

THE (IN)VALIDITY OF THE FULFILLMENT OF DUTY DOCTRINE IN POLICE PURSUIT KILLINGS*

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ABSTRACT

This paper aims to review the fulfillment of duty doctrine in police killings of fleeing offenders, and critique it using constitutional and international human rights standards and principles. It is argued here that the doctrine is a colonial legacy, which emerged when police abuses were unquestioned and human rights standards were not yet clearly established. The jurisprudential development of the fulfillment of duty doctrine was conceptual in nature, focusing on what the doctrine means. One major turn of the doctrine was its departure from Spanish jurisprudence with the introduction of the *Oanis* two-requisite rule, which was imposed without legal basis. Such conceptual development also failed to provide a human rights-based standard upon which the use of force on fleeing offenders is evaluated. Moreover, it is likewise argued that the application of the doctrine in non-dangerous fleeing suspects cases runs against the constitutional reasonableness standard on the use of force. The doctrine's justification of the killing of non-dangerous fleeing prisoners and even retreating attackers also violates international human rights standards and principles. Most importantly, the requisites of necessity and proportionality—the twin pillars of police use of force—are absent in these cases. Additionally, the application of the doctrine violates the principle of non-discrimination among different types of suspects. These conclusions imply the need to abandon the said applications of the doctrine in police pursuit killings and move towards a rights-centric approach to police use of force evaluations.

KEYWORDS: fulfillment of duty, police pursuit killings, use of force, necessity, proportionality

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INTRODUCTION

Police use of force in the Philippines has gained international notoriety due to increasing reports of human rights violations. Official government data reveal that during President Duterte's war on drugs, law enforcement agencies extrajudicially killed 6,252 drug suspects from July 1, 2016 to May 31, 2022.¹ This has been characterized as a "murderous war on

¹ HUMAN RIGHTS WATCH, WORLD REPORT 2023: PHILIPPINES EVENTS OF 2022 (2023), at <https://www.hrw.org/world-report/2023/country-chapters/philippines>.

the poor,”² a form of “police vigilantism,”³ “state-sponsored murder,”⁴ and a form of “genocide.”⁵ Thus, in an analysis, the Philippine police were found to be more lethal, with a higher kill ratio than law enforcers in other countries facing similar drug-related incidents.⁶ Evidently, police use of force during the drug war had far-reaching negative human rights consequences.⁷

Even after Duterte’s drug war, the police continue to be under scrutiny due to persistent reports of police brutality. For instance, in 2023, police officers shot dead a minor, Jerhode “Jemboy” Baltazar, while he was fleeing from the officers unarmed.⁸ The officers reasoned that it was just self-preservation, and that they were just firing “warning shots” into the water where they allegedly thought the murder suspect they were searching for was swimming.⁹ This received widespread condemnation and even caused a Senate Committee investigation.¹⁰ A subsequent court decision,¹¹ however, found only one officer guilty of homicide with a mitigated penalty due to an incomplete justifying circumstance of fulfillment of duty and voluntary surrender.¹² Commentators consider this as a mere “slap on the wrist” given the gravity of the offense’s consequences.¹³

² *Philippines: The police’s murderous war on the poor*, AMNESTY INT’L WEBSITE, at <https://www.amnesty.org/en/latest/press-release/2017/01/philippines-the-police-murderous-war-on-the-poor/>.

³ PETER KREUZER, PRIF REPORT NO. 142: “IF THEY RESIST, KILL THEM ALL”: POLICE VIGILANTISM IN THE PHILIPPINES 7 (2016), at https://www.prif.org/fileadmin/Daten/Publikationen/Prif_Reports/2016/prif142.pdf.

⁴ Lian Buan, *Investigating Duterte’s drug war using data: It’s ‘state-sponsored murder’*, RAPPLER, Mar. 6, 2021, at <https://www.rappler.com/newsbreak/in-depth/investigating-duterte-drug-war-data-impunity-patterns/>.

⁵ Dahlia Simangan, *Is the Philippine “War on Drugs” an Act of Genocide?*, 20 J. GENOCIDE RES. 68, 87–89 (2018).

⁶ Clare Baldwin et al., *Police rack up an almost perfectly deadly record in Philippine drug war*, REUTERS, Dec. 5, 2016, at <https://www.reuters.com/investigates/special-report/philippines-duterte-police/>.

⁷ See Gil Espenido, *Philippines’ War on Drugs: Its Implications to Human Rights in Social Work Practice*, 3 J. HUM. RTS. & SOC. WORK 138 (2018).

⁸ Charie Abarca, *Navotas cop on why Jemboy Baltazar was shot: ‘It was like panic firing’*, INQUIRER.NET, Aug. 29, 2023, at <https://newsinfo.inquirer.net/1823540/navotas-cop-on-why-jemboy-baltazar-was-shot-it-was-like-panic-firing>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *People v. Maliban*, Crim. Case No. N23-571-CR (RTC-Branch 286, Navotas Feb. 27, 2024), slip op.

¹² *Id.* at 43. The RTC sentenced the officer to suffer an indeterminate prison term of four (4) years, two (2) months and ten (10) days of *prison correccional* medium as minimum, to six (6) years, four (4) months and twenty (20) days of *prison mayor* minimum as maximum.

¹³ Charie Abarca, *Hontiveros questions ‘lighter’ conviction in Jemboy Baltazar case*, INQUIRER.NET, Feb. 27, 2024, at <https://newsinfo.inquirer.net/1910822/hontiveros-questions-lighter-conviction-in-jemboy-baltazar-case>; The Philippine Star, *EDITORIAL - Slap*

This paper argues that law and jurisprudence enable police violence. Legal killings of fleeing offenders frequently occur and are justified under the fulfillment of duty doctrine in the Philippines.¹⁴ Although this doctrine is prominently featured in criminal law commentaries, such commentaries uncritically and selectively present the doctrine as applied in Supreme Court cases.¹⁵ The Philippine Supreme Court has also uncritically applied this doctrine, resulting in confusing and conflicting decisions on police use of force in the country.¹⁶ The Court almost always treats such cases as a criminal law question, failing to tilt towards constitutional and human rights-based standards in evaluating police use of force.

While previous studies provide useful information on the current state of the legality of police use of force laws and policies,¹⁷ there is a gap in the evaluation of literature with regard to the use of force against fleeing offenders in the Philippines. Previous studies were general and did not examine the jurisprudence on the use of force against fleeing offenders in great detail. Thus, this paper attempts to fill this gap. It aims to review the fulfillment of duty doctrine as conceived and applied under Philippine jurisdiction, and to critique it using human rights standards and principles. In particular, it aims to review the origins and jurisprudential development of the doctrine. It also aims to determine the legality of the doctrine using established jurisprudence on the use of force and human rights standards and principles.

Part I reviews the fulfillment of duty doctrine—its concept, rationale, and the Supreme Court's struggle in the application of the doctrine in police shooting cases. *Part II* shows the invalidity of *People v. Oanis*'¹⁸ introduction of the doctrine's two-requisite rule. The invalidity of the application of the

on the wrist, PHIL. STAR, Feb. 28, 2024, at <https://www.philstar.com/opinion/2024/02/28/2336650/editorial-slap-wrist>.

¹⁴ See REV. PEN. CODE, art. 11, ¶ 5. "Any person who acts in the fulfillment of a duty or in the lawful exercise of a right or office."

¹⁵ See, e.g., LUIS B. REYES, I THE REVISED PENAL CODE: CRIMINAL LAW 217–25 (2021); LEONOR BOADO, NOTES AND CASES ON THE REVISED PENAL CODE 117 (2018); RAMON AQUINO & CAROLINA GRIÑO-AQUINO, THE REVISED PENAL CODE 203–08 (1997).

¹⁶ This will be discussed in the succeeding sections.

¹⁷ See, e.g., Claudia Flores et al., *Global Impunity: How Police Laws & Policies in the World's Wealthiest Countries Fail International Human Rights Standards*, 49 GA. J. INT'L & COMP. L. 243 (2021); Stefan Newton, *The excessive use of force against blacks in the United States of America*, 22 INT'L J. HUM. RTS. 1067 (2018); AMNESTY INTERNATIONAL, DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES (2015), at <https://www.amnestyusa.org/reports/deadly-force-police-use-of-lethal-force-in-the-united-states/>; Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. A/68/382 (Sept. 13, 2013).

¹⁸ [Hereinafter "*Oanis*"], 74 Phil. 257 (1943).

doctrine on fleeing suspects who do not resist is shown in *Part III* by outlining the constitutional reasonableness standard and jurisprudence adopted from the United States. Finally, in *Part IV*, the validity of the application of the doctrine on fleeing prisoners is measured using international human rights principles and standards.

I. THE PHILIPPINE FULFILLMENT OF DUTY DOCTRINE

Aside from self-defense, Filipino police officers often resort to the fulfillment of duty doctrine to justify police-citizen encounter killings. The doctrine emerged from jurisprudence applying the justifying circumstance provided under Article 11, paragraph 5, of the Revised Penal Code, which reads:

Article 11. Justifying circumstances. - The following do not incur any criminal liability:

* * *

5. Any person who acts in the fulfillment of a duty or in the lawful exercise of a right or office.¹⁹

Under the fulfillment of duty doctrine, police officers are exonerated from criminal liability even if they shoot to death a fleeing suspect if these requisites are met:

(a) that the offender acted in the performance of a duty or in the lawful exercise of a right or office; and (b) that the injury or offense committed be the necessary consequence of the due performance of such duty or the lawful exercise of such right or office.²⁰

This doctrine differs from self-defense with respect to the principle upon which it is based. While self-defense is based on the right to self-preservation, this doctrine is based on the due performance of duty.²¹ Thus, while self-defense requires necessity and proportionality, this doctrine does not.²² Under the self-defense rule, it is not permissible to shoot an attacker

¹⁹ REV. PEN. CODE, art. 11, ¶ 5.

²⁰ *Oanis*, 74 Phil. 257, 262–63; GUILLERMO GUEVARA, PENAL SCIENCES AND PHILIPPINE CRIMINAL LAW 92 (1974).

²¹ *Cabanlig v. Sandiganbayan* [hereinafter “*Cabanlig*”], 502 Phil. 564, 575 (2005).

²² See REYES, *supra* note 15, at 222. “In the case of *People v. Delima* [...] the unlawful aggression had already ceased to exist; but the killing was done in the performance of a duty. The rule of self-defense does not apply. The public officer acting in the fulfillment of a duty

when the attack has already ceased, and he is running away. However, under the fulfillment of duty doctrine, it is permissible for police officers to shoot such attacker.²³

Unlike other justifying circumstances, especially self-defense, this doctrine operates with only two requisites. Thus, it is easier to apply, especially with its ready application of incomplete defense. This simplified framework tends to favor law enforcement officers as they do not need to establish, as in self-defense, unlawful aggression, reasonable necessity of the means employed to prevent or repel the attack, and lack of sufficient provocation required in self-defense cases. This structural difference has practical implications for judicial decisions, because it is simpler for the courts to grant either complete or incomplete justification under this doctrine.

Relying on this doctrine, the Supreme Court has absolved police officers in hot pursuit cases that resulted in the death of the victims. For example, the Court absolved from liability police officers who shot dead an unarmed prisoner who was running away to escape without attacking any of the officers.²⁴ The Court also exonerated a police officer who shot an escaped prisoner who earlier attacked, but did not hit, the former.²⁵ In another case, a prisoner escaped from detention, hid, and suddenly attacked the pursuing officer with a stone and started to run away.²⁶ The police officer shot and killed the fleeing prisoner, but the Supreme Court absolved the former from liability.²⁷ In a recent case, the Court once again absolved a police officer who shot dead a fleeing detainee who grabbed an Armalite rifle from an officer and jumped out of the police vehicle.²⁸ Similarly, the Court relied on the doctrine to exonerate police officers who inflicted injuries without causing death.²⁹

The Court also cited the doctrine in absolving officers in cases that are supposed to be covered only by self-defense rules (i.e., frontal encounters). It found an officer not liable when he shot dead a suspect who was armed

may appear to be an aggressor *but his aggression is not unlawful, it being necessary to fulfill his duty.*" (Emphasis supplied.)

²³ See, e.g., *People v. Delima* [hereinafter "*Delima*"], 46 Phil 738, 739 (1922). See also REYES, *supra* note 15, at 222.

²⁴ *United States v. Magno* [hereinafter "*Magno*"], 8 Phil. 314, 316–17, 320–21 (1907).

²⁵ *Delima*, 46 Phil at 739.

²⁶ *Valcorza v. People* [hereinafter "*Valcorza*"], 140 Phil. 651, 653–54 (1969).

²⁷ *Id.* at 656–57.

²⁸ *Cabanlig*, 502 Phil. 564, 571–72, 577.

²⁹ See *United States v. Bertucio* [hereinafter "*Bertucio*"], 1 Phil. 47 (1901); *United States v. Resaba* [hereinafter "*Resaba*"], 1 Phil. 311 (1902).

with a shotgun.³⁰ The suspect did not fire the shotgun but merely pointed the shotgun at the officer after the latter's warning shots.³¹ In a defense of a stranger case, the officer who shot an insane person chasing and about to hack another police officer was absolved from liability.³² Likewise, an internal revenue officer was exonerated under this doctrine when he shot dead a suspect who was hacking another officer.³³

However, for the doctrine to apply, it is important that the officers were performing a lawful duty imposed by law and not by moral or religious obligations.³⁴ In a case, the Supreme Court denied the application of this justifying circumstance because the accused was not lawfully appointed as a *barrio* policeman.³⁵ The Court also refused to apply the doctrine in a case where an officer shot the victims while he was in civilian clothing.³⁶ Moreover, police officers were found liable for shooting a victim who was not committing a crime, but was merely reaching for his identification card in his pocket.³⁷ In numerous cases, the officers were performing a lawful duty, but were only granted incomplete justification as they exceeded their duty under the law.³⁸

While this paper focuses on the application of the fulfillment of duty doctrine in police use of force, the doctrine has broader applications. It extends not only to law enforcement but to all public officers and private individuals exercising duties, rights, or offices. The Supreme Court has applied the doctrine to an agent of internal revenue,³⁹ jail guards,⁴⁰ security guards,⁴¹ barangay captains,⁴² mayors,⁴³ and Citizens Armed Forces Geographical

³⁰ *Frias v. People* [hereinafter "*Frias*"], 215 Phil. 1 (1984).

³¹ *Id.* at 14–15.

³² *Masipequiña v. Ct. of Appeals*, 257 Phil. 710, 712–14, 719–21 (1989).

³³ *United States v. Aviado* [hereinafter "*Aviado*"], 38 Phil. 10, 13–15 (1918).

³⁴ GUILLERMO, *supra* note 20, at 93.

³⁵ *People v. Pajenado*, 161 Phil. 233 (1976).

³⁶ *People v. Tan*, 411 Phil. 813 (2001).

³⁷ *Cabuslay v. People*, 508 Phil. 236 (2005).

³⁸ *See, e.g., Oanis*, 74 Phil. 257; *People v. Lagata* [hereinafter "*Lagata*"], 83 Phil. 150 (1949); *Torres v. Sandiganbayan*, 227 Phil. 128 (1986); *Lacanilao v. Ct. of Appeals* [hereinafter "*Lacanilao*"], 245 Phil. 519 (1988); *Andal v. Sandiganbayan* [hereinafter "*Andal*"], 258-A Phil. 591 (1989); *People v. Ulep* [hereinafter "*Ulep*"], 395 Phil. 78 (2000); *People v. Belbes* [hereinafter "*Belbes*"], 389 Phil. 500 (2000); *People v. Catbagan* [hereinafter "*Catbagan*"], 467 Phil. 1044 (2004); *Baxinela v. People* [hereinafter "*Baxinela*"], 520 Phil. 202 (2006); *Mamangun v. People* [hereinafter "*Mamangun*"], 543 Phil. 42 (2007).

³⁹ *Aviado*, 38 Phil. 10.

⁴⁰ *Lagata*, 83 Phil. 150.

⁴¹ *People v. Dagani*, 530 Phil. 501 (2006).

⁴² *Sienes v. People*, 540 Phil. 35 (2006).

⁴³ *Ambil v. Sandiganbayan*, 669 Phil. 32 (2011).

Unit officers.⁴⁴ However, the focus on police use of force reflects the doctrine's most controversial application and its frequent invocation in jurisprudence.

A. Reasons Why the Supreme Court Justifies the Police in Killing a Fleeing Offender

The most cited justification for use of force is the *duty of the police to arrest or prevent escape*. For instance, in *United States v. Magno*,⁴⁵ the Court held that Constabulary officers were justified in shooting two detainees who were running away to escape, resulting in one death. The Court reasoned that “Cabral, disregarding the warning of his custodians, persisted in his attempt to escape, and that there was no other remedy but to fire at him, as they did, in order to prevent him from getting away.”⁴⁶ This rationalization was also used by the Court in *Valcorza v. People*,⁴⁷ *Cabanlig v. Sandiganbayan*,⁴⁸ and *United States v. Bertucio*.⁴⁹

The Court also noted the *obligation of the offender to obey and surrender*. In *Delima*, the Supreme Court ruled that the deceased was under the obligation to surrender as he “had no right, after evading service of his sentence, to commit assault and disobedience with a weapon in the hand, which compelled the policeman to resort to such an extreme means, which although it proved to be fatal, was justified by the circumstances.”⁵⁰ Moreover, in another case, it was held that the police were justified in wounding a suspect who did not attack the officers because “he did resist them by refusing to obey and surrender to his captors.”⁵¹

The Court also held that *when the police are in grave danger*, they are justified in shooting a fleeing offender. As noted by the Court in *Cabanlig*, the policemen had the duty not only to recapture Valino but also to recover the loose firearm as “[b]y grabbing Mercado's M16 Armalite, which is a formidable firearm, Valino had placed the lives of the policemen in grave

⁴⁴ *People v. Gervero* [hereinafter “*Gervero*”], 836 Phil. 99 (2018).

⁴⁵ 8 Phil. 314 (1907).

⁴⁶ *Id.* at 320.

⁴⁷ 140 Phil. 651.

⁴⁸ 502 Phil. 564.

⁴⁹ 1 Phil. 47.

⁵⁰ *Delima*, 46 Phil. 738, 739.

⁵¹ *Resaba*, 1 Phil. 311, 312–13.

danger.”⁵² The Court added that because of the exigency of the situation, Cabanlig had to respond quickly.⁵³

Lastly, the Supreme Court justified the use of lethal force *to avoid demoralizing police officers*. Aside from recognizing the need to prevent the escape of the offender, the Court speculated in *Valcorza* that the Court’s failure to justify the police would defeat public interest by demoralizing the police. The Court held:

To hold him guilty of homicide may have the effect of demoralizing police officers discharging official functions identical or similar to those in the performance of which petitioner was engaged at the time he fired at the deceased Pimentel, with the result that thereafter[,] [w]e would have half-hearted and dispirited efforts on their part to comply with such official duty. This of course, would be to the great detriment of public interest.⁵⁴

It should be noted that the early cases of *Magno* and *Delima* predated not only the Revised Penal Code but also the 1935, 1973, and 1987 Philippine Constitutions and international human rights treaties and instruments. The absence of the bill of rights and the international human rights standards and principles meant that early courts interpreted the doctrine without the human rights framework.

However, even during the effectivity of the said Constitutions and human rights treaties, the Supreme Court continues to fail to reassess these colonial-era precedents. *Delima*, for example, continues to be cited in modern cases, contradicting the notion that it has already been superseded.⁵⁵ Moreover, the Supreme Court never considered necessity and proportionality (as conceptualized in international human rights law) as a standard in the application of the fulfillment of duty doctrine. As *Cabanlig* states, “[u]nlike in self-defense where unlawful aggression is an element, in performance of duty, unlawful aggression from the victim is not a requisite.”⁵⁶ If there is no unlawful aggression, there can never be necessity and proportionality in the use of force by the police.

⁵² *Cabanlig*, 502 Phil. 564, 578.

⁵³ *Id.* at 579–80.

⁵⁴ *Valcorza*, 140 Phil. 651, 657.

⁵⁵ See, e.g., *Valcorza*, 140 Phil. 651; *Cabanlig*, 502 Phil. 564; *Gervero*, 836 Phil. 99.

⁵⁶ *Cabanlig*, 502 Phil. at 576.

B. Struggles in the Application of the Doctrine

The evolution of the doctrine's jurisprudence has focused primarily on its conceptual dimensions. In other words, Philippine jurisprudence has focused on the "*what*" of the doctrine—a struggle to clarify what the doctrine really is. Consequently, some decisions muddled the waters and introduced confusion as to the dimensions of the doctrine. The evolution of the application of the doctrine is beset with (1) *the confusion as to the rule's conception* and (2) *the blurring of the rule's boundaries*.

1. *The Confusion as to the Conception of the Doctrine*

In many cases, the Supreme Court has struggled to conceptually capture the doctrine. One notable aspect of the application of the doctrine is *the confusion as to the conception of the doctrine*. In particular, the Supreme Court cases reviewed in this paper tend to have different interpretations as to what "duty" the doctrine is referring to. Some cases conceived "duty" as "*being on duty*," while other cases see it as "*doing a duty*." In *People v. Catbagan*,⁵⁷ the Supreme Court finally pointed out the difference between the two: "*presence at the scene of the incident should be distinguished from [the] act of shooting*."⁵⁸ Thus, it is not enough that the police officers are "on duty" while at the scene of the incident, but they must be "doing a duty." Unfortunately, many past cases confused these two.

In *complete justification cases*, the Court exonerated some police officers as they were "on duty" when they shot the fleeing offenders, without regard to whether the act of shooting itself was a "lawful duty." An example of this is *Delima*.⁵⁹ In this case, a police officer, Delima, was chasing an escaped convict. The convict attempted to hit the police with a bamboo lance, but the latter dodged it. For failing to stop, the police shot the fleeing convict, thereby killing him. Upon the officer's appeal, the Supreme Court exonerated him and ruled:

That killing was done in the performance of a duty. The deceased was under the obligation to surrender, and had no right, after evading service of his sentence, to commit assault and disobedience with a weapon in the hand, which compelled the policeman to resort to such an extreme means, which although it prove to be fatal, was justified by the circumstances.⁶⁰

⁵⁷ 467 Phil. 1044 (2004).

⁵⁸ *Id.* at 1070. (Emphasis in the original.)

⁵⁹ 46 Phil. 738, 739 (1922).

⁶⁰ *Id.* at 739.

The same conception of “duty” can be found in the Supreme Court’s decisions in *Valcorza*⁶¹ and *Cabanlig*⁶² that granted complete justification to officers who killed fleeing suspects.

In *incomplete justification cases*, the Court, although finding that the acts of the police officers were unlawful, nevertheless recognized that they were “on duty.” Thus, they were granted incomplete justification, thereby mitigating their penalties. Foremost of these cases is *Oanis*.⁶³ In that case, the officers committed murder by shooting an alleged suspect who was sleeping. However, the Court granted the officers incomplete justification because “only the first requisite is present—appellants have acted in the performance of a duty. The second requisite is wanting for the crime by them committed is not the necessary consequence of a due performance of their duty.”⁶⁴ Likewise, the Supreme Court in *Andal* affirmed and quoted Sandiganbayan’s statement, as follows: “[i]t is evident that accused was acting in the performance of his duty as supervisor of deceased and policemen when the events that led to the shooting occurred.”⁶⁵ Some more recent cases have ruled in the same way.⁶⁶

Giving premium to “being on duty” is unfortunate. “Being on duty” should not be a basis on whether to grant complete or partial justification to police officers when they have used lethal force. The correct approach is to see whether the police is “doing a duty.” Under international law, “being on duty” is immaterial in use of force cases. What matters are the specific mandated duties the law requires from the police. For instance, the United Nations (UN) Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that “[l]aw enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms.”⁶⁷ Also, Article 3 of the UN Code of Conduct for Law Enforcement Officials states that “[l]aw enforcement

⁶¹ 140 Phil. 651, 657.

⁶² 502 Phil. 564, 578.

⁶³ 74 Phil. 257.

⁶⁴ *Id.* at 263.

⁶⁵ 258-A Phil. 591, 597.

⁶⁶ *See, e.g., Belbes*, 389 Phil. 500; *Ulep*, 395 Phil. 78; *Catbagan*, 467 Phil. 1044; *Baxinela*, 520 Phil. 202; *Mamangun*, 543 Phil. 42.

⁶⁷ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, at ¶ 4, U.N. Doc. A/CONF.144/28/Rev.1, (Aug. 27–Sept. 7, 1990).

officials may use force only when strictly necessary and to the extent required for the performance of their duty.”⁶⁸

While being on duty, therefore, the police are expected to do their duty to observe necessity and proportionality principles in use of force situations. In particular, they have the duty “to use non-violent means wherever possible[,] to use force only for a legitimate law enforcement purpose[,] and to use only the minimum necessary force that is reasonable in the prevailing circumstances”⁶⁹ under the necessity principle. Notwithstanding necessity, the police are also mandated to use force proportionate to the threat posed before them.⁷⁰ Moreover, the immateriality of “being on duty” in deciding use of force cases is illustrated in various international cases, as will be discussed in Part IV of this paper.⁷¹ Such cases found liability on the part of the police even if the use of force occurred while they were on duty.

This alternative conception of “duty” is consistent with the current application of the doctrine in Spain. Although the text of the corresponding Spanish Penal Code provision remains the same, the concept of duty as applied in use of force cases has developed to incorporate necessity and proportionality.⁷² In Spanish case law, the current fulfillment of duty doctrine has the following requirements:

- (1) that the perpetrator acts in the course of the duties arising from his position (the exemption does not cover the use of the position for private interests); (2) that the use of force is *necessary* from a rational point of view, taking into account the circumstances and the interests required to be protected; (3) that the force used is *proportionate* to the situation, excesses not being permitted; and (4)

⁶⁸ United Nations General Assembly, Code of Conduct for Law Enforcement Officials [hereinafter “Code of Conduct”], at 186, art. 3, U.N. Doc. A/RES/34/169, (Dec. 17, 1979).

⁶⁹ STUART CASEY-MASLEN & SEAN CONNOLLY, POLICE USE OF FORCE UNDER INTERNATIONAL LAW 82 (2017).

⁷⁰ *Id.* at 92–93.

⁷¹ See, e.g., Communication No. 1900/2009: Views adopted by the Committee at its 110th session (10 to 28 March 2014) [hereinafter “Communication No. 1900/2009”], U.N. Doc. CCPR/C/110/D/1900/2009 (2014); Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2536/2015 [hereinafter “Communication No. 2536/2015”], U.N. Doc. CCPR/C/125/D/2536/2015 (May 30, 2019); Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2813/2016 [hereinafter “Communication No. 2813/2016”], U.N. Doc. CCPR/C/137/D/2813/2016 (June 8, 2023).

⁷² LORENA BACHMAIER WINTER & ANTONIO DEL MORAL GARCÍA, CRIMINAL LAW IN SPAIN 93 (2010). (Emphasis supplied.)

that there is a certain degree of resistance or activity on the side of the passive subject that allows presumption of danger that justifies the use of force.⁷³

With this, there is no room left for granting complete or partial justification to police officers just because they killed while they were on duty.

2. *The Court Blurs the Rule's Boundaries*

The Supreme Court's *blurring of the rule's boundaries* is demonstrated in several cases. It has been noted that the fulfillment of duty doctrine differs from the rule of self-defense. While the latter requires, for example, the presence of unlawful aggression, the former does not.⁷⁴ The former applies when a police officer acts in the fulfillment of a duty, and the latter applies when one is not on duty, or one is a private person. However, the Court, in several cases, applied the fulfillment of duty doctrine in self-defense cases, thereby blurring the boundaries between the two rules.

For example, in *Frias v. People*, a police officer shot a suspect who pointed his shotgun at him after several warnings to stop.⁷⁵ The suspect was also able to fire his gun,⁷⁶ and thus this was a case where self-defense rules should govern. However, the Supreme Court ruled that the officer was justified under the fulfillment of duty doctrine.⁷⁷ Likewise, in *Masipequiña v. Court of Appeals*,⁷⁸ the police officer shot an insane person wielding a bolo who was chasing and about to hack another police officer.⁷⁹ Here, the Court once again applied the fulfillment of duty doctrine⁸⁰ when it was clearly a case of defense of a stranger.

Interestingly, a unique application of the doctrine was made in *Andal*.⁸¹ In this case, the Supreme Court found that a police officer's invocation of self-defense was without merit due to lack of unlawful aggression.⁸² However, the Court proceeded to mitigate the penalty because the officer was on duty at the time of the incident.⁸³ Thus, the Court evaluated

⁷³ *Id.*

⁷⁴ *Cabanlig*, 502 Phil. 564, 576.

⁷⁵ *Frias*, 215 Phil. 1, 15.

⁷⁶ *Id.*

⁷⁷ *Id.* at 16.

⁷⁸ 257 Phil. 710.

⁷⁹ *Id.* at 713–14.

⁸⁰ *Id.* at 720.

⁸¹ 258-A Phil. 591.

⁸² *Id.* at 596.

⁸³ *Id.* at 596–97.

the use of force using self-defense rules, but it determined the corresponding penalty using the fulfillment of duty doctrine.

II. THE INVALIDITY OF *OANIS*' TWO-REQUISITE RULE

This part demonstrates the invalidity of the Supreme Court's introduction of the two-requisite rule in *Oanis* by tracing the doctrine's evolution. This requires us to first review the Spanish origins of the doctrine.

A. A Spanish Legacy

The fulfillment of duty doctrine is a Spanish colonial legacy in the Philippines. It can be traced back to the 19th century Spanish penal codes, where it particularly found expression in the 1870 Spanish Penal Code.⁸⁴ The Spanish Penal Code of 1870 was enforced in the Philippines from 1887 until it was superseded by the Revised Penal Code.⁸⁵ Its original text reads:

Art. 8.º No delinquen, y, por consiguiente, están exentos de responsabilidad criminal:

* * *

11. El que obra en cumplimiento de un deber o en el ejercicio legítimo de un derecho, oficio ó cargo.⁸⁶

This provision, however, was adopted from the 1848 Spanish Penal Code,⁸⁷ which was applied by the Spanish Supreme Court in numerous

⁸⁴ Jose Javier, *A Short Study of the Philippine Revised Penal Code*, 14 PHIL. L.J. 161, 161 (1934).

⁸⁵ *United States v. Tamparong*, 31 Phil. 321, 323 (1915); Javier, *supra* note 84, at 161.

⁸⁶ CÓDIGO PENAL Y LEY PROVISIONAL PARA LA APLICACION DE LAS DISPOSICIONES DEL MISMO EN LAS ISLAS FILIPINAS, art. 8, ¶ 11.

This provision is translated as follows: "ARTICLE 8. The following are exempt from criminal liability:

* * *

11. Any person who acts in the fulfillment of a duty or in the lawful exercise of a right or office." THE PENAL CODE OF THE PHILIPPINE ISLAND (English Translation), art. 8, ¶ 11, (The Attorney-General ed., Manila: Bureau of Printing, 1911).

⁸⁷ JOAQUIN FRANCESCO PACHECO, EL CÓDIGO PENAL: CONCORCADO Y COMENTADO 474 (1881). "11. El que obra en cumplimiento de un deber, ó en el ejercicio legítimo de un derecho, autoridad, oficio ó cargo."

Spanish cases prior to its promulgation in the Philippines.⁸⁸ Salvador Viada noted that all of these are justified under the doctrine: an officer who executes a convict through death penalty, a police officer who arrests a guilty man, and a doctor who amputates a gangrened arm.⁸⁹ Likewise, the Spanish Supreme Court justified the conduct of a police officer who shot a fleeing suspect subject to an arrest who did not stop running after the officer warned him twice to stop.⁹⁰ The Court acquitted the officer and ruled that he was only complying with the order of his superior even though the force used was fatal.⁹¹

Unfortunately, Spanish police officers sometimes abused this rule by feigning that suspects were fleeing. Such scheme is called “*ley de fuga*,” wherein police officers forced or allowed offenders in custody to run away so that they could shoot the latter.⁹² For instance, the Governor of Spain’s Córdoba Province used this method to rid the territory of banditry in the 1870s.⁹³ In the 19th century Philippines, *ley de fuga* was also adopted by the Guardia Civil:⁹⁴ “[a]ccording to the *ley fuga*, police were acting within their authority in shooting down anyone trying to escape custody.”⁹⁵ Police officers typically used this scheme to eliminate famous bandits in the Philippines. These bandits were allowed to escape while the officers were watching the *fuga* and shot the *fugaz* afterwards.⁹⁶

B. The Invalid Introduction of the Two-Requisite Rule

The first notable post-Spanish period turn of the doctrine in the Philippines is the *invalid introduction of the rule’s requisites*. A successful invocation of this doctrine requires that the officer meets these requisites: “(a) that the offender acted in the performance of a duty or in the lawful exercise of a right; and (b) that the injury or offense committed be the necessary consequence of the due performance of such duty or the lawful exercise of such right or

⁸⁸ See SALVADOR VIADA, CÓDIGO PENAL REFORMADO DE 1870: CON LAS VARIACIONES INTRODUCIDAS EN EL MISMO 27–28 (1885).

⁸⁹ *Id.* at 27.

⁹⁰ SALVADOR VIADA, CÓDIGO PENAL REFORMADO DE 1870 179–80 (1890).

⁹¹ *Id.*

⁹² PAUL VANDERWOOD, JUAN SOLDADO: RAPIST, MURDERER, MARTYR, SAINT 23–24 (2004).

⁹³ *Id.* at 47.

⁹⁴ Police force in the later 19th Century Philippines. Greg Bankoff, *Crime, Society, and the State in the Nineteenth Century Philippines*, at 563 (1990) (doctoral thesis, Murdoch University).

⁹⁵ *Id.* at 343.

⁹⁶ “Fuga” means “the act of flight or escape,” while “fugaz” means “a runaway or fugitive.” *Id.* at 562.

office.”⁹⁷ These requisites were first enunciated in the case of *Oanis* in 1943. However, the Supreme Court did not cite the source of these requisites.

It was Justice Hontiveros’ dissenting opinion in *Oanis* that clarified the source of these requisites. Justice Hontiveros attributed the requisites to Judge Guillermo Guevara, one of the members of the Committee that drafted the Revised Penal Code.⁹⁸ However, in the book⁹⁹ quoted by Justice Hontiveros, Judge Guevara did not cite any source for the two requisites. Nevertheless, Judge Guevara cited *United States v. Aviado*¹⁰⁰ as the source of these requisites in his book on penal science:

Two requisites are necessary in order that this circumstance may exist, viz : (a) that the perpetrator performs a lawful duty or exercises a lawful right; and (b) that the injury or offense committed be the necessary consequence of the performance of a duty or the exercise of a right or office.¹⁰¹

However, the verbatim version of the requisites cannot be found in the *Aviado* decision even though it cited the doctrine. In fact, *Aviado* is a defense of a stranger case involving imminent danger which justifies killing as self-defense. As held in the case: “[t]he defendant was acting in defense of his companion, exactly as he would act in defense of his own person and there concurred unlawful aggression on the part of the deceased, and reasonable necessity for the means of employed to prevent or repel it.”¹⁰² Thus, the said requisites originated neither from law nor jurisprudence.

Oanis relied on the said requisites in granting an incomplete justifying circumstance to police officers who killed an alleged suspect while he was sleeping.¹⁰³ In effect, the penalty of murder imposed on the officers was lowered.¹⁰⁴ This was the first time that the Court introduced such incomplete

⁹⁷ *Oanis*, 74 Phil. 257, 262–63.

⁹⁸ *Id.* at 266 (Hontiveros, J., *dissenting*).

⁹⁹ GUILLERMO GUEVARA, COMMENTARIES ON THE REVISED PENAL CODE OF THE PHILIPPINES 28 (1957).

¹⁰⁰ 38 Phil. 10, 15–16.

¹⁰¹ GUILLERMO GUEVARA, PENAL SCIENCES AND PHILIPPINE CRIMINAL LAW 92 (1974). (Citation omitted.)

¹⁰² *Aviado*, 38 Phil. 10, 14.

¹⁰³ *Oanis*, 74 Phil. 257.

¹⁰⁴ *Id.* at 263. The penalty for the murder committed was reduced to an indeterminate penalty of from five (5) years of *prision correccional* to fifteen (15) years of *reclusion temporal* instead of *reclusion temporal* in its maximum period to death.

justifying circumstance.¹⁰⁵ The Court noted that while the first requisite was met because the officers were performing a lawful duty, the second requisite was not met because the murder was not a necessary consequence of their duty.¹⁰⁶ However, Justice Hontiveros, in his dissenting opinion, argued that the majority opinion was incorrect.¹⁰⁷

Justice Hontiveros argued that Article 69 of the Revised Penal Code,¹⁰⁸ which allows for the grant of incomplete justifying circumstances, does not apply to the fulfillment of duty doctrine. He again cited Judge Guevara, as follows:

Judge Guillermo Guevara, one of the members of the Committee created by Administrative Order No. 94 of the Department of Justice for the drafting of the Revised Penal Code, in commenting on Article 69, said that the justifying circumstances and circumstances exempting from liability which are the subject matter of this article are the following: self-defense, defense of relatives, defense of strangers, state of necessity and injury caused by mere accident. Accordingly, justifying circumstance No. 5 of Article 11 dealing with the fulfillment of a duty or the lawful exercise of a right, calling or office, cannot be placed within its scope.¹⁰⁹

Indeed, Judge Guevara in his commentary on Article 69 did not include fulfillment of duty.¹¹⁰ Justice Hontiveros also cited Groizard, a Spanish author, who stated that Article 69 does not include fulfillment of duty.¹¹¹ Thus, there is a contradiction as to Guevara's invented requisites and

¹⁰⁵ Prior to 1943, the cases that cited the fulfillment of duty doctrine and penalized the police officers had not granted any incomplete justifying circumstance to the officers. *See, e.g., United States v. Capisonda*, 1 Phil. 575, 580 (1902).

¹⁰⁶ *Oanis*, 74 Phil. at 262–63.

¹⁰⁷ *Id.* at 265.

¹⁰⁸ REV. PEN. CODE, art. 69. "Article 69. Penalty to be imposed when the crime committed is not wholly excusable. - A penalty lower by one or two degrees than that prescribed by law shall be imposed if the deed is not wholly excusable by reason of the lack of some of the conditions required to justify the same or to exempt from criminal liability in the several cases mentioned in articles 11 and 12, provided that the majority of such conditions be present. The courts shall impose the penalty in the period which may be deemed proper, in view of the number and nature of the conditions of exemption present or lacking."

¹⁰⁹ *Oanis*, 74 Phil. 257, 265–66 (Hontiveros, *J., dissenting*).

¹¹⁰ GUEVARA, *supra* note 99, at 128.

¹¹¹ *Oanis*, 74 Phil. at 266 (Hontiveros, *J., dissenting*). Justice Hontiveros quotes Groizard, as follows:

the Supreme Court's subsequent adoption of it, as well as the non-inclusion of the doctrine in his commentary on Article 69.

Spanish jurisprudence from the 19th century supports this view. Viada commented that Article 87 of the Old Penal Code, upon which Article 69 of the Revised Penal Code was based, is not applicable to the fulfillment of duty doctrine.¹¹² Viada added that this doctrine had only one requisite (i.e., fulfillment of lawful duty).¹¹³ Consequently, an incomplete justifying circumstance arising from this rule is impossible. In a case, the Spanish Supreme Court ruled that a municipal guard cannot be granted an incomplete justifying circumstance after he shot a fleeing thief who did not stop after his warning.¹¹⁴ Thus, the Supreme Court in *Oanis* just adopted the requisites invented by Judge Guevara which had no basis under the law and jurisprudence at that time.

It should be noted that after *Oanis*, the Court was not consistent in its application of the two-requisite rule. *Oanis* espoused a rule that a police officer may be granted incomplete justification even if he committed murder as long he was on duty. In many cases, the Court granted incomplete justification based on this premise.¹¹⁵ For example, in *People v. Belbes*, the Supreme Court granted incomplete justification to a police officer who shot dead, without

¹¹² "The eminent treatiser of criminal law Mr. Groizard, in his commentary of Article 87 of the Spanish Penal Code of 1870 which is the source of Article 69 of our Code, says:

"Ni tratándose de la imbecilidad, ni de la locura, ni de la menor edad, ni del que obra violentado por una fuerza irresistible o impulsado por miedo insuperable de un mal igual o mayor, o en cumplimiento de un deber, o en el ejercicio legítimo de un derecho, oficio o cargo, o en virtud de obediencia debida, ni del que incurre en alguna omisión hallándose impedido por causa legítima o insuperable, puede tener aplicación al artículo que comentamos. Y la razón es obvia. En ninguna de estas exenciones hay pluralidad de requisitos. La irresponsabilidad depende de una sola condición. Hay o no perturbación de la razón; el autor del hecho es o no menor de nueve años; existe o no violencia material o moral irresistible, etc., etc.; tal es lo que respectivamente hay que examinar y resolver para declarar la culpabilidad o inculpabilidad. Es, por lo tanto, imposible que acontezca lo que el texto que va al frente de estas líneas requiere, para que se imponga al autor del hecho la penalidad excepcional que establece; esto es, que falten algunos requisitos de los que la ley exige para eximir de responsabilidad, y que concurren el mayor número de ellos, toda vez que, en los casos referidos, la ley no exige multiples condiciones."

¹¹² SALVADOR VIADA, CÓDIGO PENAL REFORMADO DE 1870: CON LAS VARIACIONES INTRODUCIDAS EN EL MISMO 119 (1885).

¹¹³ *Id.*

¹¹⁴ SALVADOR VIADA, CÓDIGO PENAL REFORMADO DE 1870: CONCORDADO Y COMENTADO 50 (1904).

¹¹⁵ See, e.g., *Lagata*, 83 Phil. 150; *Lacanilao*, 245 Phil. 519; *Andal*, 258-A Phil 591; *Ulep*, 395 Phil. 78; *Mamangun*, 543 Phil. 42; *Baxinela*, 520 Phil. 202; *Belbes*, 389 Phil. 500; *Catbagan*, 467 Phil. 1044.

warning, a high school student who was reportedly causing trouble in the school.¹¹⁶ However, it was found that the student was only vomiting while holding on to bamboo splits which eventually broke and prompted the shooting.¹¹⁷ Similarly, in *Mamangun v. People*, the police officer was granted incomplete justification when he shot a man on a rooftop whom he believed to be the suspect of the robbery they were responding to.¹¹⁸ The man uttered “[h]indi ako, hindi ako[.]” and it eventually turned out that the man killed was not the true suspect.¹¹⁹

However, in several cases, the Court ignored the fact that the officers were on duty at the time of the killings, and thus did not apply the two-requisite rule and the defense of incomplete justification.¹²⁰ In *People v. Pinto*,¹²¹ for example, police officers were on duty to serve a warrant. However, they mistakenly believed that the suspected criminal they were to arrest was on board a jeep, when in fact, the passengers were innocent civilians.¹²² As a result, they fired upon the jeep, thereby killing three passengers and seriously injuring one.¹²³ The Court considered these acts as murder and frustrated murder, respectively.¹²⁴ In *Balanay v. Sandiganbayan*,¹²⁵ the Court ruled: “Although petitioner Balanay was then on duty, his act of shooting detention prisoner Antabo was not justified since the latter was not committing any offense. As aptly held in *People v. De la Cruz*, ‘Performance of duties does not include murder.’”¹²⁶ The Court then proceeded to convict the officer.

¹¹⁶ *Belbes*, 389 Phil. at 508–09.

¹¹⁷ *Id.* at 504.

¹¹⁸ 543 Phil. 42.

¹¹⁹ *Id.* at 46.

¹²⁰ *Calderon v. People*, 96 Phil. 216 (1954); *People v. Guba*, 149 Phil. 153 (1971); *People v. Pinto*, 281 Phil. 11 (1991); *People v. De la Cruz*, 298 Phil. 36 (1993); *Balanay v. Sandiganbayan*, 397 Phil. 853 (2000); *Yapyuco y Enriquez v. Sandiganbayan*, 689 Phil. 75 (2012).

¹²¹ 281 Phil. 11 (1991).

¹²² *Id.* at 21–22.

¹²³ *Id.*

¹²⁴ *Id.* at 45.

¹²⁵ 397 Phil. 853 (2000).

¹²⁶ *Id.* at 869.

III. THE INVALIDITY OF THE DOCTRINE IN NON-DANGEROUS FLEEING SUSPECTS CASES

This section shows the invalidity of the fulfillment of duty doctrine in justifying police shootings involving non-dangerous fleeing suspects.¹²⁷ Its invalidity can be based upon international human rights principles and standards, which will be shown in the next section. However, in this section, I will primarily focus on the reasonableness standard on arrest based on the US Constitution's Fourth Amendment, from which Article III, Section 2 of the 1987 Constitution was lifted.¹²⁸ The Supreme Court has upheld that where a local law was derived from another country, weight must be given to how such law is construed in its country of origin.¹²⁹ As the Supreme Court declared, "we have always felt ourselves bound by the rulings of the Supreme Court of the United States in construing and applying statutory enactments modelled upon or borrowed from English or American originals."¹³⁰ Indeed, the US Supreme Court's interpretation and construction of the Fourth Amendment has been used by the Philippine Supreme Court in several cases.¹³¹

Both the Philippine and US Supreme Courts regard arrests as "seizures."¹³² In the Philippines, the prohibition against unreasonable seizures is provided under Article III, Section 2 of the 1987 Constitution, which was also lifted from the Fourth Amendment, as follows:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may

¹²⁷ Non-dangerous fleeing suspects are those subject of an arrest and who do not pose any actual or imminent threat against the pursuing offenders. The case of Jemboy Baltazar falls within this classification. *See* Benjamin Pulta, *Navotas court convicts cop of homicide over teen's killing*, PHIL. NEWS AGENCY, Feb. 27, 2024, at <https://www.pna.gov.ph/articles/1219620>.

¹²⁸ *Saluday v. People* [hereinafter "*Saluday*"], 829 Phil. 65, 80 (2018).

¹²⁹ *See* Cuyugan v. Santos, 34 Phil. 100 (1916).

¹³⁰ *Id.* at 107.

¹³¹ *See, e.g.*, Pestilos v. Generoso, 746 Phil. 301 (2014); *Saluday*, 829 Phil. 65; *Acosta v. Ochoa*, 865 Phil. 400 (2019).

¹³² JOAQUIN BERNAS, *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 204 (2009); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 626 (2019).

produce, and particularly describing the place to be searched and the persons or things to be seized.¹³³

However, this provision has not been utilized in deciding cases concerning police use of force in the Philippines. Thus, this paper adopts the discussion of the Fourth Amendment¹³⁴ guarantee. The US Supreme Court opined that just as seizure can be effected through the tips of the officers' fingers, it can also be effected through a bullet of a firearm under the common law.¹³⁵ The US Supreme Court adds that the Fourth Amendment is "a protection that extends to '[s]ubtler and more far-reaching means of invading privacy' [...]. There is nothing subtle about a bullet, but the Fourth Amendment preserves personal security with respect to methods of apprehension old and new."¹³⁶

The *reasonableness standard* under the Fourth Amendment gained prominence in the 1980s, particularly in the case of *Tennessee v. Garner*.¹³⁷ In this case, Garner, an unarmed 15-year-old boy, climbed a fence to escape from the police. Afraid that Garner would elude arrest, the police officer shot him in the back of the head, thereby killing him. The District Court absolved the officer. However, the Circuit Court reversed this, citing the Fourth Amendment and the due process clause.¹³⁸ Upon appeal, the Supreme Court affirmed the Circuit Court, relying only on the Fourth Amendment's reasonableness standard in its decision.¹³⁹

In *Garner*, the Supreme Court used a balancing test to determine the reasonableness of the officer's act of shooting the fleeing felon. The Court found that the governmental interest to arrest by killing the felon far weighs less than the felon's interest to live.¹⁴⁰ It is, therefore, unconstitutionally unreasonable to kill an unarmed felon who does not pose any threat to the officers or the general public.¹⁴¹ Thus, the Court laid down its measure of use of force reasonableness under the totality of circumstances as follows:

¹³³ CONST. art. III, § 2.

¹³⁴ U.S. CONST. amend. IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

¹³⁵ *Torres v. Madrid*, 592 U.S. 306, 316 (2021).

¹³⁶ *Id.* at 317.

¹³⁷ 471 U.S. 1 (1985).

¹³⁸ *Garner v. Memphis Police Dep't*, 710 F.2d 240, (6th Cir. 1983).

¹³⁹ *Tennessee v. Garner*, 471 U.S. 1 (1985).

¹⁴⁰ *Id.* at 9.

¹⁴¹ *Id.* at 10–11.

Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.¹⁴²

Since then, *Garner* had become the source of instruction for courts and law enforcers in lethal force situations. However, a gap existed as to what standard should be used for situations involving non-lethal force. Thus, in *Graham v. Connor*,¹⁴³ the US Supreme Court laid down the reasonableness standard in non-deadly encounters. Using the totality of circumstances principle, courts and law enforcers were instructed to pay “careful attention to the facts and circumstances of each particular case, including the *severity of the crime* at issue, whether the suspect poses an *immediate threat to the safety* of the officers or others, and whether he is *actively resisting arrest* or *attempting to evade arrest by flight*.”¹⁴⁴

In 2007, however, the US Supreme Court, in the case of *Scott v. Harris*,¹⁴⁵ declared that these standards are not mandatory. The Court went on to discuss that one standard does not apply to all instances.¹⁴⁶ Thus, it rejected the use of the *Garner* doctrine in a situation that involved deadly use of force. Instead, it reverted to a come-what-may attitude by using the totality of circumstances principle. Courts were instructed to look at all facts and circumstances in determining the reasonableness of the police officer’s use of force. The Court said, “in the end we must still slosh our way through the fact bound morass of ‘reasonableness.’ Whether or not Scott’s actions constituted application of ‘deadly force,’ all that matters is whether Scott’s actions were reasonable.”¹⁴⁷

Regardless of the permutation of the reasonableness standard, it is clear that shooting to kill a fleeing non-dangerous suspect is not permitted by the Constitution. Even with *Scott*, *Garner’s* prohibition against shooting fleeing

¹⁴² *Id.* at 11.

¹⁴³ 490 U.S. 386 (1989).

¹⁴⁴ *Id.* at 396. (Emphasis supplied.)

¹⁴⁵ 550 U.S. 372 (2007).

¹⁴⁶ *Id.* at 381–82.

¹⁴⁷ *Id.* at 383.

suspects who pose no actual or imminent threat stands. Thus, the fulfillment of duty doctrine cannot justify police officers who shoot non-dangerous fleeing suspects.

IV. THE INVALIDITY OF THE DOCTRINE IN FLEEING PRISONER CASES AND RETREATING ATTACKERS

It is also noteworthy that the instructions in *Garner* do not apply in hot pursuit of non-dangerous pre-trial detainees and prisoners.¹⁴⁸ For example, in *Brothers v. Klevenhagen*¹⁴⁹ the police officers involved were absolved. Here, they shot a pre-trial detainee 12 times while he was running towards the gate of the jail to escape. Brothers, the detainee, was unarmed and had not assaulted the officers. The Court of Appeals reasoned that the protection under the Fourth Amendment does not apply to a pre-trial detainee who is protected under the due process clause. Consequently, the Court declared that the officers' act was not unconstitutional as they "did not act maliciously or sadistically or in an attempt to inflict punishment, but rather followed a constitutional policy that permits deadly force only when necessary to prevent an immediate escape."¹⁵⁰ The same ruling can be found in *Graveley v. Madden*.¹⁵¹

However, the US Supreme Court never had the opportunity to rule on these cases as they were not raised before it. Thus, in this section, I will evaluate the fulfillment of duty doctrine based on international human rights standards and principles, instead of US jurisprudence. These standards and principles, as noted above, also apply in non-dangerous fleeing suspect cases in the preceding section. Based on these standards and principles, shooting non-dangerous fleeing suspects and prisoners is unlawful. In this paper, the focus is on two major human rights standards: the right to life and the security of a person. Moreover, as to the human rights principles, only necessity, proportionality, and non-discrimination principles will be used to evaluate the fulfillment of duty doctrine.¹⁵²

¹⁴⁸ Wayne Beyer, *Police Shootings Under the Fourth Amendment*, 8 RICH. J.L. & PUB. INT. 1, 13 (2004); Robert Leider, *Taming self-defense: Using deadly force to prevent escapes*, 70 FLA. L. REV. 971, 988 (2018).

¹⁴⁹ 28 F.3d 452 (5th Cir. 1994).

¹⁵⁰ *Id.* at 457.

¹⁵¹ 142 F.3d 345, 14–15 (6th Cir. 1998).

¹⁵² Other human rights principles that are applicable in police use of force include legality, accountability, and distinction, which are primarily used to evaluate the legal framework, procedures and policies on police use of force. STUART CASEY-MASLEN, *THE RIGHT TO LIFE UNDER INTERNATIONAL LAW: AN INTERPRETATIVE MANUAL* 143 (2021). In this paper, however, the focus is on actual use of force situations.

This critique gains constitutional weight through Article II, Section 11 of the 1987 Philippine Constitution, which provides that “[t]he State values the dignity of every human person and guarantees full respect for human rights.”¹⁵³ This provision elevates human rights principles to constitutional status aside from being a statutory obligation under treaties. The principles of necessity and proportionality, for example, under the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, are not merely treaty-based but also part of customary international law.¹⁵⁴ Such principles are integrated into domestic law through Article II, Section 2 of the Constitution. The Supreme Court already acknowledged these principles in *Lagman v. Medialdea*¹⁵⁵ as safeguards against human rights violations of law enforcers.¹⁵⁶ Thus, these principles are not merely advisory in nature, but they constitute constitutional requirements that must aid the courts in the interpretation of the fulfillment of duty doctrine.

This section aims to critique cases on fleeing non-dangerous detainees or prisoners¹⁵⁷ and retreating attackers.¹⁵⁸ The victims in the former category do not pose any danger to the chasing officer or civilians as they are not carrying deadly weapons nor attacking any person before or during the chase. The latter are detainees or prisoners who made prior non-lethal attacks against officers and have taken flight, and thus can be considered as retreating attackers.

A. Human Rights Standards of Right to Life and Security of Person

States ought to uphold the *right to life* by seeing to it that the right is protected by a statute, and that it provides measures to protect anyone from arbitrary deprivation of his or her life.¹⁵⁹ A state has the positive duty to protect its citizens from arbitrary killings by private persons and state agents.¹⁶⁰ Such protection must be upheld by the State at all times. The right to life, as a supreme right, is a non-derogable right even in times of emergency.

¹⁵³ CONST. art. II, § 11.

¹⁵⁴ CASEY-MASLEN & CONNOLLY, *supra* note 69, at 79–80.

¹⁵⁵ 847 Phil. 317 (2019).

¹⁵⁶ *Id.* at 406–07.

¹⁵⁷ *See, e.g., Magno*, 8 Phil. 314.

¹⁵⁸ *See, e.g., Delima*, 46 Phil 738; *Valcorza*, 140 Phil. 651.

¹⁵⁹ Human Rights Committee, General Comment No. 36 (Article 6: Right to Life) [hereinafter “General Comment No. 36”], at ¶ 4, U.N. Doc. CCPR/C/GC/36 (2019).

¹⁶⁰ Communication No. 1862/2009: Views adopted by the Committee at its 103rd session, 17 October to 4 November 2011, at ¶ 7.2, U.N. Doc. CCPR/C/103/D/1862/2009 (2012).

The enjoyment and protection of this right applies even in times of armed conflict. As the International Court of Justice (ICJ) noted: “In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities.”¹⁶¹ The ICJ emphasized that the protection afforded by the International Covenant on Civil and Political Rights (“ICCPR”) does not cease during wars.

The right to life has two components: the right not to be killed arbitrarily by state agents and the right to adequate investigation and remedies.¹⁶² Arbitrariness should be interpreted broadly. It is arbitrary killing even though it is permissible under domestic law but not under international law. The UN Human Rights Committee's view in *Suárez De Guerrero v. Colombia*¹⁶³ demonstrates this rule. Here, police officers waited for suspected kidnappers in the house where they believed the victims were held. While the suspects were about to enter the house, the police fired upon them. Some were killed on the spot, and others were killed while fleeing. The actions of the officers were justified under Colombian law. However, the Committee found that the killings were violations of the right to life of the suspects due to the absence of necessity and proportionality.¹⁶⁴

The *right to personal security* is a fundamental right closely related to the right to life.¹⁶⁵ It pertains to bodily and mental integrity or the freedom from injury to the body and the mind. Article 3 of the Universal Declaration of Human Rights provides that “[e]veryone has the right to life, liberty and security of person.”¹⁶⁶ This was made binding under Article 9, Paragraph 1 of the ICCPR, which reads: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”¹⁶⁷

¹⁶¹Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 25 (July 8).

¹⁶² Christof Heyns, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, at 8, ¶ 46, U.N. Doc. A/HRC/26/36 (Apr. 1, 2014). *See also* PAUL TAYLOR, A COMMENTARY ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: THE UN HUMAN RIGHTS COMMITTEE'S MONITORING OF ICCPR RIGHTS 144–151 (2020).

¹⁶³ Views of the Human Rights Committee under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. R.11/45, at 137, U.N. Doc. Supplement No. 40 (A/37/40) (1982).

¹⁶⁴ *Id.* at 146–47.

¹⁶⁵ TAYLOR, *supra* note 162, at 247.

¹⁶⁶ Universal Declaration of Human Rights, art. 3, U.N. Doc. A/RES/217 (III) A (1948).

¹⁶⁷ International Covenant on Civil and Political Rights [hereinafter “ICCPR”] art. 9 ¶ 1, Dec. 19, 1966, 999 U.N.T.S. 171.

Just like the right to life, the right to security of person has two components: the right not to be inflicted with injury and the right to adequate investigation.¹⁶⁸ Moreover, the protection afforded to citizens covers threats and attacks from both state agents and private persons.¹⁶⁹ The right can be invoked against intimidation of human rights defenders, activists, and witnesses, domestic violence, sexual-oriented violence, and violence against disabled persons.¹⁷⁰

The right can also be invoked against unjustified use of force by state agents.¹⁷¹ For example, the Human Rights Committee found Jamaica to have violated the right to security of a murder suspect who was just walking but was shot in the back without warning by the arresting officer to effect the former's arrest.¹⁷² The suspect suffered injuries and was brought to the hospital by the police. Likewise, the state agents of Zambia were found to have violated the right to personal security of Rodger Chongwe and Dr. Kenneth Kaunda, Zambia's former President.¹⁷³ The latter was on board a vehicle when state agents fired their firearms and tear gas at the running car. Chongwe suffered a lethal injury but survived, while former President Kaunda was grazed by the bullet that hit the former.

B. Human Rights Principles of Necessity, Proportionality, and Non-Discrimination

The right to life and security of person shall not be arbitrarily infringed. Permissible intrusions into these rights must be narrowly defined and provided under the law. Additionally, such intrusions shall observe general principles limiting arbitrariness. The Human Rights Committee has a broad interpretation of what is arbitrary: "[t]he notion of 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due

¹⁶⁸ Human Rights Committee, General Comment no. 35, Article 9 (Liberty and security of person) [hereinafter "General Comment No. 35"], at ¶ 9, U.N. Doc. CCPR/C/GC/35 (2014).

¹⁶⁹ SARAH JOSEPH & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* 344 (2013).

¹⁷⁰ General Comment No. 35, *supra* note 168, ¶ 9.

¹⁷¹ *Id.*

¹⁷² Views of the Human Rights Committee under article 5, paragraph 4, of the optional protocol to the International Covenant on Civil and Political Rights concerning Communication No. 613/1995, at ¶ 9.3, U.N. Doc. CCPR/C/66/D/613/1995 (1999).

¹⁷³ Views of the Human Rights Committee under article 5, paragraph 4, of the optional protocol to the International Covenant on Civil and Political Rights concerning Communication No. 821/1998, at ¶ 5.3, U.N. Doc. CCPR/C/70/D/821/1998 (2000).

process of law, as well as elements of reasonableness, necessity, and proportionality.”¹⁷⁴

The United Nations adopted two “soft laws” to guide the police in the use of force:¹⁷⁵ the United Nations Code of Conduct for Law Enforcement Officials¹⁷⁶ and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (“Basic Principles”).¹⁷⁷ These instruments were developed through intensive dialogues among human rights and law enforcement experts, and a large number of states participated in them.¹⁷⁸ As such, the Human Rights Committee frequently refers to these two instruments when discussing limitations on police use of force.¹⁷⁹

These instruments are considered as mere soft law and non-binding.¹⁸⁰ Nevertheless, the principles therein on limiting use of force have been generally considered as reflecting rules of customary international law.¹⁸¹ For example, Philip Alston, Special Rapporteur on Extrajudicial and Summary Executions, noted that the principles on the use of force in these instruments “are rigorous applications of legal rules that States have otherwise assumed under customary or conventional international law.”¹⁸² Thus, the substance of Article 3 of the Code of Conduct and Principle 9 of the Basic Principles reflects binding international law. Moreover, regional human rights courts such as the European Court of Human Rights,¹⁸³ Inter-American Court of Human Rights,¹⁸⁴ and the African Commission on Human and Peoples’

¹⁷⁴ General Comment No. 35, *supra* note 168, ¶ 12.

¹⁷⁵ UNITED NATIONS OFFICE ON DRUGS AND CRIME [hereinafter “UNODC”], RESOURCE BOOK ON THE USE OF FORCE AND FIREARMS IN LAW ENFORCEMENT 7 (2017).

¹⁷⁶ Code of Conduct, *supra* note 68.

¹⁷⁷ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Sept. 7, 1990, at <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-use-force-and-firearms-law-enforcement>.

¹⁷⁸ Philip Alston, Interim Report on the Worldwide Situation in Regard to Extrajudicial, Summary or Arbitrary Executions, at ¶ 35, U.N. Doc. A/61/311 (2006).

¹⁷⁹ TAYLOR, *supra* note 162, at 143. *See also* General Comment No. 36, *supra* note 159, at ¶ 19.

¹⁸⁰ UNODC, *supra* note 175, at 7.

¹⁸¹ CASEY-MASLEN, THE RIGHT TO LIFE, *supra* note 152, at 143; CASEY-MASLEN & CONNOLLY, *supra* note 69, at 79–80.

¹⁸² Alston, *supra* note 178.

¹⁸³ Benzer v. Turkey, App. No. 23502/06, 163 (Nov. 12, 2013), <https://hudoc.echr.coe.int/tur?i=001-128036>.

¹⁸⁴ Cruz Sánchez v. Peru [hereinafter “*Cruz Sánchez*”], Judgment, Inter-Am. Ct. H.R. (ser. C) No. 292, ¶ 264 (Apr. 17, 2015).

Rights¹⁸⁵ have regarded these instruments as authoritative international standards in police use of force.

In general, the generally accepted principles of police use of force from the Code of Conduct and the Basic Principles include *legality, necessity, proportionality, accountability, and non-discrimination*.¹⁸⁶ Of these principles, necessity and proportionality are considered as the two pillars of police use of force,¹⁸⁷ as these govern police behavior on the scene. In their interplay, necessity precedes proportionality. While necessity limits force to a minimum, proportionality provides the ceiling to such force.¹⁸⁸ The UN Office on Drugs and Crime's (UNODC) example is on point: "for example, to stop an escaping thief might require a law enforcement official to use his or her firearm. In such a circumstance, however, the principle of proportionality will prevent such use, even where it unquestionably amounts to the minimum necessary force in any particular situation."¹⁸⁹

1. *Necessity*

This principle requires absolute necessity and not just reasonable necessity.¹⁹⁰ There is absolute necessity to use force upon any individual if such use of force meets the qualitative, quantitative, and temporal requisites of necessity.¹⁹¹ There is *qualitative necessity* if police use of force is used for the accomplishment of a legitimate objective—the protection of life and security of person. No other objective meets this requirement,¹⁹² even the protection of property.

Quantitative necessity exists when de-escalation techniques have been exhausted and the police is left with no other way to stop the offender but to use force.¹⁹³ This means that use of force is employed only as a last resort.

¹⁸⁵ *Kazingachire v. Zimbabwe*, No 295/04, Merits, African Court on Human and People's Rights [Afr. Ct. H.P.R.], ¶ 110 (May 2, 2012).

¹⁸⁶ *Cruz Sánchez*, *supra* note 184, at 265; UNODC, *supra* note 175, at 8; CASEY-MASLEN, *THE RIGHT TO LIFE*, *supra* note 152, at 143; CASEY-MASLEN & CONNOLLY, *supra* note 69, at 94.

¹⁸⁷ Alston, *supra* note 178, at ¶ 34.

¹⁸⁸ *Id.* at ¶ 41.

¹⁸⁹ *University Module Series: Crime Prevention and Criminal Justice*, UNITED NATIONS OFFICE ON DRUGS AND CRIME WEBSITE, at <https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-4/key-issues/3--the-general-principles-of-use-of-force-in-law-enforcement.html>.

¹⁹⁰ Heyns, *supra* note 162, at ¶ 60.

¹⁹¹ *Id.*; NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 201–02 (2008).

¹⁹² MELZER, *supra* note 199, at 201–02.

¹⁹³ *Id.*

Use of force is also necessary if there is *temporal necessity*. Use of force is considered temporally necessary if at the time the force is used, the qualitative and quantitative necessities persist.¹⁹⁴ This is a matter of seconds not hours.¹⁹⁵

In *Mehalli v. Algeria*, it was held that these elements were not met by Algerian police officers who shot a fleeing suspect.¹⁹⁶ The suspect was touching his hip while running due to a physical disability, but the police thought that he was reaching for a gun.¹⁹⁷ The Human Rights Committee found Algeria to have violated the right to life of the victim. The shooting was not for the purpose of protecting life, as there were other means of arresting the suspect who was unarmed, and the presumed threat was not imminent.¹⁹⁸

Likewise, the Human Rights Committee, in *Japalali v. Philippines*, found that the Philippines violated the right to life of the victims whose house was repeatedly fired upon by soldiers for 10 minutes.¹⁹⁹ Moreover, one victim was shot in the back while lying on the stairs calling for help.²⁰⁰ The Committee noted that “the State party has failed to justify how the indiscriminate use of lethal force against the victims’ house responded to an actual threat to a squad of eight heavily armed soldiers, much less that this was strictly necessary to protect life or prevent serious injury.”²⁰¹ Similar views were upheld by the Committee in *Burrell v. Jamaica*²⁰² and *Umateliyev v. Kyrgyzstan*.²⁰³

2. Proportionality

Absolute necessity alone does not satisfy the international requirement on police use of force.²⁰⁴ The official commentary of Article 3 of the Code of Conduct states that:

In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be

¹⁹⁴ *Id.*

¹⁹⁵ Heyns, *supra* note 162, at ¶ 59.

¹⁹⁶ Communication No. 1900/2009, *supra* note 71.

¹⁹⁷ *Id.* at ¶ 2.3.

¹⁹⁸ *Id.* at ¶ 7.9.

¹⁹⁹ Communication No. 2536/2015, *supra* note 71, ¶ 7.4.

²⁰⁰ *Id.* at ¶ 2.1.

²⁰¹ *Id.* at ¶ 7.4.

²⁰² Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. 546/1993, U.N. Doc. CCPR/C/53/D/546/1993 (1996).

²⁰³ Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights concerning Communication No. 1275/04, U.N. Doc. CCPR/C/94/D/1275/2004 (2008).

²⁰⁴ *University Module Series: Crime Prevention and Criminal Justice*, *supra* note 189.

achieved.” Similarly, according to Principle 5 of the 1990 Basic Principles, “Whenever the lawful use of force and firearms is unavoidable, law enforcement officers shall...act in proportion to the seriousness of the offence and legitimate objective to be achieved.”²⁰⁵

In like manner, Paragraph 9 of the Basic Principles mandates the following:

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.²⁰⁶

Thus, in terms of firearms use under Paragraph 9 of the Basic Principles, the proportionality requirement is met in the following scenarios:

- In self-defence or to defend others from an imminent threat of death or serious injury.
- To prevent a particularly serious crime involving a grave threat to life.
- To enable a person resisting arrest to be arrested if he or she is about to commit a particularly serious crime that involves a grave threat to life.
- To prevent a person resisting arrest from escaping where he or she is about to commit a particularly serious crime that involves a grave threat to life.²⁰⁷

In sum, proportionality provides for the *ceiling* of the force that the police can use.²⁰⁸ There is proportionality when the force used by the police is commensurate to the threat posed by an individual. As Paragraph 5(a) of the Basic Principles states, “[w]henver the lawful use of force and firearms is unavoidable, law enforcement officials shall [e]xercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate

²⁰⁵ *Id.*

²⁰⁶ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, *supra* note 177, at ¶ 9.

²⁰⁷ STUART CASEY-MASLEN, USE OF FORCE IN LAW ENFORCEMENT AND THE RIGHT TO LIFE: THE ROLE OF THE HUMAN RIGHTS COUNCIL 12 (2016), at https://www.geneva-academy.ch/joomlatools-files/docman-files/in-brief6_WEB.pdf.

²⁰⁸ Alston, *supra* note 178, at ¶ 41.

objective to be achieved.”²⁰⁹ International law does not require absolute proportionality. Actual and imminent or impending threats satisfy this requirement. Moreover, the extent of proportionality is not judged by the result of the force used but by the objective evaluation of the cause of such use of force.

Based on these principles, the Special Rapporteur found that Nigeria’s rules on use of force have violated the proportionality requirement.²¹⁰ Nigerian law allowed police officers to shoot thieves who could not be stopped by any other means.²¹¹ Although the use of firearms may be deemed necessary as the only means to prevent their escape, proportionality is wanting in the Nigerian law. Shooting thieves could never be proportionate to the threat, if any, posed by them.

In the case of *Murne v. Sweden*, the Human Rights Committee found the shooting of a mentally ill victim to be disproportionate.²¹² The police’s objective was to detain a psychologically ill person, but upon arrival at the latter’s house, they immediately drew their firearms.²¹³ Murne, holding kitchen knives, was several meters away and separated by a gate from the officers.²¹⁴ The four responding officers were fully equipped with shields, vests, pepper spray, and batons.²¹⁵ However, one officer fired his firearm and hit Murne in the abdomen, resulting in his eventual death.²¹⁶ Thus, aside from the absence of necessity, the force used by the officers was also considerably disproportionate. Similar views were upheld by the Committee in *Japalali v. Philippines*.²¹⁷

1. Equality and Non-Discrimination

The right to equality and non-discrimination is an underlying right applicable in the State’s protection of the right to life and security of person. This means that States must endeavor to apply the law and the use of force

²⁰⁹ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, *supra* note 177, at ¶ 5(a).

²¹⁰ Alston, *supra* note 178, at ¶ 34.

²¹¹ *Id.*

²¹² Communication No. 2813/2016, *supra* note 71.

²¹³ *Id.* at ¶ 10.6.

²¹⁴ *Id.* at ¶ 10.7.

²¹⁵ *Id.*

²¹⁶ *Id.* at ¶ 2.1.

²¹⁷ Communication No. No. 2536/2015, *supra* note 71, at ¶ 7.4.

equally and without discrimination.²¹⁸ More than this, the law itself must comply with the principle of non-discrimination. As General Comment No. 18 notes, “when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory.”²¹⁹

The right to equality and non-discrimination is a fundamental right. As Article 26 of the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²²⁰

Thus, all persons regardless of any status shall be afforded equal protection and benefit of the law. However, this right does not mean absolute equality in all substantive matters. The test is “if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”²²¹ Thus, reasonable differentiation among members of the same group is allowable.²²² What this right pertains to is the enforcement of laws. As elucidated clearly by Manfred Nowak, “the right to equality before the law is not directed at legislation but rather exclusively at its *enforcement*. It essentially means that judges and administrative officials must not act *arbitrarily* in enforcing laws.”²²³ Moreover, this right transcends laws: “[n]on-discrimination in article 26 ‘is a principle above the law’, circumscribing the legitimacy of laws themselves.”²²⁴

For example, in the case of *Kavanagh v. Ireland*, the prosecution filed multiple cases against Kavanagh before a Special Court instead of an ordinary

²¹⁸ Human Rights Committee, General Comment No. 28 (Article 3: The Equality of Rights between Men and Women) [hereinafter “General Comment No. 28”], at ¶ 31, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).

²¹⁹ Human Rights Committee, General Comment No. 18: Non-discrimination [hereinafter “General Comment No. 18”], Nov. 10, 1989, at ¶ 12, at <https://www.refworld.org/legal/general/hrc/1989/en/6268>.

²²⁰ ICCPR, art. 26.

²²¹ General Comment No. 18, *supra* note 219, at ¶ 13.

²²² TAYLOR, *supra* note 162, at 730–31.

²²³ MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 606 (2nd rev. ed. 2005). (Emphasis in the original.)

²²⁴ JOSEPH & CASTAN, *supra* note 169, at 768.

one.²²⁵ This is allowed under Ireland's law if the prosecutors deem regular courts incapable of handling certain cases.²²⁶ As a result, Kavanagh was deprived of a trial by jury and other remedies before an ordinary court available to other offenders in the same situation. The Human Rights Committee found such practice as a violation of Kavanagh's right to equal protection of law.²²⁷ Whether the domestic law was intentionally or unintentionally enacted to discriminate is irrelevant.²²⁸

Thus, this right is not lost just because a person has committed a crime. Further, regardless of the gravity of the crimes committed, one should be treated equally with others before the law. General Comment No. 36 emphasizes that "[a]rticle 6 of the Covenant guarantees this right for all human beings, without distinction of any kind, including for persons suspected or convicted of even the most serious crimes."²²⁹ In the same way, the protection of security of persons must be free from discrimination.²³⁰

Under international law, all persons with the same status must be treated equally.²³¹ Consequently, the Basic Principles have the same requisites for use of force for all types of offenders. As Principle No. 16 provides:

Law enforcement officials, in their relations with persons in custody or detention, shall not use firearms, except in self-defence or in the defence of others against the immediate threat of death or serious injury, or when strictly necessary to prevent the escape of a person in custody or detention presenting the danger referred to in principle 9.²³²

Whether the person to be arrested is a mere suspect, detainee, or convict—the rules of engagement are the same. The same principles of necessity and proportionality in the actual use of force are required by international law to be observed. Thus, the Human Rights Committee opined

²²⁵ Views of the Human Rights Committee under Article 5 Paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. 819/1998, at ¶ 10.2, U.N. Doc. CCPR/C/71/D/819/1998 (2001).

²²⁶ *Id.* at ¶ 2.1.

²²⁷ *Id.* at. ¶ 10.3.

²²⁸ *See, e.g.*, Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. 516/1992, U.N. Doc. CCPR/C/54/D/516/1992 (1995).

²²⁹ General Comment No. 36, *supra* note 159, at ¶ 3.

²³⁰ General Comment No. 35, *supra* note 168, at ¶ 17.

²³¹ General Comment No. 18, *supra* note 219, at ¶ 12; General Comment No. 28, *supra* note 218, at ¶ 31.

²³² Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, *supra* note 177, at ¶ 16.

that persons do not lose their right to life no matter how many crimes they have committed or how severe those crimes are.²³³

C. The Philippine Fulfillment of Duty Doctrine Violates Human Rights Standards and Principles

1. Violation of the Necessity Principle

The first requisite before any force is applied to an offender is necessity. Such necessity is not an ordinary one. As was discussed above, it involves absolute necessity, which is measured in terms of its qualitative, quantitative, and temporal aspects.²³⁴ There is qualitative necessity to use force when there is a threat of death or serious physical injury, or a legitimate law enforcement objective. This answers the question, “is force required?” There is a quantitative necessity to use force if other alternatives to force have been exhausted to no avail. This answers the question, “is lethal force needed?” Lastly, there is temporal necessity when at the time the force is applied there is qualitative and quantitative necessity. This answers the question, “is the threat imminent?” which is a matter of seconds, not hours.

Under the protection of life principle, lethal force shall only be used to protect life or to prevent serious injury from an imminent threat.²³⁵ Most of the Philippine Supreme Court cases applying the fulfillment of duty doctrine does not satisfy the *qualitative necessity* requirement. In these cases, the Court justified the officers’ use of lethal force, because of the duty of the police to arrest or prevent escape,²³⁶ the obligation of the offender to obey and surrender,²³⁷ and the need to prevent demoralizing police officers.²³⁸ These objectives are not sufficient reasons for officers to use lethal force because they do not involve any threat of death or serious physical injury.

Nevertheless, in *Cabanlig*, the Supreme Court noted the necessity to shoot an escaping offender because he had placed the policemen in grave danger.²³⁹ In this case, the offender grabbed an Armalite rifle from a police officer and jumped off the police vehicle. The majority opinion deduced from the evidence that the detainee turned to face the police vehicle while he was

²³³ General Comment No. 36, *supra* note 159, at ¶ 3.

²³⁴ MELZER, *supra* note 191, at 101; Heyns, *supra* note 162, at ¶ 60.

²³⁵ General Comment No. 36, *supra* note 159, at 12.

²³⁶ *Magno*, 8 Phil. 314; *Valcorza*, 140 Phil. 651; *Cabanlig*, 502 Phil. 564; *Bertucio*, 1 Phil.

47.

²³⁷ *Delima*, 46 Phil 738; *Resaba*, 1 Phil. 311.

²³⁸ *Valcorza*, 140 Phil. 651.

²³⁹ *Cabanlig*, 502 Phil. at 578.

running. The Court deemed this as an imminent threat as being armed with an automatic weapon, he could kill the officers in an instant.²⁴⁰ This case illustrates a standing threat akin to that posed by suicide bombers, which requires police officers to act swiftly with lethal force.²⁴¹ Thus, the Court is right in classifying this situation as an exigent circumstance. Unfortunately, however, the Court also said that even the mere act of running away by the detainee necessitated lethal force, citing previous fulfillment of duty cases.²⁴²

The penal code provision of the fulfillment of duty doctrine does not satisfy the *quantitative necessity* requirement. Obviously, it is a general provision that does not flesh out how force is to be executed by state agents, including the exhaustion of non-lethal means. The jurisprudence on the doctrine, however, implicitly requires a warning before using lethal force. In the case of *Belbes*, the Court did not grant full justification because the police officer did not issue any warning to the drunk suspect and instantly shot him with an Armalite rifle.²⁴³ Likewise, the Court required in several cases that certain non-lethal precautionary measures must be taken before any lethal force is applied.²⁴⁴ In these cases, the Court cited the warnings (i.e., verbal warning or warning shot) given by the police as one of the reasons for the justification granted. Moreover, the Philippine Operational Procedures (“POP”) Manual requires verbal warning in all cases and a warning shot, in high-risk situations.²⁴⁵

As to *temporal necessity*, the fulfillment of duty doctrine is unjustified. Naturally, the doctrine operates differently from self-defense, which requires imminence. In fulfillment of duty doctrine cases, imminence is not required. For instance, in *Delima*, the escaped convict struck but failed to hit the police officer with a bamboo lance and then ran away. The police officer chased and shot him dead after demanding his surrender, to no avail.²⁴⁶ The Court held that the police officer was justified in shooting the escaped convict.²⁴⁷ Here, the threat to the officer’s life had already ceased when the offender ran away and was shot by the police. Imminence of the threat was also absent in other

²⁴⁰ *Id.* at 580–81.

²⁴¹ Philip Alston, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Civil and political rights, including the questions of disappearances and summary executions, at ¶¶ 49, U.N. Doc. E/CN.4/2006/53 (Mar. 8, 2006).

²⁴² *Cabanlig*, 502 Phil. 564, 344–45.

²⁴³ *Belbes*, 389 Phil. 500, 508–09.

²⁴⁴ *See, e.g., Baxinela*, 520 Phil. 202, 215.

²⁴⁵ Phil. Nat’l Police, Revised Philippine National Police Operational Procedures, at 9, 13, PNPM-DO-D-0-2-13-219 (2021), at <https://akg.pnp.gov.ph/wp-content/uploads/2024/01/POP-Manual-2021.pdf>.

²⁴⁶ *Delima*, 46 Phil. 738, 739.

²⁴⁷ *Id.*

cases where the doctrine was applied and full justification was granted. However, in the case of *Cabanlig*, even though the offender was running away from the police, the threat remained because he was in possession of an automatic weapon.²⁴⁸ Thus, he was a standing threat and imminence was present.

2. *Violation of the Proportionality Principle*

The principle of proportionality requires that state agents should only use force commensurate to the threat and the legitimate objective to be accomplished.²⁴⁹ Even if necessity for use of force exists, state agents would still be in violation of the right to life if the force used is considerably disproportionate.²⁵⁰ This does not, however, require exact proportionality of the results but of the intended force and the legitimate aim.²⁵¹ Consistent with the protection of life principle, lethal force is proportionate only in cases where there is threat to life or a serious injury.²⁵² Thus, in cases where use of force might be the only way to stop and arrest a fleeing thief, shooting the thief to death would nonetheless be a violation of the proportionality requirement.

The fulfillment of duty doctrine justified state agents who shot non-dangerous fleeing prisoners in *Magno* and retreating attackers in *Delima* and *Valcorza* to prevent their escape. It can be deduced from jurisprudence that the Court considers offenders that have the status of fugitive as threats. However, this violates the proportionality requirement. To treat the act of running away as a threat to life, or a threat to cause serious physical injury, is highly speculative and based on mere suspicion alone. What international law requires is an actual serious threat before lethal force may be applied. Although in *Cabanlig*, there was a serious threat posed by the escaping detainee who was in possession of an automatic weapon,²⁵³ the same cannot be said in other cases where the Court accepted the defense of fulfillment of duty. In several cases, it was not even confirmed if the escaping offender possessed any weapon.²⁵⁴ Even shooting to death a person who was holding a bamboo

²⁴⁸ *Cabanlig*, 502 Phil. 564, 581.

²⁴⁹ CASEY-MASLEN & CONNOLLY, *supra* note 69, at 92–93; UNODC, *supra* note 175, at 17–18.

²⁵⁰ Alston, *supra* note 178, at ¶ 44.

²⁵¹ CASEY-MASLEN, *supra* note 207, at 9.

²⁵² *Id.* at 11.

²⁵³ *Cabanlig*, 502 Phil. at 578.

²⁵⁴ *Magno*, 8 Phil. 314; *Valcorza*, 140 Phil. 651.

lance while running²⁵⁵ is highly disproportionate. Under the self-defense rule, this is not justified.

3. Violation of the Non-Discrimination Principle

The basis of police use of lethal force is the level of threat offered by offenders.²⁵⁶ However, Philippine laws offer different levels of protection to offenders depending on whom they are evading.²⁵⁷ Suppose an offender had just attacked a private person (e.g., hit with a stone), but later on desisted and ran away. The private person attacked cannot claim self-defense if he kills the fleeing attacker, because necessity and proportionality are absent. Thus, laws and jurisprudence implicitly afford the attacker his right to life in this situation.

Suppose another offender had just attacked a police officer (e.g., hit with a stone) but he desisted and ran away. The officer can claim justification under the fulfillment of duty doctrine and the fleeing felon rule if he shoots the fleeing offender dead. These rules do not require necessity and proportionality as provided under international law. Implicitly, these rules do not grant the right to life to the fleeing offender. This is an obvious contravention against the principle of equal protection and benefit of laws. The two offenders pose the same level of threat that do not require lethal force under international law. However, Philippine laws and courts recognize the right to life to the one fleeing from a private individual, but they deem such right forfeited with respect to an offender who is fleeing from state agents.

There are cases of police use of force in the Philippines where the self-defense rule is applied as an analytical lens instead of the fulfillment of duty doctrine. This practice demonstrates the unequal treatment of offenders depending on the doctrine used in the case. As noted, self-defense requires absolute necessity and proportionality. However, the fulfillment of duty doctrine does not. Thus, in police use of force cases in the Philippines where self-defense is applied, the Court tends to recognize the victim's right to life. But the same cannot be said in cases where fulfillment of duty doctrine is applied.

²⁵⁵ *Delima*, 46 Phil. 738.

²⁵⁶ Christof Heyns, Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, at ¶ 29, U.N. Doc. A/66/330 (2011).

²⁵⁷ *Cabanlig*, 502 Phil. 564, 575–76.

In *Torres v. Sandiganbayan*,²⁵⁸ for example, the victim lunged a six-inch knife at the police officer who was two meters away.²⁵⁹ The victim did not hit the officer who moved back and drew his firearm.²⁶⁰ The officer warned the victim that he would shoot him if he attacked again; however, the victim lunged towards the officer again but did not hit the latter.²⁶¹ The victim stumbled and went past the officer, and in an instant, the officer shot him at the back.²⁶² The Supreme Court used the self-defense rule to analyze the case and acknowledged the presence of unlawful aggression by the victim and lack of sufficient provocation from the officer.²⁶³ It held that there was no reasonable necessity of the force used by the officer and stated that the officer could have just struck the victim with his gun or shot at a non-vital body part.²⁶⁴ Consequently, the Court affirmed the officer's conviction for the crime of homicide albeit with a reduced sentence.

However, if the Court applied the fulfillment of duty doctrine as an analytical lens in *Torres*, the result would be different. For instance, in *Delima*, the offender struck the officer with a bamboo lance, but the officer managed to dodge it.²⁶⁵ The offender resumed his flight and did not stop after several warnings. The Court justified the officer's act of shooting to kill the offender to prevent his escape under the fulfillment of duty doctrine. In *Torres*, the Court required proportionality, while it did not in *Delima*. This disparity is clearly contrary to the Constitution's equal protection clause and international law's equal protection principle.

V. CONCLUSION

The trend of modern criminal law is moving towards a human rights-centered approach.²⁶⁶ Unfortunately, the fulfillment of duty doctrine, as a colonial legacy, is more state-centric instead of human rights-centric. As a result, Philippine courts miss the centrality of human dignity and human rights in the analysis of police use of force cases. Instead, courts put more emphasis

²⁵⁸ 227 Phil. 128 (1986).

²⁵⁹ *Id.* at 133.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* at 132.

²⁶³ *Id.* at 133.

²⁶⁴ *Id.*

²⁶⁵ *Delima*, 46 Phil. 738, 739.

²⁶⁶ See INTERNATIONAL COMMISSION OF JURISTS, A HUMAN RIGHTS-BASED APPROACH TO CRIMINAL LAW: PRACTITIONERS' GUIDE 32 (2024), at https://www.icj.org/wp-content/uploads/2025/01/Practitioner-guideline_Final-MS-17.12.24-1.pdf.

on state agents' duty to effect arrests and the offender's obligation to surrender. These objectives, no doubt, are important in a society. However, as already shown, neither of them is a legitimate objective for the use of deadly force.

In general, this doctrine tends to use the offender's status as a proxy for the threat or danger they present. The use of the offender status as proxy to threat is akin to the rules in armed conflict situations which rely on the enemy's status as basis for use of force.²⁶⁷ The rules of law enforcement under international law are different. The basis for the use of force in law enforcement is not the offender's status or participation in hostilities, but the *suspected guilt of the offender or offender threat*.²⁶⁸

With the continued application of the fulfillment of duty doctrine, the Philippines is violating international human rights law, especially the right to life of offenders. Necessity and proportionality, the two pillars of use of force, are absent in most cases where this doctrine was applied and police killings of fleeing offenders were justified. This is unacceptable under the regime of international human rights law. The right to life demands that the same principles of necessity and proportionality govern all instances of use of force regardless of the offender's status.²⁶⁹

It must be noted that the Philippine National Police (PNP) has included its use of force policy in its POP Manual²⁷⁰ and the PNP Guidebook on Human Rights-Based Policing ("PNP Guidebook"). However, the PNP Guidebook abbreviated phrases only from the Code of Conduct²⁷¹ and does not appear to provide clear guidelines on actual scenarios of use of force, especially with regard to fleeing offenders. It provides a use of force continuum, which requires a specific level of force for every level of threat.²⁷² The POP Manual is more specific. It requires imminence, level of threat, and proportionality, especially through its use of force continuum.²⁷³ However, it does not provide guidelines with regard to fleeing offenders on foot. Nevertheless, it provides for specific guidelines on hot pursuit of fleeing

²⁶⁷ MELZER, *supra* note 191.

²⁶⁸ Heyns, *supra* note 256, at ¶¶ 73–74.

²⁶⁹ See General Comment No. 36., *supra* note 159, at ¶¶ 12, 61.

²⁷⁰ Phil. Nat'l Police, *supra* note 245, at 7–12.

²⁷¹ PHIL. NAT'L POLICE, PNP GUIDEBOOK ON HUMAN RIGHTS BASED-POLICING, 20–21 (2013), at https://akg.pnp.gov.ph/wp-content/uploads/2023/01/pnp_guidebook_on_human_rights_based_policing1.pdf.

²⁷² *Id.* at 50–56.

²⁷³ Phil. Nat'l Police, *supra* note 245, 8–12.

vehicles, which are compliant with international standards.²⁷⁴ Unfortunately, this might be overruled by the fulfillment of duty doctrine, which is also cited by the POP Manual as a rule to be followed.²⁷⁵ This contradiction, as well as the persistence of problematic judicial interpretations, underscores the need to align the doctrine's interpretation with constitutional law, international law, and contemporary law enforcement standards.

The findings in this paper are not without practical implications. Litigants can challenge, in their respective cases, the defense of fulfillment of duty when necessity and proportionality are absent. This will be possible for the following reasons: *First*, blind adherence to precedence is not anymore the rule.²⁷⁶ Courts must strive to be right in all cases by interpreting the law based on “changes in law or public policy, evolving conditions, or the most pressing considerations of justice.”²⁷⁷ The colonial practice of justifying police officers who shot to kill fleeing suspects and prisoners, even in the absence of necessity and proportionality, should be deemed supplanted by the post-World War II emphasis on human rights standards and principles in use of force cases. Courts should be quick to “revis[e] the interpretation of a legal provision to make it more harmonious with the Constitution and, whenever applicable, provisions of treaties that have the effect of law in our jurisdiction.”²⁷⁸

Second, the Supreme Court has already acknowledged the applicability of human rights principles under the United Nations Code of Conduct for Law Enforcement Officials and the Basic Principles as available safeguards in use of force situations. As the Court said: “These instruments uphold the principles of legality, proportionality, necessity, and accountability in situations involving the use of force by law enforcers.”²⁷⁹ Thus, such principles must be considered when the police enforce, and the courts interpret, the law.

Third, Article 11, Paragraph 5 of the Revised Penal Code is not facially invalid. What is invalid is its interpretation that justifies the killing of suspects and prisoners who merely flee at the time of the killing. The doctrine should be abandoned in cases involving the *killing of fleeing non-dangerous suspects and prisoners*.²⁸⁰ These situations typically involve suspects or prisoners who merely

²⁷⁴ *Id.* at 8.

²⁷⁵ *Id.*

²⁷⁶ *In re Fernandez v. Mitchell*, 59 Phil. 30, 36 (1933).

²⁷⁷ *Aquino v. Aquino*, 918A Phil. 371, 390 (2021).

²⁷⁸ *Id.* at 387.

²⁷⁹ *Lagman v. Medialdea*, 847 Phil. 317, 407 (2019).

²⁸⁰ *See, e.g., Magno*, 8 Phil. 314.

flee unarmed, and made no prior attack against the officers, regardless of gravity. In addition, the doctrine should not be used to justify *killing to stop fleeing attackers*.²⁸¹ In these cases, the fleeing suspects or prisoners have made a prior attack against the officers whether armed or not. Shooting to kill these suspects is unjustifiable under the self-defense rule because unlawful aggression has already ceased. However, the doctrine is applicable if the offender is armed with a weapon “where the threat to the life of a law enforcer [or civilian] is already imminent.”²⁸²

To conclude, the ultimate reason why the State and the police exist is for the protection of the rights of the citizens.²⁸³ As John Locke noted, private citizens surrendered some of their rights, especially the right to retaliate against the State, in exchange for the protection of their rights. A private citizen is no match against the whole state apparatus in law enforcement. The retention and protection of the citizen’s right to life acts as a balancing mechanism against such monopoly of force and violence. Thus, States that allow the arbitrary deprivation of life of their citizens betray the very calling for which they were founded.

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²⁸¹ See, e.g., *Delima*, 46 Phil 738.; *Valcorza*, 140 Phil. 651.

²⁸² *Cabanlig*, 502 Phil. 564, 580.

²⁸³ See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, ¶¶ 87–89 (J.W. Gough, ed., 3rd ed. 1966) (1690).