

Maina Sunuwar
Separating Fact from Fiction



Advocacy Forum, Nepal

MAINA SUNUWAR: SEPARATION FACT FROM FICTION

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Advocacy Forum, Nepal
Gairidhara, Kathmandu
P.O.Box: 21798
Tel: +977-1-4004007/8
Fax: +977-1-426698
Email: info@advocacyforum.org.np
Website: www.advocacyforum.org

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I

INTRODUCTION

“A lot of human rights activists and national and international journalists visit me and tell me that the story of injustice meted out to my daughter is known around the world. Furthermore, the human rights defenders tell me that the case of my daughter is “emblematic”. But I am at a loss what this “emblematic” is. Perhaps, a case becomes emblematic if the injustice involved crosses all reasonable bounds? Or when the state promotes the criminals to high-ranking posts and awards them with other prizes despite persistent pressure from national and international circles to bring the perpetrators to book?”

– Devi Sunuwar, mother of Maina Sunuwar
(Excerpts from Devi’s open letter to Prime Minister, December 8, 2009)¹

Why Maina Sunuwar? Why does this murder occupy the foreground of human rights debate in Nepal? What about other incidents of human rights violations that occurred during the decade-long conflict?

These are just some of the questions regarding the case of 15-year-old Maina Sunuwar, who was tortured and killed by members of the army on February 17, 2004. These questions took center stage in Nepal in late 2009, when Major Niranjan Basnet, one of the alleged perpetrators, was repatriated from the United Nations (UN) Peacekeeping Mission in Chad.

¹ See Appendix I for full text of the letter.

Maina Sunuwar's name has indeed become well-known, but sadly, it has also become synonymous with impunity. The fight for justice in Maina's case began on the day that she 'disappeared' in 2004, and justice has been thwarted at each step since then. Following the April 2006 end of the 10-year-long armed conflict that killed more than 16,000 people, injured and displaced tens of thousands; after the Comprehensive Peace Accord of November, the same year; then again with the end of monarchy and the successful election of a Constituent Assembly in April 2008; at each of these historic moments there was hope that there would be a new beginning which would embody all the principles of liberty and justice long denied to the Nepali people. Yet, what has happened is a conspiracy of silence, ensuring that those who committed crimes in the name of national security or revolutionary change remain protected and beyond the reach of the law

Maina's case is 'emblematic' of this failed promise. First, the army tried to cover up that they had disappeared, illegally detained, tortured and killed a young girl. They then falsely claimed that she was shot whilst trying to escape from the control of the army custody. It was only following intense national and international pressure that they initiated an internal inquiry in March 2005 and eventually recommended that three soldiers — Colonel Bobby Khatri, Captain Sunil Prasad Adhikari and Captain Amit Pun — be brought before a Court Martial. The court gave its decision on September 8, 2005, finding the three military officers guilty only of using wrong interrogation techniques and of not following proper proceedings in the disposal of the dead body. The Court of Inquiry Board report implicated then Captain Niranjana Basnet but did not recommend that he be brought before a Court Martial. It is unclear from an unofficial (and possibly partial) copy of the report obtained by Advocacy Forum on what basis the Court of Inquiry Board decided not to recommend him for prosecution.

Shockingly, no one was convicted by the Court Martial for the disappearance, torture and killing of Maina Sunuwar. The death by prolonged torture was described as 'accidental,' and put down to 'carelessness,' and a failure to follow procedures. Maina was blamed for her "physical weakness" in not being able to withstand the simulated drowning and electrocution acknowledged by the Court Martial. Based on this legal representation of the facts, the three accused were convicted of procedural offences and sentenced to six months' imprisonment, temporary suspensions of promotions and a paltry monetary fine as compensation to Maina's family. The guilty officers did not

actually have to serve the prison term because the court held that they had spent their time in confinement during the proceedings of the Court Martial.

The Nepal Army (NA) has repeatedly claimed that its own internal military proceedings ensure the protection of human rights. Since military court proceedings are not open to the public, it was always in doubt whether they were in line with international standards. In spite of the lack of transparency regarding the proceedings, the Maina Sunuwar case has served to expose the failures of the military court.

The civilian justice system too, has been slow to deliver justice. Outraged by the military court's findings, in November 2005 Devi Sunuwar lodged a complaint with the DPO, Kavre against four alleged perpetrators. In addition to the three soldiers sentenced by the military court, she also named Captain Niranjan Basnet. Under pressure from the Office of the High Commissioner for Human Rights in Nepal (OHCHR-Nepal), and after Devi, with legal support from Advocacy Forum, had lodged a writ at the Supreme Court in January 2007, the DPO, Kavre proceeded with sending dozens of letters to senior police authorities, public prosecutors' offices at regional and national level and to the NA. However, feeling intimidated by the NA and unsupported by the political leadership of the country, the police did not exercise its powers to question, arrest, detain and/or charge the suspects.

In March 2007, Maina's body, which had been illegally buried at the Panchkhal army camp, was exhumed. On May 8, 2007, the Supreme Court ordered that the NA Headquarters produce the original file concerning the Court Martial within a week. On June 11, 2007, the army headquarters merely presented a copy of the Court Martial judgment marking it as "strictly confidential". The Court of Inquiry Board report nor any of the other 33 documents considered by the Court Martial were provided.

After much pressure and a ruling by the Supreme Court in September 2007 clearly stating that the case should be dealt with in a civilian court, on January 31, 2008, the Kavre Public Prosecutor finally filed murder charges in the Kavre District Court against the four army officers. The court also issued summons for the arrest of the four accused. However, none of them were arrested. Instead, Niranjan Basnet (the only one of the four accused still serving, who had since been promoted from Captain to Major), was deployed by the NA with the United Nations (UN) Peacekeeping Mission in Chad. On September 13, 2009, the District Court ordered NA Headquarters to immediately proceed with the

automatic suspension of Major Basnet and for Army Headquarters to submit all the files containing the statements of the people interviewed by the Court of Inquiry.

In December 2009 it became publically known that Major Basnet had been deployed within the UN Peace Keeping Mission in Chad, leading to his repatriation to Nepal by the UN on December 12, 2009. He was immediately taken under control of the NA upon arrival in the country and as of February 12, 2010, has yet to be handed over to police, despite orders from the Prime Minister to do so. On January 13, 2010, the Secretary General of the United Nations, Ban Ki-moon urged the NA to comply urgently with the September 2009 court order and suspend Major Basnet. The National Human Rights Commission of Nepal also urged the NA to hand over Major Basnet.²

These are the reasons why Maina Sunuwar's case is "emblematic". She is no longer just a girl tortured to death by army personnel. In the past six years, she has come to represent the widespread injustice and failure of accountability in Nepal, and her case has exposed a deeply-entrenched impunity providing compelling evidence of the political impotence which has thus far failed to address injustice in Nepal.

Her case exposes the blatant extent of impunity, of defiance and sheer audacity to protect perpetrators of violence: the court issues arrest warrants and a suspension order after years of legal battle, but the NA and the Ministry of Defence instead, choose to send the accused on UN peacekeeping mission after laurelling him with a promotion! The human rights community lobbies for his repatriation and the UN duly screens him out and sends him back to Nepal; the military police takes the accused from the airport, holds him in its custody and desists from submitting him to civilian authorities! The national and international human rights community demands accountability and the Prime Minister apparently directs the Defense Minister to hand the accused over to police, but the Defense Ministry ignores the order! An army that sends thousands of troops on lucrative peacekeeping missions even ignores the recommendations of the UN Secretary General to comply with court orders in this case.

² Nepalnews, "NHRC urges govt to proceed cases of HR violation through civil courts", December 24, 2009, <http://www.nepalnews.com/main/index.php/news-archive/19-general/3068-nhrc-urges-govt-to-proceed-cases-of-hr-violation-through-civil-court.html>

These are all the signs of the daunting struggle that still awaits not just Maina Sunuwar's family and supporters, but all victims of human rights violations during the 10-year armed conflict. In the reports "Waiting for Justice" (2008) and "Still Waiting for Justice" (2009), Advocacy Forum and Human Rights Watch exposed the pervasive culture of impunity in Nepal with none of the perpetrators arrested in 62 selected cases of human rights violations ranging from extrajudicial executions, torture, rape to disappearances during the conflict.³ This, despite years of intensive litigation and campaigning by the victims and their families.

Out of those 62 cases only in Maina's case has there been substantial progress. The remaining cases are gathering dust in police stations' desks and cupboards. There are some cases where the police and the authorities have flatly refused to even register First Information Reports (FIRs, formal complaints). Others linger in police investigation or in lengthy court proceedings. Thousands more have simply been dumped into the databases of human rights organizations, because the government is simply unable or unwilling to handle them. Despite persistent efforts nationally and internationally to press for accountability, the state has not brought even a single perpetrator of human rights violations to book. Even initiatives to establish transitional justice mechanisms are not progressing despite repeated promises.

That is why we never tire of speaking about Maina Sunuwar. The logic is simple: *we want this case to be the beginning of the end of impunity in Nepal – a beginning of the end which starts with a trial not a speech.* Maina's case is important enough in and of itself, but her name is now synonymous with the impunity that weighs down on the victims of all human rights violations, regardless of the identity of the perpetrator. We hope that prosecutions in this case will set a precedent to deliver justice to the victims of all the other abuses that occurred during the conflict.

We focused initially on Maina's case because even in 2004, the fact that the army had lied about their role in her "disappearance" was quite apparent. We believed that Maina had been taken, and perhaps killed, only to punish her mother, Devi Sunuwar, who had

³ Advocacy Forum and Human Rights Watch, "Waiting for Justice. Unpunished Crimes from Nepal's Armed Conflict" of September 2008 and "Still Waiting for Justice. No End to Impunity in Nepal" of October 2009, <http://www.hrw.org/en/reports/2008/09/11/waiting-justice-0> and <http://www.hrw.org/en/reports/2009/10/15/still-waiting-justice-0>

publicly blamed government forces for the alleged rape and murder of her cousin, Rina, just four days earlier.

Since then, the facts of the case, the injustice and blatant attempt to cover up the incident, outraged all those that respect fundamental principles of human rights. However, the case did not gain such popular appeal overnight. It is to the credit of her parents that the case remained in the spotlight. Year after year, repeatedly turned away and ignored by the NA and the Government, they displayed resilience and unflinching courage to demand justice. It is also to the credit of human rights groups and the media, which embarked upon a systematic pooling of time and resources to organise a coordinated effort.

Advocacy Forum has been representing the case since 2004. In this report, we highlight some important facts and milestones, and try to set straight the false arguments put forward by those in power with an interest to continue to undermine the criminal justice system in Nepal.

Key Recommendations

The Government of Nepal must

- Ensure Major Niranjana Basnet be immediately produced in the Kavre District Court;
- Order the NA to fully cooperate with the Office of the Attorney General and Nepal Police and allow due process before the Kavre District Court to take its course;
- Order the NA to comply with the orders of the Supreme Court and District Court to submit the full dossier containing all documents relating to the internal army proceedings;
- Order the Nepal Police to arrest the other three (now former) army personnel charged in the case and initiate trial proceedings.

The NA must

- Respect the orders of the Supreme Court and Kavre District Court and promptly and fully adhere to them;
- Fully cooperate with the Nepal Police and Attorney General's Office in allowing due process to take place;

- Provide all documentation requested by the Kavre District Court, including all documents relating to the Court of Inquiry Board and Court Martial.

The Nepal Police must

- Proceed to execute the orders of the Kavre District Court and arrest the four accused;
- Sanction officers who do not proceed with executing these orders.

The international community must

- Not resume military aid to Nepal unless and until the NA fully cooperates with the civilian authorities in this case and hands over Major Niranjan Basnet;
- Develop a sustained approach to bring about an end to impunity in Nepal and offer full assistance to such initiatives;
- Initiating immediate action if anyone of the remaining three accused are within the jurisdiction of their respective country.

II

BACKGROUND

As many as 16,274 people lost their lives during the internal armed conflict in Nepal between 1996 and 2006.⁴ Both the Maoists and the government forces were responsible for serious violations of human rights. The Maoists were accused of torture, extortion, abduction, forced recruitment including that of children, and the killing of suspected informers or “class enemies.” The security forces were responsible for arbitrary detention, enforced disappearances, torture and extrajudicial killings.

After difficult negotiations, the coalition government under Prime Minister Girija Prasad Koirala and the Communist Party of Nepal (Maoist) signed a Comprehensive Peace Agreement on November 21, 2006. The CPA expressly commits all signatories “to create an atmosphere where the Nepali people can enjoy their civil, political, economic, social and cultural rights and ... to ensuring that such rights are not violated under any circumstances in the future.”⁵ Both sides agreed to make public within 60 days of signing the agreement the whereabouts of those “disappeared” or killed during the conflict and to set up a high-level Truth and Reconciliation Commission (TRC). More than three years later, these promises remain unfulfilled amid a lingering political crisis.

It is widely recognized that the peace process stalled after the Maoist party won the April 2008 elections. It reached a crisis point after the resignation of Maoist Prime Minister

⁴ Nepali Times, “New Report Raises Conflict Toll”, October 10, 2009, <http://www.nepalitimes.com.np/2009/10/10/285>

⁵ “Comprehensive Peace Agreement held between Government of Nepal and Communist Party of Nepal,” para 7.1.2, November 22, 2007.

Pushpa Kamal Dahal (alias Prachanda) in early May 2009 after President Dr Ram Baran Yadav countermanded a decision by the cabinet to sack the Commander of the Army, General Rookmangat Katuwal.⁶

After the Constituent Assembly was formed, there was hope that Nepal's political leadership would rapidly move towards delivering justice, which is perhaps the only way to ensure lasting peace and reconciliation. Since the Maina Sunuwar killing had become emblematic of the failure of justice, there was hope that this case would become among the first to be addressed. Though politicians repeatedly pledged their commitment to end impunity, in practice they continued to shield the perpetrators of gross human rights abuses.

Lack of cooperation between the political parties severely impacted on the workings of the Legislature-Parliament (the Constituent Assembly also functions as the parliament). Parties from across the political spectrum on numerous occasions have boycotted sessions contributing to delays in drafting a new constitution, as well as in passing new laws (including one to establish the Commission of Inquiry into Disappearances and the TRC, as mandated by the CPA).

Very recently, again there is some hope of progress as finally the discharge of disqualified Maoist combatants has successfully completed, a High-Level Political Mechanism has been formed to overcome political differences and some progress has been made towards the adoption a new Constitution. It remains to be seen whether this time the promises will be fulfilled.

⁶ UN Security Council, Report of the Secretary-General on the Request of Nepal for United Nations assistance in support of its peace process, July, 13, 2009, para 4.

III

THE ENFORCED DISAPPEARANCE, TORTURE AND KILLING OF MAINA SUNUWAR

I am just a functionally literate woman and I don't know much. What I know is that a minister of defense is our representative, he/ she is the person who is responsible for protecting the people of his/her country and safeguarding their sovereignty. I want to tell you that some of these same people who vowed to protect the country and its people under your ministry brutally tortured my child to death. Now that even the UN has screened Basnet out of its peacekeeping mission, it beggars belief what on earth is preventing you to allow his transfer to face prosecution in the civilian court.⁷

Much has been written about Maina Sunuwar's case, not all of it entirely true or entirely accurate. This chapter tries to provide a fully accurate account of her enforced disappearance, torture and killing. Except where noted, the description of the facts as set out in this Chapter has not been contested by the NA and is consistent with the NA's own March 2005 Court of Inquiry Board report and September 2005 Court Martial judgment. The Office of the High Commissioner for Human Rights in Nepal (OHCHR-Nepal) also investigated and reported on the case in detail in December 2006, citing the same NA findings among other sources.⁸ A detailed chronology is included in Appendix III.

⁷ Extract from letter by Devi Sunuwar to Bidya Bhandari, Minister of Defence, December 15, 2009. For the full text of the letter, see Appendix II.

⁸ OHCHR, The torture and death in custody of Maina Sunuwar: Summary of concerns, December 2006.

Arbitrary Arrest of Maina Sunuwar

Maina Sunuwar was at home with her father, Purna, early on the morning of February 17, 2004, when a military patrol including Captain Niranjan Basnet and Captain Sunil Prasad Adhikari, knocked on the door and then stormed in. They had been deployed from the Shri Birendra Peacekeeping Training Center, Panchkhal, Kavre District (henceforth Panchkhal Barracks) to arrest Maina's mother, Devi. Purna informed the Army officials that his wife was absent.

The army officials then arrested 15-year-old Maina, accusing her of engaging in "terrorist activities" with her mother. Maina's father was told that if he wanted Maina back, he should bring his wife, Devi, to Panchkhal Barracks.

While not acknowledged by the NA, it is evident that the attempted arrest of Devi Sunuwar, and the consequent arrest of Maina Sunuwar followed by her disappearance and murder, is closely related to another case. Five days earlier, on February 12, 2004, 17-year-old Rina Rasaili, a resident of Pokharichauri, Kavre District, was allegedly raped and murdered by Army personnel.⁹ Rina was Devi's niece. As confirmed by other eyewitnesses, Maina's mother, Devi, witnessed the initial arrest and beating of her niece and the next day, her account of her niece's alleged rape and murder was covered in local newspapers.

The Enforced Disappearance, Torture and Death of Maina Sunuwar

From February 17, 2004, when Maina was arrested in front of witnesses, until April 2004, the NA and Government denied any knowledge of Maina's fate or whereabouts or any other knowledge of her disappearance. Maina's mother and others persistently inquired with the NA at Panchkhal and other army barracks in Kavre, with the Office of the Kavre Chief District Officer (CDO) and the Kavre District Police Office (DPO) but to no avail. What really happened remained unknown until quite some time later.

The report of the March 2005 NA Court of Inquiry Board reveals details of Maina's torture upon arrival at the Shri Birendra Peacekeeping Training Center, Panchkhal at about 8:30 am. According to the NA account, seven Army personnel witnessed or participated in her torture for at least 90 minutes: Lieutenant Colonel Bobby Khatri; Captain Niranjan

⁹ Human Rights Watch, "Between a Rock and a Hard Place," Chapter IV, October 6, 2004, <http://www.hrw.org/en/node/11973/section/5>

Basnet, Captain Sunil Prasad Adhikari, Captain Amit Pun, Sergeant Non-Commissioned Officer Khadak Bahadur Khatri and two soldiers, Dil Bahadur Basnet and Shrikrishna Thapa.

The Court of Inquiry Board report provides details of the torture, including Maina's pleas of innocence against charges of Maoist activity and the response of the NA officials. It describes how acting on the orders of Captain Sunil Prasad Adhikari and Captain Amit Pun

[S]oldier Shrikrishna Thapa, grabbing Maina Sunuwar by the neck, started submerging her in the water that was in the pot. It is found that after getting the order that submersion should be for about 1 minute before removal; Shrikrishna did submersion and removal 6 or 7 times. It came to be understood that in doing this, all of the clothes that the girl was wearing became soaked and she coughed and sneezed with the water in her nose.¹⁰

Colonel Bobby Khatri then ordered electric shocks. This too was documented by the Court of Inquiry Board:

[A]fter not being able to force a confession about anything despite submerging and removing Maina Sunuwar in the water, and Colonel Bobby Khatri having given the order that now she will be convinced by being administered electrical current; according to the orders given by Captain Sunil and Captain Amit, soldier Shrikrishna Thapa, taking and fixing the line from the hot water heater, said "On what part of her body shall I administer?;" having gotten the order that it should be administered on the soles of the feet and on the hands... an electrical current was administered. It is found that after the captains having said, even now she isn't convinced, convince by administering more, soldier Shrikrishna administered the electrical current up to 4 or 5 times to Maina Sunuwar.¹¹

[S]eeing that after 4 or 5 times of administering the electrical current, blood was coming from her wrists, soldier Shrikrishna Thapa in saying that blood is coming from her wrists, what to do, and in becoming afraid of administering the electrical current, from there slowly backed off and stopped administering the current. What has been revealed from his testimony is that at that time, Maina Sunuwar had already become weak. It has

¹⁰ Court of Inquiry board, March 2005, para 11.

¹¹ Ibidem, para 13.

come to be understood that during the questioning with administering of electrical current of Maina Sunuwar, she had admitted that she had been involved with Maoist activities for 2 or 3 months, but there is no other evidence to clarify this.¹²

Despite the fact soldier Shrikrishna Thapa pointed to her injuries and wanted to stop the torture, his senior officers continued the inhuman treatment. The Court of Inquiry Board report says that:

[A]fter soldier Shrikrishna Thapa pulled back, Captain Sunil and Amit, after ordering Sergeant Non-Commissioned Officer who was there, Khadak Khatri, to convince by administering more electrical current.... What has come to be clear is that even after about 1 ½ hours of torturing, and nothing of significance having come from Maina Sunuwar, while saying that after providing her food, there would be questioning, she was sent toward the watchtower.¹³

It is clear that the Court of Inquiry Board found that Maina Sunuwar died in custody and names those that were involved in her torture and eventual death. The report states that:

There was a sentry deployed for Maina Sunuwar who had been placed close to the tower in a condition whereby she was blindfolded and her hands were bound behind her. It is understood that at that time, those who were there included Sergeant Non-Commissioned Officer Khadak Bahadur Khatri and soldier Shrikrishna Thapa. It is found that at approximately 11:00 am Maina Sunuwar, in having come to be in serious condition, vomiting and foaming at the mouth; the sentry told this to Sergeant Non-Commissioned Officer Khadak Bahadur Khatri and Sergeant Non-Commissioned Officer Khadak, in having given the message to the sleeping Major Niranjan Basnet, that Major and Sergeant Non-Commissioned Officer Khadak Bahadur both arrived at the room of Colonel Bobby Khatri to report. It has been informed by those including Major Niranjan Basnet, in reporting that the condition of Maina Sunuwar had become serious; a call for medical happened from those including Colonel Bobby Khatri; in going to the place where Maina was, her condition was serious and when the medical orderly came and checked, her death had already occurred.¹⁴

¹² Ibidem, para 14.

¹³ Ibidem, para 15.

¹⁴ Ibid. para 16.

Clandestine Burial and Attempted Cover-Up

Colonel Bobby Khatri ordered Captain Amit Pun to arrange a clandestine burial of Maina Sunuwar's body, as found in the Court of Inquiry and Court Martial proceedings.¹⁵ Before burying her, army personnel shot her corpse to simulate an attempted escape.¹⁶ Captain Niranjan Basnet, on Colonel Khatri's order, then brought the police from the Panchkhal police post in order to lodge a false affidavit.¹⁷ The same day, the NA issued a press release circulated by the state media that a terrorist was killed near Hokse jungle while she tried to run away after she threw herself out of an army vehicle and ran towards the jungle and failed to return to the vehicle even after being warned.

Campaign for Accountability

The NA repeatedly issued contradictory statements in the next few weeks all of them lacking credibility. Meanwhile, a letter from an anonymous soldier detailing how a woman had been killed in the Panchkhal Barracks by administering electric shocks on her breasts was published in the Letter to Editor Column of a widely-read weekly newspaper.¹⁸

Convinced that security forces were responsible for Maina's enforced disappearance, the national and international human rights community began intensive advocacy to try and establish the truth. Maina's disappearance began to hit the headlines of national broadsheets. The diplomatic community also began to pressurize the government to investigate the case.

Finally, in April 2004, Devi approached the NA Headquarters in Kathmandu where she was informed that Maina had been killed and that her clothes and other belongings had been sent to the police. Under sustained pressure from the international community, including from the then UN High Commissioner for Human Rights, Louise Arbour, the army proceeded with an internal Court of Inquiry in March 2005 and six months later, brought three soldiers allegedly responsible before a Court Martial.

Army Court of Inquiry

Under the direction of Colonel Mohan Bahadur Basnet, the Court of Inquiry completed its investigation and presented its report on March 14, 2005, concluding that action

¹⁵ OHCHR, pp 4–5.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Jana Aastha Weekly, Pathak-Patra, April 21, 2004.

should be taken against Colonel Bobby Khatri, Captain Sunil Prasad Adhikari and Captain Amit Pun in accordance with the Army Act 1963 (2016) since her death “occurred as a result of extreme torture inflicted upon her immaturely and very carelessly when there were other options, although the torture was inflicted on her with the intent of interrogation, not killing.”¹⁹

Nepal is a party to all the major human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Human rights law prohibits, among other things, arbitrary arrest and detention, torture and other mistreatment, enforced disappearances, and extrajudicial executions.

Despite evidence that these laws had been violated, the inquiry in a clear violation of Nepal’s international legal obligations, concluded that although torture was inflicted on Maina with the intent of interrogation there was no bad faith (*‘malafide’*) involved in killing her. It also found that wrong procedures were adopted with regard to the disposal of Maina’s body and recommended a Court Martial.

Failure of the Military Court

On March 14, 2005, upon the advice of the Department the Adjutant General (Legal Department) to conduct a Court Martial, the trial was started based on the authorization given in accordance with Section 98 of the Army Act 1963 by the Chief of Army Staff. It was held under chairmanship of then Major General Kiran Shamsher Thapa sitting with Lieutenant General Bishnu Bahadur Gurung, Lieutenant General Sarad Kumar Neupane, Colonel Hemanta Raj Kuwar and Colonel Ajit Singh Thakuri. Colonel Nirendra Prasad Aryal represented the NA Legal Department.²⁰

According to the report of the Court of Inquiry Board of March 14, 2005, Niranjan Basnet was in charge of the army patrol which arrested Maina Sunuwar and was present during the early part of her questioning, including when her head was put under water to make her confess. The report further states that Niranjan Basnet was involved in the decision to call the Kavre-based police office Maina had died; and in the subsequent cover-up of her death.

¹⁹ Court of Inquiry Board report, p. 8.

²⁰ Court martial judgement, September 8, 2005, page 1.

On the basis of the Army Court of Inquiry report, a Court Martial was conducted against Bobi Khatri, Sunil Prasad Adhikari and Amit Pun, but Niranjana Basnet was in the end not brought before the Court Martial. On the basis of the documentation available to date, it is not possible to ascertain why Niranjana Basnet was not charged and brought before the Court Martial.

The Court Martial gave its decision on September 8, 2005 after hearing the statements of 13 people including Colonel Bobby Khatri. It found three military officers— Colonel Bobby Khatri, Captain Sunil Prasad Adhikari and Captain Amit Pun— guilty of wrong interrogation techniques and of not following proper procedure when disposing of the dead body.

It sentenced Colonel Bobby Khatri 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; Captain Sunil Prasad Adhikari and Captain Amit Pun were sentenced to six months' imprisonment and suspension of promotion for one year for not adhering to the NA's instructions on observing human rights and humanitarian law in accordance with the Army Act, section 54 and 60. The Court Martial also recommended Rs 150,000 (US\$2010) as compensation to the victim's family and an additional compensation of Rs. 50,000 (US\$670) from Bobby Khatri and Rs 25,000 (US\$335) each from Sunil Prasad Adhikari and Amit Pun.

No Army personnel were convicted for the torture and killing of Maina Sunuwar. The guilty officers did not actually have to serve the prison term because they had spent their time in confinement during the proceedings.

Since the NA was operating under the protection of the Royal Palace during that time and continues to be outside effective civilian control, it has been almost impossible to get access to information about violations that occurred within the barracks. Even in the Maina murder case, the full details of the military court proceedings have not been made public. After Devi Sunuwar filed an application in the Supreme Court in May 2007 asking for a copy of the file to be provided, the Army Headquarters only sent a copy of the Court Martial report to the Supreme Court marking it as "very confidential". Afterwards, in late June 2007, the deputy registrar of the Supreme Court refused Devi Sunuwar's lawyers access to the documents arguing they were confidential. Advocacy Forum challenged this under the Freedom of Information Act 2007. Finally, on September 18,

2007, the Supreme Court quashed the decision of the deputy registrar and ordered to provide copies of the Court Martial judgment.

Even though the Supreme Court had initially ordered the army to provide the whole file related to the Maina Sunuwar case, the NA to date has failed to cooperate in this respect. Indeed, a similar order by the Kavre District Court in September 2009 has also been ignored.

The military court verdict illustrates how although grave human rights violations occurred during the armed conflict, there has been a repeated failure to hold perpetrators to account. This is in spite of regular claims by the army that it has its own internal courts and therefore there is no need for soldiers to appear before the civilian judiciary.

Police Refusal to Investigate Murder

Dissatisfied with the Army's internal inquiry and trial, Devi Sunuwar decided to lodge a complaint with the DPO, Kavre against the four alleged perpetrators. On November 13, 2005, accompanied by human rights defenders, she attempted to file a First Information Report (FIR) with the DPO, Kavre, under Chapter 13 (3) of the Country Code, demanding confiscation of property along with life imprisonment to the accused under Chapter 1 of the Country Code. The police refused to register the FIR, as they did again later in spite of an order issued by the CDO under Section 3 (5) State Cases Act, 1992.

It was not until it received an order from the Supreme Court that the DPO Kavre complied with its duty to register the FIR. Apart from Colonel Bobby Khatri, Captain Amit Pun and Captain Sunil Adhikari, Devi Sunuwar also named Captain Niranjana Basnet of NA Barracks, Panchkhal as suspects.

In spite of registering the FIR, no investigation was initiated. On January 10, 2007, with legal support from Advocacy Forum, Devi lodged a writ at the Supreme Court, seeking an order of mandamus for the DPO and public prosecutor in Kavre to complete the investigation. On January 11, 2007, a preliminary hearing before the Supreme Court resulted in a 15-day "show cause" notice issued against the District Public Prosecutor's Office and the DPO in Kavre, which meant that the DPO and Prosecutor's Office were required to either complete the investigations or inform the court of the reasons why it was not possible to do so within 15 days. Advocacy Forum pleaded that the case be made a priority, which was granted by the court.

Nine months later, in September 2007, the Supreme Court issued a historical decision, ordering the police to complete investigations within three months and clearly establishing that cases of this nature had to be brought before civilian courts. On January 24, 2008, four months after the Supreme Court clearly established its jurisdiction over the case and ordered an investigation, the Public Prosecutor finally filed murder charges in the Kavre District Court. The court issued arrest warrants against the four accused on January 31, 2008. These warrants to date have not been executed by the Nepal Police.

Throughout the prolonged efforts of Devi and supporting human rights advocates, Nepal Police blamed their inability to investigate effectively on the non-cooperation of the NA. Section 4, 10 and 14 of the State Cases Act –1992 authorizes the police to arrest suspects with support from the institutions concerned. But the police did not utilize the authority invested in it by the law. The police neither questioned the 13 persons interrogated by the Court Martial nor obtained their statements.

Eventually on September 13, 2009 the Kavre District Court made a significant ruling requesting the immediate suspension of Captain Niranjan Basnet (who by then had been promoted to the post of Major and remained the only one of the accused still serving) in accordance with Section 66 (3) of the 2006 Army Act;²¹ the Attorney General's production of witnesses consulted during the investigation; and the NA's statements of individuals named in the Court Martial judgment.

²¹ Section 66 of the Army Act states: "Offences under other laws:

- 1) Except in the event that a person under the jurisdiction of this Act commits offences mentioned in Sections 38 to 65 and those offences are committed by a military personnel against a military personnel, if the person under the jurisdiction of this Act commits the following offences, the cases which arise thereto shall fall under the jurisdiction of other courts:
 - a) Homicide,
 - b) Rape.
- 2) If the agency which is conducting an investigation and inquiry or if an investigating officer orders that the person who is alleged of being involved on offences mentioned under Subsection (1) shall be handed over to the commanding officer or Chief or relevant officer shall hand him over to the agency or officer issuing such order. The retirement or desertion of a person shall not be a bar to the conduct of an investigation and the taking of action in accordance with law.
- 3) The person under the jurisdiction of this Act who falls under the jurisdiction of other court and is under investigation shall ipso facto be suspended during the period of his custody until a final decision is reached if a case is lodged.
- 4) Even if an investigation into an offence under the jurisdiction of other courts is started in respect to a person under the jurisdiction of this Act, nothing in this Section shall be a bar to form a Court of Inquiry and conduct the investigation on the offence under the jurisdiction of this Act and subject such person to necessary action.

The NA failed to honor the directives of the court. It did not submit the documents that the court asked it to provide, nor did it proceed with the suspension of Major Basnet. It was later learnt that Major Basnet was serving in the UN Peacekeeping Mission in the Republic of Chad. He was repatriated on December 12, 2009, after the UN was informed of his alleged involvement in the Maina case. This was the first incident in the history of Nepal that a person serving in a UN Peacekeeping Mission was sent back based on an allegation of involvement in human rights violations. The sensational development in the case increased optimism that justice might be served.

However, Major Basnet was taken under NA's control from Tribhuvan International Airport, Kathmandu upon his arrival in the country on December 12, 2009 despite intense lobbying by national and international human rights groups that he be handed over to civilian authorities and produced in the court. The case remains *sub judice*.

The role of the international community

As stated above, the then UN High Commissioner for Human Rights, Louise Arbour, was one of the most active international actors pushing for justice and accountability in Maina Sunuwar's case. In January 2005, during a visit to Nepal she met with Devi Sunuwar. During meetings with the then Chief of Staff of the NA (COAS) and Home Minister, she was given assurances that an investigation would be carried out without delay.²² OHCHR-Nepal has continued its advocacy for justice in the case ever since, including by publishing a report in December 2006.

The role of other actors in the international community has been somewhat ambiguous. The United Kingdom (UK) Government, for instance during a high profile visit to the UK by the then COAS, General Rookmangat Katuwal in 2007 merely raised Maina's case in private. The COAS reportedly promised that the army would cooperate with the police investigations. Very recently, in a visit to Nepal in mid-February 2010, the UK Army Chief reportedly discussed the resumption of military aid to Nepal. The Chief reportedly raised human rights issues, including Maina Sunuwar's case, during his meeting with the Minister of Defence. The Minister reportedly told the Chief that the

²² OHCHR-Nepal, "OHCHR-Nepal insists on full investigation of Maina Sunuwar case following exhumations of remains", March 24, 2007, http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202007/MAR2007/2007_03_24_Maina_exhumation_E.pdf

Court of Inquiry Board had already found Niranjana Basnet innocent; therefore there was no need to hand him over to the civilian authorities.²³

This is in contrast to recent steps taken by the Government of the United States of America (US). On December 16, 2010, President Barack Obama signed into law the Consolidated Appropriations Act 2010 prohibiting assistance to the Nepal Armed Forces, including the NA, till they fulfil their human rights obligations, among other things.²⁴ The law stipulates that the NA will be entitled to funds under the US Foreign Military Financing Program only if it fulfils certain criteria including full cooperation on human rights violations. The key criteria are:

- It is cooperating fully with investigations and prosecutions by civilian judicial authorities of violations of internationally recognized human rights.
- It is working constructively to redefine the NA's mission, implement reforms including establishment of a civilian ministry of defense to support budget transparency and accountability, and facilitate the assimilation of former rebel combatants into the NA consistent with the goals of reconciliation, peace and stability.

Undoubtedly, currently most supportive of the NA are the Indian Government and Army. In the context of a visit to India in early December 2009 by the current COAS, General Chhatraman Gurung, India announced the resumption of military aid to Nepal. Despite appeals by members of India's civil society, the Government of India has so far remained silent on issues of accountability in Nepal.²⁵

²³ Kathmandu Post, "Bhandari defends army over rights violation", February 10, 2010, <http://www.ekantipur.com/2010/02/10/National/Bhandari-defends-army-over-rights-violation/308107/>

²⁴ Republica, "Obama Stalls US Aid to Nepal", December 19, 2009, http://www.myrepublica.com/portal/index.php?action=news_details&news_id=13027

²⁵ Asian Centre for Human Rights, "Visiting NA Chief Urged to Hand Over Major Niranjana Basnet to Police", December 17, 2009, <http://www.achrweb.org/press/2009/NP0609.html>

IV

UNRAVELING LEGAL FACT FROM FICTION

In this and other cases, members of the NA and the Government have put forward arguments or proposed measures that would undermine the Constitution of the country, several Supreme Court orders and the country's obligation as set out in Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR, to which Nepal is a party) to guarantee an effective remedy for the violation of protected rights, including the right to life.

The NA has put forward several arguments to exclude the jurisdiction of the civilian courts, including the idea that Maina Sunuwar was killed in a battlefield context, or that the NA's own Court Martial concluded the matter and renders any civilian court proceedings in violation of the principle of double jeopardy. Neither of these arguments can be sustained under Nepal's international and domestic legal obligations.

In terms of the handing over of Niranjana Basnet who was taken into military control on December 12, 2009, after he was repatriated from peacekeeping duties in Chad, the NA initially argued that they are investigating his repatriation.²⁶ However, this too appears to be without a clear basis.

Government officials have suggested a provision of amnesty for past human rights violations and have put forward related arguments that transitional justice mechanisms

²⁶ Republica, "Court of Inquiry on Basnet likely on Monday", December 20, 2009, http://www.myrepublica.com/portal/index.php?action=news_details&news_id=13070

will address the human rights abuses committed during the conflict. None of these arguments are supportable under Nepal's international legal obligations.

The principles and arguments outlined below apply equally without regard to whether alleged perpetrators of serious human rights abuses and war crimes are Maoist or State actors.

Claims of Double Jeopardy

Quite often, the principle of double jeopardy is used to argue that the prosecution of the accused army officials could not be reenacted as per no. 1 and 13(3) of the chapter on Homicide in the Nepalese Civil Act because an independent and competent body like a Court Martial has already presided over the case and issued its verdict. This was the position conveyed to the DPO, Kavre in a letter from Brigadier General BA Kumar Sharma of the NA Legal Section. In his letter of May 22, 2006, he stated that since the Court Martial had rendered a verdict, "it is not lawful to initiate actions" against the four officers.²⁷

However, such a proposition is totally baseless and superficial. What should not be forgotten is that the Court Martial passed its verdict to punish the perpetrators in accordance with section 54 and 60 of Nepalese Army Act for using wrong and irresponsible procedures while interrogating her, burial without due legal process, not adhering to human rights and protection of humanitarian law, but not for torturing and killing her.

The Supreme Court of Nepal has already dealt with the double jeopardy argument. In September 2007, the Supreme Court had before it and reviewed the NA Court Martial judgment of September 2005, and thereafter decided to refer the matter to the Kavre District Court.

The danger of permitting the NA to adjudicate its own responsibility for alleged enforced disappearance, torture and unlawful killing is manifest in the Court Martial's decision of September 8, 2005. The Court Martial found that prolonged torture occurred, described as "drowning of [Maina Sunuwar] in a drum full of water, passing electric current on her wet body [as translated]."²⁸ Notwithstanding this finding of fact, the Court Martial reached the following conclusion, seeking to shift responsibility to the victim:

²⁷ OHCHR-Nepal, "The Torture and Death in Custody of Maina Sunuwar", December 2006, page 24.

²⁸ Court martial judgment, September 8, 2005, p. 6.

[...] Maina Sunar [spelling in original document] was not killed or died as a result of intentional severe torture but died unfortunately and accidentally due to wrong techniques used out of carelessness, fickleness and irrationality during the interrogation and also due to her own physical weakness.²⁹

With similar disregard for the serious crimes disclosed by the acknowledged facts, the Court Martial describes the clandestine burial of Maina Sunuwar's body as burial "without following required procedures." In keeping with this reduction of grave crimes to administrative impropriety, the sentence of six months' imprisonment and suspended promotions is manifestly disproportionate to the offence. Furthermore, Niranjana Basnet, one of the four soldiers involved in these crimes was never even charged.

The Court Martial decision highlights the importance of ensuring that a judicial remedy for human rights violations is guaranteed by a civilian court. As already stated, in fact, the Supreme Court's September 2007 decision effectively dealt with the issues of military jurisdiction and double jeopardy by ordering the matter to come before the Kavre District Court. This principled recognition of civilian jurisdiction, however, has not been respected by the Government and NA. The inability or unwillingness of the Government of Nepal to surrender Major Basnet to the Kavre District Court is obstructing the course of justice, negating the right of victims and of the accused in this case to a fair trial.

According to the provision in section 54 of the 1963 Army Act, any army personnel found to have violated order and discipline requirements are liable to be imprisoned for up to seven years.. However, the Court Martial even overlooked this provision while deciding the case and merely imposed a sentence of six months.

Crimes committed on the Battlefield

Section 60 of the Army Act of 1963 (referred to in the Court Martial judgment) provides for adjudication of crimes committed on the battlefield by Court Martial. The new 2006 Army Act, however, excludes cases of murder and rape from jurisdictions of courts martials. This is in keeping with the principle accepted in international law that reserves the adjudication of human rights violations to civilian courts in order to ensure an effective remedy and reparations.

²⁹ Ibidem, p. 7.

Maina Sunuwar was a 15-year-old schoolgirl who was taken from her home, remote from any battlefield context, and subjected to torture leading to her death. There is no legitimate argument that this premeditated and executed enforced disappearance, torture, and unlawful killing by NA officials took place in the context of the battlefield. In any case, the proper forum for this defense is a civilian court, not the NA's own Court Martial proceedings, as recognized by Nepali legislation and international law and the Supreme Court ruling of September 2007.

The related defense of obedience to 'superior orders' in a battlefield context when committing war crimes or crimes against humanity has not been accepted under international law since at least the Nuremberg and Tokyo trials following the Second World War. Facts regarding the degree of responsibility for alleged offences will be in dispute, but it is the exclusive jurisdiction of a civilian Nepali judge to make individual determinations of guilt in these cases, with full respect for the fair trial rights of the accused.

The question of military vs. civilian jurisdiction

The Court Martial's verdict also violates international law. During an internal armed conflict, Common Article 3 of the Geneva Conventions forbids the torture or inhuman treatment of civilians and those outside of combat, including a captured enemy combatant. Maina was a school-going minor, she was not party to any side involved in the conflict. To kill a civilian after taking her into control is nothing but a crime. This is why the verdict of six months' imprisonment by the Court Martial is ridiculously lenient and unjustifiable. It proves in itself why it is morally and legally correct that military tribunals only deal with military matters to ensure the right to an effective remedy (especially to ensure prosecution and punishment of those responsible) and the right to reparation of victims and their families.

The principle that gross violations of human rights should be tried by civilian and not by military courts has been upheld by the UN Human Rights Committee and the Committee against Torture. It is also reflected in 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* which 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.*³⁰

This principle has been adopted by the Supreme Court of Nepal in its September 2007 ruling.

Investigating Niranjan's Basnet repatriation

Amid the furor in the immediate aftermath of Niranjan Basnet's repatriation, the NA issued a press release stating that it had requested the Foreign Ministry to seek clarification from the UN Department of Peace Keeping Operations about the procedure followed during the repatriation.³¹ The NA also sought to justify Basnet's deployment, claiming he was "cleared by an independent military board of enquiry".³² On December 22, 2009, the head of the army's legal department, Major-General B A Kumar Sharma stated that a Court of Inquiry Board had started its investigations into the repatriation.³³ Around January 7, 2010, news reports even alleged that a representative of the UN had indicated that the organization had acted hastily under pressure from NGOs.³⁴

In a press release issued by the Resident Coordinator of the UN in Nepal, it was confirmed that no letter was ever sent by the Nepalese Foreign Ministry requesting clarification regarding the procedure for repatriation and that the UN never wrote to the Government apologizing or admitting flaws under pressure from NGOs.³⁵ It therefore is questionable on what basis the Court of Inquiry Board is conducting its investigations into the repatriation given it has only one (i.e. its own) version of events.

³⁰ See UN document E/CN.4/2005/102/Add.1.

³¹ Republica, "Govt to lodge written complaint with UN", December 16, 2009, http://www.myrepublica.com/portal/index.php?action=news_details&news_id=12936

³² The Himalayan Times, "Amnesty urges to arrest Basnet", December 9, 2009, <http://www.thehimalayan.com/fullNews.php?headline=Amnesty+urges+to+arrest+Basnet&NewsID=212927>, Basnet was not among the three eventually court-martialled for the crime, as demonstrated in this report.

³³ Nepalnews, "NA forms Court of Inquiry on Maj Basnet", December 22, 2009, <http://www.nepalnews.com/main/index.php/news-archive/2-political/3020-na-forms-court-of-inquiry-on-maj-basnet.html>

³⁴ Republica, "UN admits flaw in Basnet case", January 7, 2010, http://www.myrepublica.com/portal/index.php?action=news_details&news_id=13781

³⁵ Nepalnews, "UN refutes report on admitting mistake in Naj Basnet case", January 9, 2010, <http://www.nepalnews.com/main/index.php/news-archive/1-top-story/3368-un-refutes-report-on-admitting-mistake-on-maj-basnet-case.html>

Recommending the case to a Truth and Reconciliation Commission (TRC)

Many have suggested that this and similar cases should be heard by the yet to be established TRC since the incident took place during the armed conflict. Using that same logic, the police have often refused to register FIRs and the appellate courts regularly nullify writs of mandamuses.³⁶ This same argument was put forward by a senior Maoist politician (and former commander) on January 12, 2010 in the context of the debate after Basnet's repatriation and the army's lack of response to the DPO, Kavre's request to hand him over.³⁷

The transitional justice process, including the anticipated work of commissions of inquiry in Nepal (regarding 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 any commission 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, 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 reforms necessary to prevent the repetition of harms. The TRC has not been established yet. It is pragmatically unsound to hypothesize the area and jurisdiction of the commission in advance. Regardless of the clear identification of the working areas to be covered under the commission, there is no doubt the responsibility to collect, register and investigate the information of criminal offences that are state cases falls under the jurisdiction of district police offices according to the State Cases Act 1992, and to finalize the case falls under the responsibility of District Courts

³⁶ Advocacy Forum and Human Rights Watch, "Waiting for Justice. Unpunished Crimes from Nepal's Armed Conflict" of September 2008 and "Still Waiting for Justice. No End to Impunity in Nepal" of October 2009, <http://www.hrw.org/en/reports/2008/09/11/waiting-justice-0> and <http://www.hrw.org/en/reports/2009/10/15/still-waiting-justice-0>

³⁷ Kathmandu Post, "Mandated action not punishable: Pun", January 12, 2010, <http://www.ekantipur.com/the-kathmandu-post/2010/01/12/top-stories/Mandated-action-not-punishable-Pun/3992/>

according to section 7 of the Administration of Justice Act 2048 and Judicial Management No. 29 of Civil Code.

Amnesty

Amnesty for participants in hostilities is appropriate following the cessation of internal armed conflict but with the important exception that suspected war crimes and grave human rights violations must be investigated and prosecuted. Statutes of limitation or other delay, obstruction or amnesty are excluded in respect of such crimes. 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)).

This was further enforced in the 2004 report on the rule of law and transitional justice in conflict and post-conflict societies by the Secretary General of the United Nations. He concluded that “United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights.”³⁸ 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.

³⁸ UN Document S/2004/616, para 10.

V

CONCLUSIONS AND RECOMMENDATIONS

It is high time for the Government and Nepal Army to allow due process before a civilian court to take its course in this case, as already directed by the Supreme Court as far back as September 2007.

At stake is the integrity of the criminal justice system, the separation of powers, and the independence of the judiciary. Failure to prosecute such cases only further entrenches impunity, undermining the prospects for a democratic transition based on the rule of law in Nepal. Without justice, the peace process will never reach its logical conclusion.

Recommendations

The Government of Nepal must

- Ensure Major Niranjana Basnet be immediately produced in the Kavre District Court;
- Order the NA to fully cooperate with the Office of the Attorney General and Nepal Police and allow due process before the Kavre District Court to take its course;
- Order the NA to comply with the orders of the Supreme Court and District Court to submit the full dossier containing all documents relating to the internal army proceedings;
- Order the Nepal Police to arrest the other three (now former) army personnel charged in the case and initiate trial proceedings.

The NA must

- Respect the orders of the Supreme Court and Kavre District Court and promptly and fully adhere to them;
- Fully cooperate with the Nepal Police and Attorney General's Office in allowing due process to take place;
- Provide all documentation requested by the Kavre District Court, including all documents relating to the Court of Inquiry Board and Court Martial.

The Nepal Police must

- Proceed to execute the orders of the Kavre District Court and arrest the four accused;
- Sanction officers who do not proceed with executing these orders.

The international community must

- Not resume military aid to Nepal unless and until the NA fully cooperates with the civilian authorities in this case and hands over Major Niranjan Basnet;
- Develop a sustained approach to bring about an end to impunity in Nepal and offer full assistance to such initiatives;
- Initiating immediate action if anyone of the remaining three accused are within the jurisdiction of their respective country.

APPENDIX—I

Devi's Open Letter to Prime Minister

Rt. Honorable Prime Minister
Madhav Kumar Nepal,

My name is Devi Sunuwar. I am the mother of 15-year old Maina Sunuwar, who was mercilessly murdered by the then Royal Nepal Army more than five years ago now. I am quite sure that you are aware of my daughter's murder.

I am writing this letter to you to inform you that I am still waiting for justice. Months have elapsed since the court issued arrest warrants against the perpetrators involved in the murder of my daughter but they are yet to be arrested. I want to know the reason behind the state's apparently deliberate indifference in this regard. If you really believe in and are committed to the rule of law and justice, I am still optimistic that justice will prevail. Therefore, I earnestly beseech you to take initiatives to arrest the alleged perpetrators, i.e. Colonel Bobby Khatri, Major Niranjan Basnet and Captains duo Amit Pun and Sunil Adhikari, and start criminal proceedings without further ado.

I am deeply hurt and upset by the recent news that the government has sent one of the chief perpetrators, Major Niranjan Basnet, on UN peacekeeping operations. Victims of human rights violations and their families have to suffer the agony of being displaced from their homes, face financial ruin in the absence of their breadwinners and, in some instances, have to face death while seeking justice; the perpetrators, on the contrary, are lauded with promotions and bestowed with several opportunities abroad. They are even sent on peacekeeping mission, which we all know is very lucrative. What kind of justice is this Honorable Prime Minister?

You are quite aware of the scale of human rights violations committed during the conflict. Thousands were killed and similar numbers disappeared, and tortured. I wonder why none of the perpetrators are brought to book. I wonder when your commitments and pledges to end impunity will materialize. Just promising accountability won't demolish the edifice of impunity that is deeply-entrenched in Nepal. A genuine first step in this direction is the prosecution of even a single perpetrator. Therefore,

I would humbly request you to arrest the murderers of my daughter and ensure their trial in a civilian court as the beginning of the end of impunity in Nepal.

A lot of human rights activists and national and international journalists visit me and tell me that the story of injustice meted out to my daughter is known around the world. Furthermore, the human rights defenders tell me that the case of my daughter is “emblematic”. But I am at a loss what this “emblematic” is. Perhaps, a case becomes emblematic if the injustice involved crosses all the reasonable bounds. Or when the state promotes the criminals to high-ranking posts and awards them with other prizes despite persistent pressure from national and international circles to bring the perpetrators to book.

Honorable Prime Minister,

Possibly you are not aware that I have not been able to perform cremation rites for my daughter. Her skeletal remains were disinterred from a jungle right next to the Panchkhal-based Birendra Peace-Keeping Training Center. The remains are now kept at the Forensic Laboratory of Tribhuvan University Teaching Hospital. I am not in a position to pay my last homage to her departed soul before I see her perpetrators being prosecuted in a civilian court. In the midst of all this, my husband was recently found dead under apparently suspicious circumstances. I don't know whether it was a murder or a suicide but the fact is that he had started to lose faith in justice. He died in the anguish of not getting justice despite years of continuous struggle.

Now that I have even lost my husband who always wiped off my tears, walked beside me and encouraged me during my struggle for justice, I feel languid sometimes. How long shall I have to wait for justice? What is the government doing with regard to the case of Maina Sunuwar? When and how will the alleged perpetrators be arrested? I am hopeful that Major Niranjana Basnet will be arrested upon his arrival and similar steps will be taken against all other perpetrators.

I am waiting with bated breath for answers to these questions.

Thank you

Devi Sunuwar

December 8, 2009

APPENDIX—II

Devi's Letter to Defense Minister

Rt. Honorable Defense Minister
Bidhya Devi Bhandari

Respected Madam,

I am Devi Sunuwar, the mother of Maina Sunuwar, who was mercilessly murdered by the then Royal Nepal Army more than five years ago now. I am sure that you are aware of the murder of my daughter and the injustice involved in her case.

I am writing this letter to express my surprise over the recent news in media that you are unwilling to cooperate with requests from the Prime Minister and the Minister of Home Affairs to hand over to the police authorities one of the murderers of my daughter, Major Niranjan Basnet. I had gained some hope that after the District Court of Kavre back in September 2009 ordered that he be suspended from his post and he was recently vetted out from the UN Peacekeeping Mission in Chad and he was returned to Nepal, that finally at least one of the accused would be produced in the court. This latest news is draining away my faint hopes of justice borne after the repatriation of Major Basnet.

Like you, I am also a widow. We both know the pain of being a widow. But I feel that losing a child the way I lost is more excruciating than losing anything else in the world. Can you imagine how painful it is to hear that your dear child is taken away by soldiers, how they deny even arresting her... you have to live for years without knowing the exact fate of your child...you then have to leave your home, your village, your dreams, beg one agency after another to help you to find out the fate of your child, you have to hide because of your desire to find the fate of your child? You then hear that your child was submerged in water by the military personnel who took her, gave her electric shock on her wet body until she died.... Desperate you, again have to beg every agency to help you to find the remains of your child?

Madam Minister,

I cannot explain in words what I have gone through. I know one can't even gauge the trauma that I underwent. But I am the mother who had to witness the most harrowing scene of the skeletal remains of my beloved child being dug up. Nightmares are meant for the nights but I saw them in broad daylight. Moreover, I have not been able to perform cremation rites for my daughter as the remains are still kept at the Forensic Laboratory of Tribhuvan University Teaching Hospital. I am not in a position to pay my last homage to her departed soul before I see her perpetrators being prosecuted in a civilian court. Every second is difficult for me to live but the hope of getting justice for my daughter keeps me alive.

I am just a functionally literate woman and I don't know much. What I know is that a minister of defense is our representative, he/ she is the person who is responsible for protecting the people of his/her country and safeguarding their sovereignty. I want to tell you that some of these same people who vowed to protect the country and its people under your ministry brutally tortured my child to death. Now that even the UN has screened Basnet out of its peacekeeping mission, it beggars belief what on earth is preventing you to allow his transfer to face prosecution in the civilian court.

You are quite aware of the scale of human rights violations committed during the conflict. Thousands were killed and similar numbers disappeared, and tortured. I wonder why none of the perpetrators are brought to book. I wonder when our government's commitments and pledges to end impunity will materialize. Just promising accountability won't demolish the edifice of impunity that is deeply-entrenched in Nepal. A genuine first step in this direction is the prosecution of even a single perpetrator. Therefore, I would humbly request you to arrest the murderers who turned my dear little daughter to a mere mass of bones and ensure their trial in a civilian court as the beginning of the end of impunity in Nepal.

I am hopeful that you will hear the cry of my daughter's skeleton for justice and facilitate the handover of Major Basnet to the police.

Thank you

Devi Sunuwar

December 15, 2009

APPENDIX—III

Chronology

February 17, 2004: Royal Nepal Army personnel visit Devi Sunuwar's house. Not being able to find Devi, they arrest her 15-year-old daughter Maina and tell Devi's husband that she would find her daughter at the Panchkhal Military Barracks (Kavre district).

February 18, 2004: Devi Sunuwar, her husband and other villagers go to the Panchkhal Military Barracks. They are told that Maina has never been arrested.

February 20, 2004: Devi Sunuwar goes to the District Police Office in Kavre district. Police officers deny Maina's arrest and detention.

During the following months, Maina's family inquires about her condition and whereabouts, visiting the District Administration Office, the District Police Office, the Panchkhal Military Barracks and other army camps, the Army headquarters and the then Chief of Army Staff. They obtain contradicting information.

Concerns raised by diplomatic representatives and various international and national organizations compel the Chief of Army Staff of the Nepal Army to constitute a Board of Inquiry to probe the incident.

March 14, 2005: The Board of Inquiry submits its opinion.

As per the recommendation of the Board of Inquiry, the Nepal Army set up a General Military Court (court martial) under the chairmanship of Kiran Shamsheer Thapa, Major General in 2005.

September 8, 2005: The Court Martial finds three Army officers (Colonel Bobby Khatri, Captain Sunil Prasad Adhikari and Captain Amit Pun) guilty of using wrong interrogation techniques and of not following decent ways in the disposal of a dead body. The defendants are sentenced to six months imprisonment. However, as they have already spent six months confined to barracks during investigations, they are set free. The defendants are also ordered to pay money to Maina's family as compensation.

November 13, 2005: Not satisfied with the outcome of the army's internal inquiry and trial, Maina's family files a formal complaint (a First Information Report) with the Kavre police, against

Colonel Bobby Khatri, Captain Sunil Prasad Adhikari, Captain Amit Pun and Captain Nirranjan Basnet.

November 6, 2006: The resignation of Sunil Prasad Adhikari from the Army is approved. At some point after this date, he leaves Nepal.

January 10, 2007: Devi Sunuwar, with legal support from Advocacy Forum, lodges a mandamus petition in the Supreme Court seeking for the court to issue a writ to the Kavre District Police Office and the District Government Attorney to proceed with investigations.

March 23, 2007: With the help of the UN Office of the High Commissioner for Human Rights, the police exhume Maina's body from the premises of the Panchkhal Military Barracks.

May 8, 2007: The Supreme Court ordered that the Nepal Army Headquarters produce the original military file concerning the Court Martial within a week.

June 11, 2007: The army headquarters merely presented a copy of the Court Martial report marking it as "very confidential". No other documents were provided.

September 20, 2007: The Supreme Court issues *mandamus* to the District Police Office and the District Government Attorney to investigate Maina's case within 3 months.

January 31, 2008: The Kavre Public Prosecutor files murder charges before the Kavre District Court against army officers Bobi Khatri, Sunil Prasad Adhikari, Amit Pun, and Nirranjan Basnet. The same day, the Kavre District Court issues arrest warrants against the accused.

September 13, 2009: the District Court of Kavre orders:

- (1) the Nepal Army to suspend the then Captain Nirranjan Basnet (who has now been promoted to the post of Major) in accordance with Section 66 (3) of Army Act 2063.
- (2) the Office of the District Government Attorney to produce the complainant and other people who were consulted during the investigation, so that the evidence can be examined according to law.
- (3) the Nepal Army to produce the statements of the defendants and other Army staff (named in the judgment of the General Military Court).

December 12, 2009: the Army Police takes control of Major Basnet at Tribhuvan International Airport, Kathmandu, after his repatriation from the UN Peacekeeping Mission in Chad.