

# O Captain, My Captain: Establishing a Framework in the Application of the Doctrine of Command Responsibility in Philippine Criminal Law

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## I. INTRODUCTION

Recent history bears witness to the multitude of politically motivated challenges confronting both military and civilian leadership in the country. With the resurgence of incidents involving extrajudicial killings and military casualties,<sup>1</sup> clamor for the re-examination of the doctrine of command responsibility has been at the forefront of the public's collective call for accountability and justice.

In 2007, during the administration of then-President Gloria Macapagal-Arroyo, the so-called extrajudicial killings of journalists and political dissidents,<sup>2</sup> as well as the enforced disappearances of tagged communist rebels,<sup>3</sup> demanded the exercise of command responsibility by the highest echelon of democratic power in the country. Years later, the death of 44 Special Action Force (SAF) commandos in the horrific Mamasapano massacre compelled no less than 20 Senators of the Republic to sign a "report [ ] hold[ing] ... [former] President Benigno Aquino III 'ultimately responsible' for the bloodiest one-day clash in Philippine police history."<sup>4</sup> Even the present administration, with its contested "war on drugs,"<sup>5</sup> is no stranger to the challenges posed by incessant calls for command responsibility.

In the absence of a statute solely dedicated to command responsibility and its consequent liability parameters, there is a need to harmonize various instruments stipulating aspects of the doctrine under international and Philippine laws.

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1. See Howard Johnson & Christopher Giles, *Philippines drug war: Do we know how many have died?*, BBC NEWS, Nov. 12, 2019, available at <https://www.bbc.com/news/world-asia-50236481> (last accessed Nov. 30, 2020).
  2. Vaudine England, *Philippine journalists 'live in danger'*, BBC NEWS, Feb. 8, 2009, available at <http://news.bbc.co.uk/2/hi/asia-pacific/7830262.stm> (last accessed Nov. 30, 2020).
  3. See Carmel Crimmins, *Philippine army on defensive after killing charges*, REUTERS, available at <https://cn.reuters.com/article/instant-article/idUSMAN3622120070222> (last accessed Nov. 30, 2020).
  4. *20 senators sign report on Mamasapano*, RAPPLER, Mar. 18, 2015, available at <https://rappler.com/nation/senate-report-mamasapano-majority-vote> (last accessed Nov. 30, 2020).
  5. See Rebecca Ratcliffe, *Philippines war on drugs may have killed tens of thousands, says UN*, GUARDIAN, June 4, 2020, available at <https://www.theguardian.com/world/2020/jun/04/philippines-police-may-have-killed-tens-of-thousands-with-near-impunity-in-drug-war-un> (last accessed Nov. 30, 2020).

Part I of this Article explores the historical evolution of the doctrine of command responsibility — from its foundation in strict military practice to its expansion to customary international law, and its eventual incorporation into Philippine law. A close scrutiny of the two forms of command responsibility, positive acts and culpable omissions, expose the preliminary nuances afflicting the establishment of criminal liability.

Part II elaborates on the applicability of the command responsibility doctrine in Philippine jurisdiction, providing an in-depth evaluation of case law originating from the post-World War II era to contemporary history.

Part III explains command responsibility as integrated in local legislation. Careful review of four domestic laws imposing criminal liability to superior or commanding officers proffers a unique perspective on the intricacies of applying command responsibility and its interplay in international and domestic laws.

With due regard to the identified incongruities affecting the liability regime in command responsibility contained in various Philippine criminal laws, this Article subscribes to the establishment of a unified Framework which faithfully adheres to generally accepted principles of international law and customary international law.

## II. THE DOCTRINE OF COMMAND RESPONSIBILITY

The doctrine of command responsibility, in its simplest and most general sense, is the “responsibility of commanders for crimes committed by subordinate members of the armed forces or other persons subject to their control in international wars or domestic conflicts.”<sup>6</sup>

“The doctrine has developed over centuries in military practice and theory, and its application has [ ] been documented over thousands of years[. Thus], its broad outlines are well entrenched in customary international law.”<sup>7</sup>

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6. Fr. Joaquin G. Bernas, S.J., *Command responsibility*, PHIL. DAILY INQ., June 27, 2011, available at <https://opinion.inquirer.net/6976/command-responsibility> (last accessed Nov. 30, 2020).

7. Iniego Carl G. Varon, *Establishing the Temporal Standard of Command Responsibility: Holding Successor Commanders Accountable*, at 20 (2012) (unpublished J.D. thesis, Ateneo de Manila University) (on file with ‘the Professional Schools Library, Ateneo de Manila University) (citing Carol T. Fox, *Closing a Loophole in Accountability for War Crimes: Successor Commanders’ Duty to Punish Known Past Offenses*, 55 CASE W. RES. L. REV. 443, 445 (2004)).

The concept of the doctrine itself is not new. It “traces its roots to the laws of war and armed combat espoused by [great] ancient civilizations.”<sup>8</sup> For instance, the Chinese General Sun Tzu recognized the doctrine in his sixth century classic, *The Art of War*, where he wrote, “Now when [ ] troops flee, are insubordinate, distressed, collapse in disorder[,] or are routed, it is the fault of the general. None of these disasters can be attributed to natural causes.”<sup>9</sup> “Although the focus [of the passage] is the failure of the officer to fulfill his[ ] military objectives and not violating the laws of war, ... [it] does set a precedent for the punishment of officers who fail to punish his[ ] subordinates.”<sup>10</sup>

“The [D]octrine continued to [flourish] in Europe by identifying individuals in command as potentially liable for their subordinate’s unlawful and atrocious behavior.”<sup>11</sup> In 1439, King Charles VII of France issued the Ordinance of Orleans, imposing a blanket responsibility on commanders for all the abuses, ills, and offenses of their subordinates by proclaiming 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].<sup>12</sup>

The first international recognition of a commander’s obligation to act lawfully occurred in as early as 1474 during the trial of Peter von Hagenbach

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8. *Rubrico v. Macapagal-Arroyo*, G.R. No. 183871, 613 SCRA 233, 269 (2010) (J. Carpio-Morales, concurring opinion).
  9. Major Michael L. Smidt, *Yamashita, Medina, And Beyond: Command Responsibility In Contemporary Military Operations*, 164 MIL. L. REV. 155, 164 (2000) (citing SUN TZU, *THE ART OF WAR* 125 (Samuel B. Griffith trans., 1963)).
  10. Varon, *supra* note 7, at 20-21 (citing Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL L. REV. 1, 3 (1973)).
  11. Varon, *supra* note 7, at 21 (citing Parks, *supra* note 10, at 4-5).
  12. *Rubrico*, 613 SCRA at 269 (J. Carpio-Morales, separate opinion) (citing THEODOR MERON, *HENRY’S WARS AND SHAKESPEARE’S LAWS: PERSPECTIVES ON THE LAW OF WAR IN THE LATER MIDDLE AGES* 149 n. 40, art. 19 (Eng. trans., 1993) & LOUIS GUILLAUME DE VILEVAULT & LOUIS BREQUIGNY, *ORDONNANCES DES ROIS DE FRANCE DE LA TROISIEME RACE XIII* 306 (1782) (emphasis omitted)).

“for [the] atrocities [he and his troops] committed during the occupation of Breisach.”<sup>13</sup>

Hagenbach was tried by an [ad hoc] international tribunal [composed] of [28] judges from allied states of the Holy Roman Empire. Despite a plea of superior orders, he was convicted, deprived of his knighthood for crimes which he as a knight ... [had] a duty to prevent, and [then beheaded].<sup>14</sup>

In 1625, the French jurist and philosopher Hugo Grotius wrote, “[A] community, or its rulers may be held responsible for the crime of a subject if they knew it and did not prevent it when they could and should prevent it.”<sup>15</sup> From this, it can be seen that “a rule is deemed to exist that public officials, up to the highest level of authority, must answer when they do not prevent certain illegal acts by their subordinates[.]”<sup>16</sup>

Thus, it can be concluded that “the notion of command responsibility has long been recognized as part of the definition of civic duty and military professionalism”<sup>17</sup> even though its more elaborate establishment and development as a doctrine under International Law did not come until after the Second World War.<sup>18</sup>

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13. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT I (3d ed. 2007) & Parks, *supra* note 10, at 4.

14. Parks, *supra* note 10, at 4-5. Hagenbach was charged with “murder, rape, perjury[,] and other crimes against ‘the laws of God and man.’” *Id.* at 4.

15. Smidt, *supra* note 9, at 169 (citing HUGO GROTIUS, DE JURE BELLI AC PACIS 523 (C.E.I.P. ed. & Kelsy trans., 1925)).

16. Fausto Pocar, *Command Responsibility: From International Criminal Tribunals to National Jurisdictions*, PHILJA JUDICIAL J., Volume No. 11, Issue No. 31, at 198 (citing HUGO GROTIUS, DE IURE BELLI AC PACIS LIBRI TRES, bk. 2, ch. XVII, para. 20 (1625)).

17. Courtney C. Hoecherl, *Command Responsibility Doctrine: Formulation Through Ford v. Garcia and Romagoza v. Garcia* (An Article Published by the University of Pennsylvania), at 6, available at [https://www.law.upenn.edu/journals/jil/jilp/articles/1-1\\_Hoecherl\\_Courtney.pdf](https://www.law.upenn.edu/journals/jil/jilp/articles/1-1_Hoecherl_Courtney.pdf) (last accessed Nov. 30, 2020) (citing Anne E. Mahle, *Command Responsibility in the United States*, available at [https://web.archive.org/web/20040505051929/http://www.pbs.org/wnet/justice/law\\_background\\_command.html](https://web.archive.org/web/20040505051929/http://www.pbs.org/wnet/justice/law_background_command.html) (last accessed Nov. 30, 2020) & Colonel William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1, 8 (1982)).

18. *Id.*

The first formal recognition and imposition under contemporary international law of an affirmative duty for a military commander to prevent and punish violations of the laws of war by their subordinates is usually traced to the Fourth Hague Convention of 1907, which dealt with land warfare.<sup>19</sup> It was stated in that Convention

that ‘laws, rights[,] and duties of war’ apply to armies, militias, and volunteer corps that are ‘commanded by a person responsible for his subordinates,’ and where it was affirmed are occupants of foreign territory, is required to ‘take all measures in his power to restore, and ensure, as far as possible, public order and safety.’<sup>20</sup>

“Most significantly, the provisions of the [C]onvention [also] hold belligerent nations responsible for the acts of their armed forces, thus foreshadowing the modern notion of holding heads of state accountable under the [doctrine of] command responsibility.”<sup>21</sup>

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19. Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT’L. L. 573, 573 (citing Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land art. 43 of the Annex of regulations, *opened for signature* Oct. 18, 1907, 187 C.T.S. 277 [hereinafter Hague Convention No. IV]; Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention art. 19, *opened for signature* Oct. 18, 1907, 205 C.T.S. 359 [hereinafter Hague Convention No. X]; & Parks, *supra* note 13, at 11); Andrew D. Mitchell, *Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes*, 22 SYDNEY L. REV. 381, 383–84 (2000) (citing Hague Convention No. IV; *supra* note 19; Hague Convention No. X, *supra* note 19; 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, 177 (1999); & Bantekas, *supra* note 19, at 573); & Allison Martson Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 122 (2005).
  20. Pocar, *supra* note 16, at 199 (citing Hague Convention No. IV; *supra* note 19, arts. 1 & 43).
  21. Fides Angeli G. Sabio, *Where the Buck Stops: Command Responsibility in Extrajudicial Killings Educing Reasonable Standards for Imposing Command Responsibility Liability on Responsible Military Officers*, at 36–37 (2007) (unpublished J.D. thesis, Ateneo de Manila University) (on file with the Professional Schools Library, Ateneo de Manila University) (citing Ann B. Ching, *supra* note 19, at 177).

However, “[i]t was not until the trials of war criminals following the Second World War that [the] doctrine of command responsibility was applied.”<sup>22</sup>

On 8 August 1945, the Allies signed the London Charter establishing the International Military Tribunal at Nuremberg.<sup>23</sup> The signing of the Charter was intended to be a concrete step in showing a “monumental, unprecedented attempt to expose, to record, to judge[,] and to punish; and hopefully to create a precedent for all times on how to deal with the acts of man’s worst inhumanity to man.”<sup>24</sup> Although “[t]he Charter of the [Nuremberg] Tribunal did not fully incorporate the doctrine of command responsibility, and proceeded only on the basis of direct liability for the highest Nazi officials[,]”<sup>25</sup> “[i]t was a milestone for the doctrine because the Charter [ ] provided that the [ ] position of the defendants, whether as Heads of States or responsible officials in Government departments[ ] shall not be considered as freeing them from responsibility or mitigating punishment.”<sup>26</sup>

In the Pacific Arena, the judgment rendered in the trial of Japanese General “Tomoyuki Yamashita, the Commanding General of the Japanese Imperial Army in the Philippines, who was convicted and sentenced to death by a [United States (U.S.)] military commission for the atrocities committed by the Japanese troops under his command”<sup>27</sup> is the first judgment that

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22. Peter James Niven, NATO and International Crimes in the Kosovo Campaign – can Bill Clinton and Tony Blair be held Criminally Liable?, ¶ 16, *available at* <https://researcharchive.vuw.ac.nz/xmlui/handle/10063/5825> (last accessed Nov. 30, 2020) (Navigate to the “View/Open” button to download.).

23. Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, *opened for signature* Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

24. Henry J. Kellerman, *Settling Accounts — The Nuremberg Trial*, 42 LEO BAECK INST. Y.B. 337, 337 (1997).

25. Niven, *supra* note 22, ¶ 16. Article 6 of the Nuremberg Charter provides that “Leaders, [organizers], instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.” Nuremberg Charter, *supra* note 23, art. 6.

26. Varon, *supra* note 10, at 24 (citing Smidt, *supra* note 9, at 174).

27. Pocar, *supra* note 16, at 198.

extensively discussed the liability of a commander for his failure to prevent or punish atrocities committed by his subordinates.<sup>28</sup>

Articulating what is now regarded as the [d]octrine of [c]ommand [r]esponsibility, the *Yamashita* trial included a charge of ‘negative criminality,’ or liability for a failure to act, stating that the General [ u]nlawfully 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, General Tomoyuki Yamashita, thereby violated the law of war.<sup>29</sup>

The case eventually reached the U.S. Federal Supreme Court, which upheld the conviction of General Yamashita in a split decision over vigorous dissent.<sup>30</sup> It was in this case where a military commander, for the first time, had been found guilty of war crimes committed by his soldiers because of his failure to adequately supervise them.<sup>31</sup>

The military commission which judged Yamashita based his conviction on the fact that the atrocities committed by the Japanese [A]rmy ‘were not sporadic in nature but in many cases were methodically supervised by Japanese officers and non-commissioned officers’ and that General Yamashita ‘failed to provide effective control over his troops as required by the circumstances.’<sup>32</sup>

In more recent history, the United Nations Security Council, in response to mass atrocities in the former Yugoslavia and by virtue of Chapter VII of the United Nations Charter, created the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>33</sup> “Reports depicting horrendous crimes in which thousands of civilians were being killed and wounded, tortured[,] and sexually abused in detention camps and hundreds of thousands expelled from their

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28. *Id.*

29. Arthur T. O’Reilly, *Command Responsibility: A Call to Realign the Doctrine with Principles of Individual Accountability and Redistributive Justice*, 40 GONZ. L. REV. 127, 130 (2011) (citing RICHARD L. LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* 80 (1982)).

30. *In re: Yamashita*, 327 U.S. 1, 25-26 (1946) & Parks, *supra* note 13, at 35 (citing *Yamashita*, 327 U.S. at 28).

31. See Parks, *supra* note 13, at 35 & Smidt, *supra* note 9, at 176-77 n. 87 (citing LAEL, *supra* note 29, at 97).

32. Pocar, *supra* note 16, at 199-200.

33. International Criminal Tribunal for Yugoslavia, About the ICTY, *available at* <https://www.icty.org/en/about> (last accessed Nov. 30, 2020).



homes, caused outrage across the world and [compelled] the [United Nations] ... to act.”<sup>34</sup> Thus, in May 1993, the ICTY was established.<sup>35</sup>

In addition,

[f]ollowing its handling of the crises in ... Yugoslavia, the United Nations Security Council next turned its sights on the humanitarian catastrophe in Rwanda [by establishing the International Criminal Tribunal for Rwanda in 1994]. Although the strife in Rwanda was internal, the ... Security Council viewed the genocide and massive human rights violations as a threat to international peace and security.<sup>36</sup>

The Statutes establishing the International Criminal Tribunals for both Yugoslavia and Rwanda included a provision holding superiors criminally liable for the acts of their subordinates, thus incorporating the doctrine of command responsibility.<sup>37</sup>

It is in the establishment of both the ICTY and the International Criminal Tribunals for Rwanda (ICTR) that the United Nations gained

an opportunity to determine what it believed the status of customary international law. There is no question [that] the intent of the United Nations ... was to create, by statute, international criminal tribunals that would apply the ... standard [and the doctrine] of command responsibility [as customary international law].<sup>38</sup>

#### *A. Codification of the Doctrine of Command Responsibility*

The first international treaty to codify the doctrine of command responsibility after the Second World War was Protocol I Additional of 1977 to the Geneva Convention of 1949.<sup>39</sup> Article 86 on Failure to Act of the said Convention provides that:

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34. *Id.*

35. *Id.*

36. Smidt, *supra* note 9, at 208–09 (Statute of the International Tribunal for Rwanda, S.C. Res. 955, art. 6 (1), U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]).

37. Smidt, *supra* note 9, at 209.

38. *Id.* at 206.

39. Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] & CASE MATRIX

- (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[; and]
- (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.<sup>40</sup>

This provision “punishes a failure to prevent or repress breaches of the protocol where a superior has information that should have enabled him to conclude that breaches of the Convention occurred or [are] about to occur.”<sup>41</sup>

Article 87 of the same Convention likewise incorporates the doctrine by imposing a liability on the parties to the Convention and military commanders under its command by providing that:

- (1) 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[;]
- (2) 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[; and]
- (3) 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

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NETWORK, INTERNATIONAL CRIMINAL LAW GUIDELINES: COMMAND RESPONSIBILITY 24 (2016) (citing Protocol I, *supra* note 39, arts. 86 (2) & 87).

40. Protocol I, *supra* note 39, art. 86.

41. O’Reilly, *supra* note 29, at 133.

appropriate, to initiate disciplinary or penal action against violators thereof.<sup>42</sup>

Under this provision, military commanders are under the obligation to “prevent, suppress, and report violations of the Convention[.]”<sup>43</sup> Also, such commanders, commensurate with the level of responsibility their position holds, have the “duty to instruct their subordinates on the law[s] of war.”<sup>44</sup>

### *B. The Two Forms of Command Responsibility*

#### *1. Responsibility for Positive Acts*

The doctrine of command responsibility encompasses two different forms of liability.<sup>45</sup> The first is direct or active responsibility or responsibility for positive acts.<sup>46</sup> This is the aspect of the doctrine that is applied when the superior takes active steps to bring about the crime by, for example, ordering or instigating his subordinates to perform unlawful or atrocious acts.<sup>47</sup> The corresponding liability imposed upon this form of command responsibility is enshrined and codified in Article 7 (1) of the ICTY Statute, which provides that “[a] person who planned, instigated, ordered, committed[,] or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”<sup>48</sup>

Likewise, Article 6 (1) of the ICTR Statute provides that “[a] person who planned, instigated, ordered, committed[,] or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in [A]rticles 2 to 4 of the present Statute, shall be individually responsible for the crime.”<sup>49</sup>

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42. Protocol I, *supra* note 40, art. 87.

43. Smidt, *supra* note 9, at 203 (citing Protocol I, *supra* note 40, art. 87 (1)).

44. Smidt, *supra* note 9, at 203 (citing Protocol I, *supra* note 40, art. 87 (2)).

45. See Bantekas, *supra* note 19, at 577.

46. See *id.*

47. *Id.*

48. 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, art. 7 (1), U.N. Doc. S/25704 (May 3, 1993) [hereinafter ICTY Statute].

49. ICTR Statute, *supra* note 36, art. 6 (1).

## 2. Responsibility for Culpable Omissions

The second form of the doctrine involves indirect or passive responsibility.<sup>50</sup> Under this form, the superior is held liable “for acts committed by [his] subordinates because of his[ ] failure to prevent them from committing such acts or a failure to punish them after the acts have been committed.”<sup>51</sup> This form is “based on the existence of a legal duty to prevent or punish crimes committed by subordinates.”<sup>52</sup> Because direct proof that a commander actually ordered his troops to commit crimes is not always forthcoming, this aspect of the doctrine is both significant in theory and practice as a distinct theory of liability.<sup>53</sup>

The corresponding liability imposed upon this form of command responsibility is again enshrined and codified in Article 7 (3) of the ICTY Statute, which provides —

The fact that any of the acts referred to in [A]rticles 2 to 5 of the present Statute 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.<sup>54</sup>

Article 6 (3) of the ICTR Statute also provides —

The fact that any of the acts referred to in [A]rticles 2 to 4 of the present Statute 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 measure[ ] to prevent such acts or to punish the perpetrators thereof.<sup>55</sup>

In interpreting the provisions of these Statutes, the respective Tribunals have developed rich jurisprudence which are of great significance because of the following instances:

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50. See Bantekas, *supra* note 19, at 577.

51. Varon, *supra* note 7, at 5 (citing Sonja Boelaert-Suominen, *Prosecuting Superiors for Crimes Committed by Subordinates: A Discussion of the First Significant Case Law Since the Second World War*, 41 VA. J. INT’L L. 747, 750 (2000-2001)).

52. Sabio, *supra* note 21, at 69.

53. Bantekas, *supra* note 19, at 577.

54. ICTY Statute, *supra* note 48, art. 7 (3).

55. *Id.* art. 6 (3).

- (1) “[T]he ad hoc Tribunals have thus effectively adopted and applied the customary international law definition of the doctrine of command responsibility[;]”<sup>56</sup>
- (2) “[T]he doctrine may be applied not only to military officers but also to civilians;”<sup>57</sup> and
- (3) “[T]he doctrine is applicable not only in international armed conflicts but also in internal armed conflicts.”<sup>58</sup>

### 3. The International Criminal Court and Command Responsibility

The doctrine of command responsibility is now codified and enshrined in Article 28 of the Rome Statute —

Article 28. Responsibility of commanders and other superiors.

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (1) 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:
  - (a) 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
  - (b) 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.
- (2) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within

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56. Sabio, *supra* note 21, at 45 (citing Steven Powles & Richard May, *Command Responsibility: A New Basis Of Criminal Liability In English Law*, CRIM L. REV. 374 (2002)).

57. Sabio, *supra* note 21, at 45 (citing Avi Singh, *Criminal Responsibility for Non-State Civilian Superiors Lacking De Jure Authority: A Comparative Review of the Doctrine of Superior Responsibility and Parallel Doctrine in National Criminal Laws*, 28 HASTINGS INT’L & COMP. L. REV. 267, 275 (2005)).

58. Sabio, *supra* note 21, at 45 (citing Smidt, *supra* note 9, at 18-19).

the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

- (a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (b) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (c) 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.<sup>59</sup>

#### Article 28 of the Rome Statute

has been described as a '*sui generis* form of liability' [that is] distinct from the modes of liability that are set out in [A]rticle 25 of the [ ] Statute [on individual criminal responsibility.] Although framed in the Rome Statute as a form by which crimes within the jurisdiction of the [International Criminal] Court ... are perpetrated, in a sense it really stands alone as a distinct crime whose gravamen is the failure to supervise or punish.<sup>60</sup>

Interestingly, Article 28 of the Rome Statute provides a distinction between a military commander and a civilian superior.<sup>61</sup> It can be observed that this provision differs with the "[S]tatutes of the ad hoc [T]ribunals [on command responsibility] where no distinction is made between military [commanders] and civilian superiors."<sup>62</sup>

"The most notable difference between the responsibility of a military commander and other superiors is [the mental element or] the knowledge requirement."<sup>63</sup> Responsibility is imposed upon the military commander "for

59. Rome Statute of the International Criminal Court art. 28, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

60. WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 457 (1st ed. 2010) (citing *Prosecutor v. Halilović*, Case No. IT-01-48-A, Appeals Chamber, ¶ 78 (Int'l. Crim. Trib. for the Former Yugoslavia Oct. 16, 2007) (emphases omitted) & Rome Statute, *supra* note 59, art. 25.

61. SCHABAS, *supra* note 60, at 459.

62. *Id.* (emphasis omitted).

63. Lieutenant Jakob Adolfsson, *Do Not Tell Me Soldier... A review of the requirement for knowledge in the Command Responsibility doctrine*, at 26

what he or she should have known, owing to the circumstances, while [the superior[ ] will be [held] liable when [he or she] consciously disregarded information which clearly indicated”<sup>64</sup> that the subordinates were committing or about to commit crimes.<sup>65</sup> It follows that “[t]he standard of liability expressed for other[ ] superiors require them to be less vigilant than military commanders since the knowledge requirement is not as harsh.”<sup>66</sup>

### C. Elements of the Doctrine of Command Responsibility

In a long line of cases laid down by the Trial Chambers of both the ICTY and the ICTR in interpreting their respective Statutes and in applying customary international law,<sup>67</sup> the Tribunals identified and enumerated the elements for criminal responsibility:

- (i) [That there is t]he existence of a superior-subordinate relationship;
- (ii) [That] the superior knew or had reason to know that the criminal act was about to be or had been committed; and
- (iii) [That] the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.<sup>68</sup>

#### 1. Superior-Subordinate Relationship and Effective Control

The existence of a “superior-subordinate relationship lies [at] the very heart of [establishing] the commander’s liability for [ ] crimes committed by his [or

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(2012) (unpublished Master’s thesis, Lund University) (on file with Lund University Libraries, Lund University).

64. *Id.* at 26–27 (citing Rome Statute, *supra* note 59, art. 28 (a) (i) & (b) (i)) (emphases omitted).

65. *See id.*

66. Adolfsson, *supra* note 63, at 27.

67. *See, e.g.*, Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgement, ¶ 294 (Int’l. Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); Prosecutor v. Zejnil Delalić, et al., Case No. IT-96-21-T, Judgement, ¶ 346 (Int’l. Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); & Prosecutor v. Dario Kordić, Case No. IT-95-14/2-T, Judgement, ¶ 401 (Int’l. Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

68. *Delalić*, Case No. IT-96-21-T, ¶ 346.

her] subordinates.”<sup>69</sup> The case of *Prosecutor v. Fatmir Limaj*<sup>70</sup> describes the superior-subordinate relationship as “the position of command over[,] and the power to control the acts of the perpetrator [of the crime,] which forms the legal basis for the superior’s duty to act, and for his [or her] corollary liability for a failure to do so.”<sup>71</sup>

This relationship “requires a formal or informal hierarchical relationship where a superior is senior to a subordinate.”<sup>72</sup> It is “not limited to a strict military command style structure” as even civilian superiors can be held liable.<sup>73</sup> Such relationship need not be recognized within a domestic legal system and “a de facto position of authority suffices for the purpose of ascribing command responsibility.”<sup>74</sup>

This “superior-subordinate relationship is based on the notion of control within a hierarchy and that this control can be exercised in a direct or indirect manner[.]”<sup>75</sup> What must be shown are not formal titles but that the superior had effective control based on a duty to exercise his or her authority so as to prevent or repress the crimes committed by their subordinates, and a failure by him or her to do so in a diligent manner is sanctioned by the imposition of criminal responsibility.<sup>76</sup>

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69. *Prosecutor v. Fatmir Limaj, et al.*, Case No. IT-03-66-T, Judgement, ¶ 521 (Int’l. Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

70. *Prosecutor v. Fatmir Limaj, et al.*, Case No. IT-03-66-T, Judgement (Int’l. Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

71. *Id.* ¶ 346. (citing *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Appeals Judgement, ¶ 76 (Int’l. Crim. Trib. for the Former Yugoslavia Mar. 24, 2000); & *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgement, ¶ 359 (Int’l. Crim. Trib. for the Former Yugoslavia Jan. 31, 2005)).

72. *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence, ¶ 401 (Int’l. Crim. Trib. for Rwanda May 15, 2003) (citing *Prosecutor v. Zejnir Delalic, et al.*, Case No. IT-96-21-A, Judgement, ¶ 303 (Int’l. Crim. Trib. for the Former Yugoslavia February 20, 2001) [hereinafter *Celebici: Appeals Judgment*]).

73. *Semanza*, Case No. ICTR-97-20-T, ¶ 401 (citing *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Judgement, ¶ 56 (Int’l. Crim. Trib. for Rwanda July 3, 2002)).

74. *Celebici: Appeals Judgment*, Case No. IT-96-21-A, ¶ 251.

75. *Id.*

76. *See id.* ¶ 197.



To satisfy the requirement of having an effective control, “a superior must have more than mere influence.”<sup>77</sup> It is the “material ability within the existing superior-subordinate relationship, directly or indirectly, to prevent, punish, or to initiate measures leading to [the] proceedings against alleged perpetrators where appropriate”<sup>78</sup> which is required.<sup>79</sup>

## ii. Knowledge

“For a superior to be held responsible under [the Doctrine of Command Responsibility] for crimes committed by a subordinate, it must be established that he knew or had reason to know that the subordinate was about to commit or had committed such crimes.”<sup>80</sup>

The knowledge element of the doctrine of command responsibility may be satisfied by proving that the superior had:

- (1) [A]ctual knowledge ... that his ... subordinates were about to commit, were committing, or had committed [the offenses]; or
- (2) [C]onstructive knowledge, [which means] that the superior had in his or her possession information that, in the specific circumstances of the case, would at least put him or her on notice of the risk of such offenses and alert him [or her] to the need for additional investigation to determine whether such crimes were about to be committed, were being committed, or had been committed by his or her subordinates.<sup>81</sup>

“[I]n the absence of direct evidence of the superior’s knowledge of the [offenses] committed by his [or her] subordinates, such knowledge cannot be presumed, but must be established by way of circumstantial evidence.”<sup>82</sup> Thus

77. Pocar, *supra* note 16, at 202 (citing *Celebici: Appeals Judgment*, Case No. IT-96-21-A, ¶ 266).

78. Pocar, *supra* note 16, at 202 (citing *Celebici: Appeals Judgment*, Case No. IT-96-21-A, ¶¶ 192, 252, & 255-256; & *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Appeals Judgment, ¶ 69 (Int’l. Crim. Trib. for the Former Yugoslavia July 29, 2004)).

79. *Id.*

80. *Limaj*, Case No. IT-03-66-T, ¶ 523.

81. Pocar, *supra* note 16, at 204-05 (citing *Celebici: Appeals Judgment*, Case No. IT-96-21-A, ¶¶ 239, 241, & 386; & *Baqilishema*, ¶ 37).

82. *Delalić*, Case No. IT-96-21-T, ¶ 386.

There is no presumption of knowledge merely because the atrocities committed may have been widespread, numerous, publicly notorious, or committed over wide areas or over prolonged periods. [T]hese factors may[, however,] allow an inference to arise that he [or she] must have possessed such knowledge.<sup>83</sup>

### 3. Failure to Take Necessary and Reasonable Measures

Finally, it must be established that the superior failed to take the necessary and reasonable measures to prevent [the happening of] future crimes or to punish [the] past crimes [and atrocities committed by his] subordinates.

With regard to the meaning of ‘necessary and reasonable measures[ ]’ [required by the Statutes and the jurisprudence laid down by the Tribunals,] ‘necessary’ measures are the measures appropriate for the superior to discharge his [or her] obligation[, ] ... [while] ‘reasonable’ measures are those reasonably falling within the material powers of the superior. What constitutes such necessary and reasonable measure to fulfill a commander’s duty is not a matter of substantive law but of evidence.<sup>84</sup>

The “commander’s degree of effective control, his [or her] material ability”<sup>85</sup> that is within his or her competence, will “determin[e] whether he [or she] reasonably took the measures required either to prevent the crime or to punish the perpetrator.”<sup>86</sup> However, it must be noted that the superior will only be “held responsible if he [or she] failed to take such measures that are within his [or her] material ability” depending on the circumstances surrounding each particular situation.<sup>87</sup> This position has been articulated by the Trial Chamber in this wise —

It must, however, be [recognized] that international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his [or her] powers. The question then arises of what actions are to be considered to be within the superior’s powers in this sense. As the corollary to the standard adopted by the Trial Chamber with respect to the concept of

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83. Sabio, *supra* note 21, at 70-71 (citing *Delalić*, Case No. IT-96-21-T, ¶ 417).

84. Pocar, *supra* note 16, at 205-06 (citing *Blaškić*, Case No. IT-95-14-A, ¶¶ 72 & 83 & *Halilović*, Case No. IT-01-48-A, ¶ 63) & *Blaškić*, Case No. IT-95-14-A, ¶ 484 (citing *Aleksovski*, Case No. IT-95-14/1-A, ¶ 72 & *Delalić*, Case No. IT-96-21-T, ¶ 346). *See also Halilović*, Case No. IT-01-48-A, ¶ 72.

85. *Blaškić*, Case No. IT-95-14-T, ¶ 335.

86. *Id.*

87. *Limaj*, Case No. IT-03-66-T, ¶ 526.

superior, we conclude that a superior should be held responsible for failing to take such measures that are within his [or her] material possibility.<sup>88</sup>

Fausto Pocar elaborates —

The superior's duty to prevent and punish his or her subordinates' crimes [and atrocities] includes at [the very] least[,] an obligation to investigate the crimes [and atrocities] to establish the facts and to report them to competent authorities, if the superior does not have the power to sanction him[self] or herself. The issuance of general or broad guidelines of standing orders of a mere formal nature [with] respect [to] human rights obligations clearly does not suffice to show that the necessary and reasonable measures have been taken.<sup>89</sup>

*D. The Doctrine as Customary International Law and the Incorporation Clause of the Constitution*

The doctrine of command responsibility is not completely alien to the Philippine notion of justice and accountability.<sup>90</sup> Although admittedly, the difficulty of applying the doctrine in this jurisdiction stems from the fact that aside from fragments of the doctrine scattered in different laws, there is currently no Philippine statute that centers on incorporating the doctrine and provides for any form of liability under it.

Although 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 Constitution. Section 2 of Article II of the Constitution provides 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.”<sup>91</sup> The doctrine of incorporation was expressed by Blackstone in his commentary when he said that “the law of nations, wherever any question arises which is

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88. *Delalić*, Case No. IT-96-21-T, ¶ 395.

89. Pocar, *supra* note 16, at 206-07 (citing *Kordić*, Case No. IT-95-14/2-T, ¶ 446 & *Blaškić*, Case No. IT-95-14-T, ¶ 335).

90. *See* An Act Punishing Military Commanders or Superiors for Crimes or Offenses Committed by Their Subordinates under the Principle of Command Responsibility, H.B. No. 4948, explan. n., 15th Cong., 1st Reg. Sess. (2011).

91. PHIL. CONST. art. II, § 2.

properly the object of its jurisdiction, is here adopted in its full extent by the common law, and it is held to be part of the law of the land.”<sup>92</sup>

The Philippines, by reason of its membership in the community of nations, is bound by the general principles of international law, which are considered to be automatically part of domestic laws.<sup>93</sup> As can be gleaned from the deliberations of the Constitution, the import of the incorporation clause of the 1987 Constitution is that “the incorporated law would have the force of a statute.”<sup>94</sup>

As early as 1949, in the case of *Kuroda v. Jalandoni*,<sup>95</sup> the Supreme Court already had the occasion to rule that the Hague Convention, incorporating the doctrine of command responsibility, is adopted in this jurisdiction as a generally accepted principle of international law despite the fact that the Philippines is not a signatory to the said Convention.<sup>96</sup>

In this case, Shigenori Kuroda, a Lieutenant-General of the Japanese Imperial Army and Commanding General of the Japanese Imperial Forces in the Philippines during the Second World War, questioned before the Supreme Court the creation of a military commission that tried him for

having unlawfully disregarded and failed ‘to discharge his duties as such commander to control the operations of members of his command, permitting them to commit brutal atrocities and other high crimes against noncombatant civilians and prisoners of the Imperial Japanese Forces, in violation of the laws and customs of war[.]’<sup>97</sup>

Kuroda claimed that the Hague Convention, which he was accused of violating, among others, was not applicable since the Philippines was not yet a party to it when the violations he allegedly committed took place.<sup>98</sup>

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92. JOAQUIN G. BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 61 (2009 ed.) (citing WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND BOOK THE FIRST* 250 (1765)).

93. ISAGANI A. CRUZ, *PHILIPPINE POLITICAL LAW* 95 (2014).

94. *Rubrico*, 613 SCRA at 267 (J. Carpio-Morales, separate opinion) (citing 4 *RECORD OF THE CONSTITUTIONAL COMMISSION*, NO. 86, at 772 (1986)) (emphasis omitted).

95. *Kuroda v. Jalandoni*, 83 Phil. 171 (1949).

96. *Id.* at 178.

97. *Id.* at 176.

98. *Id.*

In ruling against the objections raised by Kuroda, the Court held that while the Philippines was not a party to the Hague Convention at the time the violations were committed, it nonetheless embodied the generally accepted principles of international law adopted by virtue of Article II, Section 3 of the 1935 Constitution<sup>99</sup> as part of the law of the land.<sup>100</sup> The Court, speaking through Chief Justice Moran, held —

It cannot be denied that the rules and regulations of the Hague and Geneva conventions form part of and are wholly based on the generally accepted principles of international law. In fact, these rules and principles were accepted by the two belligerent nations, the [U.S.] and Japan, who were signatories to the two Conventions. Such rules 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 the recognition of rules and principles of international law as contained in treaties to which our government may have been or shall be a signatory.<sup>101</sup>

In *Rubrico*, the Court recognized the applicability of the doctrine of command responsibility in this jurisdiction even if it held that the doctrine, “as a concept defined, developed, and applied under international law, has little, if at all, bearing in *amparo* proceedings.”<sup>102</sup>

In *Rubrico*, petitioners Lourdes Rubrico and her children questioned before the Supreme Court the dismissal by the Court of Appeals of a petition for the issuance of a Writ of *Amparo* that they filed against the President, the Chief-of-Staff of the Armed Forces, and the Director General of the Philippine National Police, “on the theory that they, as commanders, were responsible for the unlawful acts allegedly committed by [certain military elements who were] their subordinates against [them].”<sup>103</sup>

In sustaining the dismissal ruled by the Court of Appeals, the Court, speaking through Justice Presbitero J. Velasco, held that

[a]s explained by the [Court of Appeals], Gen. Esperon and P/Dir. Gen. Razon were included in the case on the theory that they, as commanders,

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99. 1935 PHIL. CONST. art. II, § 3 (superseded 1973) (“The Philippines renounces war as an instrument of national policy, and adopts the generally accepted principles of international law as a part of the law of the Nation.”).

100. *Kuroda*, 83 Phil. at 178.

101. *Id.* at 178.

102. *Rubrico*, 613 SCRA at 251 & 252-53.

103. *Id.* at 250.

were responsible for the unlawful acts allegedly committed by their subordinates against petitioners. To the appellate court, ‘the privilege of the writ of *amparo* must be denied as against Gen. Esperon and P/Dir. Gen. Razon for the simple reason that petitioners have not presented evidence showing that those who allegedly abducted and illegally detained Lourdes and later threatened her and her family were, in fact, members of the military or the police force.’ The two generals, the [Court of Appeals] holding broadly hinted, would have been accountable for the abduction and threats if the actual malefactors were members of the AFP or PNP.

...

While in a qualified sense tenable, the dismissal by the [Court of Appeals] of the case as against Gen. Esperon and P/Dir. Gen. Razon is incorrect if viewed against the backdrop of the stated rationale underpinning the assailed decision vis-à-vis the two generals, i.e., command responsibility. The Court assumes the latter stance owing to the fact that command responsibility, as a concept defined, developed, and applied under international law, has little, if at all, bearing in *amparo* proceedings.

...

It may plausibly be contended that command responsibility, as legal basis to hold military [or] police commanders liable for extra-legal killings, enforced disappearances, or threats, may be made applicable to this jurisdiction on the theory that the command responsibility doctrine now constitutes a principle of international law or customary international law in accordance with the incorporation clause of the Constitution. Still, it would be inappropriate to apply to these proceedings the doctrine of command responsibility, as the [Court of Appeals] seemed to have done, as a form of criminal complicity through omission, for individual respondents’ criminal liability, if there be any, is beyond the reach of *amparo*.<sup>104</sup>

The separate concurring opinion penned by Associate Justice Conchita Carpio-Morales in the same case further affirms the acceptance and the applicability of the doctrine in this jurisdiction. According to Justice Carpio-Morales —

From the foregoing, it is abundantly clear that there is a long-standing adherence by the international community to the doctrine of command responsibility, which makes it a general principle of law recognized by civilized nations. As such, it should be incorporated into Philippine law as a generally accepted principle of international law.

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104. *Id.* at 250-53 (emphases supplied and omitted).

While the exact formulation of the doctrine of command responsibility varies in different international legal instruments, the variance is more apparent than real. The Court should take judicial notice of the core element that permeates these formulations — a commander’s negligence in preventing or repressing his [or her] subordinates’ commission of the crime, or in bringing them to justice thereafter. Such judicial notice is but a necessary consequence of the application of the incorporation clause vis-à-vis the rule on mandatory judicial notice of international law.<sup>105</sup>

In analyzing the origins and the development of the doctrine of command responsibility, it is thus clear that “it is a widely accepted general principle of law ... [and] international custom”<sup>106</sup> that can be used by Philippine courts by virtue of the doctrine of incorporation “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”<sup>107</sup> in settling controversies before them.

### III. COMMAND RESPONSIBILITY IN PHILIPPINE LAW

From a domestic perspective, command responsibility formally entered Philippine jurisdiction by executive fiat in 1995.<sup>108</sup> Issued by then President Fidel V. Ramos, Executive Order No. 226 (E.O. No. 226)<sup>109</sup> “[sought] to institutionalize command responsibility in the Philippine National Police [(PNP)] and other law enforcement agencies in recognition of the duty of superiors to closely monitor and supervise the overall activities and actions of their subordinates within their jurisdiction or command.”<sup>110</sup>

Moving past the need to establish responsibility by virtue of positive overt acts, E.O. No. 226 imputed accountability on the basis of neglect of duty of any government official or supervisor, or officer of the PNP or any law

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105. *Id.* at 273 (J. Carpio-Morales, separate opinion) (citing 1989 REVISED RULES ON EVIDENCE, rule 129, § 1).

106. *Rubrico*, 613 SCRA at 269 (J. Carpio-Morales, separate opinion).

107. BERNAS, *supra* note 92, at 61.

108. 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, Series of 1995 [E.O. No. 226, s. 1995] (Feb. 17, 1995).

109. *Id.*

110. Office of the Ombudsman v. Mendoza, G.R. No. 219772, July 17, 2019, at 7, available at <https://sc.judiciary.gov.ph/wp-content/plugins/wonderplugin-pdf-embed/pdfs/web/viewer.html?disabledoc=1&file=%2Ffiles%2Fdecisions%2F2019%2F07%2F219772.pdf> (last accessed Nov. 30, 2020).

enforcement agency.<sup>111</sup> Moreover, possessing knowledge that a crime or “offense shall be committed, is being committed, or has been committed by his subordinates, or by others within his [or her] area of responsibility and, despite such knowledge, [ ] did not take preventive or corrective action either before, during, or immediately after its commission”<sup>112</sup> likewise made any government official, supervisor, or officer, administratively liable.<sup>113</sup>

E.O. No. 226 accorded similar accountability and administrative liability by mere presumption of knowledge, upon the concurrent showing of the following:

- (1) When the irregularities or illegal acts are widespread within his [or her] area of jurisdiction;
- (2) When the irregularities or illegal acts have been repeatedly or regularly committed within his [or her] area of responsibility; or
- (3) When members of his [or her] immediate staff or office personnel are involved.<sup>114</sup>

In 2019, the Court declared in *Ombudsman v. Mendoza*<sup>115</sup> that

[t]he provisions of E.O. No. 226 clearly indicate that the law seeks to penalize the failure of superiors to take any disciplinary actions against their subordinates who have committed a crime or irregularity. It presupposes that the superior has no involvement in the actions of the subordinates, otherwise, the superior should be penalized in accordance with his or her direct participation in the questionable conduct his or her subordinates may have committed.<sup>116</sup>

Laying down the required burden of proof in establishing liability under E.O. No. 226, the Court in the case of *De Jesus v. Guerrero III*,<sup>117</sup> pronounced that

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111. E.O. No. 226, s. 1995, § 1.

112. *Id.*

113. *Id.* § 4.

114. *Id.* § 2.

115. Office of the Ombudsman v. Mendoza, G.R. No. 219772, July 17, 2019, available at <https://sc.judiciary.gov.ph/wp-content/plugins/wonderplugin-pdf-embed/pdfs/web/viewer.html?disabledoc=1&file=%2Ffiles%2Fdecisions%2F2019%2F07%2F219772.pdf> (last accessed Nov. 30, 2020).

116. *Id.* at 7.

117. *De Jesus v. Guerrero III*, G.R. No. 171491, 598 SCRA 341 (2009).



[i]n the absence of substantial evidence of gross negligence ... , administrative liability could not be based on the principle of command responsibility. Without proof that the head of office was negligent, no administrative liability may attach. Indeed, the negligence of subordinates cannot always be ascribed to their superior in the absence of evidence of the latter's own negligence.<sup>118</sup>

Proceeding outside the ambit of law enforcement, the doctrine of command responsibility was also applied by former President Joseph Ejercito Estrada to address the issue of administrative accountability against graft and corruption.<sup>119</sup> In his Memorandum dated 19 November 1999,<sup>120</sup> command responsibility was defined as

'the accountability of all heads of departments and other superior officers to closely supervise, coordinate, control, and monitor the discharge of duties by [their] subordinates[,] ... [including] 'the responsibility to control and monitor the activities of those operating within [the head's or officer's] area of jurisdiction and to take preventive or corrective measures as may be warranted under the premises.'<sup>121</sup>

#### *A. Command Responsibility in Philippine Criminal Law*

Twenty-five years following the issuance of E.O. No. 226, the doctrine of command responsibility still fails to gain traction in Philippine jurisdiction. Notwithstanding the bloody aftermath of the Mamasapano Massacre in 2015, which left "44 dead SAF, 18 dead MILF [Moro Islamic Liberation Front], and

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118. *Id.* at 353-354 (citing *Principe v. Fact-Finding & Intelligence Bureau*, 374 SCRA 460, 468 (2002); *Nicolas v. Desierto*, 447 SCRA 154, 167 (2004); & *Soriano v. Marcelo*, 507 SCRA 571, 591-92 (2006)).

119. Eugenio H. Villareal, *Authentic Superior Accountability in the Civil Service: "Command Responsibility" as a Key to Economic Development*, 53 ATENEO L.J. 242, 249 (2008) (citing *War Against Graft: Pres. Joseph Estrada institutionalizes command responsibility doctrine*, COA NEWS, Jan.-Feb. 2000, vol. 2, no. 1, available at [http://www.coa.gov.ph/COA\\_News/2000/vol2n1/graft.asp](http://www.coa.gov.ph/COA_News/2000/vol2n1/graft.asp) (last accessed Nov. 30, 2020)).

120. *Id.*

121. *Id.*

[five] dead civilians[.]”<sup>122</sup> criminal conviction on the basis of command responsibility continues to elude the highest authorities in the country.<sup>123</sup>

In the absence of a single domestic statute, the doctrine of command responsibility may instead be gleaned from the passage of four Philippine criminal laws. Methodical evaluation of these various legislations reveals the underlying legal issue confronting the imposition of different liability standards for superior commanding officers.

#### 1. Republic Act No. 9745

In 2009, the Anti-Torture Act was enacted to ensure that

no person placed under investigation or held in custody of any person in authority or, agent of a person in authority shall be subjected to physical, psychological or mental harm, force, violence, threat or intimidation or any act that impairs his [or] her free will or in any manner demeans or degrades human dignity[.]<sup>124</sup>

Thwarting the possibility of carrying out torture with impunity, the law “expressly prohibits secret detention places, solitary confinement, *incommunicado*[,] or other similar forms of detention[.]”<sup>125</sup>

In establishing command responsibility, Section 13 of the Anti-Torture Act holds equally liable as principals “[a]ny superior military, police or law enforcement officer[,], or senior government official who issued an order to any lower ranking personnel to commit torture for whatever purpose[.]”<sup>126</sup>

Furthermore,

[t]he immediate commanding officer of the unit concerned of the [Armed Forces of the Philippines (AFP)] or the immediate senior public official of

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122. R.G Cruz, *The Mamasapano tragedy: What we know so far*, ABS-CBN NEWS, Mar. 5, 2015, available at <https://news.abs-cbn.com/focus/03/05/15/mamasapano-tragedy-what-we-know-so-far> (last accessed Nov. 30, 2020).

123. See Gil Cabacungan & Jaymee T. Gamil, *SAF 44 kin hold Aquino accountable*, PHIL. DAILY INQ., Jan. 26, 2017, available at <https://newsinfo.inquirer.net/865504/saf-44-kin-hold-aquino-accountable> (last accessed Nov. 30, 2020).

124. An Act Penalizing Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and Prescribing Penalties Therefor [Anti-Torture Act of 2009], Republic Act No. 9745, § 2 (b) (2009).

125. *Lagman v. Pimentel III*, G.R. No. 235935, 854 SCRA 184 (2018).

126. Anti-Torture Act of 2009, § 13, para. 2.

the PNP shall [also] be held liable as principal ... for any act[, ] omission, or negligence ... [which] led, assisted, abetted[, ] or allowed, whether directly or indirectly, the commission of the offense by his [or] her subordinates[, provided that the following instances are present:]

- (1) If he [or] she has knowledge of or, owing to the circumstances at the time, should have known that acts of torture or other cruel, inhuman and degrading treatment or punishment shall be committed, is being committed, or has been committed by his [or] her subordinates or by others within his [or] her area of responsibility[;] and[ ]
- (2) [D]espite such knowledge, did not take preventive or corrective action either before, during or immediately after its commission, when he [or] she has the authority to prevent or investigate allegations of torture or other cruel, inhuman[, ] and degrading treatment or punishment but failed to prevent or investigate allegations of such act, whether deliberately or due to negligence[, ] shall also be liable as principals.<sup>127</sup>

Plainly, for violations of Republic Act No. 9745, criminal liability for the commission of the offense by the subordinate is confined to the immediate commanding officer of the AFP or the immediate senior public official of the PNP.<sup>128</sup>

## 2. Republic Act No. 9851

In the same year, the Philippine Act on Crimes against International Humanitarian Law, Genocide, and Other Crimes against Humanity (IHL Law)<sup>129</sup> adopted “the generally accepted principles of international law, including the Hague Conventions of 1907, the Geneva [Conventions] on the protection of victims of war and international humanitarian law, as part of the law of [the] nation.”<sup>130</sup> The same law “guarantee[s] that] persons suspected or accused of having committed grave crimes under international law [shall have]

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<sup>127</sup>. *Id.* § 13, para. 3.

<sup>128</sup>. *See id.*

<sup>129</sup>. An Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide, and other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes [Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity], Republic Act No. 9851 (2009).

<sup>130</sup>. *Id.* § 2 (d).

all rights necessary to ensure that their trial will be fair and prompt in strict accordance with national and international law and standards for fair trial.”<sup>131</sup>

Following the normative precepts of customary international law, command responsibility, as incorporated in Section 10 of the IHL Law, ascribes criminal liability to the superior for such crimes committed by

subordinates 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 properly exercise control over such subordinates, where:

- (1) That superior either knew or, owing to the circumstances at the time, should have known that the subordinates were committing or about to commit such crimes; [and]
- (2) That 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.<sup>132</sup>

Making the law equally applicable to all persons without distinction and effectively placing irrelevance on official capacity,<sup>133</sup>

[t]he fact that a crime ... has been committed by a person pursuant to an order of a government or a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless all of the following elements [occur]:

- (1) The person was under a legal obligation to obey orders of the government or the superior in question;
- (2) The person did not know that the order was unlawful; and
- (3) The order was not manifestly unlawful.<sup>134</sup>

### 3. Republic Act No. 10353

In 2012, the Anti-Enforced or Involuntary Disappearance Act<sup>135</sup> criminalized the “arrest, detention, abduction[,] or any other form of deprivation of liberty

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<sup>131</sup> *Id.* § 2 (f).

<sup>132</sup> *Id.* § 10.

<sup>133</sup> *Id.* § 9.

<sup>134</sup> *Id.* § 12.

<sup>135</sup> An Act Defining and Penalizing Enforced or Involuntary Disappearance [Anti-Enforced or Involuntary Disappearance Act of 2012], Republic Act No. 10353 (2012).

committed by agents of the State or by persons or groups of persons acting with the authorization, support[,] or acquiescence of the State[.]”<sup>136</sup> Likewise crucial is the “refusal to acknowledge the deprivation of liberty or [ ] conceal[ing] the fate or whereabouts of the disappeared person [ ] plac[ing said] person outside the protection of the law.”<sup>137</sup> This is the first law in Asia to define and penalize enforced or involuntary disappearance as a special and separate crime from kidnapping, illegal detention, or murder.<sup>138</sup>

In similar import to the Anti-Torture Act,

the immediate commanding officer of the ... AFP or the immediate senior official of the PNP ... shall be held liable as [ ] principal to the crime of enforced or involuntary disappearance for acts committed ... that shall have led, assisted, abetted[,] or allowed, whether directly or indirectly, the commission thereof by his or her subordinates.<sup>139</sup>

#### 4. Republic Act No. 11188

Recently, in 2019, the Special Protection of Children in Situations of Armed Conflict Act<sup>140</sup> recognized the State’s “primary role in providing effective protection and relief to all children in situations of armed conflict[,]”<sup>141</sup> and “to prosecute those responsible especially for grave child rights violations in armed conflict[.]”<sup>142</sup>

This law in no case exempts a person from criminal responsibility on the premise of official capacity.<sup>143</sup> Moreover, Section 14 thereof imposes criminal responsibility to superiors for crimes committed by their subordinates, where the superior had knowledge about the commission of the crime or “failed to

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<sup>136</sup> *Id.* § 3 (b).

<sup>137</sup> *Id.*

<sup>138</sup> Willard Cheng, *PNoy signs ‘desaparecidos’ bill into law*, ABS-CBN NEWS, Dec. 22, 2012, available at <http://www.abs-cbnnews.com/nation/12/21/12/pnoy-signs-desaparecidos-bill-law> (last accessed Nov. 30, 2020).

<sup>139</sup> Anti-Enforced or Involuntary Disappearance Act of 2012, § 14.

<sup>140</sup> An Act Providing for the Special Protection of Children in Situations of Armed Conflict and Providing Penalties for Violations Thereof [Special Protection of Children in Situations of Armed Conflict Act], Republic Act No. 11188 (2019).

<sup>141</sup> *Id.* § 2 (g).

<sup>142</sup> *Id.* § 2 (h).

<sup>143</sup> *Id.* § 13.

take all necessary, legitimate[,] and reasonable measures to prevent or repress [its] commission ... .<sup>144</sup>

In stark contrast to the liability regimes established both in Republic Act No. 9745 and Republic Act No. 10353, which limit the accountability for offenses committed by the subordinates to the immediate commanding officer of the AFP or the immediate senior public official of the PNP,<sup>145</sup> criminal liability of the superior officers for violations of their subordinates under Republic Act No. 9851 and Republic Act No. 11188 presents no threshold.<sup>146</sup> Insofar as the doctrine of command responsibility is applied in the Philippines, therefore, there is now an unorthodox situation where two varying liability parameters are in place.

By way of summary, the following table shows a comparison of the salient provisions governing command responsibility among the four laws:

Republic Act No. 9745	Republic Act No. 9851	Republic Act No. 10353	Republic Act No. 11188
—	<p>Sec. 9. <i>Irrelevance of Official Capacity</i> —</p> <p>This Act shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Act, nor shall it, in and of itself, constitute a</p>	—	<p>Sec. 13. <i>Irrelevance of Official Capacity</i> —</p> <p>This Act shall apply equally to all persons without any distinction based on official capacity. In no case shall the official capacity exempt a person from criminal responsibility or constitute a ground for reduction of sentence.<sup>148</sup></p>

<sup>144</sup>. *Id.* § 14.

<sup>145</sup>. See Anti-Torture Act of 2009, § 13 & Anti-Enforced or Involuntary Disappearance Act of 2012, § 14.

<sup>146</sup>. See Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, § 9 & Special Protection of Children in Situations of Armed Conflict Act, § 13.

<sup>148</sup>. *Id.* § 13.

	<p>ground for reduction of sentence. However:</p> <p>(a) Immunities or special procedural rules that may be attached to the official capacity of a person under Philippine law other than the established constitutional immunity from suit of the Philippine President during his [or] her tenure, shall not bar the court from exercising [ ] jurisdiction over such a person; and</p> <p>(b) Immunities that may be attached to the official capacity of a person under international law may limit the application of this Act, but only within the bounds established under international law.<sup>147</sup></p>		
<p>Sec. 13. <i>Who are Criminally Liable</i> —</p> <p>Any person who actually participated or induced another in the commission of torture or other cruel, inhuman and degrading treatment or punishment or who cooperated in the execution of the act of torture or other cruel, inhuman and degrading treatment or punishment by previous or simultaneous acts shall be liable as principal.</p> <p>Any superior military, police or law</p>	<p>Sec. 10. <i>Responsibility of Superiors</i> —</p> <p>In addition to other grounds of criminal responsibility for crimes defined and penalized under this Act, a superior shall be criminally responsible as a principal for such crimes committed by subordinates under his/her effective command and control, or effective authority and control as the case may be, as a result of his/her failure to properly exercise control over such subordinates, where:</p>	<p>Sec. 14. <i>Liability of Commanding Officer or Superior</i> —</p> <p>The immediate commanding officer of the unit concerned of the AFP or the immediate senior official of the PNP and other law enforcement agencies shall be held liable as a principal to the crime of enforced or involuntary disappearance for acts committed by him or her that shall have led, assisted, abetted or allowed, whether directly or indirectly, the commission thereof by his or her</p>	<p>Sec. 14. <i>Responsibility of Superiors</i> —</p> <p>In addition to the grounds of criminal responsibility for crimes defined and penalized under this Act, a superior shall be criminally responsible for such crimes committed by subordinates where:</p> <p>(a) The superior either knew or, owing to the circumstances at the time, should have known that the subordinates were</p>

147. Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, § 9.

<p>enforcement officer or senior government official who issued an order to any lower ranking personnel to commit torture for whatever purpose shall be held equally liable as principals.</p> <p>The immediate commanding officer of the unit concerned of the AFP or the immediate senior public official of the PNP and other law enforcement agencies shall be held liable as a principal to the crime of torture or other cruel or inhuman and degrading treatment or punishment for any act or omission, or negligence committed by him/her that shall have led, assisted, abetted or allowed, whether directly or indirectly, the commission thereof by his/her subordinates. If he/she has knowledge of or, owing to the circumstances at the time, should have known that acts of torture or other cruel, inhuman and degrading treatment or punishment shall be committed, is being committed, or has been committed by his/her subordinates or by others within his/her area of responsibility and, despite such</p>	<p>(a) That superior either knew or, owing to the circumstances at the time, should have known that the subordinates were committing or about to commit such crimes;</p> <p>(b) That superior failed to take all necessary and reasonable measures within his/her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.<sup>150</sup></p>	<p>subordinates. If such commanding officer has knowledge of or, owing to the circumstances at the time, should have known that an enforced or involuntary disappearance is being committed, or has been committed by subordinates or by others within the officer's area of responsibility and, despite such knowledge, did not take preventive or coercive action either before, during or immediately after its commission, when he or she has the authority to prevent or investigate allegations of enforced or involuntary disappearance but failed to prevent or investigate such allegations, whether deliberately or due to negligence, shall also be held liable as principal.<sup>151</sup></p>	<p>committing or were about to commit such crimes; or</p> <p>(b) The superior failed to take all necessary, legitimate[,] and reasonable measures to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.<sup>152</sup></p>
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150. Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, § 10.

151. Anti-Enforced or Involuntary Disappearance Act of 2012, § 14.

152. Special Protection of Children in Situations of Armed Conflict Act, § 14.



<p>knowledge, did not take preventive or corrective action either before, during or immediately after its commission, when he/she has the authority to prevent or investigate allegations of torture or other cruel, inhuman and degrading treatment or punishment but failed to prevent or investigate allegations of such act, whether deliberately or due to negligence shall also be liable as principals.</p> <p>Any public officer or employee shall be liable as an accessory if he/she has knowledge that torture or other cruel, inhuman and degrading treatment or punishment is being committed and without having participated therein, either as principal or accomplice, takes part subsequent to its commission in any of the following manner:</p> <p>(a) By themselves profiting from or assisting the offender to profit from the effects of the act of torture or other cruel, inhuman and degrading treatment or punishment;</p> <p>(b) By concealing the act of torture or other cruel, inhuman and degrading treatment or punishment and/or destroying the effects or instruments thereof in order to prevent its discovery; or</p> <p>(c) By harboring, concealing or assisting</p>			
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<p>in the escape of the principals in the act of torture or other cruel, inhuman and degrading treatment or punishment: Provided, That the accessory acts are done with the abuse of the official's public functions.<sup>149</sup></p>			
<p>—</p>	<p>Sec. 12. <i>Orders from a Superior</i> —</p> <p>The fact that a crime defined and penalized under this Act has been committed by a person pursuant to an order of a government or a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless all of the following elements [occur]:</p> <p>(a) The person was under a legal obligation to obey orders of the government or the superior in question;</p> <p>(b) The person did not know that the order was unlawful; and</p> <p>(c) The order was not manifestly unlawful.</p> <p>For the purposes of this section, orders to commit genocide or other crimes against humanity are manifestly unlawful.<sup>153</sup></p>	<p>—</p>	<p>Sec. 15. <i>Orders from a Superior</i> —</p> <p>The fact that a crime defined and penalized under this Act has been committed by a person pursuant to an order of a superior shall not relieve that person of criminal responsibility unless all of the following elements occur:</p> <p>(a) The person was under a legal obligation to obey orders of the superior in question;</p> <p>(b) The person did not know that the order was unlawful; and</p> <p>(c) The person acted under duress or coercion.</p> <p>For purposes of this section, orders to commit grave child rights violations enumerated in Section 9 hereof are manifestly unlawful and shall be</p>

149. Anti-Torture Act of 2009, § 13.

153. Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, § 12.

			punished under this Act and other applicable existing laws. <sup>154</sup>
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The objection of this Article against the command responsibility provisions of Republic Act No. 9745 and Republic Act No. 10353 is that both legislations limit the liability of senior officials only to the *immediate* commanding officers of the unit concerned of the AFP or the *immediate* senior officer of the PNP and other law enforcement agencies.<sup>155</sup> The liability of senior officials is limited to immediate officers and does not go any higher even if the requisites for the application of the doctrine of command responsibility are present.

The limitation of liability only to the *immediate* commanding officers of the Armed Forces or the Police, considering the rigid structure and discipline unique to the military, is a patent disregard to the settled doctrine of command responsibility.

“Just as dynamic military commanders can induce [ ] subordinates to accomplish heroic acts beyond the pale of traditional [and] human limitations, they also, unfortunately, possess the power and means of ordering, encouraging, or acquiescing to [atrocious] acts”<sup>156</sup> that exceed the limits of “rational application of military force” through the abuse of their legitimate military leadership and authority.<sup>157</sup> The military can be described as “a unique society[,] where the commander has tremendous authority over subordinates not normally extended to superiors in the civilian sector.”<sup>158</sup>

Revisiting the doctrine of command responsibility will show that a superior has the “duty to take [ ] appropriate measures [that] are within his [or her] power to control the troops under his [or her] command”<sup>159</sup> for the prevention of acts which are violations of the law, and the failure of such

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154. Special Protection of Children in Situations of Armed Conflict Act, § 15.

155. See Anti-Torture Act of 2009, § 13 & Anti-Enforced or Involuntary Disappearance Act of 2012, § 14.

156. Smidt, *supra* note 9, at 157.

157. *Id.* at 158.

158. *Id.* at 166.

159. *Yamashita*, 327 U.S. at 8.

superior to do so will make him liable when violations result.<sup>160</sup> As such, it is relevant to consider the individual responsibility of not just the *immediate* commanding officers of the direct perpetrators of the crime, but also the liability of *all* those within the chain of command, including the possible liability of civilian superiors who have a reasonable and effective connection to the perpetration of the crime.

#### IV. CONCLUSION AND RECOMMENDATION

The Constitution grants a tremendous degree of power and authority to the State and its organs. With all the resources at its disposal and command, the State can do almost anything and everything as it pleases. However, the same Constitution provides for standards by which the State, through its agents, are made accountable for their actions.

Over the course of time, the doctrine of command responsibility has developed, both in the domestic and in the international legal systems, in ensuring that accountability is not a mere rhetoric, but an actual working standard in the Philippine system of government. This doctrine guarantees accountability by holding even the highest-ranking commanders or officials responsible and accountable for the crimes committed by their subordinates if the commission of such crimes are known to them and they do not prevent the commission of such, or if they fail to punish them after such crimes have been committed.

The doctrine of command responsibility has served not only as a remedial measure to punish such officials but also as a deterrent for the future commission of crimes by putting such officials always on-guard with respect to possible law violations by their subordinates.

In re-examining the doctrine of command responsibility, this Article traced and explored the doctrine's development in the domestic and in the international legal systems. In focusing on the application of the doctrine in Philippine penal laws, this Article scrutinized and compared various penal laws that incorporated the doctrine.

It is the position of this Article that all penal laws incorporating the doctrine of command responsibility must have a common framework within which the doctrine must operate as a manner of incurring criminal liability.

If only to reiterate, the application of the doctrine of command responsibility should not be limited to the *immediate* commanding officer of

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<sup>160</sup>. *Id.*

the unit concerned of the AFP, or the *immediate* senior official of the PNP, as Republic Act No. 9745 and Republic Act No. 10353 provide.<sup>161</sup> The liability imposed under the doctrine must go all the way up to the highest echelons of the chain-of-command, if, and only if, it is proven that all the elements required to apply the doctrine are present. This is in consonance with the high notion of accountability that the 1987 Constitution exacts, and a contrary view would work to shield superior officials who are remiss in their duties of being true to their role provided by the Constitution.

Although it is conceded that limiting the liability of senior officials only to the *immediate* commanding officer of the unit concerned of the AFP, or the *immediate* senior official of the PNP and other law enforcement agencies is practical because of the difficulty in gathering evidence that would incriminate senior officials higher than the immediate commanding officer of the AFP and the immediate senior official of the PNP and other law enforcement agencies, this argument is not compelling to outweigh the requirements of accountability. Indeed, one of the foundations of any democratic and republican State is that “[n]o official, no matter how high, is above the law.”<sup>162</sup>

After all, “[p]ublic office is a public trust.”<sup>163</sup>

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161. Anti-Torture Act of 2009, § 13 & Anti-Enforced or Involuntary Disappearance Act of 2012, § 14.

162. *Villavicencio v. Lukban*, 39 Phil. 778, 787 (1919).

163. PHIL. CONST. art. XI, § 1. The Constitution provides that “Public office is a public trust. Public officers and employees must, at all times, be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency; act with patriotism and justice, and lead modest lives.” PHIL. CONST. art. XI, § 1.