



**Accountability Watch  
Committee (AWC)**



Mr Bharat Bahadur Karki  
Attorney General of Nepal  
Kathmandu, Nepal

17 February 2010

Rt. Honourable Attorney General,

**Subject: Government obstruction of justice and defiance of judicial authority**

We are writing to you to urge you in your capacity of Chief Legal Advisor, under article 135 of the Interim Constitution, to address the continuing obstruction by the Government and Nepal Army of criminal proceedings in Maina Sunuwar's murder case. These actions undermine the constitutional separation of powers and the rule of law by failing to recognize and implement the Supreme Court's September 2007 decision for this case to be investigated and brought before the civilian court in Kavre District.

We call on you to take steps to arrest and transfer Major Niranjan Basnet to the Kavre District Court for trial, and to arrest the other three accused (Colonel Babi Khatri, Captain Sunil Prasad Adhikari and Captain Amit Pun). Below we set out pertinent international law on the scope of military jurisdiction and on the relevance of arguments by members of the Nepal Government and Nepal Army regarding double jeopardy and amnesty.

**The Facts**

As you are aware, arrest warrants were issued against Major Basnet and three others by the Kavre District Court on 31 January 2008 pursuant to a decision by your Office to charge them with the murder of Maina Sunuwar (Chapter on Homicide of the *Country Code of Nepal (Muluki Ain)*). The Government has not yet taken action to arrest Major Basnet, and Minister

of Defense Bhidya Bhandari has publicly supported the Nepal Army's defiance of the arrest order, in spite of the rulings of the Supreme Court and Kavre District Court.

The facts surrounding Maina Sunuwar's death have yet to be determined by a civilian court, but there is consistency between the findings of national and international organizations and the Nepal Army's own reported inquiries. According to these reports, Maina Sunuwar was a victim of enforced disappearance following her arrest by a covert Nepal Army operation led by Major Niranjana Basnet on 17 February 2004. The Army denied thereafter that she had been detained. Under national and international pressure, the Nepal Army conducted an inquiry in March 2005 and concluded that Maina Sunuwar died and was buried in a clandestine grave following prolonged torture by simulated drowning and electrocution on the very day of her enforced disappearance at the Nepal Army's Peacekeeping Training Barracks at Panchkhal.

The Nepal Army Court Martial of September 2005 did not charge Major Basnet with either crimes or disciplinary offences. Now that he has been charged with murder by the Kavre District Court, it remains for that civilian Nepali court of law to determine his guilt or innocence with respect to Maina Sunuwar's murder and other related criminal offences under Nepali law, with full respect for his right to a fair trial under international law and standards.

### **Jurisdiction of Military Tribunals**

The adjudication of human rights violations by military tribunals has frequently led to impunity for those violations; denial of the right to an effective remedy (especially to ensure prosecution and punishment of those responsible); and the denial of reparation to victims. This recurring phenomenon has led international bodies, including the UN Human Rights Committee and the Committee against Torture, to hold that gross violations of human rights should be tried by civilian and not by military courts.

Principle 29 of the Human Rights Commission's *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (E/CN.4/2005/102/Add.1) states:

The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court.

International standards, as reflected in the jurisprudence of UN and regional bodies, overwhelmingly support and reinforce this principle.<sup>1</sup>

As set out below, the Nepal Army Court Martial of 8 September 2005 failed to comply with this principle, with the consequence of denying an effective remedy to victims.

The Court Martial decision, entitled “Death of a non-military person in military barracks after arrest”, applied sections 54 and 60 of the Nepal Army Act 1959 (as applicable in 2005). Section 60 (“Crime under other laws”) is applicable provided that the offences, including murder, were committed “at the time of military operations” (s.61). Section 60 allows the Court Martial to apply ordinary criminal law with regard to the offences under other law (including the provision of the Country Code (*Muluki Ain*)), including sentencing provisions. Section 54 deals with ‘disciplinary’ and ‘offences against good governance’, with possible imprisonment of up to seven years.

The Court Martial found that prolonged torture was carried out by three of four now facing arrest warrants by the Kavre District Court, after which Maina Sunuwar died. Major Basnet witnessed some of the torture, but he did not face even disciplinary charges of any kind. The Court Martial found that Maina was subjected for 90 minutes to “drowning in a drum full of water and passing electric current on her wet body.” She was then reportedly returned to a cell blindfolded and offered food, shortly after which she began vomiting and died without receiving any medical attention. Her corpse was then shot to falsify the cause of death (following a fictitious attempted escape) and buried in a clandestine grave. The Court Martial does not consider the fact that the Army persistently denied that Maina was in their custody to her family members.

Notwithstanding these findings of fact, the Court Martial reached the conclusion that the death of this 15-year-old schoolgirl following prolonged and deliberate simulated drowning and electrocution was “unfortunate and accidental”, ‘possibly’ caused by the “negligence of officials” and the “wrong method and process of interrogation”, and also due in part to “her own physical and mental condition”.

The Court Martial decision lacks any explicit consideration of the statutory elements of “crime under other law” (pursuant to s.60 Nepal Army Act), including murder and lesser offences such as negligence causing death, in accordance with the Chapter on Homicide of the Country Code (*Muluki Ain*) of Nepal. The Court Martial instead found three officials guilty of disciplinary offences and imposed penalties of six months’ imprisonment, fines, and a temporary suspension of promotions. The six-month period of imprisonment is well below the seven year maximum period allowed under s.56 of the Army Act 1959 for

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<sup>1</sup> See cases identified in: International Commission of Jurists (Federco Andreu-Guzman), *Military Jurisdiction and International Law* (2004), pp. 61-141.

disciplinary offences. Under Nepali criminal law, which was available to the Court Martial but not invoked, the accused could have been charged and sentenced for negligence causing death, or life imprisonment (20 years) for murder. The Court Martial did not rely upon or otherwise refer to these laws and sentencing procedures.

The new Nepal Army Act 2006 (s. 66) now rightly removes rape and homicide from Court Martial jurisdiction, regardless of whether it occurred in the context of a military operation, codifying what was already an applicable norm of international law at the time of Maina Sunuwar's murder in February 2004.

Nepal Army and Government officials have been referring to this deeply flawed Court Martial decision as a basis for claiming that the matter is closed, and that it would be unfair to try the accused again in civilian court. Other related views circulating in the media make the assumption that these crimes merit amnesty and that they will be considered by future commissions of inquiry as part of the transitional justice process. These arguments are now considered in more detail below.

### **Double Jeopardy**

The principle of double jeopardy only applies where an individual faces trial twice for the same statutory elements of criminal activity arising from the alleged wrongdoing. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) guarantees the right to equality before courts and tribunals and to a fair trial.

As noted above, none of the four accused, including Major Basnet, was tried for criminal offenses. Instead, three of the accused, with the exception of Major Basnet, were found guilty of disciplinary offences under the Nepal Army Act (ss. 37, 54, 60, 98).

The Human Rights Committee has clarified that the principle of double jeopardy does not apply to "disciplinary measures that do not amount to a sanction for a criminal offence within the meaning of article 14 of the Covenant".<sup>2</sup>

The Office of the Attorney General has already charged Major Basnet and three others with murder and it remains for the Attorney General to decide whether other charges pursuant to applicable Nepali criminal law should be brought in relation the gross human rights violations of enforced disappearance, torture, and unlawful killing. Under international law, it is the obligation of states to investigate, prosecute and punish these crimes.

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<sup>2</sup> UN Human Right Committee's General Comment 32 on article 14 of the ICCPR: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

In fact, the Supreme Court of Nepal has already dealt with this argument when in September 2007 it referred this matter to a civilian court without expressing any concern regarding possible double jeopardy. The Supreme Court at that time had before it and reviewed the Nepal Army Court Martial judgement of September 2005.

Furthermore, there are two important exceptions to the defense of double jeopardy. Under international law, double jeopardy does not arise if earlier proceedings were carried out to “shield” the person from criminal responsibility, or were manifestly “inconsistent with an intent to bring the person concerned to justice”. These norms are codified in article 20(3) of the Rome Statute of the International Criminal Court.

As noted above, the Court Martial shows complete disregard for the serious crimes disclosed by the acknowledged facts. Maina’s torture is described euphemistically as the use of an inappropriate “method”. Her death is described as a “possible” result of negligence as well as Maina’s own “weakness”. Her clandestine burial is burial “without following required procedures”. In keeping with this reduction of criminal offences to disciplinary infractions, the sentence falls well below the Nepal Army’s own maximum sentence of seven years’ imprisonment for disciplinary offences. Major Basnet was never before the Court Martial proceedings as an accused even for disciplinary offences. Furthermore, as stated above, Major Basnet and other three were never tried for the murder by the Court Martial as would have been permitted by the section 60 of the Army Act 1959. Hence the principle of double jeopardy is not applicable.

These findings and the exclusion of Major Basnet’s actions from any judicial scrutiny are manifestly inconsistent with bringing the four accused to justice and also have the effect of shielding Major Basnet and the other three accused from criminal responsibility. As such, they are compelling additional reasons to reject the argument of double jeopardy.

### **Amnesty**

The transitional justice process, including the anticipated work of commissions of inquiry in Nepal (regarding enforced disappearances and the aspiration for truth and reconciliation) is not a legitimate substitute or justification for delaying a judicial remedy in these cases. Prosecutions under the control of the judiciary are distinct in purpose, scope and nature from the role played by commissions of inquiry.

The most important point to note regarding commissions of inquiry is that they do not make individual determinations of guilt. This role is reserved exclusively for the judiciary, in its capacity to guarantee fair trial rights. The role of a commission of inquiry is to explain the causes of human rights violations; to make known publicly the truth about the circumstances of these violations; to disclose evidence of crimes that the Attorney General may pursue; and to recommend reparations measures as well as broader legislative, policy, and institutional reform steps necessary to prevent the repetition of harms.

The application of amnesty for crimes under international law is now clearly prohibited by international law. The prohibition has been recognized by the United Nations Secretary-General in his 2004 report on the rule of law and transitional justice, where he stated that ‘United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights’.<sup>3</sup> International UN practice reflects respect for this principle; for example, in support of transitions in Guatemala, Sierra Leone, East Timor, Cambodia, Haiti, and Côte d’Ivoire.

Similarly, although Article 6 (2) of the Second Additional Protocol to the Geneva Conventions (1949) encourages governments to grant the broadest possible amnesty to those who participated in the conflict or who were detained in connection with the conflict, the drafters of that provision recognized that such an amnesty cannot extend to war crimes. Suspected war crimes, including torture and murder, must be investigated and prosecuted without restriction through statutes of limitation or other delays. A summary of the relevant customary international humanitarian and human rights law can be found in the *ICRC Rules of Customary International Law* (see Rule 159) and in the *Rome Statute* of the International Criminal Court (s.8(2)(c)).

## **Conclusion**

We the national and international human rights organizations urge you to take immediate and effective steps to ensure the transfer of Major Basnet to the Kavre District Court, in keeping with your duty as Chief Legal Advisor to monitor implementation of legal principles propounded by the Supreme Court (article 135(3)(b)). The ongoing defiance by the Government and the Army of valid arrest warrants – pursuant to the Nepal Supreme Court’s recognition of civilian jurisdiction in this case – is a grave threat to the constitutional separation of powers and the rule of law. In this regard, we also call on your Office recommend legislation that criminalizes and effectively addresses offences against the administration of justice.

The principles and arguments outlined above apply equally without regard to whether alleged perpetrators of war crimes are Maoist or State actors. Failure to prosecute such cases only further entrenches impunity, undermining the prospects for a democratic transition based on the rule of law and human rights.

We look forward to discussing these matters directly with you, as well as following up on the steps that you will take in your capacity as Chief Legal Officer.

Signed, 17 February 2010, Kathamandu, Nepal, by the following representatives of national and international human rights organizations:

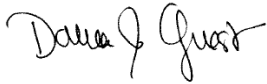
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<sup>3</sup> Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, 3 August 2004, S/2004/616, para 10

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