



International
Commission
of Jurists

Asia Pacific Regional Office
10/1 Soi Aree 2
Phahonyothin Rd.
Samsennai, Phayathai
Bangkok 10400
Thailand
t +662 619 8477/8478
www.icj.org

Nepal: the Case of Colonel Kumar Lama

The Application of Universal Jurisdiction

Questions and Answers



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® Nepal: the Case of Colonel Kumar Lama - The Application of Universal Jurisdiction
Questions and Answers

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International Commission of Jurists
P.O. Box 91
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International Commission of Jurists
Asia Pacific Regional office
10/1 Soi Aree 2, Phahonyothin Rd.
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The Application of Universal Jurisdiction - Questions & Answers

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:

1. Between 15 April 2005 and 1 May 2005, Colonel Kumar Lama, 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 Janak Bahadur Raut in the performance or purported performance of his official duties; and
2. 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.

Nepal: the Case of Colonel Kumar Lama

The Application of Universal Jurisdiction - Questions & Answers

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 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, among other reasons, 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)

Nepal: the Case of Colonel Kumar Lama

The Application of Universal Jurisdiction - Questions & Answers

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

In 2005, when the allegation of torture at issue in this case arose, Nepal was nine years into a decade-long internal armed conflict between the Government and 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.

Maoists 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

Nepal: the Case of Colonel Kumar Lama

The Application of Universal Jurisdiction - Questions & Answers

Law Abandoned¹, 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.

¹ <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/>

Nepal: the Case of Colonel Kumar Lama

The Application of Universal Jurisdiction - Questions & Answers

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

Almost seven 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 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 Ordinance² and repeatedly called on the Government of Nepal to enact a specific crime of torture and take steps to end impunity.

² <http://www.hrw.org/node/114432>

Nepal: the Case of Colonel Kumar Lama: The Application of Universal Jurisdiction - Questions & Answers

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 law³, applies to all people at all times. The prohibition against torture is unquestionably a peremptory norm of international law, 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 Torture⁴ and the International Covenant on Civil and Political Rights⁵.

Article 7 of the UN Convention against Torture requires all member States to exercise jurisdiction over persons suspected of torture in their jurisdiction, irrespective of whether the alleged act of torture was committed in another country, unless it extradites them to another state. As the International Court of Justice has clarified, the duty of a State in which a suspect is found to investigate and, if sufficient admissible evidence exists, prosecute is an obligation under the Convention against Torture, while extradition of the individual to another State is an option. 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 conclusion⁶.

³ 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.

⁴ 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), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

⁵ Article 4, Article 7, International Covenant on Civil and Political Rights, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

⁶ 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.

Nepal: the Case of Colonel Kumar Lama

The Application of Universal Jurisdiction - Questions & Answers

The United Nations General Assembly in its most recent unanimous resolution⁷, and in previous resolutions on the prohibition against torture have 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 prohibited⁸.

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 impunity⁹.

⁷ http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/67/161

⁸ http://www.un.org/ga/search/view_doc.asp?symbol=CAT/C/GC/2 : 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; <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain?docid=453883fb0> : Human Rights Committee General Comment 20, para. 15.

⁹ 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.

Nepal: the Case of Colonel Kumar Lama

The Application of Universal Jurisdiction - Questions & Answers

6. What is the prohibition of double jeopardy?

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)¹⁰ 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 jeopardy¹¹.

The UN Human Rights Committee has further clarified that the principle of double jeopardy only applies to criminal offences or 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 incident¹².

¹⁰ <http://www1.umn.edu/humanrts/instreet/b3ccpr.htm>

¹¹ 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>

¹² 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

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