

OPEN LETTER TO THE ATTORNEY GENERAL OF NEPAL: PURSUE APPEAL IN MAINA SANUWAR'S CASE

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Attorney General of Nepal
Kathmandu, Nepal

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Honourable Attorney General,

We are writing to express our concern at the district public prosecutor's decision dated 8 May 2017 against appealing the Kavre District Court decision to acquit Major Nirnanjan Basnet in Maina Sunuwar's murder case.

The undersigned organizations call on you to review the decision and pursue the appeal against the Kavre District Court judgment, as requested by Maina Sunuwar's mother, Devi Sunuwar, in her letters to the district prosecutor and the AG's office on 18 May 2017.

A failure to pursue criminal accountability against Major Nirnanjan Basnet, based on the reasoning as set out in the district court judgement, would likely lead to a denial of justice and a perpetuation of the culture of impunity that has plagued Nepal in the conflict and post-conflict years.

Nepal has a duty, under both Nepali law and international treaties to which Nepal is a party, to prosecute persons suspected of serious human rights violations, such as torture, enforced disappearance and unlawful killings. Victims of such violations, including families of those directly abused, have a right to an effective remedy and reparation for the injuries suffered. The failure to pursue justice in this case would be incompatible with those legal duties, frustrating the objectives of holding perpetrators accountable and securing redress for victims.

As you are aware, Maina Sunuwar's case has become emblematic of the shortcomings in Nepal's justice system that have repeatedly frustrated efforts of Nepali conflict victims to secure justice for crimes committed during Nepal's civil war. Maina Sunuwar's mother first filed a complaint with the police in November 2005. Since then, her family have faced numerous procedural and practical hurdles, many of a political character, and a lack of cooperation by the military seeking to protect its own.

The decision to prosecute Major Nirnanjan Basnet together with three retired army officers – even if only *in absentia* - was a welcome step that promised to secure justice for Maina Sanuwar's murder after years of inaction, raising hopes both for her family and other victims of gross human rights violations and abuses throughout Nepal. If your office fails to appeal the acquittal of Major Nirnanjan Basnet, these hopes will be dashed and the decision will historically be seen in this context of impunity for human rights violations, and the role of the Attorney General's office in shielding perpetrators of serious crimes in Nepal.

FACTS OF THE CASE

Maina Sunuwar was subjected to enforced disappearance, torture and unlawful killing after a covert military operation, which included the involvement of then captain Nirnanjan Basnet on 17 February 2004. She was 15 years old at the time. The military refused to acknowledge Maina's detention for many months.

Following national and international pressure, the military conducted an internal inquiry, and in September 2005 a court martial concluded that Maina Sunuwar died and was buried in a clandestine grave following prolonged torture by simulated drowning and electrocution on the day of her enforced disappearance at the Nepal Army's Peacekeeping Training Barracks at Panchkhal. However, her death by prolonged torture was described by the court martial as "accidental" and put down to "carelessness" and a failure to follow procedures. Maina Sunuwar was blamed 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 Nirnanjan 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 Maina Sunuwar's family. In fact, they served no term in prison as they were found to have served their sentences by being consigned to barracks during the investigation.

In a landmark ruling, the Supreme Court in September 2007 unanimously decided that the case should be dealt with in a civilian court. However, for many years the Nepal Army declined to cooperate with the police investigations and court proceedings before the Kavre District Court.

After overcoming a number of procedural and political hurdles stretching over years, on 16 April 2017, the Kavre District Court sentenced three retired army officers to life imprisonment for Maina Sunuwar's murder. The court also recommended that the sentence be reduced to five years' imprisonment because of the political context at the time and the possibility that the convicts did not intend to kill her, but this recommendation will be considered in accordance with Nepali law only when a High Court decides on the question of sentence, which has not yet occurred. Despite Major Niranjan Basnet's acknowledged role in Maina's enforced disappearance, the court acquitted him for lack of evidence.

GROUND FOR APPEAL

Reports by a number of witnesses, national and international organizations, as well as the military's own investigation, show that Maina Sunuwar was subjected to enforced disappearance on 17 February 2004 in a military operation by a team including then Captain Niranjan Basnet. She was then tortured and killed on the same day.

The district court's decision to acquit Major Niranjan Basnet is problematic on a number of grounds, including:

1. The report of the Nepal Army's Court of Inquiry Board provides details of how Maina Sunuwar was subjected to torture upon arrival at the Army's Peacekeeping Training Barracks in Panchkhal on 17 February 2004. According to the inquiry report, seven military personnel witnessed or participated in her torture for at least 90 minutes: Lieutenant Colonel Bobby Khatri; Captain Niranjan Basnet, Captain Sunil Prasad Adhikari, Captain Amit Pun, Sergeant Non-Commissioned Officer Khadak Bahadur Khatri and two soldiers, Dil Bahadur Basnet and Shrikrishna Thapa. An analysis of the district court's judgment, however, shows it did not consider this report in its decision to acquit Major Niranjan Basnet.
2. It is an acknowledged fact that Major Niranjan Basnet arrested Maina Sunuwar and subjected her to enforced disappearance on 17 February 2004. The district court's decision to acquit him based on his argument that he was only acting on superior orders is in stark contrast to rules and principles of international law, which explicitly prohibits invoking orders by superiors as justification for committing serious human rights violations.

The Attorney General, as the public prosecutorial authority in charge, has an obligation to carry out the functions of the office independently and impartially. In carrying out this responsibility and assessing the information before it, we call on your office to take into account the information that appeared to have been ignored by the District Public Prosecutor, and accordingly to pursue and appeal against this decision.

APPLICABLE INTERNATIONAL LAW AND STANDARDS

Obligation to prosecute and right to remedy and reparations

Under international law, including the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child, treaties to which Nepal is a party, Nepal is required to carry out a prompt, impartial and effective investigation of gross human rights violations with a view to bringing those responsible to justice through criminal prosecution.

In addition, Nepal has an obligation under those instruments to ensure the right of victims to an effective reparation. As expressed in the UN Basic Principles and Guidelines on the Right to a Remedy, adopted unanimously at the UN General Assembly:

"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."

The UN Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity explain the obligation on States to:

“...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.”

“Appropriate measures” in this case include appealing decisions of courts where one of the accused is acquitted without consideration of relevant facts, laws and circumstances of the case.

Duties of prosecutors

The UN Guidelines on the Role of Prosecutors set out international standards aimed at ensuring that prosecutors are able to perform their functions impartially and independently, and thus able to uphold their state’s international obligation to investigate and bring to justice perpetrators of human rights violations.

Prosecutors must perform their duties fairly, consistently and expeditiously, respecting and protecting human dignity and human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

Prosecutors must give due attention to the prosecution of crimes committed by public officials, grave violations of human rights and other crimes recognized by international law; and, where authorized by law or consistent with local practice, the investigation of such offences.

The Committee against Torture has indicated that public prosecutors violate their duty to perform their functions with impartiality if they fail to appeal the dismissal of a judicial decision in a case where there is evidence of torture.

CONCLUSION

Maina Sunuwar’s case, the case of a 15-year old Nepali girl kidnapped, tortured and killed by officers whose duty was to defend Nepal’s population, is a test case for the Nepal criminal justice system and political will to ensure perpetrators of serious human rights violations are brought to justice. We urge you to appeal the acquittal of Major Niranjan Basnet, as requested by Maina Sunuwar’s mother, Devi Sunuwar, who has been struggling to achieve justice for her daughter for more than 13 years.

We are at your disposal should you have any questions.

Sincerely,

International Commission of Jurists
Amnesty International

