

## **International Legal Arguments High Court Petition to Investigate and Prosecute Gill for Murder of Khalra**

*The excerpt below contains the main international legal arguments, demonstrating former Director General of Police (DGP) KPS Gill's responsibility for the abduction, illegal detention, torture, and murder of human rights defender Jaswant Singh Khalra. For an executive summary of the entire petition, please visit: <http://www.ensaaf.org/Gill-petition.html>. The legal background to the development, codification, and customary law status of the doctrine of superior responsibility, as well as its status as law in India, is not excerpted below.*

The doctrine of superior responsibility is well established in international law and has achieved customary status. Therefore, the international law of superior responsibility is also the law of India and governs the present case. The doctrine of superior responsibility imposes liability on superiors for the unlawful acts of their subordinates, where the superior knew or had reason to know of the unlawful acts, and failed to prevent and/or punish those acts. Based on his acts<sup>1</sup> and omissions, KPS Gill is liable under the doctrine for Khalra's abduction, illegal detention, torture, and murder. Impunity for Gill further denies Mrs. Khalra and her two children their international right to an effective remedy. Thus, as discussed below, international law holds KPS Gill liable for the crimes committed against Khalra.

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<sup>1</sup> It must be emphasized that the doctrine of command responsibility is not a theory of strict liability for the actions of one's subordinates:

“The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates. A duty is placed on the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates, and a failure of him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine. . . command responsibility is not a form of strict liability.”

Prosecutor v. Delalic (ICTY Appeals Chamber, 20 Feb. 2001) ¶¶197, 239.

However, it must also be emphasized that Gill must be held responsible for his failure to exercise his powers as a superior. See Prosecutor v. Krnojelac (ICTY Appeals Chamber, 17 Sept. 2003) ¶171 (holding “[i]t cannot be overemphasized that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control”). See also Blagojevic and Jokic (ICTY Trial Chambers, 17 Jan. 2005) ¶791 (holding “[w]here a commander has effective control and fails to exercise that power he can be held responsible for the crimes committed by his subordinates”); Prosecutor v. Stakic (ICTY Trial Chambers, 31 July 2003) ¶459 (same). Thus, causation is not an element of superior responsibility:

“[T]he nature of command responsibility . . . does not require a causal link. Command responsibility is responsibility for omission, which is culpable due to the duty imposed by international law upon a commander. If a causal link were required this would change the basis of command responsibility for failure to prevent or punish to the extent that it would practically require involvement on the part of the commander in the crime his subordinates committed, thus altering the very nature of the liability.”

Prosecutor v. Halilovic (ICTY Trial Chambers, 16 Nov. 2005) ¶78.

### **III. KPS Gill is liable for the crimes committed against Jaswant Singh Khalra under the international law of superior responsibility.**

KPS Gill is liable for the crimes of his subordinates against Khalra because each of the elements of the superior responsibility doctrine are satisfied. Under the international law of superior responsibility, a superior is liable when three criteria are met:

- “(i) the existence of a superior-subordinate relationship;
- (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed;<sup>2</sup> and
- (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.”

Prosecutor v. Kordic and Cerzec (ICTY Appeals Chamber, 17 Dec. 2004) at ¶839 (“Kordic Appeals Chamber”); Prosecutor v. Blaskic (ICTY Trial Chambers, 3 Mar. 2000) at ¶294 (“Blaskic Trial Chambers”); Delalic Trial Chambers at ¶ 346; and Aleksovski Appeals Chamber at ¶76. For ICTR decisions holding the same, see also Prosecutor v. Bagilishema (ICTR Trial Chambers, 7 June 2001) at ¶38 (“Bagilishema Trial Chambers”), aff’d Prosecutor v. Bagilishema (ICTR Appeals Chamber, 3 July 2002); and Prosecutor v. Akayesu (ICTR Trial Chambers, 2 Sep. 1998) at ¶691 (“Akayesu Trial Chambers”), aff’d (ICTR Appeals Chamber, 1 June 2001).

KPS Gill was superior to the officers who abducted, illegally detained, tortured, and murdered human rights defender Jaswant Singh Khalra. He also knew, or had reason to know, that his subordinates had committed and were about to commit these unlawful acts. Further, he failed to take the necessary and reasonable measures to prevent and/or punish his subordinates’ crimes. Therefore, Gill is also liable for their crimes under international law.

#### **A. KPS Gill was superior to the perpetrators of the unlawful acts against Jaswant Singh Khalra.**

As established below, there was a superior-subordinate relationship between Gill and the perpetrators at the time they committed the unlawful acts against Jaswant Singh Khalra. A superior-subordinate relationship exists if the superior possesses “effective control over a subordinate.” Prosecutor v. Kayishema (ICTR Trial Chambers, 21 May 1999) at ¶229 (“Kayishema Trial Chambers”) (stating that the “principle of command responsibility must only apply to those superiors who exercise effective control over their subordinates. This material ability to control the actions of subordinates is the touchstone of individual responsibility”). See also Kordic Trial Chambers at ¶ 256; Kordic Appeals Chamber at ¶840; Blaskic Appeals Chamber at ¶375; Prosecutor v. Blagojevic and Jokic (ICTY Trial Chambers, 17 Jan. 2005) at ¶791 (“Blagojevic Trial Chambers”). “Effective control” means the superior has “the material ability to prevent or punish the commission of the offences.” Blagojevic Trial Chambers at ¶378.

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<sup>2</sup> The International Criminal Court (ICC) has articulated a similar yet somewhat different knowledge standard for civilian superiors compared to the UN tribunals. The ICC requires that civilian superiors either “knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or were about to commit such crimes”. Rome Statute of the International Criminal Court Art. 28(b)(i). The facts in this case also meet the ICC standard.

See also Delalic Appeals Chamber at ¶243 (declaring that the criterion for superior responsibility is actual control).

KPS Gill possessed both *de jure* and *de facto* command of the Punjab Police. Effective control must be demonstrated in cases against both *de facto* and *de jure* superiors. Delalic Trial Chambers at ¶196. In cases of *de jure* command, “a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced.” Delalic Appeals Chamber at ¶197. Further, superior responsibility is “easier to demonstrate” in established hierarchies, such as an army, where “there is no part of the army which is not subordinated to a military commander at whatever level. Consequently, responsibility applies from the highest to the lowest level of the hierarchy.” Id. at ¶¶419-420. Operating similarities between military and police command structures have been recognized. See Bagilishema Trial Chambers at ¶¶169-174. Thus, *de jure* command, especially in a police hierarchy, creates a presumption of effective control.

KPS Gill was the *de jure* commander of Punjab Police. The *de jure* position of the accused can be the starting point of the analysis. Kordic Trial Chambers at ¶¶418-424. The *de jure* position “may be determined by reference to official appointment or formal grant of authority,” Id. at 419, or “through an analysis of the actual tasks performed by the accused in question.” Id. at 424. Further, “[a]dmitting one’s command is a “significant [factor] for the purposes of ascribing superior authority.” Delalic Trial Chambers at ¶750. In this case, Gill was both formally appointed as the Director General of Police (DGP) and performed tasks that establish his *de jure* command. DGP is the highest ranking position within the Punjab Police command structure. Ram Narayan Kumar, et al., Reduced to Ashes: The Insurgency and Human Rights in Punjab (2003, SAFHR), pp. 613-614. As Gill admits in his writings, he was officially appointed as DGP of Punjab from 21 April 1988 to 18 Dec 1990 and then again from 11 November 1991 to 31 December 1995. KPS Gill, Endgame in Punjab: 1988-1993 (2001, SATP), available at: <http://www.satp.org/satporgtp/publication/faultlines/volume1/Fault1-kpstext.htm>. Gill’s admission that he was the chief of Punjab Police provides significant proof of his *de jure* control. Gill also admitted to performing tasks associated with a high-level of *de jure* control. Gill stated in an interview that he created an “active and accountable police leadership,” that he was “[d]eeply conscious of the honour and responsibility of commanding these men,” and that he led “from the front.” KPS Gill, Endgame. Gill said that he used his control as DGP to transfer, appoint, and promote officers, recruit officers from outside of Punjab, and develop joint-interrogation teams. KPS Gill, Endgame. He coordinated operations with the army, paramilitary, and police “in complete concert, with a clearly defined institutional structure of cooperation and consultation . . . This interaction was carried up to the highest level” and he “personally coordinated actions.” KPS Gill, Endgame. He further said “the whole thrust of my work has been to build an organised and disciplined force.” Praveen Swami, “Bad apples are there everywhere,” Frontline (18 Nov. 1994), pp. 40-1. Thus, Gill’s admissions and activities establish that he was the *de jure* commander of Punjab Police and other security forces in Punjab, which creates the presumption that he exercised effective control over his subordinates.

Gill’s *de jure* control gives the presumption that he exerted effective control. Yet, even without this presumption, KPS Gill exercised *de facto* control over his subordinates. Gill’s ability to issue orders to both high and low ranking officials establishes his effective control over the Punjab Police. Giving orders which are followed is a substantial indication that a superior possesses effective control over his subordinates. See Prosecutor v. Serushagu (ICTR Trial Chambers, 15 Feb. 1999) at ¶29; Blaskic Appeals Chamber at ¶69. The order Gill likely issued to

execute Khalra provides evidence of Gill's effective control. Special Police Officer (SPO) Kuldeep Singh testified that Station House Officer (SHO) Satnam Singh told Khalra that if Khalra had followed KPS Gill's advice, Khalra would have saved both himself and the police officials. CBI v. Ajit Singh Sandhu & Ors, Addl. Sess. Judge, Patiala, Session No. 49-T of 9.5.1998/30.11.2001 (18 Nov. 2005), ¶¶ 17, 28. SPO Kuldeep Singh's testimony was unrefuted and relied upon by Judge Bhupinder Singh in convicting SHO Satnam Singh for abducting Khalra with intent to murder him. CBI v. Sandhu (18 Nov. 2005), ¶26. Because Khalra rejected KPS Gill's advice, he was executed. CBI v. Sandhu (18 Nov. 2005), ¶28. SHO Satnam Singh's statement is strong evidence indicating that Gill gave an order to kill Khalra that was obeyed. This admission shows both that Gill issued orders and that those who received the orders felt bound to obey them, even though they knew their obedience would carry repercussions. In another example, Inspector General of Police (Border Range) Chaman Lal requested to be relieved of his duties because he could not implement KPS Gill's orders at the cost of his conscience. Harish Gupta, "Chaman Lal Cleared," Tribune (11 Feb. 1989), p.1. His confession shows that Gill issued orders to his subordinates, and they felt that the only way to escape those orders was by leaving the Punjab Police. Similarly, lower-ranking police officers also publicly confessed to committing abuses, but said these were carried out in accordance with the orders of DGP Gill. Varinder Singh, "Cops confess to false encounters: Say they acted on directions from top," Tribune (13 Aug. 2001) (the policemen later retracted their statements that the encounters were false, but continued to maintain that they acted on orders from DGP Gill, SSPs and other superiors, and that their actions were certified by senior officers); "Cops defer return of gallantry awards," Indian Express (14 Aug. 2001). Thus, low and high ranking police officials alike felt pressure to obey, and did obey, DGP Gill's orders, thereby demonstrating his effective control.

Gill's power to initiate investigations and discipline subordinates is further proof of his effective control. The power to initiate investigations and discipline subordinates is a substantial factor in assessing effective control. See Delalic Trial Chambers at ¶¶740-741; Bagilishema Trial Chambers at ¶¶ 172-173; Prosecutor v. Ntagerura, et al, (ICTR Trial Chambers, 24 Feb. 2004) at ¶645. Although Gill possessed these powers, he frequently refused to exercise them. (See infra III. (C)(3)). In 1989, Gill stated that he took "internal action" after investigating allegations of "excesses" committed by a Senior Superintendent of Police (SSP), and took action against those involved in corruption. Amit Buruah, "We Have Done A Good Job"—Interview With K.P.S. Gill, DGP," Frontline (29 Apr. 1989), p. 116. In early 1990, Gill told a visiting delegation of members of the European Parliament that, in the first two months of 1990, seven police officers had been suspended and one dismissed for "crimes against the populous [sic]." Amnesty International, Human Rights Violations in Punjab: Use and Abuse of the Law (May 1991), available at: <http://www.amnestyusa.org/countries/india/document.do?id=8D63FE02A44B98C8802569A600600B91>. In September 1992, DGP Gill himself said that his office was investigating more than thirty allegations of police wrongdoing and had fired more than fifty officers for misconduct. John Ward Anderson, "Punjab's Cycle of Violence: Villagers Suffer as Sikh Gunmen and Police Trade Attacks," Washington Post (2 Sep. 1992), p.A23. In 1993, Gill demoted a Station House Officer to police lines for beating a woman to death. Amnesty International, India: Three reports of deaths in custody and "disappearances" in Punjab (April 1993), available at: <http://www.amnestyusa.org/countries/india/document.do?id=E68E1B79BC137B03802569A600602FDC>. In May 1993, Gill said that individual police officers had been punished and prosecuted for using excessive force, but there was no question of any general breakdown in police discipline; he said: "Order has been maintained." Stefan Wagstyl, "Peace is

imposed on a still troubled Punjab,” Financial Times (14 May 1993), p.5. In 1994, when questioned about human rights abuses perpetrated by his subordinates, Gill boldly said “[W]e have taken strong action against our officials. We do not take this lightly.” Swami, “Bad apples,” p. 40. In January 1995, nine months prior to Khalra’s abduction, Gill stressed that he would actively monitor missing persons cases pending investigation to ensure they received attention, and assigned the Inspector General (Crime) to verify 1000 such cases. Annexure P-2 (“Missing Persons Not Killed,” Tribune (19 Jan. 1995), p. 16). Thus, Gill admitted that he exercised his powers to initiate investigations and discipline his subordinates, demonstrating his effective control over the Punjab Police.

Gill’s ability to reward and promote his subordinates also proves his effective control over the Punjab Police. Rewarding subordinates helps prove a superior’s authority. See Kayishema Trial Chambers at ¶501. In August 1989, Gill issued an order to financially reward all superintendents of police who assassinated 53 identified “terrorists.” Although the Attorney General claimed that the order lapsed the following year, several of the alleged terrorists had already been killed in response to Gill’s reward order, demonstrating that policemen both followed his orders and received rewards from him. The Attorney General stated that in the revised order, the DGP now offered rewards for the arrest or apprehension of the alleged terrorists. Amnesty International, Human Rights Violations in Punjab, Appendix A (copy of order). Gill further promoted numerous officers. In Endgame in Punjab, Gill describes how he developed “a radical policy of postings and promotions.” KPS Gill, Endgame. See also, Shekhar Gupta and Kanwar Sandhu, “KPS Gill: True Grit,” India Today (15 Apr. 1993), p.64 (DGP Gill promoted the best officers). Thus, Gill’s ability to reward and promote his subordinates demonstrated his effective control over his subordinates.

Gill further demonstrated his effective control over his subordinates by maintaining regular contact with them. Meeting subordinates and receiving communications rendered through the chain of command illustrates effective control. See Kayishema Trial Chambers at ¶483. See also Xuncax v. Gramajo, 866 F. Supp. 162, 173 (D.Mass 1995). By his own description, Gill said that he made it his “practice to move constantly across the state” to meet with his subordinates. KPS Gill, Endgame. According to a senior police officer, Gill regularly met with his subordinates, where they reported their progress to him:

“You can check that up. Before such a meeting with Gill, 300 to 400 Sikhs used to die in Punjab. Every SSP had to report: I have killed 14. The other who said I have killed 28 was appreciated more. The third SSP who had to outsmart the first two had to report 31. The night before meeting with Gill, the Sikhs used to die so that the SSPs could vie with each other in showing their anti-terrorist achievements.”

Kumar, Reduced to Ashes, p. 107-8. Gill indicated his command and receipt of information from his subordinates by stating that he had intimate knowledge of the functioning of the police, down to individual police stations. KPS Gill, Endgame. He identified the police stations most affected by the insurgency, catalogued their weaknesses, and then addressed them. KPS Gill, Endgame. Gill also received written reports from his subordinates. KPS Gill, Endgame (stating “A continuous system of documentation and analysis, and of dissemination of all received intelligence was also introduced shortly after my assumption of command as DGP, and periodic intelligence reports were received by all senior officers of the police and para-military forces in

the state”). Thus, Gill’s regular meetings and communications with his subordinates illustrate his effective control.

The recognition that Gill received from others, from judges to journalists and senior police officials, as the individual in command of Punjab Police, provides further evidence of his effective control. How others acknowledge the superior is also evidence of effective control. Delalic Trial Chambers at ¶¶738, 745, 746, 749. During Gill’s tenure as DGP, the Supreme Court and Punjab and Haryana High Court repeatedly issued orders to Gill directing him to investigate human rights violations committed by his subordinates. See, e.g. orders in 1995, Paramjit Kaur v. State of Punjab, 1996 SC (7) 20 (15 Nov. 1995); “Notice to Gill, SSP in Dhambi case,” Tribune (18 Jan. 1995), p.4 (High Court issued notice to Gill and Ajit S. Sandhu, SSP Ropar, regarding illegal detention and torture of couple and son); “Notice to DGP in Torture Case,” Tribune (9 Feb. 1995), p.5 (High Court issued notice to Gill after torture of pregnant woman led to premature birth and subsequent death of her child); “Notice to DGP on Boy’s Custodial Death,” Tribune ( 1 Sep. 1995), p.4 (Division Bench issued notice to DGP over custodial torture and death of 12 year old boy). For example, in Inder Singh v. State of Punjab, a habeas corpus petition involving the disappearance of seven family members, ranging in age from 14 to 85, the Supreme Court explicitly referred to Gill as the controlling superior, and expressed shock when Gill did not give attention to the cases:

“[T]he complaint was not deemed to be of such importance that it merited the attention of the officer in overall command of the Punjab Police and to whom it was expressly addressed. We find this surprising . . . We are deeply concerned about the safety of the citizenry at the hands of such an errant, high-handed and unchecked police force.”

Inder Singh v. State of Punjab, Writ. Petition (Cr.) 221/1994, (1995) 1 S.C.J. 343, ¶¶10, 14. When Khalra’s disappearance was brought to the attention of the Supreme Court, the Court immediately issued notice to Gill on 11 September 1995, clearly informing him about Khalra’s abduction and instructing him to use his powers as DGP to ascertain the whereabouts of Khalra. Paramjit Kaur v. State of Punjab, 1996 SC (7) 20 (15 Nov. 1995). See also, “SC Notice to Punjab police on Khalra issue,” Indian Express (12 Sep. 1995), p.5; “SC deadline to cops for tracing Khalra,” Indian Express (19 Sep. 1995), p.7; “SC notice on Khalra case,” Tribune (13 Sep. 1995), p.1. These facts demonstrate that courts believed Gill was in charge by virtue of his position as commander and could rely on him to implement their directions. Further, when Paramjit Kaur Khalra approached Inspector General (IG) DR Bhatti to seek his help in securing her husband’s release, DR Bhatti responded by saying that only the DGP could help her. Paramjit Kaur v. State of Punjab, Writ Pet. (Crl.) 497/1995, List of Dates and Events (C). Numerous journalists also interviewed Gill because they regarded him as the commander of Punjab. See, Buruah, ““We Have Done a Good Job,”” p.116; Manoj Joshi, ““We Are Nearing Normalcy:’ Interview With K.P.S. Gill,” Frontline (20 Nov. 1992), p.29; Praveen Swami, “To bottle the genie: Police and human rights in Punjab,” Frontline (18 Nov. 1994), p.41; Swami, ““Bad apples,”” p.40. Thus, the wide acknowledgment that KPS Gill controlled the Punjab Police, including by the Apex Court, senior police officers, and journalists, further demonstrates Gill’s effective control.

As the *de jure* superior of the Punjab Police, Gill is liable for his subordinates’ crimes even if his relationship to the perpetrators is not immediate. A superior’s relationship to the perpetrator may be direct or indirect. See, e.g., Blaskic Trial Chambers at ¶301 (holding “a

commander may incur responsibility for crimes committed by persons who are not formally his (direct) subordinates, insofar as he exercises effective control over them”) (emphasis in original); Delalic Appeals Chamber at ¶¶251-252 (affirming that subordination can be indirect or direct as long as effective control is established); Halilovic Trial Chambers at ¶63 (holding “there is no requirement that the superior-subordinate relationship be direct or immediate in nature for a commander to be found liable for the acts of his subordinate”). Thus, the superior-subordinate relationship does not have to be immediate; the subordinate can be further down in the chain of command. In this case, there were several ranks between DGP and Senior Superintendent of Police (SSP) of Tarn Taran, Ajit Singh Sandhu, the highest ranking official of the nine officials indicted for Khalra’s murder. It is beyond question that Gill exercised *de jure* authority over his subordinates, including Khalra’s killers.

There can be no doubt that KPS Gill held a superior-subordinate relationship with the Punjab Police officers who committed the unlawful acts against Jaswant Singh Khalra, thus satisfying the first element of the doctrine of superior responsibility. Gill possessed both *de jure* and *de facto* command over the Punjab Police. His *de jure* command, as evidenced by his own admissions and the high-level tasks he performed, creates a presumption of effective control. His *de facto* command over his subordinates demonstrates his effective control, as evidenced by his ability to issue orders that were followed; his powers to initiate investigations and discipline subordinates; his powers to reward and promote subordinates; his regular communications and meetings with subordinates; and how others regarded him as the person with control over Punjab Police. All of these factors demonstrate that Gill had effective control over the subordinates who committed the crimes against Jaswant Singh Khalra.

**B. KPS Gill knew or had reason to know that his subordinates had committed and were about to commit unlawful acts, such as torture and murder.**

Under international law, the second element of superior responsibility requires that the superior knew or had reason to know that his subordinates committed or were about to commit unlawful acts. (*See supra III*). In this case, KPS Gill had actual and constructive knowledge that his subordinates committed and/or were about to commit unlawful acts against Jaswant Singh Khalra. Gill possessed actual knowledge of the unlawful acts because he witnessed two of the crimes. Further, his position in the chain of command, the timing of the crimes, the extensive use of police infrastructure and personnel to commit the crimes, the types of crimes committed, and the identity and character traits of the individuals involved in the commission of the crimes, also establish his actual knowledge of the crimes. KPS Gill had reason to know, or constructive knowledge, of his subordinates’ crimes against Khalra because of the number of complaints and court notices he received about Khalra’s abduction and threats to Khalra’s life, the information available in the public domain about the role of his subordinates in Khalra’s abduction, and general information on the violent history of his subordinates. Despite this actual and constructive knowledge that his subordinates had committed and were about to commit unlawful acts against Khalra, Gill refused to take any action against his subordinates.

### **1. KPS Gill knew that his subordinates committed or were about to commit unlawful acts.**

Actual knowledge is defined as “the awareness that relevant crimes were committed or were about to be committed.” Kordic Trial Chambers at ¶427. A superior’s actual knowledge can be demonstrated through direct or circumstantial evidence. Delalic Trial Chambers at ¶383; *see also* Kordic Trial Chambers at ¶427 (same).

When Gill witnessed Khalra’s illegal detention and saw evidence of Khalra’s torture, Gill possessed direct knowledge that his subordinates had committed and were about to commit further crimes against Khalra. The proximity of a superior to the location of his subordinates’ crimes is a contributing factor in establishing his actual knowledge. Delalic Trial Chambers at ¶386. *See also* Prosecutor v. Naletilic (ICTY Trial Chambers, 31 Mar. 2003 ) at ¶72. Further, witnessing abuses first-hand means that the superior knew crimes were being committed. Aleksovski Trial Chambers at ¶114. The unrefuted testimony of SPO Kuldeep Singh established at trial that Gill interrogated Khalra at SSP Sandhu’s residence for half an hour. CBI v. Sandhu (18 Nov. 2005), ¶¶17, 28. Khalra’s body bore visible marks of torture, which must have been apparent to Gill. *Id.* At that point, Gill had direct knowledge that his subordinates had illegally detained and tortured Khalra. Thus, Gill directly witnessed and had actual knowledge of two crimes: 1) illegal detention; and 2) torture. After observing Khalra’s tortured condition, Gill also knew that his subordinates would at least further torture Khalra.

Gill’s position as the top commander further helps establish that he had actual knowledge of the crimes of his subordinates against Khalra. A superior’s actual knowledge is “easier to prove” if he is “part of an organized structure with established reporting and monitoring systems.” Kordic Trial Chambers at ¶428. *See also* Naletilic Trial Chambers at ¶210. As discussed above, Gill stated that he created an “organized and disciplined” force, Swami, “Bad apples,” p. 40-1, he was “[d]eeply conscious” of commanding his men, and that he lead “from the front.” KPS Gill, Endgame. Gill regularly met, communicated with, and received reports from his subordinates. (*See supra* III.3.A). Gill’s command structure remained intact during the two months in which his subordinates abducted, illegally detained, tortured, and ultimately killed Khalra. Thus, Gill’s position as the commander of the Punjab Police must have allowed him to receive information about the crimes of his subordinates and further establishes his actual knowledge of the crimes against Khalra.

The timing and circumstances of Khalra’s abduction also demonstrate Gill’s actual knowledge of the crimes. The circumstances and the timing of the illegal acts are relevant in establishing actual knowledge. Delalic Trial Chambers at ¶386. The circumstances and timing of Khalra’s abduction are incriminating. Khalra was abducted after he publicly disclosed findings from government records establishing that Punjab Police had secretly cremated thousands of Sikhs from Amritsar district alone. Annexure P-1 (Human Rights Wing (SAD), “Disappeared:” Cremation Grounds, Ref. No. 103/95). In a high-profile public media exchange between him and Gill, Khalra accused Gill and his subordinates of extrajudicially executing thousands of Sikhs and then secretly cremating their bodies to destroy the evidence. Annexure P-3. The abduction also occurred soon after Khalra had publicized that he was receiving death threats from senior police officers, including SSP Sandhu. Affidavit of Paramjit Kaur (9 Oct. 1995), ¶4, in Paramjit Kaur v. State of Punjab, Writ Pet. (CrI.) 497/1995; CBI v. Sandhu (18 Nov. 2005), ¶¶13-14. Based on these circumstances, Judge Bhupinder Singh found that SSP Sandhu and his subordinates had a motive to kill Khalra. CBI v. Sandhu (18 Nov. 2005), ¶13-14. Thus, Gill’s



actual knowledge of his subordinates' past and future crimes against Khalra is additionally established through the timing and circumstances of Khalra's abduction.

The extensive use of police infrastructure and personnel in committing and preparing to commit the crimes against Khalra further proves Gill's actual knowledge. The number and type of subordinates involved must be considered in establishing the superior's actual knowledge. Delalic Trial Chambers at ¶386. The greater the number of subordinates involved means the greater the coordination involved in committing the unlawful acts and diverting resources from legal police duties. The scale of such an operation would alert a chief of police, who is responsible for regulating the activities of his subordinates and police resources, to the crimes. In this case, there were no fewer than nine police officers involved in the operation to abduct Khalra, including officers with the ranks of SSP, Deputy Superintendent of Police (DSP), and Inspector, who used wireless sets, automatic weapons, and unmarked vehicles to abduct Khalra. CBI v. Sandhu (18 Nov. 2005), ¶¶15-18. Further, the Sessions Court, in convicting six officers for their roles in the abduction and murder of Khalra, specifically cited the use of at least two police stations to illegally detain Khalra: Chabbal, where two individuals witnessed Khalra's detention, and Kang. CBI v. Sandhu, (18 Nov. 2005) ¶¶17, 28. Given that the officers came from numerous jurisdictions, such as Bhikiwind, Tarn Taran, Chabbal, Sirhali, Pandori Sidhwan, and Jandhoke, Paramjit Kaur v. State of Punjab, Writ Pet. (Crl.) 497/1995, Supreme Court (30 July 1996), it is very likely that the infrastructures of some of those stations and jurisdictions were used to illegally detain Khalra, as well. Thus, it is implausible that Gill, as commander of Punjab Police, did not know that numerous senior-level subordinates from multiple jurisdictions were undertaking such a large-scale illicit operation with significant police infrastructure and resources.

Because of the previous disappearances of human rights defenders, Gill knew Khalra faced the threat of illegal detention, torture, and murder after his abduction. The type of illegal acts is relevant to establishing the superior's actual knowledge. Delalic Trial Chambers at ¶386. Khalra's abduction and murder is not the first case in which Punjab Police eliminated a human rights defender. For example, in January 1992, Punjab Police abducted and disappeared journalist and human rights activist Ram Singh Billing. U.S. Department of State, Country Report on Human Rights Practices: India (1992), 1143. In May 1994, the Supreme Court heard a petition implicating the police abduction and disappearance of four Punjab human rights attorneys: Sukhwinder Singh Bhatti, abducted 12 May 1994; Kulwant Singh Advocate, his wife, and his baby, abducted on 25 January 1993; Ranbir Singh Mansahia, abducted on 12 September 1991; and Jagwinder Singh, abducted on 25 September 1992. Navkiran Singh vs. State of Punjab, Writ Pet. (Crl.) 242-258/1994, Supreme Court (2 July 1995). In July 1995, a few months before his subordinates abducted Khalra, the Supreme Court directed DGP Gill to assist the Central Bureau of Investigation in conducting inquiries related to the disappearances of these human rights attorneys. Id. Thus, when Khalra was abducted, Gill must have known Khalra's ultimate fate.

Gill's knowledge of the identities and traits of the police personnel accused of abducting Khalra further establishes his actual knowledge of the unlawful acts. The identity and character traits of the individuals involved help establish a superior's actual knowledge. Delalic Trial Chambers at ¶386. See also Delalic Appeals Chamber at ¶238. In this case, SSP Sandhu was implicated in numerous disappearance cases. See, e.g., Annexure P-7 ("Matter regarding the youths disappeared by the Punjab Police"); "Notice to Gill, SSP in Dhami case," Tribune (18 Jan. 1995), p.4. At the time of Khalra's abduction, SSP Sandhu had at least 19 charges against

him. Praveen Swami, “Forgotten War: Treatment of A.S. Sandhu Raises New Questions,” Frontline (27 June 1997), p.113. Moreover, prior to his abduction, Khalra publicly stated that SSP Sandhu was threatening to disappear him. See, e.g., Affidavit of Paramjit Kaur Khalra (9 Oct 1995), ¶¶4-6 (stating that her “husband had apprehensions that the S.S.P. Tarn Taran, Ajit Singh Sandhu, positively threatened my husband which is borne out from a horde of Press clippings as also affidavits which are being filed herewith”), in Paramjit Kaur v. State of Punjab, Writ Pet. (Crl.) 497/1995; CBI v. Sandhu (18 Nov. 2005), ¶¶13-14. Further, SSP Sandhu was immediately identified as one of the perpetrators of Khalra’s abduction and named in Mrs. Khalra’s habeas corpus petition filed on behalf of her husband. Paramjit Kaur v. State of Punjab, Writ. Pet. (Crl.) 497/1995, filed 9 Sept. 1995. Given Sandhu’s direct implication in numerous human rights violations and his violent character, Gill must have known that Khalra was in danger of torture and murder when it emerged that Sandhu was involved in Khalra’s abduction.

Thus, given Gill’s proximity to and witnessing of the crimes, position of command, the circumstances and timing of the abduction, the police infrastructure and number and type of subordinates involved, the type of illegal acts, and the identity of the perpetrators, Gill had actual knowledge that his subordinates abducted, illegally detained, tortured, and murdered Khalra.

## **2. KPS Gill had reason to know that his subordinates committed or were about to commit unlawful acts.**

Constructive knowledge is established by showing the superior possessed information that would put him on notice of the risk of offences and indicate the need for additional investigation to determine whether his subordinates committed or were about to commit crimes. Kordic Trial Chambers at ¶427. See also Delalic Appeals Chamber at ¶241; Blaskic Appeals Chamber at ¶405. The information can be general and does not have to provide specific details about the unlawful acts at issue. Prosecutor v. Krnojelac (ICTY Appeals Chamber, 17 Sept. 2003) at ¶154. The information does not have to compel the conclusion of the existence of the unlawful acts. Delalic Appeals Chamber at ¶238. It is sufficient if the information justifies further inquiry. Limaj Trial Chambers at ¶525. For example:

“[A] military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent out on a mission, may be considered as having the requisite knowledge.”

Id. A superior need not be in actual possession of the relevant information to have the requisite knowledge. The superior is deemed to possess the knowledge when the information was provided or made available to him. Delalic Appeals Chamber at ¶239. The information “may be written or oral.” Id. at ¶ 238. See also Prosecutor v. Galic (ICTY Trial Chambers, 5 Dec. 2003) at ¶175 (similar) (“Galic Trial Chambers”). In this case, both specific and general information was provided and available to Gill that justified further inquiry and proves “he had reason to know” his subordinates committed and were about to commit unlawful acts against Khalra.

KPS Gill had reason to know that his subordinates committed and were about to commit crimes against Khalra because of the numerous complaints and court notices he received alerting him to the Punjab Police’s role in abducting Khalra and threatening his life. The number of complaints received can establish the superior’s knowledge. See International Law Commission, Memorandum submitted by the Secretary-General, The Charter and Judgment of the Nuremberg

Tribunal, History and Analysis, at 102 (1949) (concluding the Nazi administrator must have known of the atrocities committed in concentration camps because he received numerous complaints about the atrocities). On 6 September 1995, the same day that Gill's subordinates abducted Khalra, Paramjit Kaur issued a telegram to Gill, notifying him of the abduction and requesting his assistance in locating her husband. Paramjit Kaur v. State of Punjab, Writ Pet. (Crl.) 497/1995, List of Dates and Events (C). Just five days later, on 11 September 1995, the Supreme Court notified Gill about Khalra's abduction. Paramjit Kaur v. State of Punjab, 1996 SC (7) 20 (15 Nov. 1995). The Court served Gill by mail and telegram a copy of the habeas petition filed by Mrs. Khalra, and ordered the DGP to render all assistance in locating Khalra. Id. The attached habeas petition specifically mentioned the "dire consequences" with which Gill's subordinates had threatened Khalra. Id. Finally, on 15 November 1995 the Supreme Court again issued notice to Gill. The court explicitly identified the subordinate officers involved in the abduction and repeated their order to Gill to render assistance to the CBI in locating Khalra. Id. Of course, at this point, Khalra had been murdered and his killers were gainfully employed under Gill. CBI v. Sandhu (18 Nov. 1995), ¶128 (murder occurred a few days after Diwali in October 1995). Thus, each of these notices proves that Gill had information in his possession or available to him that indicated his subordinates abducted Khalra and were about to commit further unlawful acts.

KPS Gill had reason to know about his subordinates' crimes against Khalra because of the immense information available to him in the public domain indicating that his subordinates committed the unlawful acts. The "widely reported" nature of the abuse has been considered in establishing the accused's knowledge. Doe v. Qi, 349 F.Supp.2d 1258 (N.D.Ca. 2004), 1332-33. During the period of Khalra's disappearance, over twenty articles published in domestic and international print media reported on the abduction. Their content indicated that Gill's subordinates were alleged to have committed crimes. See e.g. "Amnesty demands Khalra's release," UNI (12 Sep. 1995), p.16; "SC notice to Punjab police on Khalra issue," Indian Express (12 Sep. 1995), p.5; Jason Cumming, "Sikhs Want Hero Back," Toronto Sun (24 Sep. 1995), p.22; "SC adjourns missing Akali leader case," Indian Express (30 Sep. 1995), p.5; "A-G to personally supervise probe into Khalra case," Indian Express (14 Oct. 1995), p.7; "Khalra 'still missing'," Hindu (4 Nov. 1995), p.13; "Punjab admits police failure to trace Khalra: Govt counsel wants CBI to handle case," Indian Express (11 Nov. 1995), p.5; "SC orders CBI probe into Kalra [sic] case," Indian Express (16 Nov. 1995), p.4; "Khalra's wife seeks President's help," Tribune (28 Dec. 1995), p.5. In fact, Khalra's abduction was so notorious that foreign heads of state and officials, as well as the international human rights community, acted on it. The United States Congress officially discussed Khalra's abduction numerous times and condemned the crime. See, e.g. H.Res. 233, Resolution Condemning the Abduction of Jaswant Singh Khalra and Urging Release, to House Committee on International Relations (28 Sep. 1995); Hon. Philip M. Crane, House of Rep. (6 Dec. 1995), E2309; Hon. Gerald B. H. Solomon, House of Rep. (7 Dec. 1995), E2329, E2330. Congressmen also complained about Khalra's abduction to the UN Secretary General. Hon. Philip M. Crane, House of Rep. (6 Dec. 1995), E2309 (remarks include text of letter, dated 27 Nov. 1995). US President Clinton shared Congress's concern and raised the abduction with various Indian agencies and senior officials in the Indian government. James Morrison, "Clinton Checks India," Washington Times (28 Nov. 1995), p.A14; Hon. Philip M. Crane, House of Rep. (6 Dec. 1995), E2309. Similarly, Canada's Prime Minister Jean Chretien also discussed Khalra's disappearance with senior Indian officials. Amy Louise Kazmin, "Business boom tightens Indo-Canada ties," UPI (13 Jan. 1996), Int'l. Amnesty International

issued three urgent action appeals regarding Khalra's abduction. The first appeal was issued a day after Khalra's abduction on 7 September 1995 and specifically discussed the threats to Khalra by Punjab Police. Amnesty International, "India: Jaswant Singh Khalra, human rights activist: Fear of "disappearance/Fear of torture," Urgent Action Bulletin (7 Sep. 1995), ASA 20/26/95. The United Nations Working Group on Enforced or Involuntary Disappearances intervened in the matter and transmitted a complaint to the Government of India. Report of the Working Group on Enforced and Involuntary Disappearances, E/CN.4/1996/38 (15 Jan. 1996), ¶237. Civil society in India was similarly aware of and outraged at Khalra's abduction. On 29 September 1995, fifty people were arrested for protesting Khalra's illegal detention and demanding his release. "Akali Leaders, Rights Activists Held," Times of India (29 Sep. 1995). Thus, if journalists reported on Khalra's abduction by the Punjab Police and senior foreign officials, international organizations, and civil society knew that Khalra was abducted and at risk of further harm, Gill had reason to know about the unlawful acts.

KPS Gill had reason to know about his subordinates' crimes because, in addition to having specific information about Khalra's abduction by the Punjab Police, he had general information that his subordinates committed or were about to commit unlawful acts:

"A showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates, would be sufficient to prove that 'he had reason to know'."

Delalic Appeals Chamber at ¶238. Examples of general information include the character of the subordinates, Id., and their past behavior or history of abuse. Galic Trial Chambers at ¶175. Again, ample information was available to Gill that establishes he had reason to know his subordinate SSP Sandhu had a violent character and long history of abuse. As discussed above, Punjab Police admitted that SSP Sandhu had been implicated and indicted in numerous human violations, including torture, disappearances, and murder. See also, Human Rights Watch, Punjab in Crisis: Human Rights in India (1991), p.102. Further, just a few months prior to Khalra's abduction, it was widely reported by Khalra that Amritsar police had abducted and extrajudicially executed thousands of Punjabis under SSP Sandhu. In fact, Khalra exposed SSP Sandhu's extrajudicial executions, and the Supreme Court notified Gill about the SSP's crimes. "SC notice to Gill on unlawful killings," Indian Express (14 Oct 1995), p.7. Sandhu was also facing prosecution in the disappearance of Kuljit Singh Dhatt. Swami, "Forgotten War." Khalra also publicly stated that he was being threatened by SSP Sandhu, who was posted in Amritsar. Affidavit of Paramjit Kaur (9 Oct. 1995), ¶4, in Paramjit Kaur v. State of Punjab, Writ Pet. (Crl.) 497/1995; CBI v. Sandhu (18 Nov. 2005), ¶¶13-14. This threat was widely reported and further confirms SSP Sandhu's violent character and the notoriety of the risk of harm that Khalra faced. Thus, Gill had general information available to him that established Khalra's risk of abduction, illegal detention, torture, and murder by his subordinates.

Despite the constructive knowledge that his subordinates had committed and were about to commit unlawful acts against Khalra, Gill refused to pursue further inquiry. Knowledge "may be presumed where a superior had the *means* to obtain the relevant information and deliberately refrained from doing so...[A] commander is not permitted to remain 'willfully blind' of the acts of his subordinates." Halilovic Trial Chambers at ¶69 (emphasis in original). Gill willfully ignored the information that justified further inquiry and did not investigate the crimes of his subordinates. Gill's own visit to Sandhu's residence to interrogate Khalra demonstrates that he

had the means to obtain the information about the unlawful acts being perpetrated against Khalra. Gill was able to find Khalra at a time when all of Punjab Police was purportedly trying their utmost to locate Khalra. CBI v. Sandhu (18 Nov. 1995), ¶17. Further, Gill chose to allow a farcical police investigation into Khalra's abduction. On 25 September 1995, Superintendent of Police (SP) (City) Sukhdev S. Chhina filed an affidavit on behalf of Gill in response to Mrs. Khalra's habeas petition. In this affidavit, Chhina stated that he was heading the police investigation into Khalra's abduction, and that Khalra was not in police custody. Affidavit of Sukhdev S. Chhina (25 Sep. 1995), ¶¶1-2, in Paramjit Kaur v. State of Punjab, Writ Pet. (Crl.) 497/1995. Gill ignored Mrs. Khalra's affidavit filed in response to Chhina's affidavit on 9 October 1995, providing detailed information of threats against Khalra from SSP Sandhu; Gill chose not to pursue that line of inquiry. Affidavit of Paramjit Kaur (9 Oct. 1995), in Paramjit Kaur v. State of Punjab, Writ Pet. (Crl.) 497/1995. *See also*, Affidavit of Paramjit Kaur (10 Nov. 1995), in Paramjit Kaur v. State of Punjab, Writ Pet. (Crl.) 497/1995. Further, Gill was satisfied with having SP Chhina head the investigation and respond to the habeas on his behalf, despite the fact that Chhina's superior was accused of perpetrating the unlawful acts. Thus, Gill's knowledge of the unlawful acts against Khalra is imputed because he willfully ignored all of the information that provided him with constructive knowledge of the unlawful acts and justified further inquiry.

Gill, therefore, had in his possession both general and specific information that put him on notice of the unlawful acts committed and being committed by his subordinates against Khalra. Gill's duty then was to prevent his subordinates from committing further unlawful acts and to punish them for the crimes already committed.

### **C. KPS Gill failed to take necessary and reasonable measures to prevent and/or punish the unlawful acts of his subordinates.**

Gill failed to take necessary and reasonable measures to prevent his subordinates from committing unlawful acts against Khalra and/or to punish them afterwards. A superior is liable if he "failed to take the necessary and reasonable measures to prevent the crime or punish the perpetrator thereof." Blaskic Trial Chambers at ¶294. Necessary measures are "those measures required to discharge the obligation to prevent or punish in the circumstances prevailing at the time," and reasonable measures are "those measures which the commander was in a position to take in the circumstances." Bagilishema Trial Chambers at ¶¶38, 47-50. In other words, necessary and reasonable measures for a superior are those which are "within his material possibility." *See* Prosecutor v. Krnojelac, (ICTY Trial Chambers, 15 Mar. 2002) ¶95 and Delalic Trial Chambers at ¶935. *See also* Limaj Trial Chambers at ¶526 (holding "[a] superior will be held responsible if he failed to take such measures that are within his material ability"). In evaluating what actions are within a superior's material ability, the court is guided by a superior's "degree of effective control." Blaskic Trial Chambers at ¶335. *See also* Limaj Trial Chambers at ¶526. A superior must use "every means in his powers" to prevent and/or punish the unlawful acts. Kordic Trial Chambers at ¶445. He does not have to possess the explicit legal capacity to take those actions. Limaj Trial Chambers at ¶526. *See also*, Blagojevic Trial Chambers at ¶793.

Further, the failure to "prevent or punish" are two distinct crimes, where "the failure to punish concerns past crimes committed by subordinates whereas the failure to prevent concerns future crimes of subordinates." Halilovic Trial Chambers at ¶93, citing Blaskic Appeals

Chamber. Thus, the superior cannot escape liability for failing to prevent crimes that he knew or had reason to know his subordinates were going to commit, by punishing his subordinates after the commission of the crimes. Blaskic Trial Chambers at ¶336. See also Bagilishema Trial Chambers at ¶49.

Notwithstanding his effective control as the top superior of the Punjab Police, Gill failed to take necessary and reasonable measures to prevent his subordinates from abducting, illegally detaining, torturing, and murdering Khalra. He also failed to punish his subordinates for their unlawful acts. His subordinates committed these crimes in a climate of impunity that Gill created, contributing to Gill's liability for the crimes. Gill cannot escape responsibility by limiting liability to his subordinates.

**1. Gill failed to take necessary and reasonable measures to prevent his subordinates from perpetrating the unlawful acts against Khalra.**

Gill failed to take the necessary and reasonable measures, or every action within his material ability, to prevent his subordinates from perpetrating the unlawful acts against Khalra. Gill's duty to prevent his subordinates from committing the crimes against Khalra arose from the moment of Khalra's abduction. A superior's duty to prevent arises:

“from the time the superior acquires knowledge, or has reason to know that a crime is being or is about to be committed . . . . A superior must act from the moment he acquires such knowledge.”

Limaj Trial Chambers at ¶527. See also Prosecutor v. Kvocka (ICTY Trial Chambers, 2 Nov. 2001) at ¶317 (holding that “[a]ction is required on the part of a superior from the point at which ‘he knew or had reason to know’ of the crimes committed or about to be committed by subordinates”). As discussed above, Gill knew and had reason to know that his subordinates were committing crimes against Khalra the moment they abducted Khalra. Gill acquired further knowledge of the crimes when he interrogated Khalra at SSP Sandhu's residence and witnessed the crimes. Gill's subordinate unequivocally stated in an affidavit filed on behalf of Gill that the Punjab Police did not want Khalra in any matter. Affidavit of Sukhdev S. Chhina (25 Sep. 1995), ¶1, in Paramjit Kaur v. State of Punjab, Writ Pet. (Crl.) 497/1995. Thus, Gill clearly knew that his subordinates were illegally detaining Khalra. Further, at the police stations and SSP Sandhu's residence, it was apparent that Khalra was a prisoner and not a guest; Khalra was kept in a locked room with armed guards. CBI v. Sandhu (18 Nov. 2005), ¶17. It was also visibly apparent that the police had tortured Khalra; Khalra bore marks of abuse all over his body and had difficulty moving. CBI v. Sandhu (18 Nov. 2005), ¶¶17, 28. Thus, because Gill failed to take immediate measures to prevent his subordinates from committing the unlawful acts at the moment of Khalra's abduction, and, at the latest, when he observed Khalra in Sandhu's custody, Gill is liable for these crimes.

Gill could have prevented his subordinates' crimes against Khalra with a simple release order and an order prohibiting further harm against Khalra. Orders prohibiting the unlawful acts are a significant factor in determining whether the superior took necessary and reasonable measures:

“When determining whether necessary and reasonable measures have been taken, the relevant factors to be considered include: whether specific orders prohibiting or stopping the criminal activities were issued, what measures to secure the implementation of these orders were taken, what other measures were taken to ensure that the unlawful acts were interrupted and whether these measures were reasonably sufficient in the specific circumstances.”

Halilovic Trial Chambers at ¶77. See also Strugar Trial Chambers at ¶378 (similar). A release order from Gill was necessary because it was required to prevent Khalra’s continuing illegal detention and the possibility of further torture and murder; Khalra’s release would have removed him from the physical control of Gill’s subordinates. This measure was also necessary because it was legally required by the Supreme Court. The Court had served Gill with a copy of the habeas petition filed by Mrs. Khalra and had ordered him to render all assistance in producing Khalra. Paramjit Kaur v. State of Punjab, 1996 SC (7) 20 (15 Nov. 1995) (citing 11 Sep. 1995 order). Further, a release order was reasonable. At least at one point, Gill was physically present at the scene of the unlawful acts and had the chief perpetrators assembled before him. CBI v. Sandhu (18 Nov. 1995), ¶¶17, 28. His subordinates were in no position to deny or cover-up their crimes or escape an order given in person. Thus, Gill failed to take the necessary and reasonable measure of ordering Khalra’s release to prevent the unlawful acts of his subordinates.

Gill could have undertaken a wide range of actions beyond a release order, all within his materiality ability, that would have prevented his subordinates’ crimes against Khalra. A superior must go beyond routine orders, and take active steps to ensure the prevention of the unlawful acts. Halilovic Trial Chambers at ¶89; Strugar Trial Chambers at ¶374. Given his effective control as DGP, he could have assembled a special team of subordinates to conduct a raid to rescue Khalra. Even after his interrogation of Khalra, Gill had several days to marshal the appropriate forces to arrest his subordinates and rescue Khalra. Gill also could have immediately informed the Supreme Court, as he was legally bound to do, about Khalra’s location. The Court could have then appointed a warrant officer to rescue Khalra. Gill could have taken physical custody of Khalra at SSP Sandhu’s residence, also a measure within his material ability. Clearly, Gill did not use “every means in his power” to prevent these crimes.

Given these circumstances and Gill’s wide powers, no superior could have considered it reasonable to refrain from action, as Gill did. Gill completely failed to take the necessary and reasonable measures that would have prevented his subordinates’ unlawful acts against Khalra. Thus, he is liable for his refusal to prevent these crimes.

## **2. Gill failed to punish his subordinates for their unlawful acts.**

Not only did Gill fail to prevent his subordinates from committing these unlawful acts against Jaswant Singh Khalra, he also failed to punish them after the commission of the crimes. Similar to the duty to prevent, “the duty to punish arises after the superior acquires knowledge of the commission of the crime.” Limaj Trial Chambers at ¶527. Thus, Gill’s duty to punish his subordinates arose from the moment of Khalra’s abduction. The duty became alarmingly obvious when Gill himself interrogated Khalra in illegal detention.

Gill failed to punish his subordinates with disciplinary measures that were in his material ability. See Halilovic at ¶ 100 (holding “[t]he superior . . . has a duty to exercise all measures

possible within the circumstances”). *See also* Kvocka Trial Chambers at ¶ 316 (holding “[t]he superior does not have to be the person who dispenses the punishment, but he must take an important step in the disciplinary process”). The Punjab Police Rules authorize any police officer above the rank of Head Constable to suspend any police officer junior to him suspected of misconduct, pending an investigation or inquiry into the charges. Punjab Police Rules, 1934, Rule 16.17. Rule 16.2 allows officials to be dismissed for the “gravest act of misconduct.” Gravest misconduct has been found to include intentionally giving false information to a superior officer and heavy drunkenness while on duty. *See* Constable Om Parkash v. State of Haryana and others, 1995 (3) SCT 171 (P&H) (DB); State of Punjab v. Ram Singh Ex. Constable, 1992(3) SCT 448: 1992 LIC 2391 (SC). Dismissal will ordinarily follow where the official has committed a criminal offense. *See* Bhoja Ram, Ex. Constable v. the State of Haryana and others, 1972(2) SLR 459 (P&H). At a minimum, as the DGP of Punjab, Gill could have censured, transferred, suspended, investigated and dismissed or had any of his subordinates arrested. He admitted to taking such disciplinary actions in the past against officers accused of using “excessive force,” but did not take any such actions after his subordinates abducted, illegally detained, tortured, and murdered Khalra. *See, e.g.,* Stefan Wagstyl, “Peace is imposed on a still troubled Punjab,” Financial Times (14 May 1993), p.5. Even something relatively minor as being drunk has been found to constitute the gravest misconduct warranting dismissal. *State of Punjab v. Ram Singh Ex. Constable, 1992(3) SCT 448: 1992 LIC 2391 (SC)*. Here, however, Gill witnessed his subordinates perpetrate torture and illegal detention, amongst the most heinous human rights violations, yet he failed to dismiss the perpetrators or take any disciplinary actions whatsoever.

In addition to failing to punish his subordinates, Gill also refused to conduct an investigation into their crimes. The duty to punish includes “at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities.” Kordic Trial Chambers at ¶446.<sup>3</sup> Gill did not retire as DGP until December 31, 1995— four months after his subordinates abducted Khalra and over two months after his subordinates murdered Khalra. Thus, he had ample time to at least investigate his subordinates and report them to the appropriate authorities. Instead, Gill allowed his subordinates to conduct a sham investigation, that was easily deconstructed by Judge Bhupinder Singh in his November 2005 order in CBI vs. Ajit Singh Sandhu, et al. Whereas SP Chhina was content to rest his investigation on police alibis, Judge Singh exposed the falsity of the alibis through the forgery of documents, lack of corroborating evidence, and failure to conclusively demonstrate that the accused could not have been at Khalra’s residence at the time of the abduction. CBI v. Sandhu (18 Nov. 2005), ¶¶33-41. Gill’s failure to investigate and report the crimes is further reflected by the Supreme Court’s decision to turn the investigation into Khalra’s abduction over to the Central Bureau of Investigation in November 1995. This decision was further endorsed by the Advocate General of Punjab. CBI v. Sandhu (18 Nov. 2005), ¶22. Thus, Gill failed to pursue even the minimum actions within his material ability to punish his subordinates.

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<sup>3</sup> *See also* Limaj Trial Chamber at ¶529 (holding “[a] superior’s duty to punish the perpetrators of a crime encompasses the obligation to conduct an effective investigation with a view to establishing the facts. The obligation on the part of the superior is to take active steps to ensure that the perpetrators will be punished. To that end, the superior may exercise his own powers of sanction, or if he lacks such powers, report the perpetrators to the competent authorities”); Kvocka Trial Chamber at ¶316 (holding “the material ability to punish . . . may simply entail such things as ‘submitting reports to the competent authorities in order for proper measures to be taken’”).



Rather than punishing, investigating, or reporting his subordinates, Gill defended the chief accused SSP Sandhu from disciplinary actions and allowed him to be promoted. The Supreme Court ordered Gill to transfer SSP Sandhu out of Amritsar district on 15 November 1995 because of his involvement in Khalra's abduction. However, Gill did not immediately comply with the order. "Govt fails to transfer SSP," Tribune (23 Nov. 1995), p.4. Further, when SSP Sandhu was eventually transferred, he was promoted to Assistant Inspector General in Chandigarh. Paramjit Kaur v. State of Punjab, Writ Pet. (Crl.) 497/1995, Supreme Court (15 Mar. 1996). These blatant acts of contempt and impunity demonstrate that Gill never had any intention of punishing his subordinates for their unlawful acts against Khalra.

### **3. Gill is responsible because he created a climate of impunity that allowed the unlawful acts of his subordinates.**

Gill created a climate of impunity by allowing and publicly defending the widespread human rights abuses perpetrated by his subordinates. A superior's responsibility "may arise from his or her failure to create or sustain among the persons under his or her control, an environment of discipline and respect for the law," and the failure to punish "may be triggered by a broadly based pattern of conduct by a superior, which in effect encourages the commission of atrocities by his or her subordinates." Bagilishema Trial Chambers at ¶ 50.<sup>4</sup> Thus, beyond the specifics of this case, Gill created a permissive environment for abuse and disregard for the law during his tenure as DGP.

Gill created a climate of impunity by allowing the Punjab Police to perpetrate systematic and widespread human rights abuses. The Courts have recognized the role of Punjab Police in perpetrating numerous human rights abuses under DGP Gill's command. See, e.g., Committee for Information and Initiative on Punjab v. State of Punjab, Writ Pet. (Crl.) No. 447/1995; "Probe ordered into abduction," Tribune (12 Jan. 1995), p.5; Amarjit Singh, "3 found tortured in SI's custody," Tribune (18 Jan. 1995), p.1; "Notice to DGP in torture case," Tribune (9 Sep. 1995), p.5; "CBI probe into two 'encounter' deaths ordered," Tribune (23 Feb. 1995), p.4; "Notice to DGP in torture case," Tribune (13 Mar. 1995), p.4; "CBI probe ordered into disappearance," Tribune (29 Apr. 1995), p.4; "Prosecute cops: SC," Tribune (11 May 1995), p.1; Amarjit Singh, "HC order on SHO's posting," Tribune (22 July 1995), p.1; "5 cops get RI for death in custody," Tribune (17 Nov. 1995), p.1; "Probe ordered into 'disappearance,'" Tribune (1 Dec. 1995), p.4. In Committee for Information and Initiative on Punjab v. State of Punjab, the Supreme Court found that the CBI's investigations into Khalra's allegations of mass secret cremations had revealed "flagrant violations of human rights on a mass scale." Committee for Information and Initiative on Punjab v. State of Punjab, Writ Pet. (Crl.) No. 447/1995, Supreme Court (12 Dec. 1996). In other cases, the Court expressed its alarm about the unaccountable police force Gill had created. In Inder Singh v. State of Punjab, the Court wrote: "We are deeply concerned about the safety of the citizenry at the hands of such an errant, high-handed and unchecked police force." Inder Singh v. State of Punjab, Writ. Petition (Cr.) 221/1994, (1995) 1 S.C.J. 343, ¶14. Respected human rights organizations have also documented systematic violations committed under Gill's authority. See, e.g., Human Rights Watch, Punjab in Crisis: Human Rights in India

<sup>4</sup> See also Hostage Case, Law Reports of Trials of War Criminals at 1309 (1994) (finding the superior was criminally responsible because of his "attitude towards the innocent population" reflected in his "indifference" to the "unjustified and brutal murders which took place under his area of command" and permitted the crimes under his authority to go unpunished).

(1991); Human Rights Watch and Physicians for Human Rights, Dead Silence: Legacy of Abuses in Punjab (1994); Ami Laws and Vincent Iacopino, "Police Torture in Punjab, India: An Extended Survey," Health and Human Rights: An International Journal, Vol. 6, No. 1 (2003); Amnesty International, India: Human Rights Violations in Punjab: Use and Abuse of the Law (May 1991); Amnesty International, Punjab Police: Beyond the Bounds of Law, (Aug. 1994); Amnesty International, A Mockery of Justice (1998); Amnesty International, A Vital Opportunity to End Impunity in Punjab (1999); Amnesty International, State Continues to Obstruct Justice in Punjab (April 2001); Ram Narayan Kumar, et al., Reduced to Ashes: The Insurgency and Human Rights in Punjab (2003, SAFHR). Thus, Gill permitted the Punjab Police to commit widespread and systematic human rights abuses during his tenure as DGP.

Not only did Gill allow his subordinates to perpetrate systematic human rights violations, he publicly defended and attempted to justify their crimes. In an interview in 1993, Gill made it clear that police abuse was not his concern. He said, "[I]f an officer has done something wrong, it is between him and his maker." Shekhar Gupta and Kanwar Sandhu, "Pakistan has lost," India Today (15 Apr 1993), p.69. In 1990, Gill opposed the registration of criminal cases against the policemen accused of extrajudicially executing Harpal Singh and Baljit Singh at Kotla Ajner village. The Punjab Home Secretary had recommended that the guilty policemen be punished in this and other cases in which there were credible allegations of police abuses. The Home Secretary stated that such action was necessary if the credibility of the Punjab Police was not to be eroded further. However, Gill opposed legal action on the ground that such prosecutions would "demoralize the police force." Kanwar Sandhu, "New Frictions: Officials, police lock horns," India Today (15 Nov. 1990), p.14. Amnesty International, Human rights violations in Punjab (May 1991). Gill defended notorious officers such as Gobind Ram, who was accused of torturing and murdering numerous people, with the same "police morale" rationale. When the Home Secretary recommended registering criminal cases against Ram, Gill objected and threatened to resign if the cases went forward. Human Rights Watch, Punjab in Crisis (1991), p.30 n.68, p.40 n.82. Gill's disdain for accountability went so far that he personally handed Prime Minister Narasimha Rao a note urging against police convictions. Yoginder Gupta, "CMs discuss cops' convictions with Rao," Tribune (5 May 1995), p.1. When Jaswant Singh Khalra released his findings of police abductions leading to extrajudicial executions and secret cremations in early January 1995, KPS Gill attempted to white-wash these crimes by declaring that all of the disappeared persons had gone abroad. Annexure P-2 ('Missing persons' not killed: Gill). CBI v. Sandhu (18 Nov. 2005), ¶13. Thus, Gill responded to allegations of human rights abuses by his subordinates by denying, defending, and/or justifying them.

In addition to permitting his subordinates to commit atrocities under his command, Gill has continued to contribute to a climate of impunity for past abuses by ridiculing the judiciary. In a 1997 article, Gill described the habeas corpus petitions filed by relatives of victims of police abuse, who chose the judiciary as their recourse for redress, as a "weapon against the police and the state." KPS Gill, "By other means: The litigation weapon against the police and the state," Frontline (27 June 1997), p.115. Thus, it is no wonder that Gill disregarded the habeas notice issued to him in September 1995 by the Supreme Court regarding Khalra's abduction. In 1997, after SSP Sandhu's alleged suicide, Gill wrote a letter to Prime Minister I.K. Gujral, in which he described the legal cases proceeding against SSP Sandhu as "an unprecedented and unprincipled inquisition," "a sustained and vicious campaign of calumny, of institutional hostility and state indifference," and "the most convenient strategy for vendetta". KPS Gill, Letter to Prime Minister I.K. Gujral on the Death of Ajit Singh Sandhu (20 May 1997), available at

<http://www.satp.org/satporgtp/kpsgill/terrorism/97PM.htm>. He further stated in 2001, that Sandhu “was simply hounded to his death by the judiciary.” KPS Gill, “Terror unleashed by rightwallahs,” The Pioneer (8 Sep. 2001), available at: <http://www.satp.org/satporgtp/kpsgill/terrorism/Sep8Pio.htm>. In 2001, Gill described the Indian judiciary as “among the most obtuse legal systems in the world.” He further criticized the Court, stating the judiciary “pre-judged” cases that had been “concocted” against police officers, thus doubting the ability of the judiciary to independently adjudicate such cases. KPS Gill, “Man in uniform demands justice,” Hindustan Times (8 June 2001). He also doubted the Court’s competency to handle cases against accused terrorists, by calling it “guilty of a great deal of populist posturing and of what can only be described as criminal irresponsibility on this issue.” KPS Gill, “War of Thousand Cuts,” Indian Express (7 Jan. 2000), available at: <http://www.satp.org/satporgtp/kpsgill/terrorism/00Jan07IE.htm>. Thus, according to Gill, judges are the criminals, not him. Gill further described the judicial institution and its processes as “senseless.” KPS Gill, “The Fundamental Idea,” Outlook India (13 Mar. 2000), available at: <http://www.satp.org/satporgtp/kpsgill/terrorism/00Mar13Outlook.htm>. Thus, Gill has consistently and vocally ridiculed the judiciary, contributing to the climate of impunity.

#### **4. Gill cannot escape responsibility for the crimes against Khalra by limiting liability to the convicted subordinates or blaming other officials.**

KPS Gill cannot escape liability for the crimes of his subordinates merely because SSP Sandhu and Ashok Kumar are dead, and other subordinates have been convicted of Khalra’s illegal detention and murder. Under international and Indian law, every superior who knew or had reason to know that his subordinates committed or were about to commit unlawful acts and failed to prevent and/or punish those unlawful acts is responsible. See Kronjelic Trial Chambers at ¶93 (holding that “[t]wo or more superiors may be held responsible for the same crime perpetrated by the same individual if it is established that the principal offender was under the command of both superiors at the relevant time”). The fact that command over subordinates is shared by more than one official does not obviate the doctrine of superior responsibility. See Doe v. Qi, 349 F.Supp.2d at 1332 (stating “[t]he fact that command is shared by more than one official should not obviate the doctrine of command responsibility per se, lest the responsibility could never be imputed to members of a governing body which authorized human rights violations”). Further, as discussed above, the chain of command between the superior and the subordinate who perpetrated the unlawful act does not have to be direct. See Kamuhanda Trial Chambers at ¶602 (holding “[t]he chain of command between a superior and subordinates may be either direct or indirect”). See also Strugar Trial Chambers at ¶366 (holding “there is no legal requirement that the superior-subordinate relationship be a direct or immediate one for a superior to be found liable for a crime committed by a subordinate, provided that the former had effective control over the acts of the latter”). Thus, Gill cannot escape responsibility for the crimes of his subordinates against Khalra by claiming that some subordinates have been convicted of the unlawful acts or blaming other officers for failing to prevent his subordinates’ unlawful acts and punish them afterwards.

In conclusion, Gill failed to take necessary and reasonable measures within his material ability to prevent his subordinates from perpetrating unlawful acts against Khalra. He further failed to punish his subordinates after the commission of the crimes. Gill created a climate of impunity, further compounding his liability. Gill possesses no defense from his liability.

Accordingly, he must be held responsible for the abduction, illegal detention, torture and murder of human rights defender Jaswant Singh Khalra.

#### **IV. Impunity for KPS Gill denies Mrs. Khalra and her two children their right to an effective remedy.**

International human rights law guarantees an effective remedy to victims and survivors of human rights abuse. The Joint principles elaborate this right as the rights to truth, justice, and reparations. Question of the impunity of perpetrators of human rights violations (civil and political), Final Report Submitted by Mr. Louis Joinet pursuant to Sub-Commission decision 1996/119, Commission on Human Rights. A survivor's right to an effective remedy imposes an obligation on the state to take the necessary investigative, judicial, and reparatory steps to redress the violation that took place under its jurisdiction. Thus, this right includes a thorough investigation of the crimes, capable of identifying the perpetrators and leading to their prosecutions.

The right to an effective remedy is confirmed in numerous international instruments, including those to which India is a party. India acceded to the International Covenant on Civil and Political Rights (ICCPR) on 10 April 1979. Article 2 of the ICCPR requires states to provide an effective remedy, which includes the right to investigation and fair trial, and Articles 9.5 and 14.6 of the ICCPR specify a right to reparations. See also Convention on the Elimination of All Forms of Discrimination against Women, Article 2(c), and Universal Declaration of Human Rights, Article 8. Under Indian law, India is obligated to apply international law, and further, “[i]n cases involving violation of human rights, the country must forever remain alive to international instruments and conventions and apply the same to a given case where there is no inconsistency between the international norms and the domestic law occupying the field.” Apparel Export Promotion Council vs. A.K. Chopra, 1999(1) SCC 759. Thus, the international right to an effective remedy is India's law.

International judicial bodies have also concluded that states must provide victims of human rights abuse an effective remedy, which includes a thorough investigation to identify all perpetrators. The European Court of Human Rights, for example, has defined an effective remedy as including “a thorough and effective investigation capable of leading to the identification and punishment of those responsible.”<sup>5</sup> The Inter-American Court of Human Rights' landmark ruling in the Velasquez-Rodriguez case similarly held that states had a positive obligation to investigate and punish human rights violations to effectuate the right to an effective remedy.<sup>6</sup> Thus, not only does the state have a duty to investigate, it must investigate with a focus on enabling sanctions against perpetrators.

India's obligations under international law require it to fully investigate human rights violations, and enable judicial redress, including removing obstacles to justice and ending Gill's impunity for his role in Khalra's abduction, illegal detention, torture, and murder. Notwithstanding this law, Mrs. Khalra and her two children have been denied their right to an

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<sup>5</sup> See, mutatis mutandis, the Aksoy, Aydın and Kaya Trial Chambers at p. 2287, § 98, pp. 1895–96, § 103 and pp. 329–31, §§ 106 and 107, respectively.

<sup>6</sup> Velasquez Rodriguez v. Honduras, Inter-Am. Ct. H.R., Judgment of 29 July 1988 (ser. C) No. 4 (1988). In this seminal case, the Court found that states are responsible for the acts and omissions of their agents, when their agents act in violation of the law. See also Abella v. Argentina, Case 11.137, Inter-Am. C.H.R. 271, Annual Report 1997, OEA/Ser. L/VII.98, doc. 7 rev (1998) (holding that an effective remedy includes the duty to investigate violations of the right to life).

effective remedy. By shielding Gill from investigation and prosecution, the family is denied their right to hold the persecutor accountable. The DGP must be held to the highest standards of the law. He possessed the highest rank, powers, and recognition, and countless subordinates took their cue from his actions and conformed their actions to the standards he preached and practiced. It is time to shift from impunity to accountability, and for the courts to enforce the human rights that Gill destroyed.

## **V. Conclusion**

Under the international law of superior responsibility, incorporated into Indian law, KPS Gill is directly liable for the crimes of his subordinates against Jaswant Singh Khalra. The doctrine of superior responsibility is an established principle of international law. It is also the law of India and governs the present case. The present case meets all three elements of the doctrine of superior responsibility. KPS Gill was superior to the perpetrators of the unlawful acts against Khalra; he knew or had reason to know that his subordinates had committed and were about to commit unlawful acts against Khalra; and he failed to take the necessary and reasonable measures to prevent and/or punish the unlawful acts. Thus, international and Indian law holds KPS Gill liable for the crimes committed against Khalra. Impunity for Gill further denies Khalra's surviving family their right to an effective remedy.