

Lesson Series 45

Command responsibility

Summary

This lesson discusses the doctrine of command responsibility with regard to the police in Asia. Using cases studies from several countries, the lesson outlines the relationship between the impunity enjoyed by law enforcement officers and the absence of command responsibility within law enforcement agencies.

International provisions for command responsibility are also mentioned in the lesson.



COMMAND RESPONSIBILITY

A NEWLETTER ADDRESSED TO TOP RANKING POLICE OFFICERS IN SRI LANKA

October 2005

Volume-LNo. 3

A Statement by the Asian Human Rights Commission (AHRC)

Sri Lanka: Officers charged with criminal offenses protected by the Inspector General of Police

In reference to the interdiction of 106 policemen who have been charged for serious criminal offenses before Sri Lanka's high courts, a daily newspaper *Divyana* reported the country's Inspector General of Police (IGP) as saying that the officers should be allowed to continue at their posts until they are proven guilty. This statement in fact amounts to an obstruction of the legal process; under Sri Lankan law, all civil servants charged with criminal offenses should be interdicted until their criminal trials are completed. By expressing an opinion to the contrary, the IGP expects police officers to be treated differently from other civil servants.



A question to the police hierarchy from the average police officer:
Could you kindly tell me, Sir, unambiguously, should I stop returning suspects?

The IGP further accused the National Police Commission (NPC)—a constitutional authority under which the police department functions—of attempting to help criminal elements in the country by taking steps to interdict these officers. He was quoted as saying, "Some human rights organizations have a very sophisticated plan to fight against control of crime, and interdicting these officers is part of such a plan. The National Police Commission has also encouraged this." The IGP was also of the opinion that the police force may become ineffective due to the interdictions of these officers.

Contents: Statement - Officers charged with criminal offenses protected by the Inspector General of Police - FROM THE PRESS - Constitutional duties imposed upon the Inspector General of Police - Rules are meant to be broken, is that what police officers are being told? - Two forthcoming books - Some comments on the IGP's statements of support to interdicted officers - Four Police officers accused for bribery within two days



Theme: Command responsibility

The Issue

There is a significant absence of command responsibility within policing institutions throughout Asia. This results in the lack of accountability, which perpetuates a vicious cycle of abuse and impunity.

When police officers violate the rights of citizens and are not held responsible for their abuses, fear is instilled amongst the population while the police are encouraged to continue their behaviour. Similar sentiments are felt when senior officers protect their subordinates instead of disciplining them. In order for human rights to be protected and the rule of law to be upheld, law enforcement officers must be accountable to the law.

The Lessons

Lesson 1 discusses the relationship between command responsibility and the impunity enjoyed by state officials.

Lesson 2 outlines international legal provisions on command responsibility as well as domestic application of these provisions.

Cover photograph: *Command Responsibility* newsletter, vol. 1, no. 3, October 2005, AHRC

Lesson 1

A. The relationship between command responsibility and impunity

In October 2004 at least 85 people died at the hands of the military in Narathiwat, Thailand. The death of such a large number of persons in a single incident is under any circumstances a grave crime and a gross abuse of human rights. The gravity of the offence should be the determining factor in taking action for redress. However, according to Thai army commander-in-chief General Pravit Wongsuwan, “There is no disciplinary penalty for those holding the rank of general.” The three generals identified as having been primarily responsible for the killings were thus exonerated. They have since been moved to inactive posts, but can later apply for command positions.

The military principle of command responsibility is that the higher one’s rank the greater the onus when things go wrong. A high officer is more liable than a low one. In Thailand, however, it appears that the higher one goes the lesser one’s responsibility. And if one is promoted to general there is no responsibility at all.

... Equality before the law requires that all citizens be treated equally for their offences. The quality of citizenship is not a matter of military rank. A crime is a crime whether committed by the least important person in a society or the most important one [AHRC AS-26-2005, 9 March 2005].

In June 2004 officers from the Ramnagar police station, Uttar Pradesh, India requested for a villager to be sent to remand custody. The villager was arbitrarily detained and tortured, in violation of the country’s laws as well as guidelines issued by various constitutional courts. The following is the court order responding to the remand request, which details the misconduct of the police.

In the court of the Judicial First Class Magistrate Varanasi

Present: Mr. Prahlad Singh, Additional Civil Judge / 1st Class Judicial Magistrate

Today on 15-6-04 an accused named Mr. Vijay alias Chahetu Maurya son of Vanilal resident of Rampur village under the jurisdiction of Ramnagar police station Varanasi district, Uttar Pradesh was brought before me under police custody. I went through the medical report of the accused. Having observed the medical report I found that there are abrasions on his little finger of right hand of the accused and he has a wound in his right hand. Accused informed the court that he had been beaten by stick and there were injuries on his back. I made a close observation of the injuries of the accused and found that

on right and left side of his back there were dark marks of injuries. No medical inspection was done of these injuries. It seems that police has beaten the accused. Demand is being made by the police to give the accused on police remand. There is no ground of remand. Accused was brought to the court handcuffed, which goes against the direction of human rights commission. Further custody of the accused is refused. Accused may be released at once unconditionally. A copy of this order may be given to Senior Superintendent of Police Varanasi for his perusal and appropriate action.

(Signature)

Prahlad Singh
Additional Civil Judge
1st Class Judicial Magistrate
Varanasi

A copy of this order to be served to the Senior Superintendent of Police, Varanasi

Dated this the 15th day of June 2004

As of yet however, the Asian Human Rights Commission (AHRC) is unaware of any action being taken by the Senior Superintendent of Police, or any other state officers. This inaction is a clear aversion of command responsibility, and is what encourages impunity [See further: AHRC UA-079-2006, 2 March 2006].

Throughout Asia, there are problems of ineffective law enforcement and impunity for state officers committing crimes, leading to violence and instability within societies. It is a matter of common sense that unless those in positions of power or authority are held accountable for their actions, those positions will be abused. It is also obvious that such abuse will perpetrate further abuse within the organization or agency, while casting doubt amongst the public regarding the agency's credibility.

International law has evolved a doctrine of command responsibility, under which military commanders are held responsible for the acts of their subordinates, civilian authorities exercising power over the military are held responsible for the acts of the military and military forces not connected to any nation state are also held responsible for their actions.

The command responsibility doctrine can also be extended to the police department, which shares a similar command structure with the military. In both of these institutions, the chain of command and hierarchy are clearly set out. However, when it comes to acts of torture or misconduct, these guidelines are conveniently ignored. Not only are the principles of command responsibility overlooked, but the principles of ethical and humane law enforcement are also ignored at whim. For this reason, senior officers are not condemned for the

misconduct of their subordinates, and those guilty of misconduct—which in many instances amount to criminal acts—are also not disciplined. In the unlikely event that someone is held accountable, he will either be given a reprimand or a paltry fine, or transferred to another area/post. Internal disciplinary procedures are never used to their utmost effect, nor are legal proceedings initiated.

By not prosecuting those guilty of serious crimes, the message given to the perpetrators is that they can continue to commit crimes in impunity; that they are above the law. The message sent to victims of these crimes and society in general is that there is no equality before the law. This will result in public mistrust of the very institutions meant to be enforcing the law. A clear indicator of this is the perception in many Asian countries of the police and military being society's biggest menace.

The following statement made by the AHRC on the Sri Lankan police elaborates these points in detail, AHRC AS-82-2005, 19 July 2005.

Extrajudicial killings reflect absence of command responsibility within Sri Lanka's policing system

The increasing violence and extrajudicial killings in Sri Lankan police stations reflect the absence of command responsibility within the police department. Daily reports of serious police torture, oftentimes resulting in death, come from all over the country. In most of these cases, victims are tortured for the most trivial of reasons, such as stealing bananas or not immediately stopping a vehicle when asked to do so.

The most recent such incident made known to the Asian Human Rights Commission is the custodial death of 52-year-old Hettiarachchige Abeysiri at the Peliyagoda Police Station on July 13, 2005. After being arrested and taken to the police station at midnight, Mr Abeysiri was brought back to his home the next day. Together with one of his family members, Mr Abeysiri was then taken to the house of a woman who had complained of losing a telephone, where the woman allegedly slapped him. After that, Mr Abeysiri was taken back to the police station and tortured by several officers in front of his relative, who after some time moved away, unable to watch the assault. Upon the relative's return about half an hour later, Mr Abeysiri was being carried by four policemen in civilian clothes. He was taken to a hospital, where he died. When his family visited the mortuary, they saw injuries on his body; a subsequent postmortem confirmed that the death was due to injuries caused by blunt instruments.

What is disturbing about this and other cases of torture and extrajudicial killings is that regardless of the circumstances, it is almost guaranteed that none of the senior supervising officers involved will either be arrested or prosecuted. Only some lower-ranking officers are ever investigated and arrested, if at all. **This lack of accountability means that those ultimately responsible for all actions and behaviour within a police station—the Officer-in-Charge, Headquarters Inspector, Assistant Superintendent of Police and Superintendent of Police—are allowed to escape the chain of command responsibility that is fundamental to the effective functioning of any institution.**

The Inspector General of Police and the Attorney General's Department of Sri Lanka have consistently ignored the issue of command responsibility, thereby indirectly allowing police violence and extrajudicial killings to continue. The Asian Human Rights Commission has made constant submissions to both offices regarding the necessity of prosecuting supervising officers when acts of torture and custodial deaths occur at police stations, to no avail. **In fact, the Attorney General's Department appears to have taken an official decision not to prosecute senior officers except where the officer is directly and physically involved in acts of torture. Even in instances of direct involvement, action is only taken against policemen up to the Officer-in-Charge (OIC) rank.**

The Asian Human Rights Commission knows of many cases where senior officers have not been prosecuted, such as one Assistant Superintendent of Police, allegedly accused of running a torture chamber at his office and causing an arrestee to lose an eye, who has not been indicted despite a Special Unit inquiring into the case. In two famous cases from the Wattala and Kandana police stations where representations were made on behalf of the victims of the direct involvement of the OICs of the two police stations, there was no response from the Attorney General. In another instance, the Attorney General's department withdrew an indictment against an OIC on the basis that his responsibility was that of civil and not criminal liability. However, under the Convention Against Torture Act (Act No. 22 of 1994), command responsibility is recognised for acts of omissions on the part of senior officers, and this is a principle of criminal law.

This reluctance to prosecute responsible senior officers leads to a dysfunctional policing institution; no institution can properly function when command responsibility is ignored. **It is essential for all officers of any institution to perform their duties competently and to be held accountable for their actions. The police department is a vital public institution with enormous influence on the functioning of other public institutions. If it fails to function in a manner required of a public institution, it lets down all other institutions and paves the way for a state of neglect to set in amongst the entire state machinery.** In fact, this charge can be made against the contemporary policing system of Sri Lanka: the breakdown of the state machinery has been caused by a malfunctioning policing system where command responsibility is treated as a trivial matter. Although the problems currently plaguing Sri Lanka are attributed to politicians, rebels, corrupt businessmen or criminals, these are in fact superficial issues. The underlying problem is the inability of the policing system to uphold the rule of law, having succumbed to decay through the abandoning of its command responsibilities.

Police torture and extrajudicial killings should thus not be treated as isolated incidents caused only by a few lower-ranking officers, but as by-products of a system that deliberately neglects command responsibility. It is from this viewpoint that civil society must hold responsible the Inspector General of Police, the Attorney General and the National Police Commission, not only for individual violations, but for allowing the policing system to fall into a state of decay and thereby affecting the performance of other public institutions. The Asian Human Rights Commission therefore urges all concerned groups and individuals to demand the enforcement of command responsibility within Sri Lanka's policing system in an attempt to address broader issues of rule of law and collapsing institutions (emphasis added).

B. Lack of transparency

Transparency is the precondition for efficiency, accountability and credibility, all of which are necessary for institutions to function effectively. Although transparency is a key objective within the private sector, particularly in projects involving international actors, the objective has not received the same consideration within the public arena. Government agencies and other public institutions in many countries are notorious for their large and opaque bureaucracies. These tend to be inefficient and are a cause for much public scorn. However, public institutions, particularly those relating to law enforcement and justice administration, need to be transparent. This transparency is what will determine the public support of the institution, and public support is what indicates whether or not the institution is in fact serving the public good.

Key reasons for the lack of transparency in many institutions, including the police, are political manipulation and corruption. In order to hide and twist the shady dealings, the unethical promotions and the collaboration with other government agencies, it is necessary for the police department to remain opaque. There are two elements to this. Firstly, the opacity deflects public scrutiny from the institution's corrupt and unethical practices. Secondly, and perhaps more importantly, the opacity offers protection to individual officers. Without transparency, it is difficult to know who exactly gave an order for torture, who approved the illegitimate promotion and who is ultimately responsible for overseeing conduct of officers of certain ranks.

One way for the police department to remain opaque is through the absence of records. Although police guidelines require officers to keep detailed records of all events, this in effect rarely takes place. Apart from not keeping records of internal events and decisions, police officers in many instances also refuse to register complaints of victims with grievances.

In an urgent appeal of 2 March 2006, the AHRC noted the case of a student who was arbitrarily beaten by an inspector of the Manduvadih police station, Varanasi district, Uttar Pradesh, India while he was standing outside his school. The student sustained a fractured hand due to the beating. When he subsequently went to register a complaint at the police station, he was refused a hearing and no complaint was lodged. Even though a complaint was also made to the Varanasi Superintendent of Police, no action was taken against the responsible officer [See further: AHRC UA-079-2006, 2 March 2006].

Instances of opacity are further worsened when police and military forces combine, as is common in Nepal. According to a report prepared by the Asian Legal Resource Centre (ALRC), 'The mathematics of barbarity and zero rule of law in Nepal', *article 2*, vol. 3, no. 6, December 2004,

... Additionally, as the lines between various security agencies have been blurred, the army also engages in horrific torture of detainees who are accused of ordinary crimes, like Narayan Nepali, who was electrocuted on the forehead. The blurring

is also evidenced by the fact that the police are reported to carry out arrests on instruction of the army, without knowing for what purpose, such as in the case of Upendra Timilsena [pp. 15-6].

Joint operations ensure that it is unclear which group or department the officers belong to, thereby having nowhere to place responsibility for the actions committed. These operations furthermore are almost never officially recorded.

C. Abuse of authority

The lack of transparency within public institutions leads to the abuse of authority. From the cases described above, as well as considerable literature on the topic, it is clear that police officers in Asian countries notoriously abuse their power. Rather than public servants, the officers become public enemies. This abuse is manifested in many ways, one of which is their use of torture and brutality towards not only suspected criminals, but even ordinary citizens.

In a recent publication, *An x-ray of the policing system and torture of the poor in Sri Lanka*, the AHRC notes that torture in Sri Lankan police stations follow two patterns, one of which is the practice of torture merely as an abuse of power. The following cases are indicative:

A three-wheel cab driver, D W Munasinghe, who was slow in stopping his vehicle after being asked to do so by police officers was kicked and tortured to death; Rohitha Upali Liyanage, the owner of a motorcycle that was mistakenly taken by two police officers, was assaulted with an iron rod and suffered a leg fracture after asking for its return. R A Hemasiri, a former illicit liquor seller trying to lead a normal life, was beaten up because he refused to cooperate, as in the past, and admit to new charges. S C P Fernando was beaten up in an attempt to get him to withdraw a complaint of torture. J V Saman Priyankara had hot water poured on his thighs by a police officer acting on the instigation of a neighbour. A police officer beat up H H Priyadarshana Fernando over a family dispute in which the officer took the side of the wife. A cashier who demanded that police officers pay for their food was severely assaulted, while H Quintus Perera, the manager of a restaurant who refused to sell liquor to some policemen on a religious holiday—during which the selling of liquor is prohibited by law—was beaten so severely that he died of his injuries [Qtd in *article 2*, vol. 4, no. 5, October 2005, p 9].

Such torture is in most cases committed with the approval of senior officers, as the ALRC noted in its report to the Human Rights Committee in March 2005, ‘Institutionalised torture, extrajudicial killings and uneven application of law in Thailand’.

77. **Torture is approved by senior officers...** In Thailand it is a widely shared opinion that torture is necessary to deal with

'bad' people. This sentiment is not only felt among the top ranks, but also openly expressed. After some of the above-mentioned cases came to light in 2004, Police Lieutenant-General Amarin Niamsakul, Commissioner of the Immigration Bureau, said in a prime-time national television interview that as police all around the world commit torture, it is reasonable that police in Thailand do so too. He added that torture was necessary to extract confessions, and that 'bad people need bad treatment'. Although the Minister of Justice spoke publicly against his remarks, no disciplinary action was taken against Pol. Lt-General Amarin. This is despite the fact that his comments, while holding a senior government office, contradict and affront both the 1997 Constitution and the Covenant. The ALRC has since on a number of occasions called upon the government of Thailand to remove Pol. Lt-General Amarin from office. The consequence of the government's inaction, as in other cases of gross rights abuse in Thailand, is to offer an implicit endorsement of the remarks, and encouragement for other officials to continue to speak and think likewise. As a consequence, it can be expected that the use of torture as an acceptable method for interrogation will persist and expand.

Not only do senior officers condone torture and other abuse, they take part in it. In February 2006, police officers in Kerala, India detained and assaulted numerous suspects in a case of local fighting. The AHRC was able to obtain statements made by two of the suspects, both of whom said they had no knowledge of the incident. Both suspects alleged that they were assaulted in public at the time of arrest, during which a sub inspector was present. The torture continued when they were put into a cell at the police station, whereby the circle police inspector turned up and took part in their torture [See further: AHRC UA-084-2006, 2 March 2006].

Indiscipline

Without effective disciplinary measures, it is not possible to confront and eliminate the abuse of power by police officers. While this discipline should begin within the police force itself through internal mechanisms, when necessary, it must include legal proceedings and suspension of duty. As already noted earlier however, in most instances senior officers do not initiate disciplinary inquiries in response to complaints of abuse or misconduct against their subordinate officers, nor are officers suspended from duty after being indicted by a court of law. In this way, they are encouraged to continue their behaviour.

The case of disappeared Thai lawyer Somchai Neelaphaijit is indicative. On 22 March 2006, Somchai's wife Angkhana submitted a complaint to the Ombudsman of Thailand regarding the investigations into four police officers linked to Somchai's disappearance. Although the four officers were acquitted of charges in January 2006, they are being further investigated. Under police disciplinary regulations, they should be suspended from duty until all investigations are over. In her complaint, Angkhana noted that one officer, Police Lieutenant-Colonel Chadchai Leiamsa-ngoun, has returned to duty and the three other officers are seeking to do the same. Angkhana called upon the ombudsman to see that the superior officers of these police suspend them from duty,

failing which they could be liable to criminal prosecution. There is great concern that while serving as police the four officers may use their authority to destroy evidence or obstruct the investigations [For full details regarding Somchai's case, visit <http://www.ahrchk.net/somchai/>].

The Inspector General of Police of Sri Lanka is also guilty of protecting officers charged with criminal offences. In response to the interdiction of 106 policemen in 2005, the Inspector General suggested that the officers be allowed to remain at their posts until proven guilty.

This statement in fact amounts to an obstruction of the legal process; under Sri Lankan law, all civil servants charged with criminal offences should be interdicted until their criminal trials are completed. By expressing an opinion to the contrary, the IGP expects police officers to be treated differently from other civil servants.

The IGP further accused the National Police Commission (NPC)—a constitutional authority under which the police department functions—of attempting to help criminal elements in the country by taking steps to interdict these officers. He was quoted as saying, “Some human rights organizations have a very sophisticated plan to fight against control of crime, and interdicting these officers is part of such a plan. The National Police Commission has also encouraged this.” The IGP was also of the opinion that the police force may become ineffective due to the interdictions of these officers.

These comments are made in response to the criminal cases filed by the Attorney General against police officers on charges of torture under the Convention Against Torture Act. These charges are filed only after an investigation is conducted by a Special Investigating Unit of the police into complaints of torture referred to them. After a thorough investigation is made, the reports are submitted to the Attorney General's department and that department, after proper scrutiny, makes the decision to file charges.

It is after such an indictment is filed by the Attorney General's department that the officers charged are expected to be interdicted. However, there has been a practice in recent years to allow the officers to remain at their posts even after such indictments have been filed. The charged officers then use their authority to intimidate the complainants. One such complainant, Gerald Perera, who was to give evidence in court against the officers who allegedly tortured him, was assassinated. In other instances, victims are tortured for a second or even third time by the alleged perpetrators, in order to force them to withdraw their complaints or to change their testimony in court...

The IGP's opinion that it is not possible for the police department to function effectively without these officers charged with torture condemns the policing system in Sri Lanka [AHRC AS-102-2005, 3 October 2005].

While this lesson is primarily discussing the importance of command responsibility within the police force, it must be noted that the concepts of accountability and transparency—as incorporated in command responsibility—are just as important in other public institutions. For the purpose of protecting human rights and upholding the rule of law, all institutions involved in the administration of justice must be compelled to abide by this doctrine. It is only then that the culture of impunity rife across Asia can be stemmed and the perpetrators of human rights abuse brought to justice. And only then will public institutions in fact be functioning to serve the public good.

Questions For Discussion

1. What are your experiences regarding command responsibility in your own country?
2. In your opinion, what are the greatest obstacles to ensuring command responsibility?
3. Are you aware of any code of conduct for law enforcement officials in your country? Does such a code include provisions on command responsibility?
4. How would you explain the importance of command responsibility to others?

Lesson 2

A. International principles of command responsibility

The doctrine of command responsibility is codified primarily in the Additional Protocol I to the Geneva Conventions. Its status as customary law was confirmed with the explicit inclusion of command responsibility in the Statutes of the International Criminal Tribunal for the former Yugoslavia (article 7) and the International Criminal Tribunal for Rwanda (article 6), as well as the Rome Statute of the International Criminal Court (ICC).

Additional Protocol I to the Geneva Conventions (1977), article 87

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

2. *In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.*

3. *The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.*

Military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates, which includes breaches of international and domestic law. This criminal liability may arise either out of the positive acts of the superior—‘direct’ command responsibility—or from his culpable omissions—‘indirect’ command responsibility or command responsibility *strictu sensu*. A superior can hence be held criminally responsible not only for ordering, instigating or planning criminal acts carried out by his subordinates, but also for failing to take measures to prevent or repress the unlawful conduct of his subordinates.

ICC, article 28

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

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

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

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such

subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

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

Command responsibility is not a form of strict liability; a commander or superior cannot be responsible for the acts of his subordinates purely based on his position of authority. Several factors need to be established before a superior can be guilty for the acts of his subordinates. These factors were expressly set out by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Celebici* case as follows (and were subsequently codified in the Rome Statute of the ICC):

- i. The existence of a superior-subordinate relationship;**
- ii. That the superior knew or had reason to know that the criminal act was about to be or had been committed; and**
- iii. That the superior failed to take reasonable measures to prevent the criminal act or to punish the perpetrators thereof.**

i. The superior-subordinate relationship

The existence of a superior-subordinate relationship may be established in two independent ways, depending on whether the source of authority is the state (*de jure*) or a paramilitary structure (*de facto*). This stems from the fact that international law extends command responsibility to military structures that are not part of any nation state.

In *de jure command*, the source of authority can be both the military and the civilian state. In this situation, what matters is not rank, but formal subordination.

In *de facto command*, international law is interested in effective control as opposed to rank or status. Evidence of *de facto* control requires proof of superior-subordinate relationship.

The doctrine of command responsibility is predicated upon the power of the superior to control the acts of his subordinates, regardless of whether it is *de facto* or *de jure* command.

ii. *Applicable standards of knowledge*

In the *Celebici* case, the ICTY ruled that ‘actual knowledge’ might be established by either direct or indirect evidence. Furthermore, under article 7 (3) of the ICTY statute, the ‘had reason to know’ requirement does not allow for the absence of knowledge as a defense where the accused did not take reasonable steps to acquire such knowledge. In accordance with this, the court ruled that in order to satisfy the ‘had reason to know’ standard in the *Celebici* case, the commander should have had at least the information to put him on alert. Similarly, in the *Blaskic* case, the court ruled that ignorance cannot be a defense where the absence of knowledge is the result of negligence in the discharge of duties.

iii. *The duty to prevent or punish*

In *Blaskic*, the ICTY defined the obligation to prevent or punish crimes by stating that this standard does not provide commanders with two alternative paths; where the superior knew or had reason to know about the commission of criminal acts and failed to prevent them, he cannot merely punish the perpetrators and escape from criminal responsibility. It is the superior’s responsibility to both prevent and punish.

In the *Akayesu* case the ICTR stated that it is irrelevant whether the commander could in fact prevent the crimes or not, where he did not even attempt to prevent the commission of the crimes.

B. Domestic application of command responsibility doctrine

The following extract indicates instances where the courts in Sri Lanka have held state officers responsible under the command responsibility doctrine.

Thus, where acts of torture in a police station are concerned for instance, the responsibility of the officer-in-charge (OIC) of that police station has been asserted by the Court on more than one instance. Among the more recent cases is *Silva vs Iddamalgoda* (2003 [2] Sri LR, 63), where an alleged army deserter arrested by the police, died whilst in remand custody.

In this case, the 1st respondent OIC’s responsibility and liability concerning was not restricted to participation, authorisation, complicity and/or knowledge of the acts of torture and cruelty meted out to the petitioner.

He was held liable due to his not ensuring that the petitioner was being treated as the law required; in other words, by virtue of his culpable inaction including failure to monitor the activities of his subordinate police officers that would have prevented further ill treatment of the petitioner and investigation of any misconduct.

In *Wewelage Rani Fernando* (SC (FR) No 700/2002, SCM 26/07/2004) prison officials were found liable for the death of a detainee, (even though there was no evidence of their direct implication in the assault on the deceased), on the judicial finding that there had been dereliction of their duties [Kishali Pinto Jayawardene, 'Discussing command responsibility and questions of impunity', *Sunday Times*, 19 June 2005].

C. Enforcing command responsibility

The following are points taken from vol.1, no. 2 of *Command Responsibility*, a newsletter published by the AHRC.

What the top ranking police officers in Sri Lanka can do to stop the practice of fabricating cases

Give proper instructions

- Clear instructions should be given both in writing and orally to desist from the practice of fabricating cases
- These instructions should be repeated constantly until a change of attitude becomes manifest
- Clearly instruct that serious consequences will follow if such acts come to the notice of higher officers
- Include such instructions in training courses

Receiving of complaints

- Provide opportunities for the public to approach high ranking officers to make formal complaints in writing on such fabrications
- Promptly and impartially investigate the complaints
- If proved correct, take action to nullify all proceedings made on the basis of such fabrications
- Punish and eliminate officers that engage in such practices
- Provide effective witness protection for those who make complaints against the police

Impose the Penal Code against officers who engage in such fabrications

- Impose sections 188, 189, 190 and 192 of the Penal Code, which imposes goal sentences and fines for engaging in the fabrication of evidence and giving false evidence
- Clearly enforce discipline on charges relating to such fabrications

Questions For Discussion

1. Are you aware of similar applications of command responsibility doctrine in your own country?
2. What do you think are the main obstacles to such application by the courts?
3. Discuss how command responsibility can become part of the *modus operandi* of the police and other institutions.