

Questions and Answers - Colonel Kumar Lama Case

1. Who is Colonel Kumar Lama and what are the charges against him?

Kumar Lama is a Colonel in the Nepalese Army. Colonel Lama was arrested on the morning of Thursday, 3 January 2013 in St Leonards-on-Sea, East Sussex, United Kingdom.

Colonel Lama has been charged with two counts under Section 134(1) of the *Criminal Justice Act 1988* in the United Kingdom.

The charges are based on allegations that in 2005, during Nepal's decade-long internal armed conflict between the government and Maoist forces, Colonel Lama participated in the torture of two detainees at an army barracks under his command.

More specifically, the two counts are:

- Between 15 April 2005 and 1 May 2005, Colonel Kumar Lama, as a public official or person acting in an official capacity at the Gorunsinghe Army Barracks, Kapilvastu Nepal intentionally inflicted severe pain or suffering on Janak Bahadur Raut in the performance or purported performance of his official duties; and
- Between 15 April 2005 and 31 October 2005, Colonel Kumar Lama, acting as a public official or person acting in an official capacity at the Gorusinghe Army Barracks, Kapilvastu Nepal intentionally inflicted severe pain or suffering on Karam Hussain in the performance or purported performance of official duties.

2. What authority does the United Kingdom have to arrest Colonel Lama for alleged acts committed in Nepal?

The United Kingdom is exercising its authority pursuant to the legal principle of 'universal jurisdiction', which allows, and in some cases requires, States to investigate and prosecute, or extradite for

prosecution, any person suspected of committing certain acts criminalized under international law—including torture.

The United Kingdom's obligations under international law to take such action arise principally as a consequence of being a State Party to the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Convention against Torture)*. The United Kingdom became a party to this treaty on 8 December 1988. Nepal is also a State party, acceding to the Convention on the 14 May 1991.

Article 4 of the UN Convention against Torture expressly requires each State Party to ensure that all acts of torture (at a minimum as defined by the Convention), complicity or participation in torture and the attempt to commit torture are criminalized under its domestic law and are punishable by appropriate penalties that take into account the grave nature of these offences.

Article 7 of the UN Convention against Torture requires State Parties to prosecute or extradite for prosecution any person within their jurisdiction who is suspected of committing torture. This requirement applies even if the act of torture was committed in a third country, and regardless of the nationality of the victim or the nationality of the suspected perpetrator.

The United Kingdom enacted the *Criminal Justice Act 1988* on 29 July 1988 in advance of its ratification of and with a view to fulfilling its obligations under the UN Convention against Torture.

Section 134(1) of the *Criminal Justice Act 1988*, for which Colonel Kumar Lama has been charged, reads:

*134 (1) A public official or person in an official capacity, **whatever his nationality**, commits the offence of torture if in the United Kingdom **or elsewhere** he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties. (emphasis added)*

3. What was the political context in Nepal at the time of the alleged torture?

In 2005, when the allegations of torture at issue in this case arose, Nepal was nine years into a decade-long internal armed conflict between the Government and Communist Party of Nepal (Maoist)

insurgents seeking to overthrow the monarchy and install the 'People's Republic of Nepal.' The armed conflict ended in November 2006 with the signing of the Comprehensive Peace Agreement after a widespread "People's Movement" demanded an end to the fighting and the establishment of a more representative Government.

One of the main demands of the People's Movement was for accountability for the serious abuses and violations of human rights and international humanitarian law that occurred over the course of the 10-year conflict.

Government and paramilitary forces were responsible for unlawful killings, enforced disappearance, torture and other ill-treatment and widespread arbitrary detention. Maoist forces were responsible for numerous unlawful killings outside of combat operations as well as acts of torture and mutilation, abduction and forced recruitment of civilians, including children under 18 years of age. It is estimated that during the conflict approximately 13,000 people were killed, over 1,300 people were subjected to enforced disappearance and that some 150,000 people were displaced.

The Government put into place several anti-terrorism laws and security measures during the conflict, conferring wide-ranging immunity on armed forces, police forces and paramilitary forces in their conduct against the Maoist insurgents. In 2001 and again in 2005, a state of emergency was imposed suspending most of the rights enshrined in the constitution and removing checks and balances on the power of the Army.

These factors facilitated the commission of widespread human rights violations by government security forces with relative impunity. The ICJ conducted a fact-finding mission in late 2004 and released a report in 2005, *Nepal: Rule of Law Abandoned*,¹ documenting the deterioration of rule of law and the growing impunity for gross human rights. The ICJ urged the Government to repeal security laws, revoke the state of emergency and take steps to investigate and bring to justice those persons suspected of committing gross human rights violations.

4. Has Nepal taken actions to investigate or prosecute individuals suspected of committing gross human rights abuses since the end of the conflict?

¹ International Commission of Jurists, 'Nepal: Rule of Law Abandoned.' 17 March 2005, accessed at: <http://www.icj.org/royal-coup-plunges-nepal-deeper-into-human-rights-crisis-icj-urges-united-response-at-united-nations-commission-on-human-rights-2/>

Almost 10 years after the People's Movement and the Peace Accord, Nepal has failed to investigate and bring to justice a single person for gross human rights abuses or international humanitarian law violations committed during the conflict. Security laws are still in place, conferring wide immunities to the Army and police forces for conduct, including for human rights violations, taken in the course of their duties.

Parliament was dissolved in late May 2012 without having agreed on a law – on which it held much debate and consultation – to establish a proper, effective and credible transitional justice mechanism.

An ordinance for the establishment of a Truth and Reconciliation Commission, drafted by the Council of Ministers, was promulgated by the President in March 2013, with no consultation with victims of the conflict or civil society. The Ordinance, among other serious flaws, allows the possibility of amnesties for serious human rights abuses committed during the civil war.

Of further concern, there is currently no specific crime for the act of torture under Nepali law despite the Government of Nepal's obligation to criminalize the offence of torture under Article 4 of the UN Convention against Torture.

The ICJ has publicly criticized the [Ordinance](#)² and has repeatedly called on the Government of Nepal to enact a specific crime of torture and take steps to end impunity. It has also raised concerns regarding the recent 9-point deal between Nepal's leading political parties. Provision 7 of this deal directs the authorities to withdraw all wartime cases before the courts and to provide amnesty to alleged perpetrators.³ The newly proposed "Amnesty Bill" also contains similarly problematic provisions.

5. Can Colonel Kumar be immune from prosecution on the basis of statutory provisions under Nepal law?

No. The prohibition of torture under general international law and treaty law,⁴ applies to all people at all times. The prohibition against torture is unquestionably a peremptory norm of international law,

² "Nepal: Truth & Reconciliation Law Betrays Victims", 22 March 2013, accessed at: <https://www.hrw.org/news/2013/03/22/nepal-truth-reconciliation-law-betrays-victims>

³ "Nepal: 9-point deal undermines transitional justice" 13 May 2016, accessed at: <http://www.icj.org/nepal-9-point-deal-undermines-transitional-justice/>

⁴ Committee against Torture, General Comment 2, UN Doc. CAT/C/GC/2(2008) para 1; *Prosecutor v Furundzija*, Case No. 17-95-17/1-T, Judgment, International Tribunal for the Former Yugoslavia, 10 December 1998, at para 153-157; Article 2, UN Convention against Torture.

as affirmed in consensus resolutions of the UN General Assembly and international judicial rulings, meaning that no other international or national law can override this norm. The prohibition may not be subjected to any derogation or limitation, under both the [UN Convention against Torture](#)⁵ and the [International Covenant on Civil and Political Rights](#).⁶ Under international standards, there can be no prescription or statute of limitations for torture.⁷

Article 7 of the UN Convention against Torture requires all States parties to pursue criminal prosecution of persons suspected of torture under their jurisdiction, irrespective of whether the alleged act of torture was committed in another country, unless it extradites them to another state. The International Court of Justice has affirmed that this duty of the State in which a suspect is found a to investigate and, if sufficient admissible evidence exists, prosecute acts of torture. (The state may also, where appropriate, extradite the person to another State for prosecution). The Committee against Torture, the expert body mandated to monitor the implementation of the treaty by State Parties and to interpret its provisions came to a similar conclusion.⁸

The United Nations General Assembly in its most recent unanimous [resolution](#), and in previous resolutions on the prohibition against torture, has called on all States to fully implement the absolute and non-derogable prohibition of torture, and to ensure accountability for all such acts. It has further called on States Parties to the Convention against Torture to fulfill their obligation to submit for prosecution or extradite those alleged to have committed acts of torture.

Under international law, the grant of immunity or other measures such as amnesties or pardons, which would prevent prosecution or punishment of an individual for a crime under international law, including torture, are prohibited.⁹

⁵ Article 2, Convention against Torture and other cruel, inhuman or degrading treatment or punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with article 27(1)

⁶ Article 4, Article 7, *International Covenant on Civil and Political Rights*

⁷ Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, "Updated Set of principles for the protection and promotion of human rights through action to combat impunity", E/CN.4/2005/102/Add.1, 8 February 2005.

⁸ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment, International Court of Justice, 20 July 2012, para 95; see also Communication no. 181/2001, *Suleymane Guengueng et al v Senegal*, Decision of 19 May 2006, UN Doc. CAT/C/36/D/181/2001, para 9.7.

⁹ [Committee against Torture General Comment 3](#), UN Doc. CAT/C/GC/3, paras 41-42; [Committee against Torture General Comment 2](#), UN Doc. CAT/C/GC/2, para 5; Human Rights Committee General Comment [20](#), para. 15.

The Nepali Supreme Court has affirmed these principles in its judgments, including in its February 2015 judgment, when it struck down the amnesty provision of the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act 2014.¹⁰

Provisions under the laws of Nepal that would afford Colonel Lama immunity from prosecution for torture at any time would, if applied, violate international law. Any such provision in the law of Nepal would not serve as bar for his prosecution in the United Kingdom or any other national jurisdiction. And any immunity he would benefit from in Nepal would indeed provide a stronger imperative for the United Kingdom to exercise jurisdiction over him for the crime of torture rather than send him back to Nepal with its prevalent climate of impunity.¹¹

6. What is the prohibition of double jeopardy?

In the past, the government of Nepal has argued that this trial violates the prohibition of double jeopardy because Colonel Lama had been subject to disciplinary proceedings with respect to the allegations in question in Nepal, as a result of which his promotion was delayed.

The prohibition of 'double jeopardy,' means a person cannot be tried or punished more than once for the same offence in the same jurisdiction. The prohibition is a key component of the notion of due process of law and is set out in [Article 14\(7\)](#) of the International Covenant of Civil and Political Rights (ICCPR). Nepal and the United Kingdom are State Parties to this treaty.

The United Nations Human Rights Committee, the body of experts tasked with monitoring the implementation of the ICCPR by State Parties and interpreting its provisions, has clarified that a trial of an individual for the same incident **in a different jurisdiction** does not violate the prohibition against double jeopardy.¹²

The UN Human Rights Committee has further clarified that the principle of double jeopardy **only applies to criminal offences** or

¹⁰ "Nepal: Government must implement landmark Supreme Court decision against impunity" 27 February 2015, <http://www.icj.org/nepal-government-must-implement-landmark-supreme-court-decision-against-impunity/>

¹¹ See *Prosecutor v Furundzija*, Case No. 17-95-17/1-T, Judgment, the International Tribunal for the Former Yugoslavia, 10 December 1998, at para 155-156.

¹² Communication No. 204/1986, *A.P. v Italy*, 2 November 1987, para 7.3, 2 Sel. Dec. 67 at 68; Communication No. 692/1996, *A.R.I. v Australia*, 28 July 1997, UN Doc. CCPR/C/60/D/692/1996, para 6.4; see also Amnesty International, *Fair Trials Manual*, December 1998, pp 112-113, accessed at: <http://www.amnesty.org/en/library/asset/%20POL30/002/1998/en/81bf7626-d9b1-11dd-af2b-b1f6023af0c5/pol300021998en.pdf>

punishments of a criminal nature. A hearing resulting in a disciplinary measure does not shield the accused from a subsequent criminal trial on the same incident.¹³

7. What is the Jury System and how are jurors selected?

As with other similar cases in the United Kingdom, Colonel Lama's trial will involve a jury. The function of the jury is to assess the evidence and decide the facts of the case. The judge gives the direction to the jury on the relevant law, which the jury has to apply to the facts of the case in order to reach a verdict. In criminal cases, if the jury gives a verdict that the defendant is guilty, the judge then decides on an appropriate sentence.

For each case, 12 jurors are selected at random by a computer from names on the electoral register. Residents aged between 18 and 70 and registered on parliamentary or local government electoral roll may be called for jury service.

Once the list of the potential jurors is drawn, both the prosecution and defense teams of the case have the right to see the list. In some cases, the prosecution or defense may decide to vet the jury. Vetting a jury checks the suitability of the jurors, which may include background checks and political affiliations.

8. How long does it typically take for a trial to conclude in England and Wales? Can verdicts of the trial court be appealed?

The length of the trial depends on the complexity of the case and the number of witnesses who need to be called to give evidence. In England and Wales, a criminal trial takes on average seven months from the first hearing to the outcome.¹⁴ However, there is no real way to accurately predict the length of this case.

Both parties to the case can appeal against the verdict of a trial court before the Court of Appeal. Grounds for appeal are limited to: (1) procedural irregularities during the trial; or (2) new evidence has become available that was not considered during trial.

The Criminal Appeal Office makes the decision on whether or not to allow the appeal. If the appeal is against a guilty verdict, an

¹³ United Nations Human Rights Committee, General Comment 32, para 57; see also Communication No. 1001/2001, *Gerardus Strik v. The Netherlands*, 1 November 2002, UN Doc.CCPR/C/76/D/1001/2001, para 7.3

¹⁴ Government of the United Kingdom, Open Justice, accessed at : <http://open.justice.gov.uk/courts/criminal-cases/>

application must be made to the Criminal Appeal Office within 28 days of the date of conviction. If the appeal is against the sentence only, the 28-day period starts from the date of the sentence.

9. What is the current status of the trial, and why did it re-start this year?

Colonel Lama's trial began in February 2015, at the Central Criminal Court of England and Wales [the Old Bailey]. Some witnesses appeared before the court and made their statements. After a few weeks, however, the trial was adjourned because of the quality of the interpretation in court.

Colonel Lama's trial began afresh in June 2016 with witnesses recording their statements.

10. Can Colonel Lama be sent back to Nepal?

The United Kingdom and Nepal have not signed an extradition treaty. Furthermore, while the Constitution of Nepal contains some prohibitions against torture, they are not consistent with international law. While there is a Bill pending before Nepal's legislative assembly to this effect, Nepal has not yet criminalized torture. These facts, combined with the prevailing climate of impunity in Nepal,¹⁵ including that enjoyed by Colonel Lama himself while he was in Nepal, make it highly unlikely that Colonel Lama will be sent back to Nepal to face trial for these offences.

Colonel Lama is currently out on bail. According to his bail order, he cannot leave the UK until the trial is over.

Following the trial and any possible appeals, if Colonel Lama is not found guilty, he can return to Nepal. If he is found guilty, he will have to serve out his sentence in a prison in the United Kingdom.

¹⁵ See for example: "Nepal: 9-point deal undermines transitional justice" 13 May 2016, <http://www.icj.org/nepal-9-point-deal-undermines-transitional-justice/>; "Nepal: end intimidation of Human Rights Commission" 15 April 2016, <http://www.icj.org/nepal-end-intimidation-of-human-rights-commission/>; "Nepal: Government must implement landmark Supreme Court decision against impunity" 27 February 2015, <http://www.icj.org/nepal-government-must-implement-landmark-supreme-court-decision-against-impunity/>; "Nepal: Adhikari death highlights injustice" 26 September 2014, <http://www.icj.org/nepal-adhikari-death-highlights-injustice/>; "Nepal: end impunity for enforced disappearances" 29 August 2014, <http://www.icj.org/nepal-end-impunity-for-enforced-disappearances/>; "Nepal: new transitional law fosters impunity" 28 May 2014, <http://www.icj.org/nepal-new-transitional-law-fosters-impunity/>; "Authority without Accountability: The struggle for justice in Nepal" 29 October 2013, <http://www.icj.org/uk-court-decision-a-victory-in-the-struggle-for-justice-in-nepal/>.