

Nepal, Torture and Extra-Judicial Killing of a Child in the Context of the Nepalese Conflict

This case deals with the extra-judicial killing of a 15-year-old civilian by Nepalese governmental security forces during the non-international armed conflict in Nepal, which took place between 1996 and 2006. The discussion focuses on examining the applicability and the relevance of IHL to extra-judicial killing during an armed conflict.

Acknowledgements

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

A. TRIAL, UNITED NATIONS RECOGNIZES NEPAL'S RESPONSIBILITY ON THE TORTURE AND EXTRA-JUDICIAL KILLING OF A MINOR IN 2004

[Source: Trial, Press release, United Nations recognizes Nepal's responsibility on the torture and extra-judicial killing of a minor in 2004, of 24 Mai 2022; available at <https://trialinternational.org/latest-post/united-nations-recognizes-nepals-responsibility-on-the-torture-and-extra-judicial-killing-of-a-minor-in-2004/>]

Will the Nepalese government take responsibility for the death of 15-year-old Anil, and implement the UN's decisions? Nothing is less certain.

[1] [...] 18 years after Anil Chaudhary's [A.C.] assassination in 2004, at the age of fifteen, his family can finally begin to heal and look peacefully towards the future. The United Nations Human Rights Committee

(HRC) issued its decision [See Document B] on May 20th, following a complaint submitted by TRIAL International and its Nepali partner the Human Rights and Justice Center, representing the young boy's parents. Nepal has been found responsible for the arbitrary deprivation of liberty, the torture and the extra-judicial execution of Anil, who was targeted for being a member of the Tharu indigenous community. The HRC firmly requested that the Nepalese government effectively investigate the circumstances of Anil's death, identify, try and punish the perpetrators, issue an official apology to Anil's parents and build a memorial in Anil's name, to restore his and his family's dignity and reputation. Nepal should also publicly acknowledge the state's responsibility, amend domestic legislation, especially with regard to the applicable statutes of limitation for torture, offer psychological as well as medical care to the family and finally compensate the damages suffered, the UN body said. [...]

A long road towards justice

[2] Anil Chaudhary, member of the ethnic minority of the Tharus, was only fifteen when he was arbitrarily killed in 2004 by a group of Nepalese security officers, while he was biking with his neighbor, not far from his home in the village of Fattepur. The two young boys were falsely accused of being linked to the Maoists, and were interrogated, beaten and tortured before being coldly executed. [...]

[3] Anil's parents with the help of TRIAL International and the Kathmandu-based Human Rights and Justice Center submitted a complaint to the HRC on 28 March 2018. It was alleged that the boy was the victim of arbitrary arrest, torture and extrajudicial execution committed by Nepalese security officers. These acts were allegedly committed on a discriminatory ground based on his ethnicity and were aggravated by the fact that he was a minor. TRIAL International and its partner have asked the HRC to establish that Nepal had violated Anil's rights and to order it, amongst other things, to investigate his death, to hold the perpetrators accountable [...].

A long-awaited decision allowing international recognition, but with an uncertain impact

[...]

[4] While all the measures indicated by the HRC must be implemented, it is clear that the enforcement of some of them will take time. However, some measures can and should be implemented without delay. [...]

A particular context

[5] For Nepal, the path to justice for the victims of the civil war which ravaged the country between 1996 and 2006 is still long. Around 13'000 died during the conflict, with many more victims and survivors of other crimes such as torture, enforced disappearance, sexual violence, committed both by governmental forces and Maoist insurgents.

[...]

B. UN, VIEWS ADOPTED BY THE HUMAN RIGHTS COMMITTEE

[Source: UN, Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication, CCPR/C/134/D/3199/2018, of 2 June 2022; available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f134%2fD%2f3199%2f2018&Lang=en (footnotes omitted)]

[...]

[1] The authors of the communication are [P.T.] and [N.T.], nationals of Nepal born in 1968 and 1971, respectively. The authors are members of the indigenous Tharu community; they are submitting the communication on their own behalf and on behalf of their son, A.C., born in 1988, deceased at age 15. [...]

Facts as submitted by the authors

[2] The authors note that the facts of the communication must be read in the context of the armed conflict in Nepal (1996–2006), which was characterized by systematic gross human rights violations, including torture, enforced disappearances, extrajudicial killings, arbitrary arrests and sexual violence. During the conflict, members of the Tharu community were routinely targeted by security forces, which associated them with the Communist Party of Nepal (Maoist) guerrillas. On 15 March 2004, the authors' son left the family house in the village of Khuntipur, Bardiya District and cycled towards the village of Fattepur, where he attended school. He was wearing his school uniform and carrying books. On his way, he met another boy and gave him a ride on his bicycle. The two boys were intercepted by a group of approximately 200 security officers, composed of soldiers of the Royal Nepalese Army, the Nepalese police and the Armed Police Force, who were conducting a joint security operation, searching the area for members of the Maoist guerrilla movement. Such joint security operations were routinely conducted in Bardiya District during the conflict.

[3] As witnessed by numerous passers-by, as soon as the two boys were intercepted, security officers tied their hands behind their backs with shoe-laces and questioned them about any potential link with the Maoist guerrillas. Both boys denied any involvement with the guerrillas. Security officers subjected the boys to verbal assaults and physical abuse, including kicks and punches to different parts of their bodies, and beatings using boots and the butts of guns. The authors' son told the security officers where he lived and studied and the names of his parents. The security officers threatened to kill him, and the beatings continued for over half an hour.

[4] The security officers dragged the boys to a nearby canal, where they continued to beat them. Security officers then shot the other boy, killing him. The authors' son witnessed this extrajudicial execution. Subsequently, he was questioned and ill-treated for another half an hour. Eventually, security officers opened

fire on him while he was lying on the ground, shooting him three times in the back of his head, killing him. The security officers gathered some villagers and ordered them to bury the bodies of the two boys, after which the security officers departed. On 16 March 2004, a local radio broadcaster referred to the incident, stating that two Maoists had been killed in the Padmanh village development committee area. The authors heard the broadcast and, being aware of similar incidents and worried about their son, since they had not heard from him since the day before, went to the village where the school was located. Upon arrival, the villagers informed the authors about the killings of the previous day and took them to the spot where the two bodies were buried. Due to the fear of a potential return of the joint security team and the repercussions that could entail, the authors decided not to bring their son's body to the hospital for an autopsy. In addition, the closest hospital was two hours away by row boat or bus, and the likelihood of encountering security officers of the joint security team was high. They brought the body to their village, performed the funeral rituals and buried their son on 17 March 2004. An autopsy was not conducted and the body has not been exhumed for examination. A few days after the killing, security officers of the joint security team went to the authors' home and searched it, without producing any warrant. Similar searches were conducted on five other occasions. The searches were conducted by 40 to 50 soldiers, who surrounded the village and entered each house, often threatening the inhabitants.

[5] The authors note that members of the Tharu indigenous community were especially targeted by security forces in the Bardiya District during the conflict. They refer to a report published by the Office of the United Nations High Commissioner for Human Rights (OHCHR), according to which members of the Tharu indigenous group comprised 52 per cent of the population in Bardiya District during the conflict but accounted for over 85 per cent of persons disappeared by State authorities in cases documented by OHCHR. Additionally, Tharus were regularly told by security personnel that "all Tharus are Maoists", and search operations were commonly focused on Tharu settlements and houses. They further note that, according to the report, Tharus constitute one of several indigenous groups that are historically marginalized and discriminated against in Nepal.

[6] The authors submit that over the past 14 years, they have tried, without success, to obtain redress for the harm suffered and to have those responsible for the crimes identified, prosecuted and sanctioned. [...]. When the conflict ended, the authors considered that the establishment of the ad hoc mechanisms envisaged in the Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal (Maoist) could ensure them access to justice, and they accordingly waited for these mechanisms to be established, knowing that the State party's authorities had been informed in 2004 of the crimes committed against their son and were thus in a position, and under an obligation, to launch an investigation ex officio. After noting several failed attempts to establish transitional justice mechanisms, and seeing that no investigation was being initiated by the authorities, the authors eventually decided to take new initiatives to relaunch the case.

[7] The authors note that they have made repeated attempts to have a first information report registered,

which in Nepal is the mandatory trigger for a criminal investigation to be undertaken, but that their attempts have been systematically frustrated. [...]. The authors claim that the refusal to register first information reports for conflict-related crimes allegedly committed by security forces is a systematic practice in Nepal that persists to this day and renders this remedy ineffective.

[...]

[8] The authors argue that the situation of impunity and lack of adequate redress for victims of gross human rights violations in the State party is facilitated by the flawed legislation on transitional justice and the deficient domestic criminal legal framework concerning gross human rights violations, and especially the failure to criminalize torture. The authors note that section 7 of the children's act of 1992 provides that no child is to be subjected to torture or cruel treatment. [...]

Complaint

[9] The authors claim that their son is a victim of a violation of his rights [...] because of the arbitrary deprivation of liberty and torture he was subjected to, and his subsequent extrajudicial killing, by State party security officers on 15 March 2004. These violations, which perpetrated on discriminatory grounds based on his ethnicity, are aggravated by the fact that when the events took place their son was 15 years old. He was hence entitled to receive special measures of protection owing to his status as a child. The fact that he is a member of the Tharu indigenous community further enhanced his right to special measures of protection. However, the State party authorities failed to adequately protect him and, to the contrary, targeted him, arbitrarily deprived him of his liberty, subjected him to torture and killed him.

[10] [...] [T]he authors specifically note that their son was intercepted by security officers on his way to school. This incident occurred in the context of a systematic practice of arbitrary arrests and in an area where Tharu children were especially targeted in these kinds of operations.

[...]

State party's observations on admissibility and the merits

[...]

[11] The State party claims that on 15 March 2004, the joint security team of Bardiya District was on patrol in the area of the village of Fattepur. The team spotted the alleged victim riding his bicycle, with a "Communist Party of Nepal (Maoist) combatant" also on the bicycle. When the team tried to stop and search the two, the person the alleged victim was giving a ride to took out a grenade. This forced the team to act in self-defence, killing the persons on the bicycle. Since there was no one to claim the bodies, the team buried them nearby after having prepared the incident report. As soon as the team left the scene, Maoist combatants reportedly

arrived and cremated the bodies. The State party argues that the alleged victim was not taken into custody or tortured by security officers, but that he died as a result of the security force on duty acting in self-defence. It submits that his death constituted an “unwanted casualty” and that he was not targeted because of his ethnicity.

Authors' comments on the State party's observations

[12] [...] The authors note that, in their initial complaint to the Committee, they submitted pictures of their son's body, which show that he had marks on his wrists; in addition, shoe-laces were found next to his body, and his clothes were torn and the buttons of his shirt were broken. They argue that the version of events put forward by the State party is incompatible with that evidence. They further note that one of the villagers provided a written statement, in which he stated that he had been forced by the security officers to bury their son's body, contrary to the scenario put forward by the State party. They also argue that the State party has not provided any clarification as to how the security officers involved in the operation could have identified a civilian child dressed in a school uniform as a combatant taking part in hostilities. [...].

[...]

Issues and proceedings before the Committee

[...]

Discussion

I. Classification of the Situation and Applicable Law

1. (*Document A, Paras. [5]-[6]*) How would you classify the situation in Nepal from 1996 to 2006? (Online Casebook, Nepal, Civil War in Nepal) If there was an armed conflict, how would you classify it? What was the applicable law to that situation?

2. Did Additional Protocol II apply to the case at hand? Which IHL provisions can be applied to the case at hand? (GC I-IV, Common Art. 3; P II)

3. (*Document B, Para. [7]*) Was IHL applicable to the facts described in the case? Is every conflict-related crime covered by IHL? Does IHL regulate conduct that has no link to an armed conflict? What are the criteria that determine whether there is a sufficient nexus for an act to fall under the scope of IHL? Does the nexus requirement appear in IHL treaties? (GC I-IV, Common Art. 3)

4. Can IHL be applied if the act at stake is conducted by the government against its own population? Does the fact that the boys were falsely accused of being associated with the Maoists have implications for the

applicability of IHL?

II. IHL and IHRL

5. (*Document A, Paras [1]-[3]; Document B, paras [2]-[5], [9] and [11]*)

1. In a NIAC, are arbitrary deprivation of liberty, torture and extra-judicial killing regulated under IHL? Under IHRL? If both are applicable, how do you determine whether IHL or IHRL should prevail? (GC I-IV, Common Art. 3; P II, Arts 4 and 5; CIHL, Rules 89, 90 and 99; International Covenant on Civil and Political Rights, Arts 6, 7, 9)
2. Under IHL, what obligations does the State party to a NIAC have to protect civilians, including children, from arbitrary deprivation of liberty, torture, and extrajudicial killings committed by security forces during armed conflicts? Under IHRL? (GC I-IV, Common Art. 3; P II, Arts 4, 5 and 13; CIHL, Rules 149 and 150; International Covenant on Civil and Political Rights, Arts 2, 6, 7, 9; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Arts 2, 4; Convention on the Rights of the Child, Arts 6, 19, 37 and 38)

6. (*Document B, para. [11]*) Under IHL, can self-defence be invoked to justify deprivation of liberty, torture or killing someone? Under IHRL?

7. (*Document B, paras [4], [11] and [12]*) How is the treatment of the dead regulated under IHL? Under IHRL? Does the action of security officers, who gathered villagers and ordered them to bury the bodies of two boys before departing, comply with IHL? (GC I-IV, Common Art. 3; GC I, Art. 15(1); GC II, Art. 18(1); GC IV, Art. 16(2); P I, Art. 34(1); P II, Art. 8; CIHL, Rule 113)

III. Criminal Repression

8. (*Document A, paras [1] and [3]; Document B, paras [6] and [7]*) Is there an obligation for States to investigate violations of IHL? (GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; P I, Art. 85; CIHL, Rule 158; ICC Statute, Art. 8)

9. In a NIAC, are deprivation of liberty, torture and extrajudicial killings a war crime? (CIHL, Rule 156; ICC Statute, Art. 8(2)(c) and (e))