

ACCOUNTABILITY OF THE PRESIDENT UNDER THE COMMAND RESPONSIBILITY DOCTRINE

*Pacifico A. Agabin**

I. INTRODUCTION

While there is some agreement in this jurisdiction that the doctrine of command responsibility¹ is considered part of the customary international Law that

* B.S.J., LL.B., LL.M., J.S.D.; Professor of Law and Former Dean, College of Law, University of the Philippines; Professor, Philippine Judicial Academy; Dean, College of Law, Lyceum of the Philippines.

¹ The doctrine is now embodied in the Rome Statute of the International Criminal Court, §28, available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf. Last accessed 1 July 2002. (hereinafter ROME STATUTE)

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

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

should be considered part of the law of the land,² the question posed in this paper is: how high up the chain of command should the doctrine be applied? Does it go all the way up to the President, who is the commander-in-chief of the armed forces?³ It is the thesis of this piece that the question should be answered in the affirmative.

II. THE PRESIDENT AS COMMANDER-IN-CHIEF: THE SUPERIOR-SUBORDINATE ELEMENT

The Supreme Court, in the case of *Gudani v Senga*,⁴ has ruled that as Commander-in-Chief, the President has absolute authority over all members of the armed forces.⁵ As such commander, Sinco believes that he is not merely a civil official; he is a military officer.⁶ However, Father Bernas believes otherwise, relying on Bernard Schwartz on The Powers of the President. According to Father Bernas, "the weight of authority favors the position that the President is not a member of the armed forces but remains a civilian."⁷ Nonetheless, Bernas believes, like Sinco, that the President holds supreme military authority, and has control and direction, over the armed forces. "As Commander-in-Chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."⁸ The dual role given by the constitution is intended to insure that the civilians control the military.⁹

In view of this dichotomy of views, we will proceed from the assumption that the President remains a civilian exercising military powers. Under Section 18, Article VII of the 1987 Constitution, it is essential that the President has the duty to control the military. The key word here, therefore, is control. This is significant, because, under the doctrine of command responsibility, cases in international law have held that, while formal designation as a military commander is not necessary, de facto or de jure possession of powers of control over actions of subordinates is

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- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

² See JOAQUIN BERNAS, S.J., THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 61 (2003 ed.)

³ CONST. art. VII, §18

⁴ G.R. No. 170165, 498 SCRA 671, Aug. 15, 2006.

⁵ *Id.*, at 695.

⁶ VICENTE SINCO, PHILIPPINE POLITICAL LAW: PRINCIPLES AND CONCEPTS 253 (1962 Ed.).

⁷ BERNAS, *supra* note 3, at 865.

⁸ *Id.*, at 866, *citing* Fleming v. Page, 9 How. (U.S.) 603, 615 (1850).

⁹ SINCO, *supra* note 7, at 253.

necessary to qualify one as a superior.¹⁰

Of course, we have to recognize the difference between a generalized duty of control on the part of the President under Section 18, Article VII, and the concept of control under the doctrine of command responsibility as defined in Section 28 (2) of the Rome Statute, which speaks of crimes “committed by subordinates under his or her effective authority and control.”¹¹ In other words, command responsibility would assume that the President must have “material ability to prevent and punish the commission of these offenses.” To quote the *Celibici* court:

“With the caveat that such authority can have a *de facto* as well as *de jure* character, the Trial Chamber shares the view expressed by the International Law Commission that the doctrine extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.¹²

To take an example, we look at the *Yamashita* case.¹³ Yamashita, while not denying that Japanese troops under his command committed atrocities in the rape of Manila, argued that he could not have possibly exercised effective control over the troops, who had passed into his command only one month before, and the atrocities happened in Manila at the time when he was in Baguio, and he had no opportunity to change his commanding officers, over whose actions he had only the most nominal control. The military commission did not believe him, concluding that he had failed to provide effective control of his troops as was required by the circumstances.

While Yamashita was a military commander, it does not mean that the doctrine of command responsibility enunciated in his case is inapplicable to a civilian head of state. Precisely, Section 28 of the Rome Statute covers both military and non-military commanders, as long as the latter is effectively acting as a military commander. As one commentator observes:

One possible example of a person effectively acting as a commander is a civilian head of state who has supreme command powers over that country's armed forces. This same individual might also fall under “direct” command responsibility, which could apply to either a military commander or a civilian superior. In either its direct form or its imputed form, the command responsibility doctrine envisions and implements criminal accountability that upwardly traverses the chain of command to the

¹⁰ Prosecutor v. Delalic, No. IT-96-21-T (ICTY, 16 November 1998, Par. 370), (the *Celibici* case)

¹¹ ROME STATUTE, §28(2).

¹² The *Celibici* case, at Par. 377

¹³ In Re Yamashita, 327 U.S. 1 (1945)

culpable leader.¹⁴ (underscoring supplied)

The case of the prime minister of Rwanda, Jean Kambanda, for complicity to homicide and for crimes against humanity, is a recent example in international law. In 1998, the International Criminal Tribunal for Rwanda (ICTR) accepted the guilty plea of the former prime minister, which is the first conviction of a head of state by an international tribunal.¹⁵

III. THE KNOWLEDGE ELEMENT

The second element required for the application of the doctrine of command responsibility is the knowledge of the superior of the actual or impending crime.¹⁶ There are different formulations for the knowledge element so as to fulfill the mens rea requirement. Under the 'Yamashita standard', the clause used connotes strict liability: "where vengeful actions are widespread offenses and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable."¹⁷ In short, if it can be proven that certain widespread events occurred and that it was not possible for the civilian superior not to have known about them, 'constructive knowledge' is imputed to such superior.

In the Philippines, the Executive branch and the military have accepted the 'constructive knowledge' theory. This is consistent with the presumption of knowledge laid down in the President's Executive No. 226, dated 17 February 1995, which adopts the doctrine of command responsibility:

Neglect of Duty under the Doctrine of "Command Responsibility". – Any AFP Officer shall be held accountable for neglect of duty under the doctrine of command responsibility if he has knowledge that a crime or offense shall be committed, is being committed or has been committed by his subordinates, or by others within his area of responsibility and, despite such knowledge, he did not take preventive or corrective action either before, during, or immediately after its

¹⁴ Greg Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court*, 25 Yale J. Int'l L. 89, 137 (2000); internal footnotes omitted.

¹⁵ *Id.* at 137; see Prosecutor v. Jean Kambanda, No. ICTR-97-23-S, para. 3 (ICTR Sept. 4, 1998), available at Judgement and Sentence <<http://www.un.org/ictf/english/judgements/kambanda.html>>

¹⁶ ROME STATUTE, §28(a)(i)

¹⁷ Eugenia Levine, *Command Responsibility: The Mens Rea Requirement*, Global Policy Forum, Feb. 2005, citing Decision of the U.S. Military Commission, 17 December 1945, in 2 LEON FRIENDMAN, *THE LAW OF WAR: A DOCUMENTARY HISTORY* 1596 (1972)

commission.¹⁸

While the above speaks of “knowledge” of a crime or offense, there is a presumption of knowledge specified in the succeeding section:

Presumption of Knowledge. - A Commanding Officer is presumed to have knowledge of the commission of irregularities or criminal offenses within his area of responsibility in any of the following circumstances:

- (a) When the irregularities or illegal acts are widespread within his area of jurisdiction;
- (b) When the irregularities or illegal acts have been repeatedly or regularly committed within his area of responsibility; or
- (c) When members of his immediate staff or office personnel are involved.¹⁹

The above formulation follows the *Yamashita* case doctrine: the military commander or the civilian superior has a clear obligation to monitor the actions of his or her subordinates, and knowledge should be presumed if any widespread irregularities or illegal acts have been repeatedly or regularly committed within his area of jurisdiction, or when members of his immediate staff or office personnel are involved. In fact, the presumption laid in EO 226 follows the presumption in *Yamashita*: a military commander or a superior will now have to disprove knowledge of irregularities and illegal acts proven by the prosecutor.

Yet this is not really a very radical deviation from the norms laid down in international criminal law cases. Aside from *Yamashita*, in the *Celebici* case, for example, where the International Criminal Tribunal for the former Yugoslavia (ICTY) ruled that command responsibility extends not only to military commanders but also to individuals in non-military positions of superior authority, the test of knowledge laid down there was “knew or had reason to know” that the subordinate was about to commit such acts or had done so.²⁰ “It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates,²¹” according to both the ICTY and the ICTR.

It is therefore proposed that the Supreme Court adopt the doctrine of command responsibility as enunciated in the Rome Statute, and that the

¹⁸ Exec. Order No. 226, §1, Feb. 17, 1995, reiterated in AFP Memorandum of 04 February 2007, issued by General Hermogenes C. Esperon, Jr., Chief of Staff, Armed Forces of the Philippines

¹⁹ *Id.*, § 2

²⁰ the *Celebici* case, Par. 383-384

²¹ *Id.*, Paragraph 393

presumption of knowledge adopted by the President in EO 226, s. 1995 and the AFP be promulgated as a rebuttable presumption under Rule 131, Section 3 of the Rules of Court, in connection with the requirement of Section 28(b)(i) of the Rome Statute that "the superior knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes".

If the recommendation is adopted, the *actus reus* of the President's accountability will be the omission or inaction on the part of the Commander-in-Chief to take all necessary and reasonable measures within his or her power to prevent or repress the commission of irregularities and illegal acts, or to direct the commanding officers concerned to investigate and prosecute the perpetrators of the crimes. This will create a legal duty on the part of the President, as Commander-in-Chief, to take necessary measures to prevent human right violations or to punish the perpetrators thereof.

It is essential that the responsibility to prevent extrajudicial killings and to penalize the culprits be pinned on the Commander-in-Chief because of the requirement under the command responsibility rule that the crimes concerned are activities within the effective responsibility and control of the superior. In most cases, the typical reaction of an area commander to a complaint of forced disappearance is that nothing of that kind happened in his or her jurisdiction. As Harry Truman tersely put it, the game of the generals that is passing the buck will have to stop with the President.

IV. PRESIDENTIAL IMMUNITY FROM SUIT

The next issue to be confronted is the doctrine of immunity of the President from suit. How do you hold the President accountable under "command responsibility" if he or she is immune from suit?

In the first place, the doctrine of absolute presidential immunity is becoming obsolete. It is a judge-made creation of the common law that the Americans imported here. Before this doctrine was adopted, the rule was otherwise: the courts were harder on public officers who committed crimes.²² They realized that this rule was derived from the late unlamented doctrine that the king can do no wrong. But this was imported into the colonies of the British Commonwealth to protect the

²² In England, for instance, Chief Justice Holt ruled, as late as 1703, that "if public officers will infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offender." (Gellhorn and Byse, *Administrative Law: Cases and Comments* (1960), 361.

colonial administrators from suit by obstreperous natives. In emerging democracies, presidential immunity came garbed in a modern dress: separation of powers.

With the grant of independence to the colonies, the doctrine of presidential immunity served political leaders quite well, especially those who assumed dictatorial powers. In the Philippines, the Marcos regime inserted an expanded immunity clause through the 1981 amendments to the 1973 constitution.²³ This was consigned to legal history by the 1986 Constitutional Commission so that the present constitution does not have any immunity clause for the President anymore. It merely provides for state immunity from suit,²⁴ and is silent as to the President. The notion of presidential immunity is barely surviving through judicial inter-branch generosity.

Second, it is doubtful if the doctrine of presidential immunity can withstand the pressures coming from the expanded definition of “judicial power” in Article VIII, Section 1 of the Constitution, which includes the duty “to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government.”

This expanded notion of judicial power does not at all exempt the presidency, and we cannot grant exemptions where there are none.

Third, what remains of the vestiges of presidential immunity from suit in jurisprudence has been so circumscribed, cut up and delimited that it can hardly be compared to the unlamented absolute doctrine of old. For one, the U.S. Courts in the case of *Jones v Clinton*²⁵ have delimited the rule only to criminal cases, holding that civil suits involving claims for damages can proceed even against a sitting president. For another, the “functional” school of thought on presidential immunity, holding that such does not cover acts of the president outside his official functions,²⁶ has considerably eroded the doctrine. In the Philippines, in *Estrada v Desierto*,²⁷ the Supreme Court intimated that it looks with disfavor on using the shield of immunity to cover the criminal acts of a President.²⁸

²³ CONST. (1973), art. VII, §17: “The President shall be immune from suit during his tenure. Thereafter, no suit whatsoever shall lie for official acts done by him or by others pursuant to his specific orders during his tenure.”

²⁴ CONST. art. XVI, §3: “The State may not be sued without its consent.”

²⁵ See 72 F. 3 1354 (1996); see also Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701 (1995)

²⁶ *Nixon v. Fitzgerald*, 457 U.S. 731, 766 (1982) (White, Brennan, Marshall and Blackmun, JJ., *dissenting*). “Attaching absolute immunity to the Office of the President, rather than to particular activities that the President may perform, places the President above the law.”

²⁷ G.R. Nos. 146710-15, 146738, 353 SCRA 452. March 2, 2001.

²⁸ *Id.*, at 522-524.

V. RECOMMENDATION

It is high time for the Supreme Court to discard, or at least circumscribe, the archaic doctrine of absolute immunity of the President from suit. Since the Court has declared a number of times that "no man is above the law," it should give meaning to this declaration by doing away with this archaic doctrine that belongs to the days of the monarchy. At the least, it should be restricted to official and legitimate activities of the president, so that immunity will be decided by the Court on a case to case basis.

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