Command Responsibility in Armed Conflicts

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The principle objective of the armed forces is to fight and win wars. The distinctive features of the armed forces are :

(a) centralized command,

(b) hierarchy,

(c) discipline,

(d) esprit de corps and

(e) self-sufficiency. The centralized command structure ensures that a continuous chain of command links the very lowest echelon with the supreme headquarter. The Armed forces are arranged in a pyramidal hierarchy, each echelon owing explicit and peremptory obedience to its superior. From high to low, each member is subject to discipline. The chain of command is sacrosanct and everything is supposed to go through clearly established channels. The commanders at various hierarchical levels are responsible for ensuring that, while participating in an armed conflict, the forces under their command follow the laws of war or the international humanitarian law.

The modern doctrine of command responsibility can be defined as the responsibility of commanders for war crimes committed by subordinate members of their command or other persons subject to their control. The concept of 'command responsibility' in armed conflicts embraces two issues. Firstly, it concerns the responsibility of a commander, who has given an order to a subordinate to commit an act which is in breach of the law of armed conflict or whose conduct implies that he is not averse to such a breach being committed. It also covers the plea of the subordinate that he is not responsible for any breach because he was acting in accordance with the orders of, or what he presumed to be the wishes, of his commander, a plea that is more commonly described as that of "compliance with superior superior's orders". A subordinate putting forward such a plea contends that the superior alone is responsible.

Historical

Around 500 BC, Sun Tzu wrote in Ping Fa - "the Art of War" - about the duty of commanders- to ensure that subordinates conduct themselves with a certain level of civility in armed conflict. In 1439, Charles VII of France issued the Ordinance of Orleans, which imposed a blanket responsibility on commanders for all unlawful acts of their subordinates, without requiring any standard of knowledge. About two hundred years later, the Swedish King Adolphus ordered that: "No Colonell or Capitaine shall command his soldiers to doe any unlawful thing: which who so does, shall be punished according to the discretion of the Judges." The first modern attempt to codify what could be described as the laws of war was made in the 1907 Hague Convention. Article 3 of the Convention (IV) provided that if there was a violation of the articles or regulations, the belligerent state so violating them would be responsible for the acts committed by its military and would be liable to pay compensation for the same.

In 1919, subsequent to the termination of hostilities in World War-I the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties was established. The Commission recommended action against some 895 alleged war criminals. However, for political reasons, only 12 German officers were brought to trial before the German Supreme Court and the longest sentence was four years of imprisonment. The German Court accepted the defence of superior orders, which is the logical adjunct to the concept of command responsibility
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The trial of General Yamashita is perhaps the most frequently cited World War-II command responsibility case. It was the first international trial to find a commanding officer criminally liable for the crimes committed by his subordinates. Yamashita was Commanding General of the 14th Army Group between 9 October 44 and 2 September 45. He was also the Military Governor of Philippines. During this period, his troops committed widespread, brutal atrocities including acts of violence, cruelty and homicide resulting in the death of over 25,000 non-combatant men, women and children. Yamashita was charged with 'unlawfully disregarding and failing to discharge his duty as a commander to control the acts of members of his command by permitting them to commit war crimes'. Although it was not alleged that Yamashita had actually issued illegal orders, in finding him guilty, the US military commission found that the public notoriety of the crimes was such that the accused 'must have known' of them and failed to take action to prevent them or punish those responsible.

In appeal, the US Supreme Court ruled that: "the law of war pre-supposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates." The Court held that there was an affirmative duty to take such measures as were within his power and appropriate to protect POWs and the civilian population. The standard applied by the court was that the atrocities were so widespread that Yamashita "must have known" of them despite no evidence of knowledge or direct connection to the accused.

Geneva Conventions of 1949

The Geneva Convention of 1949 lays down that each belligerent party bears moral responsibility under international law for the conduct of all members of its Armed Forces, and that the State is obliged to maintain discipline, law and order at all times. All members of Armed Forces are subject to the military and criminal codes of the states they serve, and in case of infraction, they are liable to be prosecuted before military or civil courts of that state. For example, the Third Geneva Convention (Article 129) states: "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed any of the 'grave breaches' of the present Convention." The 'grave breaches' to which Article 129 refers are listed in Article 130 as :

(a) wilful killing,

(b) torture or inhuman treatment, including biological experiments,

(c) causing great suffering or serious injury to body or health, and

(d) compelling a prisoner of war (POW) to serve in the forces of the hostile Power,

(e) depriving a POW of the rights of fair and regular trial.

Article 3 of the Geneva Conventions (Common Article 3) states that in cases of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions to protected persons, that is, those not taking active part in hostilities; members of armed forces who have laid down their arms; and members of armed forces who are horse de combat by sickness, wounds, detention, etc. The acts prohibited against such persons are:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostage;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment; and
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Geneva Protocol I

The Additional Protocol I to the Geneva Conventions, adopted in 1977, was the first international treaty to codify the doctrine of command responsibility, creating an affirmative duty to repress grave breaches of international law. The provisions relating to command responsibility are contained in Articles 86 and 87 of the Protocol. A commander is liable for grave breaches committed by a subordinate 'if he knew, or had information which should have enabled him' to conclude in the circumstances at the time, that his subordinate was committing or was going to commit such a breach and did not take all feasible measures within his power to prevent or repress the breach. Apart from being liable to be considered a party to war crimes committed by his subordinates, a commander has a general duty to maintain discipline and this includes a duty to take action in respect of war crimes committed, or about to be committed by his subordinates or by other persons under his control. Protocol I places the responsibility on the High Contracting Parties to ensure that commanders prevent breaches, train their subordinates and take action against offenders.

The commanders are to prevent and, where necessary, suppress and report to the competent authorities breaches of the Geneva Conventions and Protocol I. This applies in relation to members of the armed forces and other persons under their command. The commanders are also responsible for making members of the armed forces under their command aware of their obligations under the Conventions and Protocol.

The International Criminal Tribunal for Yugoslavia

In the wake of the human rights violations committed in the former Yugoslavia, the UN Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993. It has jurisdiction over four types of crime committed on the territory of the former Yugoslavia since 1991:

(a) grave breaches of the 1949 Geneva Conventions,

(b) violations of the laws or customs of war,

(c) genocide, and

(d) crime against humanity. It can try only individuals, not organizations or governments. It was the first international criminal court to enforce the existing body of international humanitarian law, and in particular, judicially determine its customary law aspects.

Article 7(3) of the ICTY Statute states that the fact that the crimes "were committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators". There are two standards of knowledge encompassed by Article 7(3): "knew" and "had reason to know". "Knew" refers to actual knowledge, which can be established either directly or through circumstantial evidence. The meaning of "had reason to know" has been the most contentious aspect of command responsibility before the ICTY. The Appeal Chamber (ICTY) has held that the ordinary meaning of Article 86 of the additional Protocol indicated that the commander must have some information available to him, which puts him on notice of the commission of unlawful acts by his subordinates.

The ICTY has set following legal and institutional precedents:

(a) It identified and applied the modern doctrine of criminal responsibility of superiors, or command responsibility, clarifying that a formal superior-subordinate relationship is not necessarily required for criminal responsibility.
(b) It removed uncertainty about the level of knowledge to be expected from a superior whose subordinates were about to commit crimes he did not prevent, or about crimes actually committed by them.
(c) It expanded the legal elements of the crime of grave breaches of the Geneva Conventions of 1949 by further defining the test of overall control.

Rome Statute of the International Criminal Court

The idea behind the establishment of an International Criminal Court grew out of the realization that domestic courts are often "insufficient" to deter crimes under international law. The doctrine of command responsibility has been codified in Article 28 of the Rome Statute of the International Criminal Court. Article 28(a) imposes individual responsibility on military commanders for crimes committed by forces under their effective command and control if they ´either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes'. Interpreted literally, Article 28(a) adopts the stricter "should have known" standard. It is felt that this provision will serve as a deterrent, giving incentive to a commander to be aware of what his subordinates are doing. The offences dealt with under the Rome Statute are genocide, war crimes and crimes against humanity. The ICC is complementary to national jurisdictions and will intervene only where States are unable or unwilling to act.

The doctrine of command responsibility plays a fundamental role in regulating the behaviour of superiors and their subordinates in times of war. In order to meet its international obligations, the UK has passed the International Criminal Court Act, 2001. The military manuals of the US, Canada and Australia have also been amended to incorporate provisions relating to command responsibility.

The Indian Armed Forces

The Indian armed forces have been involved in UN peacekeeping missions as well as in international and internal conflicts for the last 60 years. Though India is not a party to the Rome Statute of the ICC, and has also not ratified the Additional Protocols, it is imperative that the concept of command responsibility be analysed, keeping in view the existing realities of armed conflict and developments in international law.

In the last 20 years, the national legal system has made qualitative advances. This is due in large part to the impact of international human rights norms on national legislation. The international legal system now includes the concept of international criminal accountability for the commission of certain international crimes, and the emerging concept of the duty to protect the human rights of innocents. In March 2006, the UN General Assembly adopted the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law". The UN document states that in cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, states have the duty to investigate and to prosecute the person allegedly responsible for the violations. The Supreme Court of India has also, in a number of cases, tried to assimilate or incorporate the international standard into domestic law.

We ought to examine the possible methods available to incorporate the superior responsibility standard into domestic military manuals. The international standard should be incorporated so that it does not appear that our commanders have a greater degree of immunity in military operations than those from the rest of the world. If we are to hold ourselves out as an armed Force that supports the rule of law, the internationally accepted "knew or should have known" standard of command responsibility should be followed domestically. It is more likely to prevent war crimes because it places a greater burden on commanders to pay attention to the acts of subordinates, an affirmative duty to stay informed. Moreover, adopting the superior responsibility standard will bring the Indian courts-martial practice in line with the customary international law of war.

If Indian courts-martial practice is to conform to international law, the government would need to expand the culpability of commanders where their subordinates are committing violations of the law. Perhaps the best way to resolve the issue would be for the Parliament to amend the Army Act, 1950 (and also the Air Force and the Navy Acts) to comport with the international standard. One significant advantage in following the amendment approach would be that the international standard for command responsibility would be clearly codified as domestic law. Such an amendment would allow the armed forces to continue its preference and policy of trying service members alleged to have violated the law by a court-martial.

Conclusion

The most important factor in the reduction of war crimes is an assertive and proactive command structure that aggressively seeks to prevent its subordinates from committing atrocities. Recognising this fact, the international community seeks to hold commanders personally liable for the crimes committed by subordinates if the commander "knows or should know" that the subordinates are involved in criminal conduct and the commander fails to take action to stop such acts. The doctrine of command responsibility serves as a deterrent to the commission of war crimes by forcing commanders to internalise some of the cost for directing or acquiescing to atrocities committed by their troops. To conform to the international standard, the services' Acts should be amended to create a basis of culpability for commanders equal to the international standard. It would perhaps be beneficial from a policy standpoint for the armed forces to try those who violate the laws of war as criminals under domestic law rather than as war criminals, which may trigger a host of international legal requirements based on treaty obligations. Moreover, asserting that domestic jurisdiction exists to cover alleged violations of the laws of war may prevent jurisdiction from being asserted by another country or an international tribunal.

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