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SUPERIOR RESPONSIBILITY FOR INTERNATIONAL CRIMES IN ETHIOPIAN CRIMINAL LAW

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ABSTRACT

This study aimed to assess the status of Superior/command responsibility in Ethiopian criminal law. For this purpose the international criminal law on the issue of SR, comparative criminal law, international as well as domestic cases and the Ethiopian criminal law are assessed. The study employed a doctrinal as well as qualitative approach. The assessments of the study show that: SR is a form of criminal responsibility that addresses the culpability of superiors who fail to prevent or punish their subordinates committing international crimes. It has been developed through customary international law. The justification for the development of SR in international criminal law was that low-level officials or military personnel often commit crimes because their superiors failed to prevent or repress them. The doctrine aimed at promoting compliance with international human rights law by obligating Superiors to curb the criminal acts of subordinates. This in turn promotes effective and merit based leadership. However, the doctrine of SR is not established in Ethiopian criminal law. It is not also practiced as customary international law. The absence of the doctrine of SR in the Ethiopian criminal law, cosseted the country a lot because while violation of human rights and commission of international crimes witnessed, no superior has been held criminally responsible based on the principles and elements of SR. All in all, as the study show, in the case of Ethiopia there is a legal gap on the issue of SR.

Key terms: superior responsibility, direct SR, Indirect SR, International crimes, Ethiopian criminal law, customary international law

1. INTRODUCTION

The doctrine of Superior Responsibility (SR) –also referred to as command responsibility- is one of the most important concepts developed in international criminal law after the WWII.[1] It is a responsibility for an omission.[2] If a superior fails to prevent his/her subordinates from committing criminal acts while possessing knowledge of such actions, or fails to punish or fails to take necessary measures, it entails criminal liability referred to as superior/command responsibility.[3]

The doctrine of superior responsibility plays great role in prevention of human rights violations and atrocities[4]. In most instances superiors are the most appropriate to prevent or punish their subordinates under their effective control for committing international crimes.[5] This obviously promotes effective and merit based leadership.

[1]Guénaël Mettraux, The Law of Command Responsibility (Oxford University Press 2009).

[2]Jamie Allan Williamson, 'Some Considerations on Command Responsibility and Criminal Liability' (2008) 90 International Review of the Red Cross.

[3]William H Parks, 'Command Responsibility in War Crimes' (1973) 62 Military Law Review 1.

[4]Arthur Thomas O'reilly, 'Command Responsibility: A Call to Realign Doctrine with Principles' (2004) 72 AM. U Int'l L. Rev 71

[5] ibid

This is because since failure to prevent or punish their subordinates for committing international crimes entails superiors criminally responsible, they do not be eager to be a superior before acquiring the required skills.

In countries like USA, superior responsibility is seen as atrocity prevention imperative.[6] But when we see the case of Ethiopia, while heinous human rights violation and commissions of international crimes become prevalent[7], no superior has been held criminally responsible based on the doctrine of SR for his failure to prevent or punish his subordinates committing international crimes. The main reason for this is that the doctrine of superior responsibility is not stipulated under the Ethiopian criminal law. Neither the special nor the general part of the Ethiopian criminal code, expressly deals with situations of superior or command responsibility.

However, the legal nature of command responsibility is still open to debate in international criminal law in the context of whether it is a mode of liability for the crimes committed by subordinates or a separate offence of the superior for failure to discharge his duties of control.[8] Difficulties arise if superior responsibility is understood as a mode of liability pursuant to which the superior shall be sentenced for the intentional crimes of his subordinates. This is particularly evident with respect to two aspects of superior responsibility: when the superior negligently failed to know, and thus to prevent or punish the commission of crimes by his subordinates, and when liability is solely based on the failure to punish.

The issue is more complex in the context of Ethiopia because on one hand commission of international crimes has been increasing in an alarming rate[9] in the country while superior responsibility for the commission of international crimes by their subordinates has not been exercised effectively and on the other hand the Ethiopian criminal law does not have clear stipulation for superior responsibility (the failure to control or the failure to punish). Thus, assessing the Ethiopian criminal law is important to come up with clarity.

In some countries where the domestic law doesn't effectively cover the doctrine of Superior responsibility, superiors have been held responsible for their failure to prevent their subordinates from committing international crimes through customary international law.[10] In countries such as France and Germany, Superior/command responsibility has been developed through customary international law.[11] This helped the countries to fill the legal gap in effective way accompanied by strong rule of law culture.[12]

However, in Ethiopia holding superiors responsible for their failure of not controlling their subordinates from committing international crimes through customary international law is not practicable. Because since application of customary international law needs consistent state practice[13], assessing the court practices in the

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[6]United States v. List (The Hostage Case), Trial of the War Criminals before the Nuremberg Tribunal (1950) and United Nations War Crimes Commission,8 Reports of Trials of War Criminals, The United Nations War Crimes Commission, 1949, pp.66-79, Bing Bing Jia, "The doctrine of Command Responsibility: Current Problems", in Yearbook of International Humanitarian Law, 2000, Vol. 3, p.141.

[7]<http//ohchr.org/International Commission of Human Rights Experts on Ethiopia Findings>, accessed on 5, January, 2022, 12:35 AM.

[8]Viplav Kumar Choudhry, 'Defense of Superior's Order and Command Responsibility under Criminal Laws in India' (2014) 2 Indian Journal of Public Administration 195.

[9]<http//ohchr.org/International commission of Human Rights Experts on Ethiopia Findings> , accessed on 5, January, 2022, 12:35 AM.

[10]Bantekas, Ilias, Principles of Direct and Superior Responsibility in International Humanitarian Law, Manchester University Press, 2002.

[11]The translation of Penal Code of the Federal Republic of Germany is available at <http://wings.buffalo.edu/law/bclc/Germind.htm > accessed at August 1 2018.

[12] ibid

[13] Scott James Meyer, 'Responsibility for an Omission? Article 28 of the ICC Statute on Command Responsibility' (2011) 8 Miskolc Journal of International Law 27.

ground is vital in order to come up with clear conclusion. Therefore, whether command responsibility is developed in Ethiopia as customary international law is also another area which needs clarity.

In addition, a central principle of human rights law that applies directly to the international criminal law system is the principle that to incur criminal responsibility, behavior must be prohibited and carries criminal sanction at the time of conduct. This is known as the principle of legality.[14] Even if the issue is developed as customary international law, it is difficult to determine punishing superior in Ethiopian criminal justice system. In most international crimes entertained by Ethiopian courts, there were issues of superior/command responsibility, but as the researcher witnessed during his public prosecutor career for five years, the courts have been unable to establish such responsibility as clear enough. Thus, the practices of the Ethiopian courts need to be analyzed in the context how cases having elements of Superior/command responsibility are being handled. In addition to the above, the perception of judges, prosecutors and lawyers on the issue of superior responsibility with respect to the practice in the ground needs to be assessed. Furthermore, a comparative analysis is important to the legal gap (if any) to take lessons.

Accordingly, the study aimed: to assess the status of superior/command responsibility for international crimes in Ethiopian criminal law, to assess comparatively the practice of superior/command responsibility for international Crimes under international law and other jurisdictions, to assess whether the principle of superior/command responsibility for international crimes is recognized in Ethiopian criminal law, assessing the practice of superior/command responsibly for international crimes in Ethiopian courts and assessing the practice of superior/command responsibility for international crimes in Ethiopia as customary international law.

The study largely used a doctrinal method. Analysis of international statues, case laws and customary international law, the Ethiopian criminal law, Comparative analysis of Ethiopian criminal law with some other countries, analysis of international practice with international and comparative criminal laws has been made. Rather than exhaustive collection, the most emblematic judicial decisions, judgments of international tribunals and Ethiopian courts, international criminal legislations, commentaries and books of leading publicists at the time of writing this study have been assessed.

Though the study used primarily a doctrinal approach; yet, it was also supplemented by interviews with some judges, prosecutors and lawyers at the Federal high courts of criminal benches. This approach has helped the researcher to clarify and analyze the practice of Ethiopian Courts on the issue of command responsibility. Thus, both doctrinal as well as qualitative approaches were employed.

The researcher used purposive sampling method. For the case of doctrinal part, as a doctrinal research is basically normal judicial research, statutory analysis, descriptive analysis and comparative analysis has been applied. On the other hand; for the qualitative part, qualitative analysis is applied. Therefore the study incorporated a hybrid approach of analysis.

This study has significance such as contribution to the knowledge in the area, it shows over the gaps on the legal framework and the practical challenges seen in the study will serve as an initial point for further researches. In addition, it will also give information for legislative branches of the government to fill the gap.

[14] Bert Swart, 'Modes of Criminal Liability' in Antonio Cassese (ed) The Oxford Companion to International Criminal Justice (Oxford University Press 2009).

Lastly, this article has three sections: the first section is the introduction part which included description of the subject matter, the objectives and the methods; the second part deals with the conceptual and theoretical discussions and the final section included the discussions, analysis, conclusions and recommendations.

2. Conceptual and Theoretical Framework

2.1.The meaning of Superior Responsibility

Superior/Command Responsibility is a legal term where Commander will be subject to individual criminal liability if the following elements exist:

A superior-subordinate relationship; the superior knew or had reason to know that a criminal act was about to be, was being or had been committed, and failure to take necessary and reasonable measures to prevent or punish the conduct in question.[15] Superior responsibility can arise by virtue of the superior's de jure or de facto power over the relevant subordinate.[16]

2.2. The development of superior responsibility

The doctrine of SR has been developed through customary international law which is consistent, uniform and general among the relevant states, although it does not have to be universal attaining the status of Opiniojuris.[17] It is seen as a general belief or acceptance among states that a certain practice is required by law.[18]

In post-WWII, in the Nuremberg Trial In 1942, the United Nations War Crime Commission was established by the Declaration of St James signed by the allied powers in order to conduct investigations and obtain evidence of war crimes.[19] The issues of direct responsibility of commanders were discussed thoroughly in the Nuremberg Trial and the Tokyo Trial.[20] However, the indirect responsibility of superiors seems to have been discarded in Nuremberg.

Regarding immunity of Head of State, Article 7 of the Nuremberg Charter denied the immunity of a head of state completely.[21] Article 6 of the Charter provided that 'leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the forgoing crimes are responsible for all acts performed by any persons in execution of such plan'.[22] The Nuremberg Trial did not have a chance to deal with indirect responsibility of commanders. In subsequent case law and state practices as well as statutes, it has been developed as CIL.[23]

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[15]Chantal Meloni, 'Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?' (2007) JICJ 5 619-637.

[16] Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, 29 July 2004, paras 41-42 ('Blaškić Appeals Judgment')

[17] Article 6 of the Nuremberg Charter. As seen, there is no mention of indirect responsibility for failure to act.

[18] Scott James Meyer, 'Responsibility for an Omission? Article 28 of the ICC Statute on Command Responsibility' (2011) 8 Miskolc Journal of International Law 27.

[19] Article 6 of the Nuremberg Charter. As seen, there is no mention of indirect responsibility for failure to act.

[20] Article 6 of the Tokyo Charter.

[21] Crowe, C. N., 'Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution', (1994) 29 University of Richmond Law Review, p. 213

[22] Reports of Trials of War Criminals, The United Nations War Crimes Commission, 1949, p. 76

[23] Bantekas, Ilias, Principles of Direct and Superior Responsibility in International Humanitarian Law, Manchester

University Press, 2002

2.3.The rational of superior responsibility

The purpose for the development of the doctrine of command responsibility was to demand accountability from military commanders and non-military superiors for the criminal acts of subordinates under their control and authority.[24] This was based on the fact that most of the international crimes were committed by low-level officials because the commanders or superiors failed to prevent or suppress them.[25] Scholars, institutions and even states have voiced their concern about possible abuse of the doctrine for political purposes.[26] However, reason for the responsibility is that those who have superior positions are the most appropriate persons to control or stop subordinates' acts on the battlefield in terms of position and power.[27]

2.4. The scope of superior responsibility

Some early case law suggested that a form of liability, the criminal responsibility of a commander arising from the crimes of his subordinates constituted a discrete category of violations of the laws and customs of war.[28] However, the doctrine later developed, not as a separate category of war crimes, but as a form of criminal liability that applies not just to war crimes, but to other categories of international crimes, such as crimes against humanity and genocide.[29]

The most recent and most persuasive jurisprudential pronouncements have characterized this doctrine as a form of liability for culpable omission.[30] According to that view, a superior may be held criminally responsible, not for his part in the commission of crimes by his subordinates, but because of a personal and culpable failure on his part to adopt necessary and reasonable measures to prevent or punish those crimes.[31]

International law has added one category of criminal liability which applies solely to those who bear sufficient authority over other people.[32] Those who can exercise such authority - in the form of an ability to exercise 'effective control', have a duty under international law to take necessary and reasonable measures to prevent or to punish crimes of subordinates where they have likely commission.[33] Liability is incurred for a personal failure on his part to perform an act required of him by international law, namely, to take necessary and reasonable measures to prevent or punish crimes of subordinates.[34]

2.5. Mode of command responsibility

Command responsibility includes two concepts of criminal responsibility: The first concept is direct responsibility, where the commander is held liable for ordering unlawful acts.[35] The indirect command

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[24] Jamie Allan Williamson, supra(n 9)

[25] Arthur Thomas O'reilly, supra(n 6)

[26] Major Michael L Smidt, 'Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Operations', (2000) 164 Military Law Review 155.

[27] ibid

[28] Arthur Thomas O'reilly, supra(n 6)

[29] ibid

[30] Major Michael L Smidt, 'Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Operations', (2000) 164 Military Law Review 155.

[31] ibid

[32] See Bassiouni, M. Cherif, The Law of the International Criminal Tribunal for the Former Yugoslavia, Transnational Publishers, 1996, p. 345

[33] Bassiouni, M. Cherif, Crimes against Humanity in International Criminal Law, Kluwer Law International, 2nd ed., (2000) p. 419

[34] See Bassiouni, M. Cherif, The Law of the International Criminal Tribunal for the Former Yugoslavia, Transnational Publishers, 1996, p. 345

[35] Bassiouni, M. Cherif, Crimes against Humanity in International Criminal Law, Kluwer Law International, 2nd ed., (2000) p. 419

responsibility of commanders is the criminal liability for international crimes committed by their subordinates if the commanders fail to exercise sufficient control over their subordinates.[36] In addition to these, there is also a concept of civilian superior responsibility.[37]

2.6. Elements of superior responsibility

The elements include: Existence of a Superior-subordinate Relationship, Effective Control, and Requirement of Knowledge, failure to Prevent or Punish and Requirement of Causation.[38]

2.7.Superior responsibility under international law

The doctrine of superior responsibility is recognized under international law such as International Criminal Tribunal for the Former Yugoslavia (ICTY, 1993)[39], International Criminal Tribunal for Rwanda (ICTR, 1994)[40], ICC[41], the International Criminal Court (1998)[42], The Extraordinary Chambers in the Courts of Cambodia (ECCC, 2004)[43], The Special Tribunal for Lebanon (STL, 2007)[44], IHL, International Humanitarian Law[45], Hague Regulations (1899, 1907)[46] and Hague Convention[47] and Geneva Convention (1907, 1929)[48].

2.8. Comparative aspects of superior responsibility

Countries have been using the doctrine of superior responsibility as a mechanism to prevent violation of human rights and international crimes.[49] The legal doctrine of Superior responsibility was codified in the 19th century, at the Hague Conventions of 1899 and 1907[50], and is partly based upon the Lieber Code (1863), a war manual for the United States Armed Forces, two years into the American Civil War (1861–1865).[51] However, it has

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[36] M. Cherif BassiouniI& Peter Manikas, The Law of the International criminal Tribunal for the former Yugoslavia (1996) 345, 348-50.

[37]Celebici para. 354.

[38] M Cherif Bassiouni, Crimes Against Humanity in International Criminal Law, (2nd edn, Oxford University Press1999)

[39] ICTY Statute, Art. 7(3); ICTR Statute, Art. 6(3)

[40] ibid

[41] In Bemba, the ICC Pre-Trial Chamber affirmed that military-type commanders may include those superiors who have authority and control over irregular forces, including rebel groups, paramilitary units, armed resistance movements and militias, where they are structured in a military like hierarchy and operate with a chain of command. See ICC, Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009,para. 408.

[42] ibid

[43] As a hybrid tribunal, the ECCC is founded under national law and is supported internationally through its agreement with the United Nations. See Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 6 June 2003.

[44] Statute of the Special Tribunal for Lebanon, Agreement between the United Nations and the Lebanese Republic pursuant to Security Council Resolution 1664, 29 March 2006, Art. 3(2).

[45] ICC Art.28 (a)

[46] 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); and Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Art. 1(1).

[47] Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

[48] Convention Relative to the Treatment of Prisoners of War, Geneva, 27 July 1929

[49] United States v. List (The Hostage Case), Trial of the War Criminals before the Nuremberg Tribunal (1950) and United Nations War Crimes Commission,8 Reports of Trials of War Criminals, The United Nations War Crimes Commission, 1949, pp.66-79.

[50] Bantekas, Ilias, Principles of Direct and Superior Responsibility in International Humanitarian Law, Manchester University Press, 2002

[51] Article 190 of the French Penal Code

been widely practiced by states as customary international law after WWII.[52] Thus, the developments of SR show that it has been come to practice due to the prevalence of atrocities and international crimes.[53] For example, the Hostages Trial was held from 8 July 1947 until 19 February 1948 and was the seventh of the twelve trials for war crimes that United States authorities held in their occupation zone in Germany in Nuremberg after the end of World War II.[54] In addition to this, the Tokyo trial and others have proven that the doctrine of SR is used as CIL.[55]

In France, Article 4 of the Ordinance of 28 August 1944 concerning the suppression of war crimes provided that: where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organized or tolerated the criminal acts of their subordinates.[56] In Germany, the new German Code of Crimes against International Law came into force in 2002 has a provision on superior responsibility.[57] The Code stipulates not only direct responsibility of superior but indirect responsibility of superiors caused by subordinates.[58] Although the standard is 'omits' is very ambiguous compared with the ICC standard, the Code has implemented the ICC Statute into national law.[59]

2.9. International Cases

It has been also developed through international as well as domestic cases. The international cases include the High Command case[60], the Hostage Case[61], the Tokyo Trial Case[62], the Celebic Case[63], the Blaskic Case[64] and Kordic Case.[65]

3. RESULT AND DISCUSSION

3.1.Superior Responsibility for International Crimes under Ethiopian Criminal Law

In this section the status of command responsibility under Ethiopian Criminal law is assessed in aspects of statutes, court practices and trends.

[52] Bantekas, Ilias, Principles of Direct and Superior Responsibility in International Humanitarian Law, Manchester University Press, 2002.
[53] Article 190 of the French Penal Code 27
[54] The translation of Penal Code of the Federal Republic of Germany is available at <http://wings.buffalo.edu/law/bclc/Germind.htm > accessed at August 1 2018.
[55] ibid
[56]ibid
[57]The new German Criminal Code was promulgated on 13 November 1998.
[58] ibid
[59] ibid
[60] Crowe, C. N., 'Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution', (1994) 29 University of Richmond Law Review, p. 213
[61] United States v. List (The Hostage Case), Trial of the War Criminals before the Nuremberg Tribunal (1950) and United Nations War Crimes Commission,8 Reports of Trials of War Criminals, The United Nations War Crimes Commission, 1949, pp.66-79.
[62] Article 5,6 of the Tokyo Charter
[63] Rockoff, Jennifer M., ''Prosecutor v. ZejnilDelalic (The Celebici Case), (2000) 166 Military Law Review pp. 172-176, Celebici judgment para. 333.
[64] Prosecutor vs. General Blaskic, ICTY Judgment, No IT-95-14-T, Nov. 16, 1998 (1999) was charged with crimes against humanity, grave breaches and violation of the laws and customs of war.
[65] Kordic judgment (2001), para. 388.

3.2. Superior Responsibility for International Crimes in Ethiopian Criminal Law

The criminal Code of Ethiopia provides the modes of responsibility from Articles 32 to 40. These provisions classify the participants in criminal conduct into two categories: Principal, and Secondary offenders. The Code provides three situations in which a person participates in criminal activity as principal offender. These are: Material Offender; Moral Offender; and, Indirect Offender. The material offender is the person who actually commits the crime either directly or indirectly. While the direct means is when the person commits the criminal conduct in person with the required mensrea where as the indirect means refer to the situation in which the perpetrator employs animals or natural forces.

Proclamation no. 414/2004, the criminal code of the Federal Democratic Republic of Ethiopia, article 73 stats that in the case of an act committed by a subordinate on the express order of an administrative or military superior who was competent to do so, the person who gave the order is responsible for the crime committed and is liable to punishment, where the subordinate's act constitutes a crime and did not exceed the order given (Art. 58/3).

Whereas according to article 58/3 of the criminal code, no person shall be convicted for what he either knew of or intended, nor for what goes beyond what he intended either directly or as a possibility, subject to the provisions governing negligence. From this one may argue that indirect command responsibility is recognized under Ethiopian criminal law for the commanders' failure by negligence to prevent their subordinates from committing international crimes. Because as per article 59/1/b, a person is guilty of criminal negligence when, having regard to his personal circumstance, education, occupation and rank, he fails to take such precautions as might reasonably be expected in the circumstances of the case.

This argument can be further strengthened by the statement of the criminal code under article 23/1. It states that "In this code, an act consists of omission of what is prescribed by law." But the last paragraph of the provision stipulates that "a crime is an act which prohibited and made punishable by law. In this code, an act consists of omission of what is prescribed by law."

In addition to the above, as per article 59/2 of the first paragraph, crimes committed by negligence are liable to punishment only if the law so expressly provides by reason of their nature, gravity or the danger they constitute to society. But the criminal code has no any provision which make a military commander responsible for his failure to prevent his subordinates from committing international crimes.

Furthermore, the FDRE constitution is the supreme law of the land. As per Article 9/4 of the constitution, all international agreements ratified by Ethiopia are an integral part of the law of the land. Since command responsibility as individual criminal responsibility is enshrined under international conventions, one can argue that the applicability of command responsibility can be practiced under the Ethiopian Criminal justice system. However, the Ethiopian criminal Code governs only those acts mentioned above and yet it needs its applicability as customary international law in Ethiopia.

On the other hand, on can also argue that, command responsibility is not recognized under the general part of the criminal code since article 23 of the criminal code talks about personal liability based on the actions associated with the person himself but not for the actions of others. As stipulated under Article 69 of the criminal Code, superiors will criminally be held liable only for acts committed or omitted with their express order and so far as the subordinate's act did not exceed the order given. Article 69 of the FDRE criminal Code

provides that 'if the execution of a military order in the course of duty violates the criminal law, then the superior giving the order will bear the sole responsibility therefore.'

According to the doctrine of command responsibility under international law, failure of the superior to submit the matter to the concerned authorities or punish the perpetrator who is under his effective supervision is a dereliction of duty, which entails criminal responsibility. Article 73 of the 2004 criminal code stipulates that 'whoever intentionally incites another to intentionally commit an unlawful act shall be punished as an instigator in the same as the perpetrator'. There was no reference to indirect responsibility of superior officers, but article 23 of the Codes clarified that omission by anyone is punishable when the person was under a legal duty to prevent the harm, and if his failure to act was associated with criminal conduct. Besides, for Art.73 to be applicable, it is not required that the superior should be a high-ranking official or military commander. It rather suffices that he/she should be of a higher rank than the person executing the order, i.e. he/she should have the right to give orders and that his subordinate should have corresponding duty to obey. He who gives the order must, therefore, be a person in an authority. But his being in a position to give orders does not entitle him to demand from his subordinates that he should act in violation of the law. Further, the superior who orders an act to be done, which is unlawful, is liable only for those acts. This is to say that, if the subordinate exceeds or departs from the order, the superior is not answerable for the excess or departure unless he directly or indirectly intended it to occur.

Art.74 (1) provides that the subordinate cannot escape punishment if he/she carries out an illegal order, which he is aware of it. Hence the subordinate must control the lawfulness of the orders he receives and is liable to punishment if he intentionally violates the law on being ordered to do so. The duty to obey, therefore, ceases to bind the subordinate when the doing of an act is ordered which is contrary to the law. It appears however; the law does not impose a higher duty on the subordinate to check the legality of every ordered act. He/she is required to refuse execute an order, which is manifestly unlawful as regards to its form and or contents.

As per article 320 of the criminal code, breaches of Military Duty Committed by Officers or Commanding Officers; in all cases of breach of liability to performance military service, of breach of military order or discipline, of service or of military obligation in general, an officer or commanding officer, irrespective of rank, shall be subject to exemplary and drastic punishment, according to his degree at guilt, within the limits of the punishments.

As to indirect responsibility, though the Ethiopian criminal Code has recognized criminal liability by way of omission in its general part, there is no any special provision that provide a military commander or civilian superior shall be criminally responsible for his failure to prevent his subordinate from committing an offence. However, any person effectively giving orders or exercising command and control in a unit shall be deemed equivalent to as principal criminal perpetrators. The problem of superior subordinate relation arises when a person commits an offense on the order of someone to whom he owes obedience. This can happen in numerous occasions. Articles 73/74 on the other hand are applicable only to specific types of relation, i.e. administrative and military superior subordinate relation. Whenever there is hierarchical relation and chain of command, there will be a superior who exercises hierarchical powers over his subordinates and giving them general or specific orders. Thus, such kind of relation involves a rather simple question with regards to whether the person who gives the order is guilty of the offense in every occasion. A much more controversial question is whether the

person who carries out the order is guilty of an offense. The main issue therefore is one of liability and not of participation.

On the other hand, the military defense establishment proclamation no.1100/2019 of Ethiopia does not say anything about command responsibility. The Ethiopian military defense force proclamation no. 1100/2019 talks about the powers, functions and structures of the defense force. It talks about the establishment and functions of especial military investigation, prosecution and courts without dealing with criminal responsibility. Rather the criminal responsibility of military commanders for their participation of criminal acts is stipulated under the criminal code.

Article 16 of the defense force proclamation stipulates that "…where any member of the defense forces violates provision of military laws, regulations, directives……and the offence committed is so minor that it cannot be brought to a military court case shall be disposed of in accordance with the defense forces' disciplinary regulation." Thus, this provision cross refers the military court. On the other hand article 28 of the proclamation states that especially military investigation; prosecutions and court shall be established.

But under article 37 it gives the final appellate power for the federal Supreme Court while article 38/1/a states that "the primary military court shall have jurisdiction over matters that persons responsible for military offences provided from article 284 to article 322 of the criminal code." Therefore, from the above, we can infer that the general principles and the special provisions of criminal liability issue is left for the criminal code which governs the general principles of criminal liability for all laws having provisions of criminal issues. Furthermore, when we see the anti-terrorism proclamation no 652/2009, it has not incorporated the elements of command responsibility.

To sum up though some elements of command responsibility is recognized under the Ethiopian Criminal law, it failed to incorporate this essential principle in a clear way as independent principle of criminal liability in the general part of the criminal code and to be accompanied by special provisions either in the criminal code itself or to be incorporated by different proclamations.

Under the Ethiopian criminal law, therefore, it is impossible to hold superiors criminally liable for failure of taking necessary measure on the commission of crime by subordinates unless there is a proof of direct participation in the commission of the offence, either as a principal or co-offender.

Consequently, in the Ethiopian genocide trial, it is becoming common to see superiors are liable when they participate by direct order to subordinates. But it is difficult to ascertain indirect command responsibility of military/civilian superior. When Ethiopia ratifies Geneva Convention and a norm of command gets the status of customary international law, it is an obligation of states under international law to implement it. As parts of customary international law prohibitions of crimes against humanity have binding effect on the entire globe, including Ethiopia, Ethiopia bears an obligation to give effect to this prohibition. To fulfill this obligation the country is expected to domesticate the customary norm of command responsibility to its national laws**.**

3.2.1. The practice of Superior Responsibility in Ethiopian Courts vs. Customary International Law

In this regard, the researcher interviewed judges, prosecutors and lawyers in the Federal High Court's Lideta Division.

When we see, the process of selecting judges and prosecutors as well as lawyers for interviews; the study focused on the Federal High Court's Lideta bench. Because cases having an issue of command responsibility are

litigated in this bench. In this bench, there are two hearings on Constitutional and terrorism issues. These are the 1st constitutional and terrorism hearing and the 2nd constitutional and terrorism hearings. There are three judges at each hearing. Accordingly, the researcher interviewed a total of 4 judges from each.

On the other hand, one of the directorates under the former Federal Attorney General (the current Ministry of Justice) is the Directorate for National and border crossing crimes. It is located in the back office of the Federal High Court's Lideta Division, and is the office to prosecutors who handle terrorism and border crossing crimes.

At 1st and 2nd constitutional and terrorism issues hearings, usually 1 prosecutor is assigned for one case and sometimes 3 or four prosecutors may assigned. Accordingly, two experienced prosecutors were interviewed. In addition, the researcher has worked for 5 years as a federal prosecutor. Furthermore, at the time of the study, he was working as a lawyer in federal courts. This helped the researcher to access the experienced lawyers, prosecutors and judges. As a result, the researcher interviewed two additional prosecutors who have handled the case of Derg officials as special prosecutor.

Similarly, in the case of lawyers, four of the most experienced and well-known lawyers representing the defendants in constitutional and terrorism issues hearing were interviewed.

The judges have reflected different views on the issues such as the practice of command responsibility in the Ethiopian courts and the practical scenarios that they encountered in the course of litigation.

Two of them replied that in most instances suspects for cases having the elements of command responsibility are charged with either article 240 of the criminal code for crimes of armed rising or civil war or under article 241 for crimes of attack on the political or territorial integrity of the state. Article 240 begins with: “who so ever intentionally…” and the details of the provisions show that the suspect will be liable if he has direct participation.

But the scope of article 241 is broader because it says “whosoever, by violence or any other unconstitutional means, directly or indirectly, commits….” This gives chance for the prosecutors proof their case during the witness examination.

Two of the judges said that during witness examinations, the nature of the cases appeared to be cases having the elements of command responsibility. As their statements, this could occur where the prosecutor dos not find direct provision to charge with command responsibility. Because unless there is direct and clear provision; the burden of proof will be difficult for the prosecutor.

Furthermore, they said that cases of command responsibility nature have rarely appeared in direct charge of expressly the elements of SR/CR. Thus, the practice of command responsibility is rare before courts and nor practiced as customary international law.

From the above we can infer that the status of command responsibility in the Ethiopian criminal law is that; it is not practiced as customary international law as well as there is no direct stipulation which incorporates the three elements of command responsibility: authority to control his subordinates, failed to prevent or repress within the capacity of his authority and failed to take necessary measures.

Similarly the researcher has administered interviews with prosecutors on the same issues. Three of them have begun their response with the demand for amendment of the criminal law of Ethiopia to incorporate command responsibility as a separate and clear stipulation. According to them, this will reduce their burden of proof during the litigation. They have mentioned an example for the cases of gross human rights violations in Ethiopia

because of the absence of that clear stipulation. Were that provisions exit, commanders would work their job effectively within their authority to prevent the commission of international crimes before its destructive results.

Three of the prosecutors argued that most cases have an element of command responsibility but charged with article 240[66], article 241[67] and the following of the FDRE Criminal Code. They added that when officials or commanders became liable of failing the effective control of their subordinates within the scope of their authority, prosecutors are unable to charge them under the doctrine of command responsibility because there is no direct provision in the criminal law of Ethiopia. Rather usually charged with the above provisions and the provisions under the anti terrorism proclamation. As they said there is no practice of command responsibility neither in the direct charge against offenders nor as customary international law. The prosecutors mentioned the case of Abdi Mohhamd Omar; the former Somali regional government's president. He is charged under article 240/2[68] of the FDRE criminal code.

From the above we can reason out that command responsibility is not stipulated in a clear and separate manner in the Ethiopian criminal law. There is a clear legal gap because prosecutors tend to charge under command responsibility, but for fearing of burden of proof, and because of the absence of provision, they usually charge under article 240 and the followings of the FDRE criminal code.

Prosecutors further argued that if there will be direct provision on the issue of command responsibility, the security of the country could be better because commanders can effectively perform their jobs under their authority in order to avoid responsibility.

Furthermore, the researcher has conducted interviews with lawyers on the same issues. Two of them began their responses with mentioning of suspects charged for committing corruption crimes and violations of constitutional order of the country. They mentioned cases of prosecutor vs. the former intelligence center officers, prosecutor vs. Dr. Debre-Tsion Gebre-Michael. They have explained that in the case of the former intelligence officers, the charge mentions that the accused persons have violated human rights and in the case of Dr. Debre-Tsion, the case mentions direct command of civil war. They argued that though the charges do not have mentioned command responsibility directly; it has incorporated the elements. Three of the lawyers replied that there is no the practice of command responsibility in the Ethiopian courts because no element of command responsibility has been taken as a reason for the litigations before the courts.

When we see the above responses in the context of the legal elements of command responsibility, that first the superior must had the authority to control the actions of his subordinates, Second, that the superior knew or in the given circumstances should have known that a subordinate had or was about to perpetrate a human rights violation and lastly that the superior failed to take necessary measures, within the scope of his authority, to prevent or repress the commission of the human rights violations. From this we can reason out that the concept of command responsibility is a kind of allegation against commanders for the crimes committed by their subordinates within the context of the above elements.

[66] Armed rising or civil war; where the crimes have entailed serious crimes against public security or life; proclamation no. 414; the Criminal Code of the democratic republic of Ethiopia, article 240.

[67] Attack on the political or territorial integrity of the state, Proclamation no. 414; the Criminal Code of the democratic republic of Ethiopia article 241.

[68] Federal High court Lideta Bench 1st terrorism bench, file no.231812; charged with armed rising or civil war where the crimes has entailed serious crimes against public security or life as per proclamation no. 414; the Criminal Code of the democratic republic of Ethiopia, article 140/2.

Hence, for the case of the former intelligence officers, there is an element of authority. But the charge claims an act committed by them directly. Hence, though the offence mentioned in the charge amounts to international crimes, the allegation is based up on their direct participation. Hence the concept of command responsibility is there but confused. The suspects were first charged with the anti-corruption proclamation no. 881/2009 and latter the court altered the provision when a judgment was given to defend. Even the court ordered some of them to defend under article 555 of the criminal code for grave and intentional injury against the victims as a principal offender. This shows how far the contents of the charge and the provision under which the suspects were charged mismatched. In the case of Dr. Debre-Tsion and his co-suspects; the charge mentions that the accused have directly ordered the civil war and had prepared for it. Element of authority, subordinate relationship and ability to control is there in the charge. But the charge mentions a direct participation and the claim is directly against his participation and the outcome for his direct participation but not the offences of his subordinates. But they were charged under the anti-terrorism proclamation and the criminal code article 240, and article 241 for crimes of armed raising and civil war; crimes against the political and territorial integrity of the state consecutively. Hence, the concept of command responsibility is confused. Therefore, there is no clear practice of command responsibility either directly or asa customary international law. The same works with the case of the former Somali regional government president, Abdi Mohamed.

Furthermore, the lawyers argued that if the principle of superior/command responsibility existed in Ethiopian criminal law as independent and clear way, human rights violation would decrease and effective leadership would be promoted.

They mentioned the situation of the current regional states as an example. In most heinous crimes committed in some regional states, no effective accountability of leaders or superiors has been seen not only for superior responsibility as enshrined under international law and customary international law but also for principal offences even by the superiors themselves.

They related the situation with general principles enshrined under the continental legal system. Under the continental legal system, the conduct of crimes is highly related with legality, culpability and personal liability. They also mentioned crime of improper omission; which is the concept of commission by omission. The later denote a distinct mode of criminal liability arising from committing a crime of improper omission as a principal perpetrator.

But basically omission is based on the theory that failure to perform a legal duty when one has capacity to do so is substitute for the commission of a crime. A criminal offence is committed by an omission to act only where the perpetrator has an obligation to act but fails to do so.

To establish that a crime has been committed by omission, it is necessary to show three elements. Firstly that there was a duty of care, secondly that this duty was breached and finally that there is a casual connection between the breach of duty and the conduct.

On the other hand culpability is a legal responsibility of a criminal act; an individual's blameworthiness; the quality of being culpable. It also refers to the mental state (mens rea) that must be proven for a defendant to be held criminally liable. This in turn must be accompanied by the legality principle that to hold the suspect criminally liable, a conduct must be prescribed by law as a criminal act before the conduct.

When we see the situation of Ethiopia specifically; in some regional states, sometimes the leaders manifest that they have information for the commission of the crime and the repeated actions show that there is elements of commission by omission even resembles a principal offender in giving green light for the commission of human rights violation. However as lawyers argued, to hold the leaders criminally liable, there must be a pre-legislated law which makes the omission as a criminal act.

Thus, they argued that the better medicine for such failures and acts of the leaders in the regions; where human rights violations occur frequently is that of incorporating the concept of superior responsibility in the criminal law of Ethiopia in a clear manner as independent and separate principle of criminal liability.

Furthermore, even extending the crime commission by omission as enshrined under the criminal code of Ethiopia for superior responsibility will be restricted by the principle of legality. Because the criminal code clearly demands that to hold a suspect criminally liable for an omission, the duty must be specified first, second that duty must be breached and thirdly there must be a casual connection between the breach of the duty and the conduct.

In addition to this, even criminal acts by negligence must be also promulgated under the specific part of the criminal code. Hence, extending the crime commission by omission and negligence as stated under the criminal code to the principle of superior/command responsibility is impossible in the Ethiopian criminal law for five main reasons: First that there must be the principle of legality as stated under article 2/2 of the criminal code "the court cannot consider an act as a crime unless it is prescribed by law as a crime".

Secondly, while mode of criminal conducts are exhaustively listed under articles from 32 to 40 (Principal, and Secondary offenders) of the criminal code, the mode of superior liability is not enshrined. Thirdly, under the above provisions, The Ethiopian Criminal Code provides three situations in which a person participates in a criminal activity as principal offender. These are: Material Offender; Moral Offender; and, Indirect Offender. But the situations listed above do not include the case of superior liability for his failure to prevent his subordinates from committing international crimes.

Fourthly, under article 59/2 of the criminal code, it is stated that crime by negligence is not punishable unless enshrined under the specific part of the criminal code as a criminal conduct.

Last but not least, the special part of the Ethiopian criminal code doesn't recognize superior responsibility as a mode of criminal liability or as an act of crime. Therefore, as the lawyers argued that under the Ethiopian criminal law, the possibility of holding leaders or superiors criminally liability for their failure to prevent their subordinates from committing international crimes is less. For that in some regional states, there have been frequent violations of human rights while no superior has been criminally held responsible for his failure to prevent or punish his subordinates for the commission of international crimes.

3.3. Practical Cases in Courts

3.3.1. Mengistu Hailemariam Case

Special prosecutor office (hear in after SPO) vs. Mngistu Hailemariam eta 1 charges of genocide and crimes against humanity.

According to the special prosecutor, the suspects were charges with 211 counts of genocide and crime against humanity. Accordingly, the charges divided the accused in to three different categories; policy and decision markers, officials who passed an order or reached decision on their own and allege crimes as per art 32/1/ b and

281 of penal code of Ethiopia. In view of the first objective, the SPO has brought over 5000 former leaders and other officials to justice for crimes allegedly committed while they were in power from 1974-1991.

The defendants were; (a) policy makers (146 defendants) - senior government officials and military commanders – those who deliberated on and designed the plan of genocide in their effort to eliminate their political opponent; (b) field commanders (2133 defendants) - both military and civilians who commanded the forces, groups and individuals that carried out the violations;(c) Material offender individual perpetrators (soldiers, police, officers, interrogators) who involved in material commission of the crime in line with the nationwide plan.[69]

Among the charges the top leader who have been charged and convicted in the trial were Lt.col Fisseha Desta (former vice president of Derge), Major general Legesse Asfaw (who had allegedly ordered the bombing of civilian in market place in the town of Hawzen in Tigray province as per art 32/1/b and 281/1a/ of penal code.[70]

The key mode of criminal responsibility provisions in the 1957 Ethiopian Penal Code invoked by the Special Prosecutor against the principal accused were Articles 32(1)(a) and (b), which apply to principal offences committed by offenders and co-offenders. According to Article 32(1) (a), a person shall be regarded as having committed an offence and punished as such if: 'He actually commits the offence either directly or indirectly, for example by means of an animal or a natural force; or (b) he without performing the criminal act itself fully associates himself with the commission of the offence and the intended result' (emphasis added). This makes the direct and indirect participation in the commission of crimes the most important mode of criminal responsibility. As pointed out, the core group of the accused was comprised of members of the Derg. When the Derg collapsed in 1991, seventy-three original members faced prosecution. The prosecutor alleged that these members committed crimes in their capacity as members of the Derg General Assembly and as members of committees and sub-committees that were responsible for executive decisions.[71]

According to the prosecutor, these leaders exercised effective control over the police, security and paramilitary forces who directly committed crimes.[72]According to the court decision Mengistu and senior official of Derge were prosecuted and convict about the responsibility of leadership and trials addressed crime committed by defendants through direct participation by giving direct orders. However, the provision of 32/1/b of penal code deal with individual responsibility of moral criminal that designed and plan the commission of such crime, but the case show that such higher official of Derge participation on the commission on crime through giving order. Even though, concept of command responsibility was not clearly incorporate penal code, but the fact in the case show the order of higher official to subordinate to commit the crime of genocide and crime against humanity were possible to include in the definition of direct command responsible where the superior actually delivered illegal orders to the subordinates, which will be unlawful rather wrongly determining as moral criminal as per art 32/1/b. However, there was no clear indication of indirect command responsibility that failure of superior taking of reasonable measure to prevent or punish subordinate in law as well as in the case law in Ethiopia.

[69]Alebachew B. Enyew, Transitional Justice Through Prosecution: The Ethiopian Red Terror Trials in Retrospect(2010) Bahir Dar University Journal of Law vo1 no1

[70] Special Prosecutor v. Col. Mengistu Hailamariam et al., File No. 1/87, Ethiopian Federal High Court.

[71]Firew KebedeTiba, 'The Mengistu Genocide Trial in Ethiopia'(2007) Journal of International Criminal Justice1 of 16

[72] Special prosecutor vs. DegnnetAyale eta l (1993) Amhara Region Supreme court.

Therefore, conception of command responsibility for international crime was developed; even Ethiopia is party to Geneva and Hague convection which are incorporate command responsibility but, it has practical problem of establishment of indirect command responsibility, but in international Tribunals and other national jurisdiction develop as customary international. Thus Ethiopia obliged to punish military or civilian superior commission or omission of international crime.

3.3.2. Dagnnet Ayalew Case

The case was brought before Amahara Regional state Supreme Court. The special prosecutor brought eleven counts of charge in single file against Derge official in Amhara Region on crime of genocide and crime against humanity in violation of art 32/1/b/ and 281of penal code of Ethiopia. In particular of charge state that during Derge regime that crime genocide and crime against humanity commit in place where Amharakala-DegaDamot and Awraja 1970-1980 through making an order to commit the crime of genocide in political group.[73] The court convicted and punished the defendant as they were charged. However, prosecutor charged and court convicted as per 32/1/b/, the accused as moral criminal, the fact and the analysis of the court showed that there was civilian superior order in the case, because as the case the higher official given direct order to subordinate committed such crime through written order to destroy in whole or in part of opposing parties show that someone else was not found as behind the commission of crime that organized as moral offender; rather it acted as superior order. Therefore, there was conception of direct command responsibility to give unlawful order, but the prosecutor and the court failed to establish and determine indirect command responsibility in the case.

4. Conclusions, Recommendations

4.1. Conclusions

It is established fact that superior/Command responsibility is recognized under international criminal law, customary international law and case law. In addition Comparative criminal laws on the issue of command responsibility show that countries such as Franc and Germany have incorporated command responsibility under their Criminal Law. on the other hand, though the general part of the Ethiopian criminal code have an element of indirect command responsibility in an ambiguous manner; for it recognizes crimes by omission, there no especial provision in Ethiopian criminal law on command responsibility for international crimes. In addition, the Ethiopian criminal law has no incorporated command responsibility as a principle in the general part of the law directly or indirectly. Rather cases having the nature of command responsibility has been charged under either article 240 of the criminal code for crimes of armed rising or civil war or article 241 for crimes of attack on the political or territorial integrity of the state.

International law recognizes superior responsibility as a sui generis form of liability for omission that now forms part of customary international law. Liability pursuant to that doctrine is based on a grave and personal dereliction of duty on the part of a superior. The omission relevant to this form of liability consists of a gross, culpable and intentional failure on the part of an individual in a position of sufficient.

[73] Special prosecutor vs. DegnnetAyale eta l (1993) Amhara Region Supreme court.

Authority to comply with his legal duties to prevent and punish crimes of his subordinates, as provided under international law and as might be specified by that superior's domestic law.

There remain certain issues, however, as regard the relationship that must exist between that culpable omission or dereliction of duty and the underlying offence in relation to which the superior could be held responsible. Superior responsibility is perceived as a crime of omission in relation to the commander's duty to punish crimes, and as a mode of liability in relation to his duty to prevent crimes.

As noted, a rule attains the status of customary international law if exists a widespread practice of that rule amongst States, and if there exists a conviction that the practice is required by international law based on the foregoing examination of international legal instruments and jurisprudence as evidence of customary international law, as well as domestic legislation and jurisprudence.

Ethiopia is party of Geneva and Hague convection with optional protocol one that incorporate command responsibility. However, the Ethiopian penal/criminal code does not expressly deals with situation of command or superior responsibility. As to direct command responsibility, Ethiopian criminal Code does not provide that a military commander or civilian superior shall be criminally responsible for his failure to prevent his subordinate from committing an offence. However, any person effectively giving orders or exercising command and control in a unit shall be deemed equivalent to as principal criminal perpetrators. On the other hand though indirect command responsibility by way of omission is recognized under the general part of Ethiopian criminal code in an ambiguous manner, it is not clearly stipulated and supported by any especial provision.

All in all the Ethiopian criminal law does not stipulate command responsibility as a principle in the general part with its full elements in a clear manner.

Under the Ethiopian criminal law, therefore, it is impossible to hold superiors criminally liable for failure of taking necessary measure on the commission of crime by subordinates unless there is a proof of direct participation in the commission of the offence, either as a principal or co-offender.

Consequently, in the Ethiopian genocide and other trials, it is becoming common to see when superiors are liable when they participated as a principal offender through direct order to subordinates; while it is difficult to ascertain indirect command responsibility of military/civilian superior.

As the case entertained in different courts showed that there was concept of command responsibility provisions. Therefore, it should have more detailed enough law that regulates command responsibility.

Even though, command responsibility developed as customary international law in international as well as domestic area of criminal tribunals, the practice is not existed in Ethiopian courts.

4.2. Recommendation

Even if superior responsibility developed as customary international law as individual criminal responsibility, it is difficult to charge, convict and punish individual superior, unless domesticating such responsibility in the domestic criminal law because the principle of legality must be observed. However, it doesn't mean that criminalizing certain act as crime is only domestic criminal law, it is sufficient to act as crime in international criminal law, but what matter most is nullapoenasine lege per-determined amount of punishment to certain act.

In Ethiopia, the criminal law doesn't stipulate superior responsibility as a general principle at all and not clear even if mentioned incidentally. The court practices also show that command responsibility is not practiced as

customary international law. In addition, there is un-clarity even among the lawyers. Hence, we can say that there is a legal gap in Ethiopia on the issue of command responsibility.

Therefore,

1. Ethiopia should incorporate superior responsibility for international crimes as individual criminal responsibility.
2. The legal gap on superior responsibility in the Ethiopian Criminal law has to be solved by new legislation or amending the criminal law (specifically the criminal code) by the ministry of justice.
3. As a secondary option, the Ethiopian courts should apply superior responsibility as customary international law.

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