



Honourable Prime minister Jhalnath Khanal
Office of Prime Minister
Singhadarbar Kathmandu

Date : 5 July 2011

Views of the Human Rights Committee in the case of Mr Yubraj Giri

As legal counsel for Mr Yubraj Giri, Advocacy Forum Nepal ("Advocacy Forum"), and its partner the Redress Trust ("REDRESS"), write to you concerning the views recently adopted by the United Nations Human Rights Committee (the "Committee") in Mr Giri's case. These Views have significant implications for the Government of Nepal, both in Mr Giri's case, and in relation to the many cases of serious human rights violations that still remain unpunished from the conflict period.

Mr Giri was arbitrarily arrested and detained, held in incommunicado detention in appalling conditions, tortured repeatedly, and subjected to ill-treatment in 2004-2005. Despite bringing this to the attention of the police and court authorities, including by attempting to file a criminal complaint, no investigation has been carried out into his treatment, and no person has been prosecuted.

The Committee unreservedly found Mr Giri and his family to be victims of multiple extremely serious violations of the International Covenant of Civil and Political Rights, and has called on Nepal to fulfil its obligation under the Covenant to provide Mr Giri and his family with an effective remedy.

Specifically, the Committee has stated that Nepal must:

- ensure a thorough and diligent investigation into the torture and ill-treatment suffered by Mr Giri;
- prosecute and punish those responsible;
- provide Mr Giri and his family with adequate compensation for the violations suffered;
- ensure that Mr Giri and his family are protected from acts of reprisals or intimidation; and
- prevent similar violations in the future.

The Investigation

Advocacy Forum and REDRESS stress that the Government of Nepal cannot rely on any future transitional justice mechanisms to implement the Committee's Views (as it has attempted to do in other cases). Not only would waiting for their

establishment amount to further unacceptable delay, as non-judicial mechanisms they are not able to provide an adequate and effective remedy as required by the Covenant.

This was recognised by the Committee in its Views in Mr Giri's case,¹ and is the position supported by the Office of the High Commissioner for Human Rights in Nepal.² The regular judicial system cannot be held in abeyance because a commitment to establish transitional justice mechanisms has been made or even once these mechanisms are actually established and functioning. The transitional justice mechanisms will not have judicial powers, and will not be able to punish perpetrators. The normal criminal justice system is the appropriate mechanisms to investigate and try these crimes, and it is available now.

To enable the required investigation to be completed impartially and diligently, and in accordance with international human rights law, Advocacy Forum Nepal and REDRESS call on the Government of Nepal to:

- form an independent police unit under the command of the highest police authority to carry out the investigation;
- ensure the transparency of the investigation and in particular ensure that Mr Giri and his family be allowed to participate in the investigation and be informed of the progress and result of the investigation;
- ensure that the investigation is carried out without any further delay. The Committee found that a failure to investigate these allegations for four years after they were brought to the attention of the authorities amounted to an "*unreasonably prolonged delay*". It is now almost six years since the police were put on notice of these allegations and any further delay cannot be contemplated;
- ensure that the Nepal Army and retired army personnel, including ex-Army Chief of Staff Rukmangat Katawal, cooperate with the investigation;
- develop suitable plans and safeguards together with Mr Giri and his family and potential witnesses in the investigations to ensure that they are protected from any potential intimidation or reprisals.

Wider implications

These Views again put the international spotlight on Nepal's failure to investigate and punish serious violations of international human rights law from the conflict period. The rights concerned in this case – freedom from torture, arbitrary arrest and detention, and inhumane conditions of detention – are non-derogable rights, and victims of such violations have an equally non-derogable right under the Covenant to a prompt and effective remedy. The Government is well aware of the

¹ See paragraph 6.3, in relation to the National Human Rights Commission, where the Committee made the point that the appropriate remedy in such a case is a judicial remedy.

² OHCHR-Nepal, "The Relationship between Transitional Justice Mechanisms and the Criminal Justice System", 30 March 2011, available at <http://www.un.org.np/report/relationship-between-transitional-justice-mechanisms-and-criminal-justice-system>.

many thousands of other cases from the conflict period involving violations of these and other non-derogable rights, including the right to life, which have not been investigated or punished.

Where allegations of human rights violations are made, States have a clear obligation under the Covenant to undertake a prompt, thorough and impartial investigation, and where the violations are proved, to prosecute and punish those responsible. The Committee's Views make it absolutely clear that the State cannot absolve itself of this responsibility because the crimes took place during a period of conflict. There is no room for the Government to say – as has very worryingly been said by some Government Ministers in the past month – that such crimes should go unpunished.

The Committee found in Mr Giri's case that a failure to investigate four years after the violations were brought to the attention of the authorities was an "*unreasonably prolonged delay*", and in and of itself amounted to a violation of the Covenant. A much longer delay has now been suffered by the many victims of conflict-era violations, which again amounts to separate violations of the Covenant in their cases. The Government must redouble its efforts to immediately ensure them access to justice and remedy. This must include:

- strongly condemning calls for amnesties for conflict-era crimes amounting to serious human rights violations;
- halting political interference in the investigation and prosecution of such crimes;
- immediately implementing the views of the Committee in other cases where violations have been found, including the case relating to the disappearance of Mr Surya Prasad Sharma;
- ensuring support for judicial organs in relation to these cases, for example by ensuring that where arrest warrants have been issued, they are executed, and that when orders of mandamus are made in relation to particular cases, that they are followed;
- putting in place measures to ensure that police accept the filing of First Information Reports for conflict-era crimes;
- supporting police to investigate conflict-era crimes, and ensuring the cooperation of the Nepal Army and retired army personnel in such investigations; and
- expeditiously passing the bills on the transitional justice mechanisms, while recognising that they are to complement, not to replace, the normal criminal justice system in relation to the investigation of these violations.

Preventing similar violations in the future

Serious violations of the Covenant have been proved in Mr Giri's case. As recognised in and required by the Committee's Views, Nepal is under a positive obligation to prevent similar violations in the future.

Even ahead of ensuring the proper functioning of the police and judicial system in relation to such violations (which is vital), it is crucial to ensure that the violations suffered by Mr Giri are specifically recognised as crimes under Nepalese law and are subject to appropriate punishments. In particular, the crimes of torture and enforced disappearance must be specifically criminalised without further delay.

Nepal should also ratify the UN Convention for the Protection of All Persons from Enforced or Involuntary Disappearances and the Optional Protocol to the Convention Against Torture, as recommended by the UN Universal Periodic Review. The Government's stated concern to further develop national capacity before acceding to these treaties does not stand up against the pressing need to ensure that Nepal takes all possible measures to prevent torture and enforced disappearance. Recognising commitments within the structure of these international treaties will help Nepal to develop the capacity to do so.

Equally, to ensure the non-repetition of such violations the Government must address the practical issues that allow them to continue with impunity. For example, in many instances, the state authorities intimidate victims or their legal counsel to withdraw their cases: suitable protection must be available to complainants and their families, and heavy punishment imposed on individual officials who are proved to have threatened victims or witnesses. In addition, significant training and support must be given to the medical profession to ensure that medical examinations identify cases of torture and medical reports accurately reflect the evidence of such violations.

Conclusion

Advocacy Forum Nepal and REDRESS urge the Government of Nepal to show its good faith commitment to its international obligations and the rule of law by:

- publicly announcing the concrete steps it will take to promptly implement the Views of the Committee in Mr Giri's case, in particular by launching an impartial and independent investigation as outlined above;
- strongly condemning statements calling for amnesties for conflict-era crimes amounting to serious human rights violations, halting political interference in such cases, and taking positive steps to support the criminal justice process and to ensure access to justice for victims of all human rights violations. In this, implementing the Views of the Committee and orders of the Nepali courts is vitally important to show that Nepal is committed to the rule of law, human rights and combating impunity;
- ensuring the non-repetition of such violations, including by criminalising torture and enforced disappearance without further delay and by addressing the practical issues which allow such violations to continue with impunity.

Last month the Government of Nepal affirmed before the United Nations Human Rights Council that it is committed to “*building an inclusive nation based on a culture of human rights that is in compliance with its international commitments and the fundamental rights in the interim Constitution*”, and asked for the international community’s continued goodwill, support and cooperation.

By taking concrete steps in good faith to implement the Views of the Committee in Mr Giri’s case, and by seriously taking those Views into account in its approach to other cases, Nepal can prove to the international community that the Government’s stated commitment to human rights and upholding its international commitments is a reality.

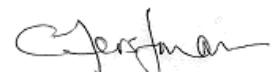
For Reference

1. Mr. Principal Secretary, Office of the Prime Minister of Nepal and Council of Ministers, Singha Durbar, Kathmandu, Nepal.
2. Mr. Secretary, the Ministry of Home Affairs, Singha Durbar, Kathmandu, Nepal

Yours sincerely



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