 3.
[29] Report Presented to the Preliminary Peace Conference, Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Pamphlet No. 32 (1919), *reprinted in* 14 Am. J. Int'l. L. 95 (1920). The Versailles Conference adopted the Commission's report but never instituted the tribunals it had sought. Prosecutions were carried out, but they were conducted in national tribunals.
[30] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Charter of the International Military Tribunal, 59 Stat. 1544, 1546, Art. 6(a).

Commanders") of Additional Protocol I to the Geneva Conventions.[31] These articles specifically note, respectively, that a superior officer is not relieved from liability when unlawful conduct is carried out by his subordinates, and that superiors have an affirmative obligation to prevent violations from being carried out by their subordinates. As a result of these and other legal developments, superior responsibility has become a recognized principle of customary international law.[32]

International courts and legal scholars have consistently reaffirmed the doctrine of superior responsibility as customary international law. For example, the ICTY determined that the doctrine has been an element of customary international law since the Geneva Conventions were recognized as customary international law[33], "…command responsibility was part of customary international law relating to international armed conflicts before the adoption of Protocol I."[34]; and "the concept of command responsibility…is not new and follows the examples set in the ICTY and ICTR Statutes that develop a concept already well-established in customary international law…."[35]

Prominent international legal scholars support this claim. "The doctrine of 'command responsibility' now clearly exists in conventional and customary international law."[36]; "…the doctrine of superior responsibility is now a recognized mode of criminal

---

[31] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Protocol I has been ratified by all Member States of the OAS with the exception of the United States, which has separately adopted the doctrine of command responsibility in its own jurisprudence. *See, e.g., In Re Yamashita*, 327 U.S. 1 (1946); *United States v. Medina*, 43 CMR 243 (1971); *United States v. Calley*, 46 CMR 1131 (1971), affirmed 48 CMR 19 (1973).

[32] Victor Hansen, *What's Good for the Goose is Good for the Gander Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards its Own*, 42 GONZ. L. REV. 335, 337 (2007) *citing* Anthony D'Amato, *Superior Orders vs. Command Responsibility*, 80 AM. J. INT'L L. 604, 607 (1984); GEORGE SCHWARZENBERGER, II INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, THE LAW OF ARMED CONFLICT 462 (1968); *see also* Major Michael L. Smidt, Yamashita, Medina, *and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155 (2000) (recognizing that command responsibility is customary international law).

[33] Protocol I was adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts and entered into force 7 December 1979, in accordance with Article 95

[34] *Celebici Appeals Judgment,* par. 195*; Hadzihasanovic* Article 7(3) AC Decision, pars 11, 27, 29.

[35] *The Prosecutor v. Jose Cardoso Ferreira,* Judgment, 5 April 2003, ¶ 507.

[36] "The doctrine of 'command responsibility' now clearly exists in conventional and customary international law." Bassiouni p 339…the section goes on to suggest various examples including an

liability under customary international law."[37] There remains debate, however, as to the exact definition of the doctrine.[38] The key elements of superior responsibility as it should be applied by this Honorable Court are reviewed in greater detail, and specifically as it relates to the Dos Erres massacre, in Section II, below.

B. Judicial Decisions and Juristic Writings Establish Superior Responsibility as a Central Doctrine of International Law

The doctrine of superior responsibility has become a central component of international law through a substantial and defining series of judicial decisions, as well as a large body of juristic writings. Because the international and domestic jurisprudence supporting the role of the doctrine of superior responsibility in defining legal accountability is so voluminous, this document provides only a brief overview of key cases and materials. Of special relevance to the establishment of the doctrine of superior responsibility are the decisions and work of the ICTY, the ICTR, the mixed tribunals and the ICC.

1. Superior Responsibility in the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda

The ICTY was created by United Nations Security Council Resolution 827 (1993)[39] and has been instrumental in developing the doctrine of superior responsibility through its jurisprudence. The ICTR was created by United Nations Security Council Resolution 955 (1994)[40] and has also played a key role in the defining the doctrine of superior responsibility. The ICTY and ICTR have virtually identical statutes, share a single prosecutor and, in many ways, mirror each other to such a degree that their jurisprudence can be meaningfully discussed together.

---

investigation by the Israeli government onto the massacres of civilians at refugee camps of Sabra and Shatilla in 1982.

[37] GUENAEL METTRAUX, THE LAW OF COMMAND RESPONSIBILITY, 21, (2009).

[38] As one noted scholar remarked, "It has already been noted that the doctrine of superior responsibility is now a recognized mode of criminal liability under customary international law. Whilst this general proposition appears to be beyond dispute, there remains some doubt as to which version of that doctrine best reflects the present state of customary law." *Id.* at 22.

[39] S/RES/827 (1993).

[40] S/RES/955 (1994).

Under the ICTY and the ICTR statutes individuals are criminally responsible for the acts of preparation, planning and supervision in that:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.[41]

The ICTY and ICTR statutes also affirm the doctrine of superior responsibility in defining criminal liability of leaders for the actions of subordinates:

> The fact that any of the acts referred to in Article 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[42]

The ICTY and ICTR have heard over 100 cases concerning the doctrine of superior responsibility. Because the doctrine is written into the statutes of the ICTY and ICTR, the question in each case was not whether to recognize the doctrine, but whether the doctrine should apply to a particular defendant in a particular case. In this regard, the cases review the three elements of superior responsibility:

1. The existence of a superior/subordinate relationship – Those directly responsible for the unlawful acts were operating under a subordinate relationship to the superior in question;
2. *Mens rea* – The superior knew or should have known about the unlawful acts that were committed by the subordinate(s) or were to be committed by the subordinate(s); and
3. *Actus reus* – The superior failed to act to prevent or punish such abuses.

These cases are significant not only because they reaffirm the fact that the doctrine of superior responsibility is an established element of international law, but because they help elucidate the specific conditions under which individuals should be found liable using this legal doctrine.

---

[41] Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 7(1). Article 6(1) of the International Criminal Tribunal for Rwanda (ICTR) is identical except for the reference to the articles violated.

[42] Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 7(3). As with the previous footnote, Article 6(3) of the Statute of the ICTR is substantively identical.

The most significant of the ICTY's superior responsibility cases is the *Celebici* judgment.[43] Detainees in the Celebici prison camp in Bosnia were tortured, raped, and killed; deprived of food, water, and medical care; and subjected to an "atmosphere of terror."[44] One of the defendants, Zdravko Mucic, was held responsible as a superior even though he was not necessarily a military commander.

In its judgment, the Trial Chamber stated that, "[t]he criminal responsibility of commanders for the unlawful conduct of their subordinates is a very well settled norm of customary and conventional law."[45] The Trial Chamber went on to state that the:

> . . .construction of the expression 'superior authority' in Article 7(3) . . . extends it to persons occupying non-military positions of authority. The use of the term 'superior' [in Article 7(3)] and [language in] Article 7(2), without doubt extends the concept of superior authority . . . to encompass political leaders and other civilian superiors . . . .[46]

The Trial Chamber affirmed that even where there existed no formal *de jure* authority over a subordinate, *de facto* control would suffice to establish superior responsibility.[47]

Thus, the issue for Mucic was primarily whether there was a superior-subordinate relationship. He and others stated that he had authority over the camp, and that he visited the camp daily. On that basis, the Trial Chamber found that he was a superior to the material actors, and thus responsible for their torturing of the detainees at Celebici. A co-defendant, Zejnil Delalic, whom the prosecution claimed was a coordinator of the area where the camp was, was acquitted because the tribunal found no superior-subordinate relationship between him and the material actors. This demonstrates that the application of the doctrine of superior responsibility does not result automatically in the conviction of a superior, but rather is a legal mechanism of

---

[43] *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, ¶¶ 364-378 (Nov. 16, 1998). This was the first international judgment since the tribunals following World War II to employ the concept of command responsibility.
[44] *See, e.g. id.*, ¶¶ 9-15.
[45] *Id.* ¶ 734.
[46] Id. ¶ 734. See also *Prosecutor v. Orić*, Case No. IT-03-68-T, Trial Judgment, 30 June 2006, in which the Trial Court concluded, "Article 7(3) does not only include military commanders within its scope of liability, but also political leaders and other civilian superiors in possession of authority."
[47] *Id.* ¶ 736.

determining whether a superior may be held criminally liable for the acts of his/her subordinate(s).

In *Prosecutor v. Aleksovski*, the defendant was found guilty through an application of superior responsibility under Article 7(3) of the ICTY Statute.[48] From January until May 1993, the defendant was the commander of a prison facility at Kaonik, Bosnia and Herzegovina, where guards physically and psychologically terrorized nearly 500 Bosnian Muslim men. The Trial Chamber found the defendant guilty, because he was the prison guards' superior, knew of the offenses being committed, and failed to take any measure to prevent them or to punish the perpetrators thereof.[49]

In *Prosecutor v. Obrenovic*, the defendant was found guilty through an application of superior responsibility under Article 7(3) of the ICTY Statute.[50] From December 1992 to November 1996, the defendant was Chief-of-Staff and Deputy Commander of the First Zvornik Infantry Brigade of the Drina Corps of the Bosnian Serb Army, which summarily executed thousands of Bosnian Muslim men in 1995.[51] The Trial Chamber found that he not only knew that members of the Zvornik Brigade took part in the organization of the killings and the burials of the executed Muslim prisoners, but also approved the release of members of the Zvornik Brigade to participate in the implementation of this plan on at least three occasions.[52] Thus, the Trial Chamber concluded, "The defendant, as acting commander/chief of staff [was] criminally responsible for the acts of his subordinates when he knew or had reason to know that his subordinates were about to commit criminal acts or had done so and he failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[53]

In Prosecutor v. Kordic and Cerkez, Dario Kordic was acquitted of all charges for which he could have been found guilty through an application of superior responsibility under Article 7(3) of the ICTY Statute, but Mario Cerkez was found guilty through the

---

[48] Case No. IT-95-14/1-T, Judgment, 25 June 1999,
[49] *See Prosecutor v. Aleksovski*, Case No. IT-95-14/I-T, Trial Judgment, ¶ 67 (25 June 1999).
[50] Case No. IT-02-60/2-S, Sentencing Judgment, 10 December 2003.
[51] ICTY, *Case Information Sheet: Prosecutor v. Obrenovic*, Case No. IT-02-60/2-S, at 4-5, *available at* http://www.icty.org/cases/party/755/4.
[52] *Id.* at 5.
[53] *Prosecutor v. Obrenovic*, Case No. IT-02-60/2-S, Sentencing Judgment, ¶ 40, 10 December 2003.

doctrine.[54] Kordic was one of the leading political figures in the Bosnian Croat community from 1991to 1995, when he was President of the Croatian Democratic Union of Bosnia and Herzegovina.[55] He was associated with the Croatian Defense Council, though informally, and therefore participated in the Council's take-over of the municipalities and the attacks on civilian Bosnian Muslims throughout the Lašva Valley from January through June of 1993.[56] However, because Kordic was neither a commander nor a superior of the Croatian Defense Council forces, and since he possessed neither the authority to prevent the crimes that were committed, nor to punish the perpetrators of those crimes, he was not punishable under Article 7(3) of the ICTY Statute under the doctrine of superior responsibility.[57]

From 1992 to 1993, Cerkez was the commander of the Vitez Brigade of the Croatian Defense Council, which arbitrarily and systematically imprisoned Bosnian Muslims from Vitez, subjected them to inhumane conditions, used them as hostages and human shields, forced them to dig trenches, and often killed or wounded them.[58] The Trial Chamber found that Cerkez was responsible for the unlawful detention and inhuman treatment of detainees in the Vitez detention facilities.[59]

In *Prosecutor v. Krnojelac*, the defendant was found guilty through an application of superior responsibility under Article 7(3) of the ICTY Statute.[60] From April 1992 to August 1993, the defendant was the commander of the Serb-run "Kazneno-Popravni Dom" detention camp in Foča, located southeast of Sarajevo, Bosnia and Herzegovina, where thousands of Bosnian Muslims from Foča were imprisoned without charge, beaten regularly, terrorized, and forced to live in deplorable conditions.[61] The defendant allowed Serb military personnel to enter the prison and assault the detainees whenever they wanted and instructed his guards to lead the soldiers to the cells and select

---

[54] Case No. IT-95-14/2-T, Judgment, February 2001.
[55] ICTY, *Case Information Sheet: Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-T, at 1, *available at http://www.icty.org/cases/party/705/4*.
[56] *Id.* at 5.
[57] *Id.*
[58] *Id.* at 6.
[59] *Id.*
[60] Case No. IT-97-25-T, Judgment, 15 March 2002.
[61] ICTY, *Case Information Sheet: Prosecutor v. Krnojelac*, Case No. IT-97-25-T, at 1, 5, *available at* http://www.icty.org/cases/party/710/4.

detainees for beatings.[62] The Trial Chamber found the defendant guilty, because he was the prison guards' superior, knew of the offenses being committed and failed to take any measure to prevent them or to punish the perpetrators.[63]

The ICTR also has a developed a substantial jurisprudence regarding the doctrine of superior responsibility. It has held people in authority responsible for malicious acts that they ordered,[64] as well as for bearing indirect superior responsibility.[65] In addition, the ICTR was the first to recognize that there is no longer a question under international law as to whether civilians can be held responsible as superiors.

In *Prosecutor v. Baglishema*, the defendant was acquitted of all charges for which he could have been found guilty through superior responsibility under Article 6(3) of the ICTR Statute.[66] The case concerned the 1994 massacre of thousands of displaced persons—predominantly Tutsi—whom the defendant, a mayor, had ordered to seek refuge from approaching *Interahamwe* in Kibuye, Rwanda, a nearby town where they were ultimately slaughtered. The Trial Chamber noted that it was possible to argue that by not taking the necessary follow-up actions (including investigations and condemnation of the killings upon finding out about the massacres) the defendant could be held liable on the ground of superior responsibility, but the evidence was insufficient to establish, beyond a reasonable doubt, the existence of a *de jure* or *de facto* superior/subordinate relationship between the defendant and the attackers. Thus, they found that the first element of superior responsibility had not been met.[67]

In *Prosecutor v. Kamuhanda*, the defendant was acquitted of all charges for which he could have been found guilty through an application of superior responsibility under Article 6(3) of the ICTR Statute.[68] The defendant, a Rwandan government minister,

---

[62] *Id.* at 6.

[63] *See generally Id.*

[64] *Prosecutor v. Akayesu*, Case ICTR-96-4-T, Judgment, ¶ 724, 726, 792 (Sept. 2, 1998). Here, the tribunal held Akayesu responsible for the acts he ordered, but as with Delalic in the *Celebici* judgment, did not hold him liable for sexual violence that his arguable subordinates, the Interahamwe, a local militia, committed because though Akayesu did nothing to prevent the violence or its perpetrators, there was not sufficient proof that he was the perpetrators' superior. *Id.* ¶ 691.

[65] *See, e.g., Prosecutor v. Kambanda*, Case ICTR-97-23-S, Judgment and Sentence (Sept. 4, 1998); *Prosecutor v. Musema*, Case ICTR-96-13-A, Judgment and Sentence, ¶ 892-895 (Jan. 27, 2000).

[66] Case No. ICTR-95-1A-T, Judgment, 7 June 2001.

[67] *Prosecutor v. Baglishema*, Case No. ICTR-95-1A-T, Judgment, ¶ 451, 7 June 2001.

[68] Case No. ICTR-99-54-T, Judgment, 22 January 2004.

gave a speech in Gikomero, Rwanda in April 1994, in which he said that he was willing to provide the weapons necessary to carry out the killings there.[69] At the end of the speech he handed out firearms, grenades, and machetes to those in attendance and eventually instigated the *Interahamwe* to massacre Tutsis who had taken refuge in a local church.[70] Because of this, he was individually held criminally responsible at trial under Article 6(1) for genocide and extermination. The Trial Chamber did not convict him under Article 6(3), however, because it found that there was no clear evidence of a superior-subordinate relationship between the defendant and the attackers, and that the defendant did not maintain effective control over the attackers during the massacre.[71]

In *Prosecutor v. Musema*, the defendant was found guilty through an application of superior responsibility under Article 6(3) of the ICTR Statute.[72] The defendant was director of the state-owned tea factory in Gisovu, Rwanda during the genocide.[73] As such, he had the legal authority to prevent the use of vehicles, uniforms, or other possessions of the factory in carrying out subsequent massacres, or to sanction anyone using them for this purpose.[74] On 26 April 1994, however, the defendant directed and participated in an attack on Tutsi refugees on the hillside at Gitwa. The Trial Chamber found that he incurred individual criminal responsibility under Article 6(3) for the crimes, other than rape, that his employees committed that day, as he was their superior and knew of the crimes they committed but failed to take any reasonable steps to prevent them.[75] The Trial Chamber did not hold the defendant criminally responsible for the rapes his employees committed because the Trial Chamber found that the prosecution failed to prove, beyond a reasonable doubt, that the defendant knew or had reason to know that the rapes were occurring and failed to either prevent them or to punish those who had committed them.[76]

---

[69] Lizzie Rushing, *Jean De Dieu Kamuhanda v. Prosecutor, Case No. ICTR-99-54A-A*, Human Rights Brief (Spring 2006), *available at* http://www.wcl.american.edu/hrbrief/13/3kamuhanda.cfm.
[70] *Id.*
[71] *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54-T, Judgment, ¶ 611, 22 January 2004.
[72] Case No. ICTR-96-13-T, Judgment, 27 January 2000.
[73] Track Impunity Always, *Trial Watch: Alfred Musema*, http://www.trial-ch.org/en/trial-watch/profile/db/facts/alfred_musema_46.html.
[74] *Id.*
[75] *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment, ¶ 915, 968, 27 January 2000.
[76] *Id.*

In *Prosecutor v. Kayishema and Ruzidana*, Case No. ICTR-95-1-T, Judgment, 21 May 1999, Clement Kayishema was found guilty through an application of superior responsibility under Article 6(3) of the ICTR Statute. Kayishema was Prefect of Kibuye, Rwanda and exercised control over Kibuye, including his subordinates in the executive branch and members of the Gendarmerie Nationale, Rwanda's national paramilitary force.[77] The case concerned the 17 April 1994 massacre of thousands of men, women, and children—predominantly Tutsi—who had sought refuge in the Catholic Church and Home St. Jean Complex in Kibuye, many of whom Kayishema had ordered to the Complex. On Kayishema's command, members of the Gendarmerie Nationale, the communal police of Gitesi commune, members of the *Interahamwe*, and armed civilians massacred the refugees in the Complex, using guns, grenades, machetes, spears, cudgels, and other weapons.[78] Kayishema participated in the attack personally.[79] The Trial Chamber found him guilty under Article 6(3) because the control he exercised over the attackers was "uncontestable" and because he had a duty as Prefect to maintain public order, but did nothing to prevent or punish the attacks once he knew that they were imminent.[80]

2. Superior Responsibility in Mixed Tribunals

Alongside the ICTY and the ICTR there have been a number "mixed tribunals," courts that combine domestic and international elements to reach important judgments on the doctrine of superior responsibility. These include the Special Court for Sierra Leone (hereafter "SCSL"); the East Timor Special Panels for Serious Crimes (hereafter "ETSPSC") of the United Nations Transitional Administration in East Timor (hereafter "UNTAET"); the State Court of Bosnia and Herzegovina (hereafter "SCBH"); and the Extraordinary Chambers for Cambodia (hereafter "ECCC").

The Government of Sierra Leone and the United Nations established the SCSL by agreement in 2002. Its mandate is to investigate and prosecute those who bear the

---

[77] *Prosecutor v. Kayishema and Ruzidana*, Case No. ICTR-95-1-T, Judgment, ¶ 21 May 1999.
[78] *Id.* ¶ 28.
[79] *Id.*
[80] *Id.* ¶ 513.

greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.[81] The Court operates under the Special Court of Sierra Leone Statute, whose Article 6 concerns individual criminal responsibility generally, and Article 6(3) contains in particular the doctrine of superior responsibility:

> (1) A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.
> (2) The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
> (3) The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
> (4) The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.
> (5) Individual criminal responsibility for the crimes referred to in article 5 shall be determined in accordance with the respective laws of Sierra Leone.

The doctrine of superior responsibility has been raised in several Sierra Leone cases. For example, in *Prosecutor v. Brima, et al.,* No. SCSL-04-16-T, Judgment, 20 June 2007, the defendant was found guilty through an application of the doctrine of superior responsibility under Article 6(3) of the SCSL Statute. He was the overall commander of the Armed Forces Revolutionary Council (AFRC) in Sierra Leone's Bombali District from May through November 1998.[82] During that time period, in villages throughout that district, the AFRC, whose troops the Trial Chamber found to be under the defendant's effective control on a day-to-day basis, terrorized and frequently killed

[81] The Special Court for Sierra Leone, *About the Special Court for Sierra Leone*, http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx.
[82] *Prosecutor v. Brima, et al.,* No. SCSL-04-16-T, Judgment, ¶ 1723, 20 June 2007.

civilians.[83] The Trial Chamber also found that the defendant actually knew or had reason to know that the AFRC troops would commit the crimes at issue in the case, and that he took no reasonable steps to prevent the crimes or punish the perpetrators.[84]

In *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T, Judgment, 2 August 2007, Moinina Fofana was acquitted of all charges for which he could have been found guilty under Article 6(3), while Allieu Kondewa was found guilty through the Court's application of the doctrine of superior responsibility. Fofana was a leading member of the Civil Defence Forces (CDF) and National Director of War of the CDF, which fought the RUF/AFRC (a combination of the guerrilla forces that had invaded the country and started the conflict and elements of the military that had taken power through a military coup).[85] The CDF shot, hacked to death, or burned alive civilians identified as RUF/AFRC collaborators. While the Trial Court found that Fofana exercised effective control over his subordinates in the CDF, it found that he did not exercise effective control over the "Kamajors" who committed the crimes during and after the CDF's attack on Bonthe town and he was acquitted.[86] [87]

The second defendant in the case, Kondewa, was also a leading member of the CDF.[88] However, unlike Fofana, he was a "High Priest" in Sierra Leone and "the supreme head of the Komajors" in the Bonthe district.[89] For this reason, the Trial Chamber concluded that he exercised effective control over the Kamajors and could have acted to prevent those crimes.[90] The trial chamber further concluded that Kondewa knew that the CDF attack on Bonthe town involved the commission of criminal acts by the Kamajors under the command of a CDF officer (who was Kondewa's subordinate) but that Kondewa took no reasonable steps to prevent those

---

[83] *Id.* ¶ 1700, 1723.
[84] *Id.* ¶ 1729-1743.
[85] Track Impunity Always, *Trial Watch: Moinina Fofana*, http://www.trial-ch.org/en/trial-watch/profile/db/facts/moinina_fofana_400.html.
[86] *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T, Judgment, ¶ 860, 2 August 2007.
[87] *Id.* ¶ 863.
[88] Track Impunity Always, *Trial Watch: Allieu Kondewa*, http://www.trial-ch.org/en/trial-watch/profile/db/facts/allieu_kondewa_399.html.
[89] *Fofana and Kondewa*, *supra note 90*, ¶ 868, 869.
[90] *Id.* ¶ 870.

acts from occurring.[91] The Trial Chamber further found that when Kondewa learned that the criminal acts had been committed, he did nothing to punish the perpetrators.[92] He was therefore found guilty of those crimes under the doctrine of superior responsibility as articulated in the SCSL Statute.[93]

Superior responsibility has been an issue in the ETSPSC as well. UNTAET created the Serious Crimes Investigation Unit (SCIU) in a Dili, East Timor district court to investigate and prosecute cases concerning the Indonesian National Army and pro-Indonesian militias' 1975 campaign of violence in East Timor in response to the Timorese vote for independence.[94] That campaign left 2,000 people dead and 500,000 people internally displaced.[95] The Court operates under UNTAET Regulation 2000/15 ("On the establishment of panels with exclusive jurisdiction over serious criminal offenses") and Section 16 of that regulation, the "[r]esponsibility of commanders and other superiors" sets forth the ETSPSC standard for superior responsibility:

> In addition to other grounds of criminal responsibility under the present regulation for serious criminal offences referred to in Sections 4 to 7 of the present regulation, the fact that any of the acts referred to in the said Sections 4 to 7 was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

In *The Prosecutor v. Jose Cardoso Ferreira*, Case No. 04/2001, Judgment 5 April 2003, the defendant was acquitted of all charges for which he could have been found guilty through the doctrine of superior responsibility under Article 16 of UNTAET Regulation 2000/15. The defendant was a commander of the Kaer Metin Merah Putih Militia (KMP) in the Lolotoe sub-district, Bobonaro district, East Timor, where in 1999 the KMP, working closely with the Indonesian National Army, carried out acts of violence against members of Lolotoe's civilian population considered to be pro-

---

[91] *Id.* ¶ 874, 880.
[92] *Id.* ¶ 880.
[93] *Id.* ¶ 903.
[94] Global Policy Forum, *Ad Hoc Court for East Timor*, http://www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts/adhoc-court-for-east-timor.html.
[95] *Id.*

Timorese independence.[96] Citing the Rome Statute for guidance in how to apply the doctrine of superior responsibility, the Panel found that the defendant was "without any doubt the commander of the KMMP militia at the time the killings at issue in the case took place," but that the prosecution failed to prove that the defendant knew the killings were going to happen or exercised enough control that he could have prevented them or punished the perpetrators.[97]

In *The Prosecutor v. Joao Franco de Silva*, Case No. 04a/2001, Judgment, 5 December 2002, the defendant was found guilty through an application of superior responsibility under Article 16 of UNTAET Regulation 2000/15. Like Ferreira, the defendant was a commander of the KMP in Lolotoe, Bobonaro, East Timor, where the militia members under the defendant's command committed acts of and torture and severe deprivation of physical liberty. The defendant admitted in the case to having a superior/subordinate relationship with the Lolotoe KMP, knowing that the acts of torture and severe deprivation would take place, but not taking reasonable steps to stop them or to punish the perpetrators.[98]

Turning to Bosnia and Herzegovina, the SCBH is different from the international and mixed tribunals discussed above in that its decisions concerning the doctrine of superior responsibility require the application of a national criminal code, the Criminal Code of Bosnia and Herzegovina, and not a statute enacted specifically for the prosecution of war crimes and crimes against humanity. The second section of Article 180 of that Code, "Individual Criminal Responsibility" concerns the doctrine of superior responsibility:

> (1) A person who planned, instigated, ordered, perpetrated or otherwise aided and abetted in the planning, preparation or execution of a criminal offence referred to in Article 171 (*Genocide*), 172 (*Crimes against Humanity*), 173 (*War Crimes against Civilians*), 174 (*War Crimes against the Wounded and Sick*), 175 (*War Crimes against Prisoners of War*), 177 (*Unlawful Killing or Wounding of the Enemy*), 178 (*Marauding the Killed and Wounded at the Battlefield*) and 179 (*Violating the Laws and Practices of Warfare*) of this Code, shall be personally responsible for the criminal offence. The official

[96] *The Prosecutor v. Jose Cardoso Ferreira*, Case No. 04/2001, Judgment, ¶ 13, 19, 5 April 2003.
[97] *Id.* ¶ 522.
[98] *Id.* ¶ 43, 44, 125.

> position of any accused person, whether as Head of State or Government or as a responsible Government official person, shall not relieve such person of criminal responsibility nor mitigate punishment.
> (2) The fact that any of the criminal offences referred to in Article 171 through 175 and Article 177 through 179 of this Code was perpetrated 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.
> (3) The fact that a person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the court determines that justice so requires.

In *Prosecutor v. Alic*, Case No. X-KR-06/294, Verdict, 11 April 2008, the defendant was acquitted of all charges for which he could have been found guilty through superior responsibility under Article 180 of the Bosnia and Herzegovina Criminal Code. The defendant was assistant commander for security with the "Hamze" Battalion of the Fifth Corps of the Bosnia Army and was accused of having participated in the abuse of captured members of the Serbian Krajina Army in August 1995 and with having failed to undertake an investigation or sanction the persons responsible for the murder of four captives.[99] However, the Trial Panel found that the defendant did not have the power in his capacity as assistant commander to issue orders to those responsible for abusing and murdering the prisoners in question.[100] The Trial Panel also found that the defendant did not know that the crimes in question were going to be committed and did not have the authority to stop them even if he did.[101] He therefore could not be held responsible for the prisoner abuse and murder that people technically subordinate to him had committed.

In *Prosecutor v. Strupar et al.*, Case No. X-KR-05/24, Verdict of 29 July 2008, the defendant was found guilty through the application of the doctrine of superior responsibility. The defendant was a commander of the 2nd Special Police Šekovići Squad, whose members massacred 10,000 Bosnians that they had taken prisoner at the

[99] *Bosnia Muslim Acquitted in War Crimes Trial*, balkaninsight.com/en/main/news/9329/?tpl=297.
[100] *Prosecutor v. Alic*, Case No. X-KR-06/294, Verdict, , pp. 46-47, 11 April 2008.
[101] *Id.* at 48.

Kravica Farming Cooperative warehouse, near Srebrenica, Bosnia and Herzegovina, on 13 July 1995.[102] The Court found that the defendant had a superior-subordinate relationship with those who carried out the massacre, had knowledge of genocide, and failed to take the measures necessary under the law to punish the perpetrators.[103]

The ECCC were established in 2006, almost ten years after the government of Cambodia established a Khmer Rouge Trial Task Force to create a legal and judicial structure to try the remaining Khmer Rouge leaders for war crimes and crimes against humanity.[104] The ECCC is a Cambodian court which the international community participates in, and which applies international legal standards to judge those who are brought before it.[105] One such legal standard the ECCC can apply is the doctrine of superior responsibility, which appears in Article 29 of the Law on the Establishment of the Extraordinary Chambers:

> Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime. The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment. 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. The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.[106]

---

[102] *Prosecutor v. Strupar et al.*, Case No. X-KR-05/24, Verdict of 29 July 2008, p. 135. This case contains a tremendously thoughtful and thorough analysis and application of the doctrine of command responsibility. *See* pp. 135-168.

[103] *Id.*

[104] Extraordinary Chambers of the Courts of Cambodia, *Introduction to the ECCC*, http://www.eccc.gov.kh/english/about_eccc.aspx.

[105] *Id.*

[106] Unofficial translation by the Council of Jurists and the Secretariat of the Task Force. Revised 26 August 2007.

At present there are several cases pending at the ECCC[107], but due to its novelty, the court has yet to produce a jurisprudence from which lessons on the application of the doctrine can be drawn. Regardless of how these cases develop, the ECCC represents another example of the vibrant role of the doctrine of superior responsibility in defining the international community's response to institutionalized impunity.

C. Superior Responsibility is a Central Doctrine of International Law through International Treaties

As noted above, the earliest international codification of the doctrine of superior responsibility is first found in Additional Protocol I to the Geneva Conventions.[108] More recently, the definition of the doctrine of superior responsibility has been reaffirmed and refined thorough adoption of the doctrine is found in Article 28 of the Rome Statute. The doctrine is acknowledged, though not expressly, in international conventions on military law dating back to the Declaration of Paris.

Some of the regional treating designed to protect human rights in the Americas have similarly recognized some of the core principles embodied by the doctrine of superior responsibility in some of its treaties relating to the protection of human rights. For example, Article 10 of the Convention on Forced Disappearances provides that:

> [i]n no case may exceptional circumstances such as a state of war, the threat of war, internal political instability, or any other public emergency be invoked to justify the forced disappearance of persons. In such cases, the right to expeditious and effective judicial procedures and recourse shall be retained as a means of determining the whereabouts or state of health of a person who has been deprived of freedom, *or of identifying the official who ordered or carried out such deprivation of freedom.*[109]

Similarly, the Inter-American Torture Convention states that:

---

[107] The first case is for Guek Eav Kaing who was indicted and sent to trial for crimes against humanity, grave breaches of the Geneva Conventions of 1949, and homicide and torture pursuant to the 1956 Penal Code. These offenses are defined and punishable under Articles 3, 5, 6, 29 and 39 of the Law on the Establishment of the Extraordinary Chambers. The second case is for Chea Nuon, who has been charged with crimes against humanity, grave breaches of the Geneva Conventions of 1949. These offenses are defined and punishable under Articles 5, 6, 29, and 39 of the Law on the Establishment of the Extraordinary Chambers.

[108] *Supra*, at note 31.

[109] Inter-American Convention on Forced Disappearance of Persons, 33 I.L.M. 1429 (1994), entered into force March 28, 1996. Art. 10. (*emphasis added*).

> a. A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so. [or]
> b. A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto shall be guilty of torture.[110]

The American system has recognized, in its multilateral instruments, the responsibility that is borne by the State for the criminal actions of its agents. Similarly, a state apparatus that allows violations by its agents and commanders to go unpunished, is not only complicit in their crimes, but has also violated customary international law under the doctrine of superior responsibility.

The most widely accepted treaty-based definition of superior responsibility found in Article 28 of the Rome Statute, "Responsibility of commanders and other superiors" which states:

> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
>
> (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; and
>
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
>
> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
>
> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

[110] Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, *entered into force* Feb. 28, 1987, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83 (1992). Art. 3.

> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[111]

The Rome Statute has been ratified by 110 countries.[112] Of the thirty-five member States of the Organization of American States (hereafter "OAS")[113], twenty-five have adopted the Rome Statute.[114] While neither Guatemala nor the United States of America have ratified the Rome Statute, the vast majority of people in Latin America

---

[111] Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90 Art. 28. There is some debate as to whether all the elements of command responsibility set forth Article 28 of the Rome Statute reflect the state of customary international law at the time of the Statute's adoption. *See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 443 (2d ed. 1998) (suggesting that the formulation of Article 28 of the Rome Statute, of which the author was an architect, "does not depart from extant customary international law, and constitutes an adequate testament of it."). *But see* GUNAEL METTRAUX, THE LAW OF COMMAND RESPONSIBILITY 23 (2009) (claiming that "while some of the elements of [the ICC] definition may be said to reflect the state of customary law at the time of the adoption of the Rome Statute, other aspects are clearly developments which are distinct from and in some respect contradict or retreat from customary international law").

[112] International Criminal Court, *The State Parties to the Rome Statute*, *available at* http://www2.icc-cpi.int/Menus/ASP/states+parties/The+States+Parties+to+the+Rome+Statute.htm (last visited July 21, 2009).

[113] The thirty-five member states of the Organization of American States are: Antigua and Barbuda, Argentina, The Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba (1), Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras (2), Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States of America, Uruguay, and Venezuela. On June 3, 2009, the Ministers of Foreign Affairs of the Americas adopted Resolution AG/RES.2438 (XXXIX-O/09) which resolves that the 1962 Resolution that excluded the Government of Cuba from its participation in the Inter-American system, ceases to have effect in the Organization of American States (OAS). The 2009 resolution states that the participation of the Republic of Cuba in the OAS will be the result of a process of dialogue initiated at the request of the Government of Cuba, and in accordance with the practices, purposes, and principles of the OAS. On 5 July 2009, the Organization of American States (OAS) invoked Article 21 of the Inter-American Democratic Charter, suspending Honduras from active participation in the hemispheric body. The unanimous decision was adopted as a result of the June 28 coup d'état that expelled President José Manuel Zelaya from office. Diplomatic initiatives are ongoing to foster the restoration of democracy to Honduras.

[114] *Id.* In the order in which they acceded to the Rome Statute, the countries are: Trinidad and Tobago (ratified 6 April 1999), Belize (ratified 5 April 2000), Venezuela (ratified 7 June 2000), Canada (ratified 7 July 2000), Costa Rica (ratified 30 January 2001), Argentina (ratified 8 February 2001), Dominica (ratified 12 February 2001), Paraguay (ratified 14 May 2001), Antigua and Barbuda (ratified 18 June 2001), Peru (ratified 10 November 2001), Ecuador (ratified 5 February 2002), Panama (ratified 21 March 2002), Brazil (ratified 20 June 2002), Bolivia (ratified 27 June 2002), Uruguay (ratified 28 June 2002), Honduras (ratified 1 July 2002), Colombia (ratified 5 August 2002), Saint Vincent and the Grenadines, (ratified 3 December 2002), Barbados (ratified 10 December 2002), Guyana (ratified 24 September 2004), Dominican Republic (ratified 12 May 2005), Mexico (ratified 28 October 2005), Saint Kitts and Nevis (ratified 22 August 2006), Surinam (ratified 15 July 2008), Chile (ratified 29 June 2009).

and the Caribbean live in countries that have ratified the ICC.[115] In addition, United States courts, both civilian and military, have recognized the doctrine of superior responsibility[116] and the doctrine is widely supported by other countries' domestic legislation and jurisprudence. A substantial majority of the world's countries and the OAS member states recognize the doctrine of superior responsibility as international law and the ICC's definition of command responsibility in particular.

II. Superior Responsibility is the Most Appropriate Legal Doctrine for Implementing the Terms of the Friendly Settlement in the Dos Erres Case

The case of the massacre at Dos Erres provides this Honorable Court with a unique opportunity to invoke and develop the doctrine of superior responsibility.

In the friendly settlement, the Guatemalan government accepted institutional responsibility for investigating and punishing "those who were materially and intellectually responsible for the massacre as well as those responsible for the delay in justice." This is an important legal commitment, but phrased in that manner it fails to link the obligation with an accepted body of international law. For this reason, it is essential that the Court link the Guatemalan government's stated legal obligation with the most appropriate, accepted and specific legal concept available which is the doctrine of superior responsibility.

As the preceding discussion shows, the doctrine of superior responsibility is a recognized element of international law has ascended to the level of customary international law. By evoking the doctrine of superior responsibility, the Court does not predetermine the outcome of the Guatemalan governments' investigation and

---

[115] Those OAS countries that have not accepted the Rome Statute include: The Bahamas; Cuba; El Salvador; Guatemala; Haiti; Jamaica; Nicaragua; Saint Lucia and the United States of America. *Id.*

[116] *See, e.g., Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006); *Chavez v. Carranza*, 413 F. Supp. 2d 891 (W.D. Tenn. 2005); *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283 (11th Cir. 2000); *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004); *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996); *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994); *United States v. Schultz*, 4 CMR 104 (1952); *United States v. Schwartz*, U.S. Court Martial, Judgment of 21 June 1970, 45 CMR (NCMR, 1971); *United States v. Rockwood*, No. 9500872, 10th Mountain Division, April 22 & May 8-14, 1995; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992); *Xuncax v. Gramajo*, 866 F. Supp. 162 (D. Mass. 1995).

subsequent prosecution. Rather, the doctrine of superior responsibility provides a legal guideline for the Guatemalan government to honor its obligation to investigate and punish those responsible for the Dos Erres massacre.

After the doctrine of superior responsibility is adopted as the proper legal mechanism for managing the investigation and prosecution of the Dos Erres massacre, it is necessary to review the specifics of the case as they related to the doctrine's three elements: 1) The existence of a superior/subordinate relationship; 2) *Mens rea*; and, 3) *Actus reus*. This submission does not pretend to engage in a full review of the case at hand and possible superiors to be held liable in relation to these factors. To do so would require a serious collection of all available information to determine the specific individuals who could be held criminally liable under the doctrine of superior responsibility. Furthermore, it would require clarity as to the specific meaning of each of the three elements based on a review of the norms of international law, some of which have been discussed above.

This said, the available information suggests that the application of the doctrine of superior responsibility will provide substantial assistance in honoring its legal commitment to investigating and punishing those responsible for the Dos Erres massacre as well as the delays in justice related to the case.

The doctrine of superior responsibility distinguishes between "direct" and "indirect" responsibility. When a superior issues orders to a subordinate to commit an illegal act or omission, the superior can be held responsible under a theory of direct command responsibility. The doctrine holds superiors liable for actions of their subordinates, so that a commander, or superior, cannot be exonerated for an act merely because he did not commit it with his own hands. In short, it makes a superior responsible for the issuance of an order.[117] Indirect command responsibility arises when a superior does not directly issue and order, but is able to take action to prevent, investigate, or punish unlawful acts of a subordinate and fails to do so.[118] Indirect command responsibility should likewise be punishable, in order to deter further atrocities and to punish perpetrators who might otherwise escape punishment. The

[117] M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 290-91 (2003).
[118] *Id.* At 292.

doctrine of superior responsibility allows those with direct and indirect responsibility to be found criminally liable for the actions of their subordinate. In part this is a reflection of the doctrine's goal of ensuring that basic rights are respected and that force is managed as required by established international norms.

The Commission's previous filings with this Court make it clear that the violations committed during the Dos Erres massacre were done at the direction of those in command of the *kaibiles* and that their deployment occurred at the direction of the State's military commanders as part of a broad national political and military strategy. That is, the existing information suggests that superiors could be found liable for direct and indirect responsibility under the doctrine of superior responsibility in regard to the Dos Erres case.

The Commission's filing of 30 July 2008, establishes ample grounds on which to find that the State bears direct superior responsibility for the crimes committed at Dos Erres. In September of 1982, the Guatemalan military engaged in a campaign to portray the people of Dos Erres as guerrillas,[119] leading to the deployment of the *kaibiles* to the area. On or about 6 December, 1982, officers within the command structure of the Guatemalan military specifically instructed the *kaibiles* as to how to proceed in their deployment.[120] The rapes that took place over the next two days did not begin until rumors spread that one of the officers had raped a girl behind the town church, and the massacre was not carried out until commanders on the ground communicated with their own superiors to confirm the mission objectives.[121] Following 8 December, the torture and murder of the *kaibiles*' guide was done at the direction of a lieutenant, and the subsequent pillage and burning of Dos Erres were done under the supervision and at the direction of the State's military and civilian leadership.[122] Once the mission had been carried out as ordered, the *kaibiles* were rewarded with eight days of rest.[123] In addition, the findings of the CEH as well as material submitted by the Commission clearly

---

[119] Comisión Interamericana de Derechos Humanos, *Demanda ante la Corte Interamericana de Derechos Humanos en el caso de la Masacre De Las Dos Erres Caso 11.681 contra la República de Guatemala*, 30 de julio de 2008, ¶¶ 100-101.
[120] *Id.* ¶¶ 105-107.
[121] *Id.* ¶¶ 114-118.
[122] *Id.* ¶¶ 129-134.
[123] *Id.* ¶ 136.

indicate that the Dos Erres massacre was one element of a broad national strategy involving numerous high level civilian and military officials.

In addition, the doctrine of superior responsibility is useful for addressing the delay in justice that has defined this case and represents one of the issues that the Guatemalan government agreed to address in the friendly settlement. The events giving rise to the present cause began in 1994; nearly twelve years after the massacre at Dos Erres took place. The course of the domestic litigation on behalf of the survivors, victims, and their families, and the various appeals that have ensued, is well documented in the Commission's Complaint[124]. For purposes of superior responsibility analysis, this Honorable Court should direct its attention to the fact that the individuals involved in the denial of justice to the survivors, victims and their families, incur additional liability under the doctrine for their interference with the State's efforts to investigate and punish the original crimes.

The doctrine of superior responsibility applies to the delay in justice for the Dos Erres massacre because after military and civilian commanders violated the human rights of the victims, the State acquired an obligation to investigate and prosecute the offenders. Its failure to effectively carry out such investigations and prosecutions comprises a separate violation of the victims' rights as regards the denial of access to an effective judiciary and effective remedy. The doctrine of superior responsibility applies to both civilian and military leaders. In light of the current posture of this case, the civilian institutions and leadership of Guatemala bear responsibility for the current and ongoing violations of Articles 8 and 25 of the Convention.

The State as an entity, in undertaking international obligations with respect to the protection of human rights, represents to the community of nations that it has the intention and ability to effect all necessary changes in domestic law and institutions to bring itself in line with those obligations. The State cannot be permitted to further impunity by premising its failure to investigate and punish on the existence of domestic provisions that prevent investigation and punishment.[125]

---

[124] *Id.* ¶¶ 137-282.

[125] American Convention on Human Rights "Pact of San Jose, Costa Rica", O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July, 1978, Arts. 2, 28 and 68; *Case of Barrios Altos*. Judgment of

Superior responsibility is the most appropriate legal doctrine for addressing the violations found in the Dos Erres case because, in the case before the Court, the elements of superior-subordinate relationship, knowledge, and failure to punish, are all met. In committing to the friendly settlement agreement[126], the State accepted responsibility for the actions which took place before 9 March, 1987, as well as for the subsequent failings of the State judicial apparatus, and undertook a series of commitments to investigate and prosecute the individuals involved, and to attempt to make those aggrieved whole.[127] The actions of the State show clearly that the State had the requisite knowledge of the events surrounding the massacre, as well as of the subsequent judicial proceedings, to give rise to the State's obligation to investigate and punish. The broader goals of the American system demand that this Honorable Court send a strong message to future commanders, reminding them that customary international law, including the doctrine of superior responsibility, requires that they exercise control over their subordinates in a manner that is consistent with the rule of law.

---

14 March, 2001. Series C No. 75. ¶. 41. "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extra-legal, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law." *See also Case of La Cantuta v. Peru.* Merits, Reparations and Costs. Judgment of 29 November, 2006. Series C No. 168. ¶¶ 146-157.

[126] Acuerdo marco de solución amistosa, de fecha 1º de abril del año 2000, suscrito entre el Estado y los representantes de las víctimas. *See* CIDH; *Demanda ante la Corte Interamericana de Derechos Humanos en el caso de Masacre De Las Dos Erres, Caso 11.681 contra la República de Guatemala.* 30 July, 2008. Annex 1 & 2.

[127] CIDH; *Demanda ante la Corte Interamericana de Derechos Humanos en el caso de Masacre De Las Dos Erres, Caso 11.681 contra la República de Guatemala.* 30 July, 2008. ¶ 56; Specifically: "El Gobierno de Guatemala reconoce también la responsabilidad institucional del Estado guatemalteco *por el retardo de la justicia para investigar los hechos relativos a la masacre, identificar a los responsables materiales e intelectuales de los mismos y aplicar las sanciones correspondientes.* En este sentido, el Gobierno de Guatemala acepta su responsabilidad por las violaciones a los derechos humanos denunciadas por los representantes de las víctimas en la comunicación enviada a la Comisión de fecha 13 de septiembre de 1996, a saber, *violación del derecho … a las garantías judiciales, a la protección judicial y violación del deber de investigar, sancionar y reparar.*" (*emphasis added*).

III. By Affirming the Doctrine of Superior Responsibility and Ordering the Government of Guatemala to Investigate and Prosecute Using that Doctrine in the Case of Dos Erres the Court Would Uphold Norms of International Law and Serve the Interests of Justice

This Honorable Court has frequently adopted the legal interpretations of other international tribunals. In one previous opinion, it stated that the American convention and other human rights documents are "living instruments whose interpretation must consider . . . contemporary international law."[128] The Court has stated that there has been a "dynamic evolution"[129] in international law, and that it is comprised not only of statutes and treaties, but also of "international instruments of varied content and juridical effects [such as] treaties, conventions, resolutions, and declarations."[130]

The Court has often looked to law from the European Court of Human Rights, the Human Rights Commission, and many other international bodies to develop its jurisprudence. As but one example, when this Court needed to define discrimination, it adopted language and reasoning from the European Court of Human Rights to determine that "a difference in treatment is only discriminatory when it 'has no objective and reasonable justification.'"[131] In his separate opinion on this same case, the Honorable Judge Rodolfo E. Piza Escalante recognized the "need to interpret and integrate each standard of the Convention by utilizing the adjacent, underlying or overlying principles in other international instruments . . . and in the trends in effect in the matter of human rights."[132]

This case is just one of many cases where this Court has utilized the interpretation of other international tribunals in reaching its decisions.[133] In *Baena-*

---

[128] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Series A, No. 16, ¶ 114-115 (1999).
[129] *Id.* ¶ 115.
[130] *Id.*; *see also Ituango Massacres Case*, Series C, No. 148 ¶ 157 n. 177 (2006).
[131] *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 Series A No. 4 ¶ 56 (19 January, 1984) (*quoting* Eur. Court H.R., *Case relating to "Certain Aspects of the Laws on the Use of Languages in Education in Belgium,"* Judgment on the Merits, ¶ 34 (23 July, 1968)).
[132] *Id.* Separate opinion of the Honorable Judge Rodolfo E. Piza Escalante, ¶ 2.
[133] *See, e.g.*, *Last Temptation of Christ Case*, Series C, No. 73 ¶ 69 n. 18 (2001) (*citing Handyside v. United Kingdom*, ECHR Series A, No. 24 (1976), and subsequent cases); *Hilaire, Constantine, and Benjamin et al. v. Trinidad and Tobago*, Series C, No. 94 ¶¶ 103, 105 (21 June, 2002) (citing such varied bodies as the U.N.

Ricardo, this Court looked to the ICTY for guidance about whether the Court could decide the issue of its own competence[134], and cited the ECHR in support of the notion that State compliance with treaty obligations must encompass substantive and procedural obligations.[135] In *The Miguel Castro-Castro Prison* case, the Court, "following the line of international jurisprudence", turned to the ICTR's *Akayesu* decision in determining what acts constitute "sexual violence"[136], and the Honorable Judge Trinidade, in a later concurrence, found support in the Special Court for Sierra Leone for the notion that international humanitarian law has expanded beyond only State actors although only States may be parties to treaties.[137] In short, the Court has a history of interpreting the evolving norms of international law alongside other tribunals, courts and international bodies in order to continue to fulfill its vital mandate.

In keeping with that tradition of recognizing the progression of international law, the Court should affirm a doctrine of superior responsibility similar to that which has developed in many international tribunals, including *ad hoc* tribunals such as the ICTY and the ICTR.

These tribunals are at the forefront of developing international criminal law. It has been recognized that "the *ad hoc* tribunals form the most significant body of case law in international criminal law."[138] Thus, the decisions cited earlier from the ICTY, ICTR, and other tribunals represent an evolution of international law that this Honorable Court should expressly incorporate into its own jurisprudence. Indeed, this

---

Human Rights Commission, the Supreme Court of India, the Supreme Court of South Africa, and even incorporating language into its decision from the Supreme Court of the United States of America); *Case of Velásquez-Rodríguez v. Honduras*, Judgment of 29 July, 1988. Series C No. 4 (applying the doctrine of iura novit curia, citing Lotus, Judgment No. 9, 1927, P.C.I.J., Series A No. 10, p. 31 and *Handyside*, ¶ 41); *Case of Velásquez-Rodríguez v. Honduras*, Judgment of 21 July, 1989. Series C No. 7, ¶ 28 (citing the Human Rights Committee and the European Court of Human Rights); *See also* J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS, 19 (1995) (discussing other cases where this Court has relied on the reasoning of the European Court without explicitly adopting its language).

134 *Case of Baena-Ricardo et al. v. Panama. Competence.* Judgment of 28 November, 2003. Series C No. 104, ¶ 55(f).

135 *Id.* at ¶ 66.

136 *Case of the Miguel Castro-Castro Prison v. Peru. Merits, Reparations, and Costs.* Judgment of 25 November, 2006. Series C No. 160, ¶ 306.

137 *Case of the Miguel Castro-Castro Prison v. Peru. Interpretation of Merits, Reparations, and Costs.* Judgment of August 2, 2008. Series C No. 181, (Concurring Opinion of Judge A.A Cançado Trindade, ¶¶ 90-91)

138 Jason Manning, *On Power, Participation and Authority: The International Criminal Court's Initial Appellate Jurisprudence*, 38 GEO. J. INT'L L. 803, 838.

Court has looked to these bodies for conceptual interpretation before,[139] and should do so again on the issue of superior responsibility.

By affirming the doctrine of superior responsibility as established element of international law and joining similarly situated courts in recognizing the doctrine as customary international law, this Honorable Court would further justice. In addition, a judgment of this type would deter impunity by holding superiors accountable for their failure to properly exercise command over their subordinates and by holding States accountable for their failure to punish those superiors and for failing to correct systemic flaws that allow those superiors to avoid punishment.

[139] *See Case of Baena-Ricardo et al. v. Panama*, Competence Judgment, Series C., No. 104, ¶ 14-15 (28 November 2003); *Case of Almonacid-Arellano v. Chile*, Judgment, Series C., No. 154 ¶ 96-108 (26 September 2006).

Conclusion

For the above reasons, IHRLI respectfully requests that this Court recognize and invoke the doctrine of superior responsibility in finding Guatemala responsible for its violations of Articles 8 and 25 of the American Convention due to its failure to comply with the friendly settlement agreement of April 1, 2000, insofar as it has failed to investigate and prosecute both the direct perpetrators and masterminds of the Las Dos Erres massacre.

Dated: Chicago, Illinois, July 28, 2009

INTERNATIONAL HUMAN R IGHTS LAW INSTITITE

By: _____
Daniel Rothenberg

_____
Daniel Thomann