

Crime and Omission: Command Responsibility from Manila to Rome

Raphael Lorenzo A. Pangalangan*

ABSTRACT

Philippine criminal law is commonly associated with positive conduct. The powers that be purport that having never ordered extra-judicial killings, liability cannot be incurred therefor. That view is mistaken. It ignores how both domestic and international law criminalizes actions and omissions alike. This is aptly illustrated through the doctrine of command responsibility: a mode of omission liability echoed throughout International Criminal Law and embedded in the Philippines' domestic history and jurisprudence. The doctrine attaches criminal liability to military commanders, persons effectively acting as military commanders, and "other" superiors for a distinct actus reus: the dereliction of duty—the failure to prevent or repress a subordinates' unlawful conduct or submit the matter to the competent authorities. It is thus not the order alone but the failure to order otherwise that may trigger individual criminal liability. By tracing the doctrine's development from Manila to Rome, the paper cures the common misconception of crime and illustrates how omissions have long been punished in Philippine legal order.

Keywords: command responsibility, omission liability, Philippine criminal law, international criminal law

Introduction

Crime is often conceived in terms of positive conduct.¹ This may be explained by the fact that Philippine criminal law penalizes mostly overt

* Assistant Professor and Associate Dean, Jindal Global Law School, O.P. Jindal Global University (Present); Bonavero Fellow, Reprieve U.K. (2020); LL.M., University of Cambridge (2020); M.St. in International Human Rights Law, University of Oxford (2019); Grad.D. in Advanced Studies on Human Rights and Humanitarian Law, American University (2017); J.D., University of the Philippines (2016); B.A. Philosophy, University of the Philippines (2012). Opinions expressed are those of the author and do not necessarily reflect the official policy or position of any other agency, organization, employer, or company.

¹ SC, G.R. No. 190912, *Fantastico v. Malicse Sr.*, 745 SCRA 126.

acts. Though the Revised Penal Code (RPC)—the country’s time-honored *lex generalis* on crime—expressly embraces actions and omissions alike, only six *delitos* out of the 367-articled RPC contemplate pure omissions.² Indeed, a case search through the Philippine Supreme Court database³ reveals that the term “crime of omission” and variations thereof have only been utilized once; in the *obiter* of *US v. Igpura*—an archaic case decided back when the Philippines’ legal framework was an adjunct to the United States of America’s system.⁴

Yet in that same breath, as evidenced by the doctrine of command responsibility, “omission liability” has likewise been entrenched in the nation’s history and jurisprudence. This will be illustrated through two parts: Part I delves into the chronicle of the “doctrine born in sin”⁵ with the Trial of Tomoyuki Yamashita, the Commanding General of the 14th Army Group of Japan during the Second World War.⁶ It then proceeds to review the doctrine’s more modern iterations in both Customary and Conventional International Law. Part II shifts its focus to Philippine domestic law and explores how command responsibility has been historically applied. By reviewing the mode of liability’s evolution from *Yamashita* to its current contemplations, the paper illustrates how omissions have long been punished in Philippine legal order.⁷

² See e.g., The Revised Penal Code, Act No. 3815, 8 December 1930 (effective on 1 January 1932), Arts. 116 (Misprision of treason), 186 (Monopolies and combinations in restraint of trade), 213 (Frauds against the public treasury and similar offenses), 233 (Refusal of assistance), 234 (Refusal to discharge elective office) and 275 (Abandonment of person in danger and abandonment of one’s own victim); see also Luis B. Reyes, *The Revised Penal Code: Criminal Law, Book I*, Rex Book Store, Inc., Quezon City, 2017, pp. 34-35.

³ “Supreme Court E-Library”, available at: www.elibrary.judiciary.gov.ph (all internet references were accessed June 2020).

⁴ SC, G.R. No. 7593, *US v. Igpura*, 27 Phil. 619.

⁵ Guénaél Mettraux, *The Law of Command Responsibility*, Oxford University Press, Oxford, 2009, p. 5.

⁶ SC, G.R. No. L-129, *Yamashita v. Styer*, 75 Phil. 563; U.S. SC, No. 61, misc., *In re Yamashita*, 327 U.S. 1.

⁷ See Fr. Joaquin G. Bernas S.J., “Command Responsibility,” *Philippine Center for Investigative Journalism*, 5 February 2007, available at: www.perma.cc/M38W-V23C.

I. Doctrinal Development: From Manila to Rome

A. “Born in Sin”: *The Trial of Tomoyuki Yamashita*

Command responsibility is a mode of criminal liability imposed on superiors for failing to prevent or repress the unlawful conduct of their subordinates or to submit the matter to the competent authorities.⁸ It imputes criminal responsibility for an *actus reus* distinct from that of the direct perpetrators, i.e., the dereliction of duty—the failure of responsible command.⁹ Though long recognized as an international law doctrine, command responsibility was first applied domestically in the trial of General Tomoyuki Yamashita.

Yamashita was incarcerated in the City of Muntinlupa for having “failed to discharge his duty as commander” and “permitting” his subordinates “to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines.”¹⁰ Though the record had not clearly established that he was aware of the crimes of his subordinates at the time they were committed, the American Military Commission held Yamashita criminally liable for “fail[ing] to ... control the troops under his command for the prevention of ... violations of the law of war.”¹¹

Without having clearly established the element of *mens rea*, the application of the doctrine in *Yamashita* came close to a form of “strict liability.”¹² While that approach would be later affirmed by the Philippine

⁸ International Criminal Court (hereinafter, “ICC”), *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Decision (Pre-Trial Chamber), 15 June 2009, para. 405 citing International Criminal Tribunal for the former Yugoslavia (hereinafter, “ICTY”), *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgement (Trial Chamber), 16 November 1998, para. 334.

⁹ Florin T. Hilbay, “The Philippine President as Tortfeasor-in-Chief: Establishing Civil Liability for Constitutional Negligence”, *Asian Journal of Comparative Law* Vol. 4, No. 1, 2009, p. 19.

¹⁰ *Yamashita v. Styer* (Perfecto *J* concurring and dissenting), above note 6.

¹¹ *In re Yamashita*, above note 6.

¹² ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-T, Judgement (Trial Chamber), 30 June 2006, para. 141; see Carsten Stahn, *A Critical Introduction to International Criminal Law*, Cambridge University Press, Cambridge, 2018, p. 141 *contra* William H. Parks, “Command Responsibility for War Crimes”, *Military Law Review*, Vol. 62, No. 1, 1973, p. 37; see generally Michael J. Sherman, “Standards in Command Responsibility Prosecutions: How Strict, and Why?”, *New Illinois University Law Review*, Vol. 38, No. 2, 2018.

and US Supreme Courts in Yamashita's *Habeas Corpus* petitions,¹³ it has since been rejected in international law.¹⁴

B. Command Responsibility in International Law: Two Iterations

1. The Ad Hoc Tribunal Approach: Customary International Law

Both the International Criminal Tribunal of the former Yugoslavia (ICTY) and International Criminal Tribunal of Rwanda (ICTR) are creations of customary international law.¹⁵ In addition to the objective elements of (i) an underlying offense by a subordinate, (ii) a superior-subordinate relationship, and (iii) the superiors' failure to control their subordinates properly, the ICTY and ICTR Charters expressly codify a subjective element of intent in their "superior responsibility" provisions.¹⁶ For a charge based on command responsibility to prosper before the *ad hoc* Tribunals, it must be shown that the accused-superior "knew or had reason to know" of the underlying criminal offense of his or her subordinates.¹⁷

Further, while the doctrine originally contemplated an armed conflict context,¹⁸ the *ad hoc* Tribunals' jurisprudence expanded command

¹³ United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. IV, His Majesty's Stationery Office, London, 1948, pp. 35-36.

¹⁴ See e.g., ICTY, *Prosecutor v. Mucic et al.* (hereinafter "*Celebici*"), Case No. IT-96-21-A, Judgement (Appeals Chamber), 20 February 2001, para. 226 "Thus, as correctly held by the Trial Chamber, as the element of knowledge has to be proved in this type of cases, command responsibility is not a form of strict liability."; see also Antonio Cassese and Paolo Gaeta, *Cassese's International Criminal Law*, Oxford University Press, Oxford, 2013, p. 190.

¹⁵ UN Security Council, *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia* (as amended on 17 May 2002) (25 May 1993) (hereinafter, "ICTY Charter") cf. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision (Appeals Chamber), 2 October 1995, p. 143; UN Security Council, *Statute of the International Criminal Tribunal for Rwanda* (as last amended on 13 October 2006, (8 November 1994) (hereinafter, "ICTR Charter") cf. ICTR, *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, Judgement and Sentence (Trial Chamber II), 22 January 2004, para. 692.

¹⁶ *Celebici*, above note 14, paras. 189-198 cf. ICTY Charter, above note 15, Art. 7(3); ICTR, *Prosecutor v. Nahimana*, Case No. ICTR-99-52-A, Judgement (Appeals Chamber), 28 November 2007, paras. 791, 840 cf. ICTR Charter, above note 15, Art. 6(3).

¹⁷ *Ibid.*

¹⁸ Jamie A. Williamson, "Command Responsibility in the Case Law of the International Criminal Tribunal of Rwanda", *Criminal Law Forum*, Vol. 13, 2002, p. 366.

responsibility beyond military lines. The superior's responsibility over his subordinates is thus now applicable in both times of armed conflict as well as peacetime,¹⁹ and to military and civilian leaders alike,²⁰ whether *de jure* or *de facto*.²¹

2. *The International Criminal Court Approach: Treaty Law*

The Rome Statute diverges from the unitary approach in customary international law²² by bifurcating the rules of command responsibility between two categories: first, under Article 28(a), the military commander or “person effectively acting as a military commander” (“military-like commander”), and second, under Article 28(b), “civilians occupying *de jure* and *de facto* positions of authority” (“civilian superiors”).²³ The distinction was drawn in recognition of the different rules and assumptions that exist within civilian and military(-like) contexts, especially with regard to the relatively less stringent disciplinary structures in civilian life.²⁴

The elements of command responsibility under Article 28(a) were identified by the Pre-Trial Chamber of the International Criminal Court (ICC) in *Prosecutor v. Bemba*:

- (i) That the accused-military commander or a person effectively acting as such must have (ii) effective

¹⁹ G. Mettraux, above note 5, p. 97 citing ICTY, *Prosecutor v. Hadžihasanović et al.*, Case No IT-01-47-PT, Decision on Interlocutory Appeal (Appeals Chamber), 16 July 2003, para. 20.

²⁰ ICTY, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Public Redacted Version of Judgement, para. 580.

²¹ ICTR, *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement (Appeals Chamber) 23 May 2005, para. 85.

²² ICTY, *Prosecutor v. Orić*, Case No IT-03-68-T, Judgement (Trial Chamber), 30 June 2006, para. 308.

²³ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), Art. 28; see Gideon Boas, James L. Bischoff and Natalie L. Reid, *Forms of Responsibility in International Criminal Law*, Cambridge University Press, Cambridge, 2007, p. 254; *Bemba*, above note 8, para. 406.

²⁴ Summary Record of the 1st Meeting of the Committee of the Whole (hereinafter “Summary Record”), UN Doc.A/CONF.183/C.1/SR.1, 20 November 1998, paras. 67-68; see also Jelena Plamenac, “ICC Statute Article 28(b)”, *Center for International Law Research and Policy*, 16 March 2017, p. 2, available at: www.legal-tools.org/doc/cf24cb/.

command and control, or effective authority and control over the subordinates who, (iii) resulting from the superior's failure to exercise control properly over them, (iv) committed a crime within the Court's *jurisdiction materiae* and (v) the superior either knew or, owing to the circumstances at the time, should have known of the subordinates offense, and failed to take the necessary and reasonable measures to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution.²⁵

While ICC jurisprudence has yet to interpret Article 28(b), the text of the Statute and its *travaux préparatoires* reveal that the same elements are generally required for both categories (i.e., a superior-subordinate relationship, knowledge, and failure to control properly). Yet in that same breath, civilian superior liability deviates from its military(-like) counterpart in both doctrine and degree.²⁶ For instance, while effective control of a superior over a subordinate is a *sine qua non* for either category,²⁷ a hierarchical command structure may be better assumed for military(-like) forces, but would require greater evidence in civilian contexts.²⁸ Neither are the superiors' duties exercised in the same manner.²⁹ While the body of international humanitarian law (IHL) generally defines the duties of a military commander, the scope of authority and obligations of civilian leaders is particularized by domestic law.³⁰

The two categories are also distinguishable as to the ambit of the subordinate's conduct. While military(-like) commanders are generally responsible for acts of forces under their effective control or authority, a

²⁵ *Bemba*, above note 8, para. 407.

²⁶ Summary Record, above note 24, paras. 67-68; J. Plamenac, above note 24, p. 5.

²⁷ *Bemba*, above note 8, para. 414; ICTY, *Prosecutor v Prlić*, Case No IT-04-74-T, Judgment (TC), 29 May 2013, para. 240.

²⁸ Otto Triffterer, "Article 28: Responsibility of commanders and other superiors," in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Beck, Nördlingen, 2008, p. 1085.

²⁹ ICTY, *Prosecutor v. Popovic*, Case No IT-05-88-A, Judgment (Appeals Chamber), 30 January 2015, para. 1892; *Celebici* above note 14, para. 266.

³⁰ G. Mettraux, above note 5, p. 108-109.

civilian superior is only responsible for official acts committed by subordinates related to their function.³¹

The most apparent distinction, however, is found in the element of *mens rea*. While a commander may be held liable under Article 28(a) if he or she “knew or should have known” of the subordinates’ underlying offense, Article 28(b) holds a civilian superior liable only “if he or she knew or consciously disregarded the information which clearly indicated that subordinates were committing or about to commit such crimes.”³² The distinction draws on the reality that a military(-like) leader within a command structure “would have far more possibilities of receiving information on the conduct of their subordinates.”³³ Thus, while “commanders may be held liable not only in light of actual or constructive knowledge, but when he should have known,” civilian leaders are subjected to a higher *mens rea* threshold, i.e., that the superior “must have known or consciously disregarded such crimes (i.e., willful blindness).”³⁴

C. International Law in Philippine Legal Order

Throughout the nation’s sovereign existence, international law has been given equal juridical status with domestic law. The Philippines is thus bound by both customary international law and ICC doctrinal iterations.

1. Customary International Law Incorporated

Philippine legal order has directly applied international law in domestic proceedings. This is aptly illustrated not only in the *Yamashita* cases, but in the trial of Shigenori Kuroda—the former Lieutenant General of the Japanese Imperial Army and Commanding General of the Japanese Imperial Forces in the Philippines.

In *Kuroda v. Jalandoni*, Lieutenant General Kuroda was similarly charged before the American Military Commission for having “unlawfully disregarded and failed to discharge his duties [over his subordinates and] permitting them to commit brutal atrocities and other

³¹ O. Triffterer, above note 28, p. 1102.

³² Rome Statute, above note 23, Art. 28.

³³ G. Mettraux, above note 5, p. 31

³⁴ Nora Kasten, “Distinguishing Military and Non-military Superiors: Reflections on the Bemba Case at the ICC”, *Journal of International Criminal Justice*, Vol. 7, No. 5, p. 986.

high crimes against noncombatant civilians and prisoners of the Imperial Japanese Forces in violation of the laws and customs of war.”³⁵ Kuroda challenged the jurisdiction of the Commission on the principle of *nullum crimen sine lege*. He claimed that because “the Philippines [was] not a signatory nor an adherent to the Hague Convention on Rules and Regulations covering Land Warfare,” he could not be criminally charged for violations thereof.

The Philippine Supreme Court rejected Kuroda’s plea. According to the Court, the “generally accepted principle[s] of international law of the present day including the Hague Convention, the Geneva Convention, and significant precedents of international jurisprudence” form part of Philippine legal order through the incorporation clause enshrined in Section 3, Article 2 of the 1935 Constitution. The rules on responsible command recognized in these instruments thus form part of the “law of the nation” even though the Philippines was not a State Party thereto.³⁶

Today, the incorporation clause is found in Section 2, Article II of the 1987 Constitution. As in the 1935 and 1973 Constitutions before it,³⁷ the doctrine of command responsibility continues to form part of the law of the land without need for enabling legislation.³⁸

2. *The Rome Statute: Ratified, Withdrawn, Binding*

The Rome Statute came into force in the Philippines on 1 November 2011, though its effectivity was short-lived. On 17 March 2018, President Rodrigo Duterte unilaterally ordered the Philippines’ withdrawal from the ICC.³⁹ Pursuant to Article 127 of the Statute, the withdrawal took effect one year thereafter.⁴⁰

³⁵ SC, G.R. No. L-2662, *Kuroda v. Jalandoni*, 83 Phil. 171.

³⁶ 1935 Constitution, art. II, §3.

³⁷ See also 1973 Constitution, art. II, §3.

³⁸ SC, G.R. No. 118295, *Tanada v. Angara*, 272 SCRA 18; Merlin Magallona, *The Philippine Constitution and International Law*, University of the Philippines College of Law, Quezon City, 2013, p. 64.

³⁹ ICC Public Affairs Unit, “ICC Statement on The Philippines’ notice of withdrawal: State participation in Rome Statute system essential to international rule of law,” ICC, 20 March 2018, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1371>.

⁴⁰ Jason Gutierrez, “Philippines Officially Leaves the International Criminal Court”, *New York Times*, 17 March 2019, available at: <https://www.nytimes.com/2019/03/17/world/asia/philippines-international-criminal-court.html>.

The constitutionality of the Philippines' withdrawal from the Rome Statute remains pending before the Supreme Court.⁴¹ Yet regardless of its outcome, the crimes committed until 17 March 2019 remain within the jurisdiction of the ICC. Article 127 clearly states that withdrawing from the treaty shall not “prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.”⁴²

II. Command Responsibility in Local Law

The nation is no stranger to the notion of command responsibility. The doctrine was first codified in the Philippine jurisdiction as early as 1876—seventy years before Yamashita was tried, sentenced, and executed. Article 244(2) of the Old Penal Code, a Filipinized rendition of Spain's *Codigo Penal*,⁴³ held rebel leaders liable for the individual felonies of their subordinates “in case the real perpetrators could not be found.”⁴⁴

The provision was subsequently repealed by the Revised Penal Code, which was in turn passed during the American regime. The Revised Penal Code continues to apply as the Philippines' *lex generalis* on crime.

Command responsibility would only next emerge in the Philippine jurisdiction through the trial of General Yamashita, but would again thereafter fade into the background.⁴⁵ It was briefly entertained as a constitutional principle during the drafting of the 1987 Constitution, but

⁴¹ SC, G.R. No. 238875, *Pangilinan v. Cayetano*, Petition, 16 May 2018; see generally Ryan Hartzell Carino Balisacan, “Was President Duterte's Unilateral Withdrawal of the Philippines from the Rome Statute Legally Valid?”, *Cambridge International Law Journal Blog*, 21 June 2018, available at: www.cilj.co.uk/2018/06/21/was-president-dutertes-unilateral-withdrawal-of-the-philippines-from-the-rome-statute-legally-valid/ cf. Raphael Lorenzo A. Pangalangan, “VFA Withdrawal and the Faults of Philippine Formalism”, *Philippines Law Journal* Vol 93 No. __ (forthcoming); Raphael Lorenzo A. Pangalangan, “Mishearing the Sound of Constitutional Silence: Defining Unspoken Limits to Presidential Treaty Power” *Ateneo Law Journal* (forthcoming).

⁴² Rome Statute, above note 23, Art. 127 cf. ICC Office of the Prosecutor, “Report on Preliminary Examination Activities 2018”, *ICC*, 5 December 2018, paras. 51-53.

⁴³ Jose A. Javier, “A Short Study of the Philippine Revised Penal Code”, *Philippine Law Journal*, Vol. 14, No. 4, 1934, p. 161.

⁴⁴ SC, G.R. No. L-8936, *People v. Geronimo*, 100 Phil. 90.

⁴⁵ Vicente V. Mendoza, “Criminal Law”, *Philippine Law Journal*, Vol. 32, No. 1, 1957, p. 13.

was “met with vigorous objections on the grounds of due process and the principle of *nullum crimen sine lege*.”⁴⁶

Its rejection notwithstanding, command responsibility presently finds itself in Philippine law through criminal,⁴⁷ administrative,⁴⁸ and investigative mechanisms.⁴⁹

This chapter will address these species of command responsibility in *seriatim*.

A. *Command Responsibility as a Mode of Criminal Liability*

For sixty years post-World War II, Philippine criminal law fell silent on the doctrine of command responsibility. It has however recently resurfaced through two special laws: the Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity (RA 9851 or the Philippine IHL Act) and the Anti-Enforced or Involuntary Disappearance Act of 2012 (RA 10353 or the Anti-Enforced or Involuntary Disappearance Act).

1. *The Philippine IHL Act*

RA 9851 is a *de facto* localization of the Rome Statute. Both laws and their respective provisions are intertwined. Historically, RA 9851 was passed at

⁴⁶ J. Bernas, above note 7, p. 5. “It read thus: ‘In the case of grave abuses committed against the right to life by members of the military or the police forces or their adversary, the presumption of command responsibility shall apply, and the state must compensate the victims of government forces.’”

⁴⁷ 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, Rep. Act No. 9851, 11 December 2009 (hereinafter “RA 9851”); An Act Defining and Penalizing Enforced or Involuntary Disappearance, Rep. Act No. 10353, 21 December 2012 (hereinafter “RA 10353”).

⁴⁸ 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 s. 1995, 17 February 1995 (hereinafter “EO 226”).

⁴⁹ The Rule on the Writ of Amparo, A.M. No. 07-9-12-SC, 25 September 2007 (effective on 24 October 2007) (hereinafter “Writ of Amparo”) *cf.* SC, G.R. No. 191805, *Rodriguez v. Macapagal-Arroyo*, 660 SCRA 84, p. 128.

a time when the Philippines had signed but not yet ratified the Statute.⁵⁰ Under the Philippine constitutional framework, treaty law must be concurred in by at least two-thirds of all the Members of the Senate to be valid and effective.⁵¹ Textually, Sections 4,⁵² 5,⁵³ and 6⁵⁴ of RA 9851 adopt the definitions of the Statute's core crimes nearly verbatim.⁵⁵ What is more, Section 15(g) looks to the Rome Statute for interpretative guidance of its own provisions.⁵⁶

The Philippine IHL Act likewise echoes the modes of liability of the Statute,⁵⁷ including that on command responsibility:

Section 10. *Responsibility of Superiors.* 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:

- (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;
- (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

⁵⁰ The Philippines signed the *Rome Statute of International Criminal Court* on 28 December 2000 and ratified the same on August 30 2011. The Statute entered into force from 1 November 2011; see R. Pangalangan above note 41.

⁵¹ 1987 Philippine Constitution, Art VII §21.

⁵² *Cf.* Rome Statute, above note 23, Art 8.

⁵³ *Cf.* Rome Statute, above note 23, Art 6.

⁵⁴ *Cf.* Rome Statute, above note 23, Art 7.

⁵⁵ SC, G.R. No. 159618, *Bayan Muna v. Romulo*, 641 SCRA 244 (Carpio, *J.*, dissenting).

⁵⁶ RA 9851, above note 47, §15(g); see *Bayan Muna* (Carpio, *J.*, dissenting), above note 55. "The Rome Statute is the most relevant and applicable international human rights instrument in the application and interpretation of RA 9851."

⁵⁷ See RA 9851, above note 47, §8 "Individual Criminal Responsibilities" *cf.* Rome Statute, above note 23, Art. 25.

matter to the competent authorities for investigation and prosecution.⁵⁸

As pronounced in *Boac v. Cadapan*, Section 10 of RA 9851 “imputes criminal liability to those superiors who, despite their position, still fail to take all necessary and reasonable measures within their power to prevent or repress the commission of illegal acts or to submit these matters to the competent authorities for investigation and prosecution.” The Philippines, however, only partially adopts the Rome Statute definition. It combines elements from conventional and customary international law by imposing the ICC Statute’s higher “should have known” standard unitarily to all superiors of both state and non-state groups, regardless of their military or civilian nature.⁵⁹ Command responsibility under RA 9851 thus takes a hybrid form, adopting elements from conventional and customary international law alike. It likewise goes further than its international law counterpart by expressly defining “effective command and control” or “effective authority and control” as “the material ability to prevent and punish the commission of offenses by subordinates.”⁶⁰

2. *The Anti-Enforced or Involuntary Disappearance Act*

RA 10353 imposes an iteration of the command responsibility standard upon the *immediate* commanding officer of the concerned unit of the Armed Forces of the Philippines (AFP), the Philippine National Police (PNP), and other law enforcement agencies. Section 14 holds such superiors liable as principals of the crime of enforced or involuntary disappearance if it is shown that they had “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

⁵⁸ RA 9851, above note 47, §10.

⁵⁹ ICTR, *Prosecutor v Radovan Karadžić*, Case No. IT-95-5/18-T, Public Judgement (Trial Chamber), 24 March 2016, para. 580; *Kajelijeli*, above note 21, para. 85.

⁶⁰ RA 9851, above note 47, §3(f).

involuntary disappearance but failed to prevent or investigate such allegations, whether deliberately or due to negligence.”⁶¹ Those “who allowed the act... when it is within their power to stop or uncover the commission thereof” are prescribed the penalty of *reclusion perpetua*—the most severe penalty in the Philippines’ criminal law framework.⁶²

Similar to RA 9851, RA 10353 only partially reflects the command responsibility doctrine of the Rome Statute. It likewise adopts a “should have known” *mens rea* element yet diverges in *jurisdictions materiae* and *personae*. First, the command liability contemplated in RA 10353 is only applicable if the underlying crime of the subordinate officer constitutes *enforced or involuntary disappearance*.⁶³ Second, as to *jurisdiction personae*, the accused contemplated therein are AFP and PNP officials or superiors of “law enforcement agencies” alone. Lastly, of all military or civilian leaders in the chain of command, only the *immediate* superior may be held liable for command responsibility.⁶⁴

B. Command Responsibility in Administrative Law

Command responsibility has likewise been utilized for non-prosecutorial purposes. Indeed, its juridification within the Philippine legal order is most apparent as a mode of administrative liability. Executive Order No. 226, s. 1995 (EO 226)⁶⁵ was issued to deliberately institutionalize the doctrine within the Philippines’ ranks.

⁶¹ RA 10353, above note 47, §14.

⁶² RA 10353, above note 47, §15.

⁶³ RA 10353, above note 47, §3(b). “*Enforced or involuntary disappearance* refers to the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such person outside the protection of the law.”

⁶⁴ Cf. Yael Ronen, “Superior Responsibility of Civilians for International Crimes Committed in Civilian Settings”, *Vanderbilt Journal of Transnational Law*, Vol. 13, No. 43, 2010, p. 318. “[T]he ILC had explained that ‘this principle [of responsibility of superiors] applies not only to the immediate superior of a subordinate, but also to his other superiors in the military chain of command or the governmental hierarchy if the necessary criteria are met.’”

⁶⁵ EO 226, above note 48.

EO 226 holds “any government official or supervisor, or officer of the Philippine National Police or that of any other law enforcement agency... accountable for ‘neglect of duty’.” Similar to the post-*Yamashita* formula, Section 1 contains an *actual knowledge* element by holding a superior liable only 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.”⁶⁶ The stringent knowledge standard is however tempered by a subsequent section, which creates a legal presumption of knowledge when: (a) the irregularities or illegal acts are widespread within his area of jurisdiction or (b) have been repeatedly or regularly committed within his area of responsibility; or (c) When members of his immediate staff or office personnel are involved.⁶⁷

Notably, EO 226 applies the doctrine not solely for the military but “in ensuring responsive delivery of services by the government, especially in police matters” as well.⁶⁸

C. Command Responsibility as a Remedial Tool

Command responsibility has likewise been utilized as a judicial tool of analysis in *Writ of Amparo* cases. The *Writ of Amparo*⁶⁹ is a “remedial measure”⁷⁰ designed for the issuance of interim measures for the provision of expeditious and effective procedural relief against violations of the basic rights to life, liberty, and security of persons or threats thereto.⁷¹ It was judicially created in 2007 amidst a spate of extralegal killings and enforced disappearances.⁷²

⁶⁶ EO 226, above note 48, §1.

⁶⁷ EO 226, above note 48, §2.

⁶⁸ EO 226, above note 48, Recitals.

⁶⁹ *Writ of Amparo*, above note 49.

⁷⁰ SC, G.R. No. 230324, *Callo v. Morente*, 840 SCRA 191 citing SC, G.R. No. 205039, *Spouses Santiago v. Tulfo*, 773 SCRA 558. “[T]he remedy of a writ of *amparo* is an extraordinary remedy that is meant to balance the government’s awesome power and to curtail human rights abuses.”

⁷¹ SC, G.R. No. 181796, *Republic v. Ca Yanan*, 844 SCRA 183.

⁷² SC, G.R. No. 180906, *Secretary of National Defense v. Manalo*, 568 SCRA 1. “On October 24, 2007, the Court promulgated the *Amparo* Rule in light of the prevalence of extralegal killing and enforced disappearances.”

The *Writ of Amparo* is a remedy in times of uncertainty.⁷³ It compels the respondent, under the threat of contempt,⁷⁴ to identify what steps or actions had been taken to determine the fate or whereabouts of the aggrieved party and the person or persons responsible for the threat, act or omission; and all “other matters relevant to the investigation, its resolution and the prosecution of the case.”⁷⁵ To this end, command responsibility has been utilized to identify the accountable officer to whom the *Writ* may be served.⁷⁶ Distinct from its use in criminal proceedings,⁷⁷ *Amparo* cases only “loosely apply” command responsibility.⁷⁸ It does not impute any form of liability *per se*, but is only relied on by the court of law to “pinpoint the superiors it considers to be in the best position to protect the rights of the aggrieved party.”⁷⁹

Command responsibility in *Amparo* proceedings is utilized as a syllogistic tool to assist the judiciary trace liability from (direct) perpetrator-subordinates to their commanding officers who would have the concomitant duty to address the disappearance and harassments complained of. In gist, the doctrine of omission liability is morphed into an investigatory tool used to identify those who are responsible⁸⁰ “to abate any transgression on the life, liberty or security of the aggrieved party”⁸¹ and thus accountable⁸² “to implement whatever processes an *Amparo* court

⁷³ SC, G.R. No. 221862, *Bautista v. Dannug-Salucon*, 852 SCRA 446; SC, G.R. No. 182498, *Razon Jr. v. Tagitis*, 606 SCRA 598.

⁷⁴ *Writ of Amparo*, above note 49, §16.

⁷⁵ *Writ of Amparo*, above note 49, §9.

⁷⁶ SC, G.R. No. 191805, *Rodriguez v Macapagal-Arroyo*, 660 SCRA 84.

⁷⁷ SC, G.R. No. 183871, *Rubrico v. Macapagal-Arroyo*, 613 SCRA 233.

⁷⁸ SC, G.R. Nos. 184461-62, *Boac v Cadapan*, 649 SCRA 618.

⁷⁹ *Ibid.*

⁸⁰ SC, G.R. No. 189155, *In the Matter of the Petition for the Writ of Amparo and the Writ of Habeas Data in Favor of Melissa Roxas*, 630 SCRA 211. “Responsibility refers to the extent the actors have been established by substantial evidence to have participated in whatever way, by action or omission, in an enforced disappearance, as a measure of the remedies this Court shall craft, among them, the directive to file the appropriate criminal and civil cases against the responsible parties in the proper courts.”

⁸¹ *Boac* above note 78.

⁸² SC, G.R. No. 184467, *Navia v. Pardico*, 673 SCRA 618. “Accountability, on the other hand, refers to the measure of remedies that should be addressed to those who exhibited involvement in the enforced disappearance without bringing the level of their complicity to the level of responsibility defined above; or who are imputed with knowledge relating to the enforced disappearance and who carry the burden of disclosure; or those who

would issue.”⁸³ Further, akin to a Preliminary Examination of the ICC-Office of the Prosecutor, determinations made through command responsibility are a “preliminary determination of criminal liability which... is still subject to further investigation by the appropriate government agency”⁸⁴ and subject to the concomitant evidentiary threshold.⁸⁵ It is without prejudice to the filing of separate criminal, civil or administrative actions,⁸⁶ and its reliefs may be made available by motion in criminal proceedings.⁸⁷

Even the Philippine president is recognized as part of that chain of command. Indeed, in *Saez v. Arroyo*, the former President Gloria Macapagal-Arroyo was named respondent in an *Amparo* proceeding for the AFP’s alleged violations of the rights of Franciz Saez—a listed member of the Communist Party of the Philippines. The Supreme Court ruled that a *Writ* may be issued against Arroyo as the commander-in-chief of the AFP at the time the violations occurred, but subject to the constitutionally ordained privilege of presidential immunity.⁸⁸ The *Writ of Amparo* may thus be issued in light of substantial evidence showing:

- (a) the existence of a superior-subordinate relationship between the accused as superior and the perpetrator of the crime as his subordinate;
- (b) the superior knew or had reason to know that the crime was about to be or had been committed; and
- (c) the superior failed to take the necessary and reasonable measures to prevent the criminal acts or punish the perpetrators thereof.⁸⁹

carry, but have failed to discharge, the burden of extraordinary diligence in the investigation of the enforced disappearance.”

⁸³ SC, G.R. No. 186050, *Balao v. Macapagal-Arroyo*, 662 SCRA 312.

⁸⁴ *Balao* (Serenio J. dissenting), above note 83.

⁸⁵ SC, G.R. No. 180906, *Secretary of National Defense v. Manalo*, 568 SCRA 1.

⁸⁶ *Writ of Amparo*, above note 49, §21.

⁸⁷ SC, G.R. No. 182165, *Castillo v. Cruz*, 605 SCRA 628.

⁸⁸ SC, G.R. Nos. 146710-15, *Estrada v. Desierto*, 353 SCRA 452. “[I]ncumbent Presidents are immune from suit or from being brought to court during the period of their incumbency and tenure but not beyond.”

⁸⁹ SC, G.R. No. 183533, *Saez v. Macapagal-Arroyo*, 681 SCRA 678.

Saez establishes that even the president may be held to answer for the acts of his or her subordinates in *Amparo* proceedings under the doctrine of command responsibility. Though the case involves the President acting as commander-in-chief of the AFP,⁹⁰ absent any qualification as to the civilian or military nature of the superior-subordinate relationship,⁹¹ command responsibility equally applies to the president as chief executive head over the PNP.⁹²

Conclusion

Rodrigo Duterte won the Philippine presidency on a law-and-order campaign promise to fatten the fish in Manila Bay “with the corpses of criminals.”⁹³ Four years and an estimated body count of 30,000 thereafter,⁹⁴ he is accused of crimes against humanity for his ruthless “drug war”.⁹⁵ Duterte, however, argues that he had nothing to do with it.⁹⁶ He claims that he has never ordered, and thus cannot be held liable for, extrajudicial killings.⁹⁷

The *Dutertian* defense assumes that crimes are committed through positive conduct alone. It is mistaken. Pursuant to the doctrine of command responsibility, superior officers may be held criminally liable for the failure to act as well. While the fine nuances of the doctrine may vary from one instrument to the other, this paper has established how omission liability has long been recognized in Philippine legal tradition.

⁹⁰ *Ibid.*

⁹¹ *Cf.* M. Sherman, above note 12, p. 318. “The statute speaks of ‘superior’ and ‘subordinates,’ designations which exist outside the military context.”

⁹² 1987 Philippine Constitution, Art VII, §17. “The President shall have control of all the executive departments, bureaus, and offices. He shall ensure that the laws be faithfully executed.”

⁹³ ICC Office of the Prosecutor, above note 42.

⁹⁴ Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Philippines, A/HRC/44/22, 4 June 2020, para. 20.

⁹⁵ Rise Up for Life and for Rights, “Communication and Complaint in re. The Situation in the Philippines,” 27 August 2018.

⁹⁶ Aaron Recueno, “Duterte never ordered killing of drug suspects — PNP Chief,” *Manila Bulletin*, 29 September 2018, available at: www.perma.cc/HLN4-CMRU; Rambo Talabong, “Don't believe dead suspects fought back? Look at killed cops, says PNP,” *Rappler*, 28 September 2017, available at: www.perma.cc/QJ84-SP9R.

⁹⁷ Allan Nawal, “Duterte: I didn't order police to kill,” *Philippine Daily Inquirer*, 29 December 2016, available at: www.perma.cc/X3PF-4CUV.