Where the Buck Stops: Command Responsibility in Extrajudicial Killings — Educing Reasonable Standards for Imposing Command Responsibility Liability on Responsible Military Officers

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I. INTRODUCTION..165
II. THE PHILIPPINE PHENOMENON OF EXTRAJUDICIAL KILLINGS: PRESENT-DAY SCENARIO..170
A. General Background
B. Legal Implications of the Extrajudicial Killings
III. COMMAND RESPONSIBILITY: DOCTRINE AND APPLICATION.........182
A. Command Responsibility and Its Development in International Law
B. Applicability of the Command Responsibility Doctrine in Philippine Jurisdiction
IV. COMMAND RESPONSIBILITY LIABILITY: THE PROBLEM OF CHARACTERIZATION..224
A. Hurdling the Constitutional Bar and the Nullum Crimen Sine Lege Principle
B. The Problem of Characterization: What Constitutes Command Responsibility Liability and Who May be Liable?
V. LAW OR RULE? HOW COMMAND RESPONSIBILITY LIABILITY MAY BE IMPOSED...235
A. Is There a Need for Legislation to Make Command Responsibility Apply?
B. The Alternative: Creation of a Rule to Lay the Condition for Command Responsibility Liability to be Imposed
VI. CONCLUSION...241
A. At the International Level
B. At the National Level

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Cite as 54 ATENEO L.J. 164 (2009).

I. INTRODUCTION

Though deaths and disappearances are often daily fodder for tabloid headlines, when they become one too many and involve persons bearing similar ideological leanings, society cannot just turn a blind eye and ignore them. In recent months, the news about unexplained extrajudicial killings of civilian militant activists and journalists have persistently hogged the headlines and have not only brought to the public consciousness the existence of flagrant violations of human rights, but also triggered finger-pointing by the usual suspects at the opposite sides of the political spectrum. In response to international and domestic public clamor to find some explanation for what seemed like politically-motivated killings, on 21 August 2006, President Gloria Macapagal-Arroyo issued Administrative Order No. 157 creating an independent commission, led by former Supreme Court Associate Justice Jose Melo, to probe the killings of media workers and activists. The Commission, which came to be known as the Melo Commission, was tasked to investigate the spate of extrajudicial killings reported by the media as having taken place between the years 2001 and 2006. Within five months from the time it was constituted, the Melo Commission came out with a controversial report (Melo Report) implicating military personnel as having a hand in some of the killings, even to the point of naming the possible involvement of a notorious military officer. Though the report was not conclusive enough to identify the perpetrator who may be criminally convicted,[1] among the recommendations the report made was for the President to propose legislation "requiring police and military forces and other government officials to maintain strict chain-of-command responsibility with respect to extrajudicial killings and other offenses committed by personnel under their command, control, or authority."[2]

The Supreme Court, concomitantly, upon the recommendation of President Macapagal-Arroyo, came out with Administrative Order No. 25-2007, setting up special courts to hear, try, and decide cases involving killings of political activists and members of the media, pursuant to *Batas Pambansa Bilang* 129,[3] in the interest of the speedy and efficient administration of justice. These special courts are specifically designated to hear cases involving "political killings." According to the Administrative Order, in determining

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1. Report of the Independent Commission to Address Media and Activist Killings, 61 (Jan. 22, 2007), *available at* http://www.pinoyhr.net/reports/meloreport.pdf (last accessed Apr. 23, 2009) [hereinafter Melo Report].

2. *Id.* at 71.

3. An Act Reorganizing the Judiciary, Appropriating Funds Therefor, and for Other Purposes, Batas Pambansa Blg. 129 (1980).

whether a crime is a "political killing," the following factors, among others, shall be considered: (1) political affiliation of the victim; (2) method of attack; and (3) reports that state agents are involved in the commission of the crime or have acquiesced in them.[4]

Not content with leaving the issue to be dismissed in history as just one more event in communal memory or of being charged with inutile inactivity and indifference to the issue of extrajudicial killings, Chief Justice Reynato Puno called for a multi-sectoral national summit to search for solutions and "gather 'inputs' on how the judiciary could fully utilize [what the Chief Justice deemed as the judiciary's] 'expanded powers' under the Constitution" as guardian and protector of constitutional rights.[5] The overwhelming support for the two-day summit, shown by the active participation of key players who came from traditionally opposing sides of the political spectrum, was an indicator of how pressing the issue of extrajudicial killings has become.[6]

While certainly it cannot be doubted that the Revised Penal Code of the Philippines (RPC)[7] has enough definitions of crimes that can possibly cover the whole gamut of possibilities by which to prosecute the perpetrators directly liable for the killings, a shadow of doubt exists as regards making other relevant persons indirectly involved in the killings liable as well. The

4. Supreme Court, Designation of Special Courts to Hear, Try and Decide Cases Involving Killings of Political Activists and Members of Media, Administrative Order No. 25-2007 (Mar. 1, 2007) [hereinafter A.O. No. 25-2007].

5. Volt Contreras, *SC to call summit on slays: Puno: Command Responsibility to be reviewed*, PHIL. DAILY INQUIRER, June 24, 2007, *available at* http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20070624-72949/%20SC_to_call_summit_on_slays (last accessed Apr. 23, 2009).

6. *See generally* Supreme Court, *Summit Guide* (Primer, National Consultative Summit on Extrajudicial Killings and Enforced Disappearances — Searching for Solutions, Manila, July 16-17, 2007), *available at* http://sc.judiciary.gov.ph/publications/summit/Summit%20Guide.pdf (last accessed Apr. 24, 2009). (The National Consultative Summit on Extrajudicial Killings and Enforced Disappearances was held at the Manila Hotel on July 16-17, 2007. This Note was submitted as a resource paper for the Summit, which was attended and participated in by representatives from the executive and legislative branches of government, the Armed Forces of the Philippines, the Philippine National Police, and the Commission on Human Rights. It was likewise attended by members of the media and the academe, civil society groups, members of the diplomatic corps, and activist groups such as Karapatan.).

7. An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815 (1932).

involvement of persons other than the direct perpetrators of the killings has significance given the chain-of-command structure of the military. As Major Michael Smidt has noted, just as dynamic military commanders can induce subordinates to accomplish heroic acts beyond the pale of everyday human limitation, they too possess the power and means of ordering, encouraging or acquiescing to atrocious acts that exceed the limits of rational application of military force through the abuse of their legitimate military leadership and authority.[8]

The Melo Report specifically mentions that although much of the data it has gathered is mainly circumstantial evidence, there is reason to believe and conclude that some elements — and certainly not the whole — of the military were involved in the killings.[9] Furthermore, aside from imposing liability on state actors directly responsible for the killings, the Melo Report also recommended that even superiors may be made liable for the killings because of command responsibility.[10] This doctrine, which originally found its origins and development in international law, is not as clearly defined under Philippine laws. In light of the Melo Report's conclusion and its recommendation to make commanders indirectly liable, it is therefore relevant to inquire whether there is sufficient legal basis under existing laws and jurisprudence to hold military commanders liable on the basis of command responsibility for the extrajudicial killings. Furthermore, with the designation of special courts to hear and try the cases involving these peculiar killings, there is a need to delineate clear standards that the courts can apply with regard to these cases.

The primary question this Note seeks to resolve is whether as customary international law, there is sufficient legal basis to make the command responsibility doctrine apply in Philippine jurisdiction. This Note therefore proposes to: (a) look into the sufficiency of the legal bases for command responsibility liability to apply; (b) determine how such liability may be applied; and, (c) recommend the possible standards to be used by the courts by which cases involving extrajudicial killings may be resolved.

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8. Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155 (2000). (According to Smidt, a soldier can be influenced to perform noble and heroic feats of courage despite natural inclinations to avoid such activity. However, warriors can just as easily be prodded into taking part in atrocities contrary to those same societal or human norms. Correct leadership may be the difference between heroic and evil conduct on the part of soldiers during war.).

9. Melo Report, *supra* note 1, at 53.

10. *Id.* at 61.

This Note examines three main issues. First, although the doctrine is primarily enunciated and developed in international law, are there sufficient legal bases to apply the doctrine of command responsibility to hold commanding officers liable for the spate of extrajudicial killings committed by subordinate soldiers? What kind of liability will the commanding officer incur, under existing laws and jurisprudence?

Second, is there a need for specific legislation or is it sufficient to set rules and guidelines for determining the conditions to impute command responsibility liability upon commanding officers, given the rule-making power granted to the Supreme Court under the Constitution?

Third, in finding that it is sufficient to set rules and guidelines to make command responsibility liability attach, what standards can Philippine courts apply to determine the existence of command responsibility liability? And as far as the military chain-of-command is concerned, up to what extent will the doctrine of command responsibility apply?

The phenomenon of extrajudicial killings naturally involves a web of interrelated issues but to put a handle on the study and to achieve the objectives set forth above, this Note shall be limited to certain parameters that in turn are based on certain underlying assumptions.

First, this Note relies on the assumption that the doctrine of command responsibility, as enunciated in international law, has acquired the status of customary international law.[11] As such, the question to be resolved is

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11. The assumption is not without basis, as attested by numerous studies on the subject. *See generally* Victor Hansen, *What's Good for the Goose is Good for the Gander, Lessons From Abu Ghraib: Time for The United States to Adopt a Standard of Command Responsibility Towards Its Own,* 42 GONZ. L. REV. 335 (2007); Avi Singh, *Criminal Responsibility for Non-State Civilian Superiors Lacking De Jure Authority: A Comparative Review of the Doctrine of Superior Responsibility and Parallel Doctrines in National Criminal Laws,* 28 HASTINGS INT'L & COMP. L. REV. 267 (2005); Allison Marston Danner, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law,* 93 CAL. L. REV. 75 (2005); Bing Bing Jia, *The Doctrine of Command Responsibility Revisited,* 3 CHINESE J. INT'L L. 1 (2004); Sherrie Russell-Brown, *The Last Line of Defense: The Doctrine of Command Responsibility and Gender Crimes in Armed Conflict* 22 WIS. INT'L L.J. 125 (2004); Leslie Green, *Superior Orders and Command Responsibility,* 175 MIL. L. REV. 309 (2003) [hereinafter Green, *Superior Orders*]; Matthew Lippman, *Humanitarian Law: The Uncertain Contours of Command Responsibility,* 9 TULSA J. COMP. & INT'L L. 1 (2001); Leslie Green, *Command Responsibility in International Humanitarian Law,* 5 TRANSNAT'L L. & CONTEMP. PROBS. 319 (1995) [hereinafter Green, *Command*

whether or not, as customary international law, there are sufficient legal bases to make the command responsibility doctrine apply in Philippine jurisdiction.

Second, the analysis of the doctrine's applicability is limited to the issue of extrajudicial killings involving the military, or any other incidents that may hereafter happen insofar as these incidents are analogous to the issue of extrajudicial killing as will be characterized herein.

Third, this Note takes as its backdrop the incidents involving victims of extrajudicial killings within 2001-2006. As will be discussed, the incidents are usually characterized as politically motivated in the sense that the victims have communist ideological leanings or are affiliated to such organizations. Against this backdrop, this Note then intends to educe some reasonable standards by which to apply the doctrine of command responsibility, but this is not to say that the doctrine will be inapplicable in analogous cases.

Finally, as far as persons liable are concerned, this Note will focus only on the involvement of the military in the killings. While half of the killings have been blamed on alleged "purgings" done by the New People's Army (NPA) or members within their ranks,[12] this Note will not delve into this issue. Moreover, as regards the military, focus will be on the commanders' and superior officers' liability, and not on the liability of the persons (subordinates) who may be directly responsible for perpetrating the killings. Insofar as officers and commanders are concerned, these should cover only those who have a reasonable degree of control over subordinates directly responsible for killings within the chain-of-command of the military and allegedly did not directly participate or have a hand in the killings but may still be found liable.[13]

It is also beyond the scope of this Note to determine the exact enumeration of officers within the military chain-of-command as the specific structure of the military will not be examined. A discussion, however, will

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Responsibility]; Bruce D. Landrum, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293 (1995).

12. *See* General Hermogenes Esperon, Jr., Chief of Staff, Armed Forces of the Philippines, Speech given at the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances: The AFP in a Democracy: Protecting Human Rights (July 16, 2007), *available at* http://sc.judiciary.gov.ph/publications/summit/Summit%20Papers/Esperon%20-%20The%20AFP%20in%20a%20Democracy.pdf (last accessed Apr. 24, 2009).

13. *See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 368 (1992). (Commentators agree that a superior bears "direct responsibility for ... orders which may be unlawful.").

be devoted to educing a reasonable standard for determining who among the commanders or superiors may be considered liable. As the conclusion will show, the determination of how far up the ladder the liability can attach is a matter of judicial discretion.

II. THE PHILIPPINE PHENOMENON OF EXTRAJUDICIAL KILLINGS: PRESENT-DAY SCENARIO

A. General Background

The phenomenon of extrajudicial killings is nothing new in Philippine history, especially if one recalls the martial law experience under the Marcos dictatorship. So true is the adage that a person once bitten becomes twice shy, that even on a communal level, the experience of the recent past has made Filipinos more keen not only to detect human rights violations, but also more vigilant in preventing the recurrence of past experience. This consciousness accounts for the reason why, when the public became aware of the rise in reported extrajudicial killings, accountability became a major issue. Something and more importantly, *someone*, has to account for the rise in reported disappearances and extrajudicial killings.

1. The Relevant Data on the Alleged Killings

a. Data from the Melo Report and Task Force Usig

Much controversy surrounded the Melo Commission after it was constituted, primarily because the report of the Commission was initially not released to the public. This fact gave rise to the suspicion that perhaps at the root of the delay in the release of the report was a finding of the possible involvement of state agents in the extrajudicial killings. This suspicion was not without foundation when the report eventually came out. The data supporting the conclusions of the Melo Report relied on the data given by Task Force Usig,[14] an investigative body of the Philippine National Police (PNP). The Melo Commission came out with the following statistics:[15]

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14. *See* Philippine National Police, Task Force Usig, *About Task Force Usig: Creation of Task Force, available at* http://www.pnp.gov.ph/about/content/offices/spl_units/tf_usigupdates/usig_sept/aboutusig.html (last accessed Apr. 24, 2009). The description states:

> On May 13, 2006, Department of Interior and Local Government Secretary Ronaldo V. Puno ordered the creation of a national-level 'Task Force' known as TASK FORCE USIG ... to investigate the incidents of slain party-list/militant members and media personalities. The Task Force is mandated to provide focus and resources to

SLAIN PERSONS	STATUS OF CASE		TOTAL
	FILED	UNDER INVESTIGATION	
Party-list Members	37	74	115
Media Persons	21	5	26
Total	58	79	141

Based on these data and its own investigation, the Melo Commission found that:

(1) There is an undisputed fact that though the numbers vary among different groups who have reported the incidents, there have been extrajudicial killings and that the victims were almost entirely members of party-list groups noted for being activists or were media personnel.[16]

(2) The victims were clearly non-combatants but were civilians.[17]

(3) There is a pattern in the manner of killings. Specifically, the victims were

> generally unarmed, alone, or in small groups, and were gunned down by two or more masked or hooded assailants, oftentimes riding motorcycles. The assailants usually surprised the victims in public places or their homes, and made quick getaways. It is undisputed that the killings subject of the investigation did not occur during military engagements or firefights. These were assassination or ambush type killings, professional hits carried out quickly and with the assailants escaping with impunity.[18]

(4) Circumstances show that "killings of activists and media personnel [are] pursuant to an orchestrated plan by a group or sector with an

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immediately investigate, solve and prosecute the perpetrators, as well as to safeguard the lives and limbs of high-risk personalities, such as party sectoral members and media practitioners. The Task Force is envisioned to provide an effective and efficient strategic approach in directing and optimizing the investigative and prosecutorial capabilities of all PNP units for the resolution of cases. The Task Force focused on its investigation on cases starting 2001.

15. Melo Report, *supra* note 1, at 7.

16. *Id.* at 5.

17. *See generally* Melo Report, *supra* note 1, at 5-6.

18. Melo Report, *supra* note 1, at 5.

interest in eliminating the victims, invariably activists and media personnel."[19]

(5) The rise in the killings cannot be attributed to mere rise in criminality but neither can the Philippine National Police give any explanation for the rise.[20]

(6) There is enough circumstantial evidence to show involvement of some military elements in the killings. In this regard, the Melo Report states:

> From the evidence gathered, and after an extensive study of the same, the Commission comes to the conclusion that there is no direct evidence, but only circumstantial evidence, linking some elements in the military to the killings. *There is no official or sanctioned policy on the part of the military or its civilian superiors to resort to what other countries euphemistically call "alternative procedures" — meaning illegal liquidations.* However, there is certainly evidence pointing the finger of suspicion at some elements and personalities in the armed forces, in particular General Palparan, as responsible for an undetermined number of killings, by allowing, tolerating, and even encouraging the killings.[21]
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> Thus, it can proceed with a certain degree of certitude in stating that, in all probability, some elements in the military, among whom is suspected to be General Palparan, are responsible for the recent killings of activists. In any case, further in-depth investigation into the numerous killings, including extensive evidence gathering, is necessary for the successful prosecution of those directly responsible.[22]

b. Data from the Technical Working Group

To the government's credit, it should be stated that the Melo Commission and the Task Force Usig were not the only bodies constituted to investigate the reported killings. Other government agencies and bodies were involved as well. Representatives of various government agencies were convened to form the Technical Working Group (TWG),[23] which would also investigate

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19. *Id.* at 6.

20. *Id.*

21. *Id.* at 53. (emphasis supplied)

22. *Id.* at 61.

23. The Technical Working Group is composed of the following: the Office of the Presidential Adviser on the Peace Process (OPAPP); the Government of the Republic of the Philippines Negotiation Panel (GRP Panel) for Talks with the

the issue. The TWG "sought to clean up the different lists of incidents and cases of alleged political killings submitted by different groups" in order to examine "similarities, discrepancies, double count, or inaccuracies."[24] The combined effort of the agencies sought to "establish factual, comprehensive, verifiable, consistent, and updated benchmark data on incidents of the reported extrajudicial killings"[25] because various civil rights groups claimed conflicting numbers of alleged incidents.

Using the figure given by Karapatan (an alliance for the advancement of people's rights) as the baseline, the TWG Report identified approximately 184 common cases.[26] For the purpose of this Note, the more significant findings in the TWG Report are the following:

(1) Although on an annual basis, there was no apparent pattern of alleged political killings over the six-year period[27] under review and that the levels fluctuated erratically, there was a 583% increase recorded from 2004 to 2005.[28] This was the highest recorded in the period under review and, as will be discussed shortly, this corresponds to certain events involving the dynamics between the NPA and the military.[29]

(2) Certain regions posted higher numbers of reported incidents, occurring mostly between 2005 and 2006. During the period under

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CPP/NPA/NDF (Communist Party of the Philippines/National Peoples' Army/National Democratic Front or, collectively, CNN); the GRP Monitoring Committee (created in 2004 to receive complaints and monitor the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law); the PNP Task Force Usig; the Inter-Agency Legal Action Group (created in 2006 to coordinate national security cases); and the Armed Forces of the Philippines (AFP).

Report of the Technical Working Group on the Alleged Political Killings (Covering the Period 1 February 2001 to 31 October 2006) ¶ 1.1 (Dec. 20, 2006), *available at* http://www.newsbreak.com.ph/democracyandgovernance/downloads/twg%20report%20dec%2020%202006.pdf (last accessed Apr. 24, 2009) [hereinafter TWG Report].

24. *Id.* ¶ 1.1.

25. *Id.* ¶ 1.2.

26. *Id.* at 8.

27. The actual timeframe is only five years because the period covered is Feb. 21, 2001 to Oct. 16, 2006.

28. TWG Report, *supra* note 23, ¶ 5.1.

29. *Id.* at 6.

review, it is interesting to note that there was almost no occurrence of killings (only one victim) in the National Capital Region.[30]

(3) Majority of the identified victims were affiliated with party-list groups or were member of organizations that were identified as activists.[31]

(4) Of the total 184 reported incidents of alleged political killings of the designated period, 47.8% have been attributed to elements of the Armed Forces of the Philippines (AFP); 3.8% against member of the PNP; and 3.3% against members of the Citizens Armed Forces Geographical Unit (CAFGU).[32]

c. Analysis of the Data

From all the data gathered, the relevant question to be asked insofar as this Note is concerned is whether there is sufficient basis to implicate elements of the military for involvement in the political killings so as to warrant an examination of the doctrine of command responsibility. Despite the discrepancies in the data[33] reported by certain groups, still, sufficient evidence has surfaced to implicate the military for involvement in the killings, as indicated by the Melo Report and the TWG Report. Most relevant in this regard is the observation stated in TWG Report that

> [t]he period of the heightened killings coincided with the heightened rhetoric from the National Democratic Front (NDF) calling on the NPA to increase offensives against the government and the announcement by the

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30. *Id.* at 7.

31. *Id.* at 8-9.

32. *Id.* at 13. (The CAFGU is a paramilitary unit established in 1987 in accordance with the notion of a citizens' armed force provided for in the 1987 Constitution. It is under military command and the members are subject to military law and regulations.)

33. The TWG Report states that, after investigation, certain persons reported by Karapatan as having been killed were later found to be alive by the PNP. These persons have been identified as the following: Renato Bugtong, reported by Karapatan as having been killed during an encounter between the NPA and the 730th Combat Group PAF in Batangas, now resides in Tuy, Batangas where he manages a restaurant business; Edwin Mascarinas, also reported dead by Karapatan, executed an affidavit contradicting his inclusion in the list of killed members of Anakpawis, a party-list group in Congress; Mark Bonsa, reported by Karapatan to have died during a massacre on Nov. 21, 2005 conducted allegedly by the 19th Infantry Battalion was found to be alive.

    See TWG Report, *supra* note 23, at 4.

> NDF that they would no longer negotiate with the Arroyo Government and just wait for the next Administration. This was matched by an increase in militaristic rhetoric on the part of the Government and in military activities. The government also drafted the NISP [National Internal Security Plan] that placed priority on armed initiatives against insurgents over peace negotiations.[34]

Furthermore, the TWG Report categorically states that the TWG has been able to "trace a number of the killings to the military and police and that the Government must continue to look into the bottom of the killings and expeditiously apprehend and prosecute the perpetrators of these crimes, no matter who they are."[35]

2. Exploring the Military Connection Further

The repeated mention of the military connection in the reported extrajudicial killings is not an idle comment by the Melo Commission or by the TWG. Certain policies undertaken by the government with regard to the Philippine insurgency problem that has plagued the government for almost 40 years[36] give an indication and lay the foundations for the supposed military connection in the killings.

It has been said that under the administration of President Gloria Macapagal-Arroyo, the government's approach to the insurgency problem has been to declare an "all-out war" against insurgents.[37] In concrete policy

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34. *Id.* ¶ 5.3.
35. *Id.* ¶ 5.6.
36. *See* Kent Hughes Butts & Curtis Turner, *Trilateral Strategic Defense Capability Planning Symposium* (Center for Strategic Leadership (CSL), US Army War College, CSL Issue Paper Vol. 7-04, Sep. 2004), *available at* http://www.csl.army.mil/usacsl/Publications/07-04.pdf (last accessed Apr. 24, 2009) (The authors claim that the 36-year old war for national liberation and democracy led by the Communist Party of the Philippines-New People's Army (CPP-NPA) remains the biggest security concern of the Philippine government.).
37. *ATO Chief sacked over U.S. downgrade*, MALAYA, Sep. 15, 2008, *available at* http://www.malaya.com.ph/dec19/news8.htm (last accessed Apr. 24, 2009); *see also* Melo Report, *supra* note 1, at 14.

    > Gen. Esperon explained that an "all-out war" means waging a holistic war. The strength of the military will bear down upon the enemy and at the same time, the various government agencies should also contribute in solving the root causes of insurgency such as poverty and injustice. The rise of activist killings has nothing to do with the marching orders of the President.

terms this pointed to the National Internal Security Plan (NISP)[38] formulated by the Department of National Defense (DND) and developed and adopted by the AFP in 2001. Operationally, this translated to the conception and implementation of Operational Plan (OPLAN) *Bantay Laya*, a five-year counterinsurgency program involving both the military and civilian agencies of the government. Its strategic goal "is to decisively defeat the insurgents' armed groups in order to obtain and maintain peace for national development. This goal reflects the victory and institutional positions, with the logic that victory is necessary for national development to take place."[39] The immediate goals of *Bantay Laya* are: "to defeat the Abu

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38. *See* Office of the President, Creating a Coordinative and Integrative System on Internal Security, Executive Order No. 21 (June 19, 2001); *see also* Roy Devesa, An Assessment of The Philippine Counterinsurgency Operational Methodology (2005) (unpublished Master of Military Art and Science thesis, U.S. Army Command and General Staff College), *available at* http://www.dtic.mil/cgibin/GetTRDoc?AD=ADA441882&Location=U2&doc=GetTRDoc.pdf (last accessed Apr. 24, 2009).

39. Carolina Hernandez, *The AFP's Institutional Responses to Armed Conflict: A Continuing Quest for the Right Approach* 6 (Philippine Institute for Development Studies (PIDS), PIDS Policy Notes No. 2006-02, Mar. 2006), *available at* http://hdn.org.ph/wpcontent/uploads/2005_PHDR/3%20PIDS %20policy %20notes%20-%20AFP_institutional_response.pdf (last accessed Apr. 24, 2009). The study states:

> Bantay Laya's operational principle consists of clear, hold, and support methodology. The clear phase involves the conduct of combat, intelligence, and psychological (the so-called triad concept) operations to militarily defeat the insurgents. The hold phase entails limiting the movement, resources, and mass base support of the insurgents and preventing their incursion in the barangays to protect the people, defend communities, and secure vital installations. The support phase is divided into subphases where consolidation and development activities would be undertaken by civilian agencies. In the past OPLANs, the military found itself performing the development responsibilities of civilian agencies for which the AFP had no training. With Bantay Laya's modified methodology, the AFP's role is to strengthen government control over contested barangays, help develop LGUs' capability during consolidation, and play a supportive role to civilian agencies during development subphases.
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> The Bantay Laya pursues the institutional policy position premised on a prior attainment of victory against the insurgents. The continuing lack of policy coherence explains the prevailing uncertain state of the peace process with the NDF and MILF. Consequently, this policy incoherence also led to the persistence of "a distant peace" for the country.

Sayyaf Group (ASG); to stop the growth of the Communist Party of the Philippines-New People's Army (CPP-NPA); and to contain the Southern Philippines Separatist Groups (SPSG, referring to the Moro National Liberation Front (MNLF), the Misuari Breakaway Group, and the Moro Islamic Liberation Front (MILF))."[40] News reports of campaigns being given by the military in several *barangays* suspected to be under the control or influence of the NPA substantiate this operational plan.[41]

It is significant to note that the military posted and claimed that there was a successful implementation of the plan, as evidenced by the number of insurgents killed since the plan's implementation. It is claimed that the killing of the insurgents took place justifiably in military encounters and combat with the insurgents in different places. While it cannot be doubted that the military had (and continues to have) combat encounters with the NPA,[42] its data, however, has to be correlated with the allegations in many of the complaints filed before the Government of the Philippines Monitoring Committee (GRP MC) that in several of the purported military encounters, there was no legitimate military combat or encounter but that the incidents were cases of military harassment or even of summary executions.[43]

Given this policy of the government, there is reason to correlate the data of the incidents of extrajudicial killings with the probability of military involvement, as pointed out in the Melo and TWG reports, as a result of the operational activities of the military. Neither the existence of the NISP nor the consequent heightened military activity directly establish the causal link

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40. *Id.* ("It [Bantay Laya] also aims to reduce the CPP-NPA affected areas, manpower, and firearms and to degrade the capability of the SPSGs. Among the OPLAN's long-term goals are to prevent the resurgence of the ASG, resolve the CPP-NPA threat, and compel the SPSGs to renounce their separatist objective.").

41. *See* Rhanny Belle Urbis, *Ilocos HR group blame military for HRVs*, THE NORTHERN DISPATCH WEEKLY, Apr. 7, 2007, *available at* http://www.nordis.net/blog/?p=881#more-881 (last accessed Apr. 21, 2009) (The Ilocos Human Rights Advocates (IHRA) reported that the military conducted a census to determine the names of the residents whom they [the military] claimed are supporting NPA members. The military was reported to conduct meetings in various *barangays* and schools where they presented an AFP briefing, "Knowing your Enemy," where progressive organizations and party-lists are labeled as "communist fronts" and organizations.); *see also* Melo Report, *supra* note 1, at 12.

42. *See generally* Armed Forces of the Philippines, Military Portal, *available at* http://www.afp.mil.ph/ (last accessed Apr. 24, 2009).

43. *See generally* TWG Report, *supra* note 23.

between the occurrence of the killings and the hand of the military but they do, however, lay the foundations for and buttress the findings of the Melo Commission and the TWG Report. In other words, they give credence to the belief that the persons responsible for the extrajudicial killings may be overzealous men in uniform bent on fulfilling their mandated mission in the swiftest way possible without regard for the means used to achieve the stated goal of the organization. While the allegations may not be conclusive in establishing the concrete persons responsible for the killings, yet these allegations, together with the circumstantial evidence gathered by the Melo Commission and the findings of the TWG, provide enough rational bases to hold that the military has some involvement in the rise of extrajudicial killings between 2001 and 2006.

B. Legal Implications of the Extrajudicial Killings

1. As a Violation of the Constitution

What does military involvement in the killings amount to and what are the legal implications behind this? The military is a peculiar organization, primarily because of the awesome power lodged in it. Moreover, the functions it is called to undertake in civil society make it susceptible to abuse.[44] Thus, in view of the weight of the power it exercises, the Constitution has established certain safeguards enshrined in the Bill of Rights to protect civilians from possible abuses of exercise of the State or its agents.[45] The foremost consideration is that the government has the duty to protect life, liberty and property of every citizen and person sojourning in Philippine territory. Furthermore, the constitutional right to due process and the guarantee of freedom from unreasonable searches and seizures are all expressions of the safeguards found in the Constitution.

In addition, the 1987 Constitution bears the mark of the Philippines's own historical experience with the military as attested to in several provisions which specifically point out its identity and its duty within society. As a ground rule, the Constitution states that "[c]ivilian authority is, at all times, supreme over the military. The Armed Forces of the Philippines

44. *See* David v. Macapagal-Arroyo, 489 SCRA 160 (2006); Valmonte v. De Villa, 178 SCRA 211 (1989).

45. 1 RECORD OF THE 1986 CONSTITUTIONAL COMMISSION 687 (1986) (Fr. Joaquin Bernas in his sponsorship speech clarified: "The Bill of Rights is strictly on the traditional freedoms of liberal constitutionalism. They guarantee freedom from the State and protection against the state, and they do not need any further implementing action by the legislature. They are limits on the legislature and every other official person or body.").

is the protector of the people and the State. Its goal is to secure the sovereignty of the State and the integrity of the national territory."[46]

In making sense of this constitutional duty of the military, Fr. Joaquin Bernas, an eminent constitutionalist, comments that this provision contains an underlying philosophy of "disapproval for the abuses committed by the military against civilians during the period of authoritarian rule."[47]

The Constitution also makes the following references to the Armed Forces of the Philippines:

> (1) All members of the Armed Forces shall take an oath or affirmation to uphold and defend the Constitution.
>
> (2) The State shall strengthen the patriotic spirit and nationalist consciousness of the military, and respect for people's rights in the performance of their duty.[48]

With regard to these provisions, Bernas comments that these are the expectations that society has towards the military precisely because of the power behind this institution as a holder of arms.[49]

In light of the above demands made by the Constitution over the military, the imputation that men in uniform may be guilty of perpetrating the killings has greater legal significance than what the provisions of the RPC would cast over a civilian suspect. While there is no doubt that someone has to be made directly responsible for the crime of extrajudicial killing, for the purposes of this Note, the more relevant question to ask is whether *somebody else* should be made liable for the crime, other than the ones directly responsible for it. This question is relevant when one considers the rigid chain-of-command structure of the military. In the words of the Supreme Court, "critical to military discipline is obeisance to the military chain-of-command. Willful disobedience of a superior officer is punishable by court-martial under Article 65 of the Articles of War."[50] In light of the chain-of-command structure of the military, it is not sufficient to impute liability only on the persons directly responsible for the crime. Even those who had the ability to prevent such a crime should be made liable as well.

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46. PHIL. CONST. art. II, § 3.

47. JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 65 (2003 ed.) [hereinafter BERNAS COMMENTARY].

48. PHIL. CONST. art. XVI, § 5.

49. BERNAS COMMENTARY, *supra* note 47, at 1284.

50. Gudani v. Senga, 498 SCRA 671, 697 (2006).

The underlying philosophy behind this idea is expressed in the words of Smidt:

> [T]he military is a unique society where the commander has tremendous authority over subordinates not normally extended to superiors in the civilian sector. Coupled with this significant lawful control over the troops is the commander's stewardship over a unit's tremendously awesome destructive capabilities. Mankind must, therefore, rely on commanders to use their authority to control both a military force's organic capacity for destruction and the conduct of their subordinates. Commanders have both a moral and legal role in preventing atrocities that could potentially be committed by subordinates against non-combatants, including the wounded and sick, civilians, and prisoners of war, as well as the destruction of civilian property lacking in military value.[51]

2. As a Violation of International Obligations

The legal implications of military involvement in the extrajudicial killings go beyond national borders in view of the international legal obligations taken on by the Philippines as a member of the society of nations. The Philippines is party to the four Geneva Conventions for the protection of war victims;[52] to Additional Protocol II, applicable in non-international armed conflicts;[53] to various human rights instruments — including the International Covenant on Civil and Political Rights (ICCPR)[54] and the International Covenant on

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51. Smidt, *supra* note 8, at 166; *see generally* In re Yamashita, 327 U.S. 1 (1946).

52. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.NT.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287. (The 1949 Geneva Conventions entered into force on Oct. 21, 1950 and were ratified by the Philippines in 1952.).

53. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Dec. 7, 1978, 1125 U.N.T.S. 609 [hereinafter Protocol II]. (Additional Protocol II is exclusively concerned with regulating and protecting victims of internal armed conflicts. It expands common art. 3 of the four Geneva Conventions. The Philippine government has been a signatory to this protocol since December 1986.).

54. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. (The Philippines signed the Covenant on Dec. 19, 1966 and ratified it on Oct. 23, 1986.)

Economic, Social and Cultural Rights (ICESR)[55] — and to other major conventions. The Universal Declaration of Human Rights (UDHR)[56] enshrines the basic human right which the State is supposed to protect, while the ICCPR provides that "every human being has the inherent right to life [that] shall be protected by law [and] [n]o one shall be arbitrarily deprived of his life."[57] In view of this obligation, the State incurs liability in the event that it fails to fulfill this duty.[58]

As regards the military, which is a state agent, any act it does in violation of this obligation will redound to state responsibility.[59] In the context of this Note, however, it is more relevant to look at the individual responsibility of state agents, and more particularly at the indirect liability of state agents in command positions. It has been recognized in international law that over and above the responsibility of the state to abide by its treaty obligations, in certain instances, international law imposes individual criminal responsibility for acts or omissions of state agents, and for which punishment may be imposed, either by properly empowered international tribunals or by national courts and military tribunals.[60]

Based on the foregoing, and given the peculiar structure of the military and its rigid chain-of-command, it is no surprise that there is a perceived need to make the military take greater responsibility for the killings in the event that certain of its elements may indeed be found guilty. When the supposed protector of the State becomes the suspected assassin of its

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55. International Covenant on Economic, Social, and Cultural Rights, Jan. 3, 1976, 999 U.N.T.S. 3. (The Philippines signed on Dec. 19, 1966 and ratified it on June 7, 1974.)

56. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). (Article 3 provides that "[e]veryone has the right to life, liberty and security of person.")

57. ICCPR, *supra* note 54, art. 6 (1).

58. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 437 (5th ed. 1999). In this regard, a separate but no less interesting discussion with regard to the issue of extrajudicial killings is the State's liability due to government inaction. *See* Kevin A. Bove, *Attribution Issues In State Responsibility*, 84 AM. SOC'Y INT'L L. PROC. 51 (1990).

59. BROWNLIE, *supra* note 58, at 451.

60. *See generally* BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 9 (2d ed. 2003); Natalie Reid, *Bridging the Conceptual Chasm: Superior Responsibility as the Missing Link between State and Individual Responsibility under International Law*, 18 LEIDEN J. INT'L L. 795 (2005).

constituents, then this is indeed a serious condition. And serious conditions call for serious measures. Philippine society's historical experience and present-day events thus call for the re-examination of the doctrine of command responsibility.

III. COMMAND RESPONSIBILITY: DOCTRINE AND APPLICATION

A. Command Responsibility and Its Development in International Law

1. General Concept of Command Responsibility

Command responsibility, in its most general sense, is the "the responsibility of ... commanders for war crimes committed by subordinate members of their armed forces or other persons subject to their control."[61] Commentators divide it into two branches.[62] The first concerns the responsibility of a commander who has given an order to an inferior to commit an act which is in breach of the law of armed conflict or whose conduct implies that the commander is not averse to such a breach being committed. The other branch covers the plea of the subordinate denying responsibility for the breach because he, as a subordinate, was acting in accordance with orders or what he presumed to be the wishes of his commander, a plea that is more commonly described as that of "compliance with superior orders." The inferior putting forward such a plea contends that the superior alone is responsible. This Note, because of the context in which it will be used, will only focus on the first branch involving the liability of superior officers. These officers are presumed to possess the knowledge, authority, and power to prevent and punish the transgressions of combatants. The imposition of criminal culpability is intended to create an incentive to insure that subordinates abide by the laws of war and the extension of liability to the commanders is necessitated by the lethal consequences resulting from the contravention of the code of conflict.[63]

Commentators further specify that there are generally three elements of command responsibility: (1) the existence of a superior-subordinate relationship between the officer and the perpetrator of the substantive crime; (2) a *mens rea* element that requires knowledge on the part of the commander, often constructive, suggesting a negligence standard, of the

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61. Weston Burnett, *Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra,* 107 MIL. L. REV. 71, 76 (1985).

62. *See* Green, *Command Responsibility, supra* note 11.

63. Lippman, *supra* note 11, at 1.

subordinate's *jus cogens* violations; and (3) an *actus reus* element, which requires that the superior either failed to prevent the abuses, or *post-hoc*, failed to punish the subordinate perpetrators for their actions.[64] Smidt opines that "[i]f certain conditions are met, a commander is charged as a principal to a crime even though the commander did not directly participate in the commission of the actual offense."[65] Though some commentators opine that its parameters still remain imprecise,[66] there is still a general concurrence that the doctrine itself is already considered part of customary international law.[67]

2. Historical Background and Development of the Doctrine in International Jurisprudence

The development of the doctrine of command responsibility finds its context in the development of the laws of war and armed combat which harks back into antiquity, even as far back as the time of the Chinese general Sun-Tzu and the Greeks.[68] These civilizations have shown that even in those times, there were customary laws of war that governed situations of armed conflict. There is on record, for example, a statement in 1439 from Charles VII of Orleans who proclaimed in his *Ordinances for the Armies*, that

> the King orders each captain or lieutenant be held responsible for the abuses, ills, and offenses committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice so that the said offender be punished in a manner commensurate with his offense, according to these Ordinances. If he fails to do so or covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offense, as if he has committed it would have been.[69]

64. Singh, *supra* note 11, at 269.
65. Smidt, *supra* note 8, at 167.
66. Lippman, *supra* note 11, at 1.
67. Roberta Arnold, *Command Responsibility: A Case Study of Alleged Violations of The Laws of War At Khiam Detention Centre*, 7 J. CONFLICT & SECURITY L. 191 (2002).
68. Ann Ching, *Evolution of the Command Responsibility Doctrine in Light of the Celebici Decision of the International Criminal Tribunal for the Former Yugoslavia*, 25 N.C. J. INT'L L. & COM. REG. 167, 168 (1999).
69. Leslie Green, *Superior Orders*, *supra* note 11 (citing THEODOR MERON, HENRY'S WARS AND SHAKESPEARE'S LAWS, 149 N. 40, ART. 19 (ENG. TR. 1993)).

Though individual countries concededly had their own customary laws regarding rules of engagement, the first attempt to constitute a common body of rules governing war and armed conflict surfaced in 1868 with the Declaration of St. Petersburg, and subsequently in 1899 with the Hague Conference convened by Czar Nicholas II to discuss disarmament. The Conference came out with several documents that constituted the earliest examples of laws of war codified in the form of a multinational treaty.[70] Perhaps the first international recognition of the command responsibility doctrine occurred in the Hague Convention IV of 1907. This Convention, which dealt with land warfare, defined lawful combatants in part as being commanded by a responsible superior. One of the command responsibilities designated by the Hague Convention IV is insuring "public order and safety" in areas occupied by military troops. Most significantly, the provisions of the convention held belligerent nations responsible for the acts of their armed forces, thus foreshadowing the modern notion of holding heads of state accountable under the command responsibility doctrine.[71]

The events of World War II further gave occasion for the development of the laws of war and the emergence of the doctrine of command responsibility. More particularly, most authors would trace the development and application of the doctrine as rooted in several cases tried after and in relation to World War II and subsequent events.

a. Nuremberg Tribunal Cases

The doctrine of command responsibility emerged in its raw form in the cases involving atrocities committed during World War II. The judgments made by the Nuremberg Tribunal, attaching liability on commanders by applying the laws of war, led to the further examination of the doctrine.[72] One such

70. Ching, *supra* note 68, at 168.

71. *Id.* at 170.

72. *See generally* MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 278 (6th ed. 1993); The Avalon Project, The International Military Tribunal for Germany: Contents of The Nuremberg Trials Collection, *available at* http://avalon.law.yale.edu/subject_menus/imt.asp (last accessed Apr. 24, 2009). (In Aug. 8, 1945, a decree called the *London Charter* established the International Military Tribunal, pursuant to an agreement signed by the Allied powers (the United States of America, France, United Kingdom, and the Union of Soviet Socialist Republics) for the just and prompt trial and punishment of the major war criminals of the "European Axis" (Germany, Italy, Japan, Hungary, Romania, Bulgaria, the former Yugoslavia, and the Slovak Republic). The Tribunal consisted of four members, each with an alternate. Three categories of crimes were defined: war crimes, crimes against

case was that of the *German High Command*[73] which treated the subject of command responsibility in greater depth. In that trial, 14 German officers were charged with atrocities committed in the European war. Among these officers, General Wilhelm von Leeb was accused of implementing Hitler's *Commissar Order* and *Barbarossa Order*, which called for the murder of Russian political officers and the mistreatment of Russian civilians, respectively. The defense claimed that von Leeb was completely unaware of the atrocities committed and that he had done everything within his power to oppose Hitler's illegal orders, short of an outright refusal to obey. The Tribunal rejected the prosecution's argument that a superior is, from the fact alone of being a superior, responsible for the atrocities of subordinates within the area of his occupation. Acquitting von Leeb of some of the charges against him, the Tribunal held that "criminality does not attach to every individual in this chain-of-command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part."[74]

b. The Yamashita Trial

Most commentators would invariably trace the roots of the doctrine to the trial of General Tomoyuki Yamashita as enunciated in the case of *In re Yamashita*.[75]

Yamashita was the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands. Yamashita

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peace, and crimes against humanity. The Charter also stated that holding an official position was no defense to war crimes. Obedience to orders could only be considered in mitigation of punishment if the Tribunal determined that justice so required. The trials conducted by this tribunal are more commonly known as the Nuremberg Trials.).

73. United States of America v. Wilhelm von Leeb, et al. (1948), UNITED NATIONS WAR CRIMES COMMISSION, XII LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1997) [hereinafter German High Command Trial].

74. *Id.* at 76. (The military tribunal opined that

> [m]odern war … entails a large measure of de-centralization. A high commander cannot keep completely informed of the details of military operations of subordinates. He has a right to assume that details entrusted to responsible subordinates will be legally executed. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command.).

75. In re Yamashita, 327 U.S. 1 (1946).

was captured as a prisoner of war and was held for trial by a military commission composed of five army officers appointed by order of General Styer, Commanding General of the United States Army Forces, Western Pacific. He was charged with violating the laws of war. Prior to the filing of the case in the U.S. court, Yamashita filed a petition for *habeas corpus* and prohibition in the Commonwealth Philippine Supreme Court, which denied his petition. The charge filed before the U.S. court stated that Yamashita,

> while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he … thereby violated the laws of war.
>
> Bills of particulars, filed by the prosecution by order of the commission, allege a series of acts, one hundred and twenty-three in number, committed by members of the forces under petitioner's command, during the period mentioned. The first item specifies the execution of 'a deliberate plan and purpose to massacre and exterminate a large part of the civilian population of Batangas Province, and to devastate and destroy public, private and religious property therein, as a result of which more than 25,000 men, women and children, all unarmed non-combatant civilians, were brutally mistreated and killed, without cause or trial, and entire settlements were devastated and destroyed wantonly and without military necessity.' Other items specify acts of violence, cruelty and homicide inflicted upon the civilian population and prisoners of war, acts of wholesale pillage and the wanton destruction of religious monuments.[76]

In light of this charge, the issue that the Court had to resolve was whether Yamashita, as the commander of the Japanese forces, committed a breach of duty by failing to control the operations of the members of his command by permitting them to commit the atrocities which they were said to have done. In the words of the Court:

> The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result.[77]

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76. *Id.*

77. *Id.*

Yamashita pleaded not guilty to the charge after almost two months of trial, with the Commission hearing 286 witnesses and going over 3,000 pages of testimony. Though there was no direct evidence that Yamashita ordered or even knew of the commission of the war crimes,[78] he was found guilty by the Military Tribunal and was sentenced to death by hanging. Justice Murphy, however, in his dissent, made an impassioned argument that the charge against Yamashita lacked legal precedent.[79]

Legal scholars and commentators who have studied the case have varied interpretations and opinions regarding the personal responsibility of Yamashita and the standard of command responsibility imposed upon him.[80] One commentator takes the view that Yamashita had personally ordered the summary executions and was therefore directly liable for the killings.[81] Another commentator, meanwhile, takes the view that Yamashita was convicted under a standard of strict liability under the command responsibility doctrine as there was no direct evidence that he personally ordered the killings, for if Yamashita personally ordered the atrocities, there would have been more offenses committed in his area of command.[82] Although the parties in the case may have been sharply divided over the procedural and evidentiary issues, and commentators do not generally agree over the outcome of the case, the command responsibility doctrine as defined in *Yamashita* was to become more accepted in the latter half of the 20th century.[83]

3. Codification of the Doctrine of Command Responsibility

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78. Steven Powles & Richard May, *Command Responsibility: A New Basis of Criminal Liability in English Law*, CRIM. L. REV. 363, 365 (2002).

79. In re Yamashita, 327 U.S. 1, 28. Murphy, J., dissenting:

> Yamashita was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge.

80. Landrum, *supra* note 11, at 299-300.

81. William Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 25 (1973).

82. RICHARD LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY 139-40 (1982).

83. Ching, *supra* note 68, at 172.

a. The Geneva Conventions

The first international treaty to codify the command responsibility doctrine after World War II was Protocol I Additional of 1977,[84] a follow-up to the Geneva Conventions of 1949. This Protocol clearly provides:

> (1) The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
>
> (2) The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information that should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[85]

It also talks of the duty of commanders, to wit:

> The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
>
> In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
>
> The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.[86]

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84. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

85. *Id.* art. 86.

86. *Id.* art. 87 (1).

These provisions merit further discussion regarding their implications on the doctrine of command responsibility, but suffice it to say at this point that these provisions certainly influenced the later permutation and application of the doctrine, as attested by the fact that two decades later, the United Nations (UN) created the International Criminal Tribunal for the former Yugoslavia (ICTY) and subsequently the International Criminal Tribunal for Rwanda (ICTR).

b. The Judgments of International Ad-Hoc tribunals: ICTY and ICTR

It was only after World War II that war crimes were tried and the international community had the opportunity to apply the doctrine of command responsibility at the international level, thanks to the creation of the ICTY and the ICTR.[87] The UN, in response to atrocities committed in Yugoslavia[88] and Rwanda[89] created these *ad-hoc* tribunals to address the

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87. Smidt, *supra* note 8, at 206.

88. A brief look at the history of the former Yugoslavia shows that after World War II, Yugoslavia, which used to be a monarchy, became a communist republic called the Federal People's Republic of Yugoslavia under Prime Minister Tito. It was composed of six republics: Serbia, Croatia, Bosnia and Herzegovina, Macedonia, Slovenia, and Montenegro, as well as two provinces, Kosovo and Vojvodina. Tito's tight rein on Yugoslavia kept ethnic tensions in check until his death in 1980. Without his pan-Slavic influence, ethnic and nationalist differences began to flare. Starting in 1991, the different republics began to declare independence and bloody ethnic and guerilla wars broke out. Among the prominent figures of this era is Slobodan Milosevic, the leader of Serbia and Montenegro. In 2001, Milosevic was arrested by Yugoslavian authorities and was charged with corruption and abuse of power and was turned over to the ICTY in The Hague. Trial on the charges of war crimes, crimes against humanity, and genocide began in 2002. Milosevic was the first head of state to face an international war-crimes court.

    See Infoplease, Timeline: The Former Yugolavia, *available at* http://www.infoplease.com/spot/yugotimeline1.html (last accessed Apr. 24, 2009).

89. Between April and June 1994, an estimated 800,000 Rwandans were killed in the span of 100 days. The internal war was between two of Rwanda's ethnic groups: the Tutsis and the Hutus. Most of the dead were Tutsis and most of those who perpetrated the violence were Hutus. The genocide was sparked by the death of the Rwandan president, Juvenal Habyarimana, a Hutu, when his plane was shot down above Kigali airport on Apr. 6, 1994. Though the two ethnic groups are actually very similar — they speak the same language, inhabit the same areas, and follow the same traditions — there have always been disagreements between the majority Hutus and minority Tutsis. This tension was heightened by the Belgian colonists who arrived in 1916. They saw the two

crimes committed in these separate jurisdictions. The statutes of the ICTY[90] and ICTR[91], promulgated in 1993 and 1994 respectively, were the next codifications of the command responsibility doctrine within the international context. The statutes are not only virtually identical, but are also similar in many respects to Articles 86 and 87 of Protocol I.[92]

As far as this Note is concerned, the judgments of these tribunals are of great significance in three respects: first, the *ad hoc* tribunals have effectively adopted and applied the customary international law definition of the

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groups as distinct entities, and even produced identity cards classifying people according to their ethnicity.

See Rwanda: How the Genocide Happened, BBC NEWS, Dec. 18, 2008, *available at* http://news.bbc.co.uk/1/hi/world/africa /1288230.stm (last accessed Apr. 24, 2009).

90. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993) [hereinafter ICTY Statute].

91. Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, annexed to *Resolution 955*, SC Res 955, U.N. SCOR, 49th sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

92. Hansen, *supra* note 11, at 379.

ICTY Statute, art. 7 (3) states:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute [Grave Breaches of the Geneva Conventions of 1949 and Crimes Against Humanity] was 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 thereof.

ICTR Statute, art. 6 (3) states:

> The fact that any of the acts referred to in articles 2 to 4 of the present Statute [Genocide and Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II] was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she 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 thereof.

doctrine of command responsibility as it stood prior to their establishment;[93] second, that the doctrine may be applied not only to military officers but also to civilians;[94] and third, that the doctrine is applicable not only in international armed conflicts but also in internal armed conflicts.[95]

As regards the status of the doctrine in international law, it has been said that since the landmark *Celebici Case*,[96] the ICTY and the ICTR have established a rich jurisprudence on command responsibility, which have been followed by subsequent *ad hoc* tribunals like that created for Sierra Leone.[97] The judgments pronounced in the ICTY and the ICTR have buttressed the idea that the doctrine of command responsibility is already well-established in customary international law. Moreover, the treatment of command responsibility was virtually identical in both the ICTY Statute and the ICTR Statute, which suggests that the customary international law standard for holding commanders liable in internal armed conflicts is now the same as that for international armed conflicts.[98]

As for the persons covered by the doctrine of command responsibility, the language of both statutes is not limited in application to just military commanders. The statutes, like Protocol I, use the term "superior" which reflects the fact that command responsibility can apply to both military and civilian leaders. Indeed, many of the reported cases of both the ICTY and ICTR have discussed, at length, the application of this statute to civilian leaders who have *de facto* command and control of military subordinates.[99]

Thus, the distinction between internal and international conflicts is relevant because the four 1949 Geneva Conventions and Additional Protocols I and II differ in application.[100] The four 1949 Geneva

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93. Powles & May, *supra* note 78, at 374.

94. *See* Singh, *supra* note 11.

95. Smidt, *supra* note 8, at 209.

96. Prosecutor v. Delalic, et al., ICTY-IT-96-21-T, Trial Chambers (Nov. 16, 1998) [hereinafter Celebici Case].

97. Joakim Dungel, Paper presented at the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances: Command Responsibility in International Criminal Tribunals (July 16-17, 2007), *available at* http://sc.judiciary.gov.ph/publications/summit/Summit%20Papers/Dungel%20-%20Command%20Responsibility%20in%20ICT.pdf (last accessed Apr. 24, 2009).

98. Smidt, *supra* note 8, at 209.

99. Hansen, *supra* note 11, at 380.

100. ALINA KACZOROWSKA, PUBLIC INTERNATIONAL LAW 507 (2d ed. 2003).

Conventions and the 1977 Additional Protocol I generally apply to international conflicts, while common Article 3 of the Geneva Conventions and the 1977 Additional Protocol II apply to non-international conflicts. The 1977 Additional Protocol II also applies when the conflict takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol. For the purposes of this Note, the distinction between internal and international conflict will be material in determining whether the doctrine may be applicable in Philippine jurisdiction.

i. The International Criminal Tribunal for the former Yugoslavia (ICTY)

The ICTY[101] is a criminal judicial body, established to prosecute and punish individuals for violations of international humanitarian law, and not to determine state responsibility for acts of aggression or unlawful intervention.[102] It is responsible for rendering judgment in what is now known as the *Celebici Case* and in other subsequent cases brought before the tribunal in the wake of the disintegration of former Yugoslavia and the atrocities committed in connection with its bloody transition into separate independent states. While several characteristics make the *Celebici* judgment unusual,[103] it is notable for the extensive discussion it made of how both

101. The International Tribunal is governed by its Statute, which was adopted by the U.N. Security Council on May 25, 1993, and by its Rules of Procedure and Evidence, adopted by the Judges on Feb. 11, 1994, as subsequently amended. Under the Statute, the Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. Articles 2 through 5 of the Statute further confer upon the International Tribunal jurisdiction over grave breaches of the Geneva Conventions of 12 August 1949 (art. 2); violations of the laws or customs of war (art. 3); genocide (art. 4); and crimes against humanity (art. 5).

102. *See* Celebici Case, *supra* note 96.

103. Press Release, ICTY Trial Chamber, Celebici Case: The Judgment of the Trial Chamber (Nov. 16, 1998), *available at* http://www.un.org/icty/pressreal/p364-e.htm (last accessed Apr. 24, 2009). The article states:

> On the issue of the legal classification of the conflict in Bosnia and Herzegovina, 'the Trial Chamber finds that the conflict … must be regarded as an international armed conflict throughout 1992.' This Judgment is the first elucidation of the concept of command responsibility by an international judicial body since the cases decided in the wake of the Second World War. It emphasizes that the doctrine

prosecution and defense interpreted the doctrine of command responsibility.[104] The Tribunal stated that it looked more to authority, as embodied in the ability to control the action of subordinates, rather than the formal status of an individual as a commander, in determining the existence of a superior-subordinate relationship.[105] It also pronounced that the doctrine of command responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates similar to that of military commanders.[106] The Tribunal stated:

> While it is, therefore, the Trial Chamber's conclusion that a superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his *de facto* position of authority, the fundamental considerations underlying the imposition of such responsibility must be borne in mind. The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates. A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine. It follows that there is a threshold at which persons cease to possess the necessary powers of control over the actual perpetrators of offenses and, accordingly, cannot properly be considered their "superiors" within the meaning of Article 7 (3) of the Statute. While the Trial Chamber must at all times be alive to the realities of any given situation and be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility for heinous acts, great care must be taken lest an injustice be committed in holding individuals

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> of command responsibility encompasses 'not only military commanders, but also civilians holding positions of authority' and 'not only persons in *de jure* positions but also those in such position *de facto*.' This Judgment entails also the first conviction of an accused person for rape as torture by the International Tribunal. Rape as torture is charged as a grave breach of the Geneva Conventions and a violation of the laws and customs of war: according to the Trial Chamber there can be no question that acts of rape may constitute torture under customary law. (emphasis omitted).

See generally Ching, *supra* note 68, at 173. (The ICTY differs from the Nuremberg Tribunal in one significant aspect: the United Nations, a community of nations that were not parties to the Bosnian conflict, created the ICTY. This avoided the criticism after the Nuremberg tribunal that the tribunal dealt "victor's justice" to a vanquished enemy.).

104. *See* Ching, *supra* note 68.

105. Celebici Case, *supra* note 96, ¶¶ 139-40.

106. *Id.* ¶ 140.

> responsible for the acts of others in situations where the link of control is absent or too remote.[107]

The Tribunal itself provided the test for the ability to control in the following words: "in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offenses."[108]

In the subsequent appeal, the Appeals Chamber held that the Trials Chamber had applied the correct test of "effective control."[109] It was also noted that the *de facto* control element of the test allows for command responsibility to arise where the superior-subordinate relationship is indirect in character, as opposed to a direct relationship in a military chain-of-command, and that the control itself could be of an indirect character.[110]

As for the knowledge required of the commander, the Tribunal recognized that actual knowledge of war crimes would be sufficient to trigger a superior's duty to take reasonable measures to prevent or punish them.[111] Then the Tribunal considered the more controversial issue of whether a *mens rea* standard short of actual knowledge could trigger command responsibility.[112] The Tribunal concluded that "a superior can be held criminally responsible only if some specific information was in fact available to him, which would provide notice of offenses committed by his subordinates."[113] The Tribunal also said:

> Instead, Article 7 (3) provides that a superior may be held responsible only where he knew or had reason to know that his subordinates were about to or had committed the acts referred to under Articles 2 to 5 of the Statute. A construction of this provision in light of the content of the doctrine under customary law leads the Trial Chamber to conclude that a superior may possess the *mens rea* required to incur criminal liability where: (1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes referred

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107. *Id.* ¶ 377.

108. *Id.*

109. Prosecutor v. Delalic, et al., ICTY-96-21-A, Judgment on Sentence Appeal, Appeals Chamber (Apr. 8, 2003) [hereinafter Celebici Appeal].

110. *Id.* ¶¶ 251-52.

111. Celebici Case, *supra* note 96, ¶ 382.

112. *Id.* ¶ 140.

113. *Id.* ¶ 146.

> to under Articles 2 to 5 of the Statute, or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offenses by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.[114]

Thus, the Tribunal rejected the prosecution's contention that ignorance resulting from a failure to supervise could trigger a superior's liability.[115] Nonetheless, the Tribunal noted that willful blindness was no excuse; once a superior had information providing him notice of war crimes, he could not choose to simply disregard that information.[116] In the words of the Tribunal:

> There can be no doubt that a superior who simply ignores information within his actual possession compelling the conclusion that criminal offenses are being committed, or are about to be committed, by his subordinates commits a most serious dereliction of duty for which he may be held criminally responsible under the doctrine of superior responsibility. Instead, uncertainty arises in relation to situations where the superior lacks such information by virtue of his failure to properly supervise his subordinates.[117]

The Appeals Chamber rejected the prosecution's assertion that customary international law established a "duty to know" for military and civilian superiors.[118] Such a duty would have the effect of making criminal liability under the doctrine of command responsibility a form of strict liability.

The Tribunal further elaborated on the standard of proof required in finding that a superior had actual knowledge of the commission of war crimes by subordinates.[119] First, the Tribunal acknowledged that direct evidence was admissible to make a finding of actual knowledge.[120] It noted that circumstantial evidence was also admissible, and provided non-exclusive examples of circumstantial evidence that could permit a finding of actual knowledge. The twelve factors listed by the Tribunal included the following: (a) the number of illegal acts; (b) the type of illegal acts; (c) the scope of illegal acts; (d) the time during which the illegal acts occurred; (e) the

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114. *Id.* ¶ 150.

115. *Id.* ¶¶ 141-142.

116. *Id.* ¶ 144.

117. Celebici Case, *supra* note 96, ¶ 144.

118. Celebici Appeal, *supra* note 109, ¶¶ 248-68.

119. Celebici Case, *supra* note 96, ¶ 142.

120. *Id.*

number and type of troops involved; (f) the logistics involved, if any; (g) the geographical location of the acts; (h) the widespread occurrence of the acts; (i) the tactical tempo of operations; (j) the modus operandi of similar illegal acts; (k) the officers and staff involved; (l) the location of the commander at the time.[121]

Furthermore, the Tribunal stated that "there is no presumption of knowledge merely because offenses may have been widespread, numerous, publicly notorious, or committed over wide areas or over prolonged periods. However, these factors may allow an inference to arise that he must have possessed that knowledge."[122]

Although the conflict in Yugoslavia has been ruled international in conflict, a later case brought before the Tribunal held that command responsibility was part of international customary law, and its omission from Protocol II did not render it inapplicable to an internal armed conflict.[123] Furthermore, the Tribunal in a later case[124] recognized that the distinction between international and internal conflicts is artificial and loses importance taking into account that fundamental human rights should be guaranteed irrespective of the classification of a conflict and that there are in fact a growing number of international instruments protecting civilians in internal conflicts.[125]

ii. The International Criminal Tribunal for Rwanda (ICTY)

The ICTY was created on 8 November 1994 by the UN Security Council in order to judge the persons responsible for the acts of genocide and other serious violations of the international law performed in the territory of Rwanda, or by Rwandan citizens in nearby states, between 1 January and 31 December 1994.[126] The Tribunal's competence is limited to the prosecution of genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.[127] Like its Yugoslavian sibling, the Rwandan court was also authorized by the UN

121. *Id.* ¶ 143-44.

122. *Id.* ¶ 417.

123. Singh, *supra* note 11, at 275.

124. Prosecutor v. Tadic, "Prijedor," IT-94-1-AR77, Appeals Chamber (July 15, 1999).

125. KACZOROWSKA, *supra* note 100, at 507-08.

126. ICTR Statute, art. 1.

127. BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 385 (Philippe Sands & Peirre Klein eds., 5th ed. 2001).

Security Council to hold individuals liable on a theory of command responsibility.

Furthermore, the ICTR Statute extends the application of command responsibility, not codified in Protocol II, to an internal armed conflict. Moreover, the ICTR, faced with trials of individuals acting outside the parameters of the formal state, has had to deal extensively with the superior culpability of civilians often lacking *de jure* authority, and has been less cautious in finding culpability for civilian superiors. Its first case, for example, *Prosecutor v. Akayesu*,[128] had as a defendant Jean-Paul Akayesu, a *bourgmestre* (mayor) of Taba commune, a teacher, and a school inspector. The biggest achievement of the ICTR, however, was the conviction of Jean Kambanda, once the Prime Minister of Rwanda, for the crime of genocide. His conviction was confirmed by the Appeals Chamber.[129]

Subsequent tribunals have further applied the doctrine of command responsibility and today, the concept of command responsibility is enshrined in the statutes of all major international tribunals.[130]

c. The International Criminal Court and the Rome Statute

In the aftermath of the events of World War II, there was a general consensus of a need for an international body that would adjudicate crimes which have an international character. This general sentiment paved the way for the creation of The International Criminal Court (ICC), as well as the development of the statute of this court, now known as the Rome Statute.[131] The Rome Statute established the ICC, which has the power to

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128. Prosecutor v. Akayesu, ICTR-96-4-T, Trial Chamber (Sep. 2, 1998).

129. KACZOROWSKA, *supra* note 100, at 512.

130. ICTY Statute, Annex, art. 7 (3); ICTR Statute, Annex, art. 6 (3); Statute of the Special Court for Sierra Leone, Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, S/RES/1315, Annex, art. 6 (3) (Jan. 16, 2002); Statute of the Khmer Rouge Tribunal, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/1004/006, art. 29 (Oct. 27, 2004); Statute of the Special Tribunal for Lebanon, U.N. Doc. S/RES/1757 (2007), art. 3 (2); Rome Statute of the International Criminal Court, art. 28, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

131. The Rome Statute was finally adopted by a vote where 120 were in favor, seven against and 21 abstained. The ICC is based in the Hague and has jurisdiction over suspected perpetrators of genocide, crimes against humanity, war crimes or aggression, including superiors or military commanders. The Court may exercise its jurisdiction if the state on the territory of which the act

exercise its jurisdiction over persons for the most serious crimes of international concern and has jurisdiction which is complementary to national criminal jurisdictions. Its jurisdiction covers the crime of genocide, crimes against humanity, war crimes and the crime of aggression as defined in the Statute. The Statute was opened for signature by all states in Rome on 17 July 1998 and had remained open for signature until 31 December 2000 at the UN Headquarters in New York. Its provisions, however, require that it be subject to ratification, acceptance or approval of the signatory states.

As far as the doctrine of command responsibility is concerned, the experience and pronouncements of various *ad hoc* tribunals adjudicating war crime trials has led to the refinement of the doctrine which is now embodied in Article 28 of the Rome Statute. Discussing the responsibility of commanders and other superiors, the Article provides:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
>
> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
>
> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
>
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
>
> With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her

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or omission occurred or the state of nationality of the suspect is Party to the Statute or has accepted the jurisdiction of the Court. The Prosecutor can refer cases *motu proprio* (on his/her own initiative). The Court does not have retroactive effect. The ICC is not intended to take over jurisdiction exercised by national courts: the ICC is intended to exercise its jurisdiction only when the state is unwilling or genuinely unable to prosecute. States continue to have the primary duty to prosecute suspected war criminals before their own courts.

effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
>
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[132]

Given the history by which the doctrine of command responsibility has developed in international law, it could rightly be said that this formulation of the Rome Statue embodies the doctrine in its latest, most refined form.[133] It should be noted, however, that the language used in the Rome Statute to denote the *mens rea* requirement for command responsibility differs in some respect from that used in Article 86 of Protocol I and that pronounced in the ICTY and ICTR judgments. Article 28 above uses the "know or should have known" standard, similar to that used in the *Yamashita* judgment whereas Article 86 of Protocol I and ICTY and ICTR use the phrase "know or had reason to know" to reflect the *mens rea* standard. Furthermore, other than the fact that the drafters of the Rome Statute clearly intended to establish the *Yamashita* "knew or should have known" standard of command responsibility, the Rome Statute also created a separate and arguably stricter standard for holding non-military superiors liable under a theory of command responsibility. For civilian superiors, the "knew or should have known" standard gives way to the "knew or consciously disregarded information which clearly indicated" test of liability for the criminal acts of subordinates.[134] The significance of the differences in the *mens rea* standard is that this aspect of the doctrine is still a matter of varying formulations and interpretation.[135]

4. The Application of the Concept in Foreign Domestic Spheres: The Experience of Other Jurisdictions

132. Rome Statute, art. 28.

133. Hansen, *supra* note 11, at 371.

134. Smidt, *supra* note 8, at 211.

135. Hansen, *supra* note 11, at 387.

After the creation of the ICC and the Rome Statute that governed it, many signatories of the treaty that also ratified it in their respective jurisdictions have begun to adjust domestic law to implement the treaty.[136] As regards the doctrine of command responsibility, several of the implementing legislations have used the standards and language used by the Rome Statute. A few illustrations from randomly selected countries will suffice to underline the idea that the doctrine of command responsibility as embodied in the Rome Statute, has been applied, though by no means uniformly, in several domestic jurisdictions.

Canada is a case in point. In 2000, it enacted the Crimes Against Humanity and War Crimes Act,[137] which provides for the prosecution of any individual present in Canada for any offense stated in the Act regardless of where the offense occurred. The Act primarily codifies offenses of genocide, crimes against humanity, war crimes, and breach of responsibility by military commanders and civilian superiors. It also creates new offenses to protect the administration of justice at the ICC, including the safety of judges and witnesses. Finally, it recognizes the need to provide restitution to victims and provides a mechanism to do so for these victims.

Canada's law, which recognizes that there is a causal link between the omission of the commander and the offenses of his subordinates, for example, states that a military commander commits an indictable offense if the military commander, outside Canada,

> (i) Fails to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offense under section 4, or
>
> (ii) Fails, before or after the coming into force of this section, to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offense under section 6.[138]

Germany has also adopted a piece of legislation that mirrors the criteria laid down in the Rome Statute. Germany's law[139] makes a commander a

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136. *See* ICC Basic Legal Texts, *available at* http://www2.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/ (last accessed Apr. 24, 2009) (for a complete list of states with national implementing legislations).

137. Crimes against Humanity and War Crimes Act 2000, c.24 (2000). (Sec. 4 concerns crimes committed within Canada, while Sec. 6 concerns those without. Sec. 5 is identical to Sec. 7).

138. *Id.* § 5 (1) (a).

139. An Act to Introduce the Code of Crimes against International Law [CCAIL] (2002).

perpetrator if he fails to prevent a crime, and failure in supervision or failure to report is a separate offense.[140] One of its provisions provide that:

> A military commander or civilian superior who omits to prevent his or her subordinate from committing an offense pursuant to this Act shall be punished in the same way as a perpetrator of the offense committed by that subordinate.[141]

In the chapter on "Other Crimes," it is stated that:

> [a] military commander who intentionally or negligently omits properly to supervise a subordinate under his or her command or under his or her effective control shall be punished for violation of the duty of supervision if the subordinate commits an offense pursuant to this Act, where the imminent commission of such an offense was discernible to the commander and he or she could have prevented it.
>
> Intentional violation of the duty of supervision shall be punished with imprisonment for not more than five years, and negligent violation of the duty of supervision shall be punished with imprisonment for not more than three years.[142]

Moreover, "[a] military commander or civilian superior who omits immediately to draw the attention of the agency responsible for the investigation or prosecution of any offense pursuant to this Act, to such an offense committed by a subordinate, shall be punished with imprisonment for not more than five years."[143]

The United Kingdom passed a law called the International Criminal Court Act 2001.[144] This Act implements into the law of England, Wales, and Northern Ireland the Rome Statute. Concretely, Section 65 implements Article 28 of the Rome Statute, which deals with the responsibility of commanders and other superiors and even uses the language of the Rome Statute almost *in toto*.[145]

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140. Jia, *supra* note 11, at 14.

141. CCAIL, § 4 (1).

142. *Id.* § 13 (2).

143. *Id.* § 14 (1).

144. An Act to give effect to the Statute of the International Criminal Court; to provide for offenses under the law of England and Wales and Northern Ireland corresponding to offenses within the jurisdiction of that Court; and for connected purposes [International Criminal Court Act 2001], c. 17 (2001).

145. Sec. 65. Responsibility of commanders and other superiors:

(1) This section applies in relation to —

As for the United States (U.S.), though U.S. President Bill Clinton authorized the signing of the Rome Statute by the U.S. in 2000,[146] the Rome Statute was never ratified. In 2002, the U.S. Congress passed the American Servicemembers' Protection Act (ASPA), which contained a number of provisions, including prohibitions on the U.S. providing military aid to countries which had ratified the treaty establishing the ICC. In

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(a) Offenses under this Part, and

(b) Offenses ancillary to such offenses.

(2) A military commander, or a person effectively acting as a military commander, is responsible for offenses committed by forces under his effective command and control, or (as the case may be) his effective authority and control, as a result of his failure to exercise control properly over such forces where —

(a) He either knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such offenses, and

(b) The offenses concerned activities that were within his effective responsibility and control, and

(3) With respect to superior and subordinate relationships not described in subsection (2), a superior is responsible for offenses committed by subordinates under his effective authority and control, as a result of his failure to exercise control properly over such subordinates where —

(a) He either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such offenses,

(b) The offenses concerned activities that were within his effective responsibility and control, and

(c) He failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(4) A person responsible under this section for an offense is regarded as aiding, abetting, counseling or procuring the commission of the offense.

146. Subsequently, the Bush Administration informed the United Nations Secretary-General that the United States did not intend to become a party to the treaty and that accordingly, the United States has no legal obligations arising from its signature on Dec. 31, 2000. This was widely described as "unsigning" the treaty or "withdrawing" the signature of the United States, although the United States in its letter did not use that terminology. The United Nations, however, has not removed the name of the United States from the official list of signatories.

addition, the ASPA contained provisions prohibiting U.S. cooperation with the ICC, and permitting the President to authorize military force to free any U.S. military personnel held by the court, leading opponents to dub it "The Hague Invasion Act." The act was later modified to permit U.S. cooperation with the ICC when dealing with U.S. enemies.

The non-adherence of the U.S. to the Rome Statute, however, does not mean that the U.S. does not recognize command responsibility. "Article I, Section 8, Clause 10 of the U.S. Constitution provides for national trials for those who commit criminal offenses against 'the law of Nations.' Article II confers on the President the title of 'Commander in Chief,' thereby authorizing him to establish military commissions."[147]

Furthermore, the doctrine of command responsibility as a derivative of war crimes trials found its way into U.S. jurisdiction by way of policy, as embodied in the United States Army Field Manual.[148] The Field Manual, however, is not a penal code and so it is opined that it does not in and of itself create any basis for criminal liability in domestic courts-martial. Rather, it is a statement on the status of the law of war, the purpose of which is to inform operators and attorneys in the field.[149] By informing soldiers of the law, the intent is to prevent violations thereof. More recent manuals reinforce this position: "Command is a specific and legal position unique to the military. It's where the buck stops. Command is a sacred trust. The legal and moral responsibilities of commanders exceed those of any other leader of similar position and authority."[150]

This policy, however, was to be tested in the case of U.S. Army court-martial of Captain Ernest Medina for his responsibility in the My Lai Massacre in Vietnam. In keeping with U.S. policy, Captain Medina was not charged with violations of the law of war, but rather, was charged with

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147. Stephen Young, United States to Military Commissions: A Quick Guide to Available Resources, *available at* http://www.llrx.com/features/military.htm (last accessed Apr. 24, 2009).

148. *Id.* ("Field Manual (FM) 27-1: Legal Guide for Commanders and Field Manual (FM) 27-10: The Law of Land Warfare. These are two of the US Army's Field Manuals for commanding officers. They provide guidance in legal matters for officers in the field, including remedies for violations of international law." Paragraph 501, "Responsibility for Acts of Subordinates," incorporates the doctrine of command responsibility.).

149. Smidt, *supra* note 8, at 186.

150. Center for Army Leadership, US Army Command and Staff College, *Army Leadership: Be, Know, Do*, arts. 1-60, Army Field Manual No. 22-100 (1999).

violations of the Uniform Code of Military Justice (UCMJ).[151] Therefore, the judge determined that the appropriate standard of personal culpability for Captain Medina, as a result of the atrocities committed by the soldiers under his command, was Article 77 of the UCMJ which reads:

> Any person punishable under this chapter who —
>
> (1) Commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or
>
> (2) Causes an act to be done which if directly performed by him would be punishable by this chapter; is a principal.[152]

It is opined that by convicting Captain Medina on the basis of Article 77, the U.S. military court did not apply the doctrine of command responsibility laid down in *Yamashita* but instead imposed a more stringent criteria. The basis for this, however, may be due to the extent of knowledge. Whereas in *Yamashita*, the crimes were so widespread that Yamashita should have known, yet in My Lai, although the crimes were certainly horrendous, all the supposed acts took place at one location within a matter of hours. Because all the crimes occurred in one place and time, it would be difficult to conclude that Captain Medina should have known. Medina either knew or he did not know, and the panel of jurists who tried his case concluded that he did not.[153]

State practice also differs from country to country. For instance, Spain's military law treats a case of command responsibility as a separate offense, distinct from offenses by subordinates, as does the law in China, Turkey, and India. But Greece treats such cases as if the commander was a principal of the subordinate offense, as do the Netherlands and Iran.[154]

The differences in national law, sometimes amounting to contradictions, show that state practice is by no means uniform on the question, in spite of what they stated during the Rome Conference of 1998. As can be seen from the German experience in implementing the Rome Statute, the legislation itself allows for different treatments accorded commanders depending on whether their intent or negligence is involved, and the concept of

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151. Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 801-946 (1950). (The UCMJ is the basis of the military system of justice in the United States armed forces. Article 21 of the UCMJ provides the authority for the existence and operation of military tribunals.).

152. *Id.* § 877; *see also* Smidt, *supra* note 8, at 195.

153. Smidt, supra note 8, at 199-200.

154. *See* Jia, *supra* note 11.

knowledge, employed in Article 28 of the Rome Statute, is not even mentioned.[155]

5. Distilling the Context and Standards of the Doctrine

After tracing the development of the doctrine of command responsibility in international law, it is necessary at this juncture to sift through the different stages of its development in the various tribunals that elucidated on, and enriched, the understanding and application of the doctrine in order to identify the salient points of the doctrine of command responsibility.

a. Context: Armed Conflict

At this point, it is important to examine the background upon which the doctrine of command responsibility developed. The doctrine of command responsibility forms part of and has actually developed together with a body of principles falling under the general umbrella of international humanitarian law which comprises the whole of established law serving the protection of the person and property in armed conflict.[156] International humanitarian law comprises all those rules of international law which are designed to regulate the treatment of an individual in armed conflicts.[157] In order to apply the body of law termed "international humanitarian law" to a particular situation, it must first be determined that there was, in fact, an "armed conflict," whether of an internal or international nature.[158] In *Prosecutor v. Duko Tadic*,[159] the ICTY Appeals Chamber had the occasion to define an armed conflict as that which "exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[160] Furthermore, the Appeals Chamber further stated that

> [i]nternational humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring

155. *Id.*

156. THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 1 (Dieter Fleck ed., 1999).

157. *Id.* at 9.

158. Celebici Case, *supra* note 96, ¶ 182.

159. Prosecutor v. Tadic, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995).

160. *Id.*

> States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[161]

The Trial Chamber in the *Celebici Case* considered these definitions as test for the existence of an armed conflict that will trigger the application of humanitarian laws. The Chamber also considered such test as applicable to both conflicts of an internal and international character.[162] The *Celebici* Trial Chamber noted that in an international conflict, the existence of armed force between states is sufficient of itself to trigger the application of international humanitarian law. In an internal conflict, however, there is a need to identify the conflict as an internal one, in order to distinguish it from cases of civil unrest or terrorist activities. In an internal conflict, the emphasis is on the protracted extent of the armed violence and the extent of organization of the parties involved.[163]

In the context of this Note, the existence of an armed conflict is crucial to the determination of whether to apply the doctrine of command responsibility. Since the doctrine of command responsibility finds its roots in international humanitarian law, the context in which it is to be applied is in an armed conflict, whether international or internal in character. Then, there must be an obvious link between the criminal act and the armed conflict. Clearly, if a relevant crime was committed in the course of fighting or the take-over of a town during an armed conflict, for example, this would be sufficient to render the offense a violation of international humanitarian law.

Such a direct connection to actual hostilities is not, however, required in every situation. The Appeals Chamber of the ICTY had stated a view on the nature of this nexus between the acts of the accused and the armed conflict. In its opinion,

> [i]t is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. This re-emphasises the view expressed above that there need not have been actual armed hostilities in the Konjic municipality in order for the norms of international humanitarian law to have been applicable. Nor is it required that fighting was taking place in the exact time-period when the acts alleged in the Indictment occurred.[164]

The significance of this statement is that the doctrine of command responsibility can be made applicable even if the act was committed not

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161. *Id.*

162. Celebici Case, *supra* note 96, ¶ 184.

163. *Id.* ¶ 186.

164. *Id.* ¶ 74.

directly within an armed conflict or that an actual fighting took place. It is sufficient that there be a close relation between the internal conflict and the alleged illegal act. This context has a bearing on the nexus that will be established between the extrajudicial killings and the internal strife going on between the AFP and armed insurgents, as will be discussed later.

b. The Standards of Command Responsibility

The proper context for the application of the doctrine of command responsibility having been established, it is also useful to summarize and distill the salient points of the doctrine of command responsibility. The following are the salient points that can be gathered from the previous discussion tracing the doctrine's development:

i. Aspects of Command Responsibility

Command responsibility has two aspects: (1) responsibility for positive acts (e.g., ordering, instigating, planning) and (2) responsibility for culpable omissions, such as the failure to prevent or punish war crimes of subordinates. The latter omission-based (or "indirect") responsibility is based on the existence of a legal duty to prevent or punish crimes of subordinates. Where there is little or no evidence that the superior had a direct hand in the atrocities, and the superior may often have simply known about the crimes but failed to prevent them, the customary international law doctrine of command responsibility may nevertheless hold superiors liable for their dereliction with respect to the duties that accompany their position.[165] The liability attached to command responsibility is primarily based on a failure to prevent or punish subordinates for unlawful actions.[166] Since the basis is a failure to prevent, command responsibility may be characterized as an omission mode of offense.

ii. Elements Involved

Under this omission-based responsibility, the elements in command responsibility are:

(1) The existence of a superior-subordinate relationship;

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165. Timothy Wu & Yong-Sung Kang, *Criminal Liability for The Actions of Subordinates — The Doctrine of Command Responsibility and Its Analogues in United States Law*, 38 HARV. INT'L L.J. 272 (1997).

166. Eugenia Levine, Command Responsibility: The *Mens Rea* Requirement, GLOBAL POLICY FORUM, *available at* http://www.globalpolicy.org/intljustice/general/2005/command.htm (last accessed Apr. 24, 2009).

(2) The superior knew or should have known (or may also be stated as "had reason to know"[167]) that the criminal act was about to be or had been committed; and

(3) The superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[168]

iii. First Element: Characteristics of the Superior-Subordinate Relationship

The superior-subordinate relationship can be either *de facto* or *de jure*, and individuals can be criminally liable under the command responsibility doctrine when in non-military positions of superior authority.[169] The relationship must be characterized by the superior having effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offenses.[170]

iv. Second Element: *Mens Rea* Requirement

The *mens rea* element that the superior "knew or had reason to know that the criminal act was about to be or had been committed" can be satisfied by either actual knowledge or by possession of information sufficient to put the superior on notice of the risk of such offenses having occurred or occurring. The prosecutor must establish actual knowledge through direct or circumstantial evidence.[171] There is no presumption of knowledge merely because offenses may have been widespread, numerous, publicly notorious, or committed over wide areas or over prolonged periods. However these factors may allow an inference to arise that he must have possessed that knowledge.[172]

The second part of the criteria, "had reason to know," is consistent in meaning with Protocol I in reference to "had information which should have enabled them to conclude ...."[173] A commander therefore needs to be in possession of some information sufficient to put him on notice that crimes

167. ICTY Statute, art. 7, § 3.

168. Rome Statute, art. 28.

169. Celebici Appeal, *supra* note 109, ¶¶ 251-52.

170. Celebici Case, *supra* note 96, ¶¶ 377-78.

171. *Id.* ¶ 383.

172. *Id.* ¶ 417.

173. Protocol I, art. 86 (2).

had been, or were going to be, committed. The types of information that can put a commander "on notice" vary, including oral and written reports, knowledge of levels of training and the character of his men; and for the information to be "in his possession" it is sufficient that it was available or provided to the superior, even if he did not acquaint himself with it.[174] As such it is necessary to establish particular information a superior had "in his possession," which was sufficient to put him on notice.

v. Third Element: Failure to Take Necessary and Reasonable Measures

The third overall requirement is failure to take necessary and reasonable measures in accordance with the commander's legal duty. According to the ICTY Trial Chamber in *Celebici*, "a superior can only reasonably be expected to take such measures as are within his power to take, expressed by the trial court as such measures that are within his material possibility."[175] It should be noted, however, that the Trial Chamber also stated that the "lack of formal legal competence to take the necessary measures to prevent or repress the crime in question does not necessarily preclude the criminal responsibility of the superior."[176] Furthermore, as the Chamber noted, it is impossible to lay down strict guidelines on what might constitute necessary and reasonable measures outside of the context of the facts of a particular case.[177]

As an author proposes,

> [g]iven that there is an "effective control" test by which to found a superior-subordinate relationship, the nature of that control on the facts of a given case will affect what might constitute necessary and reasonable measures. Under some circumstances, reporting the matter to "the competent authorities" may be sufficient to discharge this obligation. The factual framework of the superior-subordinate relationship, both *de facto* and *de jure*, the degree of control asserted, and the measures reasonably open to a superior in a given situation, among other factors, will determine in a

174. Celebici Case, *supra* note 96, ¶¶ 238-39.

175. *Id.* ¶ 935.

176. *Id.* ¶ 395.

177. *Id.* ¶¶ 394-95; Peter James Niven, *NATO and International Crimes in the Kosovo Campaign — Can Bill Clinton and Tony Blair be held Criminally Liable?*, 2003 VICTORIA U. WELLINGTON L. REV. 2 (2003), *available at* http://www.austlii.org/nz/journals/VUWLRev/2003/2.html (last accessed Apr. 24, 2009).

given fact situation what would have constituted necessary and reasonable measures.[178]

B. Applicability of the Command Responsibility Doctrine in Philippine Jurisdiction

1. Relevance of the Geneva Conventions

As previously discussed, the four Geneva Conventions of 1949 provide the basis for the conventional meaning in customary international law for the protection of victims of armed conflict. Their provisions seek to guarantee the basic human rights to life, dignity, and humane treatment of those taking no active part in armed conflicts. These provisions alone, without implementation, however, will render their aims a mere vision. It is their enforcement by criminal prosecution which is the key to their effectiveness. The system of mandatory universal jurisdiction over those offenses described as "grave breaches" of the Conventions requires all states to prosecute or extradite alleged violators of the Conventions.

Initially, it was thought that grave breaches of the Geneva Conventions could only be committed in international armed conflicts.[179] As discussed, however, subsequent pronouncements by international tribunals have come to recognize that a strong case can be made for the application of grave breach of international humanitarian law, even when the breach takes place in an internal conflict. Thus, the customary law scope of the "grave breaches regime" is now seen to encompass even internal conflicts. As previously discussed, this can be seen in the pronouncements of the Trial Chamber in the *Celebici Case*, which expressed the view that there should be recognition that customary law has developed the provisions of the Geneva Conventions since 1949 to constitute an extension of the system of "grave breaches" to internal armed conflicts.[180]

Given this trend in customary international law, the Philippine internal strife is sufficient reason to desire that the principles so far developed be applicable to Philippine jurisdiction. Moreover, in light of extrajudicial killings that have happened of late, there is further reason for the doctrine of command responsibility to be made applicable. At this point, it is necessary to explore what possible legal bases can be proposed to make the doctrine applicable.

2. The Philippines and the Rome Statute

178. Niven, *supra* note 177.

179. Celebici Case, *supra* note 96, ¶ 70.

180. *Id.*

Though the Philippines is a signatory to the Rome Statute, the latter has not been ratified.[181] This was the subject in the case of *Pimentel, Jr. v. Executive Secretary*[182] where Aquilino Pimentel, as a member of the Senate, filed a petition for *mandamus* to compel the Office of the Executive Secretary and the Department of Foreign Affairs to transmit the signed copy of the Rome Statute to the Philippine Senate for concurrence.[183]

Pimentel's main argument hinged on his theory that the ratification of a treaty, under both domestic law and international law, is a function of the Senate. Hence, it is the duty of the executive department to transmit the signed copy of the Rome Statute to the Senate so it could exercise its discretion with respect to ratification of treaties. Moreover, Pimentel argued that the Philippines has a ministerial duty to ratify the Rome Statute under treaty law and customary international law. The Supreme Court, therefore, had to resolve the issue of whether the Executive Secretary and the Department of Foreign Affairs have a ministerial duty to transmit to the Senate the copy of the Rome Statute signed by a member of the Philippine Mission to the United Nations even without the signature of the President.

Ruling in the negative, the Supreme Court took the occasion to clarify the theory presented by Pimentel: while ratification is the formal act by which a state confirms and accepts the provisions of a treaty concluded by its representative, it is generally held to be an executive act, undertaken by the head of the state or of the government.[184] The Court therefore discarded Pimentel's submission that the Philippines is bound under treaty law and international law to ratify the treaty which it has signed. In the words of the Court:

> The signature does not signify the final consent of the state to the treaty. It is the ratification that binds the state to the provisions thereof. In fact, the Rome Statute itself requires that the signature of the representatives of the states be subject to ratification, acceptance or approval of the signatory states. Ratification is the act by which the provisions of a treaty are formally confirmed and approved by a State. By ratifying a treaty signed in its behalf, a state expresses its willingness to be bound by the provisions of such treaty. After the treaty is signed by the state's representative, the President, being accountable to the people, is burdened with the responsibility and the duty

181. The Philippines signed the Statute on Dec. 28, 2000.

182. Pimentel, Jr. v. Executive Secretary, 462 SCRA 622 (2005).

183. *Id.* (Under Section 21, Article VII of the 1987 Constitution, "[n]o treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.").

184. *Pimentel, Jr.*, 462 SCRA at 635 (2005).

to carefully study the contents of the treaty and ensure that they are not inimical to the interest of the state and its people.[185]

The Court emphasized that the power to ratify a treaty is vested in the President, subject to the Senate's concurrence; the Senate's role is limited to giving or withholding its consent, and not ratification. The Court further opined that "[a]lthough the refusal of a state to ratify a treaty which has been signed on its behalf is a step that should not be taken lightly, such decision is within the competence of the President alone, which cannot be encroached on by the Court via a writ of *mandamus*."[186]

Hence, although the Philippines is a signatory to the Rome Statute, it has not attained the status of a treaty simply because it has not been ratified. Does this mean then that the principles embodied in the Statute are inapplicable in Philippine jurisdiction? It is argued that the principles embodied in the Statute, insofar as they constitute customary international law, would still apply in the Philippines by virtue of the incorporation clause found in its Constitution. Furthermore, by virtue of the fact that the Philippines is a party to the Geneva Conventions, including Additional Protocol II, the Philippines is obliged to comply with its international legal obligations under the general principle of *pacta sunt servanda*: a treaty in force is binding upon the parties and must be performed by them in good faith.[187] Corollarily, there is reason to believe that the doctrine of command responsibility, insofar as it forms part of customary international law, may still be applicable in Philippine jurisdiction.

3. Status of Customary International Law in Philippine Jurisdiction

a. The Constitution and the Incorporation Clause

The issue of command responsibility, though not novel in international law,[188] is a doctrine which has not yet found grounding in Philippine statutory law. To date, the doctrine is found mostly in administrative issuances of the Armed Forces of the Philippines and the Philippine National Police. Though the doctrine of command responsibility may be bereft of statutory basis, the support for the doctrine may be found not in any statute but in the basic law of the land: the Constitution.

185. *Id.* at 637-38.

186. *Id.* at 638.

187. BROWNLIE, *supra* note 58, at 620.

188. Ching, *supra* note 68, at 167.

The incorporation clause, found early on in the Constitution, states that "[t]he Philippines ... adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."[189] By virtue of this provision, the Philippines, as a member of the family of nations, considers itself bound by international law in its relations with other states.[190] Furthermore, by this provision, the Philippines also makes the generally accepted principles of international law part of domestic law.[191] The intent of the framers of the Constitution, however, is that the incorporated law would have the force not of a constitutional imperative, but that of a statute.[192] Moreover, not everything in international law would become part of domestic law; but rather the principle of incorporation applies only to customary law and to treaties which have become part of customary law because the rule is that treaties become part of Philippine law only by ratification.[193]

Under the doctrine of incorporation, since international law has the force of domestic law, it "can therefore be used by Philippine courts to settle domestic disputes in much the same way that they would use the Civil Code or the Penal Code and other laws passed by Congress."[194] Philippine courts have made use of the various principles of international law to settle domestic disputes. It has therefore been said that the application of the incorporation clause in Philippine legal history has been almost entirely a judicial construct.[195] This gives life to the legal imprimatur of Article 8 of the Civil Code when it states that "[j]udicial decisions applying or interpreting the laws or the Constitution shall form part of the legal system of the Philippines." Judicial decisions, in fact, have given rise to a body of

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189. PHIL. CONST. art. II, § 2.

190. *See* BERNAS COMMENTARY, *supra* note 47, at 61-63.

191. *Id.* at 10-11.

192. 1 RECORD OF THE 1986 CONSTITUTIONAL COMMISSION 33 (1986).

193. BERNAS COMMENTARY, *supra* note 47, at 61.

194. *Id.*

195. *See* Aloysius Llamzon, *The Generally Accepted Principles of International Law as Philippine Law: Towards a Structurally Consistent Use of Customary International Law in Philippine Courts*, 47 ATENEO L.J. 243 (2002). (This Note builds on the conclusions made by Llamzon: that the Supreme Court's modern interpretation of the incorporation clause has almost entirely become a matter of judicial construct.).

jurisprudence touching on various principles of international law that have found local application.[196]

b. Other Relevant Laws

Other relevant statutory laws also acknowledge that certain doctrines of international law have a bearing on Philippine domestic laws. Article 2 of the Revised Penal Code, for example, states that the provisions of the Code are applicable in the Philippines, "except as provided in the treaties and laws of preferential application." Article 14 of the Civil Code, likewise, provides that "[p]enal laws and those of public security and safety shall be obligatory upon all who live or sojourn in the Philippine territory, subject to the principles of public international law and to treaty stipulations." All these are indicative of the status and effect that doctrines of international law — as well as treaties — have on domestic application.

c. Case Law on the Matter

The case of *Kuroda v. Jalandoni*[197] is authority for the idea that even if the Philippines is not a signatory to a treaty, it may still be bound by a doctrine of customary international law.[198] Among the issues resolved in this case were (a) the validity of an Executive Order issued by the President establishing a National War Crimes Office for the prosecution of war criminals, and (b) the validity of the application of the Hague Convention and the Geneva Convention (because the Philippines is not a signatory to the first and signed the second only in 1947). In resolving the second issue, which is most relevant to this Note, the Supreme Court stated:

> [I]t cannot be denied that the rules and regulation of the Hague and Geneva conventions form part of and are wholly based on the generally accepted principles of international law ... Such rule and principles therefore form part of the law of our nation even if the Philippines was not a signatory to the conventions embodying them for our Constitution has been deliberately general and extensive in its scope and is not confined to

196. *See generally* DIGEST OF PHILIPPINE INTERNATIONAL LAW JURISPRUDENCE (Pacifico Castro & Myrna Feliciano eds., 1982); ALEJANDRO FERNANDEZ, INTERNATIONAL LAW IN PHILIPPINE RELATIONS: 1898-1946 (1941); Adolfo Azcuna, *The Supreme Court and Public International Law: 1945-2000*, 46 ATENEO L.J. 24 (2001).

197. Kuroda v. Jalandoni, 83 Phil. 171 (1949).

198. *Id.* at 178.

> the recognition of rule and principle of international law as contained in treaties to which our government may have been or shall be a signatory.[199]

Furthermore, even if these principles were applicable only because the Philippines was then under the sovereignty of the United States, the Court has pointed out that "these rights and obligations were not erased by our assumption of full sovereignty."[200]

Kuroda is but one illustration of the fact that the determination of what constitutes generally accepted principles of international law has often been in Philippine legal history a matter of judicial determination.[201] For the purpose of this Note, however, one can find in the Constitution and in *Kuroda* sufficient legal bases to hold that as a principle of customary international law, the doctrine of command responsibility may be validly applied in Philippine jurisdiction.

4. The Concept of Command Responsibility in Philippine Laws

The general concept of command responsibility, meaning that of making a superior accountable for the acts of a subordinate under his control, is not alien to Philippine legal history. Though the doctrine of command responsibility as developed in international law is not strictly defined in Philippine laws, one can still find that the seminal concept is often used in laws, jurisprudence, and administrative issuances, even if such concept does not exactly correspond to the strict definition of command responsibility under international law. At this point, it is important to examine the different areas and modes where the concept has already been discussed or even applied in different ways.

a. Drafting of the 1987 Philippine Constitution

The discussions on the Philippine Constitutional Commission reveal that there was a previous attempt to incorporate the doctrine of command responsibility in a provision that was proposed to be included under the Bill of Rights. The relevant discussion concerned a proposal of Commissioner Ople with a proposed amendment by Commissioner Guingona, to include a provision in the Bill of Rights that will oblige the State to compensate victims of grave abuses of members of the military or police.[202] The proposal was precisely grounded on the experience of the martial law years. The

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199. *Id.*

200. *Id.*

201. BERNAS COMMENTARY, *supra* note 47, at 62.

202. 1 RECORD OF THE 1986 CONSTITUTIONAL COMMISSION 753-54 (1986).

proposal read: "In the case of grave abuses committed against the right to life by members of the military or police forces or their adversary, the presumption of command responsibility shall apply, and the state must compensate the victims of government forces."[203] The proposal, however, was immediately met with fierce opposition, primarily from Commissioner Padilla:

> MR. PADILLA: Madam President, I do not know about presumption or the principle of command responsibility. I do not know whether that is recognized under military law, but I am certain that under the Revised Penal Code, we do not recognize criminal liability based on so-called command responsibility unless that command responsibility would fall under Article 17 as to who are the principals — those who directly force or induce others to commit the crime. "Responsibility" under the Penal Code would refer to the principals, accomplices and accessories as enumerated under Article 16. Article 17 provides for three kinds of principals: by direct participation, by direct inducement and by indispensable cooperation. Should there be conspiracy among several accused and such conspiracy is established, then there will be collective responsibility, otherwise, there is only individual or separate responsibility.
>
> Madam President, compensation would be in the nature of a civil liability. Under the Penal Code, a person criminally liable is also civilly liable, but the person who is liable civilly is the person who is accused and convicted as principal. Here we make the state compensate, but the state is not the accused. Maybe higher officers in the military, if they are specifically charged and are convicted, will be civilly liable, but not the state for the crimes committed by others even if they are public officers.
>
> Moreover, this speaks of flagrant and systematic abuses. Today this really amounts to crimes against persons, particularly murder. What about other crimes of the Penal Code like rape, crimes against chastity, or kidnapping with ransom, crimes against personal liberty and security? Will this be limited only to abuses against life? It is not even clear whether the victim has actually died as a consequence or as a causal effect of the criminal acts of the accused.
>
> With regard to presumption, there are legal presumptions in law, but they must be based on facts from which the law infers or deduces a legal presumption. There can be no presumption of liability because that would be contrary to the presumption of innocence.
>
> And so, Madam President, I believe that this proposed new section should not be included, even if it be amended by corrective or perfectionary

203. *Id.*

suggestions because it violates the fundamental principles of criminal responsibility and civil liability under the Penal Code.[204]

More discussions followed until finally the provision was not accepted; hence, the doctrine of command responsibility was not included. It should be noted here that the discussion of command responsibility was in reference to making the State responsible for the illegal acts of its agents. Moreover, it was discussed in an era when there were no developments yet in international criminal law which, in recent years, in the light of developments embodied in the Rome Statute, has accepted the doctrine of command responsibility in a given context.

b. The Civil Code

The idea closest to command responsibility may be found in the area of tort law, specifically, the concept of vicarious liability. In Anglo-American law, the applicable doctrine is called *respondeat superior*, a form of vicarious liability where the liability is strictly imputed on the employer not because of his act or omission but because of the act or omission of the employee. Under this principle, the employer cannot escape liability by claiming that he exercised due diligence in the selection or supervision of employees.[205] In Philippine jurisdiction, though vicarious liability does not follow the strict liability imposed by the doctrine of *respondeat superior*, the vicarious liability is still founded on a superior-subordinate relationship. For example, employers or parents are being made liable not only because of the negligent or wrongful act of the person for whom they are responsible but also because of their own negligence.[206] This vicarious liability is expressed in Articles 2180 to 2182 of the Civil Code.[207]

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204. *Id.*

205. TIMOTEO B. AQUINO, TORTS AND DAMAGES 628 (2001).

206. *Id.* at 629.

207. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386 (1950).

Art. 2180 provides in part: "The obligation imposed by Article 2176 is demandable not only for one's own acts or omissions, but also for those of persons for whom one is responsible."

Art. 2181 provides that: "[w]hoever pays for the damage caused by his dependents or employees may recover from the latter what he has paid or delivered in satisfaction of the claim."

Art. 2182 provides: "If the minor or insane person causing damage has no parents or guardian, the minor or insane person shall be answerable with his

c. Revised Penal Code (RPC)

It is said, however, that the exceptional cases where the doctrine of *respondeat superior* has been applied are those found in the RPC, specifically in articles 101, 102, and 103.[208] Under these articles which tackle the vicarious civil liability arising from delict, the employer and other persons placed in the position of a superior are held liable for the negligence of a subordinate irrespective of his exercise of due care. This instance follows the principle of *respondeat superior* because strict liability is imputed without providing the

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own property in an action against him where a guardian *ad litem* shall be appointed."

208. REVISED PENAL CODE, art. 101. *Rules regarding civil liability in certain cases.* The exemption from criminal liability established in subdivisions 1, 2, 3, 5 and 6 of Article 12 and in subdivision 4 of Article 11 of this Code does not include exemption from civil liability, which shall be enforced subject to the following rules:

> *First.* In cases of subdivisions 1, 2, and 3 of Article 12, the civil liability for acts committed by an imbecile or insane person, and by a person under nine years of age, or by one over nine but under fifteen years of age, who has acted without discernment, shall devolve upon those having such person under their legal authority or control, unless it appears that there was no fault or negligence on their part.
>
> ...

Art. 102. *Subsidiary civil liability of innkeepers, tavernkeepers and proprietors of establishments.* In default of the persons criminally liable, innkeepers, tavernkeepers, and any other persons or corporations shall be civilly liable for crimes committed in their establishments, in all cases where a violation of municipal ordinances or some general or special police regulation shall have been committed by them or their employees.

Innkeepers are also subsidiarily liable for the restitution of goods taken by robbery or theft within their houses from guests lodging therein, or for the payment of the value thereof, provided that such guests shall have notified in advance the innkeeper himself, or the person representing him, of the deposit of such goods within the inn; and shall furthermore have followed the directions which such innkeeper or his representative may have given them with respect to the care and vigilance over such goods. No liability shall attach in case of robbery with violence against or intimidation of persons unless committed by the innkeeper's employees.

Art. 103. *Subsidiary civil liability of other persons.* The subsidiary liability established in the next preceding note shall also apply to employers, teachers, persons, and corporations engaged in any kind of industry for felonies committed by their servants, pupils, workmen, apprentices, or employees in the discharge of their duties.

superior the usual defense afforded by the Civil Code to superiors or persons in authority.

Title Seven of the RPC tackles crimes committed by public officers and contains an enumeration of crimes committed as a result of dereliction of duty. Of particular relevance is Article 208[209] which is entitled "Negligence and Tolerance in the Prosecution of Offenses." There is no express mention of command responsibility but the crime arises as a result of a public officer's or officer of the law's failure to prosecute or cause the institution of prosecution after an offense has been committed. It is important to note, though, that the crime involves an element of malice, different from the liability resulting from negligence that is contemplated under the doctrine of command responsibility. As jurisprudence has explained:

> The title of the article uses the word "negligence" which should not be understood merely as a lack of foresight or skill. The word "negligence" simply means neglect of duties of his office by *maliciously failing* to move the prosecution and punishment of the delinquent.[210]

Since malice is an important element, the liability involved here does not correspond to the concept of command responsibility, which does not involve malice but negligence, as will be explained later.

d. Other Laws

The Administrative Code of 1987[211] lays down the doctrine of strict liability with regard to superior officers, to wit:

> Sec. 38. *Liability of Superior Officers.* —
>
> (1) A public officer shall not be civilly liable for acts done in the performance of his official duties, unless there is a clear showing of bad faith, malice or gross negligence.
>
> (2) Any public officer who, without just cause, neglects to perform a duty within a period fixed by law or regulation, or within a reasonable period if

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209. REVISED PENAL CODE, art. 208. *Prosecution of offenses; negligence and tolerance.* The penalty of *prision correccional* in its minimum period and suspension shall be imposed upon any public officer, or officer of the law, who, in dereliction of the duties of his office, shall maliciously refrain from instituting prosecution for the punishment of violators of the law, or shall tolerate the commission of offenses.

210. U.S. v. Mendoza, 23 Phil. 194 (1912) (emphasis supplied).

211. Administrative Code of 1987 [ADMINISTRATIVE CODE], Executive Order No. 292 (1987).

> none is fixed, shall be liable for damages to the private party concerned without prejudice to such other liability as may be prescribed by law.
>
> (3) A head of a department or a superior officer shall not be civilly liable for the wrongful acts, omissions of duty, negligence, or misfeasance of his subordinates, unless he has actually authorized by written order the specific act or misconduct complained of.[212]

The Family Code[213] also contains the seminal idea of command responsibility when it imputes liability on the parents' neglect in the care over their children. Articles 219 and 221[214] of the Family Code impose liability over parents or guardians for the damage caused by their children or ward. Article 58 of the Child and Youth Welfare Code[215] likewise complements the provisions of the Civil Code and the Family Code as regards the liability of parents and guardians.

In all the provisions above, it can be seen that the law imposes a liability on relevant persons on the basis of the authority or responsibility and ability to control that the superior has over the subordinate or the child. It can also be seen that the rational foundation of the imposition of liability is precisely the same rationale found in the doctrine of command responsibility, as applied in customary international law.

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212. *Id.* art. 38.

213. The Family Code of the Philippines [FAMILY CODE], Executive Order No. 209 (1987).

214. *Id.* art. 219.

> Those given the authority and responsibility under the preceding Article shall be principally and solidarily liable for damages caused by the acts or omissions of the unemancipated minor. The parents, judicial guardians or the persons exercising substitute parental authority over said minor shall be subsidiarily liable.
>
> The respective liabilities of those referred to in the preceding paragraph shall not apply if it is proved that they exercised the proper diligence required under the particular circumstances.
>
> All other cases not covered by this and the preceding articles shall be governed by the provisions of the Civil Code on quasi-delicts.
>
> Art. 221. Parents and other persons exercising parental authority shall be civilly liable for the injuries and damages caused by the acts or omissions of their unemancipated children living in their company and under their parental authority subject to the appropriate defenses provided by law.

215. The Child and Youth Welfare Code, Presidential Decree No. 603 (1974).

> Art. 58. *Torts.* Parents and guardians are responsible for the damage caused by the child under their parental authority in accordance with the Civil Code.

e. Command Responsibility in Case Law

Philippine case law is replete with references of the concept of command responsibility. In a number of decisions, the Supreme Court found individuals liable because of their failure to exercise the due care required of a superior over the control and supervision of a subordinate. The concept has been applied in civil cases, administrative cases, and even in criminal cases.

To illustrate, in *Solatan v. Inocentes*,[216] a lawyer was made responsible for the dishonest acts of a subordinate under the principle of command responsibility; in *Nokom v. NLRC*,[217] a manager was made liable for the unexplained anomalies and instances of fraud that happened in her division. *People v. Lucero, Jr.*[218] involved the criminal case against Col. Vicente Lucero, Jr. and 1st Lt. Benjamin P. Santiago for the murder of two Muslim men in Basilan. While Santiago was directly implicated for shooting the victims, the trial court convicted Lucero on the basis of the doctrine of command responsibility and conspiracy. The trial court's decision, as reproduced in the case, reads:

> On the basis of the doctrine of command responsibility, that is, 'the accountability or responsibility or answerability of the commander of a Military Force or Unit for the acts of his men, inclusive of the authority to order, to direct, to prevent or control the acts of his men,' Col. Vicente Lucero, being the Battalion Commanding Officer who was present during the killings but did nothing to prevent it, is liable. Corollarily, Col. Lucero is guilty as co-principal by means of conspiracy.[219]

Thus, the trial court cited *State v. Patterson*[220] which enunciated: "One merely witnessing a crime, without intervention, is not a party thereto, unless interference was duty and interference was condition of crime, or was designed and operated as encouragement to, or protection of, perpetrator."[221]

The Supreme Court, however, reversed the decision of the trial court and held that Santiago could not be convicted because his guilt was not proven beyond reasonable doubt due to the inconsistencies of the

216. Solatan v. Inocentes, 466 SCRA 1 (2005).

217. Nokom v. NLRC, 336 SCRA 97 (2000).

218. People v. Lucero, Jr., 197 SCRA 717 (1991).

219. *Id.* at 727.

220. State v. Patterson, 155 SE 661, 109 W. Va. 588 (1930).

221. *Lucero, Jr.*, 197 SCRA at 727 (citing State v. Patterson, 155 SE 661, 109 W. Va. 588 (1930)).

testimonies. More importantly, the Court acquitted Lucero based on the fact that his presence at the scene of the crime was not fully established; hence, he did not witness the killings. Implicit in this decision is the determination that for command responsibility to attach, the commander should have witnessed the commission of the crime and assented to it.

f. Command Responsibility in Administrative Circulars

To further stress the point that command responsibility is not an alien concept in the Philippines, it is also relevant to point out that, even in the military, the concept exists, but in the form of an executive order and some administrative circulars as well as letter-directives.

In 1995, then President Fidel Ramos issued Executive Order No. 226[222] which institutionalized the doctrine of command responsibility in government offices and, in particular, in the Philippine National Police and law enforcement agencies. The Order imposes administrative liability on the officer or superior found guilty of neglecting his duty based on the premise that a supervisor or commander is duty-bound and, as such, is expected to closely monitor, supervise, direct, coordinate, and control the overall activities of his subordinates within his area of jurisdiction. The officer or superior can be held administratively accountable for neglect of duty in taking appropriate action to discipline his men. The Order defines the liability and even provides for a presumption, to wit:

> Sec. 1. *Neglect of Duty under the Doctrine of "Command Responsibility".* — Any government official or supervisor, or officer of the Philippine National Police or that of any other law enforcement agency shall be held accountable for "Neglect of Duty" under the doctrine of "command responsibility" if he has knowledge that a crime or offense shall be committed, is being committed, or has been committed by his subordinates, or by others within his area of responsibility and, despite such knowledge, he did not take preventive or corrective action either before, during, or immediately after its commission.
>
> Sec. 2. *Presumption of Knowledge.* — A government official or supervisor, or PNP commander, is presumed to have knowledge of the commission of irregularities or criminal offenses in any of the following circumstances:
>
> (a) When the irregularities or illegal acts are widespread within his area of jurisdiction;

222. Office of the President, Institutionalization of the Doctrine of "Command Responsibility" in All Government Offices, Particularly at All Levels of Command in the Philippine National Police and Other Law Enforcement Agencies, Executive Order No. 226 (Feb. 17, 1995).

> (b) When the irregularities or illegal acts have been repeatedly or regularly committed within his area of responsibility; or
>
> (c) When members of his immediate staff or office personnel are involved.[223]

Recently, in 4 February 2007, General Hermogenes Esperon issued a letter-directive[224] commanding strict adherence to the doctrine of command responsibility. The Letter was addressed to commanders of all relevant services and to the Provost Marshal General of the Armed Forces of the Philippines. It is interesting to note that the Letter makes reference to Executive Order No. 226 and articulates the standards stated in it. Aside from adopting the liability and presumptions laid down by the Order, the Letter enunciates the duty of a commanding officer, to wit:

> Duty of Commanding Officer. — It shall be the duty of a Commanding Officer:
>
> (a) *Erring personnel to be taken into custody:* Upon receipt of an adverse report indicating that military personnel under his command committed a serious offense, the commander shall immediately take custody of subject military personnel subject to the provisions of EO 106, s-37, and cause the expeditious conduct of investigation of such report by an appropriate investigating Officer, if he is not yet under police or under the custody of the regular courts.
>
> (b) *Arrest and confinement or restriction of offenders:* To immediately order the arrest and confinement of military personnel who commit, are actually committing, or have been charged for committing a grave offense pursuant to Article of War 70. If arrest or confinement is made without prior investigation or formal charges filed immediately upon arrest or confinement, investigation shall be initiated and completed not later than eight (8) calendar days after the arrest and confinement to determine the existence of prima facie evidence to justify his continuous confinement, restriction to limits or custody under a responsible officer.[225]

The letter-directive further states that

> commanders of erring military personnel found in violation of the directive shall be held accountable either for violation of Article of War 96 (Conduct Unbecoming of an Officer and a Gentleman), or as an accessory after the

223. *Id.*

224. Department of National Defense, Letter from the Office of the Chief of Staff of the Armed Forces of the Philippines re: Strict Adherence to the Doctrine of Command Responsibility (Feb. 4, 2007).

225. *Id.*

> fact upon deliberate refusal or failure or neglect to act accordingly and decisively[226]

as required by pertinent laws.

Given the above orders and directives, it is not unreasonable to conclude that the doctrine of command responsibility exists in a seminal form in Philippine jurisdiction and though the liability attaching to it is not statutorily defined as a crime, there is sufficient basis to hold commanders liable. But to properly aid the courts in determining whether the liability exists, it is necessary at this point to define command responsibility liability within the context of Philippine laws and jurisprudence. It is also necessary to lay down the conditions which should be present to make the liability attach.

IV. COMMAND RESPONSIBILITY LIABILITY: THE PROBLEM OF CHARACTERIZATION

A. Hurdling the Constitutional Bar and the Nullum Crimen Sine Lege Principle

The strongest argument against making command responsibility liability attach is the basic principle of due process, as well as the basic principles embodied in criminal law as discussed by Commissioner Padilla in the Constitutional Commission sessions. The Constitution states that "[n]o person shall be held to answer for a criminal offense without due process of law."[227] This due process requirement is satisfied when, assuming that a competent court is trying a person,

> the accused is informed as to why he is proceeded against and what charge he has to meet, with his conviction being made to rest on evidence that is not tainted with falsity after full opportunity for him to rebut it and the sentence being imposed in accordance with a valid law.[228]

Moreover, as a civil law jurisdiction, the Philippines abides by the principle of *nullum crimen sine lege* (that there can be no crime imputable on anyone unless it is clearly defined by law). This principle is embodied in Article 21 of the RPC, which states that "no felony shall be punishable by any penalty not prescribed by law prior to its commission."[229] This provision is actually a declaration that "no person shall be subject to criminal

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226. *Id.*

227. PHIL. CONST., art. III, § 14.

228. Nuñez v. Sandiganbayan, 111 SCRA 433, 452-53 (1982) (citing Vera v. People 31 SCRA 711, 717 (1970)).

229. REVISED PENAL CODE, art. 21.

prosecution for any act (or omission) of his until after the State has defined the crime and has fixed the penalty therefor"[230] and "[u]nless there be a particular provision in the penal code or special penal law or any other existing law recognized under our jurisdiction that defines and punishes the act, even if it be socially or morally wrong, no criminal liability is incurred in its commission."[231] At the heart of these basic requirements is the principle of fairness required for the benefit of the accused, especially when the prosecuting arm of the State is after him. Furthermore, these principles are especially applicable when one speaks of specific positive acts that need to be defined clearly as a violation of law before such can be proscribed.

Given the fact that command responsibility is a doctrine of customary international law which is not only clearly defined and codified in a number of international legal documents but has also been applied in several instances by international criminal tribunals, there is reason to believe that implementing the doctrine under the incorporation clause of the Constitution would not violate the constitutional requirements of due process. In other words, the status of the doctrine of command responsibility as a widely accepted principle in customary international law, satisfies the due process requirement and the *nullum crimen sine lege* principle. It is relevant to state here that this was the reasoning relied upon by the Trial Chamber in resolving the *Celebici Case*.[232] By the incorporation of the doctrine into Philippine jurisdiction by virtue of its being part of customary law, no citizen can claim that command responsibility liability has not been properly defined. Thus, it is possible for Philippine courts to apply the principles and standards embodied in customary international law as regards this doctrine. In addition to the status of the doctrine of command responsibility as customary international law, the Philippines has the

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230. U.S. v. Parrone, 24 Phil. 29, 35 (1913).

231. U.S. v. Taylor, 28 Phil. 599, 604 (1914).

232. *See* Niven, *supra* note 177.

> In interpreting Article 7 (3) the ICTY had to have regard to the international customary law existing at the time of the offenses, to avoid compromising the *nullum crimen sine lege* principle. The Tribunal considers its interpretation of Article 7 (3) to be consistent with the position in customary international law *at the time the offenses were committed*, having regard to the World War Two jurisprudence from the Nuremberg and Tokyo trials, the relevant notes from the First Protocol, the ICC Statute and the ILC Draft Code. As a result its jurisprudence is of significance for other international tribunals or courts (the ICTR, and the ICC) and also for domestic courts dealing with offenses under domestic jurisdiction (emphasis supplied).

consequent legal obligation to abide by the valid treaties it has contracted under the principle of *pacta sunt servanda*.

Assuming but not conceding that the doctrine of command responsibility — as a doctrine of international law — may not yet find applicability in Philippine jurisdiction, a careful perusal of the RPC will show that command responsibility liability is not an alien concept and may very well be already embodied in certain crimes described and punished therein.

B. The Problem of Characterization: What Constitutes Command Responsibility Liability and Who May be Liable?

1. Command Responsibility Proper as a Derivative and Omission Mode of Liability: Articles 3 & 365 of the RPC

It has been stated that the liability attached to command responsibility is primarily based on a failure to prevent or punish subordinates for unlawful actions,[233] and thus is properly characterized as an omission mode of offense or a kind of negligence. Negligence denotes the mental disposition of a person who commits a wrongful act, and although the person who committed the act did not intend to act illegally or to cause the harmful consequences of the act, in doing so he or she deviated from conduct expected of a reasonable person within the same circumstances. While the person who acts intentionally foresees the illegality and harmful consequences of his or her act, the person who acts negligently does not appreciate the illegality or the harmful consequences of his or her action, while a reasonable person would in the prevailing circumstances have foreseen and avoided acting illegally or bringing about the harmful consequences of the act.[234]

The RPC recognizes this mode of offense when it states that "[f]elonies are committed not only by means of deceit (*dolo*) but also by means of fault (*culpa*)."[235] Further, it clarifies what constitutes *culpa* when it states in the same provision that "there is fault when the wrongful act results from imprudence, negligence, lack of foresight or lack of skill."[236] The incipient idea in this Article is fully developed when later, a whole chapter is devoted

233. Levine, *supra* note 166.

234. Niven, *supra* note 177.

235. REVISED PENAL CODE, art. 3.

236. *Id.*

in the Penal Code to characterizing criminal negligence.[237] Reckless imprudence, as criminal negligence is called in the RPC, "consists in the voluntary, but without malice, doing or failing to do an act from which material damage results by reason of inexcusable lack of precaution on the part of the person performing or failing to perform such act."[238] The RPC provides the basis by which to measure the degree of negligence by providing the factors to be considered: "employment or occupation, degree of intelligence, physical condition and other circumstances regarding persons, time and place."[239] When the act is attended by a lower degree of negligence, it is called simple imprudence which consists in the "lack of precaution displayed … in which the damage impending to be caused is not immediate nor the danger clearly manifest."[240]

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237. REVISED PENAL CODE, art. 365.

> Any person who, by reckless imprudence, shall commit any act which, had it been intentional, would constitute a grave felony, shall suffer the penalty of arresto mayor in its maximum period to prision correccional in its medium period; if it would have constituted a less grave felony, the penalty of arresto mayor in its minimum and medium periods shall be imposed; if it would have constituted a light felony, the penalty of arresto menor in its maximum period shall be imposed.
>
> Any person who, by simple imprudence or negligence, shall commit an act which would otherwise constitute a grave felony, shall suffer the penalty of arresto mayor in its medium and maximum periods; if it would have constituted a less serious felony, the penalty of arresto mayor in its minimum period shall be imposed.
>
> When the execution of the act covered by this article shall have only resulted in damage to the property of another, the offender shall be punished by a fine ranging from an amount equal to the value of said damages to three times such value, but which shall in no case be less than twenty-five pesos.
>
> Reckless imprudence consists in voluntary, but without malice, doing or failing to do an act from which material damage results by reason of inexcusable lack of precaution on the part of the person performing or failing to perform such act, taking into consideration his employment or occupation, degree of intelligence, physical condition and other circumstances regarding persons, time and place.
>
> Simple imprudence consists in the lack of precaution displayed in those cases in which the damage impending to be caused is not immediate nor the danger clearly manifest.

238. *Id.*

239. *Id.*

240. *Id.*

Considering these concepts put forward by the RPC, it is not far-fetched to conclude that the elements involving command responsibility liability may be properly characterized as falling within the description of criminal negligence. Of course, this goes without saying that with regard to concrete circumstances and acts, the determination of whether such negligence exists is within the sound discretion of the court. The point here, however, is that given the characterization of command responsibility liability, it is possible to make a commander liable under Article 365 of the RPC since such military commander has positive duties imposed on him by law and by his office and that his failure or negligence in the exercise of such duty will make him liable under existing laws. Liability through the command responsibility doctrine depends on an affirmative duty on the part of the superior, whereby an omission may constitute the *actus reus* of the crime. As the liability of the superior is derivative of the subordinate's illegal act, a duty must exist if there is to be any legally relevant connection between the subordinate's act, the superior's omission, and the eventual imposition of liability. The superior's duty thus defines the contours of the command responsibility doctrine — to whom and in what situations command responsibility should apply.[241] Again, the actual application of the principle will depend on the sound discretion of the court when it examines the concrete facts of the case.

Furthermore, it has also been previously stated that command responsibility is in some way a kind of accomplice liability[242] and is a form of complicity through omission. Since accomplices and principals are held equally liable, the failure of commanders to discharge a binding obligation entails a responsibility for the underlying crimes committed by subordinates. This liability should be differentiated from liability that accrues from positive and direct participation in the crime, for example through ordering or inciting others.[243] Again, this kind of liability is recognized under the RPC when it states in Article 18[244] who accomplices are. Command responsibility liability would therefore be cooperation by omission. This view, though, may be applied only in a limited sense and subject to existing jurisprudence on the matter. While there is a wealth of jurisprudence in international law

241. Wu & Kang, *supra* note 165, at 290.

242. *Id.* at 283.

243. Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573, 577 (1999).

244. REVISED PENAL CODE, art. 18 ("Accomplices are the persons who, not being included in Article 17 [Principals], cooperate in the execution of the offense by previous or simultaneous acts.").

illustrating this mode of liability, there may be few or no instances yet in Philippine case law.

2. Who May be Found Liable for the Crime and the *Mens Rea* Requirement

a. The Person Liable

The next area to be examined is the person who may be liable under the doctrine of command responsibility. When there is a genuine question as to how blameworthy one agent is with respect to another, and as to what mental states and actions must be attributable to that agent such that he is as guilty as the other, these questions cannot simply be assumed away by imposing strict liability.[245]

Logically, with regard to command responsibility, the person liable is the superior or commander of the subordinate who is the direct perpetrator of the crime, whether or not the latter is identified by name. It is sufficient that the perpetrator is identified as belonging to a unit or group controlled by the superior.[246] Furthermore, if one considers the chain-of-command which exists in the military, the next logical idea that comes to mind is that there may be a whole line of superiors that may be found liable under this doctrine, even reaching up to the Commander-in-Chief of the Armed Forces. One reaction to this multiplicity of potential defendants would be to prosecute those who are furthest up the chain of authority, but such a prosecution must surmount a number of theoretical and doctrinal conundrums, as the superior in question may be many times removed from the illegal actions of his subordinates. The further away a superior is from the actual "smoking gun," the more difficult he is to prosecute.[247] It is even opined by a commentator that it would be too treacherous to define or even to indicate by way of illustration the class of agents who may stand in such a responsible relation. To attempt a formula embracing the variety of conduct whereby persons may responsibly contribute in furthering an illegal action would be mischievous futility. In such matters, the good sense of prosecutors and the wise guidance and ultimate judgment of trial judges must be trusted.

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245. Wu & Kang, *supra* note 165, at 282.

246. Prosecutor v. Blaskic, IT-95-14-A, Appeals Chamber, ¶ 217 (July 29, 2004). (The ICTY here held that "[i]t is sufficient that the perpetrators are identified as belonging to a unit or group controlled by the superior.").

See also Prosecutor v. Brima et al., SCSL-04-16-T, Trial Chamber, ¶ 790 (June 20, 2007).

247. Wu & Kang, *supra* note 165, at 272.

Our system of criminal justice necessarily depends on "conscience and circumspection in prosecuting officers."[248]

It is proposed, therefore, that a reasonable connection has to be established between the subordinate directly responsible for the crime and the superior who had the ability to effectively control the subordinate. It is proposed that that the tests that may be employed are two: (1) reasonability in the connection between the superior and subordinate; and (2) the ability to effectively control the actions of the subordinate. This effective control should be construed in the sense of having the material ability to prevent and punish the commission of these offenses, as laid down in the doctrine under customary international law.

b. Mens Rea Requirement

It is a salient principle of criminal law as well as legal ethics that a person should not be punished for wrongful acts unless the perpetrator's conduct was attended by a blameworthy state of mind. The principle encapsulated in the maxim *actus non facit reum, nisi mens sit rea* (an act does not render the perpetrator culpable unless there is a criminal intention) thus represents a moral directive of the legal idea.[249] The relevant question therefore is that if the subordinate commits a crime for which intent is required, does the superior have to share that intent, or is mere knowledge, recklessness, or even negligence enough? A simple and consistent solution to this problem would be to require that the mental state of the superior be the same as that of the subordinate. Liability would then be straightforwardly personal, and "vicarious" only to the extent that the last link in the chain of causation leading to the result element is the subordinate, not the superior.[250] However, this is not always easy to prove and is not always the situation contemplated by the doctrine of command responsibility.

Since the liability is premised on a kind of negligence or imprudence, then the standards set by the Rome Statute would suffice, which is that the superior "knew or had reason to know that the criminal act was about to be or had been committed." This translates to actual or constructive knowledge on the part of the superior or commander. In other words, the superior should have possession of information sufficient to put the superior on notice of the risk of such offenses having occurred or occurring. As previously

248. *Id.* at 287.

249. John Van der Vyver, *The International Criminal Court and The Concept of Mens Rea In International Criminal Law*, 12 U. MIAMI INT'L & COMP. L. REV. 57 (2004).

250. Wu & Kang, *supra* note 165, at 282.

mentioned, the types of information that can put a commander "on notice" vary, including oral and written reports, knowledge of levels of training and the character of his men, and for the information to be "in his possession" it is sufficient that it was available or provided to the superior, even if he did not acquaint himself with it.[251] As such, it is necessary to establish the particular information a superior had "in his possession" which was sufficient to put him on notice. Even general information (e.g., media reports) which would place the superior on notice of possible unlawful acts by his subordinate should be sufficient to hold him criminally liable if he failed to investigate and punish his subordinate.

The foregoing discussion may suggest that the specification of a single, rigorously defined, unambiguous *mens rea* requirement may be the best approach; but this would be a fruitless exercise as it is almost impossible to discern the precise holdings of derivative liability cases with respect to *mens rea* in practice.[252] Some of the relevant factors in making a constructive knowledge finding include:

(a) the number of illegal acts;

(b) the type of illegal acts;

(c) the scope of illegal acts;

(d) the time during which the illegal acts occurred;

(e) the number and type of troops involved;

(f) the logistics involved, if any;

(g) the geographical location of the acts;

(h) the widespread occurrence of the acts;

(i) the tactical tempo of operations;

(j) the modus operandi of similar illegal acts; and

(k) the location of the commander at the time.[253]

Again, these criteria are not exclusive and the determination of whether there was actual or constructive knowledge would still depend on the findings of the court hearing the case.

3. The Elements Involved

251. Celebici Case, *supra* note 96, ¶¶ 238-39.

252. Wu & Kang, *supra* note 165, at 286.

253. *Id.* at 16.

In the event that a case is filed alleging that an extrajudicial killing was committed with the involvement of the military, there is a need to properly establish that such killing is politically motivated, setting it apart from ordinary crimes. This is relevant because, for command responsibility liability to attach, the context has to be properly established. To establish the context, several determinations have to be made.

First, the killing should be characterized as politically-motivated. The standard that could be laid down here are those mentioned in the Supreme Court's Administrative Order No. 25-2007, where it is stated that in determining whether a crime is a "political killing," the following factors, among others, shall be considered: (1) political affiliation of the victim; (2) method of attack; and (3) reports that State agents are involved in the commission of the crime or have acquiesced in them.[254]

Other elements that could be considered in this regard are the following: pattern in the killings; scale of the atrocities involved; or those factors offered by the Minnesota Protocol[255] such as where the political views, religious or ethnic affiliation, or social status of the victim give rise to a suspicion of government involvement or complicity in the death because of any one or combination of the following factors: (i) where the victim was last seen alive in police custody or detention; (ii) where the modus operandi is recognizably attributable to government-sponsored death squads; (iii) where persons in the Government or associated with the Government have attempted to obstruct or delay the investigation of the execution.[256]

Second, the military connection has to be clearly established. This means that it will not suffice to make general allegations that the military was involved. Rather, there is a need to establish clearly the military connection by either identifying the direct perpetrator of the crime as an element of the military; or, in case identification is not possible, to establish a reasonable connection with them. An example with regard to the latter would be the case of the disappearance of Jonas Burgos where it was alleged that the

254. A.O. No. 25-2007, *supra* note 4, § 6.

255. Model Protocol for a Legal Investigation of Extra-Legal, Arbitrary and Summary Executions, U.N. Doc. E/ST/CSDHA/12 (1991) [hereinafter Minnesota Protocol]. (The Minnesota Protocol is a Model Protocol drafted as an offshoot of the previous work on the drafting of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions recommended by the Committee on Crime Prevention and Control at its 10th session in Vienna in 1988.).

256. *Id.* ¶ D (1) (a).

getaway car used to kidnap him was later found in the barracks of the military.[257] Such makes a case for a possible military connection.

When the military connection is properly established, then the elements of command responsibility proper should also be considered: (1) the existence of a superior-subordinate relationship; (2) the superior knew or had reason to know that the criminal act was about to be or had been committed; and (3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

4. Procedural Aspects

Among the considerations that may be involved in the imposition of command responsibility are those dealing with the procedural aspects because of the due process requirement previously discussed. In this regard, it is important to establish the following elements:

a. Allegations Required in the Pleadings

As previously discussed, the determining factor of whether to impute command responsibility liability should be seen in the allegations in the pleadings. Absent this requirement, the courts should refrain from even considering the possibility of implicating other persons indirectly liable for the extrajudicial killing. In other words, aside from implicating the supposed direct perpetrator (even if designated as John/Jane Doe), the complainant should at the outset allege in the pleadings the persons supposedly indirectly liable for the killings.

b. Presumptions of Law and Quantum of Evidence Required

It is a well-established principle that the burden of proof lies always with the prosecution which must rely on the strength of its evidence and not on the weakness of the defense.[258] In certain instances, however, the law has established certain conclusive and disputable presumptions when certain facts are present.[259] Moreover, the law has also allowed the shifting of this burden when certain facts are established and a *prima facie* case exists which allows the shifting of the burden. This happens, for example, in cases where there is an unexplained possession of stolen goods which creates the presumption of

257. *See* Peter Ritter, The Philippines' Disappearing Dissidents, TIME.COM, June 9, 2008, *available at* http://www.time.com/time/world/article/0,8599,1813070,00.html (last accessed Apr. 25, 2009).

258. People v. Amania, 220 SCRA 347, 353 (1993).

259. *See* REVISED RULES ON EVIDENCE, rule 131, §§ 1 & 2.

larceny;[260] or where the failure of an accountable officer to produce the money in his charge upon demand shall be *prima facie* evidence of malversation.[261] The rationale behind these provisions is that "the fact presumed is but a natural inference from the fact proved" and that there is a rational connection between these two sets of facts.[262]

Based on this rationale, it is not unreasonable therefore to create a presumption with regard to command responsibility liability. It is proposed that when the elements previously discussed have been alleged and the fact of the killing and the military connection have been established, it is possible to shift the burden on the accused commander to prove that he has not been negligent in the exercise of his duty. This is akin to the doctrine laid down in torts cases involving guardians and persons in authority. In these instances, when the fact of injury or damage has been established, the burden is upon the superior or guardian to prove that he has been diligent in the exercise of his duty.[263]

As regards the quantum of evidence, the prosecutor must establish actual knowledge through direct or circumstantial evidence.[264] There is no presumption of knowledge merely because offenses may have been widespread, numerous, publicly notorious, or committed over wide areas or over prolonged periods.[265] However, these factors may allow an inference to arise that he must have possessed that knowledge.

As for the quantum of evidence required for conviction, a finding of criminal liability should require proof beyond reasonable doubt[266] while the finding of civil liability will require the lesser standard of preponderance of evidence.[267]

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260. U.S. v. Catimbag, 35 Phil. 367, 371 (1916).

261. REVISED PENAL CODE, art. 217.

262. People v. Mingoa, 92 Phil. 857, 859 (1953).

263. *See* CIVIL CODE, art. 2180. ("The responsibility treated of in this article shall cease when the persons herein mentioned prove that they observed all the diligence of a good father of a family to prevent damage.").

264. *C.f.* 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 113, § 5 (b). ("When an offense has just been committed and he has probable cause to believe based on personal knowledge of facts or circumstances that the person to be arrested has committed it.").

265. *See* Celebici Case, *supra* note 96, ¶ 417.

266. *See* REVISED RULES ON EVIDENCE, rule 133, § 2.

267. *Id.* § 1.

5. Liabilities and Penalties to be Imposed

As discussed earlier, the liability of the commander will consist in his negligence in the discharge of his duties. These will involve mostly his passivity or neglect in controlling his subordinates when he knew or had reason to know that certain crimes were being committed within his area of responsibility. It will also involve the failure of a commander or superior to hand over a subordinate to the proper authorities. In the event that military personnel have already been charged in court with a crime involving extrajudicial killing, it should also be the duty of a commander to hand over a subordinate after a warrant of arrest has been properly issued. The failure of a commander to deliver the subordinate officer *should* make him liable as well. This imposition may be grounded on factual reports that sometimes certain military officers refuse to turn in subordinates even though these have been properly served with an arrest warrant.[268]

V. LAW OR RULE? HOW COMMAND RESPONSIBILITY LIABILITY MAY BE IMPOSED

A. Is There a Need for Legislation to Make Command Responsibility Apply?

When examining the actions taken by different countries to implement doctrines embodied not only in customary international law but also those specific principles found in the Rome Statute, it is very reasonable to conclude that there is a need for an implementing legislation. This fully accords with the requirements laid down by the Constitution for due process and the respect of the rights of every citizen to be informed of what actions constitute crimes. As regards extrajudicial killings and the concomitant application of the doctrine of command responsibility, a law addressing these

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268. Asian Human Rights Commission, Urgent Appeals Programme, UPDATE (Philippines): Military fails to turn personnel charged with murder over to the police, *available at* http://www.ahrchk.net/ua/mainfile.php/2007/2407?print =yes (last accessed Apr. 25, 2009).

> The Asian Human Rights Commission (AHRC) writes to inform you of the continuing failure by the leadership of the military to surrender their men, including a sergeant who is subject to arrest for the murder of a couple, Bacar and his wife Carmen Japalali nearly three years ago in Tagum City, Mindanao. Even though arrest warrants have already been issued five months ago, only three of the eight accused have so far been turned over to police custody on May 21, 2007. There are also difficulties by the victims' family and the police to locate the whereabouts of the other accused even though they are still active in service.

issues will ensure a thorough examination of the circumstances and address the issue in a more comprehensive manner.

In the alternative, it is also proposed that the Philippines has another option to make the doctrine of command responsibility apply. This would be to ratify the Rome Statute under which the doctrine is already clearly set forth. Since the Philippines has already signed the Statute, its ratification will give the Statute — and corollarily the doctrine of command responsibility — the status of a binding treaty.

In the absence of these two options, however, it is still further argued that based on the discussions thus far, there is sufficient legal basis to make the doctrine applicable. As previously demonstrated, the primary legal basis is found in the incorporation clause of the Philippine Constitution. Moreover, making the doctrine applicable will not violate the due process requirements because the doctrine, as it stands now under customary international law, already constitutes sufficient notice about the existence of the liability and the acts (or, more precisely, omissions) that are criminalized. Furthermore, there are sufficient provisions in the RPC which may be deemed to already encompass the liability as it is presently characterized. As to the manner of implementation, the device is also provided for in the Constitution, under the rule-making power of the Supreme Court.

B. The Alternative: Creation of a Rule to Lay the Condition for Command Responsibility Liability to be Imposed

1. The Rule-Making Power of the Supreme Court

Even Chief Justice Puno recognizes the urgent need for the resolution of the unsolved incidents of extrajudicial killings by adverting to the possibility of rewriting the rules to facilitate matters for victims and to impose more stringent responsibilities on state agents. Among these measures is a review of the concept of command responsibility.[269] However, this inevitably puts to issue the legal basis that would allow the Supreme Court to carry out these measures.

To address this, the Chief Justice adverted to the fact that under the present Constitution, the rule-making power of the Supreme Court has been expanded. Thus, under the Constitution, the Supreme Court has the power to

> [p]romulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the

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269. Contreras, *supra* note 5.

> admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights, rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.[270]

However, there are two relevant discussions to consider. The first concerns the phrase "[p]romulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts," and the second concerns the phrase "shall not diminish, increase, or modify substantive rights."

The first phrase refers to a traditional power granted to the Supreme Court.[271] Chief Justice Puno, writing for the Court in *Echegaray v. Secretary of Justice*,[272] characterized the nature of this rule-making power as having been designed to provide a stronger and more independent judiciary by taking away from Congress the power to repeal, alter, or supplement the rules of court promulgated by the Supreme Court.[273] In the eloquent words of Justice Puno:

> *The rule making power of this Court was expanded.* This Court for the *first time* was given the power to promulgate rules concerning the protection and enforcement of constitutional rights. The Court was also granted for the *first time* the power to disapprove rules of procedure of special courts and quasi-judicial bodies. *But most importantly, the 1987 Constitution took away the power of Congress to repeal, alter, or supplement rules concerning pleading, practice and procedure.* In fine, the power to promulgate rules of pleading, practice and procedure is no longer shared by this Court with Congress, more so with the Executive.[274]

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270. PHIL. CONST. art. VIII, § 5, ¶ 5.

271. BERNAS COMMENTARY, *supra* note 47, at 969.

272. Echegaray v. Secretary of Justice, 301 SCRA 96 (1999).

273. *Id.* (Eminent constitutionalist, Bernas, however, opines that Congress still has the power over such rules since it has plenary legislative power and that the silence of the Constitution can only be interpreted as meaning that there is no intention to diminish that plenary power. He further opines that the statement of the Court in *Echegaray*, repeated by Justice Puno in his dissent in *Republic v. Gingoyon*, 478 SCRA 474 (2005) was merely *obiter dictum*. *See* BERNAS COMMENTARY, *supra* note 47 at 972. Justice Puno, however, repeated the same statement in *People v. Lacson*, 400 SCRA 267 (2003)).

274. *Echegaray*, 301 SCRA at 112 (emphasis supplied).

The second relevant discussion concerns the limitation placed on the Supreme Court's rule-making power which is that such rules "should not diminish increase or modify substantive rights."[275] What constitutes substantive rights was aptly explained in *Bustos v. Lucero*[276] to the effect that substantive law creates substantive rights and the two in this sense may be synonymous. Of particular relevance to the discussion is that which states:

> As applied to criminal law, substantive law is that which declares what acts are crimes and prescribes the punishment for committing them, as distinguished from the procedural law which provides or regulates the steps by which one who commits a crime is to be punished.[277]

The idea of what constitutes substantive rights was further clarified in *Fabian v. Desierto*[278] where the Court held:

> [T]he test whether the rule really regulates procedure, that is the *judicial process for enforcing rights and duties recognized by substantive* law and for justly administering remedy and redress for a disregard or infraction of them. If the rule takes away a vested right, it is not procedural. If the rule creates a right such as the right to appeal, it may be classified as substantive matter; but *if it operates as a means of implementing an existing right then the rule deals merely with procedure.*[279]

These discussions are relevant to this Note because in the event that the Supreme Court drafts and implements a rule to facilitate the filing of a case in relation to the issue of extrajudicial killings, the next important question to resolve is the nature of the rules to be drafted. Will it be sufficient for the Supreme Court to apply the doctrine of command responsibility by the mere imposition of a special rule? The question is a complex one and hinges on the nature, contents, and purpose of the rule. If such a rule creates or takes away a substantive right, then clearly such a rule would be unconstitutional

275. BERNAS COMMENTARY, *supra* note 47, at 969.

276. Bustos v. Lucero, 81 Phil. 640 (1948).

> "Substantive rights" is a term which includes those rights which one enjoys under the legal system prior to the disturbance of civil relations. Substantive law is that part of the law which creates, defines and regulates rights, or which regulates the rights and duties which give rise to a cause of action; that part of the law which courts are established to administer; as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtains redress for their invasion.

277. *Id.* at 650.

278. Fabian v. Desierto, 295 SCRA 470 (1998).

279. *Id.* at 492 (citing 32 AM. JUR. 2d, Federal Practice and Procedure, § 505 and *People v. Smith*, 205 P. 2d 444) (emphasis supplied).

and therefore beyond the powers of the Supreme Court to impose. If the rule, however, is crafted in such a way as to lay down the conditions by which to impose the doctrine of command responsibility liability, then such a rule would be within the powers of the Supreme Court to implement.

The next relevant discussion, therefore, focuses on the characteristics that such a Supreme Court rule should have for it to sufficiently lay down the conditions by which to apply the command responsibility liability without necessarily removing or imposing substantive rights.

2. The Characteristics of a Valid Rule to Implement the Doctrine of Command Responsibility Liability

As discussed, one of the inherent limitations on the rule-making power of the Supreme Court concerns substantive rights. It is thus proposed that such a rule should have the following characteristics:

(a) The rule should not define a special law of extrajudicial killing but rather, should lay the condition by which to impose command responsibility liability after certain conditions are met.

It is important to recall here the previous discussion that there are sufficient laws to hold a commander liable under the RPC. What the rule proposes to do, therefore, is not to define a new or special crime but to clearly define the conditions by which to impose command responsibility liability on commanders who have been negligent in their duties.

(b) The rule should not infringe on any of the rights of the accused granted by the Constitution and the law.

It is sufficient to look at the Bill of Rights of the Constitution to conclude that if the rule infringes on any of the rights of the accused, then clearly the rule would be invalid. The relevant rights here are: the presumption of innocence of the accused and the right to procedural and substantive due process.[280] Thus, a rule which automatically imposes a liability on the commanding officer by virtue of his being such *per se* would violate the constitutional right of the presumption of innocence.

(c) The rule should require what specific allegations have to be present in order to establish the military connection and thus lay the condition for command responsibility liability to attach.

280. *See* BERNAS COMMENTARY, *supra* note 47, at 101-59 (for an extensive discussion of what constitutes substantive and procedural due process).

(d) The rule should specify that the imposition of command responsibility liability shall only be applicable to instances where there is a military connection in the commission of the crime. It should not apply when a civilian is allegedly involved in the control of the troops, if such were possible. Under such a circumstance, the civilian may be found liable under other existing crimes defined under the RPC and special laws.

(e) The rule should require a quantum of evidence presented against the accused commander to overcome the constitutional presumption of innocence.

For the presumption of innocence to be overcome, there must be a certain quantum of evidence presented to lay the condition for liability to attach. The quantum of evidence required, following the earlier discussions in this Note, must be such as to point to the existence of a pattern and a plan.

(f) The rule should provide for a simplified and inexpensive procedure of filing cases of this type, following the constitutional mandate.

(g) The rule should define what characteristics should be present in the allegations in the complaint to classify the killing as "politically motivated" in order for the case to possibly fall under the category of an extrajudicial killing.

(h) As far as the *mens rea* requirement is concerned, it is suggested that the following criteria may be considered by the trial judge hearing the case to make a determination that the commander had constructive knowledge of the criminal activity or activities of his subordinates:

(1) the number of illegal acts committed by the subordinate;

(2) the type of illegal acts;

(3) the scope of illegal acts;

(4) the time during which the illegal acts occurred;

(5) the number and type of troops involved;

(6) the logistics involved, if any;

(7) the geographical location of the acts;

(8) the widespread occurrence of the acts;

(9) the tactical tempo of operations;

(10) the *modus operandi* of similar illegal acts;

(11) the location of the commander at the time;

(12) any definable pattern that may emerge in the killings.[281]

(i) The rule should provide for a time period within which the investigations and the trial of the case should run in order to fulfill the constitutional mandate of the speedy disposition of cases falling within this category.

(j) In relation to other aspects of the issue of extrajudicial killing, the rule could specify other related matters[282] pertaining to the manner by which investigations are to be conducted, other remedies granted to the complainants in the event that the writ of *habeas corpus* proves ineffectual; rules on the handling of witnesses and protection of these and the evidence acquired in the course of the investigation. The rules could further specify the other agencies involved for better coordination.

VI. CONCLUSION

No less than the Constitution places a high and important duty on the military, stating that the Armed Forces of the Philippines is the protector of the people and the State.[283] Aside from providing for its role, the Constitution further outlines the goal of this powerful institution: "to secure the sovereignty of the State and the integrity of the national territory."[284] Given this important task, it is the supreme irony when the protector of the people becomes its assassin. The irony is made horrific by the fact that there have really been instances of extrajudicial killings in the very recent past and that a shadow of doubt is now cast upon the military, negating the otherwise pristine image they try to project. The horror is somehow compounded and brought closer to reality when some of its elements — among them even responsible commanders — release statements that confirm rather than diminish the suspicion.

Given this background, this Note has tried to first lay down the necessity of re-examining the doctrine of command responsibility and then finding the

281. Wu & Kang, *supra* note 165, at 286.

282. The determination of what exactly these are is beyond the scope of this Note but they are mentioned here to give an overall view of the scope that the rule may have.

283. PHIL CONST., art. II, § 3.

284. PHIL CONST., art. II, § 3.

legal bases for its application in Philippine jurisdiction. After the requisite discussion of the aims that this Note hopes to achieve, the subsequent discussion established the necessity by pointing to the reality of extrajudicial killings in very recent history. There is enough evidence to show that these killings are real and not mere speculation. Moreover, there is also sufficient reason to believe that the military is involved in some of these killings. Then, this Note went into an exhaustive examination of the doctrine of command responsibility as it is rooted and developed in customary international law and as it had been applied in other jurisdictions. Aside from tracing the development, this Note also educed the standards that have been arrived at as a result of the development of the doctrine. An extensive half of this study went on to examine the applicability of the doctrine in Philippine jurisdiction. Subsequently, command responsibility liability was characterized in the context of existing laws in the Philippines. This portion meant to examine whether there are existing laws that encompass command responsibility liability in order to establish that these laws may also be the basis for applying the doctrine and punishing offenders. After establishing the legal bases by which to apply the doctrine, the means by which this doctrine may be applied was proposed. All these discussion support the view that the most effective means of applying the doctrine is through an enabling law. Alternatively, the Philippines could choose to ratify the Rome Statute, thereby giving the principles found therein the status and binding force of a treaty. This Note goes further to propose that in the absence of a statute, the doctrine may still be applied through the rule-making power of the Supreme Court which the Constitution has already amplified.

Since this Note was conducted with the aim of trying to educe legal bases and reasonable standards by which to apply the doctrine of command responsibility, the following proposed courses of action may be taken:

A. At the International Level

1. Ratify the Rome Statute

While this is purely an executive discretion, this course of action will not only make the doctrine applicable and thus provide a more concrete and unassailable legal basis to prosecute criminals, but it will also give the government a much needed image boost to afford it further credibility in projecting the image that it is indeed earnest in its efforts to solve the spate of extrajudicial killings.

2. Seek Technical Assistance from the UN Office of the High Commissioner on Human Rights (OHCHR)

The UN-OCHR welcomes requests for technical assistance by governments, aimed at improving governmental action in combating human rights violations.[285] Sanctioned by the Special Rapporteur, this option may significantly assist the Philippines in its data gathering techniques, as well as the processing of data concerning human rights violations.

B. At the National Level

1. As an Alternative or Concurrent with Ratification of the Rome Statute, Propose Legislation to Enforce Command Responsibility

This was one of the proposals of the Melo Commission. The President should propose legislation to require police and military forces and other government officials to maintain strict chain-of-command responsibility with respect to extrajudicial killings and other offenses committed by personnel under their command, control, or authority.

Such legislation must deal specifically with extra-legal, arbitrary, and summary executions, including "forced disappearances" (though this was not discussed earlier, the proposed legislation should be more encompassing); and provide appropriate penalties which take into account the gravity of the offense. It should penalize a superior government official, military or otherwise, who encourages, incites, tolerates, or ignores, any extrajudicial killing committed by a subordinate. The standards to be applied may be those extensively discussed in this Note.

Finally, since the liability is based on omission, there should be no requirement that a causal relationship be established between a superior's failure to act and the subordinate's crime; his liability under the doctrine of command responsibility should be based on his omission to prevent the commission of the offense or to punish the perpetrator.

2. Exercise of Rule-Making Power by the Supreme Court

In the absence of an enabling statute, the Supreme Court may exercise its rule-making powers and lay down the conditions for the liability to attach, given that sufficient legal bases therefor exists. Moreover, since the doctrine of command responsibility is not used in isolation, the rules should encompass other enabling mechanisms that will contribute to the speedy resolution of the case: enhancement of prosecutorial powers of the

285. *See* Ambeyi Ligabo, Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Report delivered to the Commission on Human Rights: Civil and Political Rights, Including the Right to Freedom of Expression ¶ 3 (Feb. 8, 2005), U.N. Doc. E/CN.4/2005/64.

government; improvement of the witness protection program; and a more responsive mechanism for bringing suspects within the jurisdiction of the courts.

3. Make the AFP and PNP More Cognizant of the Implications of the Doctrine of Command Responsibility as Required by the Obligations of the Philippines under the Geneva Convention

An education and information campaign may be useful in this regard and will serve as a deterrent to future violations of human rights and the demands of command responsibility. In relation to this, it may also be useful for the military to reassess the effectivity of the National Internal Security Plan and realign its goals with treaty obligations, especially those related to respect for human rights. Contrary to the old adage, the end will never justify the means; there must be the realization that only licit means may be employed to achieve noble goals.

Finally, it is also useful here to adopt the recommendation of UN Rapporteur Philip Alston for "the Government to immediately direct all military officers to cease making public statements linking political or other civil society groups to those engaged in armed insurgencies."[286] If such characterizations are ever to be made, it must be by civilian authorities, on the basis of transparent criteria and the human rights provisions of the Constitution and relevant treaties.

The importance of command responsibility within a military structure cannot be overstated, as it is the commanders who are entrusted with the duty of ensuring that the laws of war are obeyed on the ground, and it is their duty to ensure the protection of the civilian population from abuse.[287]

As a final note, let it be said that with regard to the military — or any organization for that matter — leadership is an important factor in bringing out the best conduct in any field of duty. It is leadership that provides the purpose, direction, and motivation to accomplish the mission. And any kind of leadership begins with a good foundation of values and attributes that

286. Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report delivered at the 8th Session of the Human Rights Council: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development ¶ 67 (c) (Apr. 16, 2008), U.N. Doc. A/HRC/8/3/Add.2.

287. Anne Mahle, Command Responsibility in the United States, *available at* http://www.pbs.org/wnet/justice/law_background_command.html (last accessed Apr. 25, 2009).

shape a leader's character.[288] Though this Note has shown that it would be absurd to push the liability of command responsibility up until the highest rung of the ladder absent any reasonable and effective connection, it could still be said that ultimately, the resolution of this issue of extrajudicial killings requires the political will and political integrity of the nation's leaders. It is hoped that such qualities really be present where they matter.

288. The Philippine Army Core Philosophy, AFP Code of Ethics, *available at* http://www.army.mil.ph/Core_Philosophy2/operational_imperative.htm (last accessed Apr. 23, 2009).