



वकालत मञ्च-नेपाल
ADVOCACY FORUM- NEPAL
Lawyers forum for human rights and rule of law

5 July 2011

Attorney General Yuvraj Sangraula
Office of the Attorney General
Ramshapath, Kathmandu

Subject: Criminal Investigation into the Killing of Reena Rasaili

Dear Attorney General,

As legal counsel for the family of Reena Rasaili, we are writing to raise our concerns about the current state of the criminal investigation in the case. The First Information Report filed at the Kavre District Police Office on 25 May 2006 identified unnamed members of an army patrol led by second lieutenant, Saroj Basnet from No.9 Brigade, Bhakundebeshi, Kavre as suspects. One member of the patrol was detained on 17 September 2010. While we welcome the fact that a suspect has finally been arrested, we remain concerned that there has otherwise been no progress in the investigation.

As you may know, in December 2009, the Supreme Court concluded that the Nepal Police had not properly investigated the case, in part because of inadequate supervision by prosecutors. The Court ordered the Office of the Attorney General to direct the District Attorney of Kavre to take prompt action to ensure that the investigation and prosecution moves forward - including directing and coordinating with the District Police. We believe strongly that your Office has a vital role in ensuring that justice is done in this case, and in other cases that have similarly been obstructed and delayed. Our hope is that you will take a pro-active role to ensure that the Supreme Court's decision is implemented. We would like to offer our help to you and your officers in this regard.

As legal counsel for the family, with the assistance of non-government organizations, we have obtained information that may be useful for your investigators and prosecutors. We would be more than willing to meet with you to discuss how we might assist you in pushing forward the investigation and prosecution. As a first step, in this letter, we would like to highlight (a) several avenues for further investigation in the case, and (b) the inadequacies of the legal arguments put forth by the defendants to justify their non-cooperation with police and prosecutors.

Issues of Concern in the Investigation

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* Only One Suspect Has Been Apprehended and Suspected Army Commanders Remain Free

To date, the only suspect who has been taken into police custody has been Kaji Karki. He was arrested on 17 September 2010 by the District Police in Kaski, and handed over to the police in Kavre. At the time of the incident, Mr. Karki was a low ranking Nepal Army officer of the unit present on the night of Reena's death. However, other soldiers who were present during her interrogation have yet to be arrested, or even taken into police custody for questioning. The Kavre District Police Office issued an arrest warrant for then Lieutenant Saroj Basnet in September 2010, but he has yet to be arrested.

* Weaknesses in the Statement of the Defendant to the Police

After his arrest in September 2010, Kaji Karki made a statement to the police. The statement is brief and full of contradictions, and suggests that the police did not take proper care when the interview was conducted. In the statement, Karki simply denies involvement, and police interrogators did not follow up with detailed questioning. It is particularly troubling that Karki mentions in his statement that Devi Sunuwar made a false accusation against him, as the first response of the NA to the DPO Kavre in 2006 and the NA court-martial decision of 28 August 2005, suggest that it was the Army who accused Karki of the killing.

In his statement, Karki acknowledged that Rasaili was raped by a team of soldiers. This shows that Karki was knowledgeable about what took place that night. We hope that the Office of the Attorney General can instruct its prosecutors to take a second look at the role of Karki, and consider the possibility that even if he was not directly involved, he may have been a witness to the crimes - and may be eligible for a plea bargain arrangement that could push the case forward.

* Court-Martial Documents Have Not Been Handed Over to the Court

The Nepal Army conducted a court-martial into the breach of disciplinary rules (though not into the extra-judicial killing itself) related to the case (see below). There are many documents listed in the court-martial decision, including a 42-page compilation of the statements of the defendants and other concerned individuals that have never been provided to the police. It is crucial that those documents be made available to the police and prosecutors. We would like to request that the Attorney General make every effort to obtain those documents from the Army.

* Uninvestigated Allegations of Sexual Violence

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Karki was charged under Article No. 13 (1) on Homicide in the National Legal Code (*Muluki Ain*). However, there is evidence that Ms. Rasaili was subjected to sexual violence before she was killed. This evidence includes a contemporaneous record of a witness accounts, additional witness statements and photographs. We urge you to direct the police and public prosecutors to ensure that that this is fully and impartially investigated.

The Legal Arguments Offered By The Army To Justify Non-Cooperation With The Courts and Police

* Challenging the Jurisdiction of the Civilian Courts

On 26 January 2011, Brigadier General Nirendra Prasad Aryal sent a letter to the Kavre District Court claiming that the Nepal Army was not obliged to comply with the warrant issued by the court for the arrest of Saroj Basnet. The letter stated that because Basnet had been tried by a court martial, the principle of double jeopardy applied, and as a result, Basnet was under no obligation to comply with the court's order.

This letter, in which the Army has refused to recognize the jurisdiction of the civilian court system and, by implication, the authority of the Nepal Police and the Office of the Attorney General, raises serious concerns. Firstly, the Human Rights Directorate of the Nepal Army has no legal authority to decide if the principle of double jeopardy applies. If the Army wants to put forward such an argument, then they should do so in court after complying with the arrest warrant and other orders. Secondly, the Supreme Court has already spoken on this issue numerous times. For example, the Court heard the very same argument, and rejected it, when considering its September 2007 decision in the case of Maina Sunuwar. The Court stated that the crime of homicide should be investigated and prosecuted in the civilian courts. A prior court-martial proceeding in which some of the suspects were disciplined for violating disciplinary rules should not prevent the investigation and prosecution from moving forward.

Even if the court martial was an appropriate means of investigating soldiers suspected of killing a civilian, the evidence shows that the court martial did not meet international standards for an impartial investigation, and the sentences imposed did not correspond with the severity of the crime. In fact, Karki was only charged by the military court for breaching disciplinary rules by defecting after Reena's death, for which he was sentenced to 46 days in detention. He was not tried or punished for the unlawful killing. Double jeopardy clearly does not apply.

The principle that violations of human rights should be tried by civilian courts has been upheld by the UN Human Rights Committee and the Committee against Torture.¹ It is also reflected in various

¹ UN Human Rights Committee, Concluding Observations of the Human Rights Committee on the

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human rights documents, including the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity;² the Draft Principles Governing the Administration of Justice through Military Tribunals;³ the Draft Universal Declaration on the Independence of Justice (the Singhvi Declaration), and the OSCE/DCAF Handbook on Human Rights and Fundamental Principles of Armed Forces.⁴

* Demanding That the Defendant Be Turned Over To Military Custody

Not only has the Army refused to cooperate with the courts in this case, it has further requested on 15 March 2011 that Karki be transferred to military custody in submissions made to the Supreme Court in the lead-up to a *habeas corpus* hearing. In its submissions, the Army offered several arguments to justify its request, including that conflict-related prosecutions must be dealt with solely by a truth and reconciliation commission, and that civilian courts have no jurisdiction over rape and murder (despite the clear language of the amended Army Act to the contrary). The Army offered these arguments despite the fact that they have been rejected by the Supreme Court. Such legal justifications for impunity are also inconsistent with Nepal's international law obligations, as set out in a recent legal briefing by the Office of the High Commissioner for Human Rights.⁵

We fear not only that Army obstruction and poor investigation will result in injustice in this particular case. We are concerned that this constitutes an attempt to wrest jurisdiction for the investigation and prosecution of all serious human rights cases from the civilian justice system, that it may constitute a challenge to the authority of the Office of the Attorney General itself.

I thank you in advance for your efforts in this matter.

Democratic Republic of the Congo, UN Doc.CCPR/C/COD/CO/3; UN Committee Against Torture: Conclusions and Recommendations of the Committee against Torture on Guatemala, UN Doc. CAT/C/GTM/CO/4 para.14.

² Principle 29: The jurisdiction of military tribunals must be restricted solely to specifically military offenses 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.

³ Principle 7: The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel; Principle 8: "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.

⁴ Declaration Principle 5(f): The jurisdiction of military tribunals shall be confined to military offences; OSCE/DCAF p. 229: "in instances where civilian and military courts have overlapping jurisdictions, the choice of assuming jurisdiction over a case should lie with the civilian court".

⁵ This legal briefing is available at <http://www.un.org.np/report/relationship-between-transitional-justice-mechanisms-and-criminal-justice-system.kj>

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Yours respectfully,

Mandira Sharma

Chairperson

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