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G.R. No. 183871 LOURDES D. RUBRICO, ET AL. *versus* GLORIAMACAPAGAL-ARROYO, ET AL.

Promulgated:

February 18, 2010

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SEPARATE OPINION

CARPIO MORALES, *J.:*

I concur with the *ponencia* in all respects, except its treatment of the doctrine of command responsibility.

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The *ponencia*'s ambivalence on the applicability of the doctrine of command responsibility overlooks its general acceptance in public international law, which warrants its incorporation into Philippine law via the incorporation clause of the Constitution.

Under Article II, Section 2 of the Constitution, the Philippines adopts the generally accepted principles of international law as part of the law of the land. Based on the clarification provided by then Commissioner Adolfo Azcuna, now a retired member of this Court, during the deliberations of the Constitutional Commission, the import of this provision is that the incorporated law would have the force of a statute.

The most authoritative enumeration of the sources of international law, Article 38 of the Statute of the International Court of Justice (ICJ Statute), does not specifically include "generally accepted principles of international law." To be sure, it is not quite the same as the "general principles of law" recognized under Article 38(1)(c) of the ICJ Statute. Renowned publicist Ian Brownlie suggested, however, that "general principles of international law" may refer to rules of customary law, to general principles of law as in Article 38(1)(c), or to logical

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propositions resulting from judicial reasoning on the basis of existing international law and municipal analogies.

Indeed, **judicial reasoning** has been the bedrock of Philippine jurisprudence on the determination of generally accepted principles of international law and consequent application of the incorporation clause.

In *Kuroda v. Jalandoni,* the Court held that while the Philippines was not a signatory to the Hague Convention and became a signatory to the Geneva Convention only in 1947, a Philippine Military Commission had jurisdiction over war crimes committed in violation of the two conventions before 1947. The Court reasoned that the rules and regulations of the Hague and Geneva Conventions formed part of generally accepted principles of international law. *Kuroda* thus recognized that principles of customary international law do not cease to be so, and are in fact reinforced, when codified in multilateral treaties.

In *International School Alliance of Educators v. Quisumbing,* the Court invalidated as discriminatory the practice of International School, Inc. of according foreign hires higher salaries than local hires. The Court found that, among other things, there was a general principle against discrimination evidenced by a number of international conventions proscribing it, which had been incorporated as part of national laws through the Constitution.

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The Court thus subsumes within the rubric of "generally accepted principles of international law" both "international custom" and "general principles of law," two distinct sources of international law recognized by the ICJ Statute.

Respecting the doctrine of command responsibility, a careful scrutiny of its origin and development shows that it is a widely accepted general principle of law if not, also, an international custom.

The doctrine of command responsibility traces its roots to the laws of war and armed combat espoused by ancient civilizations. In a 1439 declaration of Charles VII of Orleans, for instance, he proclaimed in his Ordinances for the Armies:

> [T]he King orders each captain or lieutenant be held responsible for the abuses, ills, and offences committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice so that the said offender be punished in a manner commensurate with his offence, according to these Ordinances. If he fails to do so or covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offence, as if he has committed it x x x . (underscoring supplied.)

The first treaty codification of the doctrine of command responsibility was in the Hague Convention IV of 1907. A provision therein held belligerent nations

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responsible for the acts of their armed forces, prefiguring the modern precept of holding superiors accountable for the crimes of subordinates if they fail in their duties of control, which is anchored firmly in customary international law.

The development of the command responsibility doctrine is largely attributable to the cases related to World War II and subsequent events.

One prominent case is the *German High Command Case* tried by the Nuremberg Tribunal, wherein German officers were indicted for atrocities allegedly committed in the European war. Among the accused was General Wilhelm Von Leeb, who was charged with implementing Hitler's Commissar and Barbarossa Orders, which respectively directed the murder of Russian political officers and maltreatment of Russian civilians. Rejecting the thesis that a superior is automatically responsible for atrocities perpetrated by his subordinates, the tribunal acquitted Von Leeb. It acknowledged, however, that a superior's *negligence* may provide a proper basis for his accountability even absent direct participation in the commission of the crimes. Thus:

> [C]riminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. (underscoring supplied.)

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In *In re Yamashita,* the issue was framed in this wise:

> The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to **control** the troops under his command for the *prevention* of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his *failure to take such measures* when violations result. (emphasis, underscoring and italics supplied.)

Resolving the issue in the affirmative, the Court found General Tomoyuki Yamashita guilty of **failing to control** the members of his command who committed war crimes, even without any direct evidence of instruction or knowledge on his part.

The post-World War II formulation of the doctrine of command responsibility then came in Protocol I of 1977, Additional Protocol to the Geneva Conventions of 1949, Article 86 of which provides:

> 1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

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> 2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate **does not absolve his superiors** from penal or disciplinary responsibility, as the case may be, if they knew, or had information that should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach *and* if they did not take all feasible measures within their power to prevent or repress the breach. (emphasis, underscoring and italics supplied.)

The doctrine of command responsibility has since been invariably applied by *ad hoc* tribunals created by the United Nations for the prosecution of international crimes, and it remains codified in the statutes of all major international tribunals.

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

While the exact formulation of the doctrine of command responsibility varies in different international legal instruments, the variance is more apparent than real. The Court should take judicial notice of the core element that permeates these formulations – a commander's **negligence** in preventing or repressing his subordinates' commission of the crime, or in bringing them to justice thereafter. Such judicial notice is but a necessary consequence of the application of the

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incorporation clause vis-à-vis the rule on mandatory judicial notice of international law.

That proceedings under the Rule on the Writ of *Amparo* do not determine criminal, civil or administrative liability should not abate the applicability of the doctrine of command responsibility. Taking *Secretary of National Defense v. Manalo* and *Razon v. Tagitis* in proper context, they do not preclude the application of the doctrine of command responsibility to *Amparo* cases.

Manalo was actually emphatic on the importance of the right to security of person and its contemporary signification as a guarantee of protection of one's rights by the government. It further stated that protection includes conducting effective investigations, organization of the government apparatus to extend protection to victims of extralegal killings or enforced disappearances, or threats thereof, and/or their families, and bringing offenders to the bar of justice.

Tagitis, on the other hand, cannot be more categorical on the application, at least in principle, of the doctrine of command responsibility:

> Given their mandates, the PNP and PNP-CIDG officials and members were the ones who were remiss in their duties when the government completely failed to exercise the extraordinary diligence that the *Amparo* Rule requires. **We hold these organizations accountable through their incumbent Chiefs who**, under this Decision, **shall carry the personal responsibility of seeing to it that**

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> **extraordinary diligence**, in the manner the *Amparo* Rule requires, **is applied in addressing the enforced disappearance** of Tagitis. (emphasis and underscoring supplied.)

Neither does Republic Act No. 9851 emasculate the applicability of the command responsibility doctrine to *Amparo* cases. The short title of the law is the *"Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity."* Obviously, it should, as it did, only treat of superior responsibility as a ground for criminal responsibility for the crimes covered. Such limited treatment, however, is merely in keeping with the statute's purpose and not intended to rule out the application of the doctrine of command responsibility to other appropriate cases.

Indeed, one can imagine the innumerable dangers of insulating high-ranking military and police officers from the coverage of reliefs available under the Rule on the Writ of *Amparo*. The explicit adoption of the doctrine of command responsibility in the present case will only bring *Manalo* and *Tagitis* to their logical conclusion.

In fine, I submit that the Court should take this opportunity to state what the law ought to be if it truly wants to make the Writ of *Amparo* an effective remedy

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for victims of extralegal killings and enforced disappearances or threats thereof. While there is a genuine dearth of

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evidence to hold respondents Gen. Hermogenes Esperon and P/Dir. Gen. Avelino Razon accountable under the command responsibility doctrine, the *ponencia's* hesitant application of the doctrine itself is replete with implications abhorrent to the rationale behind the Rule on the Writ of *Amparo.*

CONCHITA CARPIO MORALES

Associate Justice

4 RECORD OF THE CONSTITUTIONAL COMMISSION 772 (1986). The Commission unanimously voted in favor of the provision, with no abstentions.

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(b) international custom, as evidence of a general practice accepted as law;

(c) general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, Art. 38(1).

IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW *Sixth Edition* 18 (2003).

83 Phil. 171, 178 (1949).

G.R. No. 128845, June 1, 2000, 333 SCRA 13.

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Text culled from Theodor Meron, Henry's Wars and Shakespeare's Laws 149 N.40, Article 19 (Eng. Tr. 1993); Louis Guillaume De Vilevault & Louis Brequigny, Ordonnances Des Rois De France De La Troisieme Race XIII, 306 (1782).

Respecting the Laws and Customs of War on Land, October 18, 1907, U.S.T.S. 539, 36 Stat. 2277.

Id., Article 3.

Vide *Prosecutor v. Mucic*, International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber), judgment of February 20, 2001, para. 195. For command responsibility in international armed conflict, *vide* *Prosecutor v. Hadzihasanovic*, International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber), decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility of July 16, 2003, paras. 11 et seq.

United Nations War Crimes Commission, XII Law Reports of Trials of War Criminals 1, 76 (1948).

327 US 1 (1946).

The Geneva Conventions consist of four treaties concluded in Geneva, Switzerland that deal primarily with the treatment of non-combatants and prisoners of war. The four Conventions are:

> First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (first adopted in 1864, last revised in 1949)
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> Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (first adopted in 1949, successor to the 1907 Hague Convention X)
>
> Third Geneva Convention relative to the Treatment of Prisoners of War (first adopted in 1929, last revised in 1949)
>
> Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (first adopted in 1949, based on parts of the 1907 Hague Convention IV).

Protocol I Additional to the Geneva Conventions of August 12, 1949 and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827 (1993), Annex, Article 7(3); Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), Annex, Article 6(3); Statute of the Special Court

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for Sierra Leone, Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, January 16, 2002, Annex, Article 6(3); Statute of the Khmer Rouge Tribunal, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Article 29; Rome Statute of the International Criminal Court, circulated as document A/CONF. 183/9 of July 17, 1998 and corrected by process-verbaux of November 10, 1998, July 12, 1999, November 30, 1999, May 8, 2000, January 17, 2001 and January 16, 2002, Article 28; Statute of the Special Tribunal for Lebanon, UN Doc. S/RES/1757 (2007), Article 3(2).

Section 1, Rule 129 of the Rules of Court provides in relevant part:

Section 1. *Judicial notice, when mandatory.* - A court shall take judicial notice, without the introduction of evidence, of . . . the law of nations . . .

G.R. No. 180906, October 7, 2008, 568 SCRA 1.

G.R. No. 182498, December 3, 2009.

Supra note 16 at 57.

AN ACT DEFINING AND PENALIZING CRIMES AGAINST INTERNATIONAL HUMANITARIAN LAW, GENOCIDE AND OTHER CRIMES AGAINST HUMANITY, ORGANIZING JURISDICTION, DESIGNATING SPECIAL COURTS, AND FOR RELATED PURPOSES; SIGNED INTO LAW ON DECEMBER 11, 2009.

Section 10. *Responsibility of Superiors.* - In addition to other grounds of criminal responsibility for crimes defined and penalized under this Act, a superior shall be criminally responsible as a principal for such crimes committed by subordinates under his/her effective command and control, or effective authority and control as the case may be, as a result of his/her failure to properly exercise control over such subordinates, where:

(a) That superior either knew or, owing to the circumstances at the time, should have known that the subordinates were committing or about to commit such crimes;

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

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