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The Command Responsibility in International Criminal Law and Islamic Law: A Comparative Study

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Abstract

During armed conflicts, it is witnessed that civilians are subject to inhumane treatment by the members of the opponent's armed forces. They become victims of torture, persecution, molestation, biological attacks, enforced prostitution, slavery, and rape. These are the frequent crimes whose commission takes place during a conflict mostly when the territory has been occupied by the forces of an adversary state. These crimes are chiefly committed by the subordinates, as the commanders would not participate in the actual combat in many instances. In International Criminal Law, the doctrine of command responsibility plays an imperative role, in determining and prosecuting the perpetrators of these crimes. According to ICL, "A Commander shall be held criminally responsible for the acts of his subordinates if he had the effective control and was in the authority to punish or prevent them". However, according to Islamic principles, "a leader shall be held liable for the acts of those whom he led". The aim of this research is to compare the concept of command responsibility in Islamic Law and ICL. In addition, it examines the different perpetrators' prosecution modes under ICL and Islamic Law. It will further inquire into the status of subordinates in both Islamic Law and ICL. This research paper will be based on doctrinal research methodology. The data would be collected from international treaties, conventions, and sources of Islamic Law.

Keywords: Command responsibility, Armed conflict, Islamic Law, ICL and Effective control

Command Responsibility in International Criminal Law

Introduction

International Criminal law establishes a method for punishing those who break its principles based on criminal liability. Command/subordinate or Superior/subordinate Responsibility is crucial in the context of international laws, particularly in the ICL. The commander or superior authority (the commander could be a military commander or a civilian leader) shall be held responsible for the unlawful acts committed by their subordinates. Superiors are held accountable in a strict sense when they fail to prevent their subordinates from committing an offense. Culpability occurs when the accused is aware of the rules and is mindful that ordering such an act may violate those standards;

only then will he be held accountable. When subordinates disobey commands, commanders are not held responsible.

Command Responsibility

Rule no. 153 of the Customary International Humanitarian Law (CIHL) elaborates on the notion of command responsibility, stating that:

“Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commissions, or if such crimes had been committed to punishing the persons responsible.”

This rule is applicable in IAC and NIAC. The same rule has been elaborated further in Article 86(2) and Article 28 of the ICC Statute of 1998.

Types of Criminal Liabilities

There are two types of liabilities.

1. The commander shall be held directly liable for ordering his subordinates to commit illegal acts. In this case, if the subordinate considers an order to be unlawful then he may deny following it.
2. The commander or superior shall be held indirectly liable for the illegitimate acts of his/her subordinates, if he has effective control over them, have reasonable knowledge and does not prevent or punish them.

Types Under Rome Statute

There are two types under the ICC statute

1. Article 28, ICC Statute states responsibility of Commander of the armed forces; any person who is having an effective control over the armed forces as a Commander, shall be held accountable for the crimes committed by his/her forces.
2. Responsibility of Civilian Superior; similarly, any person who is not the military head, however, he/she is the civilian superior, shall be liable for the acts of his/her subordinates if he/she knew, or deliberately disregarded, information about the commission of the offence.

Responsibility During NIAC

The Geneva Conventions and Additional Protocol II do not make any specific mention of the Criminal liability during the conflict which is non-international in nature. However, in most of the national legislation's superiors are held liable for the war crimes irrespective of the nature of the conflict, either international or non-international. The ICTY and ICTR, statutes, held superiors accountable in NIAC. This type of accountability applies to all offenses brought before such tribunals. The UN established a Special Court for Sierra Leone, the statute of which claims the same competence in Articles 3 and 4.

The Peace and Justice Initiative 2015 states: For determining the degree of responsibility the tribunals (ICTY, ICTR) use effective control test, based on the evidence of each case in which the court determines whether the superior/commander has the material ability to prevent or to punish the perpetrators (*The Prosecutor vs Bemba*, para 40, ICC-01/05-01/08).

Responsibility for an Omission

Responsibilities arise when a commander orders unjustified acts to be carried out by subordinates or when subordinates commit an offense not commanded by the commander, but he does not penalize the subordinates.

General Yamashita became the first commander to be charged purely based on the blame for an omission, before a U. S. military commission in 1945, which is also famous as the “Victor’s Justice”. During World War II's Pacific Theater, he led the 14th Area Army of Japan in the Philippines when some Japanese troops committed crimes against thousands of civilian population and prisoners of war. He was indicted of "disregarding and neglecting to execute his responsibility as a commander to regulate the activities of members of his command by allowing them to commit war crimes" while serving as commanding officer. Yamashita was executed after his sentence was handed down.

Requirements to Prove Command Responsibility

The commander shall not be held liable unless following 3 elements are established against him;

- (i) That the commander has an effective control and there is superior and subordinate relationship between commander and the perpetrator/offender of crime.
- (ii) That the commander has the knowledge of the commission of the crime or at least having constructive knowledge,
- (iii) The commander does not take any appropriate measures to prevent the perpetrator from the commission of the crime or to punish him as per the rules (*The Prosecutor v Ignace Bagilishema*, para 38 Trial Chamber, June 7, 2001).

Element 1: Presence of Superior Subordinate Relationship and Effective Control

Superior-Subordinate Relationship

It refers to both a formal or informal relationship that exists between a commander and his/her subordinate, in which the subordinate is bound to follow superior orders. The connection isn't exclusive to a military command system (*The Prosecutor v Laurent Semanza*, para 401, Trial Chamber, May 15, 2003).

Effective Control

By effective control we mean the ability of the commander to prevent or his/her authority to punish the perpetrators of crime committed in a place where he/she exercises such control. The effective control is to be determined by the facts of the case (*The Prosecutor v Kayishema and Ruzindana*, para 229-231, Trial Chamber, May 21, 1999), for example if the commander has an ability to prevent the subordinates which is prima facie from the facts of the case, then he shall be held accountable (*The Prosecutor v Ignace*, para 45 Trial Chamber, June 7, 2001).

Control: De facto or De Jure

It is "obliged to evaluate the duty of all those who exerted effective control, i.e., de jure or de facto." The idea of command responsibility is based entirely on the superior's ability to regulate his subordinates' actions. The Pre-Trial Chamber, ICC observed that focusing on the accused's de jure powers would misrepresent the facts at the time, and this could lead or mislead one or both sides by misrepresenting the accused's authority. It can be established that he had been the de jure or de facto commander and that the atrocities were carried out in his directions, the Chamber believes that this should be enough to establish command responsibility (*Supra note 13*, para 229-231.).

Although the imposition of command responsibility requires a position of command, the actual presence, or lack thereof, of a part of control over subordinates is the factor that establishes responsibility. The ability to control subordinates, as evidenced by duties and skill, is a deciding factor in judging who is superior (*The Prosecutor v Ignace Bagilishema*, para 39 Trial Chamber, June 7, 2001.). When a civilian commander has active (de facto/de jure) control, over those who violate international humanitarian law, can he be charged with superior culpability (*The Prosecutor v Alfred Musema*, para 141, Trial Chamber, January 27, 2000, see also *The Prosecutor v Eliezer Niyitegeka*, para 472, Trial Chamber, May 16, 2003).

Applicable to Civilian as well as Military Commanders

The term 'superior' is used instead of the more specific term military leader.' The usage of the words "Heads of State or Government" or "responsible Government officials" indicates that the drafters intended to extend this provision of superior duty beyond military leaders. The Prosecutor v Kambanda and Serushago cases at the ICTR, where the former minister and a "prominent local civilian" and militia leader pleaded guilty to charges, support this interpretation (*Supra note 13*, para 213-215). According to the Chamber, individual criminal responsibility applies not just to military commander but also to civilian superiors/commanders (*Supra note 17*, para 148.), which is further determined on case to case basis (*The Prosecutor vs. Akayesu*, para 491, Trial Chamber, September 2, 1998).

Whether Civilians Require Control Similar to that of Military

The Civilian superiors/commanders may be held criminally liable if they exercise control over their subordinates in a similar way in which the military commanders do control. Control must be effective, and the superior/commander must have the ability and capability to prevent the crime or punish the perpetrator/criminal. It must be evident from the fact of the cases that superior has the awareness about the acts or actions of his associates, and they are following his orders (*The Prosecutor v Ignace Bagilishema*, para 42-43 Trial Chamber, June 7, 2001).

Element 2: Mental State (Mens Rea)

Knowledge or Constructive Knowledge

The superior doesn't need to act knowingly for him to be held liable; all that is required is for him to have knowledge or reason to know that the subordinates are about to commit or had already committed crimes and he fails to take appropriate steps to prevent or punish the perpetrators/criminals. It is proper to ascertain that there was a malicious purpose, or at the very least, that the neglect was severe enough to imply acceptance or perhaps ill intent. Men's rea is an essential requirement to incur criminal liability if it is evident from the direct or circumstantial evidence that the superior has knowledge about the crimes committed by subordinates (*The Prosecutor v Ignace Bagilishema*, para 46 Trial Chamber, June 7, 2001).

It is Not Based on Strict Liability

Although a person's command position may be a piece of strong evidence that he or she was aware of the offenses, such knowledge cannot be assumed solely based on that person's position.

Test for Mental State

Due to the circumstances at the time, if the commander knows or have already the knowledge that the subordinates are involved in committing the offences or are about to commit, he has a more active

obligation to keep himself informed of their activities. If he intentionally disregarded the information then his liability incurs (*Supra note 13*, para 227-228).

Element 3: Prevent or to Punish

Under the rules of international criminal law, it is the utmost responsibility and obligation of the commander that he must prevent his subordinates from the commission of the crimes or if they had committed the crimes, to punish them according to the laws. If he fails to take all necessary and precautionary steps for prevention or appropriate measures for punishing, then he shall be held liable for their acts. For example, if he knows that his subordinates are committing war crimes and he did nothing to stop them, his liability incurs.

It is only required to assess whether the commander knew or had reason to know about the offenses and did nothing to prevent or punish them when he did not order them, the factors of 'knowing' and failure to prevent and punish must be fully considered.

Logic Behind Command Responsibility

We are examining deeper into command responsibility under this heading, looking at the logic and ramifications of command responsibility.

- 1 The primary rationale for this check or obligation is to prevent battlefield losses, particularly by placing commanders under specific constraints.
- 2 It is employed as a deterrence tool to prevent and punish the offenders.
- 3 Another idea underlying this theory is to use it against superiors who act overtly and frequently in ways that save/defend them from criminal accountability because of their elevated/marked positions.
- 4 The scope of the principle is determined by the elements (discussed above). Which requires a superior-subordinate relationship; that the superior knew and had purposefully ignored information that would lead him to believe that a subordinate would be committing or had already committed wrongdoing; and he also fails to take necessary measures to prevent or punish the person responsible for the war crimes.
- 5 The idea should not be misunderstood to mean that it is solely used to hold an individual (Commander) accountable; instead, it is used to determine if the commander could prevent the crime.

Unlawful Orders

In the context of IHL, unlawful orders are those issued by superiors that are inhumane and violate the law. There have been many illegal orders issued by various commanders/leaders of multiple countries throughout history.

Under their domestic law, subordinates are obligated to obey the instructions of superiors, but they are not obligated to follow if they know the orders are unconstitutional. Every combatant or subordinate must disobey an unlawful order (Rule 154, CIHL).

Executing the order of the superior is not a defense against a war crime, if the subordinate knows that the order is illegitimate, he is not bound to follow that order. Several courts have held that superior orders cannot be used as a defense if they are illegitimate, since such instructions must be disregarded (Belgium, Sergeant Case (volume II, Ch.: 43, page no 820).

Many military manuals, official statements and regulations of various states clarify that there is no need of obeying unlawful orders it is the duty of subordinates to defy an order which is unlawful or

illegal or illegitimate or requires the commission of a war crime. The national laws also support this ruling (The US, Military Appeals, Calley Case). In domestic laws, (the Legislation of Armenia, 2017) defiance of an unlawful order does not lead to criminal liability, as subordinates are only supposed to obey the lawful orders.

Analysis of Trial After World War Ii

The concept of Command/Superior/Individual and subordinate responsibility became an important topic during World War the II. Although the Nuremberg International Military Tribunal's Charter did not contain any regulations on the matter, the verdicts reached in different trials apprehended after the war established broad guidelines. The following principles were introduced as a result of the trials held after WWII, which and Article 86(2) AP. I

"If a subordinate violated the Conventions or this Protocol, that does not absolve his commander of the criminal responsibility, as the case may be if he knew, or should have known, in the circumstances at the time, that his subordinates were committing or was about to violate the Conventions or this Protocol."

Further military commanders' responsibilities and obligations to their subordinates are stated in (Article 87, AP I)

"Superiors must prevent or repress severe breaches committed by their subordinates and report them to the appropriate authorities." A superior can only be found criminally liable for neglecting to act if he fails to fulfill these tasks."

Developments After WW-II

The Allies confronted two issues near the conclusion of WWII: punishing Nazi crimes against Jews that occurred before WWII and dealing with thousands of defendants who could be accountable for offences.

Article 6 of the Charter states that: "Leaders, controllers, initiators, and accomplices engaged in the preparation or execution of a common plan to commit any of the offenses are accountable for any acts undertaken by any persons in executing such plan." "Defendants' official positions, whether as Head of State or accountable officers in Government Departments, shall not be construed as absolving them of culpability or lessening punishment," says Article 7. The following propositions can be deduced from this language:

1. A leader who is also the part of government could be held liable for colluding to wage hostilities, even if he did not commit any explicit acts supporting the hostilities.
2. Leaders could also be held liable for subordinates' crimes which are carried out under their orders.
3. Leaders who are the official of the governments could not claim immunity or protection from punishment because of their positions.

These proposals primarily address a commander's liability for giving an unlawful order.

Trial After WW-II

General Tomoyuki Yamashita of Japan was tried after WWII and provided a somewhat contentious modern application of the command responsibility philosophy. He commanded Japanese armed forces in the Philippines, from October 9, 1944, until September 3, 1945, when he surrendered. (Yamashita case, 327 U.S. 1, 1946) under his ultimate command, troops were suspected of obligating

war crimes against US and Filipinos. A Military Commission tried General Yamashita following his capture, and he was found guilty of war crimes during the trial beyond the shadow of doubt and was sentenced to death.

The specific charge against him was that, while commanding his armed forces in a war against US and its allies, he illegally omitted and failed to exonerate his duty as commander to control the operation of the members which were under his command, due to which the subordinates committed brutal acts and other serious crimes against the civilians of the adversary. His failure to act, which the court described as a breach of his duties as a commander, was used to establish his responsibility.

The ultimate and primary object of protecting prisoner of wars and civilians from violence would be mainly defeated invading army commanders who could act with immunity and fail to make and implement reasonable efforts to safeguard them. As a result, the law of war, otherwise known as international humanitarian law, has the assumption that such blatant violations could be stopped by making commanders/superiors responsible for the illegal, unlawful and illegitimate acts of their subordinates during war operations in the territory of their control.

Approach of ICTY:

Protocol I, additional to the four Geneva Conventions of 1949 was the first international pact that defined the command responsibility doctrine following World War the II.

Article 86 of this law states:

“The High Contracting Parties shall repress grave breaches of the Conventions or this Protocol resulting from a failure to act while under a responsibility to do so and shall take all necessary steps to suppress all other breaches.”

According to the second paragraph, the *mens rea* for establishing command responsibility is not strict liability. Instead, given the facts the commander had access to, it is either based on actual knowledge or knowledge indicated from the circumstances. Under Protocol I, it appears that a commander's responsibility to act "feasibly" and "within his ability" to prevent a subordinate from committing a war crime is triggered by actual or implied knowledge.

When the UN adopted the Statute of the ICTY after two decades in 1997, Protocol I's influence was clear." The command responsibility doctrine is addressed in Section 3 of Article 7 of that Act. The command responsibility theory has evolved from ancient concepts to modern international conventions, the ICTY Statute's command responsibility concept rejects that standard by demanding a *mens rea* factor of "knowing or had reason to know."

Command Responsibility in Islamic International Law

Introduction

The principle of command responsibility is a principle of international law that establishes criminal liability upon the commanders of military groups for war crimes committed by soldiers which they have command over and they were aware or had reason to be aware of the fact that soldiers under their command are committing war crimes and did not take reasonable measures to stop such crimes.

In modern history (Nostrand, 1862) we may find its roots embedded within the Lieber code which was a legal doctrine drafted during the American civil war to regulate the conduct of union soldiers on the battlefield and was one of the first modern documents that codified certain core principles of International Humanitarian Law.

During the early to mid-twentieth century the world became engrossed in what would later become to be known as the two great world wars. The first started in 1914 and ended in 1918 and the other started in 1939 and ended in 1942. (Sir J. Causton, 1921) Both world wars led to humankind inventing new and more destructive ways of killing itself. In world war one we see the principle of command responsibility being first applied during the trial of Emile Muller who was a prison warden and was responsible for the deaths of many prisoners. During world war two (UNWCC, 1948) the commander of the Japanese forces of the Philippine islands Tomoyuki Yamashita was held responsible for the acts committed by his troops during war time.

History of Command Responsibility in International Islamic Law

International Islamic Law or Shariah law although is expansive and deals with all walks of human life, from mundane matters involving daily routine life to complex transactions, shariah law works in an entirely different manner than international law would work. (Hossein, 2021) Shariah law does not define criminal acts in the same way international law does. For instance, in international criminal law war crimes, genocide and crimes against humanity are specifically defined in the Rome Statute 1998, however, (Hossein, 2021) shariah law creates distinction by making two categories, one for crimes against the state and the other for crimes against the individual.

Crimes Against State

Generally, as per any law declaration of war against a sovereign nation or any act of aggression against a state is considered a violation of international law unless it is done in self-defense. According to (Farid, 2014) However, in Islamic law declaring war or participating in acts of terrorism against the state is a crime.

What this means is that once a war has taken place there are two types of methods in which justice may be delivered. The first which shall be discussed later is when the victim asks for justice for acts done against them (crimes against individual). The second, is when the ruler, whether democratically elected or selected by clergymen (i.e. the state) acts by prosecuting the perpetrators of such crimes says (C. Hascall, 2014).

Islamic law, as discussed previously does not create a distinction between various crimes. (Chibli, 2020) To this extent to say that it distinguishes between the concepts of international or non-international armed conflicts would also be wrong since shariah law has no concept. Instead the concept of *Baghi* (rebellion) or *Hiraba* (unlawful warfare) exists.

Baghi (Rebellion) in Shariah Law

Baghi or baghy is the term used for acts of aggression or attacks against the state in order to bring about governmental change due to an ideological driven purpose says (Esma'il, 2014) In order to understand who might commit the offense of baghi we must understand that the *bughat* (person who commits baghi) seeks to overthrow what they deem to be an illegitimate government and to bring about political change says (Esma'il, 2014).

To this extent (Hossein, 2021) there is a slight distinction between the two major sects of Islam on who might commit the crime of baghi. The Sunni Muslims believe that baghi or the act of rebellion occurs when it is used to overthrow a ruler has been elected or chosen to rule. The Sunni sect does not create any distinction on good or bad rulers in fact Abu Zakaria Yahya Ibn Sharaf al-Nawawī a sha'fi jurist stated that it is a crime for any person to rebel against a ruler (who is Muslim), irrespective of whether that ruler is a despot. To further (Hossein, 2021) this Al-Sarakhsi, one of the most prominent Muslim jurists stated that when rebellion is created during the reign of a leader who has been chosen, the crime of baghi has been committed.

On the other hand, the Shia school of thought enshrines that *baghi* or acts of rebellion may only be committed against those rulers who are pious and lead their country in accordance with the edicts of Islam. Therefore, the key difference between the two major Islamic sects are that the Shia school of thought believe that rebellion only occurs when the act is performed against someone who is a righteous leader while the Sunni school of thought believe that it is irrelevant whether the leader of the state is righteous or evil. What matters is the fact that the individual was chosen to lead the state and any ideological motivated act to remove such ruler from his position of power would be deemed to be an act of *baghi* or rebellion.

The punishment for committing the crime of *baghi* is the death penalty however unlike the crime of *hiraba* *baghi* is not punished under the hudood, instead it is considered that someone who has committed the crime of *baghi* is ideologically motivated and therefore incredibly dangerous due to the fact that they may not give up their chance to commit the crime again says (Hossein, 2021)

Hiraba (Unlawful Warfare) in Shariah Law

Hiraba is the term used for unlawful warfare and is a more serious offense in comparison to *Baghi*. Essentially, *hiraba* or unlawful warfare means acts that are committed against society and can include crimes like killing non-combatants, setting fire to crops and poisoning sources of water says (Khalid, 2005)

The act of *hiraba* is a serious and heinous crime. Any person who commits the crime of *hiraba* is called a *Muharib* which in English translates to someone who has committed acts against Allah, in other words a perpetrator. In Islamic Jurisprudence the crime of *hiraba* is punished under the divine laws known as hudood. The source of hudood punishment for the crime of *hiraba* may be found in the Quran which is the primary source of Shariah law. The (Quran, 5:33) verse states that:

“The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter.”

The above cited verse of the Holy Quran limits jurists in handing out punishments for the crime of *hiraba* to four possible punishments and each of those punishments are in turn quite severe. The first punishment is to either kill the *Muharib* although the method of killing has not been prescribed. The second is crucifixion. The third is to amputate the hands or feet and the last method of punishment is exile (which is the least severe of the other three forms of punishment).

Crimes Against the Individual

Shariah law like international law understands that human beings have a tendency of harming other human beings, more so in times of peace. Therefore, unlike western international law which establishes the rights and duties of combatants and non-combatants in relation to each other through conventions (the Geneva Conventions), shariah establishes this through the rights of the individual. That being the rights and duties individuals have over each other says (Hossein, 2021).

What this essentially means is that under shariah law the individual who has been victimized can go to the court and seek a remedy from crimes that have been committed against them or people that are close to them. Usually this occurs when crimes have been committed which involve physical harm and direct damage to body of the individual.

In situations where someone has been injured or killed the relatives of the victim can claim one of three things. According to (Hashim, 2019) the first being *qisas* which is punishment in the same

manner as the victim was hurt (eye for an eye). The second is diyat, which is the concept of blood money i.e. where the perpetrator of the crime pays a sum of money to the victim's family in order to be absolved of the crime says (Shafqat, 2020). The last method is simple forgiveness.

Conclusion

Unlike western international law, the principle of command responsibility is clearly outlined in various case laws and legal texts. Islamic law takes a different approach. Under shariah law there is no specific provision that would directly outline the responsibility of a commander or superior and create liability upon him for the actions of those under his command.

A superior would be held directly responsible for the actions of his troops simply by the fact that they had violated the injunctions of Quran while they were under his command. In shariah law, as discussed above there are two methods for legal actions to be taken against a person or group of people. The first being through crimes committed against the individual. In such a case the severity of the punishment and the liability on the part of the commander would change depending on the relief sought and the crime committed by the combatant.

As far as crimes against the state are concerned in both cases (*baghi and hiraba*) state law would demand the death penalty for all those involved due to serious nature of the offenses. For example, a leader or commander who oversees rebellion would in most cases be deemed responsible and has a higher chance of being punished with death than the combatants involved in acts rebellion simply because of the sheer threat that person carries. As far as *hiraba* is concerned the acts committed go against the core values prescribed in the Quran and Sunnah and therefore the person or group of people involved in such acts are not only considered enemies of the state but enemies of society in general and therefore, their punishment would be collective.

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