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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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APPLICABILITY OF THE PRINCIPLE OF COMMAND RESPONSIBILITY AND ENFORCEABILITY OF JUDGMENTS IN CASE OF NON-STATE ACTORS

AUTHORED BY - NOORANSH GROVER

I. ABSTRACT

The paper delves into the intricate realm of command responsibility in International Humanitarian Law (IHL), focusing on the critical obligations of military commanders in upholding the laws of war during armed conflicts. It explores the nuances of command responsibility, emphasizing the duty of commanders to prevent violations of IHL by their subordinates, punish breaches of the laws of war, and report such violations to the appropriate authorities.

The analysis underscores the significance of Article 87 of Additional Protocol I of the Geneva Conventions, which delineates the pivotal role of commanders in ensuring compliance with IHL and holding them individually accountable for war crimes committed by forces under their command. Furthermore, the paper delves into the complexities and challenges of ensuring command responsibility during non-international armed conflicts, highlighting issues such as fragmented command structures, training deficiencies, legal clarity, cultural considerations, and the applicability of the principle to non-state actors.

Ultimately, the paper aims to underscore the importance of accountability, compliance with IHL, and the protection of civilians in conflict settings, advocating for robust training, clear guidelines, enhanced communication, and strengthened compliance mechanisms to navigate the complexities of armed conflicts effectively.

Keywords: Command Responsibility, Non-State Actors, Implementation of Judgment against Non-State Actors

II. OBJECTIVES

- Examine whether the idea of command responsibility applies to non-state actors like terrorists, insurgents, and other armed organisations.
 - Examine how military commanders enforce international humanitarian law (IHL) during armed conflicts, as stipulated in Article 87 of Additional Protocol I of the Geneva Conventions.
 - Explore commanders' dual duty to prevent subordinate IHL violations and punish troop Law of War infractions.
 - Examine the difficulties of assigning culpability during NIACs, assessing command responsibility in complicated conflict situations, and how cultural and ethical factors affect IHL enforcement.
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III. HYPOTHESIS

Command Responsibility should be applied to non-state actors violating provisions of International Humanitarian Law and effectively implementing judgments in such cases is necessary.

IV. INTRODUCTION

International Humanitarian Law, in its pursuit for serving its purpose for repressing violence in instances of armed conflict, has effectively laid down a detailed framework for ensuring that there are minimal instance of unnecessary sufferings and military excesses. One such framework has been the adoption of the principle of 'Command Responsibility'.

Command Responsibility established two-pronged liability of the commander of a state's military force in situations of armed conflict, be it an international armed conflict or a non-international armed conflict.

¹Firstly, there exists a direct liability of a commander for ordering his subordinates to perform an

¹ International Committee of Red Cross, 'Command Responsibility and failure to act' (Advisory Service on International Humanitarian Law, ICRC, 2014) <<https://www.icrc.org/en/download/file/1087/command-responsibility-icrc-eng.pdf>> accessed 31 March 2024

unlawful act. In such circumstances, the subordinate troops can claim this as a defense and avoid individual criminal responsibility for the commission of such acts.² Secondly, the commander can also be held responsible for the unlawful acts committed by his subordinate even in the absence of direct orders given by him. Such liability can be invoked in circumstances wherein the commander fails in his duty to prevent such acts and he was ought to know about the commission of such acts by his subordinate.³

The rationale behind this principle is that the entire framework established by the Geneva Conventions is to target those persons who have committed or ordered for the commission for grave breaches.⁴ A natural corollary of this principle is to impose liability upon those persons who have failed to act have indirectly allowed the commission of such a breach and thus, it becomes imperative for imposition of criminal liability upon such persons.⁵

The basic tenets and principles of IHL apply to both state as well as non-state actors meaning thereby that ratification of IHL conventions is not a prerequisite for parties to an armed conflict to respect these principles.⁶ This effectively communicates that parties to an armed conflict cannot take the defense of non-ratification for avoiding respectability to the basic principles of IHL.

A state as well as a non-state actors have to abide by the Hague Law, Geneva Conventions and Additional Protocols whether they are a signatory to those or not.⁷ This has given effect to customary international law which basically obligates non-ratifying states to be bound by conventions and legal norms which are based on consistent state practice and *opinio juris*,

For effective enforceability of the principles of IHL, it is important that all parties to an armed conflict abide by these principles and decisions imposing liability upon these parties for violating these principles

² Jamie Allan Williamson, 'Some considerations on command responsibility and criminal liability' (2008) 90(870) International Review of the Red Cross <https://www.icrc.org/en/doc/assets/files/other/irrc-870_williamson.pdf> accessed 31 March 2024

³ Sherrie L. Russell-Brown, 'The Last Line of Defense: the Doctrine of Command Responsibility and Gender Crimes in Armed Conflict' (2012) 22(1) WILJ <<https://wilj.law.wisc.edu/wp-content/uploads/sites/1270/2012/02/russell-brown.pdf>> accessed 31 March 2024

⁴ American Red Cross, 'Summary of the Geneva Conventions of 1949 and their Additional Protocols' (ARC, 2011) <https://www.redcross.org/content/dam/redcross/atg/PDF_s/International_Services/International_Humanitarian_Law/IHL_SummaryGenevaConv.pdf> accessed 31 March 2024

⁵ James G. Stewart, 'The Future of the Grave Breaches Regime: Segregate, Assimilate or Abandon?' (2009) 7(4) JICJ <<https://academic.oup.com/jicj/article/7/4/855/857193>> accessed 31 March 2024

⁶ Sandesh Sivakumaran, 'Re-envisioning the International Law of Internal Armed Conflict' (2011) 22(1) EJIL <<https://academic.oup.com/ejil/article/22/1/219/436546>> accessed 31 March 2024

⁷ Vladyslav Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' (2017) 28(2) EJIL <<https://academic.oup.com/ejil/article/28/2/563/3933332>> accessed 31 March 2024

are implemented efficiently.

It is seen that enforceability of decisions of IHL can be a complex task given the nature of non-state actors and there exists numerous challenges to ensure compliance on their part.⁸ Non-state entities often lack the necessary organizational frameworks and resources to adhere to legal rulings, posing difficulties in enforcement.⁹ Moreover, the jurisdictional authority of global courts over such entities is often restricted, impacting the efficacy of enforcing judgments.¹⁰

Despite these obstacles, endeavors are undertaken to hold non-state actors responsible for breaches of International Humanitarian Law. International Criminal Tribunals and the International Criminal Court possess the jurisdiction to prosecute individuals affiliated with non-state armed factions for offenses like war crimes, crimes against humanity, and genocide, subject to specific conditions.¹¹

Nevertheless, executing these judgments effectively may necessitate collaboration from state parties, international bodies, or other entities to ensure their implementation.

V. COMMAND RESPONSIBILITY: ANALYZING THE LAW

5.1 Article 86: Failure to Act

Meaning

Article 86 of Additional Protocol 1 to the Geneva Conventions of 1949 provides for the concept of 'Failure to act'. Clause 1 of Article 86 imposes a mandatory obligation upon the High Contracting Parties as well as the Parties to an armed conflict, to repress all grave breaches and undertake measures to suppress all other breaches of the Geneva Conventions and the Additional Protocol 1 which are a result of a failure to act when under a duty to do so.

A nuanced analysis of this article conveys the inherent categorization of the term 'breach'. The Geneva Conventions address various aspects of humanitarian law during armed conflicts, distinguishing between grave breaches and other breaches.¹² While grave breaches are clearly defined and widely criminalized,

⁸ Cedric Ryngaert, Anneleen Van de Meulebroucke, 'Enhancing and Enforcing Compliance with International Humanitarian Law by Non-State Armed Groups: an Inquiry into some Mechanisms' (2012) 16(3) JCSL <<https://academic.oup.com/jcsl/article/16/3/443/777786>> accessed 31 March 2024

⁹ Tilmann Altwicker, 'Transnationalizing Rights: International Human Rights Law in Cross Border Context' (2018) 29(2) EJIL <<https://academic.oup.com/ejil/article/29/2/581/5057069>> accessed 31 March 2024

¹⁰ Anton O. Petrov, 'Non-State Actors and Law of Armed Conflict Revisited: Enforcing International Law through Domestic Engagement' (2014) 19(2) JCSL <<https://academic.oup.com/jcsl/article/19/2/279/797954>> accessed 31 March 2024

¹¹ Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14(3) EJIL <<https://academic.oup.com/ejil/article/14/3/481/440578>> accessed 31 March 2024

¹² Chile Eboe-Osuji, 'Grace Breaches' as War Crimes: Much Ado about Serious Violations?' (ICC) <<https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/827EE9EC-5095-48C0-AB04-E38686EE9A80/283279/GRAVEBREACHESMUCHADOABOUTSERIOUSVIOLATIONS.pdf>> accessed 31 March 2024

other breaches, often referred to as minor or simple breaches, have received less attention in terms of legislative enforcement mechanisms. States are generally required to suppress all breaches of the Conventions, but the focus has predominantly been on grave breaches.¹³ The duty to legislate enforcement mechanisms for suppressing simple breaches is highlighted by Jean Pictet, a key figure in the development of the Geneva Conventions.¹⁴ However, the legislative actions of states in criminalizing non-grave breaches have been limited, with most states only addressing grave breaches in their legislation¹⁵

The Yamashita Case¹⁶

The Yamashita Case, involving General Tomoyuki Yamashita, is a significant historical event that sheds light on the complexities of command responsibility and war crimes during World War II. The case revolved around Yamashita's alleged involvement in atrocities committed by his subordinates in the Philippines. Despite the lack of direct evidence linking him to the crimes, Yamashita was held accountable under the principle of command responsibility.¹⁷

Facts of the Case:

Yamashita, a Japanese general, faced accusations of failing to prevent his troops from committing war crimes, including torture, rape, and murder of Filipino civilians.¹⁸ The case highlighted the challenges of attributing responsibility to a commander for the actions of their subordinates, especially in the context of wartime chaos and confusion.

¹³ Jesse Medlong, 'All other Breaches: State Practice and the Geneva Conventions' Nebulous Class of Less Discussed Prohibitions' (2013) 34(4) Michigan Journal of International Law

<<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1009&context=mjil>> accessed 32 March 2024

¹⁴ Emily L. Camins, 'Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law' (2016) 10(1) IJTJ <<https://academic.oup.com/ijtj/article/10/1/126/2356892>> accessed 31 March 2024

¹⁵ Yves Sandoz, 'The History of the Grave Breaches Regime' (2009) 7(4) JICJ <<https://academic.oup.com/jicj/article/7/4/657/857200>> accessed 31 March 2024

¹⁶ In re Yamashita 327 U.S. 1 (1946)

¹⁷ Jamie Fellows, 'Law at a Critical Juncture: the US Army's Command Responsibility Trials at Manila 1945-1947' (2020) American Journal of Legal History <<https://academic.oup.com/ajlh/article-pdf/doi/10.1093/ajlh/njaa005/33444498/njaa005.pdf>> accessed 4 April 2024

¹⁸ Jean Senat Fleury, 'The Tokyo Trial' (2022) <https://d1wqtxts1xzle7.cloudfront.net/88866210/THE_TOKYO_TRIAL-libre.pdf?1658511082=&response-content-disposition=inline%3B+filename%3DTHE_TOKYO_TRIAL.pdf&Expires=1712176828&Signature=H~EGnkdrTuJHDR-E7l4r~ZlnZv~JQm9kcNrhORVh~vCUMqSBOih-MtaADQGBqfZSEd0z3ia-bo0Ey6HPBSffFKOKiYuo05SgghHm9S8a1nyyi8za14acqxHq42UyrtAwylb6pFa6Yu6B5xpOnbuup~MeoQ2G2VF4NG6EdqAHjb~vLNHoRt2NBWg3K6dslqk6R5fBj63fbl56C3pwKPPSFSI1~BsZc5MSVc~y7PbgGQyQS~IYoPm9GsfOReQBg~3PD8PURDGG8~f~Jtw9nBspyZVvivHL3P5W2hpJCGXBvUr5hgNmKEJOENxntfs2rncbi852GeXGpTNTYhmixW9qKg_&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA> accessed 4 April 2024

Legal Proceedings:

The legal proceedings against Yamashita were contentious, with debates over the legitimacy of the military commission that tried him. The case raised questions about the fairness of the trial, including concerns about hearsay evidence, procedural anomalies, and the pressure exerted by General MacArthur's headquarters on the trial process.¹⁹

Judgment:

Despite dissenting opinions and claims of a miscarriage of justice, Yamashita was sentenced to death and executed in February 1946. The case sparked debates about the extent of a commander's responsibility for the actions of their troops, especially in situations where control and communication were severely compromised.²⁰

Legacy and Controversies:

The Yamashita Case remains a subject of historical and legal scrutiny, with ongoing discussions about the appropriateness of holding commanders accountable for the actions of their soldiers. The case highlighted the challenges of balancing justice, accountability, and the complexities of wartime decision-making.²¹ Undoubtedly, the Yamashita Case serves as a poignant reminder of the intricate legal and moral dilemmas surrounding command responsibility in times of conflict.²² It underscores the need for nuanced approaches to addressing war crimes and holding individuals accountable within the complexities of military command structures.²³

Case Law: United States v. Wilhelm von Leeb (High Command Case)

The case of United States v. Wilhelm von Leeb²⁴, also known as the High Command Case, was the last of

¹⁹ David Glazier, 'Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission' (2003) 89(8) Virginia Law Review <<https://www.jstor.org/stable/3202371>> accessed 4 April 2024

²⁰ Robin Rowland, 'Command Ability and Command Responsibility: Lt. Col. Hirateru Banno and the "F Force" Trials' (M.A Thesis, York University 2003)

²¹ Kirsten Ainley, 'Excesses of Responsibility: The Limits of Law and the Possibilities of Politics' (2011) 25(4) Ethics and International Affairs <<https://www.cambridge.org/core/journals/ethics-and-international-affairs/article/excesses-of-responsibility-the-limits-of-law-and-the-possibilities-of-politics/A57A5011E1A88DF744D4E1C9BC5E8439>> accessed 8 April 2024

²² Annex – A Note on Command Responsibility (Human Rights Watch) <<https://www.hrw.org/reports/2005/us0405/10.htm>> accessed 8 April 2024

²³ James Stewart, 'The End of 'Modes of Liability' for International Crimes' (2012) 25(1) LJIL <<https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/abs/end-of-modes-of-liability-for-international-crimes/B2D623853D6AC70CE29270F6D7CF2B36>> accessed 8 April 2024

²⁴ United States v. Wilhelm von Leeb et al 12 LRTWC 1 at 59 (1948)

the twelve trials for war crimes held by U.S. authorities in Nuremberg after World War II.²⁵

Facts:

Wilhelm von Leeb, along with other high-ranking German generals, faced charges related to war crimes and crimes against humanity, including crimes against peace, war crimes, and crimes against humanity.²⁶

Importance and Findings:

The trial highlighted the responsibility of military commanders in preventing and addressing serious violations of international humanitarian law, emphasizing the concept of command responsibility.²⁷ The judgment of this case underscored the importance of accountability and adherence to the principles outlined in the Geneva Conventions and international humanitarian law to ensure the protection of victims in armed conflicts.²⁸

Analysis

According to Article 11 of the Additional Protocol I of the Geneva Conventions, breaches are violations of the Protocol's provisions that are not considered grave breaches. These breaches are less severe infractions of the Protocol's rules.²⁹ On the other hand, grave breaches, as defined in both the Geneva Conventions and Article 85 of Additional Protocol I, refer to serious violations of the Conventions and the Protocol.³⁰

Grave breaches involve acts such as willful killing, torture, inhuman treatment, extensive destruction and appropriation of property not justified by military necessity, and other severe offenses.³¹

²⁵ Jewish Virtual Library, 'Nazi War Crimes Trials: High Command Trial' <<https://www.jewishvirtuallibrary.org/high-command-trial-1947-1948>> accessed 31 March 2024

²⁶ Casebook ICRC, 'United States Military Tribunal at Nuremberg, United States v. Wilhelm von Leeb et al' <<https://casebook.icrc.org/case-study/united-states-military-tribunal-nuremberg-united-states-v-wilhelm-von-leeb-et-al>> accessed 31 March 2024

²⁷ John Jay Doughlass, 'High Command Case: a Study in Staff and Command Responsibility' (1972) 6(2) International Lawyer <<https://scholar.smu.edu/cgi/viewcontent.cgi?article=3898&context=til>> accessed 31 March 2024

²⁸ United States Holocaust Memorial Museum, 'Subsequent Nuremberg Proceedings, Case #12: The High Command Case' (Holocaust Encyclopedia) <<https://encyclopedia.ushmm.org/content/en/article/subsequent-nuremberg-proceedings-case-12-the-high-command-case>> accessed 31 March 2024

²⁹ Dieter Fleck, 'Shortcomings of the Grave Breaches Regime' (2009) 7(4) JICJ <<https://academic.oup.com/jicj/article/7/4/833/857159>> accessed 31 March 2024

³⁰ Jean-Marie Henckaerts, 'The Grave Breaches Regime as Customary International Law' (2009) 7(4) JICJ <<https://academic.oup.com/jicj/article/7/4/683/857186>> accessed 31 March 2024

³¹ Lindsay Moir, 'Grave Breaches and Internal Armed Conflict' (2009) 7(4) JICJ <<https://academic.oup.com/jicj/article/7/4/763/857123>> accessed 31 March 2024

The distinction lies in the level of severity, with grave breaches being the most serious violations that are subject to prosecution as war crimes. Understanding this distinction is crucial for determining the gravity of violations of international humanitarian law and the corresponding legal consequences.

5.2 Article 87: Duty of Commanders

Meaning

This provision requires military commanders to ensure that members of their armed forces comply with the rules and principles of international humanitarian law, including the Geneva Conventions and their Additional Protocols. Commanders are tasked with preventing violations of international humanitarian law by their subordinates, punishing any breaches of the laws of war committed by their troops, and reporting such violations to the appropriate authorities.

Analysis

Article 87 of Additional Protocol I of the Geneva Conventions is a pivotal provision that delineates the duty of military commanders in armed conflicts, emphasizing their crucial responsibilities in upholding international humanitarian law.³²

This article underscores the significant role that commanders play in ensuring compliance with the rules and principles of the Geneva Conventions and their Additional Protocols. Commanders are entrusted with the vital task of preventing violations of international humanitarian law by their subordinates, necessitating proactive measures to ensure that their forces adhere to the laws of war and respect the rights of civilians and other protected persons.³³

Furthermore, Article 87 mandates that commanders not only prevent violations but also hold the responsibility to punish any breaches of the laws of war committed by their troops³⁴. This dual obligation highlights the accountability and authority vested in military commanders to maintain discipline and uphold the expected standards of conduct in armed conflicts. The provision also underscores the principle of command responsibility, which holds commanders individually accountable for war crimes and

³² Sylvain Vite, 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations' (2009) 91(873) IRRC <<https://doi.org/10.1017/S181638310999021X>> accessed 31 March 2024

³³ Julian M. Lehmann, 'All Necessary Means to Protect Civilians: What the Intervention in Libya Says About the Relationship Between the *Jus in Bello* and the *Jus ad Bellum*' (2012) 17(1) JCSL <<https://academic.oup.com/jcsl/article/17/1/117/865607>> accessed 31 March 2024

³⁴ Alessandra Spadaro, 'Punish and Be Punished? The Paradox of Command Responsibility in Armed Groups' (2020) 18(2020) JICJ <<https://academic.oup.com/jicj/article-pdf/doi/10.1093/jicj/mqz059/33394475/mqz059.pdf>> accessed 31 March 2024

violations of international humanitarian law committed by forces under their command.³⁵

The principle of command responsibility extends to situations where commanders either had actual knowledge of the crimes or should have known about them but failed to take appropriate action.³⁶ This aspect emphasizes the critical importance of commanders in promoting compliance, accountability, and the protection of civilians during times of conflict.

In essence, Article 87 serves as a cornerstone in the legal framework of international humanitarian law, emphasizing the pivotal role of military commanders in upholding the laws of war, ensuring accountability for violations, and safeguarding the well-being of civilians in the midst of armed conflicts.

VI. COMMAND RESPONSIBILITY DURING NON-INTERNATIONAL ARMED CONFLICT

Responsibility for failing to act during a non-international armed conflict is a complex and critical aspect of international humanitarian law. In the context of non-international armed conflicts (NIACs), commanders and superiors bear significant responsibility for the actions and omissions of their subordinates.³⁷ International humanitarian law (IHL) recognizes the hierarchical structure of armed forces and the authority vested in commanders, imposing specific obligations on them and holding them individually criminally responsible for their own acts, omissions, and those of their subordinates or individuals under their effective control.³⁸ One key legal provision that underpins the responsibility of commanders during NIACs is the principle of command responsibility.

Moreover, customary international law imposes criminal liability for serious violations of common Article

³⁵ Nayef Ahmad Althunibat, 'The Global Accountability of Commanders and Superiors: Exploring the Powers and Responsibilities of the International Criminal Court' (2023) 5(2) Journal of Research Administration <<https://journalra.org/index.php/jra/article/view/682/492>> accessed 31 March 2024

³⁶ Jenny S. Martinez, 'Understanding *Mens Rea* in Command Responsibility: From *Yamashita* to *Blaskic* and Beyond' (2007) 5(3) JICJ < <https://academic.oup.com/jicj/article/5/3/638/790806>> accessed 31 March 2024

³⁷ Hannes Jobstl, 'Bridging the Accountability Gap: Armed Non-state Actors and the Investigation and Prosecution of War Crimes' (2020) 18 JICJ <<https://academic.oup.com/jicj/article-pdf/doi/10.1093/jicj/mqaa026/33788425/mqaa026.pdf>> accessed 1 April 2024

³⁸ Chia Lehnhardt, 'Individual Liability of Private Military Personnel under International Criminal Law' (2008) 19(5) EJIL <<https://academic.oup.com/ejil/article/19/5/1015/505543>> accessed 1 April 2024

3 of the Geneva Conventions in the context of internal armed conflicts.³⁹ This includes breaches of fundamental principles and rules regarding means and methods of combat in civil strife. The responsibility for failing to act during a NIAC extends not only to commanders but also to states, which may be held accountable for violations of IHL attributable to their armed forces or organs.⁴⁰ States are responsible for ensuring that their armed forces adhere to the laws of war and may face consequences for grave breaches of the Geneva Conventions.⁴¹

In situations of armed conflict, the failure to prevent or punish crimes can have severe humanitarian consequences, leading to increased human suffering and violations of fundamental rights. The responsibility for failing to act during a NIAC underscores the importance of accountability, compliance with international humanitarian law, and the protection of civilians. It highlights the need for commanders and states to actively ensure that their forces respect the laws of war, uphold ethical standards, and prevent atrocities during armed conflicts.⁴²

Ensuring command responsibility during non-international armed conflicts (NIACs) presents a myriad of challenges that complicate accountability and compliance with international humanitarian law. The complexities inherent in NIACs, such as fragmented command structures and the involvement of non-state armed groups, pose significant hurdles in identifying clear superior-subordinate relationships.⁴³

In these scenarios, attributing accountability becomes intricate, especially when multiple factions are engaged in conflict, leading to challenges in determining who holds command responsibility.

³⁹ Christa Meindersma, 'Violations of Common Article 3 of the Geneva Conventions as Violations of the Laws or Customs of War under Article 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia' (2009) 42(3) *Netherlands International Law Review* <<https://doi.org/10.1017/S0165070X00005891>> accessed 1 April 2024

⁴⁰ Remy Jorritsma, 'Where General International Law meets International Humanitarian Law: Attribution of Conduct and the Classification of Armed Conflicts' (2018) 23(3) *JCSL* <<https://academic.oup.com/jcsl/article/23/3/405/5236611>> accessed 1 April 2024

⁴¹ Sonja Boelaert-Suominen, 'Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law moving towards a Uniform Enforcement Mechanism for all Armed Conflicts?' (2000) 5(1) *JCSL* <<https://www.jstor.org/stable/44471205>> accessed 2 April 2024

⁴² Benson Wawery Thuo, 'Achieving Accountability from Terrorist Groups for War Crimes and Crimes against Humanity: A Case Study of Somalia' (2022) 1(1) *EAIJHL* <<https://eaijhl.org/wp-content/uploads/2022/09/EAIJHL-Journal-Vol-1-Issue-1-Downloadable-Size.pdf#page=112>> accessed 2 April 2024

⁴³ Chiara Redaelli, 'A Common Enemy: Aggregating Intensity in Non-International Armed Conflicts' (*Humanitarian Law & Policy*, 22 April 2021) <<https://blogs.icrc.org/law-and-policy/2021/04/22/common-enemy/>> accessed 2 April 2024

Additionally, the lack of effective control in NIAC environments further exacerbates the difficulty for commanders to oversee and influence the actions of their subordinates.⁴⁴

Factors like limited communication, geographical distances, and the autonomy of armed groups hinder commanders from enforcing compliance with IHL, highlighting the challenges of maintaining command responsibility in decentralized conflict settings.⁴⁵ Moreover, the issue of training and awareness emerges as a critical challenge in ensuring command responsibility during NIACs.

In multinational operations or diverse conflict environments, ensuring that all troops are adequately trained on international humanitarian law can be a daunting task. Inadequate education on the laws of war can lead to unintentional violations by troops who may not fully grasp their legal obligations, placing a significant burden on commanders to provide comprehensive training and guidance to their forces.⁴⁶ The fast-paced and high-stress nature of combat situations further complicates decision-making for commanders, as the fog of war, limited information, and the need for rapid responses can create dilemmas in determining the legality of orders and actions taken by subordinates.⁴⁷

Commanders must navigate the complexities of combat scenarios while upholding the principles of IHL, underscoring the challenges of making real-time decisions that align with legal standards.⁴⁸ Legal clarity and interpretation also present significant obstacles for ensuring command responsibility during NIACs. The evolving jurisprudence surrounding command responsibility and the interpretation of legal standards can introduce ambiguity for commanders, making it challenging to determine the threshold for criminal

⁴⁴ Office of the High Commissioner for Human Rights, 'International Legal Protection of Human Rights in Armed Conflict' (UN OHCHR New York and Geneva 2011) <https://www.ohchr.org/sites/default/files/Documents/Publications/HR_in_armed_conflict.pdf> accessed 2 April 2024

⁴⁵ Rob Grace, 'Surmounting Contemporary Challenges to Humanitarian-Military Relations' (Watson Institute International & Public Affairs Brown University 2020) <https://watson.brown.edu/chrhs/files/chrhs/imce/research/Surmounting%20Contemporary%20Challenges%20to%20Humanitarian-Military%20Relations_Grace.pdf> accessed 2 April 2024

⁴⁶ United Nations, 'International Laws Protecting Civilians in Armed Conflict Not Being Upheld, Secretary-General Warns Security Council, Urging Deadly Cycle Be Broken' <<https://press.un.org/en/2023/sc15292.doc.htm>> accessed 2 April 2024

⁴⁷ Mark Bonchek and Chris Fussell, 'Use Doctrine to Pierce the Fog of Business' (Harvard Business Review 2013) <<https://hbr.org/2013/02/use-doctrine-to-pierce-the-fog>> accessed 2 April 2024

⁴⁸ International Review of the Red Cross, 'International humanitarian law and the challenges of contemporary armed conflicts' (2007) 89(867) IRRC <<https://www.icrc.org/en/doc/assets/files/other/irrc-867-ihl-challenges.pdf>> accessed 2 April 2024

liability and assess the reasonableness of measures taken.⁴⁹

Navigating the nuances of IHL violations in complex conflict scenarios requires commanders to have a deep understanding of legal principles and the ability to apply them effectively in dynamic and unpredictable environments. Additionally, cultural and ethical considerations add another layer of complexity, as commanders operating in diverse cultural contexts may face challenges in reconciling ethical norms with military orders.⁵⁰

Balancing cultural sensitivities, moral values, and legal obligations in the midst of conflict can create ethical dilemmas that impact commanders' ability to enforce compliance with international humanitarian law.⁵¹ Addressing these multifaceted challenges demands a comprehensive approach that includes robust training programs, clear guidelines on command responsibility, enhanced communication strategies, and ongoing efforts to strengthen compliance mechanisms in NIACs. By recognizing and mitigating these challenges, commanders can navigate the complexities of non-international armed conflicts more effectively, uphold their responsibilities under IHL, and promote accountability in conflict settings.⁵²

The legal framework surrounding responsibility for failing to act during a non-international armed conflict is essential for promoting compliance with international humanitarian law, preventing violations, and safeguarding the well-being of individuals affected by armed conflicts. Commanders, superiors, and states play pivotal roles in upholding the principles of IHL, and their failure to act can have far-reaching consequences. By emphasizing accountability, the legal provisions governing responsibility during NIACs aim to mitigate human suffering, protect civilians, and uphold the standards of conduct expected in times of conflict.⁵³

⁴⁹ Guenael Mettraux, *The Law of Command Responsibility* (OUP 2009) chp. 4

⁵⁰ John Gentry, 'Complex Civil-Military Operations: A U.S. Military-centric Perspective' (2000) 53(4) *Naval War College Review* <<https://www.jstor.org/stable/44638891>> accessed 4 April 2024

⁵¹ Nils Melzer, 'International Humanitarian Law: A Comprehensive Introduction' (ICRC) <https://www.jep.gov.co/Sala-de-Prensa/Documents/4231_002-IHL_WEB_13.pdf> accessed 4 April 2024

⁵² Hitoshi Nasu, 'Operationalizing the 'Responsibility to Protect' and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict' (2009) 14(2) *JCSL* <<https://academic.oup.com/jcsl/article/14/2/209/862280>> accessed 4 April 2024

⁵³ Medecins Sans Frontieres, 'The Practical Guide to Humanitarian Law' <<https://guide-humanitarian-law.org/content/article/3/responsibility/>> accessed 4 April 2024

VII. APPLICABILITY OF PRINCIPLE OF COMMAND RESPONSIBILITY ON NON-STATE ACTORS

In recent years, there has been a growing debate over the applicability of this principle to non-state actors, such as terrorists, insurgents, and other armed groups that operate outside of the formal structures of the state.

On the one hand, non-state actors can and do commit war crimes, and there is a need to hold them accountable for their actions⁵⁴. On the other hand, non-state actors often operate outside of the formal structures of the state, and it can be difficult to establish the necessary level of control and command over their subordinates to hold them accountable under the principle of command responsibility.⁵⁵

One of the main arguments in favor of applying the principle of command responsibility to non-state actors is that they often have a hierarchical structure and a clear chain of command, similar to that of state actors.⁵⁶ This means that non-state actors have the power to control and direct the actions of their subordinates, and therefore have a responsibility to ensure that they are not committing war crimes.⁵⁷ For example, if a non-state actor orders its subordinates to commit a war crime, such as the deliberate targeting of civilians, then the non-state actor can be held accountable for that crime under the principle of command responsibility⁵⁸. Another argument in favor of applying the principle of command responsibility to non-state actors is that it is necessary to ensure that there is no impunity for war crimes, regardless of who commits them.⁵⁹ If non-state actors are not held accountable for their actions, then they may be emboldened to commit further war

⁵⁴ Manisuli Ssenyonjo, 'Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court' (2005) 10(3) JCSL

<<https://academic.oup.com/jcsl/article/10/3/405/877609>> accessed 4 April 2024

⁵⁵ Nicholas Tsagourias, 'Non-State Ungoverned Spaces and International Responsibility for Cyber Acts' (2016) 21(3) JCSL <<https://academic.oup.com/jcsl/article/21/3/455/2567829>> accessed 4 April 2024

⁵⁶ Kubo Macak, 'Decoding Article 8 of the International Law Commission's Articles on State Responsibility: Attribution of Cyber Operations by Non-State Actors' (2016) 21(3) JCSL

<<https://academic.oup.com/jcsl/article/21/3/405/2525375>> accessed 4 April 2024

⁵⁷ Shane Darcy, 'Assistance, direction and control: Untangling international judicial opinion on individual and State responsibility for war crimes by non-State actors' (2015) 96(893) IRRC

<<https://www.cambridge.org/core/journals/international-review-of-the-red-cross/article/assistance-direction-and-control-untangling-international-judicial-opinion-on-individual-and-state-responsibility-for-war-crimes-by-nonstate-actors/9A3F940EDC97D401C3AAC72CD34F4834>> accessed 4 April 2024

⁵⁸ Dan Saxon, 'Violations of International Humanitarian Law by Non-State Actors during Cyberwarfare: Challenges for Investigations and Prosecutions' (2016) 21(3) JCSL <<https://academic.oup.com/jcsl/article/21/3/555/2567000>> accessed 4 April 2024

⁵⁹ Marko Milanovic, 'State Responsibility for Genocide' (2006) 17(1) EJIL

<<https://academic.oup.com/ejil/article/17/3/553/2756272>> accessed 4 April 2024

crimes, and this could lead to a culture of impunity that undermines the rule of law and the protection of human rights.⁶⁰

However, there are also several arguments against applying the principle of command responsibility to non-state actors.

One of the main arguments is that it can be difficult to establish the necessary level of control and command over non-state actors to hold them accountable under this principle⁶¹. Non-state actors often operate in a decentralized and fluid manner, and it can be difficult to identify the individuals who have the power to control and direct the actions of their subordinates.⁶²

Another argument against applying the principle of command responsibility to non-state actors is that it could have unintended consequences, such as discouraging non-state actors from participating in peace negotiations or humanitarian efforts.⁶³ If non-state actors fear that they will be held accountable for war crimes committed by their subordinates, then they may be less likely to engage in peace negotiations or to provide humanitarian assistance to those in need.⁶⁴

Thus, while there are strong arguments in favor of holding non-state actors accountable for war crimes committed by their subordinates, there are also valid concerns about the practicality and potential unintended consequences of applying this principle to non-state actors.

⁶⁰ Alana Tiemessen, 'The International Criminal Court and the lawfare of judicial intervention' (2016) 30(4) <<https://journals.sagepub.com/doi/full/10.1177/0047117815601201>>

⁶¹ Amrei Muller, 'Can armed Non-state Actors Exercise Jurisdiction and Thus Become Human Rights Duty-bearers?' (2020) 20(2) HRLR <<https://academic.oup.com/hrlr/article/20/2/269/5858245>> accessed 4 April 2024

⁶² Harriet Bulkeley and Heike Schroeder, 'Beyond state/non-state divides: Global cities and the governing of climate change' (2011) 18(4) EJIR <<https://journals.sagepub.com/doi/full/10.1177/1354066111413308>> accessed 4 April 2024

⁶³ Claudia Hifmann and Ulrich Schneckener, 'Engaging non-state armed actors in state- and peace-building: options and strategies' (2012) 93(883) IRRC <<https://www.cambridge.org/core/journals/international-review-of-the-red-cross/article/abs/engaging-nonstate-armed-actors-in-state-and-peacebuilding-options-and-strategies/CF8BD9D922D282660D004AA2890E3AEF>> accessed 4 April 2024

⁶⁴ Ben Saul, 'Enhancing Civilian Protection by Engaging Non-State Armed Groups under International Humanitarian Law' (2016) 22(1) JCSL <<https://academic.oup.com/jcs/article/22/1/39/2525367>>

VIII. ENFORCEMENT OF JUDGMENTS AGAINST NON-STATE ACTORS

The enforcement of judgments against non-state actors is a complex and challenging task. Unlike state actors, non-state actors do not have the same legal obligations or mechanisms for enforcing judgments against them.⁶⁵ This means that the enforcement of judgments against non-state actors requires a different approach, one that takes into account the unique challenges and circumstances of non-state actors.

One approach to the enforcement of judgments against non-state actors is to use financial sanctions.⁶⁶ Financial sanctions can be an effective way to hold non-state actors accountable for their actions, as they can disrupt their financial networks and limit their ability to operate.⁶⁷ For example, the United Nations Security Council has imposed financial sanctions on a number of non-state actors, including terrorist groups, for their involvement in war crimes and other criminal activities. These sanctions can include asset freezes, travel bans, and arms embargoes, and can be enforced through international cooperation and coordination.⁶⁸

Another approach to the enforcement of judgments against non-state actors is to use military force.⁶⁹ Military force can be used to target the leaders and infrastructure of non-state actors, and can be an effective way to disrupt their operations and prevent them from committing further war crimes.⁷⁰ However,

⁶⁵ David Kretzmer, 'Rethinking the Application of IHL in Non-International Armed Conflicts' (2012) 42(1) ILR <<https://www.cambridge.org/core/journals/israel-law-review/article/abs/rethinking-the-application-of-ihl-in-noninternational-armed-conflicts/FD452F1CB9260CD1EDFDA9023A15279A>> accessed 4 April 2024

⁶⁶ Francesco Guimelli and Michal Onderco, 'States, firms, and security: How private actors implement sanctions, lessons learned from the Netherlands' (2021) 6(2) EJIS <<https://www.cambridge.org/core/journals/european-journal-of-international-security/article/states-firms-and-security-how-private-actors-implement-sanctions-lessons-learned-from-the-netherlands/2D74ECCB8252B534F2B36C2375BA88F1>> accessed 4 April 2024

⁶⁷ Russell Buchan, 'Cyberspace, Non-State Actors and the Obligation to Prevent Transboundary Harm' (2016) 21(3) JCSL <<https://academic.oup.com/jcsl/article/21/3/429/2566738>> accessed 4 April 2024

⁶⁸ Jonathan Black-Brance, 'Nuclear Terrorism by States and Non-state Actors: Global Responses to Threats to Military and Human Security in International Law' (2017) 22(2) JCSL <<https://academic.oup.com/jcsl/article-pdf/doi/10.1093/jcsl/krx004/19597681/krx004.pdf>> accessed 4 April 2024

⁶⁹ Federica Paddeu, 'Use of Force against Non-state Actors and the Circumstance Precluding Wrongfulness of Self-Defence' (2016) 30(1) LJIL <<https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/use-of-force-against-nonstate-actors-and-the-circumstance-precluding-wrongfulness-of-selfdefence/3B607A56CCE90FEEA4CFC973FDC65991>> accessed 4 April 2024

⁷⁰ Stephanie Meulenbelt and Maarten Nieuwenhuizen, 'Non-State actors' pursuit of CBRN weapons: From motivation to potential humanitarian consequences' (2016) 97(889) IRRC <<https://www.cambridge.org/core/journals/international-review-of-the-red-cross/article/nonstate-actors-pursuit-of-cbrn-weapons-from-motivation-to-potential-humanitarian-consequences/F8CDDFC5729028E7ADB5039830F187FA>> accessed 4 April 2024

the use of military force must be carefully considered, as it can have unintended consequences, such as civilian casualties and the radicalization of local populations.⁷¹

A third approach to the enforcement of judgments against non-state actors is to use diplomatic and political pressure.⁷² Diplomatic and political pressure can be used to isolate non-state actors and limit their ability to operate.⁷³ This can include expelling non-state actors from the territories where they operate, or imposing diplomatic sanctions on states that support or harbor non-state actors⁷⁴. Diplomatic and political pressure can also be used to encourage non-state actors to participate in peace negotiations and to engage in humanitarian efforts.⁷⁵

Despite these approaches, the enforcement of judgments against non-state actors remains a challenging task. Non-state actors often operate in a decentralized and fluid manner, and it can be difficult to identify the individuals who have the power to control and direct the actions of their subordinates.⁷⁶ Non-state actors also often operate in areas where there is a lack of effective governance and the rule of law, making it difficult to enforce judgments against them.⁷⁷

⁷¹ Sahla Aroussi, 'Strange Bedfellows: Interrogating the Unintended Consequences of Integrating Countering Violent Extremism with the UN's Women, Peace, and Security Agenda in Kenya' (2020) 17(4) *Politics & Gender* <<https://www.cambridge.org/core/journals/politics-and-gender/article/strange-bedfellows-interrogating-the-unintended-consequences-of-integrating-countering-violent-extremism-with-the-uns-women-peace-and-security-agenda-in-kenya/4867E46CE1DF9A4AAE84B5C159BBFA52>> accessed 4 April 2024

⁷² Ayelet Berman, 'Between Participation and Capture in International Rule-Making: The WHO Framework of Engagement with Non-State Actors' (2021) 32(1) *EJIL* <<https://academic.oup.com/ejil/article/32/1/227/6273003>> accessed 4 April 2024

⁷³ Britt Koehnlien and Ore Koren, 'COVID-19, state capacity, and political violence by non-state actors' (2022) 59(1) *Journal of Peace Research* <<https://journals.sagepub.com/doi/full/10.1177/00223433211063034>> accessed 4 April 2024

⁷⁴ Seunghwan Kim, 'Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context' (2016) 30(1) *LJIL* <<https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/nonrefoulement-and-extraterritorial-jurisdiction-state-sovereignty-and-migration-controls-at-sea-in-the-european-context/DEB19084E3229F6950496F3F8044CAC6>> accessed 4 April 2024

⁷⁵ Pascal Bongard and Jonathan Somer, 'Monitoring armed non-state actor compliance with humanitarian norms: a look at international mechanisms and the Geneva Call *Deed of Commitment*' (2012) 93(883) *IRRC* <<https://www.cambridge.org/core/journals/international-review-of-the-red-cross/article/abs/monitoring-armed-nonstate-actor-compliance-with-humanitarian-norms-a-look-at-international-mechanisms-and-the-geneva-call-deed-of-commitment/81753DB5717332B1C0CE0FA3BC835AFC>>

⁷⁶ Gloria Gaggioli and Pavle Kilibarda, 'Counterterrorism and the risk of over-classification of situations of violence' (2021) 103(916-917) *IRRC* <<https://www.cambridge.org/core/journals/international-review-of-the-red-cross/article/counterterrorism-and-the-risk-of-overclassification-of-situations-of-violence/61321E0D2023274D6421F88A672C61DF>> accessed 4 April 2024

⁷⁷ David Jason Karp, 'Transnational corporations in 'bad states': human rights duties, legitimate authority and the rule of law in international political theory' (2009) 1(1) *International Theory* <<https://www.cambridge.org/core/journals/international-theory/article/abs/transnational-corporations-in-bad>>

To address these challenges, it is important to build international cooperation and coordination in the enforcement of judgments against non-state actors. This can include sharing intelligence and information, coordinating military and law enforcement operations, and providing technical assistance and training to states that are dealing with non-state actors. It is also important to engage in dialogue and diplomacy with non-state actors, to encourage them to participate in peace negotiations and to engage in humanitarian efforts.

If the principle of command responsibility is applicable to non-state actors, then the enforcement of judgments against them becomes an important issue. The use of financial sanctions, military force, and diplomatic and political pressure can be effective approaches to the enforcement of judgments against non-state actors, but they must be carefully considered and implemented in a way that takes into account the unique challenges and circumstances of non-state actors.

IX. CONCLUSION

The idea of command responsibility in international humanitarian law is an indisputable fact that serves as a crucial instrument to ensure accountability and reduce unnecessary suffering in instances of armed conflict. This is an irrefutable truth. This notion establishes a dual kind of responsibility for commanders. It holds them directly accountable for giving illegal orders to their subordinates, and indirectly responsible for any unlawful actions carried out by their subordinates if the commander fails to prevent or punish such activities. Put simply, commanders have ultimate responsibility for both categories of activities. Both state and non-state actors are obligated to comply with the framework of international humanitarian law (IHL), which prioritizes the importance of following the principles specified in the Geneva Conventions and Additional Protocols, irrespective of whether a party has ratified these treaties.

Enforcing the standards of international humanitarian law is particularly challenging when it comes to non-state actors, since they often lack the necessary organizational structures and resources to comply with legal regulations. Efforts are being made at the international level to establish responsibility for non-state actors that commit breaches of international humanitarian law, notwithstanding the challenges that have been

[states-human-rights-duties-legitimate-authority-and-the-rule-of-law-in-international-political-theory/13C3775B09B5E6E3671B991392735E3C](https://www.ohchr.org/en/hr-bodies/hrc/interim-reporters/interim-reporter-on-the-issues-of-impunity-and-accountability-for-violations-of-international-humanitarian-law)> accessed 4 April 2024

faced. The International Criminal Tribunals and the International Criminal Court has the jurisdiction to prosecute individuals associated with non-state armed organizations for crimes such as genocide, crimes against humanity, and war crimes, as long as certain conditions are fulfilled. However, the effective implementation of these rulings may need the involvement of state parties, international bodies, or other entities to ensure their enforcement.

Both the Yamashita Case and the High Command Case are significant legal precedents that shed light on the complexities of command responsibility and war crimes, particularly in the context of the chaos and uncertainty that arise during times of war. Given the complexities of military command structures, these occurrences emphasize the need of implementing subtle and sophisticated approaches to address the issue of war crimes and ensuring accountability for individuals' acts. To determine the gravity of violations of international humanitarian law and their corresponding legal consequences, it is crucial to distinguish between minor violations and major violations.

Hence, the concept of command responsibility in international humanitarian law is crucial for maintaining order and minimizing the occurrence of unnecessary suffering in times of armed conflict. To effectively enforce the principles of international humanitarian law, it is necessary to employ creative solutions and foster international cooperation. This will ensure that accountability is upheld and that the norms and principles of international humanitarian law are respected. It is particularly challenging to enforce these principles when dealing with non-state actors.



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