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Appraising Command Responsibility As A Basis For Crimnal Liability Under International Humanitarian Law

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Abstract: ***International Humanitarian Law (IHL) imposes responsibilities on military and civilian commanders to ensure that their subordinates strictly adhere to and abide by the rules of IHL in situation of armed conflict. The doctrine of command responsibility is the legal machinery through which this obligation is enforced and punished. The doctrine prescribes the criminal liability of those persons who, being in positions of command, have failed to either prevent or punish the crimes of their subordinate. By this doctrine, a commander is under an affirmative duty, under international law, to ensure that subordinates under his command comply with the rules of IHL. A critical component of this duty is the obligation to prevent/suppress the breach of IHL through effective control and monitoring of subordinates. Also, where the infraction has already taken place, the commander is obligated to adequately punish the culprit. Failure by a commander to do this, will give rise to criminal liability. This work is essentially designed and constructed to espouse the doctrine of command responsibility and accentuate the need for commanders to live up to the confirmatory responsibilities imposed on them by the international community on the respect for and observance of IHL by their subordinates.***

Keywords: Command Responsibility, IHL, Criminal Liability

I. INTRODUCTION

International Humanitarian Law (IHL) is that division of public international law which regulates the conduct of war and seeks to mitigate the hardship occasioned by the outbreak of hostilities. This law does not only place limits on the choice of the means and methods parties to a conflict should adopt, it equally protects persons and objects that are not part of the conflict. The main principle underlying this rule is that human beings are entitled to certain minimum rights – protection, security and respect, whether in time of peace or in war (Buergenthal, 1995: 72). If wounded or captured, he is entitled to care and humane treatment; if dead, his body is entitled to decent treatment (Umozurike, 1993: 212). Buergenthal (1995: 70) describes it as "the human rights components of the law of war." Professor Pictet defines it as that considerable part of international law which is dominated by the feeling of humanity and is aimed at the protection of the persons (Geza Herezegh, 1984: 58). The International Committee of the Red Cross which played a consequential and prominent role in the development of IHL, has defined it to be those international rules, established by treaty or custom, which are specially intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of the parties to a conflict to use methods and means of warfare of their choice

or protect persons and property that are, or may be affected by the conflict (Hans-Peter, 1993: 3).

This branch of law therefore standardizes the conduct of war and also pursues to alleviate the privation elicited by out-break of conflicts. In other words, it imposes parameters and constraints on the choice of means and methods of conducting military operations on the one hand, and on the other, provides for the safeguard of persons who do not or no longer take part in military actions (Igor Blishchenko, 1989: 34). It should be emphasized that the guidelines and philosophies of IHL are applicable notwithstanding of the legality or justness of the conflict. In this connection, parties to conflict acting under acceptable platform of self-defense or under collective action by the United Nations are nonetheless obligated to strictly adhere to the rules of IHL.

Validation of this position can be found in the introductory chapter of the United States department of the Air Force Commanders Handbook on the Law of Armed Conflict issued in the name of the Judge Advocate General. Also, the rules of IHL enjoy universal application which makes it applicable and enforceable against any state whether or not such state is a party to the conventions. Invariably therefore, IHL rules have acquired the status of *jus cogens;* a peremptory rule considered so ultimate from which no derogation is ever permitted. For this reason, the fundamental rules of IHL are to be observed by all the States whether or not they have ratified the conventions that contain them, because they constitute fundamental principles of international customary law. The four Geneva Conventions and the Additional Protocols contain the fundamental rules of humanitarian character from which no derogation is possible by any State (Agarwal, 2011: 934).

In order to realize the objectives set out by the above law, the basic rules of IHL which are contained in the four Geneva Conventions of 1949, the Additional Protocols of 1977 and customary international law have developed a rule that imposes criminal responsibilities on superiors for the actions of their subordinates. The effect of this obligation is that commanders have been entrusted with the task of ensuring respect for that body of laws by their subordinates (Jamie Allan, 2008: 303). The doctrine is designed and constructed to hold military officers accountable for any infraction committed by subordinates under their authority in armed conflict situation. Thus, the doctrine fundamentally focuses on punishing senior military/civilian officers who may not be direct wielders of the weapons of warfare but are deemed nonetheless criminally responsible for failing to act appropriately in controlling and punishing subordinates who breach the rules of IHL. The utility and plausibility of the doctrine is predicated on the fact that since armed forces maintain regimental command structure under a superior, the latter should be held responsible for any infraction by subordinates under his supervision if steps are not taken to prevent and/or punish culpable culprits. Superior responsibility has proved to be a vital conduit for prosecutors at the international tribunals to bring to trial heads of government ministries and other civilian superiors who in their capacity as civilian superiors clearly played substantial role in overseeing and directing violations of IHL without necessarily setting foot in the arena of combat or where the crimes were committed. Command Responsibility is calculated to ensure that the rules of warfare are observed by combatants and enforced by the international community. The doctrine essentially holds military commanders responsible for the acts of their subordinates. That is to say, if subordinates commit violation of the laws of war, and their commanders fail to prevent or punish these crimes, then the commanders also can be held directly and/or vicariously responsible.

This doctrine is not applied whimsically on commanders. To be applicable and for culpability to attach, certain situations and condition must be present. For an individual or commander to be held responsible for the misconduct of his subordinate, the relationship of a commander and subordinate must exist. Armed forces are usually placed under a command that is answerable for the conduct of subordinates thereby creating the needed commander/subordinate relationship. Apart from this, the subordinate must have been guilty of war crimes and the commander had failed in his own duty in the conduct of the war. We seek to evaluate the essence and utility of the doctrine by examining the normative and jurisprudential development and stating its exact nature and application in the enforcement of the rules of IHL.

II. NORMATIVE EVOLUTION OF COMMAND RESPONSIBILITY

Historically, the doctrine of command responsibility gained acceptance and witnessed exponential exposition after World War II, although the doctrine is not novel in military codes or national laws. As early as the 15th century, King Charles the VII Orleans declared that his military commanders were to be held answerable should those under their supervision commit crime against the civilian population, regardless of the commanders' participation in the crimes (Jamie Allan, 2008: 303). Also, in an effort to control the behaviour of armies in the field, in the early 1800s the United States of America government worked with Alfred Lieber, a professor at Columbia University, to codify the rules governing warfare. The U. S. adopted the results, a document, known as the Lieber Code, in 1863 at the outset of the civil war. The Lieber Code represents the first attempt in the history of the modern nation state to codify the conduct of armies. The Code mandated commanders to be in full control of their subordinates and imposed liability on superiors for the delinquency of juniors.

In 1439, Charles VII of France promulgated an Order holding that each captain or lieutenant be held responsible for the abuses, ills and offences committed by members of his company and as soon as he receives any complaint concerning any such misdeed or abuse, he brings the offender to justice so that the said offender be punished in a manner commensurate with his offence, according to this ordinances. If he fails to do so or cover up the misdeed or delays in taking action or if because of his negligence or otherwise, the offender escapes investigation or punishment, the captain shall be responsible for the offence as if he had committed it himself and shall be punished in the same way as the offender would have been (Lescie Green, 1993: 323).

The doctrine has found support under the United Nations international criminal law enforcement regime. The Rwanda

pogrom afforded the UN the opportunity to test the efficacy of the doctrine. Pursuant to Security Council Resolution 955 the statute creating the International Criminal Tribunal for Rwanda (ICTR) was enacted. The relevant section of the statute which dealt with command responsibility is Article 6. Once more, on May 25th, 1993, and subsequent to Resolution 808, the Security Council adopted Resolution 827 that enacted the statute of the International Criminal Tribunal for the former Yugoslavia (ICTY). The Secretary-General's report on the establishment of the ICTY explains that, when a commander is held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates, this is a form of imputed liability or criminal negligence which is the basis of command responsibility (Williams Parks, 1990: 33). Articles 7(1)(3) of the ICTY statutes, 6(1) of the ICTR and Article 5 of the International Criminal Court, (ICC) statute all provide for the application of the doctrine. A corollary of these provisions is to the effect that when war crime is committed by a subordinate the commander will be held criminally culpable 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 measures to prevent such acts or to punish the perpetrator thereof.

The Additional Protocol I ("AP1") of 1977 to the Geneva Convention of 1949 was the first international treaty to comprehensively codify the doctrine of command responsibility.

Article 86(2) of AP 1 states that:

the fact that a breach of the Convention or of this Protocol was committed by a subordinate does not absolve his superior from responsibility if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or about to commit such a breach and if they did not take all feasible measures within their powers to prevent or repress the breach.

The codification of the doctrine of command responsibility is an eloquent testimony of the fundamental character and potency of the doctrine. The development of an effective normative framework by the international community has given great impetus and created a congenial platform for the recognition and enforcement of the doctrine of command responsibility.

III. RESPONSIBILITY IMPOSED ON COMMANDERS IN ARMED CONFLICT SITUATION

It is necessary to reiterate here that generally and in accordance with established military tradition, a commander is responsible for the actions of his subordinates in the performance of their duties. Military law recognizes no principle which is more firmly fixed than the rule that a military superior is responsible for the proper performance by his subordinates of their duties. The responsibility of a commander for controlling and supervising his subordinates is the cornerstone of a responsible armed force (Judge Latimer, 2003: 45).

To effectively exercise control and maintain discipline amongst subordinates, a commander is expected to give clear, concise orders and must be sure they are understood. After taking action or issuing an order, a commander must remain alert and make timely adjustment as required by the changing situation. A commander keeps informed on the situation at all times where he can best influence the action. He supervises his unit by checking on its progress in accomplishment of actions and orders. Stated succinctly, the successful commander ensures mission accomplishment through personal presence, observation and supervision. He alone is responsible for everything his unit does or does not do. The commander is thus authorized to delegate responsibility to subordinates by ordering their means and method of warfare but he is not permitted to abdicate his supervisory role as the bulk stops on his desk.

A commander has a duty, both as an individual and as a commander, to ensure that humane treatment is accorded to non-combatants like civilians, surrendering combatants such as prisoners of war and those rendered *hors de combat* by reason of injury, shipwreck or illness. The provision of the Third General Conventions which deals with the treatment of Prisoners of Wars, specifically article 3 prohibits violence to life and person, particularly by murder, mutilation, cruel treatment, and torture. Also prohibited is the taking of hostages, outrages against personal dignity and summary judgment and sentence. It demands that the wounded and sick be cared for. These same provisions are found in the Third Geneva Convention Relative to the Protection of Civilian Persons in Time of War. While these requirements for humanitarian treatment are placed upon each individual involved in the protected persons, it is especially incumbent upon the commanding officer to ensure that proper treatment is given.

Additionally, all military personnel, regardless of rank or position, have the responsibility of reporting any incident or act thought to be a war crime to his commanding officer as soon as practicable after gaining such knowledge. Commanders receiving such reports must also make such facts known to their Army Chief. It is quite clear that war crimes are not condoned and that every individual has the responsibility to refrain from, prevent and report such unwarranted conduct. While this individual responsibility is likewise placed upon the commanders, he has the additional duty to ensure that war crimes committed by his troops are promptly and adequately punished as required by Articles 86 and 87 of the 1977 Protocol I to the Geneva Conventions of 1949.

Commanders indeed occupy strategic position in warfare. Apart from the fact that they determine the means and methods to be adopted in an offensive operation, they also undertake the planning of the means, method and strategy to be adopted. In view of this, international law places a responsibility on them to ensure that their style is not at variance to the rules of war. Hence, commanders who conduct offensive operations must ensure that they comply with the basic responsibilities of commanders who plan or decide upon an attack. Such commanders must (Rogers, 2005: 5):-

- ✓ Do everything feasible to verify that the target is a military objective.
- ✓ Take all feasible precautions in the choice of weapons and tactics to avoid or at least minimize death or injury to civilian objects.

- ✓ Cancel, suspend or re-plan the attack if incidental attacks are likely to be excessive in relation to the military advantage expected from the attack.
- ✓ Give effective advance warning of attacks which may affect civilian population, unless the circumstances do not permit.

Also, the commander has to consider various factors including: firstly, the importance of the target or the urgency of the situation. Secondly, the Intelligence about proposed targets i.e. what is its being or would be used for and when. And thirdly what weapon is available, their range, accuracy of target such as terrain, weather, night or day etc. In doing this, he is also entitled to take into account the risk to his own troops posed by the various options open to him.

According to Hillier Tim (1999:279), in addition to the question of targets of attack, there are four methods of warfare which are specifically prohibited under international law, namely:

NO QUARTER

This refers to methods of warfare which admit of no limit. An order to leave no survivors and take no prisoners would amount to no quarter and it has long been prohibited by international law. Article 40 of Geneva Protocol I specifically forbid such orders given in relation to enemy combatants. Accordingly, it is a serious infraction for a superior to order or supervise an attack that is indiscriminate and excessive in nature and which has the potency of annihilation of humanity.

STARVATION

Suffering or death caused by having nothing to eat or not enough to eat is not an acceptable war tactics. Therefore, it is a war crime to deliberately subject civilian population to starvation as a means of defeating the enemy. Article 54 of the Geneva Protocol I expressly prohibit the use of starvation as a method of warfare and also prohibit attacks on foodstuffs and other objects and areas indispensable to the survival of the population, for example, drinking water installations. Article 69-71 further provide protection to those engaged in humanitarian relief operations.

BELLIGERENT REPRISALS

Acts of victimization or vengeance directed against civilians, Prisoners of Wars or others *hors de combat* in response to attacks by non-combatants are prohibited by international law. In this connection, any act or practice of resorting to brute force contrary to the dictate and demand of IHL in retaliation for damage or previous loss suffered is not condonable and will attract necessary criminal sanctions.

PERFIDY

International law draws a distinction, which is not always easy to make in practice, between a general level of deception which is an integral part of warfare and the deliberate use of certain specific acts of treachery and 'impermissible ruses' such as the improper use of the white flag of surrender, the use of false flags, and such things as disguising missile sites as hospitals.

Accordingly, the responsibilities of the commander include among others the obligation to ensure that the target is a military objective, precautions in the choice of weapons and tactics to avoid, or at least minimize death, injury to civilians or damage to civilian object, ensure compliance to the rule of proportionality and the need to give advance warnings of attacks which may affect the civilian population (Sanford Kadish, 1985: 323). The reason for the responsibility is that those who have superior positions are the most appropriate persons to control or stop subordinate's acts on the battlefield in terms of position and power (Timothy Wu & Yong-Sung King, 1997: 290). Following this logic, the burden of duty is imposed where a commander has a choice to stop, which means that he should have stopped the subordinates when he found out that the atrocities were happening or had reason to know about the violation owing to the circumstances at that time.

IV. JURISPRUDENTIAL TRENDS OF THE DOCTRINE

As seen above, if subordinates commit war crimes and the commander fails to take measures to prevent or punish the commission of such crimes, criminal culpability will attach for both the subordinate and more importantly the commander. The criminal responsibility of commanders flowing from this doctrine has received judicial authorisation, endorsement and fortification in trials conducted to prosecute war criminals in international and non-international armed conflicts. It is on this basis that a number of commanders were found guilty of war crimes committed by their subordinates in several trials. This doctrine was used as a potent weapon for establishing criminal liability in trials that took place before and after the World Wars and has been effectively engrained in the legal jurisprudence of IHL as part of customary international law. Examined *infra* is an overview of the jurisprudential drifts of the doctrine so as to underscore the criminal culpability under it.

COMMAND RESPONSIBILITY BEFORE THE WORLD WAR

The first instance (Ching, Ann, 1999: 176) of an international trial for war crimes seems to have been of Peter Von Hagen Bach, in the year 1474. He was placed by Charles the Bold, Duke of Burgundy (1433-1477), at the helm of the government of the fortified city of Breisach, on the Upper Rhine. Peter Von Hagen became brutal and brutish in order to reduce the population of Breisach to total submission. All these violent acts were also committed against residents of bordering territories; including Swiss Merchants on their way to the Frankfurt fair (Osim Ndifon, 2007: 162). But a large coalition put an end to the tyranny and ambition of Duke. This was a prelude to Charles' death in the battle of Nancy. Archduke of Australia, under whose authority Von Hagen was captured, had ordered the trial of the bloody governor. An *ad hoc* court was set up, consisting of 28 judges of the allied location of states and towns. The defendant was charged with

murder, rape, perjury. The accused pleaded superior order which was disallowed. He was convicted and executed.

COMMAND RESPONSIBILITY DURING THE FIRST WORLD WAR

During the First World War, the ambiguity of the concept of command responsibility did not see any major war crime prosecutions of military commanders for violation of the laws of war (Ching, Ann, 1999: 176). However, subsequent to the termination of hostilities the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties was established in 1919. One of the first recommendations of this commission was that individuals, regardless of rank or position, could be held criminally culpable for certain acts that contravened the laws and customs of war. Further, it was recommended by the commission that an international court or tribunal ought to be created to deal with the alleged criminal acts or orders of individuals that may be deemed to offend the laws of nations.

It is worthwhile to note that there was considerable debate within the commission on the issue of command responsibility. The report is significant because the discussion was to the effect that both military as well as civilians ought not to be relieved of culpability for either orders or act simply because a superior had been held accountable for the same acts or orders. The actual peace treaty, the Treaty of Versailles, i.e., Treaty of Peace between the Allied and Associated Powers and Germany, June 28, 1919, contained provision for the establishment of an *ad hoc* international tribunal to prosecute the German Kaiser.

One of such trial was in *Muller* Case, a First World War case involving the issue of command responsibility. Captain Muller was officer commanding a prisoner of war camp, in French, that housed English Prisoners of War. He was in command of this facility during the first half of 1918 for perhaps two or three months. The prison camp in question was located in a dirty swamp setting, and the trial court found, as a matter of fact, that disease, inadequate food and water and improper sanitation existed at the relevant time. The court further accepted evidence that on a number of occasions Muller had sent, via his chain of command, requests for suppliers to improve conditions. Muller was charged with two main offences. (1) willful neglect (2) improper punishment of prisoners. As it pertained to the first allegation; the charge of willful neglect, the trial court found that the officer had done everything within his powers to properly treat his prisoners and that the ongoing conditions continued as a result of circumstances which were beyond his control. Muller also faced charges of mistreating prisoners. It was alleged that he allowed them to have been tied or otherwise bound in such a way that they were being mistreated. The court found that these acts were perpetuated by others, and that they were done without the knowledge of the defendant, Muller, and, therefore, he was acquitted. However, Muller was also alleged to have witnessed a prisoner being abused by a German non-commissioned officer and, in registering a conviction on a charge of ill-treatment of prisoners, the court found, as a matter of fact, that even though he did not give the order to have this particular prisoner beaten, nevertheless he either tolerated or condoned the same. He was convicted and sentenced to six months imprisonment.

It is deducible from the foregoing that the doctrine of command responsibility was not firmly established in its entire ramification within this era. At this period, the defence of superior order was accepted as being able to exculpate an accused from criminal liability. Besides, the aspect of commanders being criminally liable for failure to prevent and punish subordinates who breach IHL was not entrenched. Thus, the idea of imputed knowledge for acts of subordinates was never considered. Therefore, command responsibility was developed up to the level where a commander was held liable on the basis of direct responsibility for illegal orders and or participating in war crimes.

COMMAND RESPONSIBILITY UNDER THE SECOND WORLD WAR TRIBUNALS

NUREMBERG TRIBUNALS

The Nuremberg Tribunal was established as a result of the signing of the London Declaration; Agreement for the Prosecution and the Punishment of the Major War Criminals of the European, August 8, 1945. It is perhaps meaningful to note that the Nuremberg Tribunal was a product of a particular treaty. During the lead-up negotiations and discussions to the execution of this treaty, discussions and deliberations took place on the issue of command responsibility and how the same was to be applied. Article 8 of the Nuremberg Charter dealt specifically with the defense of superior order and non-applicability of same. It states that the fact that the Defendant acted pursuant to order of his government or of the superior shall not free him from responsibility, but shall be considered in mitigation of punishment if the Tribunal so requires.

At this stage, the defense of superior order was emasculated as against what was obtainable in the period up to the First World War. This was a major stride in the development of the doctrine of command responsibility. The defense of superior order is a major cog in the respect for and implementation of the rules of IHL. It constituted a potent and technical context for subordinates to breach IHL and escape criminal liability. If subordinates do not carry out illegal orders then the breach of IHL will be drastically minimized.

The Tribunal comprised four judges; one member being appointed from each of the London Agreement Signatories. The trials commenced in November 1945 with lawyers from the four major powers conducting the prosecution case against 22 individuals indicted for crimes under three main categories; crime against peace, war crimes, and crime against humanity. The accused were represented by a German counsel. Article 6 of the charter set out the offences, for which there was to be individual responsibility. This Article can now be regarded as part of customary international law (Malcolm N. Shaw, 1998: 471).

Judgment of the tribunal was handed down on October 1, 1946 and resulted in 12 accused being sentenced to death by hanging (including Martin Bormann who was tried in absentia; Hermann Goerring committed suicide only a few hours before he was due to be executed. Seven other convicted individuals received long terms of imprisonment ranging from

10 years to life imprisonment. The three remaining accused were found not guilty (Clairede Than and Edwin Shorts, 2003: 275).

It was the primary contention of the various defendants that they were entitled to rely upon the defence of superior orders, particularly where the individual lacked the specific knowledge that the order in question was illegal. However the judgment was clear that an individual was obliged to possess certain universal obligations that took clear precedence over a specific set of domestic orders. A reading of the judgments suggests that superior orders was not considered as a defense to criminal acts contravening the law of war, however, and at the same time, the judgments also established that superior orders was still available in mitigation of penalty.

From the foregoing, the chief purpose of the Nuremberg Charter was to establish individual responsibility, negate the superior order defence and deny the immunity of Head of States. In Nuremberg, the defendants were high ranking politicians and military commanders and were actively involved in the formulation and/or execution of a common plan or conspiracy to commit heinous crimes. They were charged with direct responsibility for war crimes. Therefore, the Nuremberg Trial did not have a chance to really deal with indirect responsibility of commanders.

TOKYO TRIAL

In addition to the trials at Nuremberg in Germany, the Allies set up a tribunal to bring to trial the leaders of Japan, another member of the Axis powers in World War II. In Tokyo trials, also known as International Military Tribunal for the Far East, not only commanders but also political leaders were indicted, the idea of which was new under international criminal law at that time. One of the unique aspects of criminal liability in Tokyo is that the notions of direct responsibility and indirect responsibility of superiors were clearly distinguished, and both of them were found to be an act of crime. Although the Nuremberg Trial dealt only with direct responsibility of superiors, the concept of indirect responsibility of superiors was suddenly affirmed in Tokyo. A peculiarity of the difference is that a number of prisoners of war were mistreated by Japanese soldiers without actual orders of superiors during war time, and the superiors in charge claimed that they did not issue orders to mistreat the prisoners of war. Although there remains the question that indirect responsibility of superior was established under international law at that time, the notion of indirect responsibility was accepted in subsequent trials concerning crimes committed during the Second World War (Clairede Than and Edwin Shorts, 2003: 275).

Thus unlike Nuremberg, the Tokyo trial dealt with cases of indirect responsibility of superiors. Some of them were similar to the notion of ordinary negligence of criminal law, but the 'should have known' standard seems to have gone beyond that level. In Tokyo, the punishment of individuals based on inaction of leaders was thoroughly discussed and the court accepted it. However, the criteria to establish the knowledge of superiors had remained ambiguous until the ICTY specified them. Thus, the Tokyo Trial laid the foundation for the development of superior responsibility at the ICTY, the ICTR and the ICC.A major stride in Tokyo would be that it punished defendants with the notion of indirect responsibility, which was neither promulgated in the Charter nor the Control Council No. 10. Applying the same standard of command responsibility to political leaders was however highly debatable during this period.

DEVELOPMENT OF COMMAND RESPONSIBILITY UNDER THE UNITED NATIONS REGIME

INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA (ICTY)

The Tribunal was established pursuant to Resolution 808 of the Security Council which adopted Resolution 827 that enacted the statute of the Tribunal (ICTY). Article 7 of the statute addresses the issue of individual criminal responsibility. Regarding command responsibility the Trial Chamber quoted Report of the Secretary - General stating that individuals who actually participated in the planning, preparation or execution of serious violations of IHL are liable. In relation to the responsibility of commanders who did not actually issue illegal orders, the chamber held that Military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates. Thus, a superior maybe held criminally responsible not only for ordering, instigating or planning criminal acts carried out by his subordinates, but also for failing to take measures to prevent or repress the unlawful conduct of his subordinates.

The Trial Chamber considered the concept of control, using two terms; *de jure* position and *de facto* position. The chamber accepted the prosecution's argument that individuals in a position of authority, whether civilians or military officers, may incur criminal responsibility. It was held that the mere absence of formal authority should no longer be used for precluding criminal leader responsibility. Applying these criteria, the Tribunal in *Mucic Case*, prosecuted a camp commander and found him guilty of violations of IHL based on command responsibility. In the view of the Tribunal, the convict possessed effective control over the subordinates yet he failed and neglected to control and suppress their illegality.

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR)

The United Nations Security Council established the International Criminal Tribunal for Rwanda to prosecute persons responsible for genocide and other serious violations of IHL committed in the territory of Rwanda and neighbouring States, between 1 January 1994 and 31 December 1994. In retrospect, beginning in April 1994, Hutu extremists waged a 100-day campaign that resulted in the murder of at least 800,000 Tutsi men, women, and children, as well as many moderate Hutus. This genocide also involved methodical rape and sexual violence against numerous Tutsi women and the bereaving of many thousands of children.

The *Akayesu* case is a foremost authority in the enforcement of criminal liability on the basis of command

responsibility. While the *Akayesu* judgement is remarkable for the fact that it was the first of the Rwanda cases that found an accused guilty of the crime of genocide (and in this case guilty of crimes against humanity as well) it is more significant in its discussion of the concept of superior responsibility. By way of background the accused, *Akayesu* was elected in April of 1993, to the position of 'bourgmeatre' for the village of Taba. Amongst the formal powers vested in his office was the ultimate authority over, and responsibility for the organization, function and control of the local police. The Trial Chamber found that subject to the residual authority of the prefect, the 'bourgmestic' had responsibility for both executive functions as well as the maintenance of order in the community. In addition, *Akayesu*, was found to have had exclusive control over the local police, and has responsibility for the execution of laws and regulation as well as the administration of justice. The judgment sums up this discussion by observing that the 'bourgmestic' is the most powerful person in the village and that his *de facto* authority was of greater significance than his *de jure* authority. It was against this background that the Trial Chamber considered the doctrine of superior responsibility. Particularly the judgment notes that in the case of civilians, the application of individual criminal responsibility enshrined in Article 6(3), to civilians remains contentious. Against this background, the Chamber holds that it is appropriate to assess on a case-to-case basis that power of authority, actually devolved upon the accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crime, or to punish the perpetrators thereof. The Chamber found that he either knew, or in the alternative, had reason to have known of the criminal acts taking place, particularly, near his own office and he did nothing to either prevent the same or to punish the perpetrators.

A corollary of this is that command responsibility has evolved through international and non-international armed conflicts trials. Since the end of Second World War different bodies, have grappled with the concept. At one end of the spectrum was the strict liability attaching to a superior for the criminal acts of subordinates. At the Nuremberg Trials, the standard was not one of strict liability, but rather determination of what the superior actually knew. The trials of war criminals pursuant to Control Council Law No. 10 further expanded the notion of command responsibility to include not only those in a chain of command, but also those in a specified territory who exercised a form of executive command. The Tokyo Tribunals added the concept of constructive knowledge and that of negligent disregard of information to allow the doctrine to be further clarified. The conflict in the Middle East, in its own way added to development and refinement of the concept with the Kahan Commission's attachment of liability to high-ranking politicians who may have had only minimal notice and to military officers outside the chain of command (Stuart Hendin, 2003: 91). This crisis resulted in the wake of the 1956 Suez Canal conflict because Israel forcefully occupied Sinai Peninsula resulted in serious violation of international humanitarian law. The two United Nations' created *ad hoc* tribunals, through their statute as well as decisions have continued this refinement. It remains yet to be seen as to whether the ICC will follow the bold jurisprudential approach and achievements of the past.

V. CONCLUSION AND RECOMMENDATIONS

The problem for international law has been to identify the individuals responsible for breaches of the laws of armed conflict and to ensure that they are effectively punished. The issue of enforcement has often shown up weaknesses in international law. This has partly been because of the procedural difficulties encountered in bringing to trial those responsible for breaches. IHL has however emerged from its erstwhile status as an obscure branch of international law into an important body of law and procedure uniquely suited to providing accountability for episodes of mass atrocity. Today, IHL is routinely offered as an important solution to vexing international problems like terrorism and serious violation of the law of war among others. The doctrine of command responsibility has created a great impact in this regard. The doctrine has sufficiently filled the fatal gap between the undertaking entered into by parties to a conflict, under IHL, and the conduct of individuals. At this level, everything depends on commanders, and without their conscientious supervision, general legal requirement are likely not to be effective. It is in recognition of this fact that commanders/superiors have been entrusted with the responsibility of ensuring respect for IHL by their subordinates.

After a careful evaluation of the doctrine, we have discovered the need for the creation of legal guidelines to aid commanders in the process of punishing subordinates who breach IHL. To ensure that violators of IHL are adequately punished, we recommend the formulation of rules of universal application to regulate situations where commanders punish their subordinates. These rules should attach specific punishment to each offence and enunciate the minimum penal measures that must be meted out on offending subordinates who commit a specified crime. Leaving the trial and punishment of subordinates by a commander unregulated will create a compelling avenue for subordinates and commanders to escape appropriate and adequate penal sanction.

In addition, the United Nations should consider the setting up of an international enforcement force for the ICC. This will send a strong signal to dictators across the globe that the international community is serious about the enforcement of IHL. As it stands today, the arrest of a former, let alone, a sitting head of state depend largely on luck, trial and error. Those who commit serious violation of IHL and are allowed to engage in hide and seek game are bastardizing the international justice system.

Finally we suggest a review of article 28(2) of the ICC statute removing the requirement of 'conscious disregard of information' from it. Article 28 advances two separate standards. For non-military commanders to incur liability, it must be shown that the person either knew or consciously disregarded information that clearly indicates that subordinates were committing or about to commit such crimes. It will be difficult to proof situations of conscious and unconscious disregard of information. The emphasis should be

the omission or inaction on the part of the superior to take all necessary and responsible measures within his or her power to prevent or repress the unlawful acts.

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