

Legal Briefing on the Nepal Army's Petition to Overturn Convictions for Maina Sunuwar Killing

November 2018

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists (ICJ) promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

® Legal Briefing on the Nepal Army's petition to overturn convictions for Maina Sunuwar killing

© Copyright International Commission of Jurists

Published in November 2018

The International Commission of Jurists (ICJ) and South Asians for Human Rights (SAHR) permit free reproduction of extracts from any of its publications provided that due acknowledgment is given and a copy of the publication carrying the extract is sent to their headquarters at the following address:

International Commission of Jurists
P.O. Box 91
Rue des Bains 33
Geneva
Switzerland

Legal Briefing on the Nepal Army's Petition to Overturn Convictions for Maina Sunuwar Killing

November 2018

Table of Contents

<i>ICJ Legal Opinion</i>	<i>1</i>
<i>Background</i>	<i>1</i>
<i>I</i>	
<i>Nepal’s international legal obligations relating to gross human rights violations and the administration of justice</i>	<i>3</i>
<i>II (a)</i>	
<i>Court Martial Jurisdiction Over Rape and Murder During ‘Military Engagement’</i>	<i>6</i>
<i>II (b)</i>	
<i>Court Martial Jurisdiction Over Gross Human Rights Violations.....</i>	<i>7</i>
<i>III</i>	
<i>Double Jeopardy Within the Meaning of International Standards.....</i>	<i>9</i>
<i>IV</i>	
<i>Conclusions</i>	<i>11</i>

ICJ Legal Opinion

This legal opinion has been prepared in response to a writ petition filed by the Nepal Army on 1 September 2017 at the Supreme Court pursuant to Article 46 and 133(2) of the Constitution of Nepal challenging the 16 April 2017 decision of the Kavrepalanchowk District Court.¹

In this legal opinion, the International Commission of Jurists, primarily through reference to applicable international law and standards, seeks to address several issues of importance in the Supreme Court of Nepal's consideration of the Nepal Army's petition, seeking to overturn convictions issued by the Kavrepalanchowk District for the torture and killing of 14-year-old Maina Sunuwar while in the custody of the Nepal Army.

Specifically, this opinion will address: (i) Nepal's obligations in respect of criminal accountability under international law, particularly its obligation to investigate and prosecute perpetrators of human rights violations notwithstanding the existence of transitional justice institutions; (ii) the appropriate jurisdiction of a military court-martial in cases of serious human rights violations under Nepal's Army Act and international law; and (iii) international jurisprudence and law pertinent to the Army's argument that the Kavrepalanchowk Court decision has violated principles of 'double jeopardy'.

The International Commission of Jurists (the "ICJ"), founded in 1952, is a worldwide organization of judges and lawyers working to advance understanding and respect for the rule of law and the protection of human rights throughout the world. The ICJ holds consultative status with the United Nations Economic and Social Council, the UN Educational, Scientific and Cultural Organization, the Council of Europe, and the African Union, and maintains cooperative relations with various bodies of the Organization of American States. The ICJ's website is www.icj.org.

Background

Maina Sunuwar was subjected to enforced disappearance, torture and cruel, inhuman and degrading treatment and unlawful killing after a covert military operation, which included the involvement, in varying capacities, of then Colonel Babi Khatri, Captain Amit Pun, Captain Niranjan Basnet and Captain Sunil Adhikari. She was 15 years old at the time she suffered these violations. After being taken into custody of the Nepal Army on 17 February 2004, the military for many months refused to acknowledge Ms. Sunuwar's detention or her subsequent fate.

After intense public and international pressure, in September 2005, a court martial concluded that Ms. Sunuwar died and was buried in a concealed grave following prolonged torture by simulated drowning and electrocution on the day of her

¹ *Capt. Saroj Regmi v. Office of the Prime Minister and Council of Ministers and Others*, writ no. 074-WO-0143.

enforced disappearance at the Nepal Army's Peacekeeping Training Barracks at Panchkhal.² However, her death, which had in fact resulted from prolonged torture was described by the court martial as "accidental" and put down to "carelessness" and a failure to follow procedures. The court martial blamed Ms. Sunuwar for her "physical weakness" in not being able to withstand the simulated drowning and electrocution acknowledged by the court martial.

The Military Court of Inquiry Board's report implicated a fourth person, then-Captain Niranjan Basnet, but decided not to refer him for prosecution. The three accused were sentenced to six months' imprisonment, temporary suspension of promotions and a small monetary fine as 'compensation' to Ms. Sunuwar's family. The court martial found that time spend consigned to barracks during the investigation satisfied the sentence, and so they served no time prison.

On 13 November 2005, Maina Sunuwar's mother, Devi Sunuwar, filed a First Information Report against Colonel Babi Khatri, Captain Amit Pun, Captain Niranjan Basnet and Captain Sunil Adhikari at the District Police Office Kavrepalanchok.

On 10 January 2007, Devi Sunuwar filed a Mandamus Writ at the Supreme Court challenging the non-action of the police and prosecutor, and requesting that the Court issue an order to complete the criminal investigation as required by the State Cases Act and submit a charge sheet against the defendants at the Kavrepalanchowk District Court. On 18 September 2007, the Supreme Court issued a Mandamus Order requiring the police to complete the criminal investigation within three months.

On 27 January 2008, the District Police Office Kavrepalanchowk concluded the investigation and submitted a report to the Office of the District Attorney of Kavrepalanchowk. On 3 February 2008, the District Attorney lodged a charge sheet under No. 1 and 13 (3) of the Homicide Chapter of the Country Code (*Muluki Ain* 2020) against the four army personnel.

The defendants did not surrender themselves before the court as required pursuant to Section 190 of the Chapter on Court Management of the Country Code (*Muluki Ain* 2020). The Kavrepalanchowk District Court, issued an arrest warrant which gave the defendants 70 days to appear before the court as required by Section 99 of the Country Code (*Muluki Ain* 2020). The Court granted an additional 30 days pursuant to Section 59 of the Country Code (*Muluki Ain* 2020), which allows defendants to surrender themselves to the Court in the instance of a situation beyond their control that prevented them from appearing before the Court within 70 days.

None of the defendants appeared before the court. The District Court suspended the trial for two years as required by No. 190 of the Country Code (*Muluki Ain* 2020) on 17 September 2013. The defendants persisted in their defiance to appear before the court during that period. Hence, the District Court made the decision to resume the trial on 12 January 2016 and issued a verdict on 16 April 2017.

2 For a *detailed* analysis of the military court-martial and Nepal Army investigations into the case, see *The torture and death in custody of Maina Sunuwar: summary of concerns*, United Nations, Office of the High Commissioners of Human Rights in Nepal (December 2006), available at: http://nepal.ohchr.org/en/resources/Documents/English/reports/IR/Year2006/2006_12_01_HCR%20Maina%20Sunuwar_E.pdf

On 16 April 2017, the Kavrepalanchowk District Court convicted then Colonel Bobby Khatri, and Captains Sunil Adhikari and Amit Pun under section 13 (3) of the Chapter on Homicide of the Country Code (*Muluki Ain 2020*) and sentenced them to life imprisonment, whereas Captain Niranjan Basnet was acquitted. A separate opinion was also made recommending that the higher court reduce the imprisonment to five years' imprisonment considering the context of incident.

On 1 September 2017, the Nepal Army filed a writ petition at the Supreme Court pursuant to Article 46 and 133(2) of the Constitution of Nepal, challenging the decision of the Kavrepalanchowk District. The petition argues that: (a) the Kavrepalanchowk District Court impermissibly usurps the jurisdiction of the Military Court, which purportedly has exclusive jurisdiction over a case when the Army is 'in action'; b) the trial by the District Court violates the prohibition against double jeopardy, as the defendants had already been tried by the Military Court, found guilty and served their sentences; and c) violations committed during the conflict come under the jurisdiction of transitional justice institutions, not the ordinary justice system.

I

Nepal's international legal obligations relating to gross human rights violations and the administration of justice

The Nepal Army in its petition claims that any armed conflict is an extraordinary situation and that certain rules applicable in times of peace do not apply. They claim that the events of armed conflict should be assessed in the light of military science, laws and theories of armed conflict, and in that light assert that the Nepal Army has the sole authority and responsibility for holding its personnel responsible. These positions fly in the face of settled international law and standards, which make clear that the Government of Nepal has an overall responsibility to undertake criminal prosecution of certain serious human rights violations.

The obligation to prosecute

Nepal has a clear legal obligation to investigate and prosecute crimes under international law. Nepal is a party to the International Covenant on Civil and Political Rights ("ICCPR")³ and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Both the ICCPR (under the general obligation of article 2(3) taken together with specific underlying provisions such as the right to life under article 6 and freedom from torture and cruel, inhuman or degrading treatment or punishment under article 7)⁴ and the CAT (under articles 4, 5 and 12) require that the responsible authorities "investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies" and "ensure that those responsible are brought to justice."

³ Nepal, along with 165 other States, is a State Party to the ICCPR.

⁴ See UN Doc. CCPR/C/21 (26 May 2004) paras 15 and 18.

The obligation to prosecute serious crimes under international law is also affirmed in universally applicable international standards. These include the *UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, applicable to all UN Member States, which make clear that: "States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished."⁵ The Principles also affirm that "States should adopt and enforce safeguards against any abuse of rules such as those pertaining to prescription, amnesty, right to asylum, refusal to extradite, *non bis in idem*, due obedience, official immunities, repentance, the jurisdiction of military courts and the irremovability of judges that fosters or contributes to impunity."⁶

In addition, the UN Basic Principles on the Right to Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by consensus of all States in 2005⁷, express in principle III(4): "In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him."

In respect of penalties, it is well established that for gross violations of international human rights law, particularly those amounting to crimes under international, the penalties prescribed must be commensurate with the gravity of the offense. Thus, article 4(2) of the CAT provides expressly that offenses of torture shall be punishable by appropriate penalties that take into account the grave nature of these crimes. In this connection, the Committee against Torture has found that States have been in breach of Article 4 of CAT for imposing a light penalty and has suggested that torture alone requires as a bare minimum of punishment of at least six years and Article 2 for having pardoned the perpetrator, which, according to the Committee, has the effect of allowing torture to go unpunished and encouraged its repetition.⁸

Transitional justice and the right to an effective remedy

The Nepal Army asserts that the Truth and Reconciliation Commission and Commission of Enquiry on Enforced Disappearances have been established to address all violations committed during the conflict. As Devi Sunuwar has filed an application before the TRC, the Army argues that the ordinary justice system has no jurisdiction over the case.

5 *Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, UN Doc E/CN.4/2005/102/Add.1, Principle 19.

6 UN Doc E/CN.4/2005/102/Add.1, Principle 24

7 A/Res/30/147 of 16 December 2005.

8 See par 6.7, *Urra Guridi v. Spain*, UNCAT Communication No. 212/2002, U.N. Doc. CAT/C/34/D/212/2002, 17 May 2005.

This position is untenable under international standards. In addressing gross human rights violations, the obligation to prosecute and the obligation to provide an effective remedy and reparation for violations are two distinct obligations under international law, including under the ICCPR and the CAT. First, the obligation to prosecute exists independently of the obligation to provide an effective remedy and reparation, including through a transitional justice process and the established Commissions. Second, an effective remedy and reparation, which covers all forms of harm suffered by victims, includes, (under the ICCPR, the CAT, the UN Principles and Guidelines on Remedy and Reparation and the UN Impunity Principles) the right to restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.⁹ Remedies must be prompt, accessible, before an independent authority, and lead to an investigation and reparation.¹⁰ Criminal prosecution, while an independent obligation, is also itself an element of reparation.

In this connection and specifically in relation to Nepal, the Human Rights Committee in a number of cases involving Nepal, in which it rejected claims by the government that investigations will be undertaken exclusively by transitional justice institutions.¹¹ For example, in *Purna Maya v. Nepal*, the Human Rights Committee categorically stated that 'the Commission established under the TRC Act would not constitute an effective remedy for the author' who was subjected to torture and sexual violence in detention.¹²

A look to the comparative international jurisprudence is also instructive in this respect. For instance, the Inter-American Commission on Human Rights has consistently concluded that the granting of compensation to victims or their relatives and the establishment truth commissions does not relieve the State of its obligation to bring those responsible for human rights violations to justice and to ensure that they are punished.¹³ In one case, the Inter-American Commission pointed out that the truth seeking function of transitional justice commissions is not "a substitute for the State's obligation, which cannot be delegated, to investigate violations committed within its jurisdiction, and to identify those responsible, punish them, and ensure adequate compensation for the victim [...] all within the overriding need to combat impunity."¹⁴

9 ICCPR article 2(3) and UN Human Rights Committee General Comment 31 See UN Doc. CCPR/C/21 (26 May 2004) at paragraph; Committee again Torture article 14 and General Comment 3; UN Basic Principles on Remedy and Reparation, articles 18 to 23; UN Impunity Principle 34, UN Doc E/CN.4/2005/102/Add.1,

10 See International Commission of Jurists Practitioners Guide 2, The Right to a Remedy and to Reparation for Gross Human Rights Violations, pp 43 to 54 <https://www.icj.org/the-right-to-a-remedy-and-to-reparation-for-gross-human-rights-violations/>

11 *Chaulagain v. Nepal*, CCPR/C/112/D/2018/2010, *Sharma v. Nepal*, CCPR/C/94/D/1469/2006, *Tharu v Nepal*, CCPR/C/114/D/2038/2011, *Purna Maya v. Nepal*, CCPR/C/119/D/2245/2013, *Maharjan v. Nepal*, CCPR/C/105/D/1863/2009.

12 *Purna Maya v. Nepal*, CCPR/C/119/D/2245/2013, para 11.4

13 Inter-American Commission on Human Rights, Report No 28/92, Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311 (Argentina), 2 October 1992, paragraph 52.

14 Inter-American Commission on Human Rights, Report N 136/99, Case 10,488, *Ignacio Ellacuría S.J. and others* (El Salvador), 22 December 1999, paragraph 230. See also Inter-American Court of Human Rights, Judgment of 27 August 1998, *Garrido and Baigorria Case (Reparations)*.

The right to an effective remedy is reproduced in numerous international human rights instruments.¹⁵ In the case of gross human rights violations, the right to an effective remedy includes the right to have access to a judicial authority (court). In a pertinent case heard by the Human Rights Committee, *Tharu v. Nepal*, the Committee took the view that the State must provide an effective remedy to the families of victims that includes conducting a thorough and effective investigation; prosecuting, trying, and punishing those responsible for the violations committed; and making the results of such measures public. In particular, the State must “ensure that its legislation allows for the criminal prosecution of those responsible for serious human rights violations such as torture, extrajudicial execution and enforced disappearance.”¹⁶

It is important to note that financial or other compensation provided to the victims or their families before such investigations are initiated or concluded does not exempt governments from the obligation “to carry out an investigation into allegations of human rights abuses with a view to identifying and prosecuting their perpetrators.”¹⁷ Importantly, the Supreme Court of Nepal itself has upheld these principles multiple times – and has made specific and extensive reference to these and other human rights principles and provisions of international law.¹⁸

II (a)

Court Martial Jurisdiction Over Rape and Murder During ‘Military Engagement’

Section 61 of the Army Act does not allow military courts to have jurisdiction over murder and rape, except that taken in ‘military action’. However, the Nepal Army claims that pursuant to Section 61(a) of the Army Act, 1959, this case constitutes the case of a person killed during military action and subject to court martial jurisdiction as per Section 107 of the Act. The Army claims that because the incident occurred during the mobilization of the Nepal Army during a state of emergency, the jurisdiction of regular courts is not applicable.¹⁹

15 Article 8 of the Universal Declaration of Human Rights; Article 2(3) of the International Covenant on Civil and Political Rights; Articles 13 and 14 of the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment; Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 39 of the Convention on the Rights of the Child; Articles 25 and 63(1) of the American Convention on Human Rights; Article 7(1)(a) of the African Charter on Human and Peoples’ Rights; Articles 12 and 23 of the Arab Charter on Human Rights; Articles 5 (5), 13 and 41 of the European Convention on Human Rights; Article 47 of the Charter of Fundamental Rights of the EU; Article 27 of the Vienna Declaration and Program of Action.

16 *Tharu v Nepal*, CCPR/C/114/D/2038/2011, para 12.

17 Report by the Special Rapporteur Extrajudicial, summary or arbitrary executions, UN doc. E/CN.4/1994/7, paragraphs 688 and 711.

18 See for example, *Rajendra Prasad Dhakal and Others v. the Government of Nepal and Others*, Nepal Kanoon Patrika, 2064 (BS) Issue 2 decision no. 7817; *Liladhar Bhandari and Others v. the Government of Nepal and Others*, Nepal Kanoon Patrika 2065 (BS), Issue 9 decision no. 8012; *Buddhi Bahadur Praja and Others v. The Government of Nepal Office of the Prime Minister and Council of Ministers and Others*, Writ No 3442 of the year 2063 (BS), decision date 12 May 2008. For details see: *Transitional Justice and Right to a Remedy: Supreme Court Jurisprudence in Nepal* (International Commission of Jurists and Nepal Bar Association, 2012).

19 The incident involving Maina Sunawar occurred on 16 February 2005, and the state of emergency was declared as per Article 115 of the then Constitution of the Kingdom of Nepal, 1990, from 16 November 2001 until 15 July 2006

Such a reading is incompatible with Nepal's international law obligations for two reasons. First, the use of torture, cruel, inhuman and degrading treatment, particularly one resulting in a death of a minor, cannot constitute a legitimate military engagement under international law, and therefore the military court did not have jurisdiction to hear such a case pursuant to Section 61(a) of the Army Act, 1959.

This is a well-established principle under international standards. For instance, in *Durand y Ugarte*, the Inter-American Court of Human Rights explained that the commission of crimes against human life and dignity cannot constitute a legitimate military function.²⁰ When military personnel commit violations of human rights such as enforced disappearance, torture, and extrajudicial executions, these acts must be viewed as non-official, and are subject to the jurisdiction of civilian courts. A defense that these were 'official' acts should not be permitted to shield officials from investigation and prosecution.²¹

For this reason, the Army Act's language that cannot be interpreted in a way that would shield the perpetrators in this case from prosecution and punishment. Granting jurisdiction over the torture and murder of Maina Sunuwar exclusively to a military tribunal on the basis that these acts were conducted during military activities would effectively do so.

II (b)

Court Martial Jurisdiction Over Gross Human Rights Violations

Irrespective of whether the jurisdiction of the court martial conforms with Nepal law, it does not conform with international law and standards.²² Military courts and justice systems should not be used to adjudicate cases involving gross human rights violations and crimes under international law, including torture and other cruel, inhuman or degrading treatment, enforced disappearance and violations of the right to life. Indeed, the Supreme Court has already spoken on this issue in the Mandamus writ of Maina Sunuwar, where it explicitly said that "the civilian courts have jurisdiction over the killing of civilians during the conflict by the army."²³

The question as to when it is internationally lawful or otherwise appropriate to engage the jurisdiction of military tribunals in the administration of justice has been considered under a number of international declaratory standards and the

20 *Durand y Ugarte*, Judgment of Aug. 16, 2000, Inter-Am. Ct. H.R., Ser. C, No. 68, ¶169

21 Ibid. This argument mirrors the rationale for not allowing a defense of "obedience to superior orders" for violations of human rights in cases in which those orders are manifestly illegal. When military personnel commit gross violations of human rights, they have exceeded the requirements of their official capacity and can be held personally accountable for those crimes.

22 See also Organization of American States (OAS), *Inter-American Convention on Forced Disappearance of Persons*, 9 June 1994, article IX; UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, article 16(2); Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration"), E/CN.4/Sub.2/1985/18, article 5(f).

23 *Devi Sunuwara v. District Police Office, Kavrepalanchok and Other*, Nepal Kanoon Patrika 2064 (BS), Issue 6, decision no. 7857.

jurisprudence of international courts and bodies. The overwhelming trend in this regard is that military tribunals should not be used to adjudicate gross human rights violations.

Principle 29 of the UN Updated Set of Principles for the protection and promotion of human rights through action to combat impunity 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."²⁴

In addition, Principle 9 of the Draft Principles Governing the Administration of Justice Through Military Tribunals ("Decaux Principles")²⁵ states: "In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes. "

The United Nations Working Group on Arbitrary Detention has similarly affirmed that military tribunals, "should be incompetent to try military personnel if the victims include civilians."²⁶

The Inter-American Court of Human Rights has consistently ruled that military jurisdiction is not competent to investigate, prosecute or sanction in cases of human rights violations.²⁷

Court-martial jurisdiction in a case involving the torture of a child is absolutely prohibited

From an international law perspective, there is no question that there can be no court-martial jurisdiction in respect of the alleged torture of a child. Although the Nepal Army claims that the death of Maina Sunawar was due to accidental events caused by negligence and recklessness of army personnel, it is important to note that the court martial found that the defendants tortured Maina Sunawar, including through the use of simulated drowning and electrical shocks ("the illegal inhuman and unnatural treatment and torture, and wrong technique and procedure of interrogation adopted in course of interrogation").

24 The Updated Principles were recommended by the UN Commission on Human Rights by Resolution 2005/81.

25 The Principles were adopted by the former UN Sub-Commission on the Promotion and Protection of Human Rights. The Principles, while not incorporated in a treaty, were elaborated by gathering the standards derived from treaty sources and judicial and quasi-judicial bodies. They are, therefore, largely a codification of binding international human rights standards. The Principles have been relied on as a source of authority by human rights bodies, such as the European Court of Human Rights and the Inter-American Commission on Human Rights, and courts, such as the Inter-American Court of Human Rights. UN Doc. E/CN.4/2006/58 (13 January 2006).

26 *Report of the Working Group on Arbitrary Detention*, UN document E/CN.4/1999/63, para. 80.

27 IACtHR, *Case of Radilla-Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 23, 2009. Series C No. 209, at §273

The Army acknowledges that the defendants intentionally and knowingly carried out acts that constitute torture and other cruel, inhuman or degrading treatment.²⁸ *This admission alone, as a matter of international human rights law, should settle the question of whether a court-martial or a civilian court should assume jurisdiction over the case.*

Regarding the argument that the victim's death was due to her own physical weakness, Article 37 of the Convention on the Rights of the Child (CRC) is particularly pertinent in view of the young age and vulnerability of the victim.²⁹ In relevant part, "(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment...(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age."³⁰

This is complemented by Article 19 and explained by General Comment No.13, which states that "[t]here is no ambiguity: 'all forms of physical or mental violence' does not leave room for any level of legalized violence against children."³¹ Additionally, General Comment 8 further notes the particular vulnerability of children, which demands "the need for more, rather than less, legal and other protection from all forms of violence."³² Further, Concluding Observations of the UN CAT Committee have held that no defense should be available for the crime of torture nor should mitigating circumstances apply.³³

III

Double Jeopardy Within the Meaning of International Standards

The Army has also claimed that the principle of double jeopardy was violated when the District Court took jurisdiction of the case, because the offenses had

28 The UNCAT specifically prohibits the use of torture for six purposes, including (i) obtaining information, (ii) obtaining a confession, (iii) punishment, (iv) intimidation, (v) coercion and (vi) "torture for any reason based on discrimination of any kind." UNCAT Article 1.

29 Nepal ratified the Convention on the Rights of the Child on 14 September 1990.

30 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

31 *General comment No. 13 (2011): The right of the child to freedom from all forms of violence*, 18 April 2011, CRC/C/GC/13

32 UN Committee on the Rights of the Child (CRC), *General comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia)*, 2 March 2007, CRC/C/GC/8.

33 See e.g. par 10 of the Concluding Observations of the UNCAT Committee on the United Kingdom, CAT/C/GBR/CO/5, 24 June 2013, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGBR%2fCO%2f5&Lang=en, where it states for instance that the defence of "lawful authority, justification or excuse" to a charge of official intentional infliction of severe pain or suffering is contrary to the principle of absolute prohibition of torture. See also par. 14 of the Concluding Observations of the UNCAT Committee on Israel, CAT/C/ISR/CO/4, 23 June 2009, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fISR%2fCO%2f4&Lang=en regarding the removal of the 'necessity defense' exception which arises in cases of 'ticking bombs,' i.e., interrogation of terrorist suspects or persons otherwise holding information about potential terrorist attacks.

already been adjudicated in the court-martial.³⁴ However, a review of the relevant principles of criminal justice and international law, establish that the principle of double jeopardy has not been violated.

Article 14(7) of the ICCPR prohibits double jeopardy: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." Article 20 (6) of the Constitution of Nepal also provides that 'no person shall be tried and punished for the same offence in a court more than once.'

However, there are well-established exceptions to the principle of double jeopardy (or *ne bis in idem*). First, the principle may not apply in certain cases where the first court had lacked jurisdiction over the proceedings,³⁵ given that to have the effect of *res judicata*, an initial judgment must have been legitimate.³⁶ As set out in the preceding sections of this brief, as a matter of international law, the court-martial should not have exercised jurisdiction.

In addition, a second proceeding for a different offense in a different jurisdiction does not necessarily trigger double jeopardy. In the words of the Human Rights Committee, "[s]ubsequent trials for different offences or for the same offence in different jurisdictions do not violate the prohibition against double jeopardy."

³⁷ In this case, the offenses adjudicated by the court-martial proceeding were disciplinary offenses under the military code of conduct, not the crimes of torture and murder, much less war crimes or other violations of international law. Both the offenses and the jurisdiction were therefore different.

The previous court martial process did not charge the defendants with murder, but instead charged the defendants with violations of the Code of Conduct of the Nepal Army Act, 1959, ³⁸ and were found guilty of "using improper interrogation techniques and violation of protocol while disposing the dead body." They were sentenced to six months' imprisonment and suspension of promotion for one

34 The Petitioner asserts that "The accidental events which occurred during conflict even which the NA was exercising due care and caution, those occurred due to the negligence and recklessness of army personnel, and those happened due to lapses in the observance of army discipline were investigated by forming Military Courts as per the then Army Act which also took the needful action."

35 M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, in *INT'L CRIM. LAW, 1 CRIMES 4, 35* (M. Cherif Bassiouni ed., 2d ed. 1999). Código de Procedimiento Penal [C.P.P.] [Criminal Procedure Code] art. 439 (Peru); Código de Procedimiento Penal [C.P.P.] [Criminal Procedure Code] art.192 (Colom.); Código Procesal Penal [C.P.P.] [Code of Criminal Procedure] art. 455, EL GUATEMALTECO (1993) (Guat.); Código Procesal Penal de la Nación [COD. PROC. PEN.] [Criminal Procedure Code] art. 479, Law No. 23984, Aug. 21, 1991, [27215] B.O. 2 (Arg.).

36 In the United States, where virtually no exception to double jeopardy is allowed, the court must have had jurisdiction over both the defendant and the subject matter for double jeopardy to apply. "An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction." *Ball v. United States*, 163 U.S. 662, 669 (1896). "We assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb, the court in which he was acquitted . . . must have had jurisdiction to try him for the offense charged."

37 *A. P. v. Italy*, Communication No. 204/1986, U.N. Doc. CCPR/C/OP/2 at 67 (1990); *A.R.J. v. Australia*, CCPR/C/60/D/692/1996, UN Human Rights Committee (HRC), 11 August 1997.

38 Colonel Bobby Khatri was sentenced to six months' imprisonment and suspension of his promotion for two years for not fulfilling his responsibility in accordance with section 54 and 60 of the 1963 Army Act.

year. No Army personnel were tried or convicted for the torture and killing of Maina Sunuwar.

Thirdly, double jeopardy should not apply if the initial proceedings were instituted in order to shield perpetrators from accountability. The Inter American Court has held in respect of the prohibition of double jeopardy, "it is not an absolute right, and therefore, is not applicable where: 1) the intervention of the court that heard the case and decided to dismiss it or to acquit a person responsible for violating human rights or international law, was intended to shield the accused party from criminal responsibility; ii) the proceedings were not conducted independently or impartially in accordance with due procedural guarantees, or iii) there was not real intent to bring those responsible to justice. A judgment rendered in the foregoing circumstances produces an "apparent" or "fraudulent" *res judicata* case."³⁹

In a case in the Americas, the Inter-American Court ruled that the State must not conduct trials that act to "shield particular individuals or groups – i.e., military and police officials – from prosecution."⁴⁰ Further, the Human Rights Committee has found that the "wide jurisdiction of the military courts to deal with all the cases involving prosecution of military personnel ... contribute[s] to the impunity which such personnel enjoy against punishment for serious human rights violations."⁴¹ Whether proceedings were undertaken for the purpose of shielding a perpetrator from criminal responsibility is a factor when the ICC is deciding whether or not to initiate a case that falls within its jurisdiction.⁴² This might include deliberately undercharging those accused of serious human rights violations in order to avoid accountability.⁴³

IV

Conclusions

1. The Government of Nepal is under a duty to investigate and prosecute all alleged violations of human rights, in accordance with international law and standards, and the decisions of its own Supreme Court. This obligation applies notwithstanding the fact that Devi Sunuwar sought relief from subsequently established transitional justice commissions. The State's obligations to provide an effective remedy and reparation, and to establish the truth about what happened are distinct and separate, although interrelated, obligations.
2. The perpetrators' actions cannot be considered to have been part of "engagement in military action." The court-martial decision itself established that the victim was not armed or engaged in the conflict, and that illegal interrogation methods, amounting to torture and ill-treatment, resulted in her death. Such human rights violations fall within the group of crimes excluded

39 InterAmerican Court on Human Rights, Case of Almonacid-Arellano et al v. Chile, Judgement of September 26, 2006, http://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf

40 Velasquez Rodriguez Case, Interpretation of the Compensatory Damages Judgment, Judgment of August 17, 1990, Ser. C No 9,

41 UN Doc. CCPR/C/79/Add. 76 - 3 May 1997. Para. 34; UN Doc. CCPR/C/79/Add. 104 - 30 March 1999, Para. 9; UN Doc. CCPR/C/79/Add. 67 - 25 July 1996. Para. 23.

42 Rome Statute, Article 20(3).

43 Supreme Court, Chamber on Criminal Cassation, Decision 29,559, "Carlos Mario Jiménez Naranjo", 22 April 2008.

from military jurisdiction because they are not, by their very nature, service-related offenses. The jurisdiction of the Kavrepalanchowk Court is therefore proper.

3. Even if Sections 61 and 62 of the Army Act were to apply, they are inconsistent with the Constitution and Nepal's international legal obligations. Military jurisdiction must be restrictive and exceptional, and serious human rights violations against civilians must be tried in civilian courts. The proper venue for prosecution of the torture and killing of Maina Sunuwar has always been, and remains, within the civilian court system.
4. Double jeopardy does not apply in this case. The previous court martial process: (i) for the reasons stated above, did not have jurisdiction over this case as it does not constitute killing during "military action"; and (ii) involved the adjudication of disciplinary offenses.

Commission Members

October 2018 (for an updated list, please visit www.icj.org/commission)

President:

Prof. Robert Goldman, United States

Vice-Presidents:

Prof. Carlos Ayala, Venezuela

Justice Radmila Dragicevic-Dicic, Serbia

Executive Committee:

Justice Sir Nicolas Bratza, UK

Dame Silvia Cartwright, New Zealand

(Chair) Ms Roberta Clarke, Barbados-Canada

Mr. Shawan Jabarin, Palestine

Ms Hina Jilani, Pakistan

Justice Sanji Monageng, Botswana

Mr Belisário dos Santos Júnior, Brazil

Other Commission Members:

Professor Kyong-Wahn Ahn, Republic of Korea

Justice Chinara Aidarbekova, Kyrgyzstan

Justice Adolfo Azcuna, Philippines

Mr Reed Brody, United States

Justice Azhar Cachalia, South Africa

Prof. Miguel Carbonell, Mexico

Justice Moses Chingengo, Zimbabwe

Prof. Sarah Cleveland, United States

Justice Martine Comte, France

Mr Gamal Eid, Egypt

Mr Roberto Garretón, Chile

Prof. Michelo Hansungule, Zambia

Ms Gulnora Ishankanova, Uzbekistan

Ms Imrana Jalal, Fiji

Justice Kalthoum Kennou, Tunisia

Ms Jamesina Essie L. King, Sierra Leone

Prof. César Landa, Peru

Justice Ketil Lund, Norway

Justice Qinisile Mabuza, Swaziland

Justice José Antonio Martín Pallín, Spain

Prof. Juan Méndez, Argentina

Justice Charles Mkandawire, Malawi

Justice Yvonne Mokgoro, South Africa

Justice Tamara Morschakova, Russia

Justice Willy Mutunga, Kenya

Justice Egbert Myjer, Netherlands

Justice John Lawrence O'Meally, Australia

Ms Mikiko Otani, Japan

Justice Fatsah Ouguergouz, Algeria

Dr Jarna Petman, Finland

Prof. Mónica Pinto, Argentina

Prof. Víctor Rodríguez Rescia, Costa Rica

Mr Alejandro Salinas Rivera, Chile

Mr Michael Sfard, Israel

Prof. Marco Sassoli, Italy-Switzerland

Justice Ajit Prakash Shah, India

Justice Kalyan Shrestha, Nepal

Ms Ambiga Sreenevasan, Malaysia

Mr Wilder Tayler, Uruguay

Justice Philippe Texier, France

Justice Lillian Tibatemwa-Ekirikubinza, Uganda

Justice Stefan Trechsel, Switzerland

Prof. Rodrigo Uprimny Yepes, Colombia



**International
Commission
of Jurists**

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00

f +41 22 979 38 01

www.icj.org