

THE TIME IS NIGH FOR LEGISLATIVE RECOGNITION OF RESPONSIBILITY OF SUPERIORS IN THE POLICE FORCE FOR ACTS OF THEIR SUBORDINATES

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Introduction

Police brutality is a recurring phenomenon in Sri Lanka. Notwithstanding the existence of a long line of jurisprudence of the Supreme Court which has denounced police brutality and held that brutal force inflicted by police officers often amount to violation of fundamental rights of victims, there is recurring incidence of the same. The author extrapolates principles of responsibility of commanders and superiors as recognized in international criminal law, to propose the case for legislative/regulatory recognition of criminal responsibility of police superiors for illegal acts of their subordinates.

The author argues that the absence of a legislative/regulatory framework to attribute penal sanctions on superior police officers for illegal acts of subordinates, contributes to the recurrence of incidence

of police brutality. This essay discusses the need and positive attributes of adopting legislation/regulations by which superiors of the police force may be held liable for illegal acts of their subordinates.

The concept of superior and command responsibility in international law

Responsibility of superiors and commanders for acts of their subordinates has been recognized in international criminal law. Article 28 of the Statute of the International Criminal Court¹ recognizes the responsibility of military and non-military leaders for criminal acts committed by their subordinates.

Responsibility of military commanders includes the failure to exercise control over

¹ Article 28 of the UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998 [hereinafter 'ICC Statute'].

forces under his effective command and control.² A commander is responsible if he knew or, owing to the circumstances, should have known that forces under his control were committing or about to commit crimes.³ Failure to take necessary and reasonable measures, within his power, to prevent or repress criminal activities or submit subordinates to competent authorities for investigation and prosecution attracts liability.⁴

Responsibility of superiors has also been recognized by the ICC Statute. A superior is criminally responsible for crimes of subordinates under his effective control or authority, for failure to exercise proper control over subordinates.⁵ If a superior had knowledge of the commission of crimes by subordinates, or that they were about to commit crimes, which concerned activities within the effective responsibility and control of the superior, and the superior consciously disregarded the same, he is held liable.⁶ Failure to take necessary and

reasonable measures, within a superior's power, to repress crimes or to report them to competent authorities for investigation and prosecution also attracts liability.⁷ In addition to the ICC Statute, responsibility of superiors has been recognized by several instruments of international criminal law.⁸

There exists a gamut of writing and jurisprudence relating to superior responsibility in international law. This article discusses the most salient aspects of the principle of superior responsibility to support the contentions of the author.

Attributing responsibility to a superior requires the relationship between the superior and subordinates to be established, along with the criminal acts of

² ICC Statute, Art.28(a).

³ ICC Statute, Art.28(a)(i).

⁴ ICC Statute, Art.28(a)(ii).

⁵ ICC Statute, Art.28(b).

⁶ ICC Statute, Art.28(b)(i)&(ii).

⁷ ICC Statute, Art.28(b)(iii).

⁸ International Criminal Tribunal for the Former Yugoslavia, Security Council Resolution 827, 25 May 1993, [hereinafter 'ICTY'] Art.7(3); International Criminal Tribunal for Rwanda, Security Council Resolution 955, 8 November 1994, [hereinafter 'ICTR'] Art.6(3); Special Panels in East Timor, UN Transitional Authority in East Timor Regulation No. 2000/15, 6 June 2000 (UNTAET Regulation No. 2000/15); Statute of the Special Court for Sierra Leone, 16 January 2002 [hereinafter 'SCSL'] Art.6(3); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, [hereinafter 'ECCC'] Art.29; Statute of the Iraqi Special Tribunal for Crimes against Humanity, Law No. 1 of 2003, as amended, 18 October 2005, Art.15(4); Statute of the Special Tribunal for Lebanon, 29 March 2006, [hereinafter 'STL'] Art.3(2).

subordinates.⁹ It must be established that the superior knew or had reason to know that the subordinates were committing or about to commit the alleged crimes and that the superior failed to take reasonable measures to prevent crimes or punish subordinates.¹⁰ The level of control that a superior must possess over a subordinate is characterized as effective control.

Effective control is the material ability of a superior to prevent or punish criminal conduct.¹¹ Control of a superior is the formal and actual position of authority over a subordinate.¹² ‘Control’ has been specifically used to attribute responsibility to civilian leaders¹³ and the existence of a *de jure* or *de facto* superior-subordinate relationship has been accepted to meet the threshold of effective control.¹⁴

⁹ ICTR, *Ndindiliyimana et al.*, Trial Chamber [hereinafter ‘TC’] II, ICTR-00-56-T, 17 May 2011, ¶126. See also ¶1916.

¹⁰ *ibid.*

¹¹ ICTR, *Nyiramasuhuko et al.*, TC II, ICTR-98-42-T, 24 June 2011, ¶121. See also ICTR, *Bizimungu et al.*, TC II, ICTR-99-50-T, 30 September 2011, ¶1872; ICTY, *Stakic*, TC II, IT-97-24-T, 31 July 2003, ¶459.

¹² ICTY, *Aleksovski*, TC, IT-95-14/1-T, 25 June 1999, ¶74.

¹³ ICTY, *Mucic et al.*, Appeal Chamber [hereinafter ‘AC’] IT-96-21-A, 20 February 2001, ¶196.

¹⁴ ICTY, *Kordic and Cerkez*, AC, IT-95-14/2-A, 17 December 2004, ¶839.

Failure to prevent, repress or punish subordinates attracts liability for the superior. If a superior had the material ability to prevent crimes of subordinates, he may be found liable.¹⁵ Additionally, failure to take ‘necessary’ and ‘reasonable’ measures to prevent or repress crimes of subordinates attracts liability.¹⁶ Necessary measures are those which are appropriate for a superior to discharge his functions while reasonable measures are those which fall within the material power of the superior.¹⁷ Failure to exercise control properly, and failure to take measures to prevent¹⁸ or punish crimes,¹⁹ attracts responsibility.

¹⁵ ICTY, *Mucic et al.*, TC, IT-96-21-T, 16 November 1998, ¶¶394-395. See also ICTY, *Krnjelac*, TC II, IT-97-25-T, 15 March 2002, ¶95; ICTY, *Aleksovski*, AC, IT-95-14/1-A, 24 March 2000, ¶¶73-74, 81; SCSL, *Taylor*, TC II, SCSL-03-01-T, 18 May 2012, ¶501. ICC, *Bemba*, Pre-Trial Chamber [hereinafter ‘PTC’] II, ICC-01/05-01/08-424, 15 June 2009, ¶495.

¹⁶ ICTR, *Bagilishema*, TC I, ICTR-95-1A-T, 7 June 2001, ¶47. See also ICTY, *Halilovic*, TC I, IT-01-48-T, 16 November 2005, ¶74.

¹⁷ ICTY, *Halilovic*, AC, IT-01-48-A, 16 October 2007, ¶63. See also ICTY, *Oric*, AC, IT-03-68-A, 3 July 2008, ¶177.

¹⁸ Elies van Sliedregt, “Command Responsibility at the ICTY-Three Generations of Case Law and Still Ambiguity” in Bert Swart, Alexander Zahar, and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, 2011, p.392.

¹⁹ SCSL, *Fofana and Kondewa*, TC I, SCSL-04-14-T, 2 August 2007, ¶248. See also *Limaj et al.*, TC II, IT-03-66-T, 30 November 2005, ¶528; ICTY, *Halilovic*, TC I, IT-01-48-T, 16 November 2005, ¶89.

The *mens rea* attributed to superiors arises from the failure of the superior to take measures to prevent or punish their crimes.²⁰ Jurists have stated that express evidence of knowledge or inferential proof of knowledge based on the widespread nature of offences may be used to attribute knowledge of crimes of subordinates to superiors.²¹ International jurisprudence has held that in the absence of direct evidence of knowledge of the superior, it must be established with circumstantial evidence.²² Circumstantial evidence *inter alia* the number of illegal acts, their type, scope, time of occurrence, logistics and *modus operandi* have been used to determine the *mens rea* or knowledge of a superior.²³

Mens rea has been presumed in instances where a superior ‘should have known’ that a subordinate was committing or about to

commit a crime or for failure to acquire such knowledge.²⁴ Additionally, actual knowledge, defined as the awareness that illegal acts were committed or about to be committed, has been used to attribute *mens rea* to a superior.²⁵ However, it has also been suggested that even in the absence of proof of actual knowledge, a superior may be found liable for failure to obtain information about the conduct of subordinates.²⁶ Therefore, varying degrees of *mens rea* have been utilized to attribute responsibility to superiors. Thus, international case law and writings of eminent jurists suggest that a subjective approach must be taken to ascertaining *mens rea* or knowledge of a superior.

Jurisprudence of Sri Lankan courts

²⁰ Chantal Meloni, *Command Responsibility in International Criminal Law*, T.M.C. Asser, 2010, pp.83-84.

²¹ Jenny S. Martinez, “Understanding Mens Rea in Command Responsibility From Yamashita to Blaskic and Beyond”, 5(3) *Journal of International Criminal Justice*, 2007, p.652. See also ICTR, *Karemera and Ngirumpatse*, TC III, ICTR-98-44-T, 2 February 2012, ¶1530.

²² ICTY, *Mucic et al.*, TC, IT-96-21-T, 16 November 1998, ¶386.

²³ *Ibid.* See also ICC, *Bemba*, PTC II, Decision on the Confirmation of Charges, ICC-01/05-01/08-424, 15 June 2009, ¶429-431; ICTY, *Blaskic*, TC, IT-95-14-T, 3 March 2000, ¶54-57, 308.

²⁴ ICTY, *Mucic et al.*, TC, IT-96-21-T, 16 November 1998, ¶388, 393. See also ICTY, *Blaskic*, TC, IT-95-14-T, 3 March 2000, ¶322; *U.S.A. v Yamashita*, United States Military Commission, Vol. IV, Law Reports, p.82; *U.S.A. v Soemu Toyoda*, Official Transcript of Record of Trial, 6 September 1949, p.5006.

²⁵ SCSL, *Taylor*, TC II, SCSL-03-01-T, 18 May 2012, ¶497.

²⁶ *Ibid* p.652-3.

The Sri Lankan judiciary has given recognition to the liability of superiors for acts of subordinates. The liability of a Commanding Officer of the Navy was recognized for failure to prevent the torture of a detainee.²⁷ The Commanding Officer was precluded from stating that he was unaware of the torture of the detained officer, since no complaint was made to him. Fernando J., held that:

“.....responsibility and liability is not restricted to participation, authorization, complicity and/or knowledge. His duties and responsibilities as the Commanding Officer were much more onerous. In the Forces, command is a sacred trust, and discipline is paramount. He was under a duty to take all reasonable steps to ensure that persons held in custody (like the petitioner) were treated humanely and in accordance with the law. That included monitoring the activities of his subordinates, particularly those who had contact with detainees. The fact that the petitioner was being held in custody under his specific orders made

his responsibility somewhat greater.”²⁸

Thus, the Commanding Officer was found liable for torture of a detainee by his subordinates. The said judgment pertains to the Navy. However the principle elucidated in the judgment has been applied to superiors of the police force.

An Officer-in-Charge of a police station has been held liable for violation of Article 11 of the Constitution, since he had control and supervision over subordinates who violated the fundamental rights of a detainee.²⁹

“As Officer-in-Charge he had overall responsibility to supervise and control the conduct of his subordinates, and it was he who had the power to release the Petitioner. He is therefore liable if the Petitioner's arrest and/or detention were unlawful, and for any torture that occurred at the Station.”³⁰

Additionally, a superior has been held to incur liability for his acquiescence of illegal

²⁷ *Deshapriya v. Captian Weerakoon, Commanding Officer, Sri Lanka Navy Ship “Gemunu” and Others* 2003 (2) Sri L.R.99.

²⁸ *Ibid* p.103.

²⁹ *Sanjeewa Attorney-at-Law (on behalf of Gerald Perera) v. Suraweera, OIC Wattala and Others* 2003 (1) Sri L.R.317.

³⁰ *Ibid* p.322.

acts of subordinates.³¹ Prolonged failure to give effect to the directions designed to prevent violation of Article 11 and failure to ensure that a proper investigation, followed by disciplinary or criminal proceedings, has been held to justify inference of acquiescence or condoning of illegal acts, if not also of approval and authorization.³² Deliberate encouragement, tolerating and acquiescence of inflicting acts of torture and inhuman treatment of a detainee by superior police officers has been recognized as rendering superior officers to be personally liable for illegal acts of subordinates.³³ Kulatunga J., stated that:

*“If the injuries to the petitioner were inflicted by subordinate police officers without the complicity of the 1st and 2nd respondents one would have expected these two respondents to have sent the petitioner for medical treatment. The failure to do so confirms the allegation that the petitioner was tortured on their orders or instigation...”*³⁴

³¹ *Ibid* p.328.

³² *Ibid* p.329.

³³ *Ratnapala v Dharmasiri HQI Ratnapura* (1993) 2 Sri L.R.224.

³⁴ *Ibid* p.236.

Responsibility of superior officers has received judicial recognition in respect of superior prison officers.³⁵ Failure to prevent ill treatment of a detainee leading to the violation of the law, Prison Rules and International Conventions, was held to violate the detainee’s fundamental rights under Article 11 and 13(4). Court held that:

*“.....Officer In Charge, the Chief Jailor and the Superintendent of the Negombo prison, respectively, were under a duty to take all reasonable steps to ensure that the persons kept in the Prison are treated with kindness and humanity.....On a consideration of the totality of the circumstances of this case, I declare that there had been dereliction of duties by the 3rd, 4th and 5th respondents for not being able to prevent the assault on the deceased by some of the Prison Officials and therefore they too are responsible for the infringement of the deceased's fundamental rights.....”*³⁶

It is patently clear that the jurisprudence of Sri Lanka has given recognition to the responsibility of superior officers for illegal

³⁵ *Lama Hewage Lal (Deceased) and Others v. OIC, Seeduwa Police Station and Eight Others* 2005 (1) Sri L.R.40.

³⁶ *Ibid* p.54.

acts of subordinates. Notwithstanding such recognition, police brutality is a continuous recurrence, often with the sanction of superiors and/or by their failure to prevent and/or punish such illegal acts. Therefore, the author argues that the time is nigh for legislative/regulatory recognition of responsibility of superiors in the police force for illegal acts of subordinates.

Legislative or regulatory recognition of responsibility of superiors and commanders

In the absence specific laws to recognize responsibility of superiors for acts of subordinates, there exists no incentive for superiors to prevent and/or punish illegal acts of subordinates. This glaring lacuna has led to recurrence of incidence of police brutality of detainees.

In this context, the National Police Commission (NPC) can play a vital role in finding superiors responsible for acts of subordinates, through disciplinary control

and dismissal of police officers.³⁷ The NPC is empowered to entertain and investigate public complaints against police officers³⁸ and Rules of Procedure for such public complaints have been adopted.³⁹ Therefore, legislation/regulations must be introduced to enable a detainee or any person to complain of police brutality, to the NPC. Legislation/regulations must be introduced to provide for a specific framework to conduct investigations to allegations of police brutality and institute disciplinary action against superiors for acts of subordinates.

There is a lacuna of specific provisions pertaining to complaints against police brutality and superior responsibility for acts of subordinates. In the absence of such specific provisions, disciplinary action taken against superiors may not be retributive or punitive. Therefore, legislation/regulations must make specific provision to recognize the responsibility of superiors for illegal acts of subordinates,

³⁷Constitution of the Democratic Socialist Republic of Sri Lanka [hereinafter Constitution], Art.155G(1)(a).

³⁸ Constitution, Art.155G(2).

³⁹ Rules of Procedure for Public Complaints Investigation Gazette Extraordinary 2047/22 dated 28.11.2017.

combined with punitive sanctions being imposed on them, if found guilty.

Drawing from the recognition of superior responsibility in international criminal law, the legislative/regulatory framework must recognize liability of a superior for illegal acts of subordinates under his effective control or authority. The relationship of superior and subordinate must be clearly established to find a superior liable. If established, a superior may be responsible for failure to exercise proper control over subordinates. If a superior had knowledge of illegal activities of subordinates, or imminent commission of illegal activities, or if illegal activities came within the effective responsibility and control of the superior, and the superior consciously disregarded the same, he must be found liable for acts of subordinates. Failure to take necessary and reasonable measures within his power, to repress illegal activities or to report them to a competent authority such as the NPC for investigation and prosecution, must attract punitive sanctions against the superior.

Legislation/regulations must provide a yardstick to determine the illegality of acts of subordinates. Determining the illegality of acts of subordinates may not always be assessed objectively. In the absence of a definition of police brutality, torture or inhuman and degrading treatment of a detainee, a subjective approach may be taken towards ascertaining the illegality of acts of subordinates. Notwithstanding the lack of a definition of police brutality, torture or inhuman and degrading treatment, the NPC subjectively assess whether acts of subordinates were justified.

Legislation/regulations must therefore unambiguously draw the parameters for the element of *mens rea* or knowledge required of superiors when attributing responsibility for illegal acts of subordinates. Instances in which a superior has knowledge or the necessary *mens rea* to attract liability must be specified. The legislative/regulatory framework must also include guidelines or indicia to illustrate circumstantial evidence used to determining *mens rea*/knowledge. Failure to do so may result in superiors being averse to giving orders to

subordinates causing grave affectation to services rendered by the police.

In instances requiring spontaneous action, subordinates may be compelled to take action without formal orders from superiors. Legislation/regulations must provide for such situations, enabling the NPC to evaluate the orders to conduct spontaneous operations and the degree of involvement of the superior.

The existence of such a legislative/regulatory framework which attracts penal sanctions for infractions of subordinates on superiors contributes to deter illegal activities of subordinates, as superiors would exercise greater vigilance over subordinates. The possibility of being attributed criminal responsibility must be coupled with punitive sanctions such as delay and/or suspension of promotions, causing serious detriment to the career progression of superior officers. Such measures may deter superiors from authorizing and/or failing to prevent

and/or punish illegal acts of subordinates. This would contribute to reducing incidence of police brutality which is usually condoned and/or not punished by superiors.

Conclusion

Considering the deterrent created by introducing a legislative/regulatory framework to recognize responsibility of a superior for acts of subordinates, the author contends that the existence of a legislative/regulatory framework for finding superiors liable for failure to prevent and/or punish illegal acts of subordinates, may largely contribute to curtail incidence of police brutality. Such a framework must specify the scope of illegal acts provided for and make specific reference to the element of *mens rea* and knowledge required of a superior, to effectively be applied to the police force, to curtail recurrence of police brutality by subordinates of the police force.