

CHAPTER TWO

LITERATURE REVIEW

A. Command Responsibility

Command responsibility assigns criminal responsibility to higher-ranking members of the military for crimes of genocide, crimes against humanity, and war crimes committed by their subordinates. It has been adjudicated upon through the form of superior responsibility in a number of cases before the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, based on overlapping yet distinct legal classifications as well as the International Criminal Court, through the classification of command responsibility¹⁰

The responsibility of commanders includes two concepts of criminal responsibility:

First, the commander can be held directly responsible for ordering his subordinates to carry out unlawful acts. In this context, subordinates who invoke the defense of superior orders may avoid liability depending on whether, in the circumstances, they should have obeyed or disobeyed the order of superiors.

This is to be distinguished from the second concept, called command or superior responsibility, where the commander may be held liable for a

¹⁰ Article 28 of the ICC Statute, differentiating between the responsibility of commanders under Article 28(a) and nonmilitary or military-like superiors in Article 28(b).

subordinate's unlawful conduct. This concept of command responsibility is a form of indirect responsibility and is based on the commander's failure to act.¹¹

As a mode of liability, command responsibility assigns criminal responsibility to high-ranking members of the military as well as a militia for the crimes committed by their subordinates. At the most basic conceptual level, the individual criminal responsibility of such high-ranking individuals is attributed through their inactivity and requires both that they hold a superior-subordinate relationship with the direct perpetrators and that they knew or should have known that the crimes were being or had been committed.

These requirements have been codified in various ways in international legal instruments, as forms of military discipline in International Humanitarian Law, into a mode of individual criminal responsibility which applies to military leaders as well as leaders of military-like organizations, such as paramilitary groups, armed defense organizations and rebel groups. As such Van Sliedregt has recognized it that "an important tool in punishing those in superior positions for lack of supervision over persons under their command or authority"¹² but also as a peculiarity of international criminal law.¹³

¹¹ International Committee of Red Cross, 2014, *Command Responsibility and Failure to Act*, Geneva, Geneva, Advisory Service on International Humanitarian Law, p. 1.

¹² Elies van Sliedregt, 2012, *Individual Criminal Responsibility in International Law*, Oxford, Oxford University Press, p. 183-184.

¹³ *Ibid.*

The definition of command and supervisor responsibility has been acknowledged as “the longest definition of a single modality concerning individual criminal responsibility under International Law.”¹⁴ International Humanitarian Law provides a system for repressing violations of its rules based on the individual criminal responsibility of those responsible. The violations can also result from a failure to act. In armed conflict situations, armed forces or groups are generally placed under a command that is responsible for the conduct of subordinates.¹⁵

When speaking of the responsibility of a commanding officer for war-humanitarian crimes, or Command Responsibility, there exists a common misunderstanding that this responsibility represents an objective responsibility arising from the very duty to command which he or she is entrusted with.¹⁶ Since the criminal liability of a commanding officer for war-humanitarian crimes, same as the criminal liability of any other person for any other crime, must be based on conscious and intellectual component of the perpetrator, having in mind the fundamental legal standards in determining the possible criminal liability of a person, in relation to the command responsibility for war-humanitarian crimes.

¹⁴ Roberta Arnold and Otto Triffterer, “Article 28: Responsibility of Commanders and Other Superiors” in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd ed, Beck 2008), p. 798.

¹⁵ International Committee of Red Cross, *Loc. Cit.*

¹⁶ Franjo Bacic, 2001, “Command Responsibility”, *Croatian Annual for Criminal Law and Practice*, Vol. 8., No. 2/2001, Colombia, Centre of International Law Research and Policy, p. 113.

B. Autonomous Weapons Systems

The weapons systems used today are remotely controlled instead of capable of autonomously operating on their own.¹⁷ From the perspective of International Humanitarian Law, remotely operated weapons systems are rarely uncontroversial because they are under the control of a human operator.¹⁸ The International Committee of Red Cross (ICRC) has defined Autonomous Weapons Systems as: “Any weapons systems with autonomy in its critical functions. That is, a weapon system that can select (i.e., search for or detect, identify, track, select) and attack (i.e., use force against, neutralize, damage or destroy) targets without human intervention.”¹⁹

There are some classifications of Autonomous Weapons Systems that has been made by Human Rights Watch based on the degree of autonomy, in order to categorize the various forms of Autonomous Weapons Systems:²⁰

1. The first category is the *Human-in-the-Loop Weapons*. These weapons are described as: “A weapon system that, once activated, is intended only to engage individual targets or specific target groups that have been selected by a human operator.” So, these weapons systems can select individuals targets or specific groups of targets and deliver force

¹⁷ Hin-Yan Liu, 2012, “Categorization and Legality of Autonomous and Remote Weapons System”, *International Review of the Red Cross* Volume 94 Number 886 Summer 2012, Cambridge, Cambridge University Press, p. 631.

¹⁸ *Ibid.*

¹⁹ Neil Davison, *Op. Cit.*, p. 5.

²⁰ Human Rights Watch, 2012, “Losing Humanity: The Case against Killer Robots”, <https://www.hrw.org/report/2012/11/19/losing-humanity/case-against-killer-robots#> accessed on 10 February 2019 at 7:32 p.m.

only with a human command.²¹ These weapons are Semi-Autonomous Weapons Systems.

2. Second Category, *Human-on-the-Loop Weapons*: Robots that can select targets and deliver force under the oversight of a human operator who can override the robots' actions. So, these weapons systems can autonomously select and engage specific targets. No human must decide if those particular targets are to be engaged, but there is a human operator who can intervene to halt the operation if necessary.²²
3. Third Category, *Human-out-of-the-Loop Weapons*: Robots that are capable of selecting targets and delivering force without any human input or interaction.²³ These weapons systems are capable of selecting targets and delivering force without any human input or interaction.²⁴ These weapons systems are programmed to autonomously select individual targets and attack them in a pre-programmed selected area during a certain period of time.²⁵

Autonomous Weapons Systems are mostly categorized as *human out of the loop* weapons systems. However, some categorize Autonomous

²¹ Human Rights Watch, 2012, "Losing Humanity: The Case against Killer Robots", <https://www.hrw.org/report/2012/11/19/losing-humanity/case-against-killer-robots#> accessed on 10 February 2019 at 7:54 p.m.

²² Paul Scharre and Michael C. Horowitz, 2015, *Autonomy in Weapons System*, Washington D.C, Center for a new American Security, p. 8.

²³ Human Rights Watch, 2012, Losing Humanity: The Case against Killer Robots, <https://www.hrw.org/report/2012/11/19/losing-humanity/case-against-killer-robots#>, accessed on 10 February 2019, at 5:12 p.m.

²⁴ Jack M. Beard, 2014, *Autonomous Weapons and Human Responsibilities*, Nebraska, College of Law, University of Nebraska, p. 627.

²⁵ AIV, CAVV, *Autonomous Weapons Systems: the Need for Meaningful Human Control*, No 97 AIV/ No. 26 CAVV, 2015, p. 19.

Weapons Systems as human beyond the wider loop weapons systems, because Autonomous Weapons Systems are not truly making their own choices, they are performing certain actions on the basis of human-defined rules, and they respond to signals picked up by its sensors.²⁶

C. International Humanitarian Law

International Humanitarian Law (IHL), also known as the Laws of War or the Law of Armed Conflict, is the legal framework applicable to situations of armed conflict and occupation. As a set of rules and principles, it aims, for humanitarian reasons, to limit the effects of armed conflict.

Fundamental to IHL are the following two principles:

1. Persons who are not, or are no longer, participating in hostilities must be protected; and
2. The right of parties to an armed conflict to choose methods and means of warfare is limited.

IHL is a part of Public international law. Public international law is a broad set of treaties, customary law, principles, and norms. The framework traditionally regulated relationships only between States. It has evolved, however, to cover a broad range of actors. IHL is notable in this regard, as it recognizes obligations for both States and non-State armed groups that are parties to an armed conflict.

IHL regulates activity during armed conflict and situations of occupation. It is distinct from and applies irrespective of, the body of law

²⁶ *Ibid*, p. 10.

that regulates the recourse to armed force. This framework is known as the *jus ad bellum* and is preserved in the United Nations (UN) Charter. It regulates the conditions under which force may be used, namely in self-defense and pursuant to UN Security Council authorization. Once there is an armed conflict, IHL applies to all the parties, whether a party was legally justified in using force under *jus ad bellum* principles.

The balancing of humanity and military necessity is seen in the foundational IHL norms of distinction and proportionality. Parties to an armed conflict are required to distinguish, at all times, between civilians and combatants and between civilian objects and military objects. Additionally, an attack may not be launched if it is anticipated to cause incidental loss of civilian life, injury to civilians, or damage to civilian objects that would be excessive in relation to the direct military advantage anticipated. Additional IHL principles include the duty to take precautions to spare the civilian population before and during an attack, the prohibition against the infliction of unnecessary suffering or superfluous injury, and the prohibition of indiscriminate attacks.²⁷

International Humanitarian Law is founded upon the following principles:

1. the distinction between civilians and combatants
2. prohibition of attacks against those *hors de combat*
3. prohibition on the infliction of unnecessary suffering
4. principle of proportionality

²⁷ International Justice Resource Center, International Humanitarian Law, <https://ijrcenter.org/international-humanitarian-law/> accessed on 14 February 2019 at 7:29 p.m.

5. notion of necessity
6. principle of humanity

In terms of Means and Methods of Warfare, especially on the use of Autonomous Weapons Systems, there are three main principles that must be considered. Those are the principle of Distinction, Proportionality, and Unnecessary Suffering.

Each basic principle should be found within the specific rules and norms of IHL itself, but the principles may also help interpretation of the law when the legal issues are unclear or controversial. Depending on the issue, the balance between the principles and interest shifts. For example, during hostilities, military necessity may limit the notion of humanity by allowing for destruction, but in other situations such as the protection of the wounded and sick, the principle of humanity is at the heart of the legal rules.²⁸

IHL is applicable in a situation where there is a conflict of armed people or armed group and in IHL the situations classified into 2 situations. Non-International Armed Conflict and International Armed Conflict. International Armed Conflicts (IAC) are those waged between States,²⁹ or between a State and a national liberation movement³⁰ provided the requisite

²⁸ Diakonia, 2019, “Basic Principle of IHL”, <https://www.diakonia.se/en/ihl/the-law/international-humanitarian-law-1/introduction-to-ihl/principles-of-international-law/> accessed on 15 February 2019 at 3:02 p.m.

²⁹ Common Article 2 of Geneva Convention 1949.

³⁰ Article 1(4) of Additional Protocol I and relating to the Protection of Victims of International Armed Conflict.

conditions have been fulfilled.³¹ It is generally accepted that an international armed conflict is triggered when there is a gap between two States leads to the use of armed force by one against the other, regardless of the intensity of fighting or its duration. IHL governing international armed conflict is comprised of a series of treaties, the most important of which are the 1949 Geneva Conventions for the protection of victims of war and the First Additional Protocol of 1977. International armed conflicts were for centuries governed primarily by rules of customary IHL, which remains an important source of applicable rules to this day.³²

It is different with Non-International Armed Conflict (NIAC); it can be defined that Non-International Armed Conflict is one waged between a State and one or more organized non-State armed groups or between such groups themselves.³³ IHL does not specify the criteria that must be met for the threshold of non-international armed conflict to be reached, but they have been identified in practice, jurisprudence, and doctrine. It is generally accepted that a certain intensity of hostilities and the requisite organization of the non-State armed group are conditions that must be fulfilled in order to classify a situation of violence as a NIAC.³⁴

In International Armed Conflict, IHL permits the internment of Prisoners of War (POWs) and, under certain conditions, of civilians. As the

³¹ *Ibid*, Art 96(3).

³² Common Article 3 of Geneva Convention 1949, Additional Protocol to Geneva Convention; and Relating to the Protection of Victims of Non-International Armed Conflict.

³³ Common Article 3 of Geneva Convention 1949.

³⁴ *See* ICTY, *The Prosecutor v. Dusko Tadic*, Judgment, IT-94-1-T (7 May 1997), p. 561-568.

Lex Specialis crafted specifically for situations of armed conflict, IHL applicable in International Armed Conflict is the interpretive tool by means of which the interplay between this body of norms and Human Rights law may be determined. POWs include combatants captured by the opposing party in an International Armed Conflict. As a term of “combatant” symbolizes a legal status that, as such, exists only in this type of conflict. Under IHL rules on the conduct of hostilities, a combatant is a member of the armed forces of a party to an international armed conflict which has “the right to participate directly in hostilities.”³⁵

³⁵ Article 43(2) of Additional Protocol I, this exclude Medical and Religious Personnel.