

INFORMAL

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A pair of brass scales of justice is shown against a teal background. The scales are unbalanced, with the left pan hanging lower than the right pan. In the background, a faint, light blue map of the African continent is visible. The scales have a curved metal beam and three chains supporting each pan.

**Crippled
with Impunity !**

INSEC's Quarterly Publication on Human Rights & Social Justice



INFORMAL

South Asian Human Rights Solidarity

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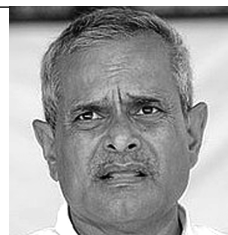
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Formal–Informal

‘The peace process can't be taken to a logical conclusion if a national consensus is not forged in the days ahead.’

Dr. Ram Baran Yadav
President
Talking to journalists in Jaleswor



‘Nepal is fully committed to protect and promote the human rights of its people under all circumstances with constitutional and legal guarantees and implementation of the international human rights instruments to which Nepal is a party. The government is committed to end the environment of impunity.’

Pushpa Kamal Dahal
Prime Minister
Addressing the general debate of 63rd session of UN General Assembly



‘Nepali Congress will play the role of a responsible opposition, we will oppose the government's move which is directed against democracy, independence of judiciary, politicization of security forces, bureaucracy and free press.’

Girija Prasad Koirala
Former Prime Minister and President of Nepali Congress
In an interview with Spotlight Weekly



‘Peace is not just the absence of war, It is the assurance to all citizens that they can carry on with their lives and livelihood in conditions of security, in a state which protects their human rights through impartial enforcement of law, order and justice.’

Ian Martin
Special Representative of the UN Secretary-General in Nepal
Speaking at a programme held to mark International Peace Day



‘By just providing a compensation of Rs 1, 00,000, the victim should not be denied justice.’

Devi Sunuwar
Mother of Maina Sunuwar, who was murdered after torture by the then RNA
Speaking at an interaction entitled 'Culture of Impunity and Role of CA'



End Impunity for democracy

Nepal saw dramatic political transformation following the success of the April movement of 2006. The April movement not only ousted the 239 year-old Shah dynasty but also established federal democratic republic in the country. The recent political changes resolved the decade long Maoist insurgency, but foundations for sustainable peace are yet to be built by providing Justice to conflict victims.

Ending impunity is a must for restoration of sustainable peace in the country, but the government is yet to start any measures in this regard. People involved in grave human rights violations in the past are yet to be brought to justice and conflict victims are yet to get relief. The major political parties seemed reluctant to end the trend of impunity. All the governments, in the past, formed commission to probe human rights abuses and atrocities committed to suppress the political movements but the recommendations of such commissions were not implemented. The government formed 'Mallik Commission' to probe atrocities committed to suppress popular movement of 1990 but the recommendations of the commission were not implemented. The 'Rayamajhi Commission' formed to probe the atrocities committed to suppress April movement of 2006 also met same tragic end.

Rather than implementing the recommendations of the commission, the government did not even make the report public. Governments in the past never showed strong will power to end impunity and maintain law and order situation. Previous government of seven political parties and the CPN-M had agreed to form a number of mechanisms to combat impunity in various agreements reached after the success of April movement, but none of the mechanisms are in place, so far. The then House of Representatives on 25 July 2006, endorsed a unanimous directive proposal to ratify the Rome Statute of the International Criminal Court (ICC) but the government failed to abide by the directive. Reluctance at the part of political parties to abide by their commitments has been promoting impunity. The time is now for the political parties to translate their commitments into reality. Political parties have to show enough courage to bring perpetrators of human rights violations to justice regardless of their affiliation and should also ensure victim's rights to justice and redress.

Impunity, is not only the failure of the state to arrest and put trial those perpetrators of human rights violations, but is also the inability of the state to undertake a range of measures to combat impunity. So, failure at the part of the government to address impunity also hints the failure of the state, so, the government of republic Nepal must take strict measures to end prevailing trend of impunity. For doing so, the government should effectively enforce law and order situation and bring the perpetrators involved into violations of human rights into justice.

It a challenge for the new government to translate its commitment expressed in the Policies and Programmes passed by the legislature parliament on 14 September that the government's first responsibility is to guide the socio-economic transformation process towards a progressive direction by taking the peace process to a logical end and also establishment of rule of law by ending existing situation of impunity. Doing so will only fulfill people's aspiration of New Nepal and restoration of sustainable peace in the country.

Letter to Editor

Dear Editor,

I am really delighted to go through your magazine 'INFORMAL' and feel happy to share my feelings about the paper. All articles in this magazine are very strong and outstanding as these articles give in-depth knowledge about the issue. The article "In Search of an Identity: Terai or Madesh?" written by Bhuwan Adhikari has drawn my attention as this is the most talked issue these days. The fight for identity has been concentrated in the contest for geography not for the rights. The remnants of war and warrior psyche not only prevail in the country rather it is more widespread, but the political parties are only concentrating in power game.

I am in confusion whether this is the face of 'New Nepal'. Unity in diversity is slowly vanishing. Before it will vanish forever, we general people should understand that we are being used every time. For the permanent peace in the country, we should recognize unity is strength.

Salina Khadgi
National Integrated
College-Dillibazar

Dear Editor,

'INFORMAL' has stood as a great endeavour of making people aware about different human rights related issues. Its credibility is really appreciable. Nepal currently stands at the challenging phase of making new constitution for political stability, pluralism and sustainable peace. In this context, instead of cooperating with government Madheshi community is demanding for 'One Madhesh One Province'. Everyone puzzled from their demand as not only Madheshis, Tharus, Maithali and other indigenous people are also the inhabitants of same Terai. It is true that Madheshi people were neglected



and suppressed by the government in the past and they should be given equal rights and opportunities in New Nepal rather than fulfilling their demand for national unity. 'Unity in diversity' is the identity of Nepal, so, it may create another conflict, chaos and war among people of different ethnicities if the country goes for 'One Madhesh One Province' as demanded.

Mina Lama

Dear Editor,

I had an opportunity to go through joint issue (January-June 2008) of your quarterly publication 'INFORMAL'. As, I am interested about the human rights situation of the country, the magazine became a good source of knowledge for me. However, I am trying to shed light in some issues that needs to be addressed in the coming issues to make the magazine more popular among its readers. First the issue was combined issue and it also seemed outdated as the country was moving towards drafting a new constitution at a time when you published the magazine but the magazine was concentrated on the issue of ensuring free and fair elections. Secondly, you have presented some representative incidents of human rights violations but what I suggest is that rather than presenting some representative incidents, you need to show the trend of human rights violations during the period and you can do so by presenting the statistics into graph. It would be better to make the magazine more interactive and concentrate in one issue.

Raju Thapa
Bishalnagar, Kathmandu

Dear readers,

we are planning to make some changes in INFORMAL from next edition. Therefore, we would like to know what type of content do you prefer to read and what changes should be made in INFORMAL? Please send your valuable suggestions/comments to us at informal@insec.org.np. Your valuable suggestions will be our best guidelines.

Denied By Delaying Clash of Commitment and Response to Impunity in Nepal



»Bidhya Chapagain«

1. Background

The Comprehensive Peace Accord (CPA) signed by the Government of Nepal and the CPN-Maoist on 21 November 2006 ended the decade long armed conflict in the country paving the way for 'New Nepal' and promised a set of transitional mechanisms to address the political, social and economic challenges facing the people. The accord further offered an opportunity for the government to renew its commitment for justice, security, social, cultural, and economic equality and inclusion. But, the commitments of the government are yet to materialize.

The Constituent Assembly (CA) formed through the historic election to the Constituent Assembly of April this year brought a number of historic changes in Nepali politics like declaring the country a Federal Democratic Republic after putting an end to the 239-year-long Shah Dynasty, and election of the first President and Vice-President. People gave verdict for a consensus-led politics amongst major political parties through the CA poll. However, extended and deepened haggling politics suggests that the consensus-based approach to constitution making and furthering socio-economic transformation of the country remains a distant

dream of Nepali people. Underlying causes of the armed conflict and a number of deep-rooted consequences of the conflict are seeking proper response. Practice of the rule of law is yet to enter into the political arena.

One of the most daunting challenges is the deepened culture of impunity, which is pervasive and prevalent in the country. In most situations, bringing perpetrators of human rights violations to justice is a severely hurdled task. A pervasive and prevalent culture of impunity means a complete collapse of respect for human rights in the society. Where there is impunity, a phenomenon of lawlessness, paranoia, graft and corruption, and distrust amongst the people roots the society. The state, which cultivates culture of impunity, sends a message to the people that it is possible to commit crimes and violate human rights without being subjected to any sort of punishment. Impunity makes protection and promotion of human rights in a country hazardous and often fatal pursuit. Even two years after the signing of CPA, the government is reluctant to establish any form of mechanism to investigate the whereabouts of hundreds of allegedly disappeared persons during the decade-long conflict. It has not initiated the process of forming

high-level commissions as promised in the CPA, Interim Constitution (IC) 2007, and subsequent political agreements.

2. Defining Impunity

Generally, impunity is taken as lack of punishment to the perpetrators, lack of investigation on violations, and lack of justice. A culture of impunity, in this sense, refers to

The state, which cultivates culture of impunity, sends a message to the people that it is possible to commit crimes and violate human rights without being subjected to any sort of punishment.

the culture of implicit approval of the morality of human rights violations and abuses. Many scholars suggest that the opposite of impunity is accountability,¹ adopting a conventionally narrow view of impunity as occurring when the perpetrator is not punished. However, there are broader concepts that pro-

1. For example, see, Mary Margaret Penrose, 'Impunity – Inertia, Inaction, and Invalidity: A Literature Review' (1999) in *BU International Law Journal* and M. Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) in *Law and Contemporary Problems*. Cited in Katherine Hooper, *The ending of impunity and the fight for justice for victims of human rights violations: a chasm too great to be crossed?*, Flinders University, South Australia.

vide a range of interrelated aspects of impunity. Impunity is in itself an act of violence.² Impunity encourages human rights violations.³ It is the primary barrier to the equal enjoyment of human rights by all people.⁴

There is no consensus in favour of a broad and victim-focused notion of impunity. Joyner, by contrast, places the victim within his wider definition, stating '[i]mpunity ... means exemption or freedom from punishment and connotes the lack of effective remedies

Impunity, therefore, is not only the failure of the state to arrest and put the perpetrators of human rights violations to trial, but is also the inability of the state to undertake a range of measures to combat impunity.

for victims'.⁵ Arguably, 'effective remedies' for the victim require reparations not immediately flowing from a criminal trial. However, Joyner's definition maintains the understanding of impunity as non-punishment. The lack of remedy for the victim is viewed as a consequence of impunity rather than an aspect of impunity itself.

In 1991, the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the Commission on

Human Rights decided to undertake a study on the impunity to perpetrators of human rights violation. The Sub-Commission also decided that this study should cover violations of civil and political rights as well as violations of economic, social and cultural rights. Pursuant to these decisions, Louis Joinet, the Special Rapporteur, on the question of impunity to perpetrators of human rights (civil and political) violation, submitted to the Sub-Commission a Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity. In 2004, the UN Secretary-General appointed Diane Orentlicher as an independent expert tasked to update said principles in light of developments in international law and practice.

Under the Set of Principles, Louis Joinet defined impunity as the "impossibility, de jure or de facto, of bringing perpetrators of human rights violations to account—whether in criminal, civil, administrative or disciplinary proceedings—since they are not subjected to any inquiry that might lead them to being accused, arrested, tried and if found guilty, convicted."⁶ Diane Orentlicher retained this definition in her update and further clarified that the state's obligation to combat impunity does not stop at instituting proceedings against individuals responsible for serious crimes under international law. Combating impunity also includes abiding by other obligations, such as the fulfillment of the rights of victims to reparations, to know the truth, and to ensure the non-recurrence of the violations.⁷

Impunity, therefore, is not only the failure of the state to arrest and put the perpetrators of human rights violations to trial, but is also the inability of the state to undertake a range of measures to combat impunity. Definition in the Set of Principles implies the existence of criminal and non-criminal sanctions, for example lustration, disciplinary penalties, payment of compensation to the victim and public naming. It acknowledges that impunity may be explicit, or may occur latently.

Louise Arbour, UN High-Commissioner for Human Rights in OHCHR's Strategic Priorities 2006-2007⁸, says, "Impunity for gross violations of human rights, either through design or inefficient institutions, persists". The failure to seriously investigate and punish perpetrators for violations of human rights only encourages further abuses. National laws that call for punishment to perpetrators of genocide, crimes against humanity, and war crimes must be enforced, and a high level of political will to furnish justice and ensure accountability must be in place.

Impunity has to be understood in the context of the society, laws and the criminal justice system. Lack of judicial independence, the non-functioning of constitutional bodies, lack of political will, non-application of existing laws, and denial of justice for human rights abuses contributed to impunity in Nepal.

3. General Obligations Of State To Combat Impunity

Generally, impunity arises

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2. Paz Rojas Baeza, 'Breaking the Human Link: The Medico-Psychiatric View of Impunity' in Charles Harper, *Impunity: An Ethical Perspective* (1996). Cited in Katherine Hooper, op cit
 3. UN Commission on Human Rights, *Human Rights Resolution 2005/81, Impunity*
 4. Ibid
 5. Christopher C. Joyner, 'Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability' (1998) *Denver Journal of International Law and Policy*. Cited in Katherine Hooper, op cit
 6. UN ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 48th Session, Agenda Item 10, at 8, U.N. Doc.E/CN.4/sub.2/1996/18 (1996)
 7. UN ESCOR, Commission on Human Rights, 61st Session, Agenda Item 17, at 7, U.N. Doc.E/CN.4/2005/102 (2005)
 8. UN High Commissioner's Strategic Management Plan, 2006-2007, available at: <http://www2.ohchr.org/english/about/docs/strategic.pdf>

from failure of states in meeting their obligations to investigate human rights violations. Another reason of impunity is the result of state's failure to take appropriate measures in respect to the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished. Similarly, impunity arises from state's failure to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.

In order to combat impunity, according to the Set of Principles for the protection and promotion of human rights through action to combat impunity (2 October 1997, updated 2005), a society in transition must be able to find the delicate balance of the following:

3.1 Right to Know

Combating impunity includes fulfilling the victim's right to know. This right, according to the Set of Principles, is an "inalienable right" to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. All people have the right to understand and be aware of all the facts of gross violations of human rights and the circumstances and reasons, which led to these gross violations. It is important for people to have full and effective exercise of the right to truth, which provides a vital safeguard against the recurrence of violations. The right to know also includes the duty of the state to remember. People's knowledge of their history of oppression is part of their legacy.

Irrespective of any legal proceedings, victims and their families have the right to know the truth

about circumstances in which violations took place and, in the event of death or disappearance, the victims' fate. It is therefore the responsibility of the state to take steps to preserve this collective memory and to staunchly guard against forces attempting to negate or whitewash that period of oppression and gross violations. States must take appropriate actions including measures necessary to ensure the independent and effective operation of the judiciary to give effect to the right to know.

3.2 Right to Justice

State's obligation to combat impunity also includes fulfilling victim's right to justice. In the haste of putting together a stable economic and political environment, government often disregard victim's right to justice and resort to reconciliation brought about by compromising with perpetrators of the past violations. The Set of Principles expressly laid out that there can be no just and lasting reconciliation without an effective response to the need of Justice. To ensure justice to victims, states must undertake prompt, thorough, independent and impartial investigations on violation of human rights and international humanitarian laws, and take appropriate measures in respect to the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international laws are prosecuted, tried and duly punished.

3.3 Right to Reparation and Guarantee of Non-Recurrence

Any human rights violation gives rise to right to reparation on the part of victim or his or her beneficiaries, implying a duty on the part of the state to make reparation and the possibility for the victim to seek redress from the perpetrator. The duty includes ensuring that the past violations will never happen again. The victims must receive reparations that cover all the injuries

they have suffered from the perpetrators. The right to reparation covers the right to restitute, compensation, rehabilitation, and satisfaction as provided by international laws. It also includes measures of guarantees of non-repetition. To this end, states must undertake institutional reforms and other measures necessary to ensure respect for the rule of law, foster and sustain a culture of respect for human rights and restore or establish public trust on government institutions.

4. Key Initiatives To Address Impunity In Nepal

4.1 Government and Political Parties

4.1.1 Commissions Dealing with the Past

The history of Nepal is silent on ensuring justice for widespread past violations as it enters a transitional period from conflict to lasting peace. There were some efforts to end impunity by establishing investigation commissions to bring to account those responsible for past serious crimes especially after 1990. However, the recommendations of the commission are yet to be implemented. Mallik Commission became a metaphor of the business-as-usual insincerity of elected governments after 1990 that ultimately tarnished Nepali democracy. Since no action could be contemplated against the perpetrators, the report of Mallik Commission was consigned to the darkest recesses. The Rayamajhi Commission recommended enactment of new law to penalize some of the accused who enjoy immunity under the present laws. The only punitive measure taken was the enactment of the Constituent Assembly Members Election Act, which barred individuals, named as accused by the Rayamajhi Commission from contesting the Constituent Assembly elections. But that too was struck down by the Supreme Court on 27 September 2007 on the ground that the Act was in contravention of the

Interim Constitution. Once again they escaped the net of justice, and there is no guarantee that the perpetrators identified by the Rayamajhi Commission will be brought to the justice. Similarly, in July 1990, a Committee to Find Persons Disappeared in Course of the Struggle for Restoration of Democracy during the *Panchayat* Regime (1960-1990) was formed by the government and the Committee submitted a report to the government in April 1991 with details of cases of disappearances during the *Panchayat* regime and their status. However, most of its recommendations never came to implementation.

4.1.2 Political Commitments

The CPA, the IC, the CMP of the Interim Government, the 23-point agreement of the Seven-Party Alliance and CPN-M of 2007 and Policies and Programmes of CPN-M led coalition government have pledged for the establishment of a range of high-level commissions. Such commissions include Truth and Reconciliation Commission, Peace and Rehabilitation Commission, High Level Investigation Commission on Disappearances and Commission for Restructuring of the State, Study and Recommendation Commission

for Scientific Land Reform and High Level Committee for Monitoring the Effective Implementation of the CPA that could ascertain rule of law and sustainable peace and create conditions propitious for national reconciliation.

The CPA clearly sees the need to address the past, and towards this end, includes several important provisions favoring accountability, particularly in the area of truth seeking and reparations to victims. The Accord provides some specific measures to address past atrocities, such as, to make public within 60 days,⁹ the situation and details of persons disappeared and killed during the armed conflict. Similarly the CPA has also the provision for establishment of 'National Peace and Rehabilitation Commission' to maintain peace, provide relief and or reconstruction¹⁰, establishment of a 'Truth and Reconciliation Commission' to investigate those who have been involved in serious violations of human rights and have committed crime against humanity¹¹ and to create conducive environment for the return of the internally displaced persons.¹²

The Accord provides three mechanisms, namely 'National Peace and Rehabilitation

Commission', 'Truth and Reconciliation Commission' and a 'High-level Recommendation Commission for the Restructuring of the State'¹³ that deal with transitional justice and thus implement all the decisions, agreements and understanding reached between the Seven Party Alliance, the Government of Nepal and the CPN-M.

The Interim Constitution, promulgated on 15 January 2007, has some provisions for addressing the past atrocities. Measures prescribed under the responsibilities of the state in the Constitution include, among other things, providing appropriate relief, respect and rehabilitation to the families of the killed, or injured leading to disability and physically unfit persons during the armed conflict.¹⁴ It stipulates for providing relief to the families of the disappeared persons in accordance with the recommendations of the report of the Investigation Commission.¹⁵ Other measures provisioned in the Constitution include launching special programmes to rehabilitate displaced persons; providing relief against the destruction of the private and public property; reconstructing the infrastructures;¹⁶ and establishing the Truth and Reconciliation Commission to

9. Clause 5.2.3 of the CPA: Both sides agree to make public the information about the real name, surname and address of the people who were disappeared by both sides and who were killed during the war and to inform also the family about it within 60 days from the date on which this Accord has been signed.
10. Clause 5.2.4 of the CPA: Both sides agree, to maintain the peace in the society normalizing adverse situation occurred by the reason of the armed conflict and to carry out relief work for, and to rehabilitate people victimized and displaced by the war to constitute a National Peace and Rehabilitation Commission to perform the business related to it.
11. Clause 5.2.5 of the CPA: Both sides agree to constitute a High-level Truth and Reconciliation Commission through the mutual agreement in order to investigate truth about those who have seriously violated human rights and those who were involved in crimes against humanity in course of the war and to create an environment for reconciliations in the society.
12. Clause 5.2.8 of the CPA: Both sides express their commitment to allow the persons displaced due to the armed conflict to return back voluntarily to their respective ancestral or previous places of residence without any political prejudice, to reconstruct the infrastructure destroyed as a result of the conflict and to rehabilitate and socialize the displaced persons with due respect.
13. Clause 8.4 of the CPA
14. Article 33 (p) of the IC: To make arrangements for appropriate relief, recognition and rehabilitation for the family of the deceased persons the disabled and helpless persons due to injury during the course of armed conflict.
15. Article 33 (q) of the IC: To provide relief to the families of the victims, on the basis of the report of the Investigation Commission constituted to investigate the cases of disappearances made during the course of the conflict.
16. Article 33 (r) of the IC: To conduct special programs to rehabilitate the displaced, to provide relief for damaged private and public property, and to rebuild infrastructures destroyed during the course of the conflict.

investigate persons involved in committing serious human rights violations and crimes against humanity in the past.¹⁷

Provisions of the Interim Constitution guide measures to address the past human rights violations. However, it does not include sufficient provisions and measures that contribute to end impunity and to effectively address the past wounds. All such provisions, which favour, to some extent, the transitional justice mechanisms, are placed under the directive principles of the state policy.¹⁸ As these are non-binding provisions, non-implementation of these principles cannot be questioned in the court.

The Policies and Programmes of the CPN-M led coalition government adopted by the legislature-parliament on 14 September state that the government's first responsibility is to guide the socio-economic transformation process toward a progressive direction by taking the peace process to a logical end and also establishment of rule of law by ending existing situation of impunity. The government has expressed commitment to implement all the past agreements including peace agreement and agreements between the government and different groups at war footing. The government has pledged to form Truth and Reconciliation Commission to erase vestiges of the conflict, Commission to investigate disappeared people, High-level scientific land reform commission to resolve land-related problems, Inclusion Commission to make all state organs inclusive, State Restructuring Commission to suggest ways to prepare a future federal structure for the government, Administration Restructuring Commission to suggest ways to convert the current bureaucracy

under the new federal system commissions to enforce its policy and programme. Major political parties including the Nepali Congress and CPN-UML have expressed their commitments to support and initiate the ratification of the Rome Statute of the ICC. However, the CPN-M has not yet expressed such a particular commitment.

However, frequent reports on involvement of Maoists and their youth wing Young Communist League (YCL) in killings and abductions have shown that such illegal behaviors have further deteriorated the situation of impunity. Acts of Maoists and YCL, among other things, include operation of parallel administrative structures, unofficial "law enforcement" actions, influencing the process of application for and granting of government tenders, and physical assaults and intimidation against supporters of rival parties, journalists and business persons. Recently, CPN-UML has also established Youth Force under its youth wing, which has been carrying actions as that of YCL, and such behaviour has been widely criticized by people from various walks of life. In recent weeks, the Nepali Congress, CPN-UML and Madhesi People's Rights Forum (MPRF) have either established youth wings or issued instructions to their youth wings, allegedly to counter the perceived threat from YCL, which has led to an increase in confrontations among these groups. National and international organizations have expressed grave concern at the formation of youth groups fashioned after the YCL of the Maoist. The newly formed groups like Youth Force of CPN-UML, Tarun Dasta [youth squad] of Nepali Congress and Madhesh Brigade of Nepal Sadbhawana Party have been found involved in seizing

of private properties, kidnapping, forceful collection of donations, obstructing highways and padlocking government offices. Even if such groups were constituted with a good intention, the activities of such groups are hindering the peace and security and undermining the rights of ordinary citizens. The political parties should refrain from promoting actions which, directly or indirectly, weaken law and order situation and undermine human rights.

The non-seriousness of the state to investigate and punish persons involved in serious crimes of humanity and war crimes, and to the culture of ignorance on the issue of impunity has only contributed to deepen the culture of impunity and violence. It has further encouraged the perpetrators to be involved in human rights violations enjoying impunity and non-punishment.

4.2 Legislature

The House of Representatives, reinstated following the April movement of 2006, on 25 July 2006, made a landmark decision by endorsing a unanimous directive proposal to ratify the Rome Statute of the International Criminal Court (ICC). The direction of the house paved way for accessing the world body having international jurisdiction for estab-

17. Article 33 (s) of the IC: To constitute a high-level Truth and Reconciliation Commission to investigate the facts regarding grave violation of human rights and crimes against humanity committed during the course of conflict, and create an atmosphere of reconciliation in the society.

18. Article 34 (1) of the Interim Constitution 2007, It shall be the chief objective of the State to promote conditions of welfare on the basis of the principles of an open society, by establishing a just system in all aspect of national life, including social, economic and political life, while at the same time protecting the lives, property, equality and liberty of the people.

lishing justice to the people and for ending culture of impunity. The resolution had directed the government to ratify the Statute, allowing international prosecution of any person committing crime against humanity and other serious offences as outlined in the Statute. The parliamentary motion had paved way for the government to translate its commitments to democracy, human rights, peace and justice into reality. The non-seriousness of the state to investigate and punish persons involved in serious crimes of humanity and war crimes, and to the culture of ignorance on the issue of impunity has only contributed to deepen the culture of impunity and violence. It has further encouraged the perpetrators to be involved in human rights violations enjoying impunity and non-punishment.

The legislature in 1996 passed a 'Torture Compensation Act' which enables victims of torture to receive compensation. However, the Act has been widely criticized by human rights community for characterizing many flaws. The Act does not only fail to meet international standards by failing to criminalize the act of torture, but also lacks adequate consideration to the needs of the victims of torture. The Act is undergoing re-drafting process to ensure its full compliance with the UN Convention Against Torture (CAT). The undergoing draft of the new anti-torture law is expected to criminalize torture, something that UN human rights bodies and national and international NGOs have been calling for over the years.

Amendments to the Civil Code regarding "disappearances"

and abduction or hostage-taking were initiated by the Interim Legislature-Parliament in May 2007. Further, the interim Legislature-Parliament instructed¹⁹ the government to draft a law on enforced disappearances in line with the International Convention for the Protection of all Persons from Enforced Disappearances and the 1 June 2007 judgment of the Supreme Court of Nepal. The order reflects the desire of the Legislature-Parliament for a future in which the acts of torture will not be tolerated.

However, the pending bill on domestic violence, ratification of the Optional Protocol to OP-CEDAW with reservation on Article 8 and 9 and lack of political-will in relation to the ratification of OP-CAT and ICC treaty signify weak parliamentary stands. These issues may remain unaddressed until and unless the parliament proactively initiates calling for an effective implementation of its directives and decisions and seriously takes such issues with the government and other concerned stakeholders through creation and effective functioning of formal mechanisms within the parliamentary system.

4.3 Judiciary

The Supreme Court has continued to play a key role in support of human rights during transitional period. The Court's decisions on disappearances, on torture, on investigation of Maina Sunuwar case, decision on excessive use of force, and on the rights of sexual minorities are landmarks in defense of human rights. These are historical steps towards addressing

impunity prevailing in the country.

The Supreme Court gave a landmark verdict on 1 June 2007 in relation to a number of pending enforced disappearance cases²⁰. The decision is a significant step in recognizing the rights of victims of enforced disappearance and their families to truth, justice and reparation. The Supreme Court also illuminated the mechanisms to investigate and publicize the condition of disappeared citizens, effectiveness of the existing legal system to probe the condition of missing persons, punish the culprits and compensate the victims. The Court has analyzed the possible treatment including investigation about the citizens said to have been disappeared and the issue related to damages and effects on the families of the missing persons. Further, the Court discussed on the necessity of establishing an interim mechanism to compensate them.

In September 2007, the Supreme Court directed the police to conduct an investigation and report back to the Court within three months on the case of Maina Sunuwar²¹. On 31 January 2008, the District Court of Kavre submitted charge sheets in the name of the perpetrators involved in the torturous murder of Maina. The Court subsequently issued summons for the accused to appear before it. Maina Sunuwar's case presents a significant opportunity for the government to send a signal that the culture of impunity is ending.

Likewise, the Supreme Court, on 12 May 2008, in response to a writ petition filed by the families of victims of the infamous Kotwada (Kalikot district) massacre

19. On 28 November 2007 the Parliamentary Committee on Law, Justice and Legislative Relations ordered that the draft bill providing the amendments to the Civil Code be withdrawn from Parliament and ordered the Government to draft a law on enforced disappearances. The amendments relating to abduction and hostage taking were passed by the interim Parliament-Legislature with some changes.

20. The decision included an order that the Government enact a law which would criminalize enforced disappearance in line with the International Convention for the Protection of all Persons from Enforced Disappearance; establish a high level commission of inquiry on disappearances in compliance with the international criteria on such commissions of inquiry; require investigations and prosecutions of persons responsible for disappearances; and provide for adequate compensation and relief to the victims and their families.

21. Maina Sunuwar was tortured and killed in February 2004 while in the custody of the Nepalese Army.

in which 35 innocent workers were gunned down by the army in November 2001, ordered the government to enact a comprehensive law to address human rights violations resulting from excessive use of force, while also ensuring compensation for the victims. Noting that the country lacks a law that specifically addresses human rights violations resulting from excessive use of force and also lack of any law to compensate the victims of excessive use of force²², the court asked government to bring a law to end impunity in relation to use of excessive use of force. The court also ordered the government to seek help of experts while drafting the law, which should have provisions for adequate compensation to the victims. Likewise, it also gave directives to the government to bring a law criminalizing torture.

4.4 National Institutions

Nepal has the National Human Rights Commission (NHRC) since June 2000 with five-year term of the members. The Commission was incepted by the Human Rights Commission Act, 1997. The IC made the Commission one of the constitutional bodies of the state. Independent, impartial and efficient functioning of NHRC has been a prime concern for all including victims of human rights violations and human rights defenders. However, the provisions in IC relating to NHRC do not conform to the universally accepted Paris Principles. Although it is a constitutional body, NHRC is still functioning under the 1997 National Human Rights Commission Act.

The post of Chief Commissioner and Commissioners of the NHRC remained vacant since 9 July 2006 and after a long gap, the Constitutional Council

(CC) made a recommendation for the appointment of the Chief Commissioner and other Commissioners of the NHRC in September 2007. The appointment of Commissioners is an important development for the protection and promotion of human rights in Nepal and also an opportunity to develop the NHRC as a credible human rights institution that maintains its independence and upholds national and international human rights standards. However, it received criticism from a number of human rights groups regarding its in-compliance with the Paris Principles including the appointment process, which should have ensured pluralism, respect for diversity and active and broad participation of all civilian forces in society. The government tried to paralyze the NHRC by designating Secretary of the Ministry of Law, Justice and Parliamentary Affairs to head the administrative responsibilities of the Commission on 17 July 2007 through a cabinet meeting. Following wider criticism from human rights community and the staff of the Commission, the government appointed Bishal Khanal, a law professor in the position. The approach of the government clearly indicates government's intention to cripple the independence of the Commission and weaken it. Such attempt demonstrates reluctance of the government to protect human rights, maintain rule of law, and indicates systematic promotion of impunity. Though the NHRC is authorized to recommend for governmental action including the provision of compensation in cases of human rights violations, the government has denied the Commission's access to intervene in many cases.

A joint study of Advocacy forum and International Centre for Transitional Justice (ICTJ) revealed

that only 10 percent of victims and their families file complaint at the NHRC while other go to Nepal Bar Association, other HR organizations, police, courts, community leaders and office of Chief District Officer to file complaint on HR violations. The study report shows grim picture of effectiveness of the national rights watchdog. Weak political will and confidence of the constitutional body; weak administration and capacity; non-cooperation with civil society and UN agencies; and lack of effective plan of action of the Commission are considered as some of the reasons for making the constitutional body a 'weak and an ineffective' institution, which is entirely failing to take up the issue of impunity and act upon the past cases of human rights violations.

In addition, the recommendations of the NHRC are hardly observed by the government. Currently there is a backlog of some 8,700 cases at the NHRC. The NHRC has settled 1,350 cases and issued recommendations on 149 cases since its inception in 2000. The government has acted upon only 53 of the total number of recommendations made by the Commission, which shows the government's passivity towards making the constitutional body a powerful national institution. However, the rate of implementation of the recommendations is quite dismal.²³ The number of policy-related recommendations that the government has implemented following the NHRC recommendations also signify the ineffectiveness of the Commission.

Non-cooperation by the government is another issue that has resulted in an ineffectiveness of the NHRC, so, the national institution would not raise the issues of impunity and accountability. The

22. Many human rights abuses occurred during the democratic movement in 1990, the 10-year Maoist conflict and during the April movement of 2006 due to excessive use of force by security personnel. On the one hand, victims have not been compensated while on the other the perpetrators have not been brought to justice, leading human rights activists to charge that it has promoted a culture of impunity in the country.

23. NHRC, March 2008, Annual report, May 2007 to May 2008

NHRC has an important role to play in ensuring accountability for past crimes, developing transitional justice strategies and fostering national reconciliation in countries emerging from conflict like Nepal. However, the government wants a weak institution because it does not want the incidents of human rights violations be investigated in an impartial manner, the perpetrators be brought to justice and the victims be provided with justice. The intention to foster the culture of impunity has also been reflected through

The NHRC has an important role to play in ensuring accountability for past crimes, developing transitional justice strategies and fostering national reconciliation in countries emerging from conflict like Nepal.

the government's attempt in weakening the NHRC.

Similarly, the existing national institutions namely the National Dalit Commission and the National Women Commission have been in a limbo like situation by a non-transparent and highly politically influenced appointment of members as well by intervention in many instances through various informal means in the day-to-day functioning of such institutions. The CPN-M led coalition govern-

ment in its Policies and Programme has pledged to take initiatives to give a constitutional status to the National Women's Commission, and make the National Dalit Commission more effective.²⁴ While lifting the status of these Commissions, independence and effectiveness of the body should be ensured in accordance with the Paris Principles.

4.5 United Nations

The desire of the international community to see Nepal's peace process directing towards a logical conclusion has been added on by the successful completion of the elections to the Constituent Assembly. International communities including the United Nations have been encouraging Nepali actors to continue their positive move towards a lasting peace in the country. This stand is largely based on the principles of human rights and justice and it demands an end to the culture of impunity. United Nations Treaty Bodies, Special Procedures, senior officials including the High Commissioner for Human Rights had visited Nepal²⁵ while expressing their support for upholding human rights and raising concerns for justice in Nepal. Their respective offices have been constantly drawing attention of the government and concerned actors in Nepal's peace process to make their efforts successful and put an end to impunity.

During an official visit to Nepal in January 2007, the United Nations High Commissioner for

Human Rights Louise Arbour said, "Ending impunity for serious human rights violations include the need to resolve all outstanding cases of disappearances; the need for a well-functioning law enforcement and criminal justice system as an essential means of strengthening human rights protection; and the need to address long-standing discrimination and social exclusion".²⁶ According to the High Commissioner, transforming a climate of impunity into a culture of accountability will be essential to a successful transformation and sustainable peace.²⁷

Likewise, the UN Secretary-General Ban Ki Moon has warned the Nepali actors that a pattern of repeated human rights violations and continuing impunity would not only have the cumulative effect of diminishing the prospect of a free and fair electoral process, but could also negatively impact the possibility of a more democratic and inclusive society that many Nepalese hope for.²⁸ The Special Representative of the Secretary-General Ian Martin, who heads the UN Mission in Nepal (UNMIN), has been continuously putting his emphasis on a need to overcome the persistent impunity for crimes and human rights violations in Nepal in order to re-establish justice, public security and law and order.

OHCHR-Nepal has been playing an important role both for promotion and protection of human rights and addressing issues of impunity as well as in the prevention of violence, especially through

24. Clause 77 and 76, Policies and programme of Maoists lead coalition Government, 14 September 2008

25. 1996: Working Group on Arbitrary Detention, 2000: Special Rapporteur on extrajudicial, summary or arbitrary executions; 2004: Working Group on Enforced or Involuntary Disappearances; 2005: Representative of the Secretary-General on the human rights of internally displaced persons and 2005: Special Rapporteur on the question of torture.

26. Truth and justice mechanisms: Ensuring accountability and sustainable peace and democracy in Nepal, Louise Arbour, United Nations High Commissioner for Human Rights, Kathmandu, Monday 22 January, 2007, available at: http://nepal.ohchr.org/en/resources/Documents/English/statements/HC/Year2007/2007_01_22_HC%20Transitional%20Justice_E.pdf

27. Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation in Nepal, A/HRC/7/68, 18 February 2008, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/G08/106/24/PDF/G0810624.pdf?OpenElement>

28. With Nepal at crossroads, Ban Ki-moon urges parties to agree on future steps, available at: <http://www.un.org/apps/news/story.asp?NewsID=24389&Cr=nepal&Cr1=&Kw1=OHCHR&Kw2=Impunity&Kw3=Nepal+>

its monitoring activities in all the regions of the country. OHCHR has investigated two cases in which members of armed groups were allegedly extra-judicially executed by police, bringing to at least 18 the number of alleged unlawful killings by police. OHCHR has submitted 135 disappearance cases to the UN Working Group on Enforced and Involuntary

Disappearances (WGEID) in 2008.²⁹ It has also called on the government to fully implement the Supreme Court's decision, and ensure that any Commission of inquiry which is established to investigate disappearances meets international human rights standards.

The UN Special Rapporteur on Torture has expressed deep concern with the prevailing culture of impunity for torture in Nepal, especially the emphasis on compensation for acts of torture as an alternative to criminal sanctions against the perpetrator.³⁰ The Special Rapporteur has requested the government to comment on the outcome of this case and bring forward proposals on how it plans to fight impunity in the future. Likewise, the UN Committee against Torture is also concerned about the prevailing climate of impunity for acts of torture and ill-treatment and the continued allegations of arrests without warrants, extrajudicial killings, deaths in custody and disappearances.³¹ Similarly, the reports of the Representative of the Secretary-General on the human rights of internally displaced persons³², the

WGEID³³, the Special Rapporteur on Violence Against Women, its causes and consequences³⁴ and the Special Rapporteur on extrajudicial, summary or arbitrary executions³⁵ have expressed their concerns on the pervasive climate of impunity for human rights violations, including extrajudicial executions, which prevails in Nepal and have noted that human rights abuses were widespread and carried out with impunity in the country. They have reiterated the fact that the prevailing weak criminal legal system has contributed to extend impunity for serious human rights violations including extrajudicial, summary or arbitrary executions, which in turn perpetuates the vicious circle of violence in Nepal.

5. Deserted Commitments

Though a series of commitments have been reiterated by various documents, none of the Commissions have been established as of September 2008. Development in relation with the high-level commissions, which are ensured by the CPA, IC, CMP, the 23-point agreement and Policies and Programmes of Maoists led coalition government, is briefly analyzed in the following sections:

5.1 Truth and Reconciliation Commission

As a latest development in establishing a TRC, the government has come up with another draft bill at the end of June 2007. The CPA,

the IC, the CMP of the Interim Government and the Policies and Programmes of the coalition government have provisions to establish such Commission to ascertain the truth about cases of human rights violations and create conditions propitious for national reconciliation. Thus, the Truth and Reconciliation Commission is supposed to find and share the truth and must work towards an effective implementation

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of recommendations including those relating to criminal prosecution of individuals, which is extremely important for the victims and to recommend appropriate actions against the perpetrators. The findings of a non-judicial truth commission support judicial efforts to pursue an effective investigation and aid the prosecution of human rights violations.³⁶ However, the draft bill is widely criticized by human rights defenders for not being in compliance with the inter-

29. Report of the Secretary-General on the request of Nepal for United Nations assistance in support of its peace process (S/2008/454) (10 July 2008), p.12

30. Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, E/CN.4/2006/6/Add.5, 9 January 2006

31. Conclusions and recommendations of the Committee against Torture, CAT/C/NPL/CO/2* 13 April 2007

32. Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin - Mission to Nepal (E/CN.4/2006/71/Add.2)

33. Report of the Working Group on Enforced or Involuntary Disappearances - Mission to Nepal (E/CN.4/2005/65/Add.1)

34. Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy (E/CN.4/2001/73/Add.2)

35. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir (E/CN.4/2001/9/Add.2)

36. "Truth and justice mechanisms: Ensuring accountability and sustainable peace and democracy in Nepal", Louis Arbour, United Nations High Commissioner for Human Rights, Kathmandu, 22 January 2007

national standards as well as the verdict of the Supreme Court of Nepal.³⁷ Defenders have cautioned the government that a weak TRC, if formed based on the currently proposed bill, would entirely fail to bring the perpetrators to justice and provide justice to the victims. In that case, the TRC seems to be just a showpiece of the government rather than the true realization of agonies of the victims.

5.2 Peace and Rehabilitation Commission

The CPA states that National Peace and Rehabilitation Commission should be established if the need arises in order to make the campaign for peace a success. The composition and working procedures of the Commission would be as determined by the Interim Government. The IC³⁸ ensures mechanisms for the rehabilitation of the conflict victims including the rehabilitation for the family of the deceased, disabled, and helpless persons due to injury during the course of the armed conflict. The Ministry of Peace and Rehabilitation has been established within the Interim Government. However, the Peace and Rehabilitation Commission as envisioned by the CPA, IC and the CMP, and re-emphasized in the 23-point agreement as Peace and Reconstruction Commission is yet to be established.

5.3 Investigation Commission on Disappearances

The government announced formation of a 'High-level Probe Commission on Disappeared Persons' under the Chairmanship of former Supreme Court Justice on 21 June 2007 to investigate the cases of disappearance. However, the establishment of such a Commission, without enacting

related laws and providing enough mandates to make it capable of investigating the alleged cases of disappearances, is in contradiction to the directives contained in the landmark verdict of the Supreme Court of Nepal and the domestic and international human rights commitments made by the country. The Court had directed the government on 1 June 2007 to form a Commission on enforced disappearances only after enacting a separate comprehensive law to govern it and suggested that the government ensure enact law in compliance with the UN Convention of Enforced Disappearance. But, the government's decision seems likely to prolong and reinforce the culture of impunity that currently reign the country with regards to the problem of forced disappearances, enabling perpetrators to continue to avoid being brought to justice for their actions and ensuring that victims and their families are deprived of rights to justice, truth and reparation.³⁹ Due to its wrong-headed formation process, the Commission could not come to have complete 'establishment' and also could not come to be in place as such. The continued reluctance of the government to establish a mechanism to hold accountable even a single perpetrator of enforced disappearance perpetuates impunity and threatens rule of law, which is in turn contributing to current failures in the field of law and order. A commitment by the government to investigate the truth and to ensure justice for the families of disappeared persons would be a key sign for establishment of accountability and the rule of law in the country, and would send a clear message to the international community that it is committed to the protection of human

rights.

5.4 Commission for Restructuring of the State

Nepal faces numerous problems as a result of social exclusion such as discrimination against the Dalit people, the Madhesis, indigenous people, women and girls, persons with disabilities, sexual minorities, and many other groups. But, the perpetrators of structural violence and long-standing discriminations have never been taken into notice while discussing about the issue of impunity. Formation of a State Restructuring Commission, as envisaged in the key documents of the government would contribute to minimize the extent of the impunity granted on the basis of politico-social, economic and cultural background of the people and be an initiative to bring about these aspects into the mainstream debate concerning impunity. Such Commission, if formed with a broader mandate, could be instrumental in contributing towards establishing economic, social and cultural rights of the people, along with the civil and political rights, at a higher level of attainment through a number of mechanisms and an appropriate restructuring of the state. However, no development has been made so far in establishing such Commission.

5.5 Study and Recommendation Commission for Scientific Land Reform

A meeting of the supreme leaders of the seven political parties held on 23 December 2007 made a decision to form a Study and Recommendation Commission for Scientific Land Reform. The Policies and Programmes of coalition government adopted on 14

37. On 1 June 2007, The Supreme Court of Nepal ruled on a large number of enforced disappearance cases and ordered the government to enact legislation that would criminalise enforced disappearances and take into account the new International Convention for the Protection of all Persons from Enforced Disappearance.

38. Article 33 (p), (r) Interim Constitution 2007

39. FORUM-ASIA and INSEC Press Statement, "Nepal: Formation of Commission on Disappeared Persons Likely to Institutionalise Impunity", 5 July 2007

September also mentioned about the establishment of High-level Commission for Scientific Land Reform. Usages and productivity of land can be increased through land reforms. A long-term land use policy should be formulated to encourage effective land management, and justifiable land distribution and management for scientific agricultural system. Such Commission can ensure land rights to thousands of landless, tenants and poor farmers through forward-looking recommendations to be implemented by the government. However, as other commissions, this commission is yet to be established.

5.6 High Level Committee for Monitoring Effective Implementation of CPA and Other Agreements

A 23-point package deal of 23 December 2007 committed to establish the Monitoring Committee for the effective implementation of the Peace Accord and other agreements.

The parties' commitment to oversee the peace deal and other agreements backed by an independent monitoring body is an appreciative decision to strengthen the peace process and increase the focus on political inclusiveness, starting by implementing agreements on representation of women, Janajatis, Madhesis, Dalits and other groups. Timely establishment of the monitoring mechanisms for the implementation of many CPA provisions and of new and existing legislation which could strengthen the protection of human rights has led to widespread and systematic situation of impunity. However, the political parties failed to form such committee.

6. State Of Impunity And Key Areas Of Concern

In the context of Nepal, perpetrators have always been trying to establish a notion that re-opening the cases of past human rights viola-

tions would push the society towards an unnecessary antagonism and increases risk of turmoil. However, for human rights defenders, it could not be taken for granted, and the state should always listen to the people's voice, which never allows for a total amnesty and widespread culture of impunity. Ending impunity should be facilitated at the grass roots level with a bottom-up approach, so that the entire society could consider their own situation and come for appropriate measures such as truth seeking, forgiveness, reparation and reintegration.

Nepal is a state party to a number of UN and other human rights and international humanitarian laws treaties including the 'Big Six' treaties and the Geneva Conventions of 1949. However, a timely reporting to the concerned mechanisms – in particular the UN Treaty Bodies (TBs), implementation of the Concluding Observations (COs) provided by the TBs and recommendations of Special Procedures as well as other obligations of the state generated by joining the UN are the key areas that Nepal should perform its best. Similarly, there are a couple of treaties, such as the Rome Statute of the ICC, Optional Protocol to the Convention against Torture (OPCAT), Convention on Migrant Workers (CMW), Convention on Enforced Disappearances, Additional Protocols to the Geneva Conventions among others that Nepal should ratify in no time to have better position in the course of addressing impunity and establishing the rule of law.

Following are some of the key areas that need to be raised as constant concerns in course of dealing with impunity in Nepal:

6.1 Political will against impunity

The problem of impunity has been one of the key obstructing factors to justice for decades. As deeply rooted in Nepal's politics, culture and society, impunity has

been a historical characteristic that the country has been experiencing. However, political impunity has tremendously multiplied the effects on other societal aspects and encouraged ignorance of justice by the state agencies. Principles of the rule of law have been largely undermined with indication that the restoration of democracy has also not been a matter of complete success in regards to end impunity.

Despite proactive campaigns spearheaded by the human rights community to address the deepening problem of impunity, there is little to indicate that the government is taking adequate measures to bring gross human rights violators to justice in the country and establish responsiveness and accountability. The commitments of the political parties during the democratic movement to establish mechanisms with full authority and wider jurisdiction proceed for an in-depth investigation of the cases related to perpetration to people, and take up the outcomes to an effective implementation have not yet been translated in practice.

6.2 Implementation of commitments

Domestic instruments such as the CPA, IC, CMP of Interim Government, the 23-point agreement and the Policies and Programmes of Maoist led coalition government have provisioned for establishment of a number of mechanisms dealing with impunity in various sectors through the transitional measures. However, the reality is different. The culture of impunity has been highly encouraged by the inaction of the government and political parties, which has crippled the society and worsened the human rights situation.

Essence of the above mentioned instruments are the core values of the commitments expressed by the political parties to strengthen the rule of law and uphold human rights and justice. This is only possi-

ble by responding to the past cases of human rights violations, putting in place proper mechanisms to deal with those issues, effectively facilitating civil society and national human rights institutions towards promoting principles of the rule of law and good governance, and proactively moving for strengthening voice of the people at the ground. Creating a constructive pressure and holding constant dialogue with the government and political parties to make them accountable for implementation of their commitments is another side of the coin that the civil society has to put in priority in their actions.

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6.3 Government action

If we look at the recent cases, the government formed a High Level Probe Commission (Rayamajhi Commission) to look at the atrocities committed during the royal regime, but the government neither made the report public nor implemented the Commission's recommendations. One of the worrying cases was the appointment of head of department of army and police institutions. Despite the huge

protest from civil society organizations, the government appointed a controversial Chief of Army Staff, who was allegedly involved in much grave violation of human rights in the past. The previous heads of police institutions, who were allegedly involved in suppressing people's movement during the royal regime, were also rewarded by the government by transferring to the ministries rather than expelling from their respective posts. The impunity for crimes the army and police staffs have committed against the civilian population in the past continues to threaten the long march for justice.

6.4 Policy against impunity

There is no universal formula for achieving justice in times of political transitions. However, minimum standards can be developed by setting measures that establish accountability for past abuses and help reconciliation process. In Nepal, absence of government policy towards establishing system for accountability and bringing the perpetrators involved in heinous crimes to justice has complicated the dealings. Though the CPA, IC, CMP of the Interim Government and the 90-point Policies and Programmes of new government have reiterated that ending impunity is one of the key areas of concern, lack of political will and intentional ignorance of the political parties and the government has been largely contributing towards an absence of concrete policy to combat impunity. It is obvious, if the government does not come up with an effective measure, it will be difficult to end impunity in practice.

A verdict of the Supreme Court on 1 June 2007 rules out that the existing legal provisions are inadequate to probe disappearance cases and that the current criminal legal apparatus lacks necessary pro-

visions to deal with these issues. Punishing the perpetrators of past human rights violations is constrained because Nepal does not have specific laws with retroactive effects. Impunity has resulted from protection received by the criminal elements from political parties and governments under their influence. Criminal activities sponsored by the state agencies and the political parties, in one or another way in practice, has been a major problem to this effect. Lack of political will amongst all stakeholders, in particular the government and political parties, has been contributing to foster the culture of impunity in almost all spheres of social life. Creating laws that deal with past human rights violations and have retroactive effect is another matter of concern. These issues demand larger debate and political sensitivity.

6.5 Mobilization of voice

The government is silent over the concerns raised by the UN agencies including the OHCHR, civil society, human rights and professional organizations and the victims of human rights violation. There has not been any trustful response from the government over the issues raised by OHCHR-Nepal regarding the disappearance of 49 persons from the Bhairavnath Army Battalion, Kathmandu⁴⁰, which can be taken as an example of unwillingness of the government in responding the cases of crimes against humanity. Such an irresponsible behaviour of the government contributed to deteriorate the situation by encouraging the perpetrators for impunity. Government authorities have also failed to investigate the cases of human rights violations through civilian or judicial procedures. In this context, a stronger civic pressure including mobilization of the people includ-

40. A report of the OHCHR-Nepal, in May 2006, said that the situation of 49 people who were detained at the Bhairavnath Army Battalion located at Maharajgunj, Kathmandu, capital city of Nepal, at various times during the armed conflict (1996-2006) is unknown.

ing victims remains vital in fighting impunity.

In many instances, shared involvement and dialogue among diverse groups and their members support a sense of unity. Despite differences among elites at a national level, communal groups have served as vehicles for non-violent expression of different interests and values in many war-torn societies.⁴¹ These experiences can add on Nepali civil society efforts to empower people in course of fighting impunity. People's efforts facilitated by the civil society actors could create a conducive environment for both establishing justice as well as fostering a culture of reconciliation in the societies. Collective initiatives of civil society organizations could add strength to the voices and lead to achievements in course of establishing accountability and rule of law.

6.6 Wider discussion on amnesty

The government of Nepal has been granting general amnesty to several prisoners who were serving even life terms after being convicted by the court simply because the prisoners are claimed to be cadres of CPN-M. The case of granting general amnesty to 30 "CPN-M cadres" who were serving sentences in various prisons last year is one of such incidents that link with the political intension matured within the political system. In the case of those 30 persons, the government simply took the decision at the cabinet level and freed them without any consultation with victims and other stakeholders. It has raised serious questions regarding justice and legal procedures in addressing the past human rights violations.⁴²

An amnesty is a provision where a person becomes legally free from prosecution for any alleged criminal behaviour. A blanket amnesty applies to an entire group

and restricts any inquiry into the past abuses. This tendency to impose a forgive-and-forget approach usually led to renewed conflict in various countries in the past⁴³. Such issues need wider consultations and discussion with a larger participation of victims and their families. They should be provided with authorities to decide first on these issues. Even though accountability for human rights violations is considered critical in a transition to new political relations, amnesty has been advocated for political convenience.⁴⁴ Giving amnesty to murder convicts in a non-transparent way has largely undermined the rule of law and fostered the culture of impunity. In Nepal's case, the government is taking decisions on all such cases with an intention to make the to-be-formed TRC a rubber stamp to legitimize the cabinet decisions. To use a window of TRC, the government is trying to bring a TRC Bill with unchecked provisions for amnesty. These steps of the government have put threats to the possible avenues for justice and accountability.

6.7 Victims first

Victims and their families and relatives are the ones who have been suffering the brunt of conflict. In fact, they are the primary source for all stakeholders to have feelings of victimization and to learn the best ways to repair their wounds. Only a 'victim first' approach can contribute to lead the way for justice and lasting peace in any society. Any effort that centre on dealing with out-burst issues and leave long-standing issues of violence and bloody consequences of the conflict aside attention can not have assurance of non-repetition. Such ignorance only contributes to add upon additional despair and brutality. Unfortunately, victims of the con-

flict and human rights violations have been at the bottom of attention of the state and political parties in Nepal. They have been a matter of burden for the government.

Victims should be honoured instead of discard. It is not just a matter to be considered by the 'outsiders'; rather, it is their rights established through international human rights standards. Their right to know truth about serious crimes committed against themselves and their families, right to obtain justice, in particular the right to obtain prosecution and trial by a criminal

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jurisdiction of the presumed authors of the serious crimes, and to obtain adequate redress for the damages suffered are the prime issues of concern. These rights of the victims should not be compromised at any stage of any negotiation.

However, the situation in Nepal is different. The government authorities are not even receiving

41. Jeong, Ho-Won, *Peacebuilding in Postconflict Societies (Strategy and Process)*, (2006) New Delhi: Viva Books Private Limited, pp. 180-181

42. Jha, Dipendra and Prakash Gnyawali, "General amnesty and truth commission", *The Kathmandu Post*, 18 July 2007

43. HREIB, *Transitional Justice Basics* (2003) Thailand: Human Rights Education Institute of Burma, p. 6

44. Jeong, Ho-Won (2006), op cit, p. 169

complaints from the victims regarding the murders of their dearest. In the case of receiving First Information Report (FIR), the authorities have sidelined these complaints by referring the constitutional provision of establishment of a TRC, which doesn't have link to mention at the moment unless the Commission is in place. On the other hand, the practice of granting amnesty and reduction is also undermining the rights of the victims. These are the tools of injustice to the victims because such provisions largely ignore the rights of the victims to have justice.

Enforced disappearance is one of the most serious human rights violations, and extremely traumatic for family members of the victims. The criminalization of enforced disappearance and torture can be forward-looking steps that could bring perpetrators to justice. However, comprehensive laws on enforced disappearance and torture, which encompass relevant international human rights standards, are yet to be seen in Nepal. This also negatively counts the government's political will on ending impunity and ensuring accountability.

6.8 Democratic legislative process

Ensuring that the laws related to TRC and Disappearance Commission are adopted through regular democratic legislative processes is one of the major challenges at present. Adoption of such legislation should follow broad-based consultations and should meet Nepal's international human rights obligations. All elements of transitional justice including the truth, justice and reparation need to be addressed by the legislation. To combat the culture of impunity, it is essential that the legislation addresses past gross violation of international human rights and humanitarian law including crimes against humanity and that the Commission has necessary powers and mandates.

Establishment of rule of law

in a society is vital to ending impunity. Respect for the rule of law entails pursuing prosecutions and meting out punishment to persons who committed crimes and human rights violations. Ignoring the rule of law and fostering impunity would create a chained relation in society where the feudal character would have larger space to grow up further. In that case, it is always difficult to ensure that such crimes will not repeat in the future. The climate of uncertainty, in many cases, gains favourable conditions to widen itself in the society if there is absence of democracy and democratic legislative processes. Establishing the rule of law and ending impunity ensures respect for human rights leading to a free and fearless society only if democratic system and practices are upheld. Nepal, at this transitional stage, needs to address all the above challenges and open up an avenue for a just and lasting peace with full respect to the principles of human rights, democracy and the rule of law.

References

- Advocacy Forum and Human Rights Watch, 2008, *Waiting for Justice: Unpunished Crimes from Nepal's Armed Conflict*, United States of America, Human Rights Watch
- FORUM-ASIA, 2008, *2008 Report on the Performance and Establishment of*
- *National Human Rights Institutions in Asia*, Thailand: Asian Forum for Human Rights and Development
- FORUM-ASIA and INSEC, "Nepal: Formation of Commission on Disappeared Persons Likely to Institutionalise Impunity", *Press Statement*, 5 July 2007
- HREIB, 2003, *Transitional Justice Basics*, Thailand: Human Rights Education Institute of Burma
- INSEC, 1997, *Nepal Human Rights Yearbook 1997*, Kathmandu: Informal Sector Service Centre
- INSEC, 2008, *Nepal Human Rights Yearbook 2008*, Kathmandu: Informal Sector Service Centre
- Jeong, Ho-Won, 2006, *Peacebuilding in Postconflict Societies (Strategy and*

Process), New Delhi: Viva Books Private Limited

- Katherine Hooper, *The ending of impunity and the fight for justice for victims of human rights violations: a chasm too great to be crossed?*, Flinders University, South Australia
- Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak - Mission to Nepal (E/CN.4/2006/6/Add.5)
- Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin - Mission to Nepal (E/CN.4/2006/71/Add.2)
- Report of the Working Group on Enforced or Involuntary Disappearances - Mission to Nepal (E/CN.4/2005/65/Add.1)
- Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy (E/CN.4/2001/73/Add.2)
- Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir (E/CN.4/2001/9/Add.2)
- Report of the High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation in Nepal (A/HRC/7/68)
- Report of the High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation, in Nepal (A/HRC/4/97)
- Report of the Visit of the High Commissioner to Nepal (A/HRC/4/97/Add.1)
- Report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her Office, including technical cooperation, in Nepal (E/CN.4/2006/107)
- Report of the Secretary-General on the request of Nepal for United Nations assistance in support of its peace process (S/2008/454)
- *The Kathmandu Post*, 18 July 2007
- United Nations Set of Principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1) ■

The importance of Truth in times of Transition: Reflections for the Nepali case

ICTJ Nepal*

"Justice, peace and democracy are not mutually exclusive objectives but rather mutually enforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities."

- Report of the Secretary-General, The rule of law and transitional justice in conflict and post conflict societies¹

Introduction

Over the last two decades, the field of transitional justice has contributed significantly in accounting for past human rights abuses. Transitional justice refers to multiplicity of approaches to address past human rights abuses in societies transitioning from authoritarian rule to democracy or those emerging from conflicts, and has been variously employed in contexts as diverse as East Timor, Liberia, Colombia and Morocco. Its emergence can be attributed in part to the numerous transitions in Latin America that emphasized the need to uncover the truth about the nature and extent of violations that occurred during the authoritarian regimes, and partly to the increased realization that peace and justice were no longer mutually exclusive objectives.

Transitional justice is broadly premised on the principle that conflicts are based on retribution and the role of retribution is vengeance. In effect a model of pros-

ecution solely based on retribution will be unable to break the cycle of violence.² In order to break this cycle of violence, there is a need to 'transfer the responsibilities from apportioning blame and punishment from victims to public bodies acting according to the rule of law.'³ In other words, it is important to know the truth about violations of human rights and building a national consensus on the illegality is necessary to prevent their recurrence.⁴

Important goals of this approach includes the following: establish the truth, promote criminal accountability for serious crimes, develop the rule of law, provide reparation to victims, stress institutional reform and long term development, encourage reconciliation and finally facilitate public deliberation and debate. In doing so, it seeks to focus on long term reforms rather than particular events. In order to achieve the objectives stated above transitional justice utilizes, in some combination and dependant on the local context, truth seeking, prosecutions, institutional reforms, reparations and memorialization.

One of the most widely known and applied approaches of transitional justice is that of truth seeking. Increasingly, countries undergoing political transitions have established official truth seeking bodies to confront the legacy of past human rights abuses. These non-judicial bodies referred to as truth

commissions are also finding their way into numerous negotiated peace agreements, as a means to begin the process of accounting for the past.

Truth commissions have evolved in two distinct situations.

Given that truth commissions have been established in diverse context, there is no one size fits all formula that can be prescribed to form a truth commission. Each transition is unique and a truth commission should respond to the local demands of the context, culture, available resources, and history of the conflict. Nonetheless certain common characteristics must be mentioned.

When they were established in Latin American countries such as Argentina, Chile, and El Salvador, their primary purpose was to uncover and acknowledge the specific truth about the violations that had occurred. In the 1970s, these coun-

1. S/2004/616

2. Miriam J. Aukerman, "Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice", 15 *HHRJ* 60 (2002). See Carlos S. Nino, "The Duty To Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina", 100 *Yale L.J.* 2635 (1991).

3. Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* 11-12 (1998).

4. Paul Van Zyl, The Dilemmas of Transitional Justice: The case of South Africa's Truth & Reconciliation Commission, 52 *J. Int. Aff.* 647 (1999)

tries witnessed serious crimes such as large scale disappearances, around which very little was known either publicly or to the concerned victim's families. On the other hand, in countries such as Bosnia or South Africa, truth was not hidden but contested by the various ethnic or racial groups. In these contexts, truth commissions narrowed down the multiple versions of social truth, so that it became impossible to deny massive or gross human rights violations that were committed against certain ethnic or racial communities. Most significantly, truth commissions provided a platform for victims to come forward to share their stories, and recognized them as primary stakeholders in the process.

Given that truth commissions have been established in diverse context, there is no one size fits all formula that can be prescribed to form a truth commission. Each transition is unique and a truth commission should respond to the local demands of the context, culture, available resources, and history of the conflict. Nonetheless certain common characteristics must be mentioned. First, they are non judicial bodies with no powers to prosecute. Second, they are temporal bodies established usually for a period of one to two years. Third, they examine the root causes of the conflict, investigate and identify patterns of abuses. In South Africa, for instance, the Truth and Reconciliation Commission found that the structural inequalities of the apartheid era were a major reason for the pervading human rights violations. Fourth, truth commissions publish a report that outlines their findings and recommendations, sometimes running into thousands of pages. Finally, they make general and policy based recommendations with a view to reforming abusive institutions, providing reparations to victims, and/or prosecuting perpetrators.

The Justice vs. Truth Discussion

Countries which have undergone transitional justice processes had been involved in a recurrent discussion about the apparent mutually exclusive nature of truth seeking processes and justice (prosecutions). Non-judicial truth seeking mechanisms started in Latin America, generally followed or within a context of blanket amnesties for perpetrators of human rights violations. The words of a Guatemalan Ministry of Defense illustrate well this point: "We are fully support of a truth commission (...) Just like in Chile: truth but not trials"⁵

For civil society and human rights advocates, this type of statements reaffirmed their concerns of truth commissions being used to avoid justice. After almost 25 years since the first Truth Commission in Argentina, the mutually exclusive relationship between truth seeking mechanisms and criminal trials is not that evident. Even though more research and concrete studies are necessary, the experience shows that in many cases truth seeking mechanism had complement or triggered justice oriented processes. The reports of many commissions have been used to strength cases against perpetrators. In Peru a special investigation unit was created within the TRC to investigate 73 cases of human rights violations (among them massacres, disappearances and extra judicial killings) in which the TRC had information of clear individual responsibility. When the Commission finalized its mandate, the evidence was submitted to the Public Prosecutor Office to open the cases. Further, information gathered by the commission has been used in the current trial of former Peruvian President Alberto Fujimori for crimes against humanity during his mandate. In Chile, the Truth Commission operated within an already passed amnesty. However, the Commission was able to estab-

lish individual responsibility in a number of cases. When the report of the Commission was released, the newly democratically elected president submitted the report to the Supreme Court with clear instructions to use the report to expedite pending cases in the court as well as to open new cases in which information was collected and provided by the commission. Furthermore, the detention of former Chilean dictator Augusto Pinochet in Chile, relied heavily on information contained in the Chilean Truth Commission Report.

Another discussion regarding the relationship between truth and justice has to do with the type of interaction that a tribunal and a TRC might have in case of operating during the same period of time. According to some scholars, "it was always undesirable to have truth commissions and criminal courts operating concurrently because of the complications it could create in the conduct of investigations, the use of witness statements, and the integrity of trial proceedings"⁶. The experience has shown that even though the process can become challenging, clear coordination and planning will solve these problems. In Sierra Leone, a Truth and Reconciliation Commission and a Special Court were functioning concurrently. The lack of prosecutions after the conditional amnesty experiment during the South African TRC- in which perpetrators, who were not granted amnesties in exchange for their testimonies were prosecuted- showed Sierra Leoneans that there was a need to take other measures to ensure accountability and punishment for human rights violations occurred during the SL conflict. Even though in the beginning there were some difficulties, especially in relation to perpetrators testimonies. Both bodies eventually developed clear protocols and coordination that allowed the advancement of justice and truth

5. Hayner, Priscilla. "Unspeakable Truths: Facing the Challenges of Truth Commissions" Routledge New York and London, 2002. Page 86

6. Henkin, Alice. Ed. "The Legacy of Abuse; Confronting Past, Facing the Future" Aspen Institute, 2002. Page 6.

in the country.

In addition to collect information and preserve evidence that might be later used in criminal trials. Truth Commissions can help to advance the agenda of justice in areas that criminal prosecutions cannot. Truth Commissions investigate the role of different institutions during the conflict period. In that sense, TC analyzes the role of the judicial system, how it responded to the pressure of people in position of authorities to overlook violations, how independent the judicial system was during the conflict, how corrupted, etc. TC can also provide with specific recommendations on judicial reforms and the reform of the criminal justice system to strengthen and promote the respect for human rights.

Transitions are complex processes that need multi layered responses. Truth and Justice are not exclusive mechanisms, but responses to the different needs and problematics that emerge during the aftermath of a conflict or periods of massive human rights violations. Criminal justice helps to respond to the need of accountability, deterrence and guarantees of non-repetition. However, in cases of massive violations of human rights, criminal trials will only include a limited number of perpetrators and do not look into specific needs of victims and communities, the factors that were at the origin of the violence, the patterns of the violence as well as institutional responsibilities.

Examples of how different countries have dealt with truth seeking mechanisms

Prior international experience confirms that the work of truth commission make a partial but vital contribution to dealing with a country's legacy of past human rights

abuse. By establishing the truth of prior gross violations of human rights, truth commissions lay the foundation for all other forms of transitional justice, such as reparations, institutional reform and criminal justice. Each of the cases discussed below demonstrate the relevance of truth commissions to other transitional justice endeavors but also highlight the benefits and challenges of truth commissions operating in circumstances that are also relevant to Nepal.

Truth commissions came to prominence in Latin America in the 1980s. In Argentina, the National Commission on the Disappearance of Persons (CONADEP) was established in 1983 to investigate the fate of disappeared persons and other human rights violations between 1976 and 1983⁷. This meticulous process documented approximately 9,000 cases of disappeared persons, but noted that the total number of disappeared was likely higher. The work of the Commission took place behind closed doors with no support or cooperation from the government or army, but enabled the families of victims to uncover the *specific truth* about their loved ones through the work of human rights organizations and victim groups. CONADEP published its findings in its report *Nunca Mas* (Never Again), starting a long history of transitional justice in Argentina that extends to prosecutions ongoing today⁸. The case of Argentina reaffirms that truth is the foundation of justice and highlights the vital importance of civil society in transitional justice activities.

The most popular conception of truth commissions remains the South African Truth and Reconciliation Commission (TRC)⁹. The South African TRC took statements from 24,000 victims of human rights abuse through spe-

cially trained statement takers and described their findings in the context of racial and economic discrimination inherent in the criminal policy of apartheid. The TRC also named individual and institutional perpetrators of human rights violations, subject to rigorous due process requirements. The South African TRC is also noticeable for its provision of an amnesty for perpetrators of human rights abuses in exchange for "full disclosure of all the relevant facts relating to acts associated with a political objective."¹⁰ The TRC received 7,500 applications, of which only 10% were granted amnesty. It is arguable that international law has since evolved to the point that such amnesties for gross violations of human rights are now impermissible. In any event, it is regrettably the case that few prosecutions took place against those perpetrators, who failed to apply for or were denied amnesty.

In addition, this was the first commission to use public hearings as a means of truth telling. Approximately 2,000 victims participated in public hearings in locations throughout the country. Further hearings took place to establish the *institutional* effects of apartheid on various sectors of life in South Africa, such as the media, legal profession, and health and educational systems. The work of the TRC was also covered extensively in the media, which raised public awareness and debate about its hearings and findings. This extensive awareness contributed to the development of a *social* truth regarding victims and past human rights abuse in particular apartheid and to narrowing the range of permissible lies and denials regarding the past.

Finally, the TRC made a series of recommendations in light of its findings in its Final report. Its

7. See generally J. Malamud-Goti, "Punishing Human Rights Abuses in Fledgling Democracies: The Case of Argentina", in N. Roht-Arriaza, ed. *Impunity and Human Rights in International Law and Practice*, New York, Oxford University Press, 1995

8. C. Nino, "The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina." 1991, *Yale Law Journal*, pg. 2618

9. See generally P. van Zyl, *Unfinished Business: The Truth and Reconciliation Commission's Contribution to Justice in Post-Apartheid South Africa* in M. Cherif Bassiouni (ed) *Post-Conflict Justice* (New York: Transnational Publishers, 2002), pp 745-760

10. Promotion of National Unity and Reconciliation Act, No. 34 of 1995, available at <http://www.doj.gov.za/trc/legal/act9534.htm> (Last visited 17-07-08)

recommendations related *inter alia* to the media, health sector, prisons, and security forces and urged the provision of financial and symbolic reparations. Regrettably, the government of South Africa has failed to provide any reparations to date.

The South African example demonstrates the power of truth commissions, in particular through public hearings, to acknowledge and affirm the experiences of victims of human rights abuse and to raise awareness, debate and participation throughout a country in dealing

for reparations and institutional reform and providing the means for justice and prosecutorial initiatives from its investigations. This link created a distinct methodology and a special unit for investigations¹¹. The CVR in Peru drew from a rich and sophisticated civil society in its staff and those who participated, which enabled the CVR to work with a detailed and precise methodology in its investigations.

The CVR admittedly experienced early credibility challenges due to the direct appointment of its Commissioners by the President, rather than on the basis of public participation and nomination. The CVR overcame these challenges through the intensity and extensiveness of its investigations. In addition, the effect of its findings significantly altered public awareness of the perceived level of violations that occurred in Peru. Prior estimates from human rights organizations indicated approximately 35,000 deaths due to conflict. The CVR estimated that the figure was closer to 70,000, doubling the extent of recorded violence in Peru. The CVR was also instrumental in establishing the particular and disproportionate impact of violence on rural indigenous groups, a fact hitherto understated by human rights groups and civil society.

The Peruvian example is particularly relevant to Nepal because it demonstrates the benefit of a truth commission operating where the majority of the human rights violations take place outside the capital city against minority groups and where there has been limited public awareness and scrutiny of these events. This case also serves to emphasize the need for a broad and deep consultation process throughout the operation of a truth commission, but particularly in the initial appointment of its Commissioners.

The prominent example of the Commission for Reception, Truth and Reconciliation for East

Timor (CAVR) is relevant to Nepal not only as an Asian example of a truth commission, but also as it represents significant best practice in its selection process and criteria for Commissioners and encouraging and enhancing public participation in the truth seeking and truth telling processes.

The CAVR was formed to establish the truth regarding past human rights violations in East Timor, promote reconciliation and the reintegration and rehabilitation of those who caused harm to their communities through minor offenses. It also referred cases of serious crimes to a Serious Crimes prosecutions unit. The CAVR is distinctive because of the detailed criteria for its Commissioners, 30% of whom were women. In addition, a Selection Panel drew the Commissioners after broad consultation and nomination primarily from the ordinary people of East Timor affected by the armed conflict. Broad consultation and public participation in the selection of Commissioners helped ensure public legitimacy and support for the truth commission.

The CAVR is distinctive because it seeks to move beyond the South African model in a number of respects. First, although it includes a form of amnesty provision, this excludes a category of serious crimes. Second, the process was not strictly an amnesty but rather an indigenous, community-based process of agreement, which required perpetrators of non-serious crimes to complete an act of community service prior to extinguishing their liability. This advancement represents a positive step that perpetrators can undertake to further reconciliation. Third, the CAVR had particular regard to the affect of conflict and sexual violence on women and had thematic public hearings on this topic. It was first, envisaged that these hearings would be closed. However, the affected women, particularly so-called "comfort women" requested public hear-

The prominent example of the Commission for Reception, Truth and Reconciliation for East Timor (CAVR) is relevant to Nepal not only as an Asian example of a truth commission, but also as it represents significant best practice in its selection process and criteria for Commissioners and encouraging and enhancing public participation in the truth seeking and truth telling processes.

with the past. South Africa also serves as a cautionary tale against an expectation on truth commissions to achieve full justice for victims and society. We must recognize that commissions are merely one constituent element of transitional justice.

In Peru, the Comisión de la Verdad y Reconciliación (CVR) included on its mandate determining the conditions that gave rise to violence, establishing collective violations suffered by indigenous communities, issuing recommendations

11. E. Gonzalez Cueva, "The Contribution of the Peruvian Truth and Reconciliation Commission to Prosecutions." (2004) *Criminal Law Forum*

ings, so that they could clarify the particular victimization that they suffered to local communities, where they had previously faced stigmatization for sexual offences committed against them.

In addition and in contrast to the above examples, the CAVR operated in circumstances where civil society was minimal and resources and infrastructure were extremely weak, but the Commission nonetheless engaged in a process and produced a report that have been very well received in Timor.

Considering the distinct experiences of these examples together, core characteristics emerge. Each commission was effective in large part due to extensive consultation and participation from civil society and the people of the country in question. The appointment of commissioners, who are respected across the divides of local communities, is essential to the effective operation of any truth commission process. The case of South Africa, in providing an amnesty for gross violations of human rights, is an exception rather than the rule in the cases examined. Finally, each truth commission has been uniquely tailored to respond to the needs and expectations of victims and other stakeholders in each country. We hope and expect that any truth commission project in Nepal would similarly reflect the views and expectations of the victims of conflict in Nepal.

Promise of transitional justice

The Comprehensive Peace Accord (CPA) of November 21, 2006 ended a decade of armed conflict in Nepal between the State security forces and CPN-M forces. The CPA envisages a number of transitional justice mechanisms:

- ▶ A Truth and Reconciliation Commission (TRC);
- ▶ A High-Level Inquiry Commission on Disappeared Citizens (Disappearances Commission); and
- ▶ Provisions for reparations for victims of the conflict

While there have been some discussions and negotiations regarding these mechanisms, no effective implementation has yet occurred. Judicial pressure has ensured that disappearances remain a key issue in Nepal's transitional justice efforts. On 1 June 2007, a landmark Supreme Court judgment recommended that Parliament establish a commission to investigate enforced disappearances in line with international law and standards. In response, the Government of Nepal established a High Level Commission of Inquiry on Disappeared Persons (Commission on Disappeared Persons), to investigate enforced disappearances committed in Nepal between 13 February 1996 and 21 November 2006. However, the Commission on Disappeared Persons was established under the same law that the Supreme Court had already found to fall short of international standards.

The process of setting up the Commission involved minimal consultation with relatives of victims and civil society. Though Commissioners were appointed, the Disappearances Commission never started its work. It remained marred in controversy and has *de facto* ceased to operate. Legislative efforts have also been encouraging but ultimately failed to bear fruit. In November 2007, the Parliament passed a bill that criminalized abduction, removing the chapter on disappearance. Since then various government authorities have prepared different draft bills, none of which have reached the public domain, let alone been enacted.

Transitional justice proposals in Nepal assume constitutional significance and weight in light of the Interim Constitution of Nepal 2007, which provides for the provision of relief to the families of the victims, on the basis of the report of the Investigation Commission constituted to investigate the cases of persons, who were the subject of enforced disappearance during the course of the conflict. In addition, the Interim Constitution further

guarantees to constitute a high-level Truth and Reconciliation Commission to investigate the facts about those persons involved in serious violations of human rights and crimes against humanity committed during the course of conflict, and to create an atmosphere of reconciliation in the society.

In the recent past, however, transitional justice discussions in Nepal have focused on truth commissions. A draft Truth and Reconciliation Commission Bill was published by the government in July 2007. The draft Bill provided for the establishment of a Truth and Reconciliation Commission to investigate 'persons involved in gross violations of human rights and crimes against humanity during the course of armed conflict'. The Bill has been subject to significant criticism from local civil society groups and international organizations. In particular, the Bill appears to provide for an amnesty for a variety of crimes under international law, most troublingly enforced disappearance. The government has not completely addressed these concerns in the subsequent drafts of the bill, though certain crimes are now excluded from the amnesty provision. Amnesty remains a contentious issue for victim groups in Nepal. It is advisable that any amnesty provision will be the result of broad and deep consultation with these victims and other relevant stakeholders.

Finally, the 21-point agreement signed by the then ruling Seven-Party Alliance to amend the Constitution and take forward the peace process on June 25, 2008 reaffirms the commitment of the political parties to the establishment of several commissions, including a National Peace and Rehabilitation Commission, a Truth and Reconciliation Commission, a High-Level Commission for Restructuring the State, a Commission to Investigate the Disappeared, and a Commission on Land Reform within one month.

■

What should be done to end impunity in the country ?

Krishna Pahadi, Founding President, Human Rights and Peace Society

There is a need of wider political commitment to end the culture of impunity. Action should be ensured against all the persons involved in human rights violations in the past, so that other forms of violations are not invited in the future. All the agreements reached in the past in course of peace process should be implemented thoroughly. Any person involved in human rights violations should be punished at any cost.

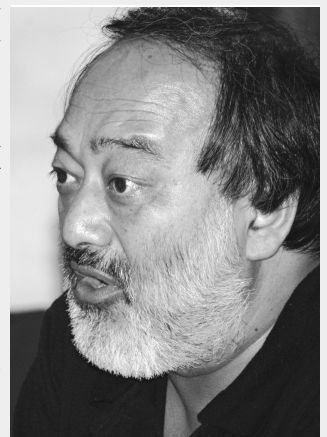
As the government always tries to be autocratic, civil society should check its autocratic activities, and pressurize it to ensure the rule of law. At present, there is a need of civic movement to end impunity and create respect for human rights and rule of law. There are some indications that the present government might sideline the issue of impunity, which is not a good sign for human rights. Rather than ratifying the Rome Statute of the International Criminal Court, and forming the Truth and Reconciliation Commission, the government has hinted on giving impunity to the perpetrators based on political bargaining. This calls the need for a civil movement to end impunity and establish the culture of human rights in the society.



Prof. Kapil Shrestha, Former Commissioner, National Human Rights Commission

The main reason for the rise in impunity is the lack of commitment from the political parties. They have only made opportunist commitment but lack courage and commitment in the real sense to end the culture of impunity. Unless and until political parties realize that the culture of impunity must be stopped and they are able to stop it, the trend will continue. Since, the political parties have just been making commitments in the past but have not made any efforts to transform it into reality; it seems that their commitments are not trustworthy.

There is a need of another movement to compel the political parties to translate their commitments into reality. Only such movement will end impunity and help to create accountable society. Civil society, human rights organizations and leaders, who are against the impunity, should join hands together and start a movement against impunity and in favour of human rights. The reinstated House of Representatives had ordered the government to ratify the Rome Statute of the ICC but the political parties failed to abide by the house order not because they did not know the importance of ICC but just because they have the culture of hypocrisy. Despite various movements conducted by the civil society, the government and the political parties have always turned deaf-ear to the issue of ending impunity and respecting human rights despite their commitments to do so. Therefore, there is a need of decisive movement against such tendency.



Padma Ratna Tuladhar, Senior Human Rights Activist

The government is not serious towards ending impunity from the country. All the governments formed in the past after the success of historic movements failed to take the issue seriously. Though the human rights community and the civil society have been taking the issue seriously, and organizing various programmes for ending it; the governments continue to turn deaf-ear over the issue. I am confused why the state is not taking the issue raised by the human rights community seriously? All the political parties have been time and again expressing commitments towards human rights and ending the culture of impunity, but they lack strong willpower in this regard. Political parties, who played leading role for the historic change, have also been neglecting the issue of human rights and ending the culture of impunity. Human rights community and civil society must raise the issue continuously and pressurize the political parties to abide by their commitments of respecting human rights and ending the culture of impunity.



Laxman Prasad Aryal, Coordinator, Interim Constitution Drafting Committee

There are two main reasons for promoting impunity in the country. The first reason is lack of laws to take action against the perpetrators, and second is the failure at the part of the state to strictly enforce law and order. Nepal lacks retrospective law to make perpetrators accountable and bring them to justice for the crimes they had committed in the past. Therefore, all the perpetrators involved in human rights violations and committing crime against humanity have been receiving amnesty. As per the international practice, action can be taken in the acts related to war crime and genocide committed in the past, but we are practicing the general criminal law, which prohibits retrospective action. Failure at the part of the state to form retrospective law is also equally responsible to promote impunity. Therefore, while drafting the Interim Constitution, we incorporated a provision of taking action against the perpetrators involved in grave human rights violations in the past. Sadly, the provision was removed by the political parties. There should be clear demarcation between general incidents, which does not require retrospective law and incidents of grave human rights violations, which requires the need of enforcing retrospective law.



Since the law enforcing mechanisms of the country are weak, there is a tendency of not abiding by the existing laws. All should realize that abiding by the laws is their obligation. As there is a tendency of breaching law from the very top level, the tendency must be stopped, and all should abide by the rule of law. Thirdly, there are no proper mechanisms to check impunity in the country. The country lacks special tribunals to conduct hearings in the issues of impunity and human rights violations. The formal process of seeking justice is lengthy. Similarly, the role of civil society to combat impunity is not as effective as expected. Though the role played by civil society in various political movements is laudable, civil society failed to take campaign against impunity on a regular basis. Organizing campaign against impunity as a regular campaign and making people aware about it is also necessary to discourage such tendency.

In conclusion, retrospective law should be promulgated to take action in the cases of grave human rights violations. Similarly, existing laws relating to impunity should be strictly enforced and special mechanisms should be developed to examine the cases related to providing justice to the victims, and civil society should continue the movement against impunity to end the culture of impunity from the country.

The Need for Truth in Nepal

Proposals for a truth commission in Nepal respond in part to the desire of the Nepali people for justice after a war in which its being claimed that at least 13,000 people died (there are no actual statistics, and the numbers might be higher); during the conflict thousands of civilians were killed, tortured, people were disappeared and abducted, women became victims of sexual violence by security forces and Maoists alike. The need for truth in Nepal should not be limited to fulfill the commitments of the political parties in the CPA but to deal with the root causes of conflict in the country and to understand what happened during the conflict, how did it happen and how can Nepalese prevent a reoccurrence of a situation of widespread violence such as one the country just experienced. A holistic understanding of the past legacy of human rights violations is also necessary as the basis for any further transitional justice endeavors. This reflects the weight of comparative experience discussed above.

Thus, a truth commission is important for Nepal not only as a process to satisfy the conditions of political settlement following the conflict but also as means to establish an authoritative truth regarding individual victims as well as broader social truths regarding the conflict in Nepal. In any post-conflict society, a clear understanding of past patterns of violence, including identification of victims and the root causes of violence is necessary to establish the parameters of reparations schemes, the appropriate avenue for institutional reform, and identification of individual responsibility for potential prosecution. A truth commission is also a process with the potential to consolidate mutual acceptance and tolerance in a socially and politically torn nation, such as Nepal, with long standing distrust and hatred in certain communities.

No two commissions have shared an identical design or mandate. A truth commission for Nepal must be tailored to the particular

circumstances and challenges facing Nepal today and at the time of its establishment. It is important these needs and challenges be discerned as a result of widespread consultation and discussion, reflecting the diversity of experience and views in Nepal. For instance, a truth commission is made more effective when it provides a basis for victims to feel sufficiently secure to give testimony and statements to the commissions. This could be achieved through a witness protection program and would respond to security concerns expressed by victims to date when they have sought to pursue justice. Additionally, the timing of the truth commission should be such that victims and others feel adequately secure to come forward to engage with the commission. An environment of general insecurity, which is replete with fear and threats of intimidation or harassment, may prove to be an obstacle in achieving the aims and objectives of a truth commission.

In Nepali society where it appears that many victims of the conflict are who have also suffered systematic discrimination, a truth commission would also give them space to express their expectations and needs through investigations, statement taking, making findings and archiving. In addition, as discussed above, many truth commissions offer victims a public platform to share their experience and affirm not only their victim-hood but also their agency through public hearings. Such hearings can also be organized by theme to ensure that specific issues are emphasized and brought to the attention of Nepali society.

Similarly, a truth commission in Nepal might recognize not only the harm suffered by victims through human rights violations but also consequences of those violations in the daily lives of victims. In this regard, prior commissions have recommended reparations to victims including the provision of medical care, including mental health care and long-term financial assistance,

akin to a pension. In making these recommendations, it is essential that a truth commission be designed to coordinate with freestanding programs of reparations and relief, discussions for which are underway in Nepal at present. Such reparations recommendations should again identify and be responsive to the needs of particular victims that have given statements to the Commission.

Moreover, there are discussions about the formation of a Disappearance Commission in Nepal that would be mandated to investigate and make known the whereabouts of persons who disappeared during the conflict. If the Commission of Inquiry and the TRC are formed in Nepal, it would be the first country in which these two bodies would operate simultaneously. In Nepal, the current draft bills of both the Disappearances Commission and TRC grant these bodies powers, which do not include the power to prosecute. As the process moves forward, it is important to understand the challenges that would emerge when two non judicial bodies/commissions are formed. Therefore, it becomes critical at this stage to think carefully through the linkages between the two commissions that are sought to be established in Nepal. At the outset it would be helpful to clarify the mandate, role and potential overlaps between the two bodies so that they complement each other.

Finally, it must be underscored that truth commissions are one of the numerous ways to achieve accountability for the past and address the needs of the victims/survivors of the conflict. While truth forms the basis of other transitional justice interventions, it is important to recognize that it is in conjunction with other measures such as reparations, prosecutions and institutional reforms that a truth commission will be most effective in Nepal. ■

**This article is the result of a collaborative effort of the ICTJ Nepal Team: Carla Fajardo, Warisha Farasat, James Gallen and Prabindra Shakya*

Addressing Disappearances: Supreme Court Ruling, Government's Failure and Victims' Expectations



► Govinda Sharma 'Bandi' ◀

Introduction

Enforced disappearance is a complex crime involving multiple human rights violations, including the right to personal liberty and security, the right to recognition as a person before the law, the right to an effective remedy, the right not to be subjected to torture or other cruel, inhuman or degrading treatment, and a grave threat to or violation of the right to life.

Nepal stands with very bad legacy of enforced disappearance committed during the decade long internal armed conflict. The peace negotiator, while signing of the Comprehensive Peace Agreement (CPA) in November 2007, agreed to form a Commission on Disappearance, make public the name of the disappeared persons, and provide "compensation" to the victims¹. In response to a number of Habeas Corpus and Mandamus writ petitions, the Supreme Court issued a directive order to the Government of Nepal on 1 June 2006 to address the cases of Enforced Disappearance by criminalizing the act of disappearance and forming a Commission of Inquiry in line with the international standards, but the government appears reluctant to fol-

low the court order.

This article aims to critically examine the phenomenon of disappearance and possible ways to address it. The first part summarizes the historical and legal context of disappearance that includes background of disappearance, imposition of state of emergency and introduction of counter insurgency legislation. The second part describes various efforts that have been made to address the problem, which includes administrative efforts, law drafting, formation of high level commission and Supreme Court's contribution. The third part discusses the victims' expectation and governments' failure to meet the expectation.

I. Background

A. Conflict and causes

The practice of enforced disappearance is not new to Nepal. It was firstly appeared in the Panchayat era where several cases of enforced disappearances were reported in mid-1985 in the context of a civil disobedience campaign against the government and a series of bomb explosions in the capital². The United Nations Working Group on Enforced or Involuntary Disappearance retains four unclarified cases from that period. Laxmi

Narayan Jha, Iswar Lama, Padam Lama, Maheswar Chaulagain and Saket Mishra are some of the examples who were disappeared from police custody during the Panchayat regime. However, the systematic

Amnesty International's research reveals that the most commonly reported pattern was that people suspected of CPN-M involvement were arrested by unidentified security forces personnel, often dressed in civilian clothes, and were taken to army barracks, police stations or APF camps, where they were held incommunicado in unacknowledged detention.

practice of disappearance emerged immediately after the declaration of 'people's war' by the CPN-M³.

The "people's war" declared on 13 February 1996 aimed to

1. The article 5.2.3 provides that both sides also agree to make public within 60 days of signing of the agreement the real name, caste and address of the people made 'disappeared' or killed during the conflict and also inform the family members about it. For details see http://www.sambidhan.org/peace%20agreement_en/Comprehensive%20Peace%20Agreement%20held%20between%20Government%20of%20Nepal.pdf (visited 3 July 2008)

2. For details: AI Index: ASA 31/05/2000 see www.amnesty.org (visited 3 July 2008)

3. The "people's war" declared on 13th February 1996, aimed to "bring an end to the rule of vengeful regime and to establish a people's New Democracy" and constitutes a "historical revolt against feudalism, imperialism and so-called reformists." (For more information see Bulletin No. 1, May 1996, published by the Central Publicity Division of the CPN (Maoist).)

"bring an end to the rule of vengeful regime and establish a people's New Democracy" and constituted a "historical revolt against feudalism, imperialism and so-called reformists." The *Samukta Jana Morcha* (SMJ) announced that it was joining the "people's war" because the government had failed to respond 40-point memorandum presented by the party to the then Prime Minister Sher Bahadur Deuba on 4 February 1996. The demands include abolition of royal privileges, promulgation of a republican constitution, abrogation of the Tanakpur treaty with India on the distribution of water and electricity and the delineation of the border between the two countries among others. Prior to the formal declaration of the "people's war", a police operation was launched referred to as "Operation Romeo" in Rolpa District in November-December 1995. During the operation, there were widespread reports of arbitrary arrests and detention. Significant numbers of fake encounters were recorded; however, no cases of disappearance were reported during the Romeo Operation.

On 13 February 1996, the CPN-M waged "people's war" to establish a "new democracy" in Nepal. In response, the government launched numbers of security operations, declared state of emergency, introduced new anti-terrorist legislation and deployed the then Royal Nepalese Army, but could not improve the security situation. Instead, it intensified the conflict resulting in worsened form of human rights violation.

B. State of Emergency and Counter Insurgency legislation

As part of its counter-insurgency policy, the government of Nepal imposed state of emer-

gency, and introduced several draconian laws empowering security agencies to commit human rights abuses. State of emergency was declared, for the first time, on 26 November 2001, following the massive attack on numbers of security posts by the Maoist party. The emergency was extended twice: first time through the approval of the House of Representatives⁴ and by dissolving the Parliament and circumventing the constitutional process on second time on 27 May 2002. The emergency was lifted on 27 August 2002. The emergency was again imposed by the then King Gyanendra, when he took over the executive power on 1 February 2005. The imposition of state of emergency, deployment of the military and establishment of a unified command virtually collapsed the civilian system of government. The government forces resorted to large-scale arbitrary arrests, detentions, "disappearances", extra judicial executions and torture including rape⁵.

The proclamation of the State of Emergency suspended many articles of fundamental rights apart from Habeas Corpus. Under Article 4 of the *International Covenant on Civil and Political Rights, 1966*, to which Nepal is a state party, a temporary suspension of human rights obligations is permitted if: "there is a public emergency which threatens the life of the nation". Further, the measures taken in derogation must be "to the extent strictly required by the exigencies of the situation". However, while issuing the emergency orders, no justification was given as to the reasons why these rights were to be derogated. For example, the suspension of Article 23 of the 1990's Constitution (the right to constitutional remedy) had no bearing on the situation with the Maoists. It

seems that there was not any objective assessment so as to what rights to be derogated. Even the later debate on the extension of the emergency does not seem to have been focused and based on the objective grounds.

The Human Rights Committee notes that with concern that the state party, in seeking *inter alia* to give effect to its obligations to combat terrorist activities pursuant to Resolution 1373 of the Security Council, is considering the adoption of legislative measures, which may have potentially far-reaching effects on rights guaranteed in the Covenant, and which, in the State Party's view, may require derogations from human rights obligations. The State Party should ensure that any measures it undertakes in this regard are in full compliance with the provisions of the Covenant, including, when applicable, the provisions on derogation contained in article 4 of the Covenant⁶. However, while making decision to impose emergency, no such measures had been adopted, this apparently resulted in massive human rights violation including a terrible picture of disappearance. It, therefore, can be argued that imposition of an emergency without adopting adequate measure to protect non-derogable rights is largely responsible for disappearance in Nepal.

Furthermore, the then king also issued an ordinance "Terrorist and Disruptive Activities (Prevention and Control) Ordinance 2001" (TADO), three days after the declaration of a state of emergency. The government further declared the CPN-M and its sister organizations as "terrorist organization" under the newly introduced TADO. In March 2002, the TADO was approved by

4. Almost all political parties supported the declaration of the state of emergency and approved it from the parliament for next three month on 22 February 2002.

5. On May 22, 2002, Prime Minister Sher Bahadur Deuba dissolved the House of Representatives when almost all political party including his party, the Nepali Congress (NC), disagreed with him on the need to extend the state of emergency.

6. Amnesty International. Nepal Fear for safety Fear of disappearance. Amnesty International, London, UK; <http://www.amnesty.org/en/library/asset/ASA31/155/2004/en/dom-ASA311552004en.pdf> (Accessed July 3 2008.).

Parliament and subsequently became the "Terrorist and Disruptive Activities (Control and Punishment) Act, 2002". Its duration was limited to a two-year period (as opposed to the government's proposal that it be effective until repeal) in response to opposition resistance. On 13 October 2004, HMG Nepal promulgated a more stringent version of Terrorist and Disruptive (Control and Punishment) Ordinance (TADO) 2004, which gave security forces the power to arrest persons without an arrest warrant. Also, the security forces can detain suspects for up to one year in a place "suitable for human being" in preventive detention, without scrutiny by a court. This has increased the likelihood of disappearances of people who opposed the government⁷. TADO gives far-reaching and unrestricted powers to the security forces in dealing with anyone deemed to be a terrorist, and provides immunity from prosecution for "any act or work performed or attempted to be performed in good faith while undertaking their duties." Such a broad grant of immunity has fostered a climate of impunity among the Nepali security forces, in clear violation of Nepal's international obligation.

B. Patterns: Widespread and Systematic

Throughout the period of the counter insurgency operation, the government security forces used various methods to suppress the rebels and disappearance was one of them. The idea of the government and security agencies to seek military solution to the conflict is primarily responsible for enforced disappearance. This phenomenon

occurs for various reasons, including collapse of civil system of government, weak intelligence report, lack of trust of the common people to the security agencies, fear of reprisal, weak administration of justice, ineffectual reporting channels, institutionalized systems of impunity, limited intervention from civil society and little or no international intervention.

Amnesty International's research reveals that the most commonly reported pattern was that people suspected of CPN-M involvement were arrested by unidentified security forces personnel, often dressed in civilian clothes, and were taken to army barracks, police stations or APF camps, where they were held incommunicado in unacknowledged detention. Many detainees held in army custody report being kept hooded throughout their detention, being subjected to torture, and being threatened not to speak about their detention after release.⁸

My constant work on enforced disappearance suggests that there was a clear plan and policy to disappear people involved in Maoist insurgency. While working as a member of the Supreme Court formed Detainees Investigation Court Task Force (DITF)⁹, some senior security officials told me that the government security forces were instructed by the superior authority to kill anyone if s/he belonged to CPN-M; however, they refused to record such statement officially. After having a careful look at the patterns and method of arrest and detention, number of disappeared people suggest that enforced disappearance has been practiced as a part of counter insurgency policy and in

some cases it was also targeted to some particular community such as *Tharus* from Bardiya district and *Magar, Gurung* from mid-western Hills.

The OHCHR has carried out thorough investigation on allegation of disappearance. In its report, widely known as the "Bhairabnath Report", brings those facts which essentially establish the widespread and systematic patterns which may constitute crime against humanity¹⁰. However, the OHCHR has substantially failed to analyze whether the enforced disappearance in Nepal constitute crime against humanity or not. Though the OHCHR report has brought very important facts and analyzed patterns of enforced disappearance, its failure to analyze legal insinuation apparently puts it in a questionable position. Some experts involved in the investigation and report writing are of the opinion that the objective of the investigation was to bring facts out not to indict people. However, this argument seems pathetic in terms of satisfying the question raised.

In this connection, the report of the DITF is pretty much clear. It concludes that there are ample evidences, reasons and grounds of systematic and widespread pattern of disappearance which may constitute crime against humanity. It is hard to determine as how many people have been disappeared. The Society of Victims' Family claims that the whereabouts of more than 3,000 disappeared people is still unknown, where as various human rights organizations claim that over 1,000 documented cases of disappeared are yet to be resolved¹¹. Informal Sector Service

7. U.N. Human Rights Committee, Concluding Observations of the Human Rights Committee on the Fifth Periodic Report Submitted by the United Kingdom of Great Britain and Northern Ireland, CCPR/CO/73/UK, November 2001.

8. For details see page 38, Alternative report to second, Third and Fourth Periodic (Combined) State Report of Nepal

9. Nepal: Escalating disappearance amid a culture of impunity, AI Index: ASA 31/155/2004, for details see www.amnesty.org (visited 3 July 2008)

10. *Infra* note 17

11. The OHCHR report concludes that the pattern of RNA activity in the Kathmandu Valley during this period of escalating violence and violations of international humanitarian and human rights law demonstrates a concerted RNA operation to eliminate the CPN-M operational capacity in Kathmandu. This pattern establishes the systematic practice of enforced disappearance which might constitute crime against humanity. For details see www.nepal.ohchr.org (visited 3 July 2008)

Center (INSEC) alone, has documented 933 cases of enforced disappearance, 828 from government security forces and 105 from CPN-M¹². According to the record maintained at the National Human Rights Commission (NHRC), about 2028 complaints of enforced disappearance have been registered between May 2000 and 13 January 2007. Among them over 600 of these cases remain unsolved¹³. The analysis of the documented cases of enforced disappearance suggests that the biggest number of reported disappearance (354+65=419) occurred during Sher Bahadur Deuwa led government. The second highest record can be found during the premiership of Surya Bahadur Thapa (189+4=193). The third one is the period of Lokendra Bahadur Chand (83). Outgoing Prime Minister Girija Prasad Koirala holds fourth position with 36 (18+18) cases of disappearance during his tenure, whereas Krishna Prasad Bhattarai holds the last position with smaller number (6) of disappearances.

Similarly, Maoist and its PLA are also equally responsible for enforced disappearance. The National Human Rights Commission (NHRC) has recorded 266 unresolved complaints against Maoist. As most of the support mechanisms including the UN Working Group on Enforced and Involuntary Disappearance do not entertain their jurisdiction over an act committed by the non-state actor, it is very hard to find out the numbers from Maoist side. NHRC could have established a channel of communication with Maoist thereby documenting the cases of disappearance/abduction by Maoist. However, it is frustrating that the NHRC has not taken any such

action so far.

II. Efforts to Address the Problem

A. Administrative Efforts

The first effort to find out the whereabouts of disappeared persons was started from 25 May 2005 with formation of a commission to find the whereabouts of disappeared people under the chairmanship of Joint Secretary at the Ministry of Home Affairs. The commission was mandated to investigate the case of the disappeared persons and to prepare a report describing their status thereby recommending necessary measures. Out of 776 complaints it traced out, the status of 174 was made public. This committee was an administrative committee and its report is primarily based on the official record of the various government agencies. Hence, it virtually failed to investigate the cases of disappearance.

B. The CPA and Political Agreements

The CPA and the Interim Constitution 2007 included the provision to investigate the serious violation of human rights and crime against humanity committed during the conflict period including the act of enforced disappearance. The CPA directs both parties to take strong measures to address issues related to disappearances, reaffirming commitments made in previous agreements. These included making public the status of people in their captivity and releasing them all within 15 days, and to make public within 60 days names of those disappeared or killed during the conflict and inform the family members. In addition, the 8 November agreement included a provision to "form a high-level commission to investigate and make public the

whereabouts of the citizens stated to have been disappeared by the state and the Maoists in the past". Article 33 (p) of the Interim Constitution provides that 'on the basis of the report of the Committee formed to investigate the disappeared people, the family of the victim will be provided relief'. Furthermore, Article 33 (s) provides "to constitute a high-level Truth and Reconciliation Commission to investigate the facts regarding grave violation of human rights and crimes against humanity committed during the course of conflict".

C. Formation of a High- Level Commission: A Botched Attempt

Following the CPA, the government of Nepal formed Commission on Disappeared Persons to investigate enforced disappearances on 21 Jun 2007¹⁴. This Commission was established under section 3(2) of the Commission of Inquiry Act 1969, a law that the Supreme Court had already found to fall short of international standards¹⁵. In *Rajendra Dhakal vs. The Home Ministry and others*, the Supreme Court observes that the existing legal framework related to commissions of inquiry is inadequate to address the cases of disappearance that have been systematically practiced during the armed conflict in Nepal. The order, therefore, instructs the interim Government to introduce new legislation to ensure establishment of a credible, competent, impartial and fully independent commission. The order also states that, in doing so, the government should take into account the Convention for the Protection of all Persons from Enforced Disappearance and the Criteria for Commission of Inquiry developed by the United Nations

12. The International Committee of Red Cross is still tracing about 1128 cases of documented cases. For details see [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/7EUEDT/\\$FILE/icrc_ar_07_nepal.pdf?OpenElement](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/7EUEDT/$FILE/icrc_ar_07_nepal.pdf?OpenElement) (visited 3 July 2008)

13. No. of victim disappeared by State and Maoist, for details see <http://www.inseconline.org/hrvdata/Disappearance.pdf> (visited 3 July 2008)

14. For details see www.nhrc.org (visited 3 July 2008)

15. Following the political agreement with CPN Maoist, the government, formed a high-level commission on disappeared persons under the chairmanship of former Supreme Court justice Narendra Bahadur Neupane. However, the move couldn't make headway in the face of national and international criticism over its jurisdiction.

Office of High Commission of Human Rights. Against this backdrop, the Commission could not work as it was heavily criticized by the national and international human rights organizations. Consequently, members of this Commission refused to take an oath of office. Because of the controversy, the Disappearances Commission had not started its work and remains as non-existence.

D. Supreme Court -Formed Task Force

In response to the numbers of Habeas Corpus writ petitions, the Supreme Court constituted a DITF¹⁶ which would find out the status of the persons mentioned in the petition whether they were held in the custody or not, thereby submitting a report along with an opinion and finding on what shall be reasonable step to be taken by the Supreme Court. The terms of reference of the DITF included:

- (a) To conduct investigation and inquiry by examining anyone to ascertain the situation in respect to the detainees from the date mentioned in the petition up to now,
- (b) To clarify rank and present office of the relevant officer, who has arrested, ordered to arrest and purpose of the arrest,
- (c) To clarify whether a case has been lodged against the detainee or not,
- (d) To clarify how long the whereabouts of detainees was unknown and when it was unknown, which agencies and officers are involved therein,
- (e) To investigate other facts, which are relevant in the course of writ of Habeas Corpus.

The Task Force carried out unprecedented investigations into the arrest and forced disappearance of Rajendra Dhakal, Bipin Bhandari, Dil Bahadur Rai, and Chakra Bahadur Katuwal in 1999, 2002 and 2001 respectively. The Task Force presented its report to the Supreme Court on 8 April 2007. The DITF recommended that: (i) a high-level commission be formed to impartially and independently investigate the cases of those subjected to enforced disappearance during the armed conflict; (ii) retroactive laws in matters such as crimes against humanity be enacted; (iii) appropriate judicial directives be issued for stopping the repeated arbitrary arrests and detentions; (iv) those involved in the violation of human rights be tried according to law and (v) the victims' families be given appropriate compensation.

E. Supreme Court Ruling

On 1 Jun 2007, the Supreme Court's Division bench comprising Justice Kalyan Sherestha and Justice Khil Raj Regmi, gave a landmark verdict based on the recommendations made by the DITF. The decision included an order that the government enact a law, which would criminalize enforced disappearance in line with the International Convention for the Protection of all Persons from Enforced Disappearance; establish a high level commission of inquiry on disappearances in compliance with the international criteria on such commissions of inquiry; require investigations and prosecutions of persons responsible for disappearances; and provide for adequate compensation and relief to the victims and their families. Perhaps, for the first time

in the history, the Apex Court used an international instrument "International Convention for the Protection of all persons from Enforced Disappearance, 2007" (Convention against Disappearance), which has not come into the force yet.

The decision is a significant step forward in recognizing the rights of victims of enforced disappearance and their families to truth, justice and reparations. Furthermore, it is particularly important in terms of combating impunity in Nepal. It instructs the government of Nepal to criminalize disappearance according to the International Convention on Enforced and Involuntary Disappearance, form a high level commission on disappearance to establish the truth, prosecute those responsible for such heinous crime and provide reparation to the victim. From transitional justice point of view, this ruling lies on the heart of the transitional justice approach. In addition, the judgment has demonstrated the important role any judiciary can play in upholding respect for rule of law and international human rights principles, irrespective of the situation the country is in¹⁷. A scholar has termed this ruling as a 'semblance of justice'¹⁸. To the best of my knowledge, this is the only comprehensive jurisprudence from an Apex Court which recognizes almost the entire important component of transitional justice approaches while addressing enforced disappearance. In terms of standard setting, *inter alia*, this ruling can fairly be compared with the jurisprudence developed by so-called 'civilized nations' or the supra national judicial mechanism.

16. *Rajendra Dhakal v. Ministry of Home Affairs and Others*, SC Bulletin , Special Issue Jun 2007, Page 80

17. Responding a numbers of write petitions On August 28, 2006, the Supreme Court of Nepal had formed a three member judicial investigation task force on disappeared detainees, comprising Justice Lokendra Malik, Joint Attorney Saroj Gautam and Advocate Govinda Sharma Bandi, in order to find out the situation in respect to the persons mentioned in the petition whether they were held in the custody as claimed in the petition or not, their updated and real situations and to submit, within a period not exceeding three months of the commencement of the work, a report along with its opinion and finding on what shall be reasonable step to resort on the issue of this petition and on the matters in which such issue appears.

18. Arya Kharel, UN Convention on Protection of All Persons Against Enforced Disappearance, 2006 and its relevance to Nepal, *Nyayadoot*, year 38, no171, vol.6 p.17

F. Bill to criminalize disappearance

On 20 April 2007, the government had submitted a draft Bill on disappearance in the Legislative-Parliament. The draft Bill had proposed through the amendment of the Civil Code, which is contradic-

On 20 April 2007, the government had submitted a draft Bill on disappearance in the Legislative-Parliament. The draft Bill had proposed through the amendment of the Civil Code, which is contradictory with the legal International Standards, the decision of the Supreme Court and the obligation of Nepal towards the past and continuous act of disappearance.

tory with the legal International Standards, the decision of the Supreme Court and the obligation of Nepal towards the past and continuous act of disappearance. The draft has prohibited the act of disappearances in future but it substantially failed to address the past and continuous act of disappearance. Various national and international organizations pointed out various

weaknesses in the draft¹⁹. Following immense lobby from the civil society, over 59 amendment proposals were submitted to the parliament by the Members of the Parliament. The Bill, thus, went to the Parliamentary Committee for further discussion. In December 2007, the interim Legislature-Parliament instructed the Government of Nepal to draft a separate law on enforced disappearances that is in line with the International Convention for the Protection of all Persons from Enforced Disappearances and the 1 June 2007 judgment of the Supreme Court of Nepal. The drafting process is still on and it is learnt that numbers of versions and editions have been made. However, the government has not made the draft public yet and there has not been any consultation with relevant stakeholders including victims and civil society. Nepal Bar Association, therefore, had taken a lead in drafting an alternative Bill from civil society²⁰. After having couple of consultation meetings, the drafting team produced an Alternative draft Bill and submitted to the government accordingly.

III. Victim's Expectations

A number of victim groups²¹ have been raising their voices mainly pointing out the failure of the government to address the past human rights violation including enforced disappearance. Their demands includes, *inter alia*, making public and finding the whereabouts of those disappeared

during the conflict, meting out severe punishments to the perpetrators who are found, both directly and indirectly, accountable for the violations of human rights and humanitarian laws via civilian courts, introducing substantial laws concerning disappearance with the participation of the families of the disappeared and its due implementation, the family members of the conflict victims should be bestowed with special facilities, opportunities and rights, memorials should be constructed to commemorate those who lost their lives during the conflict and immediate allocation of interim relief-aid to the families of the victims. They also demanded that the families of the victims should be provided with compensations, such as free education to the children of the victims, guarantee as to the fundamental needs like food, clothing, shelter, education and health to the families of the conflict victims without any dilly dallying, provision of employment to every member of the victims' families, skill-developing trainings and provisions of loan disbursement for the victims' families and other special programs for the conflict victims²². Victims' expectation can be traced out in threefold.

1. Truth
2. Justice
3. Reparation.

Truth

Victims of enforced disappearance and their families have the right to know the whole truth. The right to truth has both an individual

19. Uprety, Kishor, Against Enforced Disappearance: The Political Detainees' Case Before the Nepal Supreme Court (July 2008). Chinese Journal of International Law, Vol. 7, Issue 2, pp. 429-457, 2008

20. On 30 May 2007, the International Commission of Jurists (ICJ) submitted a letter to the Speaker of the interim Legislature-Parliament of Nepal setting out 23 recommendations related to the Bill tabled in the interim Legislature-Parliament which provides for the amendment of the Civil Code to include a chapter on disappearance, abduction and hostage taking. For details see http://www.icj.org/news.php3?id_article=4164&lang=en (visited 3 July 2008)

21. In December 2007, the human rights Committee of Nepal Bar Association formed a three member's Committee - comprising Basanta Ram Bhandari, Govinda Bandi and Bal Krishna Dhakal, and assigned to draft the Bill on 'enforced disappearance', with intention to help ongoing drafting process.

22. The Conflict Victim Committee, Bardiya, submitted a memorandum to the Prime Minister via the Chief District Officer on October 14, 2007.

and a collective dimension²³. Every member of the society, therefore, has right to know the truth about the past legacy of the enforced disappearance. Almost all of the victims of enforced disappearance want truth. The status of those disappeared must be made public; it should be clarified whether they are dead or alive. Because of this dilemma victim's families have not been able to carry out the last rites of their family members²⁴. The importance of truth of the past human rights violation has been recognized by the Nepali society since long time. The Malik Commission on the truth of the 1990's people's movement (*Jana Adndolan I*), Rayamajhi Commission on the April 2006 (*Jana Andolan II*) and the DITF are some of the examples of the truth seeking process in Nepal. However, establishing a mere truth alone may not satisfy the expectation of the victim, particularly in enforced disappearance, as most of the victims know how their beloved were arrested or abducted and in some cases the perpetrators. In other words, they know the half truth and now they apparently want to know the whole truth. Making public the status of disappeared, therefore, may not satisfy the expectations of the victim.

Interestingly, The Supreme Court favors the victim's right to know the truth by constituting a DITF thereby issuing an order to form a Commission of Inquiry on enforced disappearance. This gives a clear, binding and general obligation to the government of Nepal to constitute a separate Commission of Inquiry on enforced disappearance. The court further observes that a truth seeking mechanism on

enforced disappearance should be empowered to investigate all related incidents. It, therefore, suggests that the jurisdiction of the commission is clear; that the commission's inquiry does not replace the jurisdiction of the Court; that persons nominated for such a commission are appropriate and competent for such work; that the terms of office and conditions of service and facilities are provided for; that representation of women and other castes or communities are guaranteed; that the powers, duties and functions of the commission are prescribed in the Act itself; and that, in considering the nature of the problem, investigations could be initiated on the basis of information received from any source. It is also necessary to have provisions on continuous inquiry until the status of an allegedly disappeared person is determined; the availability of protection and security for victims, witnesses, plaintiffs, advocates and investigator, so as to solicit their continuous assistance in the probes; the right and opportunities for the victims to record their statements and raise their concerns, and if desired, to keep their statements confidential if so called for; and the power of the Commission to conduct searches and to question all persons who it deems necessary. It is also necessary to ensure the means and resources necessary for such commission to accomplish its goals²⁵. The distinctive nature of this ruling is to recognize the transitional justice approaches by an Apex Court unlike the judicial position of many judiciaries in transition contexts. In several occasions, the national judiciaries have failed to recognize the notion of the transitional justice. For example in Nigeria, the Military Generals chal-

lenged the legality of the Commission in the courts in relation to summoning witness during the truth seeking process. The Supreme Court of Nigeria favored to emphasize the individual rights of the witnesses summoned, finding that these rights were infringed by the powers of the Commission to compel witnesses to appear. Hakkem O. Yusuf, a lawyer working in the field of human rights in Nigeria, observes that a broader perspective from the court would have considered that the issues arising from the case transcended the question of the personal rights of the plaintiffs and involved instead the individual rights of the victims whose cases were being dealt with by the Commission. The decision also ran contrary, if only implicitly, to Nigeria's obligation under international law to ensure that victims of human rights violations are provided with both the opportunity to be heard and an effective remedy²⁶.

The government seems quite reluctant to follow the court's directives. The main reason of this has twofold. Firstly, most of the senior government officials including some political leaders think that the court ruling crosses the limit of the judicial paradigm or tradition. A secretary of the government had argued that the Constitution does not empower the Supreme Court to encroach the jurisdiction of a legislative parliament; hence, it has lost the binding character. However, the Supreme Court had addressed this issue while making verdict. The court observed that "the State may also contend that the implementation of its directive principles is solely a matter of its own discretion. But the legal investigation, prosecution and remedies to be implement-

23. For details, see "Study Report on a Regulatory Framework on the Truth and Reconciliation Commission, Center for Legal Studies (CLS) 2064, see also TRC Bill, Report of the Workshop on Transitional Justice held on 10 August 2007, British Council and Nepali Voices Victims' perceptions of justice, truth, reparations, reconciliation, and the transition in Nepal.

24. Truth, justice and reparation: Amnesty International report on establishing an effective truth commission, for details see <http://www.amnesty.org/en/library/asset/POL30/009/2007/en/dom-POL300092007en.pdf>

25. Nepali Voices Victims' perceptions of justice, truth, reparations, reconciliation, and the transition in Nepal page 40, ICTJ and AF, for details see http://www.advocacyforum.org/pdfcoll/ITJ_Nepali_Voices_Final.pdf

26. Supra Note 16 Page 82

ed with respect to a remedial mechanism involving fundamental rights cannot be a matter of secondary priority and in addition, are not outside the jurisdiction of this Court²⁷." Second, most of the political leaders, particularly those who were in the power during the violation occurred and those who were military commander of Maoist side, seem to have scared of future prosecution. However, it would be very difficult for a "federal democratic

cent of the respondents stated that accountability (prosecution) was very important and 25 percent of them said important.²⁹ The survey on the victim's perception further suggests that most of the victim want national trail whereas a small number of victim also expect international trail. Among them about 69 percent support national trials, while 13 percent expect international trials. In the opinion of one percent of respondents, both national and international trials were options.

The victim's perception on the accountability can also be seen through the cases that they have filed in various judicial and quasi-judicial mechanisms. There has been an increasing trend of filing First Information Report (FIR) throughout the country. Initially these FIRs were rejected by the police authority stating that it would be dealt by the TRC as the CPA and interim Constitution has such provision, however, after the Supreme Court's order in *Maina Sunuwar vs. District Police Office, Kavre*³⁰, police have started registering the FIRs.

Despite the victim's desperate desire to have justice, the question of holding perpetrator accountable is much controversial in political level. In ongoing peace discourse, the political commitment on the truth is fairly reasonable in compare to justice component. The CPA and other agreements are primarily focused on making public the status of disappeared thereby ignoring the prosecution. All "peace treaties" are silent on the prosecution, as both parties are in

"win-win" position, which apparently is going to be a big challenge for accountability. Some government official and sometimes some "experts" argue that TRC can be a best accountability mechanism as it is a transitional context. The judicial position is much comprehensible than the political position. In *Rajendra Dhakal vs. Home Ministry and Others* the Supreme court held that "... it is ordered that officials or employees involved in these acts should be prosecuted on the basis of additional investigations to be completed, thereby providing justice to the victims³¹."

In *Arjun Lama vs. District Police Office, Kavre*³², the Supreme Court held that this was the duty of the police to investigate a crime when it receives information of commission of any crime under Annex 1 of the State Cases Act 1992. The court further held that crime under the existing law needs to be investigated by the state thereby bringing perpetrators to the justice.

These three cases are the leading cases that not only advocate for prosecution in serious human rights violation including disappearance, but also impose binding obligation to the government to hold perpetrators accountable. However, the government has not done anything in line with demand of the victim and particularly the ruling of the Apex Court. Brad Adams, Asia director at Human Rights Watch rightly pointed out that Nepal's new government has promised to find the truth and ensure justice for 'disappearances,' but has been slow to make good on

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republican government of Nepal" to directly defy the court order.

Justice

Similar to other transitional contexts, majority of the victim are looking for justice in Nepal. A credible study shows that 90 percent of the respondents want trials and punishment for past human rights violations. Only 6 percent did not want trials for abuses committed during the conflict²⁸. The report also brings out the fact that 68 per-

27. *Travaux of Truth: Achieving Justice for Victims of Impunity in Nigeria*, Hakeem O. Yusuf, *The International Journal of Transitional Justice*, Vol. 1, 2007, 268–286,

28. *Supra* note 16, Page 60

29. *Nepali Voices Victims' perceptions of justice, truth, reparations, reconciliation, and the transition in Nepal* page 40, ICTJ and AF, for details see http://www.advocacyforum.org/pdfcoll/ITJ_Nepali_Voices_Final.pdf

30. *Nepali Voices Victims' perceptions of justice, truth, reparations, reconciliation, and the transition in Nepal* page 40, ICTJ and AF, for details see http://www.advocacyforum.org/pdfcoll/ITJ_Nepali_Voices_Final.pdf

31. On 18th September 2007, the Supreme Court of Nepal issued a Mandamus Order to the government of Nepal to carryout criminal investigation on the Maina Sunuwar case, with in three month. The major issue of the case was about the jurisdiction of military court and civilian court. Since the letter received from army office Kathmandu read that the perpetrators had been tried in court martial and the case has already decided, and no further trial in the same case is necessary.

32. *Supra* note 16, page 79.

these pledges³³.

Reparation

Reparation is relatively new term to Nepali context. Compensation is being used as an alternative. CPA, Interim Constitution and other agreements have also used the term compensation. Interestingly the draft TRC bill, despite several flaws, also uses the term compensation, however, the component described in the bill give a clear hint that this is all about reparation.

Reparation is a major component of any transitional justice measures. It entails restitution, compensation, rehabilitation, satisfaction and guarantee of non-repetition³⁴ to the victims of human rights violations committed during the past regime, could be in violent conflict or under a dictatorial system, upon the restoration of peace and democratic system. Reparation is important for reconciliation in a post-conflict society. The UN Basic Principles and Guidelines on the Right to Remedy and Reparation identify and provide guidance on different forms of reparations. It says: "reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law³⁵. Comprehensive and integrated reparations programmes should therefore comprise both collective and individual measures, as

well as both material and symbolic reparations.

The Supreme Court has recognized the internationally accepted principles of reparation. It says that: "In addition to the trauma suffered by persons who were disappeared, their family members have continuously suffered socially, economically and mentally. If the costs of time spent searching for the disappeared person, the lost labor, expenditure, and peace of mind sacrificed in this course of the search, and the costs of loss of labor productivity and security due to the absence of disappeared person are assessed, far reaching social and economic losses would surface."³⁶ The Court, therefore, ordered to provide interim relief, even in symbolic form, with the limited purpose of helping the victims' families bear the pains suffered by them while seeking justice.

The Court also made it clear that the interim relief would not affect the amount and nature of the remedy to be provided in future. It issued a directive order to the government of Nepal to provide immediate relief of two hundred thousand rupees to the nearest claimant of Chakra Bahadur Katuwal, whose death was verified by the investigation of the DITF, one hundred fifty thousand rupees each to Rajendra Prashad Dhakal, Bipin Bhandari and Dil Bahadur Rai, as the investigation of the DITF verified their arrest by the security forces but their whereabouts still remained unknown and one hundred thousand rupees each to remaining persons stated in the petitions whose status has not been clarified.

The *interim relief* directive is

landmark in order to develop a comprehensive reparation programme in Nepal. It is in line with the recently adopted International Convention on the Protection of all persons from enforced disappearance. Interestingly, the court has used this instrument, which has not come into force yet. It says: "Although the Disappearance Convention has not yet come into force and Nepal has not yet ratified it, this Convention has developed an important standard concerning the obligations of a state with respect to the security of disappeared persons; in the event that the Disappearance Convention is accepted by international community, it is expedient to accept the standards established in the Convention as the prevailing standard in international law. Therefore, the state ought to comply with these standards, accordingly."³⁷

At the end,

Enforced disappearance is the most serious amongst all human rights violations and extremely traumatic for family members of the victims. Addressing disappearance is, therefore, an integral part of the peace process without which lasting peace can not be achieved. The future direction for this problem has been precisely laid down by the 1 June verdict of the Supreme Court. Enactment of a legislation on criminalization of enforced disappearance, establishment of truth of the past enforced disappearance, bring responsible to the justice and provide reparation to the victim are the only way to deal with the problem. However, the political willpower has been major snag in achieving the goal. ■

33. On 10 March 2008, the Supreme Court issued an order to the District Police Office and District administration Office of Kavre District to register a First Information Report (FIR) and conduct criminal investigation in relation to a murder case against six Maoist cadres. Earlier the DPO and DAO had refused to register the petitioner's FIR stating that the issue would fall under the jurisdiction of the proposed Truth and Reconciliation Commission. (the decision is yet to be published in Law Reporter)

34. Nepal: Supreme Court Orders Action on 'Disappearances', for detail see <http://www.hrw.org/english/docs/2007/06/15/nepal16194.htm> (visited 3 July 2008)

35. For detail meaning of the words see Chapter on Reparation, A Handbook, Reconciliation After Violent Conflict, edited by David Bloomfield and Others, Published by International Institute for Democracy and Electoral Assistance, 2003, Stockholm, pp 145-146. See also Dr. Bhattra, A.M., 'Transitional Justice for the Promotion and peace and Democracy in Nepal', NJA Law Journal, Vol.1, No.1, 2007, p 35

36. Supra note 16 page 84-85.

37. Ibid, page 50



»Pratibedan Baidya«

Getting Justice: A Far Cry for Conflict Victims

Though Nepal has now witnessed change of two eras, democracy and republic, within two and half years after the end of direct rule of the King in April 2006, but getting justice has become a far cry for conflict hit people of the country.

Not only people from urban areas and leaders and cadres of

CPN-M, which had started violent conflict in 1996 with an objective of creating classless just society, had joined political mainstream putting an end to the decade long violent conflict and emerged as the largest party in the Constituent Assembly election. But, the plights of conflict hit people are yet to be heard.

political parties, people from various walks of life had participated in the April movement 2006 with the hope that their voices would be heard in 'New Nepal' and they would get justice, but their wish has turned into mirage in this period. Political parties have failed to address the issues of conflict hit people after they mainly concentrat-

ed on power games after they came at the helm of power following the success of People's Movement. CPN-M, which had started violent conflict in 1996 with an objective of creating classless just society, had joined political mainstream putting an end to the decade long violent conflict and emerged as the largest party in the Constituent Assembly election. But, the plights of conflict hit people are yet to be heard. Over 13,000 people had lost their lives and thousands were wounded during the decade long Maoist insurgency but majority of the deceased people's families have not received any compensation so far. The whereabouts of over one thousand people is yet to be made public. The Maoists have not returned properties of many people captured during the conflict period. People became optimistic when the provision of providing relief to conflict hit people, returning seized properties to their owners and publicizing the whereabouts of missing people were incorporated into the Comprehensive Peace Agreement. However, these issues were not given preferences by the political parties as they did not find time to work in these issues for being engaged in political gives and takes and balance of power most of the time. The political parties made various agreements and amended the interim constitution time and again for meeting political objectives and satisfying the demands of various emerging agitating groups but failed to prioritize the issue of conflict hit

people as these people could not hit the street with their demands.

Many innocent civilians became the target of both the warring sides during the conflict period but they are yet to receive any compensation from the state for not being affiliated to any political ideology. Many conflict victims are still living with bullets in their body as they do not have sufficient money for treatment. A 12-year-old Ram Bahadur Kathyat of Kotwada VDC of Kalikot district had to leave his studies as his father Lahabire Kathyat was among 35 labourers brutally murdered by the then Royal Nepalese Army at airport construction site of Kotwada on 23 February 2002. "As my father was the sole bread earner of my family, I could not continue my studies after my father's death due to financial reasons," says Kathyat rolling tears from his eyes. He says he will get justice when appropriate action is taken against persons involved in the murder of his innocent father and appropriate compensation given to his family. Similarly, Deurupa Gharti, wife of Bahadur Gharti of Daha VDC-1, who was arrested by Nepal Police while attending marriage ceremony at his own village on 26 November 1998 and murdered at the hill of Bhalukuieya two days later, says she doesn't need any financial assistance but appropriate action should be taken against perpetrators involved in the murder of her innocent husband, for her to realize she got justice. Such is the plight of Chaiti Tharu of Bardiya,

whose 14-year-old son Raju Tharu, who was the only bread earner of her family, was abducted and murdered by the Maoists. Chaiti says she did not receive any support after the death of her son adding those responsible for her son's murder should be taken into book and appropriate compensation should be given to her. These are mere some representative incidents. There are many people, who had to face similar fate. However, political parties failed to materialize their commitment of forming 'Truth and Reconciliation Commission' and provide compensation to conflict hit people as per their commitments expressed in various agreements reached earlier. Political parties reached at the helm of power thanks to the sacrifices made by the people, who were either killed or injured but the political parties are yet to listen their woes.

Very recently INSEC Mid-Western Regional Office conducted re-fact finding missions of nine incidents of grave human rights violations committed in this region during the Maoist insurgency. However, it was known that victims of only two incidents received some support from the state. The office informed that there are nearly 100 such incidents of grave human rights violations in the region alone and it is re-investigating such cases to find whether the victims have received justice or not. INSEC's study revealed that no action was taken against any perpetrators involved in such incidents. The re-fact finding report of INSEC reveals shocking picture of conflict hit people.

As the political parties did nothing to make accountable the perpetrators involved in grave human rights violations and failed to abide by their commitments, passivity is gradually increasing in conflict victims and also in the general people, which will be an obstacle for restoring lasting peace in the country. The growing pessimism among the conflict hit people may give

space to some other forms of conflict, so the time has now come for the political parties to act. The political parties, which failed to materialize their commitments to form 'Truth and Reconciliation Commission', 'Victim Repatriation Commission' among others, should address the issue of conflict hit people if they are really serious about restoring lasting peace in the country. Providing justice to conflict affected people and taking appropriate action against persons involved in grave human rights violations could be an instrument for restoring sustainable peace in the country.

Though Comprehensive Peace Accord signed on 22 November 2006 proposed formation of 'Peace and Rehabilitation Commission' and 'Truth and Reconciliation Commission' to conduct investigation on gross human rights violation at the time of conflict, on crime against humanity, and to create a situation of reconciliation in the society but failure at the part of political parties to form such commission has created frustration among conflict victims. The provisions of the CPA and failure of the political parties to take action against the perpetrators involved in suppressing people's movement II as recommended by the Rayamajhi Commission hints that any Commission formed by the government would just be a showpiece and will be means of giving impunity to perpetrators. Providing compensation is not sufficient for victims of conflict, they should be given justice and the trend of impunity must end to have a just society. The best way to give justice to the victims is to take action against the perpetrators.

Not only other political parties, the Maoist party, which had promised to provide relief to the conflict victims has removed the task from its priority list after it started its run for power. Rather than providing compensation to conflict hit people gradually, Maoists have been obstructing the relief distribution process in some

remote districts saying their cadres were not in the list of getting relief, which shows that rather than being a party of all people, Maoist party is still moving ahead with narrow vision even after being the largest party of the Constituent Assembly. Maoist rather than working to initiate efforts for providing justice to conflict hit people, is trying to politicize the issue and take benefit from it. Rather than reuniting conflict victims, Maoists have been using them in political activities. For example, 11 civilians were murdered by the police in Daha VDC of Jajarkot district but Maoists pressurized families of the victims to

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stay at their commune rather than helping them to get justice and providing support.

Although the Maoist insurgency formally ended two and half years ago after leaving heavy toll to the people and economy, the country is still witnessing the emergence of armed groups and their armed activities in terai region. If proper mechanisms are not made to put an end to impunity and take action against people involved in grave human rights violations, the country and people have to suffer a lot in the days to come.

■



»Deepak Raj Tiwari«

Role of Media in Social Healing Process

Healing is the process by which the cells in the body regenerate and repair to reduce the size of damaged or necrotic area. Healing incorporates both removal of necrotic tissue, and the replacement of this tissue in medical science. In the same way, social healing

to the human development.

Adam Curle has described his experience in a write up 'Social Healing of the Wounds of War' about the process and its success on peace keeping. He writes an experiment to 're-socialize' ex-prisoners of War at the end of World War II and considers its relevance for the 21st century as well. He describes how the prisoners were resettled in their society. Similarly, Mary Ruwart has written a book entitled 'Healing the World'. The book deals on how to build social harmony across the world. Mary writes, "The easy way-out of the realization that others do not create our global harmony and abundance any more than they create our inner peace and enrichment; our reactions to others determine our fate by basing our social action on the same principles that govern our individual relationships, we can create a win-win world of peace and progresses, where everyone comes out ahead."

When a society collapses social justice and human rights, moral values go through transitional period, and it needs to be healed with humanity, love, mercy and forgiveness. Mainly, societies in armed conflict and post armed conflict develop many wounds of insurgency and see a collapse of social justice, human rights, social cohesion and moral values, so, such societies need to be healed. Because of the aggression of losing beloved ones, loss of identity, and toll of losing property with status, the sense of revenge

develops among the people and it gives space for another form of violent conflict. Promotion of humanity, love, mercy and forgiveness to the people are some ways to heal the society, which helps to promote sustainable peace in the society.

Media is the only best and easy way to reach to the mass. Multidisciplinary nature (print, audio, video and online) of media can provide perfect lessons of social healing to the people. They can see, hear and read stories of peace building initiatives by the governmental, non-governmental agencies and international practices. Thus, using media will be the best practice to convey the peace-keeping message to the people.

There is no doubt on the impact of media's role in social movements. Media has very significant role on social healing. Some people raise doubt; have Nepalese media paid proper attention to the peace process? If so, is it sufficient? Except in some few cases, we have seen that Nepalese media had wonderful contribution on the peace process in the past, especially during the insurgency period and post-insurgency period too. But, still media are not serious about social healing process, as media are supposed to be. People anticipate much more from the media than what they have delivered. Nepalese media need to operate peace campaign on the transitional period. They have huge responsibility and challenges as well in the crucial period of tran-

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is a process by which we find the root causes of conflict, and resolve them for sustainable peace. The process is related to changed attitude of people, government and changed agent. This process carries human rights principle with regards

sition. As the political scenario of the country has changed to post-conflict scenario from armed conflict, media needs to follow the new development. Government and non-governmental agencies should also try to associate media in their campaigns of social healing.

The principle of social healing focuses on restoring sustainable peace in the societies. This process is applied more in transitional societies. People had lost their beloved ones, land and properties, identity and so on during the armed conflict of the past. So, the sense of revenge developed among the victims of the armed conflict is rising in spiral cycle, which could be an obstacle for restoring lasting peace in the country. The traumatic feelings of the victims need to be vented out, and a common forum should be built for the victims to express their feelings and sorrow. Media could be an instrument in doing so. As a responsible agent of the society, media must formulate policy to work on healing process and give priority for

such contents. Some national media have already started the process in different way. A teli-film, ‘Madan Bahadur–Hari Bahadur’ being aired from Kantipur Television is an example of social healing process. The film presents a true picture of the armed conflict and the suffering of general people during the period. The film also presents lessons on how we can make consensus in the society, rehabilitate conflict induced internally displaced people, provide justice to the conflict victims among others.

Mass media can use successful peace building initiatives as their content to encourage social healing and peace building process. This trend will help sharing best practices of healing process among people. Media can make magical change on people's attitude and behavior. This in not all the time but it can be practiced in post-conflict period or when the country is passing through transitional period. If perpetrators help victims to know the truth, victim can forgive them, and media can

facilitate the process.
At present, Nepali journalism sector is not focused on healing process because of the urgency in reporting. Media must acknowledge its role in social healing process and restoring sustainable peace in the country. Media has special social responsibility in the transitional period. The practice will help to promote win-win principle and healing process.

References

1. A.T.M. Wilson, E.L. Trist and Adam Curle, 'Transitional Communities and Social Reconnection' The Socio-psychological Perspective, University of Pennsylvania Press, Philadelphia 1990, pp.88-112
2. Mc Quail, Denis, Mass Communication Theory; Sage Publication 2000, pp 81-82
3. Mary J. Ruwart., Healing our world: the other piece of the puzzle, Sun Star Press, Kalamazoo, Michigan, United States, 1993.



Provisions Related with Transitional Justice	
<p>Comprehensive Peace Agreement, 21 Nov. 2006</p> <p>5.2.2. Both parties agree to publicise and release all the person kept under detention within 15 days.</p> <p>5.2.3. Prepare the details of the disappeared persons or those killed in the conflict with their real name, surname and residential address and publicise it within 60 days from the day of signing this agreement and inform the family members of concerned persons.</p> <p>5.2.4. Both parties agree to form a national peace and rehabilitation commission to initiate process of rehabilitation and providing relief support to the persons victimised by the conflict and normalise the difficult situation created due to the armed conflict.</p> <p>5.2.5. Both parties agree to form a high level Truth and Reconciliation Commission on mutual understanding to conduct investigation about those who were involved in gross violation of human rights at the time of the conflict and</p>	<p>those who committed crime against humanity and to create the situation of reconciliation in the society.</p> <p>The Interim Constitution of Nepal 2007 Article 33: Responsibilities of the State: The State shall have the following responsibilities:</p> <p>(q) To provide relief to the families of the victims, on the basis of the report of the Investigation Commission constituted to investigate the cases of disappearances made during the course of the conflict.</p> <p>(r) To conduct special programs to rehabilitate the displaced, to provide relief for damaged private and public property, and to rebuild infrastructures destroyed during the course of the conflict.</p> <p>(s) To constitute a high-level Truth and Reconciliation Commission to investigate the facts regarding grave violation of human rights and crimes against humanity committed during the course of conflict,</p>



» Dilip Raj Giri «

ICC Campaign in Nepal: Challenges for its Ratification

Background

Once known as a peaceful country, Nepal has been passing through transitional period following the bloody insurgency that lasted for ten years. Though the country has been witnessing peace, in the meantime, the wounds of the decade long violent conflict that claimed lives of over 13,000 people are yet to be healed.

CSOs have been playing crucial roles to protect human rights from the very beginning of promulgation of the Universal Declaration of Human Rights. CSOs, more specifically human rights organizations, are always advocating for the rights of the people and the need of international instruments for protecting these rights.

The decade was really a difficult one for Nepali people as almost every sector had to suffer at the period. The achievements of the success of popular movement of 1990 could not be institutionalized as Maoists waged revolt against the state in 1996. Violations of people's rights were regular occurrences during that period. Human rights were limited only in papers as both the warring

parties i.e. the state and the Maoists were not serious about people's rights. The period of 1996-2006 was really a difficult period in the history of Nepal. The law and order situation of the country was almost defunct and violation of the people's rights was increasing day by day creating an environment of terror in the society. Weak law and order situation of the country and passivity at the part of warring sides to abide by the human rights instruments had promoted the culture of impunity in the country.

Culture of impunity refers to the failure of the state, law and order and the situation of high crime rates and absence of controlling mechanisms to the criminals. The state of impunity is the worst outcome of the failure of the state and the ill functioning of law and order. State of impunity must be stopped in order to create a peaceful and new Nepal, otherwise the future situation of law and order will worsen more than that of today. Despite these barriers, the civil society of Nepal played crucial roles in different periods in order to secure people's rights. Civil society is always accountable towards securing the rights of the people through different activities. The civil society refers to non-governmental bodies, which work hand-in-hand with the government for the benefit and welfare of the people and the nation. Civil society not only cooperates with the government but also warns the government not to go in the wrong track and be sensitive towards people's rights. Civil society is the constituent of all bodies and people apart from the governmental tag but the Civil Society Organizations (CSOs) that I am referring here are the organiza-

tions, which work for the rights of the people. To be more precise, human rights organizations are the ones, which I am talking about in this context. CSOs are working in a coordinated way against the existing culture of impunity. The role played by such organizations during the period of Maoist insurgency and people's movement of April 2006 had already shown their accountability towards the nation and the people. These organizations have been accomplishing their roles in an accountable manner regardless of the situation of the country. In a bid to fight against prevailing trend of impunity, different CSOs joined hands together. One of the major activities, they have been doing is the campaign for ending impunity through ratification of the ICC. INSEC, FOHRID, COCAP and several other organizations have formed National Coalition for the International Criminal Court (NCICC) to pressurize the government for ratification of the ICC in order to end impunity. The NCICC has been organizing various programmes aiming to exert pressure on the government to accede ICC for ending impunity.

ICC Campaign in Nepal

ICC as a campaign started in Nepal with the formation of a coalition entitled NCICC involving different organizations in 2001. From the day onwards, different activities have been carried out by these organizations. The coalition started its work with cooperation between human rights organizations (NGOs), media, lawyers, academicians, individuals etc. Different activities were organized by the coalition since then. Some of the major activities are as

follows:

A special issue of *Informal* (June 2005, Vol 18, No. 1), a quarterly publication of INSEC, was published on the theme of ICC. An interaction was held on 1 July 2004 about the then RNA's refusal to furnish details to the Supreme Court, despite the Court's order. The interaction participated by legal experts, intellectuals, human right activities and law students strongly condemned the RNA's act. A workshop on ending impunity through ICC ratification was held on 17 July 2003 on the occasion of the anniversary of Rome Statute. Different press releases were issued on the same theme. International lobby team from Coalition for the International Criminal Court visited Nepal from 12-15 May 2002 and held discussions with Prime Minister, human rights communities, lawyers, political parties, media, human rights defenders and civil societies. National consultation on ICC was held in November 2001. A booklet on ICC was also published by FORUM Asia. More than this, interaction programmes on ICC ratification were held in five development regions in August 2006. These interactions were held in Dhangadi of Far Western Region on 27 August, 2006, Nepalgunj of Mid-Western Region on 24 August, 2006. Similarly interactions were held in Pokhara of Western Region and Biratnagar of Eastern Region on 23 and 13 August, 2006 respectively. The coalition also sent a letter to the parliament on 24 April 2006 to ensure end of impunity through ratification of the ICC. Similarly on 23 July 2006, the coalition held discussion with members of parliament about the culture of impunity and ratification campaign of ICC and its need.

The coalition also held ICC week from 1-7 July, 2006 focusing on lobbying, networking as well as raising awareness about the ICC on the public. While submitting memorandum to the top leaders of major political parties including Nepali Congress, CPN-UML and CPN-Maoist, the leaders expressed their commitment for ending impunity by ratifying the ICC. A discussion and interaction program was held in World Trade Center at the initiation

of INSEC, where the volunteers of COCAP also presented their drama focused on ICC. Various sit-in programmes and rallies were also held in connection with the ICC ratification process. Coinciding with the 10th anniversary of the Rome Statute, the ICC campaign has been more focused in the slogan "From Impunity to Accountability". In line with the international theme, Nepali campaign also focused on ICC ratification for ending impunity. On 1st July 2008, a protest programme was held at Maitighar Mandala demanding ratification of ICC. INSEC chairperson Subodh Raj Pyakurel and representative of civil society Nutan Thapaliya and Govind Bandi among others spoke on the occasion.

As per the ongoing process for ICC ratification, FOHRID formed an 'Impunity task force' with the secretariat at its office. Most of the human rights organizations included in the coalition of ICC are involved in different activities in order to pressurize the government to end the culture of impunity.

Role of CSOs

CSOs have been playing crucial roles to protect human rights from the very beginning of promulgation of the Universal Declaration of Human Rights. CSOs, more specifically human rights organizations, are always advocating for the rights of the people and the need of international instruments for protecting these rights. Similarly, the CSOs in Nepal are, in the meantime, working and advocating for ratification of ICC in order to protect human rights and ending impunity for maintaining law and order situation in the country. CSOs played important role in awareness raising, lobbying, networking, sensitizing people about their rights and international instruments guaranteeing their rights. In the past, CSOs played important role for coordination with different stakeholders to pass different laws and also to ratify different international instruments like ICC. The role played by CSOs in April uprising of 2006 was a remarkable contribution of the CSOs. They need to play similar role for ending impunity of the country and ratification of Rome Statute of

ICC.

Political Commitment

Different activities like petition handling to the political leaders, meetings and discussions with them about the ICC and ending the culture of impunity from the nation were held in the past. Representatives of the coalition and the national campaign for ICC met with the leaders of major political parties like Girija Prasad Koirala and Ram Chandra Poudel of Nepali Congress, Dr. Baburam Bhattarai of CPN-M, Madhav Kumar Nepal of CPN-UML and Narayan Man Bijukche of Nepal Workers and Peasant Party among others and urged them to ratify the ICC. Leaders of the political parties expressed commitment for ratifying the ICC during the meeting but the commitment is yet to be materialized. The political parties can play important role in pressurizing the government as they are the strong institutions, but their commitments are merely limited in their speeches. The government has the obligation for protecting the rights of people regardless of the political situation of the country. The ICC is one of the major instruments for ending impunity and the government needs to be more focused for the ratification of ICC as it renders justice to the victims and takes action against the perpetrators. The situation here in Nepal seems that the government is not serious about ending the pattern of impunity as it failed to ratify the ICC despite the order given by the parliament and the Supreme Court to ratify ICC.

Challenges

There is no doubt that ratification of the Rome Statute of the ICC will be instrumental to end the trend of impunity of the country. However, there are many challenges for ratifying the statute. Some of the challenges are as follows:

The awareness level of Nepali people on the ICC and impunity is very low, which is also a challenge for the campaigners in Nepal. Other challenges include lack of will power of the government to ratify the statute and lack of continued pressure from CSOs. The CSOs are creating

pressure through different campaigns like media campaign, sit-in protest programmes, publication of various materials related with ICC but these campaigns were conducted occasionally. Leaders of political parties are also not aware about these issues, so they are not exerting pressure to the government to ratify it. Fear among the political leaders and security officials, to be prosecuted under the Jurisdiction of ICC, has also been hindering the ratification process.

Ways forward

As ratification of Rome Statute of ICC is instrumental for ending the culture of impunity of the country, the effort of CICC for universal ratification of the ICC will be an opportunity for Nepal to create pressure on the government for accessing the statute. The coalition of CICC is working with 2,500 CSOs under its network for universally recognizing the statute. As in the case of Nepal, NCICC along with 106 CSOs including lawyers, human rights defenders, and academicians among others is working for the ICC ratification to end the culture of impunity. The network should organize awareness raising programmes about the ICC across the country and sensitize all about the importance of ICC ratification to exert pressure on the government to ratify the statute. Active participation of CSOs is needed in order to lobby with the government collectively along with the political leaders. Collective action in a continual process can put pressure on the government to ratify ICC for combating impunity.

International Standards & Practices

Efforts are on not only at the national level but also at the international level for ratification of the Rome Statute of ICC. Different activities for the universal ratification of ICC to combat impunity are ongoing with the help of networks of the state parties along with CICC and 2,500 CSOs working for it. CICC always comes out with different journals where it focuses on the changing process of the ICC campaign and different issues and elements under it. And for this year, it's the 10th anniversary of Rome statute,

so it is urging different parties to exert pressure on the government for ratifying the ICC through different activities with the help of the coalition for ICC. The open letter on ICC ratification to combat impunity had been sent to different countries like China, Sudan, Laos, Philippines, Sri Lanka, Bahrain, Ukraine, Indonesia, Czech Republic etc urging to ratify ICC in order to fight against impunity universally. Similarly, Amnesty International has also been focusing its fight against impunity universally. Similarly, CICC is urging different organizations like African Union, Council of Europe, European Union, and Organization in American state etc. to urge their states to become the member of ICC. Some, 2,500 NGOs are involved in several campaigns of CICC. The ongoing process for the ratification of Rome Statute is one of the major activities by the CICC to fight against impunity universally. They are targeting the countries, which are not the state parties of ICC. Different review conferences with UN, African Union, and European Union are being held in order to know the progress and to find out loopholes for the universal ratification of ICC. Similarly, conference of Civil Society of ECOWAS countries on ICC was also held from 29-31 January, which was major activity for universal ratification of ICC. Apart from these initiatives, being a decade of Rome Statute, CICC and respective national coalitions of different nations are organizing different programmes worldwide to ratify the ICC.

Conclusion

The universal ratification of ICC is going on in the continual process throughout the world by the help of 2500 NGOs under the network of CICC along with 150 states supporting it. Coinciding with the 10th anniversary of the Rome Statute, the campaign for universal ratification of the Rome Statute is ongoing across the globe and Nepal is also organizing a year-long campaign from July 2008 to May 2009 as a year of combating impunity. Though the campaign for ratification of the Rome Statute started from the inception of NCICC in 2001, the

campaign is yet to bear any fruit so far. The issue of ICC is a new one so extensive awareness campaign should be organized to make people aware about the ICC and exert pressure on the government for ratifying it. Since most of the treaties ratified in the past became defunct due to low awareness level, efforts should be made to make people aware about the ICC.

As the 10th anniversary of Rome Statute 1998-2008, the slogan of "From Impunity to Accountability" has affirmed that:

- Together we can end impunity, prevent atrocities and protect future generations.
- Together, we can make justice universally and uphold the rights of victims.

The government and political parties need to think seriously, with full accountability towards the nation and the citizens, and ratify the statute at the earliest. All the members of civil society, media and all stakeholders should join hands for pressurizing the government to access the Rome Statute of ICC. Every political movements of the past were led by the political leaders with the support of citizens and CSOs, and now it's the turn of the political parties to support the initiative of CSOs and citizens' campaign to ratify ICC for ending the culture of impunity.

References

1. Basnet Lalit 2005, "Ratification of Rome Treaty: Ending of Impunity", E-Kantipur
2. Basnet Lalit 2005, "ICC: Importance & Challenges" Vol22, No. 48, Nepalnews.Com
3. Advocate Tripathi Dinesh 2006, "Nepal's Human Rights Situation & Role of Internations Community", E-Kantipur
4. Seadie Keshav Raj, "ICC & Nepal government" 2006, E-Kantipur
5. David Callahan, 2001 "What is Global Civil Society", www.civicnet.com
6. Timsina Dr. Netra, 2007 "NGOs in Nepal Social Responsibility & Governance System.
7. Kaphle Arjun, "Social Exclusion & role of NGOs in Nepal, PhD., President, NGO Federation.
8. Bhatta C.D., Jan 2007, Vol 34, Nov. 1, "Contribution to Nepalese Studies ■



» Jivanta Wagle «

The Role of Civil Society to Address Impunity in Nepal

Wikipedia defines impunity as, "exemption from punishment or loss". In the international law of human rights it refers the failure to bring perpetrators of human rights violations to justice and, as such, itself constitutes a denial of the victims' right to justice and redress. Even though, the meaning of Dandahinata (Impunity) is not mentioned in the Nepali Shabdakosh (dictionary). Culture of impunity will be taken seriously if everybody is serious on it. So, the role of civil society stands paramount to create pressure on the concerned parties to put an end to the cases of human rights violation.

The members of civic society played memorable role in the historic April Movement of 2006 for the restoration of democracy in Nepal. Its role and contribution is well known to all including the international communities. The civil society had great responsibilities to conduct the historical election to the Constitutional Assembly (CA) which they accomplished very well. Here, we can conclude that there was a sincere representation of the civil society on making the election to the CA a success. As of now, the role of civil society is being more significant as of the political parties to establish peace and ensure all human rights for all.

American scholar Noam Chomsky in his book "*Powers and Prospects*", mentions "nobody can resort the problems unless all people

unify on common agenda." He mentioned some examples of different post-conflict countries in his book. Only one political party can not sort out the entire problems of the nation on internal or external affairs. Apparently, now we have seen different genuine problems in different parts of the country, ever since after the April Movement of 2006. Though, most of the Nepali people expected that the Maoist could resolve the problems of human rights after entering into the interim legislature, but the problems stand as it were. After the April Movement, contentious issues relating to civil and political rights; economic, social and culture rights were raised all over the country i.e. rights to self-determination, rights of minority communities, rights of indigenous group, lesbian rights, Kamaiya issues, Badi issues, rights of land for landless, woman rights, rights of victim in insurgency (disappearance, extra-judicial etc), child rights, issues of cast discrimination, and issues on Truth and Reconciliation Commission. Still, numbers of genuine rights-based issues of people needs to be addressed in the present context.

Some questions might be raised in the present situation regarding the politicians' activities. Is one political party able to solve all these issues? Can one political party take any prompt initiatives on the problems? The period before the April Movement clearly depicts that only one political party can not

solve the major disputable issues. This was the very reason that the then king Gyanendra assumed all the executive powers of the state plunging the country into an autocratic regime. Though the political parties put their best efforts to overcome the royal regime, they did not

Some cases of gross human rights violation committed by the warring sides during the insurgency are yet to be highlighted to give justice to the victims and bring the perpetrators to justice. Civil society should take initiative in this regard. Such cases include serious human rights violation committed by the then Royal Nepal Army in Bhairabnath Battalion where 49 people were allegedly disappeared.

gain victory without immense people's support. People did not make their way to the sit-in programs and other assemblies organized by the political parties recounting their past behaviors. It was only after civil society took the initiative to lead the movement that people came for-

ward showing solidarity to the movement against the king's regime. The political parties by the time had very well understood the role of civil society to move the country forward. It was also a lesson learning for the political parties that nobody should be excluded in the political mainstream.

At present, people are being worried on knowing the leaders' perception on several rights based issues. It seems that, in the

The long awaited and promised Truth and Reconciliation Commission will also be a subject of confusion for the general people, if it is not perceived well by the political leaders. People have curiosity to know more about TRC, impunity and human rights. The victims of the human rights violations still question, "What will be done and how to make the human rights violators of the conflict period and April Movement responsible? How will we get justice?"

present context, nobody wants to bear the responsibility to settle down the problems. It clearly indicates the political corruption in the country. If no one is serious on different genuine issues, people can not imagine peace and prosperity in the country.

Some cases of gross human rights violation committed by the warring sides during the insurgency are yet to be highlighted

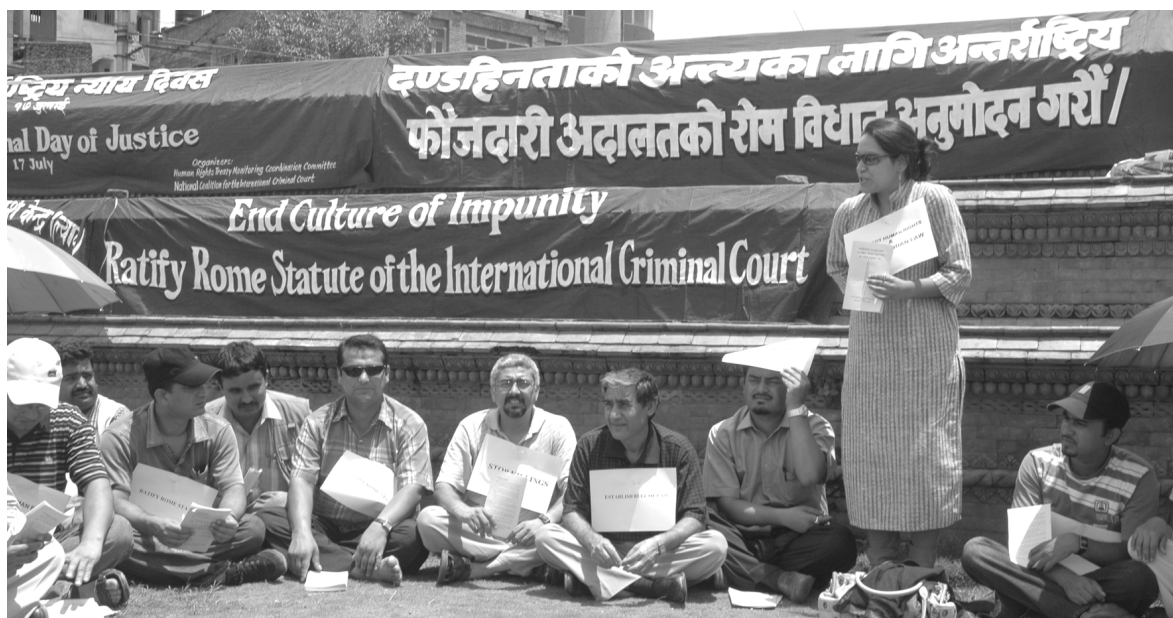
to give justice to the victims and bring the perpetrators to justice. Civil society should take initiative in this regard. Such cases include serious human rights violation committed by the then Royal Nepal Army in Bhairabnath Battalion where 49 people were allegedly disappeared. The case still lacks further investigation. Similarly, the case of Doramba where 29 persons were killed after captivity by the then Royal Nepal Army and the tragic Kotwada event of Kalitkot district where 35 labors involved into construction of Airport were killed on charge of being Maoists. Similarly, the CPN-M also carried out mass killings in different parts of the country during the insurgency period. The incidents include Madi of Chitwan where 39 civilians fell pray to the ambush of the Maoists, Bhandara incident where five travelers including a child were burnt inside the bus and murder of journalist Dakendra Thapa. Such incidents still need investigation and the perpetrators be brought to justice. No action taken in these cases clearly depict the state of impunity prevailing in the country though a new democratic government has been formed in Nepal.

Likewise, the non-implementation of the Rayamajhi Commission to take action against those responsible to suppress the April Movement also shows the increasing trend of impunity prevailing in the country. The political parties, too, have also failed to address this issue appropriately. Therefore, it calls the need of civil society to take initiative to pressurize the government to act on the recommendations made by the Commission.

When we talk about impunity, the activities carried out by the CPN-M are worth mentioning. The Maoists have now not only joined the government but they lead the government formed after the historic election to the Constituent Assembly. It is their responsibility to protect the citizens of the country,

guarantee their rights and formulate as well as implement laws to protect and preserve the rights of the citizens. But, their activities have made mockery to the concept of rule of law. Different organizations and institutions affiliated to the Maoist party are seen taking law in their hand. None of the Maoist cadres involved in such illegal activities have gone punished instead are being protected under the banner of CPN-M party. Such practices have resulted in deep rooting the culture of impunity and motivating the human rights violators to carry out such illegal activities. Reports coming from the rural areas of the country say that Maoists still conduct their parallel organizations besides the government. Continuation of labor camp, people's court etc are the testimony to this fact. Though, the Maoists expressed their commitment in different peace agreements, which paved their way to lead the government, to correct their past mistakes and abide by the democratic norms and values; they still remain in papers.

In addition with above cases, the issues of impunity are being more important in the country. Politicians have been presenting different arguments on impunity and human rights in their own way. It seems that these politicians are yet to be politically matured. Indeed, this sort of perception of political leaders on human rights and impunity will bring chaos in the political arena and the peace process. This will lead to confusion among the Nepali citizens regarding impunity and human rights. The long awaited and promised Truth and Reconciliation Commission will also be a subject of confusion for the general people, if it is not perceived well by the political leaders. People have curiosity to know more about TRC, impunity and human rights. The victims of the human rights violations still question, "What will be done and how to make the human rights violators of



the conflict period and April Movement responsible? How will we get justice?" It needs a great political will to punish the human rights violators and provide justice to the victims, but the commitments of the political leaders is yet to replicate in reality.

In this backdrop, civil society has an important role to play for restoring sustainable peace in the country, and to create a human rights friendly new constitution. The activities of the political parties and their leaders are gradually giving rise to pessimism among the general people. Though civil society organizations have been continuously organizing various movements for institutionalizing the achievements of People's Movement, and protecting people's rights, they need to do more in the days ahead as the country is passing through a transitional phase. Civil society is trying to make the human rights violators and the political parties accountable and responsible.

Political parties and the government need to do a lot for the restoration of sustainable peace in the country. In this context, members of civil society, NGOs and INGOs should be more sincere to make them accountable and responsible towards transitional justice and

human rights. This is the time for lobbying on impunity and human rights. The simple endeavor of civil society might be a good tool for making the government and political parties more accountable and responsible. Civil Society has to conduct massive awareness program on TRC, human rights and impunity, so that the gross human rights violators will be brought to justice. Civil society can do so by preparing a hand book on impunity and human rights, campaign for International Criminal Court as well as TRC, preparation of radio and TV programmes to disseminate the message to the mass. Apart from these initiatives, the civil society members should work to exert pressure on the authorities to bring perpetrators to justice, to provide compensation to the victims and for their repatriation.

Impunity is rampant in Nepal, so, the time is now for the civil society organizations to exert pressure on the government and the political parties for addressing the issue. As the civil society organizations played crucial role during the challenging days of the king's direct rule, and even during the April movement of 2006, the time now is for concentrating their fight against impunity and in favour of human

rights and social justice. Nepal's constitution prohibits torture but the Torture Compensation Act (TCA), which allows victims of torture to apply for compensation, does not define torture in line with the Convention Against Torture to which Nepal is already a state-party. Furthermore, the TCA does not criminalize torture, but merely gives judges the power to direct the relevant authorities to take disciplinary action against the officers involved. Civil society organizations have to raise voices in favour of human rights and against the impunity. Civil society organizations should work jointly in the issue of human rights and impunity as the country is passing through difficult period of transition. As the political parties are still not sensitive towards human rights and social justice, civil society organizations have to play leading role to incorporate human rights in the new constitution, which is going to be drafted by the Constituent Assembly. If the issue of impunity is not addressed on time, it may promote some sort of anarchy in the society, so all need to be serious in this regard.

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INSEC Reveals Shocking Picture of Disappearances in Nepal

Nearly two years after the government and the Maoists have signed Comprehensive Peace Agreement that formally ended the decade long Maoist insurgency, a report published by INSEC has revealed that the whereabouts of 933 persons disappeared during the period of armed conflict is yet to be known. A report entitled *'Impaired Accountability State of Disappearance in Nepal'* reveals that whereabouts of 828 persons, who were allegedly arrested by the state security forces, and 105 persons, who were abducted by CPN-M, is still unknown.

The field mission conducted by Working Group on Enforced or Involuntary Disappearance (WGEID) in December 2004, to discuss the cases of disappearance, at an invitation of the Government of Nepal, recommended the government to take a number of steps to deal with the issue. Stating that the situation of disappearance was widespread in Nepal, the WGEID made a number of recommendations including amendment in the Army Act and make no exception for crimes allegedly committed by security force personnel against civilian population during military operations and amending Nepalese criminal law to create a specific crime of enforced or involuntary disappearance among others. The Comprehensive Peace Accord (CPA) signed by the Government of Nepal and CPN-M has commitment to make public the whereabouts of allegedly disappeared persons. Similarly, the Interim Constitution (IC) has provisioned for formation of an investigation commission to look after the cases of disappearances in time of armed conflict. However, the government has not taken any step to implement these provisions, the report added.

The report traced the history of disappearance by state agencies in

Nepal back to 1951 and added that the trend of arbitrary arrest and disappearance of people mounted in the authoritarian *Panchayat* era of 1961-1989. However, the trend did not stop even after the restoration of democracy in 1990. Cases of alleged disappearance by the state significantly increased after the CPN-M launched an armed conflict in the name of 'people's war' in 13 February 1996. Police and armed forces of the government were largely involved in arbitrarily arresting the people, who were "suspected Maoists" during the period, while CPN-M was also responsible for forceful abduction and disappearance of people. The report noted that the armed conflict came to a formal end in November 2006 with signing of a CPA by government and Maoists but, whereabouts of about a thousand people remain unknown. The report concluded that the government of Nepal seems unwilling to establish a credible mechanism to probe into the cases of hundreds of persons, who were victimized of enforced or involuntary disappearance during the decade-long armed conflict.

The CPA, IC, and other agreements reached by the government, CPN-M and major political parties expressively provision for establishing a high-level investigation commission on disappearance and making public the status of allegedly disappeared persons. However, no such progress has been taken place so far. And, the government seems completely reluctant to progressively take up those commitments. Therefore, the concerns raised by the families of disappeared persons, independent experts of the UN, the OHCHR-Nepal and other national and international organizations have been largely ignored. Implementation of constructive comments and recommendations of those

IMPAIRED ACCOUNTABILITY

State of Disappearance in Nepal

A Brief Assessment of Implementation
of UN WGEID Recommendations



agencies and individuals have been further delayed due to lack of capacity and political will within the government, political parties and the state mechanisms.

Stating that the commitments expressed by the political parties and the government only remained in the paper, the report recommended the government to ratify International Convention for the Protection of All Persons from Enforced Disappearance, 2006 and establish crime of disappearance and promulgate a law on disappearance in compliance with the International Convention for the Protection of All Persons from Enforced Disappearance, 2006. The report further recommended the government to form a credible and high-level commission to probe into the cases of disappearance, their causes and the status of those allegedly disappeared by the state and parties to the conflict, immediately implement the directive order of the Supreme Court of June 2007 and provide without any discrimination the relief and assistance package to the families of victims, to amend the Army Act to provide that army personnel accused of enforced or involuntary disappearance be tried only in civilian courts and release full and complete details, including any written judgments, of all court-martial proceedings undertaken by Nepal Army in the past, and the Judges and Attorney General undertake, in the future, aggressive prosecution of army personnel accused of abducting/disappearing and torturing civilians among others.

■

Experts Call to Focus on Constitution Making Process

Stating that the Constituent Assembly has been concentrating more on day-to-day affairs of the parliament, constitutional experts have stressed the need that the Constituent Assembly should focus on drafting a new constitution rather than involving into other issues.

Speaking at an interaction entitled 'Constituent Assembly and technical aspects of it' organized by INSEC in Kathmandu on 16 September 2008, advocate Bhimarjun Acharya alleged that rather than concentrating on its mandate of drafting a new constitution, the Constituent Assembly is working at the capacity of Legislative Parliament. He further said that it is not necessary to hold the meetings of full session of the assembly except in some special agendas. Only some members of the Constituent Assembly can play the role of mini parliament to complete the work of Legislative Parliament. He stressed the need of forming Administrative Committee, Thematic Committee and Drafting Committee and concentrate on the issue of forming new constitution as per the mandate of the election of the Constituent Assembly. Acharya also charged that the Constituent Assembly had adopted the wrong track from the very beginning and got confused on its role. Acharya briefed lawmakers about the technical aspects of the Constituent Assembly.

Speaking at the same programme, former Speaker of the parliament, Daman Nath Dhungana charged that failure at the part of the political parties to form regulation of the Constituent Assembly has been delaying the new Constitution making process. He stressed the need of nominating separate Chairperson of Constituent Assembly and

Legislative Parliament to clarify the roles of both the bodies, which have separate roles. He also opined that the new constitution should be inclusive and nobody should feel that they were neglected by the constitution as previous constitutions failed just because people did not realize their ownership in these constitutions. Stating that people have high hope from the Constituent Assembly, he urged members of the Constituent Assembly to craft new constitution at the stipulated time. As per the interim constitution, the new constitution should be drafted within two months of the first meeting of the Constituent Assembly. However the deadline

programmes to exchange views of experts in various issues of Constituent Assembly to assist the constitution making process.

Acting Chairperson of Women Security Pressure Group, Sarada Pokhrel, stressed the need of incorporating women's rights in the new constitution. She also urged women members of the Constituent Assembly to cross the party whip in the issue of women's rights. She also said that 33 percent representation of women in the Constituent Assembly was ensured, thanks to the long struggle of women.

Constituent Assembly members of various political parties including CPN-Maoist, CPN-



could be expanded for six months if the constitution drafting process has not been completed at the stipulated time.

INSEC Chairperson, Subodh Raj Pyakurel urged all members of the Constituent Assembly to work tactfully while drafting the new constitution as they have dual responsibility. He also urged them to develop some sort of mechanism to communicate with people as they have very limited time for drafting a new constitution, so they may not get sufficient time to interact at the local level. Pyakurel further said that INSEC has been organizing such pro-

UML, Terai Madhesh Democratic Party had participated in the interaction programme held with the objective of imparting knowledge about the technicalities of the constitution drafting body to assembly members. They said that the role of civil society and human rights sector is crucial for making the new constitution inclusive. In a bid to sensitize lawmakers to make the new constitution inclusive and make them aware about various aspects of constitution, INSEC has been organizing a series of programmes on various aspects of Constituent Assembly and constitution making process. ■

Travels to Map Nepal's Conflict

'By the Way: Travels through Nepal's Conflict' is the compilation of essays that revolves round the experiences of authors' travel to the different parts of the country during the insurgency period from 2004 and 2005.

All the articles in this book unravel the sufferings of country people entrapped between the compulsion to follow the rules and regulations of two parallel governments; the state and the Maoists. These articles present live memories of the authors' travel to different districts during the period of armed conflict of the country that had claimed the lives of over 13,000 people. The book starts with the introduction part by Jagannath Adhikari and Bhaskar Gautam, where a concise overview has been made on the context of political, human and democratic rights. Brief introduction of the chapters presented in the book has also been elaborated in this part.

Divided into five chapters, the book provides an overall glimpse of the suffering faced by ordinary Nepalese during their daily travel and furnish well written deeply insightful and balanced accounts of their experiences and observations. Chapter one "Traveling through Maoist territory" by Jagannath Adhikari depicts the experience of the author while traveling in Bhojpur to conduct a research on livelihood improvement programme through road construction. The writer provides a vivid account of how the locals experienced insurgency while explaining the coping mechanisms developed by them. He also high-

By the Way

Travels through Nepal's Conflict



Ajit Baral
Jagannath Adhikari

Bela Malik
Purna Basnet

DR Pant
Usha Titikshu

By the Way: Travels through Nepal's Conflict

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lights the corruption, Human Rights violations, high handedness and alcohol abuse that have led to public apathy or animosity towards government security forces.

Chapter two "Far Western Villages in Conflict" by DR Pant portrays the lives of the people forced to bear upon the excesses of government security forces and Maoists. He highlights the desolation of families whose members are killed by either of them. Chapter three "Sojourn beyond five-star hotels" composed by Bela Malik and Usha Titikshu scrutinizes the

debacle of aid-driven activism, which reinforces hegemonic attitudes and exploitative social relationships, and apparently aims primarily to obtain additional aid. The growing psychological effect of war on women and children has also been beautifully explored. Purna Basnet in chapter four "Dolpa: after the tempest", sums up his adventures on the land of natural beauty with American researchers and development professionals. The writing provides an insightful elucidation of the no-harm relationships between the then Royal Nepalese Army and other security agencies, who generally controlled the district headquarter and PLA that had its heavy presence in rest of the district. The author has expounded the livelihood pattern of the locals after the other means of economic earning like tourism, trade gradually declined in the region. The last chapter "Along the Kingdom's broken shinning path" by Ajit Baral encompasses the memories of the writer touring in the Maoist controlled areas with a British Journalist. The reluctance of the Maoist cadres on allowing the authors to meet the PLA as pointed out by the author reveals their suspicion on foreigners who they think are critical about the People's movement.

By bringing out this book, Martin Chautari has made an attempt to expose the wounds of the insurgency and the scars left by it. The articles in the book only cover the situational description and would have been much better if the authors had made it more analytical, while including writers' own perception. Nevertheless, the systematic documentation of their travel memories in the form of a book has no doubt succeeded in portraying the lively account of the agony that the Nepalese people went through during conflict period. ■

Susmita Sharma

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