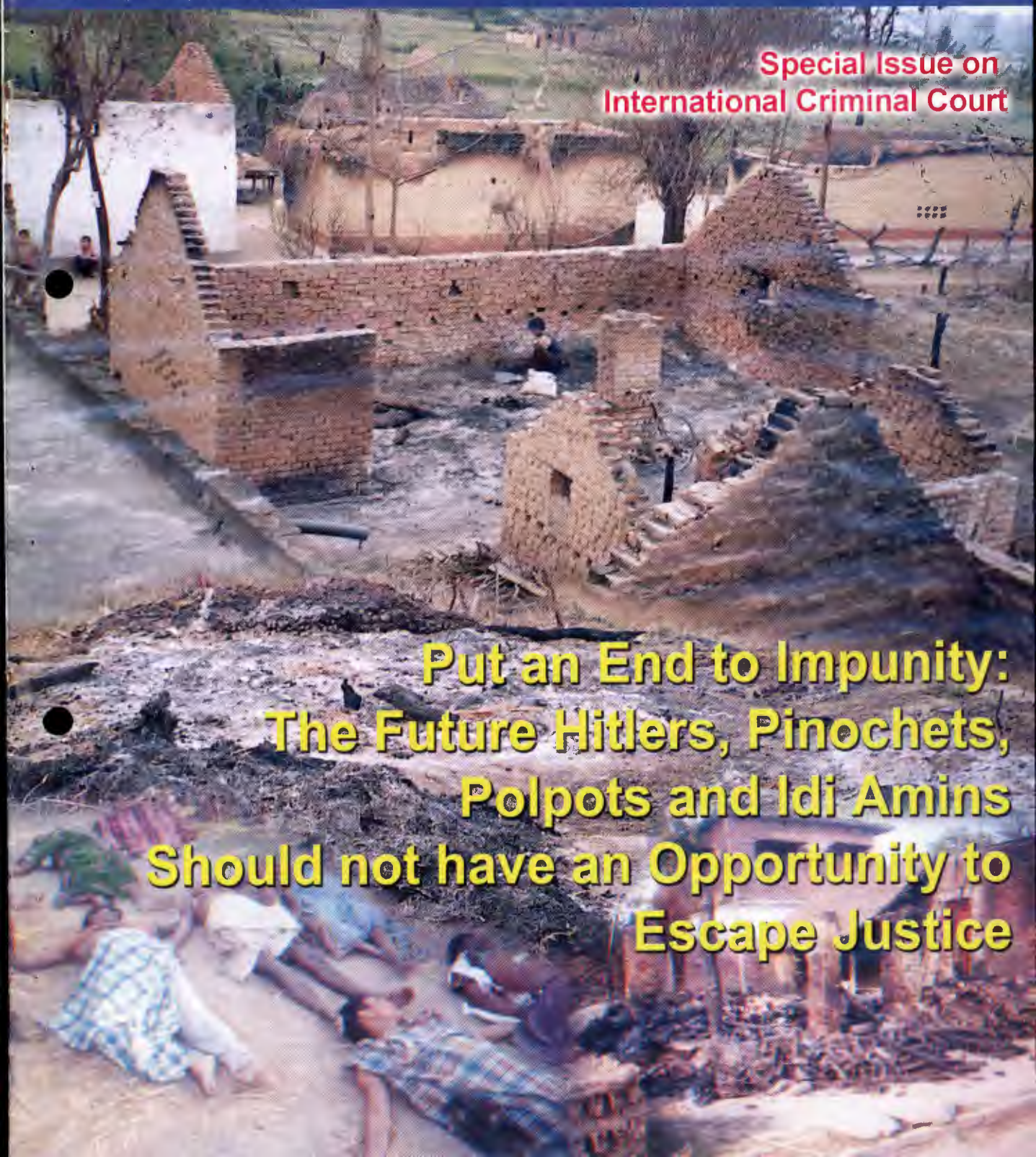


INFORMAL

Vol. 18, No.1, June 2005

Special Issue on
International Criminal Court

Put an End to Impunity:
The Future Hitlers, Pinochets,
Polpots and Idi Amins
Should not have an Opportunity to
Escape Justice



INSEC's Quarterly Publication on Human Rights & Social Justice



INFORMAL

South Asian Human Rights Solidarity

Special ISSUE on ICC, Vol. 18, No.1, June 2005



Cover Photo

Burnt houses and casualties of the arson and killings by the Village Defense Groups and Maoists in Kapilbastu and Nawalparasi districts.

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Special ISSUE on ICC

Put an end to impunity:

*The future Hitlers, Pinochets, Polpots
and Idi Amins should not have
an opportunity to escape justice*

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Human Rights Situation in Nepal: Long Term ICC Campaign

(National Coalition of International Criminal Court (NCICC), Coordinator INSEC)

Background

Seventeenth July is a historic event for advocates of peace, humanity and justice. On this day, the Rome Statute of International Criminal Court (ICC) was enacted in 1998. It took four years for the Rome Statute of the International Criminal Court to be enforced into practice. The historic significance of the Rome Statute lies in the fact that for the first time in history, a truly international court representing the major legal systems and all geographic regions of the world was established to hold individuals accountable for crimes against humanity, war crimes, genocide and crimes of aggression.

The Rome Statute entered into force on 1 July 2002 after the continuous effort of United Nations, non-overnmental organisations, women groups, students, parliamentarians, lawyers and other active members of the society. As of 15 June 2005, 99 states have ratified the Statute and 139 States have signed it.

The establishment of the ICC is a step towards victory against the state of impunity and grave violations of human rights in the world. The Court is the best and probably the only alternative means to address the inherent culture of impunity plaguing the world.

The ICC is considered as the most advanced international legal mechanism. It could render effective redress for victims of grave human atrocities.

The international community is actively involved in efforts to establish a permanent international criminal court. Nepal also was at the Rome Conference of 17 July 1998 for the establishment of the ICC. The Conference approved the Rome Statute of ICC with 120 votes. However, 21 countries, including Nepal, abstained and seven delegations opposed the statute, including USA.

The Need for an International Criminal Court

Through the Treaty of Rome, the international community tried to put an end to impunity of perpetrators of the most

serious crimes of international concern. The crimes brought under the jurisdiction of the Court are not new crimes. From the day of Nuremberg, crimes such as genocide, war crimes, crimes against humanity and aggressive war (crimes against peace) were brought under the mandate of international tribunals. By being party to the Geneva Conventions, Nepal has recognized war crimes as crimes of international concern. The core crimes covered by the ICC are crimes of universal jurisdiction.

Considering the continuous widespread violations of human rights and humanitarian law as well as the growing internal conflict and prevailing impunity, Nepal should join the ICC for the protection and promotion of human rights.

In 1990 democracy was restored in Nepal. Six years later on 13 Feb. 1996, the CPN (Maoists) declared the 'Peoples War.' Since then, nearly 13,000 people have been killed. The frequency of the extra judicial killings, mass killings, murders, forced disappearances, torture, arbitrary arrests and rape have been on the rise since.

The situation seems to have taken a turn for the worse. The Royal Palace Massacre on 1 June 2001 was on top of simmering political unrest emanating the ongoing Maoist insurgency and trenchant anti-monarchist sentiment.

Innocent civilians are being killed by the State and the insurgents as victims caught between attacks and counter attacks. Innocent people disappear and are abducted by both sides indiscriminately. Since the commencement of the Maoist's insurgency in 1996, approximately 8,112 people have been killed by the State and 4,444 by Maoists; around 26,144 were tortured by the State and as of June 2005, 1,232 peoples have been disappeared due to acts of the State. In April 2004, Maoists forced 300 captives to join the military. In that same period, Dalit youth were abducted and forced to partake in military training by the Maoists.

A Brief Review of Activities

Invitation of Lobby Team to Nepal

As Coordinator of the National Coalition for the ICC (NCICC), INSEC has taken part in the movement to ratify the ICC from the very beginning. It has raised the voice of Nepal as well as of South Asia in the preparatory commission held by UN on different dates. On May 12-15, 2002, it also invited other CICC members to Nepal to create a medium for support of the ICC.

On this event, the lobby team visited the Prime Minister's Office, main political parties, NHRC, lawyers, HR Representatives as well as multiple media outlets. In each meeting, the team discussed the importance of the ICC in the Nepali context. Delegates of the lobby team included Niza Concepcion, Joanee Lee, Ahmad Ziuaddean and David Mattas. The CICC delegates met government officials and received positive response for the ratification. The team answered crucial queries regarding the ratification of the ICC from the Nepali perspective.

Interaction Programme

As Coordinator of the NCICC, INSEC organized an interactive programme on the fifth anniversary of the Rome Statute of the ICC on 1 July 2003. The interactive programme was organized on the theme of the International Criminal Court and Human Rights a Nepali Perspective.

The objectives of the programme were to:

- ▶ Analyze the importance of the ICC from a human rights perspective.
- ▶ Discuss the possibility and potentiality of the Nepali Legal System being in compliance with the ICC.
- ▶ Discuss the activities and development of the ICC.
- ▶ Relevance of the accession of ICC by Nepal.
- ▶ Sensitise the lawyers, media, and NGO workers on necessity for the ICC in the current context of Nepal.
- ▶ Programme has been able to gather people from civil society organisations to have discussion on the importance of ICC in Nepal. This programme has also cleared up the confusions on why Nepal needs to ratify the Rome Statute in the present context.
- ▶ The programme has sensitised lawyers, media persons and civil society organisations on the need of ICC for small countries like Nepal.
- ▶ A strong voice has been raised to pressurize the government for ratification of the ICC.
- ▶ Activities performed by INSEC and the Coalition of International Criminal Court were highlighted during the programme.

On 6 June 2002, in its role as NCICC Coordinator, INSEC formally asked, the National Human Rights Commission (NHRC) to recommend to the government for ratification of the ICC.

On 2 July 2002, the NHRC released a press statement welcoming the establishment of the ICC and urged the government to accede the Rome Statute of the ICC.

Subsequently, a press statement was released on 1 January 2003 condemning the "Article 98 agreement" struck between the governments of Nepal and the USA in the name of countering terrorism. In the statement, INSEC condemned both governments, saying that the agreement violated Article 98(2) of the Rome Statute and breached Article 18 of the Vienna Convention.

On 7 Jan. 03, INSEC sponsored a study session to discuss the importance and development of the ICC. During the session, separate meeting was held for discussion on the Rome Statute of the ICC and its importance in the Nepali context.

A workshop was conducted to initiate the campaign in the support of ICC on 17 July 2003, anniversary of the establishment of the ICC.

Rome Statute of the ICC was translated into Nepali, to make locals in Nepal aware of the ICC and the need for its ratification by Nepal. INSEC has also incorporated the provisions of ICC in its training manual.

On 1 July 2004, an interactive programme among different groups of society was organised. In the programme, legal experts, intellectuals, human rights activists and law students expressed their views on the importance of ratification of the Rome Statute. Legal luminaries and human rights activists strongly condemned the Royal Nepalese Army's (RNA) refusal to furnish the details required by the Supreme Court, despite the orders, to ratify/consider the ICC.

Anti-ICC Campaign: Nepal's Agreement with the USA

By being party to the Geneva Convention, Nepal has already recognized war crimes as a crime of international concern. The core crimes under the ICC are crimes of universal jurisdiction. These crimes are so universally condemned that those who commit them are considered *hostis humani generis*, and any nation in the world has the authority to exercise jurisdiction over such persons without the consent of the individual's state of nationality. With

**Agreement Between His Majesty's Government of Nepal and
the Government of the United States of America
Regarding the Surrender of Persons to
the International Criminal Court**

His Majesty's Government of Nepal and the Government of the United States of America, hereinafter "the parties,"
Reaffirming the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes,

Recalling that the Rome Statute of the International Criminal Court done at Rome on July 17, 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court is intended to complement and not supplant national criminal jurisdiction,

Considering that both the Governments have expressed their intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by their officials, employees, military personnel or other nationals,

Bearing in mind Article 98 of the Rome Statute,

Hereby agree as follows:

1. For purposes of this agreement, "persons" are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.
2. Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party,
 - (a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or
 - (b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court.
3. When the United States extradites, surrenders, or otherwise transfers a person of the other Party to a third country, the United States will not agree to the surrender or transfer of that person to the International Criminal Court by the third country, absent the expressed consent of His Majesty's Government of Nepal.
4. When His Majesty's Government of Nepal extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, His Majesty's Government of Nepal will not agree to the surrender or transfer of that person to the International Criminal Court by a third country, absent the expressed consent of the Government of the United States.
5. Each party agrees, subject to its international legal obligations, not to knowingly facilitate, consent to, or cooperate with efforts by any third party or country to effect the extradition, surrender, or transfer of a person of the other Party to the International Criminal Court.
6. This agreement shall enter into force upon an exchange of notes confirming that each Party has completed the necessary domestic legal requirements to bring the Agreement into force. It will remain in force until one year after the date on which one Party notifies the other of its intent to terminate this Agreement. The provisions of this Agreement shall continue to apply with respect to any act occurring, or any allegation arising, before the effective date of termination.

Done in duplicate in Kathmandu on 31st of December 2002 in English language.

Sd.
MR. MADHU RAMANACHARYA
FOREIGN SECRETARY
FOR HIS MAJESTY'S
GOVERNMENT OF NEPAL

Sd.
MR. MICHAEL E. MALINOWSKI
AMBASSADOR
FOR THE GOVERNMENT OF THE
UNITED STATES OF AMERICA

a great advance in the rule of law, ending impunity and preventing and reducing the commission of these crimes in the 21st century.

HOW TO GET INVOLVED

Much of the pressing work for governments, international organizations and civil society must be undertaken at the national and regional levels. There are many opportunities for involvement, regardless of how much time you have available.

If you are...

an NGO

you can...

an individual

- * join the Coalition and contact other NGOs and ICC networks in your region (visit the Coalition's website or ask us for more information)
- * encourage other civil society organizations in your area to join the local network
- * request information from your political representative about your country's ratification plans and share it with the Coalition
- * urge your national and regional governments to sign and ratify the ICC Statute
- * hold briefings for other civil society organizations and for the press to inform them about the ICC
- * inform your membership about the ICC and encourage them to take action
- * link your website to the Coalition's website
- * follow developments at the meetings of the UN Preparatory Commission

- * visit the websites of the Coalition and its members to learn more about the ICC
- * write a letter to the editor of your local newspaper in support of the ICC
- * write a letter to your political representative, calling for his or her active and public support of the ICC
- * conduct a petition drive to gather signatures in support of the establishment of the ICC and send the petition to your political representative
- * encourage local groups with which you are involved (faith-based, community action, peace and other groups) to join the Coalition and become active on the ICC
- * contact the Coalition to do translations of key information materials to the languages in your region
- * monitor ICC coverage in your region and send copies to the Coalition for distribution

How do I contact the Coalition?

Headquarters: William R. Pace, Convenor, c/o WFM, 777 UN Plaza, 12th floor, New York, NY 0017, USA

Asia Office: Fayazuddin Ahmad, Program Coordinator, Asian Network for the ICC (ANICC)
+88-02-831-5851 (Tel.) * +88-02-831-8561 (Fax) * anicc@iccnw.org,
fayaz_anicc@yahoo.ie

Nepal: Widespread Impunity of Crime Against Humanity

Rupesh Nepal

Under the technical cooperation and advisory services in Nepal – Agenda Item 19 - the Commission on Human Rights calls upon all parties to the conflict to respect human rights and international humanitarian law, in particular Common Article 3 of the 1949 Geneva Conventions, as well as to act in conformity with all other relevant standards relating to the protection of civilians, particularly of women and children and to allow the safe and unhindered access of humanitarian organizations to those in need of assistance...

-Agenda 19. Passed on Nepal on 20 April 2005

Civilian Militia Backed by the Government

Kapilbastu, Nawalparashi and Rupandehi districts have been facing incidences of violent conflict since last year. The trend intensified since the Royal takeover on 1 February 2005. Peoples of these districts feel threatened and terrified by the constant violation of human rights and humanitarian law by the State and the rebels.

With the ten-year-old armed conflict between the government forces and the insurgent Communist Party of Nepal CPN (Maoist) intensifying, Nepal in recent days has been witnessing massive extra-judicial killings by both sides of the conflict. The prolonged conflict has already claimed the lives of more than 12,000 citizens with about the same number injured. Thousands of citizens might have been illegally executed by both sides since the beginning of the conflict and consistently gone unpunished. However, recent reports suggest that the scale of killings is increasing.

These killings are going on in the context of a severe human rights crisis and a failure of the rule of law. In addition to the killings, there are reports of hundreds of "disappearances," thousands of arbitrary arrests, rape and widespread torture by Nepali security forces, and torture, abductions, attacks on civilian infrastructure, and the use of children in military activities by the CPN (Maoist).

The crux of the problem is the environment of impunity that security forces and the CPN (Maoist) are enjoying. Despite high profile pledges of commitment to human rights, both the Nepali government, military and the CPN (Maoist) leadership have failed to investigate human rights abuses or punish those responsible.

Each warring side operates under an environment of impunity. And now the establishment and involvement of other small groups in this conflict has further complicated the state of impunity. Whatever the reasons such groups may be fighting for, the ultimate sufferers are civilians.

The recent example of such group is the Maoist Defense Committees, formed after the continuous atrocities by Maoists reached extreme proportions. To further worsen the situation, without weighing its impact on society, the state machinery is very active and publicly encouraging and establishing civil militia to counter any sort of opposition. The direct targets of such groups are those perceived as Maoists, alleged Maoist sympathizers, victims and witnesses of gross human rights violations by the state security forces, as well as human rights defenders, journalists and lawyers.

In this context, the Maoists may find a way to clear themselves of culpability by blaming their offenses upon the village defense committees. Recent events have further exacerbated this problem.

It was only after the royal takeover on 1 February 2005 that such groups were formed and were backed by the government and security institutions. Since then, the militia groups and the Maoists have been playing a cat and mouse game. But the ultimate sufferers have been the innocent people who are forced to bear the wrath of both sides. The notable point here is that although the government and the Maoists have been repeatedly making their commitments to Common Article 3 of the Geneva Convention under which attacking non-combatant is prohibited, both sides have failed to stand by their commitments.

Education Minister Radha Krishna Mainali to a mass gathering at Ganeshpur on 12 February motivated the mass to carry out such criminal activities. The address of Ministers added fuel to the flame. As a result the aggressive mass even killed people, alleged to be Maoists, in the presence of security persons. And the perpetrators remained unpunished. This also can be cited as an example raising the culture of impunity in the country. According to the report of the commission, the aggressive mass torched and looted 318 houses at Hallanagar, 118 houses at Bishanpur, 18 houses at Jalim Baghin and more than 20 houses at Khurhuria.

The Human Rights Treaty Monitoring Coordination Committee (HRTMCC) went on a fact-finding mission to confirm the facts of the incident. The facts revealed after the inspections prove that various cases of gross human rights violations such as arson, murder and rape were conducted.

On 20 February 2005 Counter action Committee burnt 306 houses in Hallanagar of Shivapur VDC accusing the resi-

dents of providing shelter to the Maoists.

About 40 VDCs out of 77 VDCs of Kapilbastu district were affected. Village Defense Committee Members killed 31 persons in the name of counteraction against Maoists, while Maoists killed 11 persons from 17 February to 5 March 2005. The Village Defense Committee also burnt 3 other persons to death on 20 February 2005 at Baraipur VDC.

According to the above facts, the state machinery seems to be fully behind the incidents. The political elite publicly instigated the actions of the Village Defense Committee.

After the incident, three ministers of the current cabinet visited the affected areas and congratulated the Village Defense Committee for their brave acts and encouraged other civilians to join such "noble cause".

No action was taken by the civil administration nor have the police conducted a thorough investigation. Instead of controlling human casualties and destructions, Chief

Son's Funeral

It was a fateful night on 13 May 2005. At 8:45 PM, Kiran Poudel was listening to the BBC Nepali service. A short distance away, three children were lying on the floor watching television. In a corner of the kitchen, Deepa, his sister-in-law was serving meal to her mother-in-law.

Suddenly, there came a loud explosion. Deepa dropped to the floor. She had no idea how many explosions to expect. When she recovered, Kiran was lying in a pool of blood. Deepa began her frantic cries for help.

Kiran, 28, of Chandrauta in Birpur VDC-7, Kapilbastu is yet another victim in the five-month long violence. According to INSEC statistics, the violence has claimed 56 lives in Kapilbastu after 1 February 2005. Of those, 32 were killed by the members of the defense committee.

Kiran was fatally wounded by the bullets shot from his window. He succumbed to the injuries at 1 am the next morning before he could be taken to the hospital.

Deepa was a health worker but to act as one for the injured brother-in-law was beyond her capacity. She, instead, started looking for vehicle to transport him to

the hospital. She cried for help. But, the vehicle was available nowhere. The lights in neighborhood began to be switched off after the Poudel family's cried for help. The doors began to be closed. At last, the army stopped a truck- a truck carrying a load of boulders. Deepa headed for Butwal with injured Kiran and a baby on her lap. But, luck ran out. The truck went out of order at some distance.

She wandered in the darkness seeking help. She reached a house where she saw a man carrying a torchlight, which she asked to borrow. But the man refused. She nearly snatched it from his hands, giving him in return a 1000-rupee note. It took two and half-hours to find another vehicle. But, by then, Kiran was already dead.

Deepa and her husband Prakash are recognized in Chandrauta as a doctor couple. They have saved a number of lives, responding to the calls during days and nights. But, for the past few months, their lives have been under constant threat.

Prakash Poudel was arrested on 22 April 2005 last year allegedly for helping the Maoists. The security forces themselves said Prakash was arrested under the pressure of the defense committee. He was released on 2 February 2005 after a long investigation. At the time of

located at Gorusinghe, on condition of anonymity.

The team has also noticed increasing communal clash between Hindu and Muslim and Hill and Terai people.

The team documented burning of 600 houses by the date this report was prepared.

Nawalparasi Incidents

Ramkishore Chamar, 40, of Somani VDC-7, was made to eat his own hand- cut by the members of the Village Defense Committee- and was later shot dead on March 26.



Arson by village defense group in Kapilbastu

The group took Chamar in control alleging him of protesting and not supporting the Committee. Behaving in the worst form of inhumanity, the group mutilated his right hand, forcefully made him eat his own chopped hand after burning and shot him dead at some distance from his house. Villagers said that the group had been overtly patrolling the village with weapons. The Village Defense Committee, to denote it as a specialized combat group, has named it the National Security Battalion Committee, says Murahari Kushwaha, Chairman of the Committee, which has been patrolling the border area with weapons. They have been checking everyone entering the area. Also, they have been beating people of the hilly region alleging to be Maoist and people of the Terai in case of not supporting them.

These groups, formed to retaliate against the Maoists and backed by security personnel have been creating problems for civilians over the past few months. On 25 December 2004, one such committee assaulted five human rights activists including Kailash Thakur of Nepal Human Rights Organization, who had been monitoring the situation in town after the Paklihawa incident. All five human rights activists were then handed over to the security persons and were released by the evening on the initiation of local journalists.

In a joint statement issued on 29 January 2005, by Kailash Thakur, Chairman of Nepal Human Rights Organization, Nawalparasi; Nasrullah Ansari, General Secretary of Nepal Human Rights Organization and member of the Nepal Bar Association; and Dhana Sharma, Member of

Nepal Human Rights Organization and member of the Nepal Bar Association, stated that they were beaten, threatened and mentally tortured by security persons. The statement read that they feared the leaders and members of the defense committee protected by the security institutions and appealed to the INSEC Chairperson to take initiation for the safety of their life and punishment of the perpetrators after investigation.

On the night of 16 April, the Maoists in their so-called counter attack against the defense committee members killed 10 innocent civilians including a child of Somani VDC, Nawalparasi. The Maoists encircled the Bargadawa

Sixty-year-old Man Killed by the Maoists, Kapilbastu

Five Maoists shot dead Laddan Musalman, 60 of Baskhor VDC-2 at 4PM on 22 May 2005 after taking him 500m away from his house. The Maoists had arrived there in two motorcycles. The post mortem of the body was conducted on 23 May 2005 in the district hospital in Taulihawa.

Teacher Killed by Defense Group, Kapilbastu

Members of the defense committee beat to death Jayas Mohammad, 38, of Jeetpur in Sisawa VDC, who was working as a teacher at Manpur Primary School on the afternoon of 14 May 2005. He was on his way to Bhalwadi VDC to attend a marriage ceremony. After the murder, the accused set the body on fire and left the charred remains behind. Security forces reached the site soon after the incident but no action was taken.

Mechanics of the International Criminal Court and Its Jurisdiction

Bhimarjun Acharya, Advocate

1. Court Structure:

The mechanics of the International Criminal Court envisioned by the Rome Statute are remarkably simple and apparently efficient in theory, at least on the macro level. The Court is made up of two independent components. The judiciary, consisting of 18 judges and their administrative support personnel, falls under the Presidency, while the prosecutorial arm of the Court, which includes the investigators, falls under an independent Prosecutor. These components, in turn, fall under the supervision of the Assembly of State Parties.

2. The Assembly of State Parties:

Each State Party to the Treaty provides one representative to the Assembly, which serves as the overall controlling body for the Court. This control is exercised to "provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court." The Assembly also maintains the power of the purse, as it decides the budget for the Court. As with many international organizations, the Assembly has an executive agency, in this case called the Bureau. The Bureau has a President, two Vice-Presidents, and eighteen members, who are elected by the Assembly for three-year terms. Who will meet at least once a year? Additionally the Assembly may establish other "subsidiary bodies" such as an independent oversight agency for the Court.

3. The Presidency:

The Court has a total of eighteen judges, subject to a potential increase by a vote of two-thirds of the Assembly of State Parties if necessary. These judges vote among themselves to select the President and the First and Second Vice-Presidents, who, together, make up the Presidency. The Presidency is responsible for the administration of the entire Court, except for the prosecutorial arm. This includes the Registry and the three Divisions of judges: Pre-Trial, Trial, and Appeals.

The eighteen judges are selected by a vote of the Assembly of States Parties from two lists of nominees, one containing candidates with a criminal law background and the other containing candidates with an international law background. Each State Party may nominate one candidate for the election, who may appear on either list if qualified for both. The Statute also requires that the initial election select at least nine judges from the criminal law list and at least five from the international law list, and that future elections be organized to maintain the "equivalent proportion" of judges from the two lists. Only one serving judge is allowed from each State, and the term of office is generally nine years, subject to a phase-in period in which one-third of the judges will have terms expiring every three years. Judges may not be re-elected, except for those serving initial three-year phase-in period terms or those elected to fill a vacancy for a period of three years or less.

4. The Chambers:

Once judges are elected, they are to be assigned to one of the three Divisions. The Appeals Division will be made up of the President and four other judges, while the Pre-Trial and Trial Divisions will be made up of at least six judges each. The qualifications of the judges will factor in the assignment, with the requirement that the Pre-Trial and Trial Divisions be heavy in judges with criminal law experience. The functions of the Divisions will be executed by the Chambers, which are the working bodies of the Court. The Appeals Division will have one Chamber, made up of all of the judges in the Division. The Pre-Trial and Trial Divisions may subdivide and operate in three-judge Chambers, and occasionally in the Pre-Trial Division, in single-judge Chambers. Based on the numbers of judges in each Division, both the Pre-Trial and Trial Divisions could have at least two Chambers each, operating simultaneously and independently on different cases.

to be informed, before questioning, that he is suspected of a crime within the jurisdiction of the Court, and to be informed of his rights, including the right to counsel.

At some point in the investigation process, the Prosecutor must examine what facts have been discovered and determine whether there is sufficient basis for a prosecution. If the determination is negative, then the Prosecutor must inform the Pre-Trial Chamber. If the case was referred by a State Party or by the Security Council, he must also inform the referring party. At the request of one of these referring parties, the Pre-Trial Chamber may review this decision not to proceed and may request the Prosecutor to reconsider. As with the decision not to pursue an investigation, if the Prosecutor's decision not to prosecute is based on a subjective determination that the interests of justice would not be served by pursuing the matter, then the Pre-Trial Chamber again has the power to reverse the Prosecutor's decision.

If, on the other hand, the Prosecutor determines that there is sufficient basis to prosecute the subject of the investigation, he must then determine whether or not arrest is necessary. If arrest appears to be necessary to ensure the accused person's presence at trial, or to prevent the accused from obstructing the investigation or continuing the criminal course of conduct of which he or she is accused, then the Prosecutor may request the Pre-Trial Chamber to issue an arrest warrant. If arrest does not appear necessary, the Prosecutor may request the Pre-Trial Chamber to issue a summons. In either case, the Pre-Trial Chamber will examine the request to decide its propriety. Such analysis will include a determination as to whether there are reasonable grounds to believe the accused person committed a crime within the jurisdiction of the Court.

If the Pre-Trial Chamber issues an arrest warrant, the Court may then request the State Party in whose territory the accused is located to arrest the person. The Court may request either a provisional arrest in urgent cases, with a promise that the proper request will follow, or an arrest and surrender with all the proper documentation provided at the outset. Once arrested by the custodial State, the accused will be brought before the judicial authorities of that State to determine that the warrant does, in fact, apply to that person and that the arrest was properly conducted with respect for the rights of the accused. The custodial State authorities may grant interim release pending surrender to the Court, but may not contest the validity of the

warrant itself. In any case, the custodial State must surrender the accused to the Court when ordered to do so.

If the Pre-Trial Chamber issues a summons, this document will specify the date the accused is to appear before the Court. The summons will be served on the accused, presumably using the procedures acceptable in the territory of the State Party where the accused is located. In this case, the accused person will be expected to present himself voluntarily on the date specified. Accordingly, this type of process should be reserved for suspects not considered to pose flight risks.

If the Pre-Trial Chamber refuses to issue the process requested (whether warrant or summons), then the Prosecutor must determine what course to take next. If at this point the Prosecutor decides not to proceed further, he can close the case, but must still inform the Pre-Trial Chamber and the referring party as indicated above. If, on the other hand, the Prosecutor decides to continue pursuing the case, he may either reopen the investigation to attempt to garner more facts to support the allegations, or, if the refusal to issue the process appears to have been based primarily on the Pre-Trial Chamber's belief that the Prosecutor requested the wrong process for the particular case, the Prosecutor may simply submit a new request for the alternate process.

7.3 Initial Proceedings, Trial, and Appeal Procedures

Whether brought before the Court by the process of warrant, arrest and surrender, or by summons and voluntary appearance, the accused will receive one more level of procedural protection before being tried on the charges alleged. At an initial appearance, the Pre-Trial Chamber will ensure that the accused has been informed of the charges and of his rights under the Statute, including the right to apply for interim release pending trial. Then, within a reasonable time after this initial appearance, the Pre-Trial Chamber will hold a hearing to "confirm" the charges.

If the Pre-Trial Chamber finds that the Prosecutor has met this burden, it will confirm the supported charges and commit the accused to a Trial Chamber for trial. If the Pre-Trial Chamber is not convinced the Prosecutor has met the burden, it has two choices. First, it may adjourn the hearing to allow the Prosecutor to consider providing additional evidence or amending charges to better fit the evidence. Alternatively, it may simply decline to confirm the

may invite the appropriate party to submit the additional appeal.

After considering the matters submitted, the Appeals Chamber may confirm, reverse, or amend the decision or the sentence, or it may modify the sentence if found to be disproportionate to the crime. Alternatively, the Court may order a new trial before a different Trial Chamber, if the extent of the error warrants this remedy. In gathering information to make this decision, the Appeals Chamber may call for evidence to answer particular factual questions, or may refer the case back to the original Trial Chamber to answer the questions. The Appeals Chamber decides the appeal by a majority vote and, in a similar fashion to the results of trial, the decision is announced in open court with its supporting rationale, including the majority and minority views, if any. In this case, however, a judge may, if he wishes, also deliver a separate opinion on a particular legal question.

Even after the final decision on the appeal, the Appeals Chamber may again be called upon to review the conviction or the sentence at some future time, if important new evidence is discovered, if it is later discovered that a fraud was committed upon the Court, or if one of the participating judges committed a serious breach of duty in the case. The Appeals Chamber has substantial leeway to take remedial action if it finds the claim to be meritorious. It may reconvene the original Trial Chamber or constitute a new one, or it may retain jurisdiction of the case within the Appeals Chamber to hear the evidence submitted and decide the matter. In the event that a conviction is later reversed on the basis of some miscarriage of justice, the Statute even provides an enforceable right to compensation for the unjustly convicted person. ●

- 1 For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; and (e) Forcibly transferring children of the group to another group. Art. 6 (of the Statute)
- 2 For the purpose of this Statute, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; and (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. (Art. 7 of the statute).
- 3 For the purpose of this Statute, "war crimes" means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Willful killing; (ii) Torture or inhuman treatment, including biological experiments; (iii) Willfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) Unlawful deportation or transfer or unlawful confinement; (viii) Taking of hostages. (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion; (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of

International Criminal Court and Internal Armed Conflict

Janak Bahadur Adhikari, Advocate

1. Background

The impunity of violations of essential humanitarian norms was the subject of grave concern of the world population since the very beginning of the modern era. The international community instituted the Tokyo and Nuremberg Tribunals to try the war criminal of the Second World War. This exercise in solidarity was repeated with the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda in 1993 and 1994 respectively.

The International Criminal Court (ICC) is the permanent institution established under the Rome Statute of the International Criminal Court in 1998. It entered into force in 2002. The principal motive for establishing the ICC is to abolish the state of impunity that is created by traditional criminal law in the name of immunity of state officials. The ICC holds jurisdiction over crimes against humanity, crimes of genocide, war crimes and crimes of aggression. But to exercise jurisdiction over crimes of aggression, the Statute must have defined the term aggression by amending the statute.

The International Criminal Court Statute is activated in conditions of armed conflict only. In the past, there was a conception that armed conflict only occurred between States. However, following the Second World War, internal armed conflict was recognized. The ICC can exercise its jurisdiction in either international or internal armed conflicts, under the rubric of international humanitarian law.

2. Internal Armed Conflict and International Humanitarian Law

Internal armed conflict is the conflict between a State and a rival group executed within the national territory of that State. Protocol additional to the 1949 Geneva Conventions

regards internal armed conflicts as "... armed conflicts which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."¹ In other words, internal armed conflicts can get international status.

Before the 1948 Genocide Convention and the four Geneva Conventions of 1949, international laws of war applied (according to their specific terms) to wars between States and had no formal bearing on non-international armed conflicts. The laws of war, as embodied in customary international law, were regarded as applicable in civil wars if the government of the State in which an insurrection existed or a third State, chose to recognize the belligerent status of the insurgent group, thereby acknowledging the law's applicability.

At the Ninth International Conference of the Red Cross (RC) held in Washington in 1912, the American Red Cross Society proposed that an international agreement be adopted to permit aid to victims of internal armed conflicts. That proposal was opposed by the Russian representative of the RC. However, at the time of the Russian Revolution, the RC provided assistance to the victims of that internal armed conflict.² Such efforts by the RC were only for humanitarian assistance.

In 1921, the Tenth International Conference of the RC, held in Geneva, adopted the principle that all victims of civil wars and social and revolutionary disturbances are entitled to relief. The Conference further appealed for international law to be respected even in times of civil war. In 1937 a commission of government experts convened by the International Committee of the Red Cross (ICRC)

5. The Current Internal Armed Conflict in Nepal and the Applicability of the ICC

Nepal is suffering from tragic internal warfare between the national government and the CPN (Maoist) since 1996. Since then, and as of 30 May 2005, 12,294 people have been killed as a result of the warfare.¹³ Among those, 4,302 were killed by Maoists and 7,992 were killed by the State.¹⁴ Similarly, there are a number of people that have disappeared at the hands of the government and Maoists alike. The National Human Rights Commission of Nepal has revealed that 717 people have disappeared.¹⁵ Furthermore, 19,408 people were tortured from 1996 through the end of 2004.¹⁶

To discuss international crime in Nepal is to discuss two kinds of international crimes: war crimes and crimes against humanity. Genocide has not occurred in Nepal, as the conflict is not directed against a particular ethnicity, religion, caste, culture, etc. Crimes of aggression are not relevant in internal armed conflict and present armed

Following is a separate discussion of specific international crimes.

5.1. Killings

As already mentioned, a large number of people have been killed in the ongoing armed conflict between the Nepali government and the CPN (Maoist). Please see table below for specific data.

The figures below may be many times greater than the revealed data because both the Government and the Maoists are hesitant to provide detailed information about the incidents. Among those killed, very few are security personnel and combatant Maoists carrying weapons. Only 541 are army personnel and 1,241 are police personnel. A large number of dead Nepali people are political workers (see table).

After political workers, the second largest number of people killed are agriculture workers. The internal armed conflicts also have claimed the life of students, civil servants, social worker, journalists, law professionals etc.

The conflicts even have claimed the life of children younger than 4 and citizens older than seventy years of age.

Number of Victims Killed by the State and Maoists
13 February 1996 – 30 May 2005

Occupation	by State	by Maoist	Total
Agricultural workers	1286	740	2026
Teachers	57	82	139
Political workers	5116	407	5523
Police personnel	12	1241	1253
Students	193	128	321
Civil servants	39	527	566
Social workers	6	7	13
Business persons	44	102	146
Workers*	137	73	210
Health workers	2	4	6
Army personnel	8	541	549
Photographers	2	3	5
Journalists	10	4	14
Law professionals	0	2	2
Prisoners	1	3	4
Dacoits	4	4	8
Engineers	0	1	1
Occupation Unknown	154	185	339
Unidentifiable persons	921	248	1169
Total	7992	4302	12294

*Workers denote waged workers, industrial workers and transportation workers.

Source: INSEC

By analyzing the below one can see that 705 Nepali less than 19 years of age lost their life due to Nepal's internal armed conflict. Among them, 185 were less than 14 years and 14 were less than 4 years of age. Similarly, the armed conflict has claimed the life of people more than 75 years old. In this period of armed conflicts 18 persons aged between 75-100 years were killed. 158 persons aged between 60 and 100 were killed as a result of the armed conflict. An analysis of these figures leads to the conclusion that attacks and counter-attacks between the Government and the Maoists are indiscriminate.

People Arrested/Tortured by State Authorities

Year	No. of Victims
1996	2071
1997	1568
1998	2665
1999	1139
2000	1035
2001	2195
2002	3430
2003	2716
2004	2589
Total	19408

Source: INSEC, DDC

house where the other nineteen were killed after being captured at Dhandakathair of Daduwa VDC. The victims were taken from the house of Yuv Raj Moktan of Doramba where they in a meeting.

The security forces publicized the incident as a Maoist encounter. However, the National Human Rights Commission (NHRC) formed an investigation team on 26 August 2003 to conduct an "on the spot" investigation

of the facts surrounding the incident. The team was headed by the former justice of the Supreme Court Krishna Jung Rayamajhi.

The investigation team concluded that the Doramba incident was not an encounter with the Maoist forces and that the people were killed after capture. The Maoists were gathered there, without arms, for the marriage celebration of two Maoist cadres. The captured people had their hands tied on their backs and taken to Danda Katheri, where they were shot dead. The NHRC further concluded that that incident seemed contrary to international humanitarian law, in particular Common Article 3 of the Geneva Conventions which embodies the principle that prisoners who are arrested and taken under complete control during times of armed internal conflict must be protected.¹⁸ On the day the Doramba incident report was released (i.e. 11 September 2003), the NHRC also published two additional reports that detailed violations of humanitarian law by Maoists. The Maoists were alleged to have ambushed a public bus in which security men and civilians were riding in Naji VDC of Panchthar District on 5 Aug. 2003. Similarly, on 19 Aug. 2003 Maoists shot dead two unarmed policemen who were engaged in bargaining at a local market in Dhangadi of Siraha District. In both incidents, the Maoists targeted security personnel who were

not engaged in hostilities, as well as civilians-- a clear violation of humanitarian norms and principles propounded by the United Nations.¹⁹ The above-mentioned incidents illustrate only a small fraction of the myriad atrocities resulting from the armed conflict. Of these, only a minority is investigated while a large majority is ignored.

5.2. Torture

Despite constitutional prohibition, torture is widely practiced in Nepal. Civilian people, political activists and captured members of the conflicting parties are continuously tortured in Nepal.

A national survey was conducted in 2001 by Centre for Victims of Torture (CVICT) among 95 percent of prisoners throughout Nepal. 70 percent of those surveyed reported that torture had been practiced and that it occurred most often in police custody, leading to the conclusion that of all

No. of Torture Victims

Perpetrator	1998	1999	2000	2001	2002
Police	260	247	714	335	678
Army	-	101	26	5	201
Maoist	-	32	23	37	180
Prison Guard	5	7	2	3	31
Forest Guard	1	8	55	20	9
Others	14	12	61	12	192
Total	277	407	881	412	1291

Source: CVICT, Annual Reports (1998, 1999, 2000, 2001, 2002)

likely to be tortured. Torture is also exercised by the Maoists. The National Human Rights Commission itself received 23 petitions on torture in 2001. But it must be noted that it is very difficult to pinpoint the exact number of torture victims because many incidents of torture go unreported due to fear of reprisal.²⁰ Please see the table above for figures regarding reported torture incidents.

Victims are tortured while in police custody, army camps, in Maoist custody, etc. As is evident from table No. 5, torture occurs most frequently in police custody. Following in numbers is the army, especially given its activities in 1999

matized by society. Thus, such crimes are usually not reported.

6. Concluding Note

The ICC can have jurisdiction over crimes committed in internal armed conflict. To exercise such jurisdiction, ratification of the ICC by the relevant State is necessary. There are 139 signatories to the Rome Statute of the ICC. Among them, 99 have ratified the Statute as of end of May 2005. A large number of the signatory nations, including USA, have yet to ratify it.

The exercise of jurisdiction of the ICC over internal armed conflict is seen by some as problematic. Some State authorities feel the ICC would be intervening in their internal affairs. In this regard, one must remember that the ICC is a complimentary institution activated only when the a State fails or is unable to punish a grave violation of humanitarian law. If States prosecute perpetrators of such violations through their national criminal justice system, the ICC does not intervene in the process. ●

- 1 Art. I, Protocol II Additional to the Geneva Conventions of 12, Aug., 1949
- 2 Roberts Adam & Guelff Richard, *Documents on the Laws of War*, Oxford University Press, 2000. p.481
- 3 *ibid*
- 4 *id* p.482
- 5 UN Doc. S/RES/808 (1993)
- 6 UN Doc. S/RES/ 827 (1993)
- 7 Article II, *Convention on the Prevention and Punishment of the Crime of Genocide*-1948.
- 8 Article 7, *Rome Statute of International Criminal Court*, 1998, UN doc. A./ CONF. 183/9.
- 9 Art.8(1)(c), *Rome Statute of International Criminal Court*, 1998, UN doc. A./ CONF. 183/9.
- 10 Prosecutor vs. Jean Paul Akayesu Case No. ICTR-96-4-T, ICTR T. Ch. I 2 Sept. 1998.
- 11 Prosecutor vs. Clement Kayishema and Obed Ruzindana (Case No. ICTR-95-1-T, ICTR T. Ch. II 21 May 1999.
- 12 Art.8 (1)(c), *Rome Statute of International Criminal Court*, 1998, UN doc. A./ CONF. 183/9.
- 13 INSEC, Documentation & Dissemination Centre, INSEC, Kathmandu.
- 14 *id*
- 15 National Human Rights Commission, *Manav Adhikar*, vol. 4, 2060 National Human Rights Commission Publication.
- 16 INSEC, Documentation & Dissemination Centre, INSEC, Kathmandu.
- 17 INSEC, *Manav Adhikar Barsh Pustak*, 2002, INSEC, p. 333
- 18 National Human Rights Commission, *Ramechhap, Doramba Ghatana Ko Anusandhan Samiti Ko Sthalgat Nirikshyan Tatha Pratibedan, 2060 (Field Observation Report of Doramba Incident, 2060)* Natinal Human Rights Commission, Herihar Bhava, Lalitpur.
- 19 National Human Rights Commission, Press Release, 2060/5/25 B.S. Harithar Bhavan.
- 20 National Human Rights Commission, *Human Rights in Nepal, A Status Report*, 2003, National Human Rights Commission Publication. Harihar Bhavan. Lalitpur p. 35.
- 21 INSEC, Documentation and Dissemination Centre, Kathmandu
- 22 The Kathmandu Post, October 21, 2001, The Kantipur Publication, Kathmandu
- 23 The Kathmandu Post February 26, 2004, vol. XII No. 8, p. 1 Col. 1-2.

must be to adopt or amend the domestic legal framework to make it compatible with the Statute of the ICC. This will entail both substantive and procedural changes that touch on an endless number of legal areas. While the principle of complementarity reserves the prosecution of nationals charged with crimes defined under the ICC for the States, they must ensure that their own judicial systems meet requisite international standards.²¹ States will also have to tread carefully when adopting judicial proceedings, such as truth commissions, so they are not viewed as avoiding prosecution.

Despite these safeguards, there is a practice among States of granting amnesty to perpetrators of gross violation of human rights and humanitarian law. This practice will have to cease. In other words, the successive governments should take proactive measures to prevent and punish past atrocities. Domestic legislation will also have to reflect a prohibition against selective amnesties after conviction since such a policy would be difficult to defend against the general purpose of the ICC of eliminating impunity of perpetrators of crimes.

5. Analysis

It is agreed that effective combat against violations of international law can be achieved through international cooperation. Cooperation will enhance the capacity of nations to promote and protect human rights and strengthen the enforcement of environmental regulations while also addressing not only the crimes defined by the ICC and the ICJ, but also other criminal activity, such as corruption, illicit drug trafficking, and national and international terrorism.

In principle, international courts and tribunals can deter crimes at the international level. However, major coopera-

tion among nations is still necessary. The implementation of a permanent court to prosecute international criminals is an important goal of the international community. This goal can only be reached through further cooperation among the member States. Additionally, States should make a collective effort against impunity at the international level and bring international criminals to justice.

In this context, the role of the ICJ has been limited to the extent of the disputes between States. The subject matter of its jurisdiction and the value of its decisions in terms of establishing the international rule of law seem much less than that of the ICC. The ICJ cannot deter grave crimes that threaten the peace, security and welfare of the world. On the other hand, the ICC would be able to cope with the disadvantages of the ICJ and deter grave crimes in the world. The ICC was established to enhance international cooperation by putting an end to the impunity of perpetrators of grave crimes that threaten the world. The role of States in implementing the ICC Statute is absolutely essential to the success of the ICC.

6. Conclusion

Supra national mechanisms for deterring serious violations of human rights and humanitarian law would be an effective measure to combat impunity at the national level. The efforts of the International Court of Justice have been significant to the development and codification of international law and in settling disputes among the States. However, in terms of protection and promotion of human rights and discouraging crimes against humanity and war crimes, the International Criminal Court would be more effective. For the ICC to carry out such functions, State cooperation and proactive support will be required. ●

¹ Although some of these crimes are defined by the subsequent development of international law. Sandra L. Jamison Leonard v.B. Sutton Award Paper: A Permanent International Criminal Court: A Proposal that Overcomes Past Objections, 23 Denv. J. Int'l L. & Pol'y 419, 1995. The US approach to Article 98 of the Statute of the ICC is one of the major issues where academicians and lawyers raised questions earlier in the drafting period of the ICC Statute.

² Ian Brownlie, *Principles of Public International Law*, ELBS with Oxford University Press, fourth edition, 1990, page 714.

³ www.icj-cij.org, the official website of the International Court of Justice.

⁴ Advisory Opinion of 8 July 1996 Preliminary Objection, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (1993) available at www.icj-cij.org.

⁵ Article 53, Vienna Convention on Laws of Treaties.

⁶ Official website of the ICJ, www.icj-cij.org

⁷ Official web site of the court: www.icj-cij.org

- 8 Ibid
- 9 *id*
- 10 For the establishment of the International Tribunal for Rwanda, see S. Res. 955, U.N. SCOR, U.N. Doc. S/RES/955 (1994)
- 11 Lawyers Committee for Human Rights, *The Rome Treaty for an International Criminal Court: A Brief Summary of the Main Issues*, vol.2, no.1, (August 1998), <<http://www.lchr.org/icc/papv2nl.htm>.
- 12 The Lawyers Committee for Human Rights, Establishing an International Criminal Court, at 1
- 13 M. Cherif Bassiouni, From Versailles To Rwanda In Seventy-Five Years, 10 Har. Hum. Rts. J. 12 (1997).at 60
- 14 Young Sok Kim, the cooperation of a state to establish an effective permanent international criminal court, 6 D.C.L. J. Int'l L. & Prac. 157
- 15 M. Cherif Bassiouni, *supra* note 4 at 62
- 16 Article 12.
- 17 Mark S. Ellis, the international criminal court and its implication for domestic law and national capacity building, 15 Fla. J. Int'l L. 215, Fall. 2002, at 236.
- 18 ICC Statute, *supra* note 1, at Art. 17(2).
- 19 *Ibid.* at Art. 17(3)
- 20 At least the states must adhere to the recognized principles and standards of due process in international human rights instruments, particularly as they relate to the rights of defendants

International Humanitarian Law and the International Criminal Court

Bidhya Chapagain

International humanitarian law (IHL) is the part of public international law that is primarily responsible for regulation of armed conflicts and in particular, protection of victims of armed conflict. It sets out the rules that all combatants must follow. IHL protections fall into two main categories. The first concerns the proper treatment of civilians and captured combatants by a party to a conflict. The second category of violations concerns the conduct of warfare and the weapons used. Attacks that do not or cannot discriminate between combatants and civilians are illegal. Civilians cannot be used as human shields. Attacks that cause disproportionate harm to civilians are prohibited. The rules of humanitarian law concerning international crimes and responsibility have not always appeared sufficiently clear. One of the thorniest problems in the implementation of the IHL relating to the legal nature of international crimes committed by individuals and considered as serious violations of the rules of humanitarian law.

The most serious IHL violations are considered war crimes including willful killings, torture and inhumane treatment, the taking of hostages, unlawful deportation and confinement, and willfully depriving a person of the rights of fair and regular trial. Civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience. The first and second world wars brought horrific violations of international humanitarian law and gaps in its implementation. The situations identified the need for more comprehensive monitoring through a universal treaty. This prompted the four Geneva Conventions of 1949, which were mainly concerned with international armed conflicts. However, they contain a key article in common dealing with non-international armed conflicts known as "Common Article 3," which, together with Protocol 2 of 1977, supplements the 1949 Geneva Conventions with regard to victims of

international armed conflicts and non-international armed conflicts.

Today, there are six main international instruments that regulate warfare and the protection of civilians and those wounded in combat. The four Geneva Conventions of 12 August 1949 and the two Protocols Additional to the Geneva Convention of 1977 provide the basis for international humanitarian law. They are particularly complex because of three different thresholds in applicability. By threshold it is meant that the conflict has to have a certain level of intensity in order to be characterized as an armed conflict:

- ▶ The four Geneva Conventions and Additional Protocol I apply in general international conflicts.
- ▶ Additional Protocol II applies in non-international conflicts, but the conflict must be fairly intense, including having an organized armed group on both sides in the fighting.
- ▶ Common Article 3 to the four Geneva Conventions applies in non-international conflict, but the requirements for the level of intensity and organization are not as strict as in Additional Protocol II.

The main shortcoming of international humanitarian law is that most of it was drafted to apply in international armed conflicts, and only partially to internal conflicts. A weak point in relation to the different thresholds is that there is no determining body to apply the standards or to decide which body of humanitarian law is applicable. The most obvious weak point is in relation to enforcement, which is also the case more generally with international law.⁷

The key challenge for international humanitarian law from the very beginning has been its enforcement. Violations of international humanitarian law are serious transgressions, whether in peace or war. The development of crimes within the international legal and jurisdictional framework.

stating with the most doubtful precedents and then concentrating primarily on the decisions of the Nuremberg and Tokyo International Military Tribunals for the trial of war criminals whose offences have no particular geographical location whether they are accused individually or in their capacity as members of organisations or groups. An important step in the lengthy process of developing rules on individual criminal responsibility under international law was taken with the setting up of the two ad hoc tribunals for the prosecution of crimes committed in the former Yugoslavia and Rwanda.

Atrocities in the former Yugoslavia and Rwanda shocked the conscience of people everywhere, triggering, within a short span of time, several major legal developments: the promulgation by the Security Council, acting under chapter VII of the United Nations Charter, of the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the adoption by the International Law Commission of a treaty-based statute for an international criminal court. These developments warrant a fresh examination of the present state and future direction of the criminal aspects of international humanitarian law applicable to non-international armed conflicts, conflicts that occur with far greater frequency than international armed conflicts.

The new international criminal court thus fills a crucial gap by providing the world with a permanent court that can act to prosecute the culprits if domestic courts fail to do so. The 1998 Rome Statute of the International Criminal Court established this court. The Rome Statute itself has enormous implications for the evolution of international humanitarian law and its enforcement. The jurisdiction of the ICC includes four varieties of crimes committed by individuals: genocide, crime against humanity, war crimes and the crime of aggression. Under the Rome Statute, the definition of genocide is derived from the 1948 Conventions Against Genocide.

Crimes against humanity encompass acts committed as part of a deliberate widespread or systematic attack against any civilian population, including murder, rape, sexual slavery and enforced prostitution. Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: life, liberty, physical welfare, health and dignity. War crimes are defined as serious international and non-international

crimes in war such as grave breaches of the 1949 Geneva Conventions and other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law.

The major merits of criminal prosecution and punishment by an international criminal court can be stated as follow:

- ▶ The purpose of an impartial tribunal is to determine the individual criminal responsibility of individual offenders.
- ▶ The judicial reckoning of perpetrators of serious violations of international humanitarian law before an independent tribunal can serve to blunt the hatred of the victims and their desire for revenge.
- ▶ The impartial justice can, in turn, create the conditions for a return to peaceful relations.
- ▶ The proceedings of an international criminal tribunal build an impartial and objective record of events.
- ▶ Punishing those who have deviated from acceptable standards of human behaviour sends a clear statement of the will of the international community to prosecute the perpetrators on the ground of their past offences.

The International Criminal Court has strengthened international humanitarian law by providing it with the following:

- ▶ The Court provides greater certainty for international humanitarian law because the Statute defined various notions like definitions of genocide, war crimes and crimes against humanity.
- ▶ The Statute enumerates instances of war crimes and crimes against humanity that provide key criteria specifying what is and what is not covered in the relationship between the Court's jurisdiction and international humanitarian law.
- ▶ The Court provides greater predictability—a distinct difference from the history of enforcement and accountability of international humanitarian law, which depended upon inconsistent and unpredictable national and local actions.
- ▶ The Statute encourages States to exercise their jurisdiction over ICC crimes. It follows the principle of complementarity, which deems that the ICC only may exercise its jurisdiction when State parties fail to investigate or undertake judicial procedures in good faith, after a crime covered under the Statute has been committed.

- ▶ The Court adopts a universal approach to humanitarian crimes. It invites participation from the global community, both governmental and non-governmental, in addressing violations of international humanitarian law.
- ▶ The Court evinces a degree of representativity in its establishment and lawmaking. The Court permitted input from both developing and developed countries, as well as from governmental and non-governmental entities.
- ▶ The Statute and its rules of procedure reflect the call for more victim-friendly and gender-sensitive interventions and remedial measures adopted by the court.

The adoption of the Rome Statute of the International Criminal Court in July 1998 was an important step forward in terms of providing legal protection to civilians in non-international armed conflicts. While the Statute was not in force at the time of preparing this module, it was anticipated that Articles 6-8 will take on a life of their own, even before the entry into force of the rest of the Statute. This is because these articles are generally seen to be reflective of international customary law and therefore, expected to have great influence.

The provisions of Articles 6-8 are a potentially great resource for advocacy and for preventing human rights violations against the civilian population. Not only do the provisions reflect international customary law, but also prosecute those who carry out the violations. Article 6 on genocide repeats the words of article 2 of the 1948 Genocide Convention. The great chances will be the enforcement mechanism provided through the court.

Article 7 on crime against humanity makes no nexus to armed conflict whatsoever; these standards can be seen as applicable in any widespread or systematic attack against civilians. Article 8 on war crimes goes beyond what in international humanitarian law so far has been recognized as "grave breaches," which are defined in Article 147 of Geneva Convention IV as acts such as "willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person or willfully depriving a protected person of the rights of fair and regular trial

as well as taking of hostages".

The next level of enforcement of international humanitarian law is through criminal jurisdiction, that is, through the prosecution and punishment by national or international tribunals of individuals accused of being responsible for violations of international humanitarian law. The enforcement of international humanitarian law must also be strengthened in order to bring those responsible to justice and to send a clear message of the international community's intolerance of such violence. Intentionally attacking humanitarian personnel who are legitimately conducting their work is a war crime, and has been specifically codified as such in the Statute of the International Criminal Court (ICC). Civil society support the ICC as a powerful instrument for bringing to justice perpetrators of crimes against humanitarian personnel, as well as perpetrators of other war crimes and crimes against humanity. The ICC will do this not only by providing a mechanism for the investigation and prosecution of such crimes where no State is able to do so, but also through the imperative it will place on States, through its complementarity regime, to investigate and prosecute such crimes through national initiative.

For centuries, those accused of some of the worst violations of human rights and humanitarian law, including war crimes, crimes against humanity and genocide, have enjoyed impunity at the global level. Violations of the more important rules are considered to be grave breaches of international humanitarian law (i.e., the Geneva Conventions and Protocols). The international community has shown a new concern for respect for fundamental rights of individuals and has strengthened international control mechanism to guarantee such respect, *inter alia*, by creating judicial bodies to bring perpetrators to justice, and in particular, by adopting the Rome Statute establishing the International Criminal Court. Under certain strict conditions, the ICC has jurisdiction to try persons suspected of having committed more serious crimes.

The relationship between international humanitarian law and the ICC will be seriously tested by the growing threat of global terrorism. Terrorist acts, many of which cause death or serious injury to civilians are grave breaches of the fourth Geneva Convention; in other words, war crimes. Under the conditions laid down by the Rome Statute, per-

sons that perpetrate terrorist acts may be subject to the jurisdiction of the ICC. But the ICC has only a subsidiary role to play. Both under the provisions of the Geneva Conventions and those of the Statute of Rome, the State which has jurisdiction over the person concerned has priority over the powers of the international tribunal.

Finally, it should be borne in mind that international law guarantees human treatment for persons who have committed a crime, be they military personnel or civilian, but does not obstruct criminal justice in the accomplishment of

that task. On the contrary, bringing suspected criminals to justice in a humane method is an essential part of ensuring respect for humanitarian commitments. By creating the International Criminal Court, the international community has made an important contribution both to the policy of prosecuting and punishing alleged violations of human rights law and international humanitarian law. The Rome Statute and the Geneva Conventions of 1949 enshrine the right of all persons to a fair trial. ●

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Book Review

Anthropological Insights on The "People's War"

"This is a readable and high-quality book. It provides more information and insight on the most successful Marxist rebellion in South Asia's history than has previously been found within one set of covers."

David Gellner, Oxford University

"Himalayan 'People's War': Nepal's Maoist Rebellion" is a good collection of articles within a set of cover which deals with the various aspects of the Maoists' "People's War." Most of the articles were presented as papers at a conference at the School of Oriental and African Studies in London on 2-3 November 2001 to cover the situation up to date. It sets forth explanations on the emergence of the Maoist movement, its expansion, response and effects on Nepali society. The writers are concentrated on examining Nepal's development and the Maoist movement from various aspects.

As Book Editor, Michael Hutt points out that the chapters vary greatly in themes, approaches, methodologies and styles, the book has brought different experiences and analyses into a single volume, which in turn will provide for a wider perspective on the causes and consequences of the movement.

Hutt writes as an introduction a chronology of the political events and developments leading up to the Royal takeover in October 2003. He addresses the monarchy, democracy and Maoism in Nepal, and analyzes the two contradicting regimes in the country by examining the insurgency, the negotiation process, and the ensuing state of emergency. He concludes that the military approach of the State to quell the Maoists "smoulder[s] the multifarious angers. If such angers are not to find new avenues and vehicles, their root causes will have to be addressed."

The political context of the country is presented in the first three articles. In "Radicalism and the Emergence of the Maoists," Deepak Thapa traces the historical roots of the CPN (Maoist) to the early days of party politics in Nepal and provides a description of the origin of the communist movement in Nepal, its development, splits, and armed uprisings before the Maoists' 'People's War'.



Himalayan 'People's War': Nepal's Maoist Rebellion

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In "The Maoist Movement: An Evolutionary Perspective," Sudheer Sharma explains how the insurgency developed and organized. He describes the organizational structure of the Maoists; the series of government agency displacements in the Maoist affected areas; the deployment of government army forces; and the Maoist's new strategies. Sharma also illustrates the political, economic and socio-cultural components of the Maoist-declared "People's Government" and their functions; the Maoists' methods of war; latent dissatisfaction with the war; and the government's failure properly to deal with the issues raised by the Maoists and quell the insurgency. Sharma also presents a brief account of the Prachanda Path— a political guideline, what the Maoists claim to be "the product of creative application of Marxist-Leninist-Maoist science in the concrete conditions of Nepal" (www.insof.org/w7). However,

Sharma emphasizes that the war has intensified and affected every part of the country, and thus, talks are the only way and the last hope to transform the armed conflict into a mainstream political debate.

In "Nepali State and the Maoist Insurgency, 1996–2001," Krishna Hachhethu examines the State's response to the insurgency up to late 2001 and concludes that elections to a constituent assembly are a plausible way to bring the Maoists into mainstream politics.

The second part of the book deals with the relationship between the Maoists and civilians. In "The Path to Jan Sarkar in Dolakha District: Towards an Ethnography of the Maoist Movement," Sara Shneiderman and Mark Turin describe how the movement impinged upon and was received in the context of Dolakha, a district in the hills of eastern Nepal. The authors make clear that they present only the perspectives of those vil-

lagers living in areas of Maoist activity with whom they had close rapport. Thus, the article does not present the perspectives of government officials, security agencies or various other groups active in the villages. The authors well present the villagers' perspective on various aspects of the movement, including the origin and objective of the Maoists, their motivation for joining the movement, and their views on government security forces. Similarly, the authors trace the major reasons "that made Dolakha a logical choice for the Maoists' first publicly-declared eastern base." The reasons include ethnic composition, caste/class concerns, demographic aspects, and the Maoist approach in dealing with local issues, among others. The article also presents a multifaceted account of the Maoist activities in the district, the formation of *Jan Sarkars* (people's government), its functions and the people's response.

Marie Lecomte-Tilouine, in "Ethnic Demands within Maoism: Questions of Magar Territorial Autonomy, Nationality and Class," examines the involvement of ethnic minorities, especially the Magars, in the Maoist movement and presents the views of Magar activists and intellectuals on this issue. In "Democracy and Duplicity: The Maoists and their Interlocutors in Nepal," Pratyoush Onta takes a critical look at the relationship between the Maoists and the Kathmandu intelligentsia and illustrates the features of Nepali society and politics after the 1990 movement as well as the growth of the Maoist movement. He presents the duplicitous features of the political, commercial and civilian sectors and their effects on politics. Onta also observes critically the Maoists' ability to place their agenda in the media and in the discourse of the intellectuals. Lastly, Mandira Sharma and Dinesh Prasain analyze the experience of rural women with the Maoist movement in "Gender Dimensions of the People's War: Some Reflections on the Experiences of Rural Women."

Part three, entitled "Geopolitical and Comparative Perspectives," is comprised of three articles. Joanna Pfaff-Czarnecka, in her piece, "High Expectations, Deep Disappointment: Politics, State and Society in Nepal after 1990," examines the causes of the movement and points out the shortcomings of the political environment after the beginning of the democratic movement in 1990.

Likewise, Saubhagya Shah, in "A Himalayan Red Herring? Maoist Revolution in the Shadow of the Legacy Raj," looks at the Maoist movement in the context of India's geopolitical domination of Nepal. To that end, he has analyzed the Maoist movement and India's response, within a historical context. "Maoism in Nepal: Towards a Comparative Perspective," by Philippe Ramirez, is a comparison of the Maoist movement with similar movements in other countries, including Cambodia, China, India, the Philippines and Sri Lanka. The writer also examines the reasons and doctrinal bases for the standard of annihilation adopted by the Maoists when dealing with enemies.

In conclusion, the book presents studies on the current situation of civilians in rural Nepal as well as the political future of the country. Hari Roka describes the ideological and organizational background of the Maoists' 'People's War' and its effects. He also reflects on the political implications of the deployment of the army mainly after the declaration of state of emergency in 2001. On the basis of background studies, Roka ponders:

[The People's War] has kindled a flame of rebellion in people, but those in charge of the [the] war have shown such a lack of principle and order, and such intolerance towards the people, that they have shoved the left movement as a whole onto a kind of directionless path. Callous deeds such as using defenseless people as shield during attacks, killing detainees and police personnel in heinous ways, and meting out death sentences to ordinary people suspected of informing on them gives some inkling of the kind of tyranny the Maoists might bring if they won tomorrow. That is why the CPN (Maoist) has come to be extremely isolated from national and international politics.

Judith Pettigrew assesses conditions in the conflict zones in the hills of western Nepal. Pettigrew writes "The presence of the Maoists and the security forces has changed the way people move around the village and the surrounding countryside." This is a general phenomenon. More specifically, the writer has pointed out the results of the "culture of terror" created by the armed conflict and people's sufferings as well their tactics for avoiding the violence.

Part five of the book includes documents such as the forty-point demands of the United People's Front (February 1996); the full text of Prime Minister Sher Bahadur Deuba's Message to the Nation (27 November 2001); and the full text of King Gyanendra's Address to the Nation (4 October 2002).

This book is a joint effort of Nepali and foreign researchers and scholars providing national as well as international perspectives on the various aspects of the Maoist movement in Nepal. Although the book contains an interesting compilation of articles, it does not illustrate the cycle of violence manifested in the areas affected by the "People's War." Though the writers have presented first-hand information through anthropological methods, in various contexts, their accounts seem biased. This may be a result of the conflict and resulting fear in those areas. Furthermore, the socio-cultural effects of the conflict and its long-term implications have not been sufficiently discussed. In sum, the book is quite useful for human rights activists, journalists, academics, social researchers and the like who are interested in the study of the Maoists' "People's War."

— Prakash Gnyawali

Role of INSEC for the information dissemination in accordance with the demands of its world-wide networks, including the national and international media, has not been well perceived among the district representatives. Though the organization is well recognized among national and international community and mass media for information related to human rights in Nepal, we were not taking adequate care for immediacy all the time.

The need was felt to energize INSEC District Representatives for the optimum use of their potential and prompt dissemination of information as well as to improve the quality of Human Rights Yearbook.

INSEC Yearbook has representatives in all 75 districts of the country. They gather information mostly related to civil and political rights. Their dispatch is being used broadly in four ways:

- ▶ For the annual flagship publication of the organization - Human Rights Yearbook.
- ▶ For the quarterly publication - Situation Report.
- ▶ For the information dissemination in accordance with the demand of the worldwide networks.

For the publication of human rights violation to bring the plight and perpetrators in the light for justice through urgent actions, appeals, press releases, etc.

INSEC-representatives in each district collect information on human rights events and situation and send them to the Documentation and Dissemination Center (DDC) at the Central Office in Kathmandu. Fact-finding missions on incidents of human rights violation are organized from time to time. The year round research has been on going. But in terms of diffusion the information dissemination process has been very much periodic.

Thus, we came to the conclusion that in order to make dissemination of information related to human rights in Nepal faster and efficient, a 24-hour outlet has been imperative. In this prospect www.inseconline.org has been introduced since 31 July 2004.

This website provides immediate reports on human rights violations. But it is not merely a window on the human rights situation; rather it provides up-dated information on various aspects of human rights.

Considering the overall objective of the Human Rights Yearbook as to protect and promote human rights and to raise awareness on human rights, we could make our information system speedy and up to date by using the same network and with almost the same resources.

INSECONLINE has been started on 31st July 2004, the 12th Memorial Day of Prakash Kaphley, an untiring human rights defender.

For Human Rights & Social Justice



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