

Command Responsibility

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The death and disappearances of members of media and of people with the same ideological leanings have become an almost daily occurrence and have triggered both domestic and international outcries asking government to do something about it. For her part, President Gloria Macapagal Arroyo issued Administrative Order No. 157 creating the Melo Commission, and the Melo Commission came out with a tentative report implicating military personal as having had a hand in some of the killings. Concomitantly, the Supreme Court set up special courts to hear, try and decide cases involving killings of political activists and members of the media. I believe we are here because we want to put our heads together to explore what else must be done.

Briefly, what I have to say is that the government must devise ways of implementing the doctrine of command responsibility for the commission of humanitarian abuses. For this purpose I intend to (1) outline the international development of the doctrine in international law; (2) briefly analyze its elements; (3) enumerate possible obstacles to its implementation; (4) and finally suggest avenues of implementation.

What is the doctrine of command responsibility? In its simplest terms, command responsibility means 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. The concept itself is not new. Sun Tzu recognized it in his sixth century classic *The Art of War*, and the Holy Roman Empire applied it as early as 1474. Its more elaborate development, however, did not come until after World War II.

We can perhaps begin with the case closest to our country, *In re Yamashita*. General Tomoyuki Yamashita was the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands. He was charged with violating the laws of war. The charge stated that Yamashita, “ [W]hile commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines . . .”

Yamashita pleaded not guilty. Though there was no direct evidence that Yamashita ordered or even knew of the commission of the war crimes, he was found guilty by the military tribunal and sentenced to death by hanging. The U.S. Supreme Court upheld the conviction.

Legal scholars and commentators who have studied the case are divided on the basis for the conviction of Yamashita. Did Yamashita have actual knowledge of the crimes or even ordered their commission? Or was he convicted on the basis of presumed constructive knowledge? There was no clear definition in the decision of what the commander’s state of mind had to be in order to justify conviction. It was not until later that the doctrine of command responsibility underwent more careful development.

The first important development was the codification of the doctrine in Protocol I to the Geneva Convention of 1977. Commentators say that this Protocol represents customary law at the time. Article 87 provides that parties to a conflict should require military commanders to prevent, supervise and report breaches of the Geneva Conventions and Protocol by troops and others under their command and, where appropriate, initiate disciplinary action. Article 86(2) provides that the fact that a breach of the convention or of the 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 which 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.

On the basis of the text of Protocol I the ICRC Commentary identified three conditions for command responsibility:

- (i) the person to be held responsible must be the superior of the person or persons committing the breach of the convention ;
- (ii) the superior must have known or had information which should have enabled him to conclude that a breach was being committed or was going to be committed ; and
- (iii) the superior did not take all feasible measures within his powers to prevent the breach.

These requisites were later reflected in Article 7(3) of the Statute of the International Criminal Tribunal for the former Yugoslavia ("ICTY") which provides as follows:

"The fact that any of the . . . crimes within the jurisdiction of the Tribunal] 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."

The Trial Chamber identified three elements for liability pursuant to Article 7(3):

- (i) the 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.

Let us take these elements one by one as explained by the Trial Chamber.

First, the superior-subordinate relationship. The superior can be military or civilian. The authority can be *de jure* or *de facto*. It was necessary to state this because in conflict situations, such as the former Yugoslavia, where formal structures of command had broken down, those who were effectively in command with power to prevent and punish crimes committed by persons under their control, could be held responsible for failure to do so.

Second, the mental state of the superior. The Trial Chamber held that a superior possesses the necessary knowledge to incur liability where:

"(1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes referred to under Article 2 to 5 of the Statute, or

(2) where he had in his possession information of a nature, which at least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates."

The Final Report of the Commission of Experts established by the Security Council explained further that the commander's state of knowledge could take one of the following forms:

(a) actual knowledge, (b) such serious personal dereliction on the part of the commander as to constitute willful and wanton disregard of the possible consequences, or (c) an imputation of constructive knowledge, that is, despite pleas to the contrary, the commander, under facts and circumstances of the particular case, must have known of the offences charges and acquiesced therein."

Third, the failure or mission of the superior. A legal duty rests upon all superiors to take all necessary and reasonable measures to prevent the commission of offenses or to punish perpetrators. But superiors cannot be held responsible for having failed to do the impossible.

There is also an important provision in the Rome Statute which created the International Criminal Court. But I have deliberately omitted it because the Philippines, following the lead of President Bush, has not ratified that treaty.

As things stand now,, it is already a well established norm of customary and conventional law that "military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates." The question for us is whether this is now also domestic law.

The easy answer to this question is Article II, Section 2 which says that the Philippines "adopts the generally accepted principles of international law as part of the law of the land . . ."

During the deliberations of the 1986 Constitutional Commission there was a proposal to adopt command responsibility as a constitutional principle. The proposal was precisely grounded on the experience of the martial law years. 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." But the proposal met with vigorous objections on the grounds of due process and the principle of *nullum crimen sine lege*. I believe that these objections should be studied in the light of the current state of domestic and international law.

It is now clearly established that grave breaches of the Geneva Conventions can be committed not only in international armed conflicts but also in an internal conflict. This is clear from the pronouncements of the Trial Chamber in the ICTY cases. Thus the Philippine internal strife is context enough for appealing to the doctrine of command responsibility as it has so far developed. A big question nevertheless is whether there is in Philippine law basis for applying command responsibility in criminal prosecution.

Experts on criminal law and procedure can probably make a case for prosecution on the basis not only of current international law jurisprudence but also on some penal provisions in our system. Moreover, one of the reasons the Chief Justice had for calling this Summit is for this body to look into the possibility of reformulating

the Rules of Court to enable government to give greater protection to human rights. There is, after all, in the Constitution a provision rarely adverted to which says that the Court shall promulgate rules "concerning the protection and enforcement of constitutional rights." As Commissioner (now Justice) Azcuna and former Chief Justice Concepcion said, this provision, not contained in previous Constitutions, has been added to emphasize "that constitutional rights are not merely declaratory but also enforceable." (I RECORD at 459).

Finally, all of this might not satisfy some elements of our contentious society. I therefore recommend that a bill implementing command responsibility be formulated and that the President be urged to certify it as urgent.

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