

Research

Asian Federation Against Involuntary Disappearances

“Diplomatic influence of international actors in the
adoption of Human Rights instruments in the
Philippines”

Focus on the Anti-Enforced Disappearances Act, Rome
Statute and forecasts for the Ratification of the
Convention for the Protection of All Persons against
Enforced Disappearances.



By Isis Le Bas
AFAD Intern

Table of Contents

Preface	3
Acknowledgments	4
Introduction	5
CHAPTER 1: FINDINGS	9
I) Principal findings	9
1. Visit of an international emblematic figure	9
a) <i>The Anti-Enforced Disappearances Act and the visit of Philip Alston</i>	9
b) <i>The Rome Statute and the visit of Sang-Hyun Song</i>	10
c) <i>Conclusions for the ratification of the Convention on the Protection of all Persons against Enforced Disappearances</i>	11
2. The impact of international and regional summit	12
a) <i>The international summits</i>	12
b) <i>The regional summits</i>	14
3. The implication of foreign governments.....	16
II) Side findings	16
1. The importance of inter-parliamentarian diplomacy	17
2. Convincing the lawmakers of the competency of the CED will not threaten national sovereignty	16
3. Convincing the President that the International Convention respects the three pillars of the Philippines Foreign Policy.....	17
CHAPTER 2: LIMITATIONS	20
CHAPTER 3: CONCLUSIONS	22
Annexes	24
Bibliography	33

Preface

This research paper complements the earlier research on the legislative advocacy for the adoption of a law defining and penalizing the practice of enforced disappearances in the Philippines. Due to limitations of time, the earlier study was not able to cover the role of other stakeholders including international actors.

Our researcher for this study, Ms. Isis Le Bas is a French intern with a Masters in Diplomacy and International Law from a university in Paris, France.

Acknowledgements

The researcher would like to kindly express her gratitude to all the persons that accepted to take time to contribute to the study, share their experience, knowledge and insights.

- **Ms. Mary Aileen Diez Bacalso**, Secretary General of the Federation Against Involuntary Disappearances (AFAD) who kindly welcomed me as an intern for 3 months and guided me in understanding the work of the NGO and the issue of involuntary disappearances in the Philippines.
- **Ms. Caroliza Tulod-Peteros**, Regional Campaign Officer at Asian Federation Against Involuntary Disappearances (AFAD), who supported me throughout my present research and helped me getting in contact with persons for interviews.
- **Yves Duss and Pauline Kuhn**, the previous interns at the Asian Federation Against involuntary Disappearance (October - December 2013) who realised a work of quality on the legislative advocacy for the adoption of a law defining and penalizing the practice of enforced disappearances in the Philippines.
- **Attorney Ricardo Sunga**, International Law teacher at La Salle University in Manila, who welcomed me to his class and answered my questions on the Philippines legal system and aspects of Filipino diplomatic practice.
- **Dr. Aurora Parong, MD**, Former Director at Amnesty International Philippines for her help in understanding Amnesty International Philippines advocacy methods and its role in the adoption of past Human Rights instruments in the Philippines.
- **Mr. Carlos Conde**, the Philippines researcher for Human Rights Watch's Asia division, for answering my questions besides his busy schedule and giving me the position of Human Rights Watch in the influencing of international protagonists in the Philippines.
- **Ms. Pamela Fahey**, legal expert and head of the program « *Justice for All: Enhancing Accessibility, Fighting Impunity* » at the EU delegation in the Philippines for kindly taking the time to meet me for the purpose of my research and sharing her insights.

Introduction

Among nine (9) United Nations Conventions on Human rights, the Philippine government signed and ratified eight (8). The only convention not applicable on the national territory is the Convention for the Protection of All Persons against Enforced Disappearances adopted by the United Nations General Assembly on 20 December 2006.

However, in 2012 the Philippine Congress passed a domestic law criminalizing Enforced Disappearances entitled the “Anti-Enforced or Involuntary Disappearance Act” (RA 10353). Strangely, this text is considerably similar to the United Nations Convention of 2006, and therefore raises many questions among experts and human rights defenders on its relevance compared to a simple ratification of this pre-existing international agreement. At the time, the Philippine government’s argument was “the necessity to adopt a national legislation on this issue prior to the ratification of the Convention for the Protection of All Persons against Enforced Disappearances”.

It has been two years now since the RA 10353 was adopted, after a 16-year long legislative process. It took no less than 37 bills in both Chambers, 5 congresses – the 11th, 12th, 13th, 14th and 15th – and 4 different presidential administrations – the administrations of Fidel V. Ramos (1992 - 1998), Joseph E. Estrada (1998 - 2001), Gloria Macapagal Arroyo (2001 – 2009) and Benigno S. Aquino III (2009 – present) for one bill to actually become a law in the Philippines.

However, since 2012, no one has been brought to justice on the strength of this law. Even worse, high and top-ranking military and police officials that are facing serious and credible charges of human rights violations have been routinely promoted despite opposition from victims, families and human rights defenders. It seems that, like other recent pro-human rights laws like those against torture, the Martial Law Compensation law or the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law (CARHRIHL), the “Anti-Enforced or Involuntary Disappearance Act” is either not implemented, diluted or circumvented.

It is therefore one of the main missions of AFAD, to advocate for the ratification of the Convention and its full implementation for the Philippines to finally be exempt of this serious violation of human rights which are enforced disappearances. AFAD is indeed right to pacifically fight for the ratification of the Convention. If the Anti-Enforced Disappearances Act tries to provide certain guaranties for the families of the *desaparecidos* and to prevent people from being victims of involuntary disappearances, some dispositions of real importance present in the Convention were not included in the domestic law. One of the main aspects is the overseeing independent international body, the Committee on Enforced Disappearances established to monitor the implementation of the Convention. It is written that “*Each State Party may recognize the competence of the Committee to receive and consider communications from or on behalf of the individuals subject to its jurisdiction claiming to be victims of a violation by the State of provisions of this Convention*”¹. The Committee may also demand to the State Party to provide information or request a visit².

These provisions are important tools to guarantee human rights protection for Filipinos. Hence, it is urgent to convince the Philippine President to ratify the Convention for the Protection of All Persons against Enforced Disappearances and to fully implement it.

To reach this goal AFAD has suggested for me to conduct this research, which is in continuation of the previous study. Yves Duss and Pauline Kuhn, who were interns at AFAD between October and December 2013, produced a quality analysis on “*the impact of civil society on the adoption of the law defining and penalizing the practice of enforced disappearances in the Philippines*”.

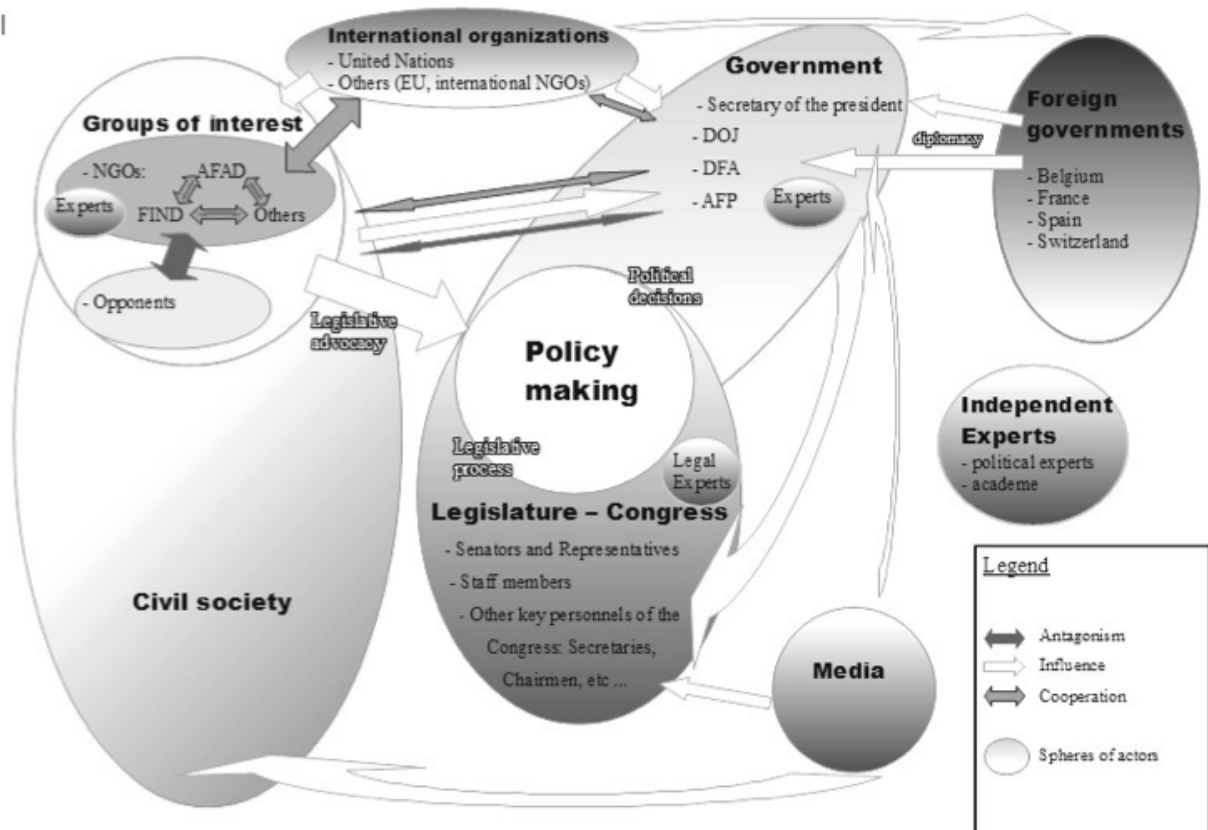
Today, AFAD’s interest is to understand what the past potential was, either direct or indirect influence of international actors in the adoption of instruments regarding the issue of enforced disappearances in the Philippines or which were the actors that did not help in the past but might be able to help in the future. These findings could help

¹ Article 31.1 of the UN Convention on the Protection of All Persons from Enforced Disappearance.

² Article 29 and 33 of the UN Convention on the Protection of All Persons from Enforced Disappearance.

AFAD to develop new complementary advocacy strategies for the ratification of the Convention by, besides targeting the national lawmakers, seeking support of international protagonists who can sometimes be influential

The theoretical figure below created by Yves Duss and Pauline Kuhn³ can help understand the factors and actors who played a part in the process of the adoption of the “Anti-Enforced or Involuntary Disappearance Act” (RA 10353) and their interactions. Their work was focused on civil society (left circle) influence on the Act’s adoption process. The present research will be looking through the potential influence of International organizations and foreign governments (top and right circles)



However, to be useful in determining which of the international actors might be targeted for help in the ratification of the UN Convention on the Protection of All Persons from Enforced Disappearance of 2006, this research will not so much be

³ Theoretical framework, Research on the legislative advocacy for the adoption of a law defining and penalizing the practice of enforced disappearances in the Philippines.

focused on studying the impact during the adoption of the Anti-Enforced or Involuntary Disappearance Act.

Indeed, the RA 10353 is a Philippines national law. Therefore, its drafting, adoption and implementation are governed by the principle of national sovereignty that imply the right and power of regulating its internal affairs without foreign interference. In these circumstances, international influence might be reduced to a minimum, engaging only time-to-time indirect encouragements sent in the most cautious and diplomatic manner. Therefore the influence of international actors cannot be equal to the adoption of a domestic law and to the ratification of an international agreement.

Consequently in order to find the protagonists that need to be targeted for the ratification of the Convention of 2006 in the future and how they can be involved in the specific process of the ratification of a treaty, we will seek their role in the adoption of the Act of 2012 and on the last international convention ratified in the Philippines.

This last convention is the Rome Statute that the Philippines signed on 28 December 2000 and ratified on 30 August 2011 after the Committee Chair Sen. Loren Legarda and head of its subcommittee on the ICC, Sen. Miriam Defensor Santiago, delivered their sponsorship speeches on 16 August 2011. The Rome Statute is the treaty establishing the International Criminal Court.

For this research, the international actors that would need to be interviewed can be classified into several categories such as:

- International organisations: United Nations
- Regional organisations: European Union, ASEAN...
- Foreign Governments
- International NGOs: Human Rights Watch, Amnesty International...
- International business companies

However, it was rather difficult in such a short amount of time, especially in July and August when all the offices are empty, to gather data on the diplomatic practices of all these international bodies in the Philippines. I will then present the factual and objective information I have collected through my research even if some actors still remain to be contacted when they will be back in September.

Chapter 1: Findings

During my conversations with the persons I had the chance to meet and through the research I made for this study, I could find some interesting cases in which international actors were influential. I hope the following findings will help AFAD in its campaign for the ratification of the Convention in the Philippines.

I. Principal findings

The first tactic involving international actors that worked for both the RA 10353 and the Rome Statute that could be replicated was the visit of an international and emblematic figure to Manila.

1. Visit of an international emblematic figure.

A determining event before the adoption of both texts was the visit of an important or symbolic person to the Philippines. It encouraged lawmakers to make a move toward the improvement of human rights protection. Such visits are a diplomatic message, an invitation to dialogue. An official makes the journey to the Philippines and it's part of the national culture to welcome him or her with respect. Therefore, a political gesture to please the guest is sometimes part of the diplomatic protocol.

a) The Anti-Enforced Disappearance Act and the visit of Philip Alston

One of the key events that pressed for the adoption of the Anti-Enforced Disappearances Act was the visit of Philip Alston and the submission of his report to the United Nations.

In 2007, Philip Alston, who was then the UN special rapporteur on extrajudicial, summary or arbitrary executions, came to the Philippines to investigate the cases of extrajudicial killings under the Arroyo administration. The report said the executions had *“eliminated civil society leaders, including human rights defenders, trade*

unionists and land reform advocates, intimidated a vast number of civil society actors, and narrowed the country's political discourse."

In his report seven years ago, Alston pointed to the responsibility of the government, military and police in the targeted killings and disappearances of hundreds of political activists and those tagged as rebel supporters as part of the counter-insurgency campaign of the state. Alston blamed "impunity" which caused the executions of journalists and leftist activists: "*the priorities of the criminal justice system had been "distorted," and had "increasingly focused on prosecuting civil society leaders rather than their killers."* He recommended a checklist of concrete steps that the Philippine government should do to address and abate the rights violations.

This report surely embarrassed the Philippine government who stay attentive to its image at the international level. The Philippines had to react and on March 1st, 2007, the Supreme Court of the Philippines issued the Administrative Order No. 25-2007, which created by designation 99 regional trial courts to try cases of killings and *desaparecidos*.. Finally in 2012, the Philippines adopted RA 10353, defining and criminalizing the practice of enforced disappearances. This law can be considered as one of the late consequences of Philip Alston's report.

b) The Rome Statute and the visit of Sang-Hyun Song

Beside the exemplary work and strength of Senator Loren Legarda and Senator Miriam Defensor Santiago, the visit of the President of the International Criminal Court, Sang-Hyun Song, on the 7th and 8th of March 2011 in the Philippines was of high importance. As well as being symbolic, the visit was practical as well . When the ICC President came to meet with Philippines's President Benigno S. Aquino III, Philippine Senators and members of the Committee on Foreign Relations of the Philippine Senate, he was also accompanied by members of the ICC staff that were able to meet with Senators and judges to talk about the action of the Court. The purpose of President Song's trip to Asia and the Philippines was to raise awareness about the ICC and to facilitate informed consultations in countries that may be considering ratification of the Rome Statute. Asia is the least represented region at

the ICC, and of the 114 States Parties only two, Cambodia and Timor-Leste, are in Southeast Asia.

During his stay in Manila, President Song addressed a civil society reception and held a lecture on ICC and Asia at the College of Law of the University of the Philippines. He gave several interviews to television and newspapers and participated in a press conference organised by the Philippine Coalition for the International Criminal Court. On 30 August 2011, the Philippines acceded to the Rome Statute.

As a side note, we can see that, during his stay in Manila, President Sang-Hyun Song's agenda was organized very precisely. He met with people from the four major areas that could influence the ratification of the Statute:

- **Lawmakers and President:** From the executive and legislative branch. They are the ones to convince for the ratification of an international agreement.
- **Academics:** Academics have a prestigious position in the society. Meeting the students, who are the future members of the executive, future judges or lawmakers, is a great opportunity to raise awareness and to increase the chances for a forthcoming improvement.
- **Media:** Media is essential to raise consciousness among the public and therefore to pressure lawmakers.
- **Civil society:** Civil society is the reins which relays the advocacy maintenance and consequently needs to be involved.

c) Conclusions for the ratification of the Convention on the Protection of all Persons from Enforced Disappearance

Seven years after the release of his report, the UN rights Expert told Philip Alston at the 26th session of the United Nations Human Rights Council in Geneva that impunity persists in the Philippines. Therefore, Alston said he would look into these issues complementary to what other UN human rights experts called mandate-holders would do. A new delegation has been mandated to come to investigate the Philippines. Among the rapporteurs who will be coming are Chaloka Beyani and Gabriela Knaul.



Dr. Chaloka BEYANI, Special Rapporteur on the Human Rights of Internally Displaced Persons is slated to conduct his official visit **this year (2014)**.

Dr. Beyani has taught International Law and Human Rights at the Universities of Zambia, Oxford, and the London School of Economics. Dr. Beyani has acted as legal advisor, consultant and expert to a number of United Nations agencies, the European Union, the Commonwealth Secretariat and the African Union.



Mrs. Gabriela KNAUL, Special Rapporteur on the Independence of Judges and Lawyer, has yet to secure an invitation from the Philippine government following her request to visit the Philippines.

Mrs. Gabriela Knaul has more than 10 years of experience as a judge in Brazil and is an expert in criminal justice, particularly on issues of due process, sentencing and execution of sentences, as well as the administration of judicial systems. She has worked with prison directors as a judicial supervisor to ensure the respect and protection of the human rights of prisoners and detainees in a variety of detention environments, including high-security prisons.

As we saw, for the adoption of the domestic law and the Rome Statute, these visits could be extremely determining and helping for the ratification of the Convention. Therefore, their date of arrival for investigations in the Philippines should be watched closely. It could be the best time to make a loud call for the ratification.

2. The impact of international and regional summits.

a) The international summits

Meeting outside of the country during international conferences is a good opportunity to gather international support and to show the Philippine lawmakers that the global community is expressing concern about the issue of Enforced Disappearances. It

could be important in the future as well since, after Philip Alston's report, the Philippine government suggested they wouldn't allow such visits anymore. Therefore, a refusal of Dr. Chaloka Beyani and Gabriela Knaul's visit are unfortunate, but still a possibility.

i) Parliamentarians for Global Action (PGA) and their action for the Rome Statute.

The PGA is a trans-regional and national mobilization of parliamentarians, supported by the PGA Secretariat, which ensures accurate analyses of the different issues stalling the ICC process in different countries and the multi-partisan involvement of stakeholders to overcome these obstacles and challenges. The tailored initiatives and activities of the Campaign are structured in such a way so as to ensure "cross-fertilization" between international and country-specific activities.

Hosted by the Parliament of Malaysia on the 9th and 10th of March 2011, the Asia-Pacific Parliamentary Consultation discussed the Universality of the Rome Statute of the International Criminal Court. The President of the ICC flew there after his visit to the Philippines. Remarkable was the presence of Sen. Miriam Defensor-Santiago, Chair, Constitutional Amendments, Revision of Codes and Laws Committee to support the ratification process of the Rome Statute in the Philippines. Foreign ambassadors such as the Dutch and Italian were reported to be very supportive of this ratification in the Philippines.

However, the number of PGA campaigns is limited to:

- PGA ICC Campaign
- PGA Global Parliamentary Campaign for Signature, Ratification and Implementation of the Arms Trade Treaty.
- PGA Global Parliamentary Campaign to Prevent and Eliminate Harmful Traditional Practices
- PGA Global Parliamentary Campaign against Discrimination based on Sexual Orientation and Gender Identity
- PGA Global Parliamentary Platform for the Abolition of the Death Penalty

Therefore, we cannot be sure that they would advocate for the Ratification of the Convention for the Protection of All Persons against Enforced Disappearances in the Philippines. But it's a good example on how international gatherings can help in the process of the adoption of human rights instruments in the Philippines.

ii) 26th session of the United Nations Human Rights Council in Geneva (2014)

The 26th session of the United Nations Human Rights Council was the occasion for Philippine civil society members to call on the international community, including Philip Alston, for pressuring the Government to implement RA 10353 and ratify the Convention on the Protection of all Persons against Enforced Disappearances (CAED).

The international actors can have an indirect influence through these international summits. Since the cases of enforced disappearances are brought to their knowledge through the civil society voice, it spreads a bad image of how the issue is handled by the Philippines. President Aquino III is sensitive to its image abroad and therefore will be more willing to change the situation if the international community is watching.

Therefore, AFAD has to participate in as much international conferences on Human Rights as possible. The increasing power of NGOs over there is now known and it is the best place to gather international support.

b) Regional summits

Some places far from Asia still care about the issue of Enforced Disappearances in the Philippines, as for example the European Commission in 2012.

i) Debates on cases of breaches of human rights, democracy and the rule of law at the European Commission, 14th June 2012 (Reference 84826)

MEPs discussed the condition in the Sahel region and the cases of impunity in the Philippines. MEPs also condemned the widespread climate of political terror in the Philippines, which has led to a large number of journalists, human rights activists, members of political parties and organizations being killed since 2001. For that reason, they urged President Aquino to ratify the Convention, and to arrest fugitive Maj. Gen Jovito Palparan, who is wanted for the abduction of two activists.

If AFAD would not be directly involved in these meetings, it can still be involved in sending communications, reports or letter to the members.

ii) Upcoming event: 7th Session of the CED – 15 September to 26 September 2014.

Even if the Philippines is not a State party and if the CED has no jurisdiction over the country, it remains that the group is a UN body. This “United Nations” denomination suggests wisdom and respect and its declaration have potential influence.

3. Implication of foreign governments

As said in the introduction, national sovereignty prevents any permanent foreign diplomatic missions from standing for or against the adoption of a domestic law. However, the international community is very welcome to congratulate a country when making a move toward the protection of Human Rights. That is what the Canadian Embassy did after the vote of the national law against enforced disappearances.

Canada co-organized with AFAD a forum-workshop on the implementation of Asia’s first domestic anti-disappearance law. At the event, nearly 200 guests from the government, academic, media, civil service and the diplomatic community gathered to discuss issues surrounding the prevention and repercussions of the disappearances laws. During the event, Canadian Ambassador Christopher Thornley welcomed the inauguration of the act and emphasized the importance of promoting democratic governance: *“This is not only a question of human rights, but of the rule of law as well. A critical element in this regard is the need to combat impunity. Those*

responsible for these horrendous acts must be brought to justice. The rights of victims and their families need to be guaranteed, and the legal mechanisms in a country must allow for justice to be carried out swiftly, effectively and impartially.” (Canada embassy can be contacted at the address : manil@international.gc.ca).

During the 26th session of the United Nations Human Rights Council, the Geneva-based country missions of Ireland, Austria, Canada, Norway and The Netherlands met with Filipino rights advocates on the continuing extrajudicial killings, filing of trumped-up charges against activists, poverty and loss of livelihood of farm workers and forced evictions of urban poor communities in the Philippines. Therefore, this information gives a clue as to which countries might be contacted in priority for supporting a ratification of the Convention even if they did not ratify the convention themselves.

However, it is rather difficult to really know what embassies that would be interested are. Indeed, as reported in the annex n°2, I have been in contact with all the embassies of countries that are parties to the Convention in Manila. Unfortunately, I could not get a clear answer from any of them. When, by chance, the secretariat was picking up the phone, I was informed that the persons that could answer my questions were not in the office, or that the “embassy” was only a consulate and thus only dealing with visas and other administrative matters.

II. Side findings

1. The importance of inter-parliamentarian diplomacy

Beside the traditional diplomacy, carried by ministers of foreign affairs, there is inter-parliamentarian diplomacy. This type of diplomacy can be considered as a soft power, which is “the ability to attract and co-opt rather than coerce, use force or give money as means of persuasion.”⁴ The linkage between parliamentarians occurs through meetings at international parliamentary organisations such as but not limited to the

⁴ Joseph Nye’s classic definition of « soft power » coined in 1990.

Asean Interparliamentary Assembly (AIPA), Asian-Pacific Parliamentarians' Union (APPU), Asian Parliamentary Assembly (APA) and the Inter-Parliamentary Union (IPU) or through parliamentary friendship groups and visits of parliamentary delegations as well as other foreign dignitaries.

The parliamentary friendship groups bring together deputies who have special interests in a particular country. Their primary purpose is to enhance relations between foreign parliaments, and, in the course of their international dealings, they can also act as instruments in the implementation of respective foreign policies .

In terms of Human Rights, it is a truism that parliaments and their members are essential actors when it comes to the promotion and protection of human rights. Parliaments are the guardians of human rights. Therefore, discussions concerning the issue of enforced disappearances might occur during meetings between parliamentarians. There is a special Committee at the House of Representatives called “Inter-parliamentary relations and diplomacy” that can be contacted. It would be interesting to seek which friendship group (which country) is willing to discuss the issue of involuntary disappearance during its sessions.

2. Convince the lawmakers that the competency of the CED will not threaten national sovereignty.

One of the main aspects making the President reluctant to sign the Convention is the competence of an external body (CED) to receive communication and to request visits to the country to conduct investigations. This was already the case for the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 18 December 2002 by the General Assembly of the United Nations. The Philippines made a reservation:

“In accordance with Part V, Article 24 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, the Republic of the Philippines hereby declares the postponement of the implementation of its obligations under Part III of the Optional Protocol, specifically Article 11 (1)(a) on the visitations by the Subcommittee on Prevention to places

referred to in Article 4 and for them to make recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.”

Consequently it’s clear that the head of the state does not want any interference and remarks on the way it manages its internal affairs. It is therefore important to include in the campaign the benefit represented by the competence of the Committee on Enforced Disappearance on the Philippines and especially that it would not threaten national sovereignty or necessarily spread a bad image of the country abroad.

3. Convincing the President that the International Convention respects the three pillars of the Philippine Foreign Policy.

During my interview with La Salle law students, they told me about the three pillars of the Philippine Foreign Policy and that it could be a good advocacy argument to convince the President that the ratification of the UN Convention on the Protection of All Persons from Enforced Disappearance would respect these three aspects. The Republic Act No. 7157, otherwise known as "Philippine Foreign Service Act of 1991", gives a mandate to the Department of Foreign Affairs to implement the three (3) pillars of the Philippine Foreign Policy, as follows:

1. Preservation and enhancement of national security
2. Promotion and attainment of economic security
3. Protection of the rights and promotion of the welfare and interest of Filipinos overseas.

Therefore, the civil society has to prove to the President and the Department of Foreign Affairs that the ratification will respect these three pillars in presenting the Convention as a way to:

1. Preserve and enhance the national security: as we saw above, it could be demonstrated that ratifying the Convention would not threaten Philippines National security, especially with the empowerment of the CED.

2. Promotion and attainment of economic security: for example, it could be explained that ratifying the Convention would protect human rights and therefore attract possible international investments.
3. Protection of the rights and promotion of the welfare and interest of Filipinos overseas. It can be demonstrated that Filipinos overseas would feel more peaceful to know their relatives are protected and that they have the assurance to meet them again when they will be back.

Chapter 2: Limitations

During the gathering of data for the purpose of this research, I had to face many obstacles. First was the limitation of the research itself.

It took me time to find the right angle to give to this study and the strategy to adopt in order to help AFAD for its campaign for the ratification of the Convention. I began this study with a too large scope and therefore the amount of work was more than I could possibly do within two months. Looking for the influence of international actors (United Nations, foreign governments, international NGOs, regional organisations...) in the adoption of human rights instruments (focusing on Anti-Enforced Disappearance act and Rome Statue) and on their potential support for the ratification of the Convention for the Protection of all Persons from Enforced Disappearances was too heavy for a single researcher. And this problem was without counting on a second one.

The second obstacle was the absence of response from many international actors. The example of the French Embassy is meaningful. I called them at the beginning of July. After a very good first contact, the secretary gave me the name of a consultant and her email address. She said this person would be able to give me an appointment and to answer my questions. Thus I wrote my first email and send it the 10th of July. After 10 days without any news from the embassy, I decided to write a second email, pretending to make sure they actually received (read) my first letter.

This second message did not receive any answer either. Within the first days of August I called the embassy again to seek for an answer. The secretary asked me to call back the next morning, and maybe try again the following day.

When I finally succeeded in talking to the right person on the phone, I found out she did not even read my emails. Then, she told me she should not be at work because she was almost retiring. Then I asked if I could talk to anyone else and she replied that

they were only three people in the office then. One was away from Manila; the second was too busy preparing the visit of the President, and her. So after one month, even if I did everything possible to have answers from them, I met a dead end. This was rather the case of all the embassies I contacted in Manila. They were not available most of the time. In my opinion, this silence can mean two things. The first one is that they don't want to bother answering the questions of a simple intern for a simple research. Second one, which doesn't exclude the first one, is that the information I was trying to get was too sensitive.

The last challenge I had to face was regarding the fact that officers, consuls, or persons able to answer my interrogations change positions very often. Therefore, the people who might have been working with these international actors during the ratification of the Rome Statute in 2011 or the adoption of the Anti-Enforced Disappearance Act in 2012 are mostly no longer in office . This aspect made the process of research even more complex and longer since when I could finally reach someone, he or she was most of the time answering for the person in charge who at that moment was gone and no email address could be given.

Chapter 3: Conclusions

After collecting and analysing data, it is clear to me that international actors have an influence on the adoption of Human rights instruments in the Philippines, within the limits of national sovereignty. Although, I noticed their clout can mostly only be indirect. In my opinion their potential can only be found through these three main channels:

- Encouragements: It is an active method that can be associated with “soft power”. An international actor such as a foreign government will send a letter of encouragement to President Aquino and his services or talk about the issue of enforced disappearances during an official visit or in an informal meeting. Foreign actors can also make tactful public statements. These encouragements are always tinged with a positive tone and would never incriminate the way the country is dealing with its internal affairs. This strategy was the one used by the inter-parliamentarian diplomacy or by ICC President Sang-Hyun Song during his visit to Manila, in combination with the second strategy.
- Congratulations: After the adoption of a human rights instrument, the international actors would send congratulations letters through its diplomatic service. For example this is what the embassy of Canada did after the adoption of the Anti-Enforced Disappearances Act of 2012 or the Sang-Hyun Song after the adoption of the Rome Statute by the Philippine Senate.

This is a very common method of international diplomacy. It enhances good relationships between two states.

- Participate in the “Naming and Shaming” advocacy method: This technique consists in “publicly stating that a person, group or business has done something wrong”⁵. It is used to reprove and discourage certain activities of the State. International actors rarely participate actively in “naming and shaming” campaign to avoid the risk of a diplomatic relations rupture. Some United Nations agency will, such as Philip Alston did, but this way of advocating from a foreigner is generally not appreciated. This is probably one of the reasons why the Philippine authorities stated after the Special rapporteur released his report in 2007 that they would not allow such visits anymore.

But, at the NGO level, foreign governments or UN bodies can be a great asset for this tactic. Bringing the issue regarding enforced disappearances in the Philippines to the knowledge of the international community has a very strong impact on its image abroad. The only fact that international actors know and disapprove of the situation in the Philippines is already heavy in the “shaming” process. So, participating in an international summit, sending communications or reports to UN bodies, regional organisations such as the European Union or working in partnership with international NGOs, are strategies involving international actors that might help for the ratification of the Convention for the Protection of All Persons from Enforced Disappearance. However this tactic must be used carefully because in some cases it can increase the intensity of violence.

⁵ Cambridge Online Dictionary

Annex n°1

The Role of Human Rights Watch

Human Rights Watch (HRW) is an internationally renowned NGO specialising in the defence and protection of human rights with headquarters in New York in the United States and which has thirty offices worldwide. HRW's mission is essentially political. It undertakes more on the international level than the individual and aims to change attitudes and laws in some countries that run counter to the Universal Declaration of Human Rights, rights, such as those relating to freedom of the press or child labour. It is also involved in the conflict resolution, alleging among other war crimes and arms trafficking.



Carlos H. Conde is the Philippines researcher for Human Rights Watch's Asia division. He kindly answered my questions upon a request on Twitter.

1. What are the advocacy methods of HRW to encourage any government and the Philippines government in adopting Human Rights instruments?

- letter to officials, declarations, shadow reports, trying to invite human rights international public figures...?

Our methods include meeting with government officials one on one, writing them letters, furnishing them copies of our reports and documents (often before the publication of reports), engaging with them in dialogue in domestic and international forums, releasing press releases and op-eds to the press to pressure the government to act, among others.

2. Did HRW get involved during the adoption of the "Anti-Enforced or Involuntary Disappearance Act of 2012" (Act 10 353) or during the ratification process of the Rome Statute in 2011?

HRW was not directly involved in the adoption of RA 10353 but we always cite it in our public documents and utterances, specifically that no one, to our knowledge, has been brought to justice on the strength of this law.

3. I am also going to meet other international actors for my research (French diplomats, UN agents, European Union delegation...), do you have any relations with them in your advocacy work?

Indeed, these international actors are key components of our advocacy strategy. So we regularly meet with them, exchanging information (often on background), briefing them on the work that we do at the moment and vice versa. Many of them seek us out for input in their own internal reporting or documents, or even in mapping out their country strategy.

The Role of Amnesty International Philippines



I met Dr. Aurora Parong at the end of July. She told me that for the ratification process of the Rome Statute, Amnesty International Philippines worked in partnership with the International Criminal Court Coalition and the Philippines local coalition for the ICC. In solidarity with them, they sent cards to deputies and advocated during the PGA summit.

According to Dr. Aurora, what was a determinant in the decision of the Philippines to ratify the Rome Statute was the visit of the International Criminal Court President in Manila. During this visit, the ICC staff was meeting with Senators.

Annex n°2: Embassies in Manila (State Party at the Convention)

Participants	Ratification	Address	Telephone	Presence of HR cooperation department
Albania	2007	1143 Pasong Tamo Street Makati City	02 899-5533 / 5758	Nobody in charge of HR cooperation
Argentina	2007	104, 8th Floor Liberty Center, H.V. De La Costa Street, Salcedo Village, Makati City 1227	02 845-3218	No answer
Armenia	2011	7, Edades Street, San Lorenzo 1223 Makati city	02 817-5140	Wrong number
Austria	2012	117, 4th Floor, Prince Building, Rada Street, Legaspi Village, Makati City	02 817-9191	No answer
Belgium	2011	9/F Multinational Bancorporation Centre 6805 Ayala Avenue Makati City	02 845-1869	On holiday in Belgium. Write a letter to manila@diplobel.fed.be
Bolivia	2008	No. 21, Damariñas Street, Binondo, Manila City 1006	02 244-5563	Occupied line
Brazil	2010	16th floor, Liberty Center Building, 104 Dela Costa St. corner Leviste St., Salcedo Village, Makati City	02 845-3651/52/53	Write a letter to: secretariado.manila@itamaraty.gov.br
Burkina Faso	2009	Unit 31-D Marina Square Suites Condominium M.H. Del Pilar cor Pedro Gil Malate	02 243-2789	Wrong number
Cambodia	2013	Unit 7A, Country Space 1 Building Senator Gil Puyat Avenue	02 818 9981	No answer

Participants	Ratification	Address	Telephone	Presence of HR cooperation department
		Makati City		
Chile	2009	17th Floor, Liberty Center Building 104 H.V. de la Costa St. corner Leviste Street Salcedo Village P. O. Box Box 1138, Makati	02 843 3461	Write a letter to: conchile@eastern.com.ph
Colombia	2012	18th Floor, Aurora Tower Araneta Center Quezon City	02 911-3101	Nobody in charge of HR cooperation
Costa Rica	2012	Smith Bell Bldg. 2294 Pasong Tamo Makati City	02 818-6740	Nobody in charge of HR cooperation
Cuba	2009	Penthouse, Cacho González Building 101 Aguirre Street, Legazpi, Makati City	02 817 1192	No answer
Ecuador	2009	Penthouse, PHINMA Plaza 39 Plaza Drive, Rockwell Center Makati City	02 8700 100	Nobody in charge of HR cooperation
France	2008	16th Floor Pacific Star Building, Buendia corner Makati Avenues, 1200 Makati City	02 857 6900	Call back in September. Everyone is too busy now
Gabon	2011	Skyfreight Brokerage, Inc. 2nd Floor, Skyfreight Building Ninoy Aquino Avenue, Parañaque	02 851 5865	No cooperation in HR
Germany	2009	6819 Ayala Ave, Makati	02 702 3000	No answer
Honduras	2008	Suite 19-A Strata 2000 Building	02 634 5708	No answer

Participants	Ratification	Address	Telephone	Presence of HR cooperation department
		No. 12 Garnet Road, Ortigas Center Pasig City		
Iraq	2010	2209 Paraiso cor Acacia Street Dasmariñas Village, Makati City	02 843 8880	Maybe not
Japan	2009	2627 Roxas Blvd, Pasay	02 551 5710	No answer on the phone
Kazakhstan	2009	26F Fort Legend Tower 3rd Avenue corner 31st Street Bonifacio Global City, Taguig 1634	02 403 4024	Nobody in charge of HR cooperation
Lithuania	2013	No. 1015, Renaissance 2000 Condominium, Meralco Avenue, Ortigas Center, Pasig City 1605	02 631 6260	Occupied
Mali	2009	Unit 2105, 21/F The Orient Square Emerald Avenue, Ortigas Center Pasig City	02 636 5804	Occupied
Mexico	2008	150 Legaspi Street, Makati City 1229	02 812 2211	Occupied
Montenegro	2011	3rd Floor, Chemphil Building, 851 A. Arnaiz Avenue, Barangay San Lorenzo Makati City District 1, Makati City	02 840 4994 Tel. No.: +63 (2) 840-4995 Tel. No.: +63 (2) 893-4702	No answer
Morocco	2013	The Enterprise Center, Tower II, 21st Floor 6766 Ayala Avenue, Makati City	2 819-1684 812 7953	Embassy located in Tokyo, Japan...

Participants	Ratification	Address	Telephone	Presence of HR cooperation department
Netherlands	2011	26th floor Equitable Bank Tower 8751 Paseo de Roxas, Makat	2-786 6666	Involved in anti-trafficking issues not ED
Nigeria	2009	1, Paraiso Street, Dasmarinas Village, Makati City 1221	2 843 9866 no
Panama	2011	11th Floor, National Life Insurance Building 6762 Ayala Avenue Makati City 1200	2 338-5811	No answer
Paraguay	2010	Suite 801-802, One Global Place 5th Avenue, corner 25th Street, Bonifacio Global Taguig City	(2) 519-3863 to 66	No answer
Peru	2012	Suite 405-406, CLMC Building 259 EDSA Greenhills Mandaluyong City	2-726-0355	No embassy in Manila
Portugal	2014	17th floor, Trafalgar Plaza, Dela Costa Street Salcedo Village - Makati City	2.848.3789	Busy now
Samoa	2012	1201 Roxas Boulevard, Ermita 1000, Manila, APO/FPO PSC 500, FPO, AP 96515-1000	63-2-301-2399	Fax number
Senegal	2008	Unit 16 A South Tower, Pacific Plaza Tower Bonifacio, Global City Taguig	2 818-6220	No answer
Serbia	2011	U-7, 3rd Floor, ENZO Building 399 Sen. Gil Puyat Avenue	2 895-6459	Nobody in charge of HR cooperation

Participants	Ratification	Address	Telephone	Presence of HR cooperation department
		Makati City		
Spain	2009	27 floor Equitable Bank Tower 8751 Paseo de Roxas, 1226 Makati	(+63) 2 817-6676 (+63) 2 817-5131	
Togo	2014	2162 Paraiso Street Dasmariñas Village, Makati City	2 818-0626	Nobody in charge of HR cooperation
Tunisia	2011	506 Heritage Building, 1851 A. Vasquez Street, Malate	2 523 9984	Nobody in charge of HR cooperation
Uruguay	2009	2F GT Tower International 6813 Ayala Avenue corner H.V. Dela Costa	2 857.59.55	Nobody in charge of HR cooperation
Zambia	2011	5th Floor, Ablaza Building 117 E. Rodriguez Sr. Avenue Quezon City	2 732-5151	No answer

Annexe n°3: Schema of research

This is the first schema of the research. The combination of:
 Expression on the enforced disappearances + influence during the act 10535 + influence during the ratification of the Rome Statute = actors relevant to support the ratification of the convention with AFAD.

Issue of ED		Act 10535		Rome Statute		Combination → Relevance for the Convention on ED
Did they express?	How	Did they influence?	How?	Did they influence?	How?	

Annexe n°4



30 July 2014

ASSISTANT SECRETARY JESUS S. DOMINGO

Office of United Nations & Other International Organizations
Department of Foreign Affairs, 2330 Roxas Blvd. Pasay
City

Dear Asec. Domingo,

Warm greetings from the Asian Federation Against Involuntary Disappearances (AFAD)!

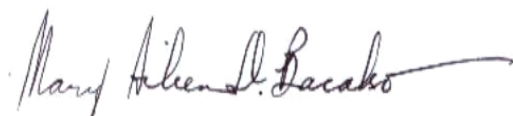
Our organization has been undertaking a study to evaluate the 16-year lobby efforts of the families and friends of victims of enforced disappearances that finally resulted in the enactment of RA 10353 or the Anti-Enforced Disappearance Act of 2012. The study looks at various actors that directly or indirectly played an important role in the whole process such as international organizations like UN bodies and international NGOs, among others.

Examining the role of international actors will also help AFAD in its current campaign for the ratification of the International Convention Against Enforced Disappearances (CAED).

We consider you and the office you represent as an important resource person in this study. In this regard, is it possible for you to spare some of your time to meet with our researcher, Ms. Isis Le Bas at your convenient time on Monday, 4th of August 2014 at your office?

Thank you very much.

Yours sincerely,



MARY AILEEN BACALSO

Bibliography

- www.academia.edu: Tanja Florat study
- <http://ec.europa.eu/avservices/video/shotlist.cfm?ref=84826>
- Human Rights Watch: www.hrw.org
- International Criminal Court official website: www.icc-cpi.int
- Government of Canada : www.canadainternational.gc.ca
- Philippines Department of Foreign Affairs (DFA): www.dfa.gov.ph
- Treaty-Making in the Philippines, The Philippines Bar Reviewer
- Research on the Legislative Advocacy for the Adoption of a Law Defining and Penalizing the Practice of Enforced Disappearances in the Philippines, by Yves Duss and Pauline Kuhn, for Asian Federation Against Involuntary Disappearances
- UN sets probe on PH killings – article on www.manilastandardtoday.com



A Study on the Importance of the Commemoration of the Disappeared every 27th of October



**Families of the Disappeared
2013**

Chapters

Acknowledgement

Introduction

Chapter one - Introduction

Chapter Two - Disappearances in the world and building monuments

Chapter Three - Commemoration and the monuments of the disappeared in
Sri Lanka

Chapter Four - Analysis

Chapter Five - Conclusions and Recommendations

Acknowledgement

Right To Life Human Rights Centre - Mr Brito Fernando, Mr Philip Dissanayake, Mr.Wasantha Ranil, Mr.Prasanga Fernando, Mr.Erantha Shreenath, Ms.Shreenika Nilashini, Mr.Mahesh Channa,Ms. Nadeeshani Malinga, Ms.Sandani Chathurika and Mr.Amila Chandrasiri.

The people who gave their time for the interviews: The politicians, Human Rights defenders, Lawyers, and the families of the victims.

Ms.Alma Fernando and Ms.Anuradha Gunarathna who helped in the translation.

Ms.Priyadarshani Premarathna and Mr.Buddhika Wijayawichrama, Ms.Fioni Munasinghe and Ms.Shashika Prasadi who helped in giving information and kind support for this research.

And all the others who helped in various ways to make this study a success.

Introduction

Sri Lanka became infamous in the world as a country where people disappeared mysteriously during the decade of 1970s. That culture of disappearances works against the groups and people who tend to question the existing situation in the political field of Sri Lanka. This happened during the period of 1987-1989. On October 27th of 1989, H.M. Ranjith, a leader in the trade zone, and M. Lionel, the legal instructor of Ranjith, were killed at the Raddoluwa junction in Seeduwa. On October 27th of 1991, a group of 17 members started to commemorate these two people. Since that day, commemorating the disappeared at this place started and continues for 22 years now. In 2000, a monument was built at this place and this particular place was named as the common place for commemorating the disappeared. This commemoration is organized in order to keep this tragedy in the hearts of the general public and make them aware of the reasons for this tragedy and take steps to prevent such mishaps in the future. It should be noted here that the experiment was accomplished in order to determine whether this commemoration has any effect on disappearing people, whether this commemoration is worthwhile for society, whether it should be continued in the future and to look into the weaknesses of the commemoration and the parts that should be changed in this commemoration.

Chapter one: Introduction

Sri Lanka obtained its Freedom from Great Britain in 1948 and began to function as a Democratic State. The first Prime Minister was Mr.D.S. Senanayake from United National Party and he governed the country by retaining relationships with the countries of the world from a capitalist viewpoint. In 1956, Mr. S.W.R.D. Bandaranaike was able to govern the country in a neutral way between capitalist and left political views and the country was ruled by the government with the priority centered in the Sri Lanka Freedom Party.

Then after the death of Mr. S.W.R.D. Bandaranaike, Mrs. Sirimawo Bandaranaike came to power. Meanwhile, we could see that UNP and SLFP had gained power from time to time and ruled the country until today through a confederation with the other parties.

From ancient times, in Sri Lanka, various conflicts and confusion have occurred every now and then under various situations. These conflicts were caused by several issues such as, gaining independence, gaining State Power, escaping from the prevailing harmful condition and gaining rights and ownership of the land.

The 1971 Rebellion against the existing Sri Lankan government was the first unsuccessful armed young rebellion. Against the existing government of Mrs.Sirimawo Bandaranaike, an armed group of young people began the rebellion on 5th of May in 1971 through the JVP and it lasted till the end of June in 1971. These armed young rebels were able to conquer some towns and villages in Sri Lanka but the government was able to totally suppress the rebellion through the Army and the Police.

Young people between 16-25 years old with the leadership of Rohana Wijeweera joined this rebellion. It seems that they initiated this rebellion in order to combat the unjustifiable social – economic and political system and to create a society with equal rights. Nearly 5, 000 people lost their lives in this rebellion and nearly 20, 000 people were imprisoned. Also, a lot of noble young people lost their lives and Mrs. Bandaranaike appointed a committee presided over by the then Chief Justice in order to review this case. It was known as ‘The Committee of Young Frustration’. This committee was appointed to search for the reasons for this calamity, but it too met the same fate as the other Commissions in Sri Lankan history.

Although the 1971 rebellion in the South was unsuccessful and defeated, in the 1980s, the youth in the Northern area started to fight for their rights and the ownership of the motherland with

weapons in hand. It seems that the rebellion of the JVP acted as a spur for these youth. Again in 1987 a group of youths called the “Patriotic Liberation Organization” joined JVP and started to battle against the political system of the existing UNP and the prevailing situation of the country.

The protests were organized due to the various reasons, such as: the implementation of Indo-Sri Lanka Agreement; the Provincial Councils and the acts of Provincial Council that came from the Amendments to the 13th Constitution; the Indian prevalence, to seek the freedom from the harassing situation that resulted from caste differences; the state of being jobless; inadequate money for survival; the closing of the Universities; the selling of Degrees; and suppressing the University students; the incapability of dissolving the Parliament due to the President’s continuous occupation of his post and the incapability of changing the political system due to the fact that only rich people have the opportunity to be involved in politics and to secure freedom from the economic harassment that resulted from the economic principles of a new colonialism; the government’s actions of suppressing JVP and impeding the political activities of JVP and hoping for a new government system with peaceful equality under JVP.

Under this situation, JVP took the necessary steps to find its way by using its armed forces and started to assault, murder and destroy lives and property with a strong protest against the UNP, its members, government officials, the President and the Prime Minister. They destroyed the government institutions, equipment, private property, the lives of the general public who were against JVP’s system, creating Harthals, closed the shops, causing havoc in the lives of the general public and killing many civilians.

The government took steps to brutally massacre the youth. It is said that nearly 30, 000 to 60,000 lives were lost. The government-sanctioned the Army and the armed groups known as ‘Pra’, ‘Black Cats who forcefully’ took the youth and massacred them.

The most catastrophic event was the massacre of the youth in Sri Lanka which was an event that had never occurred in Sri Lankan history. In the past, there were battles to gain State power and to protect the power in one’s own area and save the country by chasing emperors away from the country. In those situations, civilians were shot and killed instead of being stabbed. Although a strong grudge existed between the two parties, people were rarely harassed afterwards.

But during the rebellion of the JVP in 1987- 1989, the existing government took brutal action in order to suppress this rebellion. Without stopping by killing the youth after imprisoning them, some others were crudely harassed and victimized using electricity on parts of their bodies which were damaged and especially heads and bodies were dismembered with the body parts being exhibited in public places; people were tied onto light posts, bridges and various other places and burnt using petrol and being set on fire by throwing tires on them. It can be said that such a brutal and inhuman slaughtering culture was fostered by the government. In addition, the government tried to repress the rebellion by threatening the general public by exhibiting the corpses in public places.

Many people were also kidnapped and disappeared. This was a something which never occurred in Sri Lankan history before. The tragedy in this case is that all the youth were killed without any evidence to identify them or their whereabouts. Most of the young men who were taken for interrogation were brutally slaughtered or totally disappeared without any evidence. Moreover the parents or the relatives of those disappeared ones were unable to find out the miserable fate of their young sons. Due to the fact that making someone disappear is not mentioned as a violation of fundamental human rights in the 1978 Second Republic Constitution, it was a problem to secure justice from any legal action.

“In 1978 the UN General Assembly discussed for the first time making people disappear forcefully and they took steps to implement a compromise from the UN’s Statement in 1992 to protect people from enforced disappearances. Then in 2006 it ratified as a resolution with the contribution of the countries of the world.” (UN resolution against the involuntary and enforced disappearances, Asian Federation Against Involuntary Disappearances)

But as a country which belongs to the United Nation, Sri Lanka has not signed the UN resolution against enforced disappearance and the other statements and compromises regarding it. It is very pathetic to note that making people disappear is not mentioned as a violation of human rights in the Sri Lankan Constitution.

Suppressing the youth rebellion brutally caused the defeat of the existing government from the election and the President who came to power after this, appointed a Presidential Commission for the young disappeared ones in 1998 and it consisted of three officers. According to the final report of this investigative Commission, it was noted that these mishaps should not have happened and some kind of relief should be given to the families of those victims. But none of those approvals have succeeded until today. In Sri Lanka people still disappear. The method is symbolically transformed to a white-van from tires around the neck. . Those who are against the current political situation and those who are condemned by the politicians are victimized by enforcedly disappearing them. The society has not identified the people who are responsible for this. Mr. Mahinda Rajapaksa who played a major role in this problem in 1987-1989 is the current President in Sri Lanka. Many incidents were reported about the disappeared ones during the war in North-Eastern areas and then under the government of this current President. Although four years have gone since the war stopped, it can be said that the government was not capable to give the right information about the disappeared youth and what actually did happen to them. Also justice has not been rendered to disappeared ones according to the approval of Lesson Learnt and Reconciliation Commission and the government has remained silent. Moreover, Sri Lanka has become infamous amidst the International Tribunals of human rights.

In this sense, it seems that Sri Lanka has gained notoriety as a culture where people are disappearing. This was widely spread during the period of 1987-1989 and the commemoration held by the committee of the Families of Disappeared to honor the disappeared was somewhat affected. This was the only memorial that has been held during the past 22 years for the

commemoration of the disappeared in Sri Lanka from 1991. Its monument was built at Raddoluwa junction in Seeduwa. D.M.Ranjith who worked in the Free Trade Zone and M.Lionel who was his legal instructor were both killed in Raddoluwa Junction. From the slippers of Ranjith it was evident that they were the ones who were killed and burnt. During a time of many of disappearances and people were afraid of speaking out, Mr. Brito Fernando, who was a member of ‘Kalapaye Api’, and Jayanthi Dandeniya who was the girl friend of Ranjith and nearly 17 other people started to commemorate them on October 27th of 1991 at this same place lighting candles and offering flowers in order to commemorate the dead.

The commemoration was started amidst plenty of impediments, it spread to the extent of building a monument for the disappeared in 2000. This is the only monument for the disappeared in Sri Lanka and this is the only commemoration that is held for the disappeared every October 27th. The National Defence and the Urban Development Ministry took steps to destroy the “Ahinsakayange Aramaya” which was built at the entrance of Parliament for the commemoration of the 38 disappeared school students at Suriyakanda.

As such, the monument which was built in the Raddoluwa junction in Seeduwa and the October 27th function has been the only commemoration for the memory of disappeared ones. That is why this commemoration which is held for the remembrance of the disappeared has become a national ceremony. Although steps were taken by the government in other countries to build monuments and to hold commemorations in such situations, it seems that there is no other situation like it in Sri Lanka. Under such a situation, it seems that it is a present day need to study how important it is to commemorate the disappeared ones in a country where there are many disappearing incidents occurring.

After the war that existed for three decades in the country, people hold different notions about disappearing civilians. Rayappu Joseph- the bishop in Mannar has stated that nearly 1, 476, 667 civilians were disappeared during the late part of the war. The GA of Jaffna has stated that nearly 78, 000 civilians were disappeared after they came under Army control. Reports were presented to the UN stating that about 57 people were disappeared. According to this, it seems that about 50, 000 people were disappeared at the end of war. The relatives, friends of those disappeared people still live with hope for their loved ones. During these two years, the parents in North and Eastern province have also joined this commemoration and it was the reason that this function has become a national function. Therefore, it can be said that it is a current need to study how important it is to hold the commemoration of the disappeared ones and how it will affect the society to hold a commemoration for the disappeared in the field of human rights.

Purpose of the study

To identify how important is the commemoration of the disappeared on October 27th.

To find out if this commemoration helps as deterrence against disappearance.

To examine the effects of this commemoration against disappearance.

To identify the sectors that should be changed in this commemoration.

To identify possible duties of socializing this commemoration.

The Field of Study

The focus of this study was the monument on behalf of the disappeared and the October 27th commemoration held at Raddoluwa Junction, Seeduwa. During the period of 1987-1989, youth were disappeared from nearly all the districts in Sri Lanka and about 700 photos of those disappeared have been posted on the 'Wailing Wall' of this monument. Many victims from different areas of the country come to this place especially people from Colombo, Gampaha, Kaluthara, Kandy, Galle, Matara and Mannar. This commemoration has been held for 22 years continuously and during the last two years the families of the disappeared in North and East have also joined this commemoration. Therefore, the main study field of this study is this annual commemoration and the monument which was built on behalf of the disappeared.

Sample

The sample of this study includes the participants who joined the commemoration which was held in Raddoluwa junction, Seeduwa. A select group of 50 people from the districts of Colombo, Gampaha, Kaluthara, Kandy, Galle, Matara and Mannar belonged to this sample and they were selected under four different categories.

01. Family members of the disappeared.
02. Clergy, Officers of the NGOs and Politicians who act against the disappearing process and violations of human rights.
03. Human rights defenders.
04. The Officers of the Human Rights Centre known as "Right To Life" who organized this commemoration.

Each of those samples has participated in this commemoration more than two times and some people from this sample have participated in this commemoration continuously. This also

included people who had participated in this commemoration before but did not attend it later were also selected because they are also relevant for the purpose of this research.

Moreover, this sample consists of various status such as clergy, family members of those who disappeared, politicians, officers of the NGOs, human rights defenders, journalists, officers of the Human Rights Centre of 'Right to life' and the well-wishers of this function. From this research, it was discovered from the participants, the structure of this ceremony, the importance of it, the effect of it on the society and the portions that should be changed.

Collecting Data

In this study, data was collected in both a qualitative and quantitative ways. Special attention was given to the qualitative data and data was collected by using the following methods.

Collecting Primary Data

- Questionnaire

Quantitative Data was collected from the questionnaire.

- Interviews

Semi Structured Interviews were used to collect Qualitative Data. By using the Semi Structured Interview system, information was collected about this commemoration, its importance, the changes, its social effects and the general idea about this programme.

These Questionnaires and the interviews were given to the members of the disappeared who were being selected for the sample; clergy, lawyers, human rights defenders and other NGO officers who raise their voice against the violation of human rights and the members of the Right To Life Organization.

- Case Studies

In order to confirm the accuracy and the quality of the information that was taken from the interview and the questionnaires, case studies were conducted. Also the case studies were used to identify the different notions of the commemoration which is held on October 27th and its effect on disappearing from those who did participate in this commemoration and those who did not participate.

Collecting Secondary Data

The literature that was based on disappeared people and different concepts from various personalities were being utilized in this section. .

- The publications about enforced disappearance disseminated to the general public.
- Internet Letters
- Magazines
- Political books that were written on that particular period.

Analyzing of data

This experiment consisted of both qualitative and quantitative data. But special attention was given to qualitative data. The received data was analyzed in detail.

Problems and Limitations of the research

The major problem in this research was the difficulty in allocating dates to have interviews with people. Therefore the task of collecting data was unnecessarily delayed due to the fact that the people were busy. There were difficulties in contacting people also. Also when the parents and the relatives of the disappeared were interrogated in order to get information, most of them tended to become emotional in remembering their loved ones. This too was another difficulty.

Moreover, some people were reluctant to speak or to give information and some have forgotten their experience due to the passage of time. Some people held the notion that it was utterly useless to investigate the things that had already been erased from their minds. Others held the notion that in order to remind the general public of the tragic things that happened in our history, such experiments and research should be conducted.

In the process of collecting the necessary information, some limitations also occurred. The relatives of the disappeared probed whether they would receive any financial aid through this. Most of the people tended to express their private misery and problems around this idea.

The notion of some people was this commemoration should be enacted without considering the disappearances that occurred in the Northern and Eastern provinces. Because these disappearances occurred in 1987-1989 and it is meant to be a commemoration of the patriots and not terrorists. They gave information according to the ideas which they held. Another group of people told that it was unnecessary to hold these commemorations continuously up to the present.

Although amidst the above problems and limitations encountered, the study was completed successfully by avoiding the problematic situations.

Chapter Two: Disappearances in the world and building monuments.

In the conflicting eras of the world's history, fundamental human rights have been violated on a large scale. Internal conflicts as well as external conflicts have resulted in killings, imprisonments, exiling, mass killings, and disappearances.

Among the above mentioned fundamental human rights violations, disappearance has taken a pathetic place in the entire human history. In the case of disappearance not only the disappeared but also his or her family, relations, and friends have also become victims. They have even lost the right to know even if the disappeared is dead or alive. People can bury, if the person is dead and also people give alms giving in the remembrance of the dead person and can build a memorial in the place of the burial. But there is no such a place for a disappeared. Without knowing of a disappeared person's death, the family cannot enact the rites and rituals for that person.

Due to the above reasons memorials are built in public places in remembrance of the disappeared in the history of the world. After the disappearance, monuments are built in the remembrance of the disappeared as the date of death and the death place are not known by the people. The reason behind building monuments and celebrating the day of disappearance is to commemorate the lamentable past of the disappeared and to avoid a repeat in the future. The countries that have faced the disappearances have come up with the idea of building monuments for the above objective which is to avoid the disappearances in the future, and have started to organize ceremonies along with the commemoration. These ceremonies have become national dates, ceremonial dates and special dates sponsored by the governments of those countries.

Russia, Germany, Argentina, Chile, South Korea, El Salvador, Iraq, and Sri Lanka are recognized as the countries that have faced disappearances most and the countries that have organized ceremonies for the disappeared and built monuments.

The Military junta that prevailed from 1976 in Argentina resulted in disappearing more than 50,000 people in the country. This was called the Dirty War and the people who resisted and those who held socialist and welfare views were disappeared. During this era most of the youth rebelled against this military rule and their destiny was either death or they were disappeared. They were disappeared in a way that is mysterious and the mothers, who suffered from their disappearance, came to a place called Plaza De Mayo with their children's pictures to display and they were silent for a minute to commemorate the disappeared in order to tell the world the destiny they had to face due to the rule of Military junta. In 1980 Argentina became a republican state and the mothers who suffered from the pain of their children's disappearance were given justice. Argentina ratified the Convention for the Protection of Persons from Enforced Disappearance and monuments were built around the country to commemorate the disappeared.

In 1973 a military ruler called Augusto Pinochet came to power in Chile who was against socialism. The people who were against his dictatorship were killed or disappeared. He was

born out of republicanism, and more than 30, 000 people were tortured and more than 3,000 people were disappeared during his rule. Due to the rebellions that were going on against the dictator, Chile became a republican state and violation of human rights and disappearances were reduced. Hopes of the young, those who supported socialism were fulfilled and they are commemorated until the present.

The Gwangju Uprising in South Korea could also be mentioned as one of the world's pathetic situations of human rights violation and also one of the greatest defeats of the world. About one million people were gathered in Seoul on 18th May in 1980 against the military rule of South Korea. Their objective was to defeat the dictatorship and make South Korea a republic. During the rebellion that led to defeat in the Gwangju area, people who lived in that area went up against the Gwangju army and about 160 young people became the leaders of the rebellion. The military army of Gwangju killed most of the young and some were disappeared by the army. People believed if they go against this dictatorship one day they might fulfill their dream of having a socialist republic. In the present day context South Korea has become one of the greatest countries of republicanism and they have built a monument in Gwangju in order to commemorate the disappeared and 18th May has become the day of celebrating the young who devoted their lives for the country. Further May 18th has become a public holiday and Koreans get together to celebrate human rights and the people who created a republic without thinking about their own lives.

Likewise rebellions were held to protect human rights in the history of the world and people who devoted their lives to protect human rights are commemorated in the present day as well. And those days have become public holidays in the countries to remember the importance of protecting human rights and strengthen the people to stand against human rights violations of their own and that of their neighbors.

Chapter Three: Commemoration and the monuments of the disappeared in Sri Lanka.

In 1971 and during the period of 1987-1989 youth rebelled and they were disappeared. More than in 1971, 1987-1989 the youth were suppressed and were killed. Not only were the youth tortured but also they were killed and disappeared. The most pathetic situation was that there was no one who accepted the responsibility of killing them and making them disappeared and there was on one to accuse as well. In other countries of the world the public went against the system and rebelled. There was a system in those countries that went beyond the political parties and regarded human rights as a main concern. In those countries politics, political parties, responsibilities, reorganization, punishing the wrong doers, building monuments, and a government that will protect and take responsibility for their actions existed which was different from Sri Lanka.

Even after the chaotic situation in Sri Lanka, the political party did change but their principles did not. The prevailing situation was used as a weapon to come to power and did not pay any attention to the violations that took place. No punishment was given to the wrong doers and no solutions were provided. Not only that but until today, no monument was created and no day was held to commemorate the people who became the victims, Up to the present, as well we can see people being victimized due to disappearances as a result of the political system in Sri Lanka.

In 1980s the youth in Periyamulla who were with the New Socialist Party published a magazine called “Kalapaye Api” that published the creations of the trade zone youths. During that era many young people who worked in the trade zone were disappeared despite the fact that there were members of the rebels that were recruiting at that time and the organization “Kalapaye Api” fought for the rights of those who were disappeared. H. M. Ranjith who was a leader of the labour party and his lawyer M. Lionel who fought for the rights of the youth in the trade zone were kidnapped and killed at the Raddoluwa junction. Jayanthi Dandeniya, the girlfriend of Ranjith who was killed by burning together with Mr. Brito Fernando who was an activist in New Socialist party began to work actively to protect the human rights of the trade zone youth and to gain justice for those who disappeared in Gampaha district.

In 27th October 1991 a group of 17 people gathered at Raddoluwa junction in Seeduwa with the idea of ending the violations of ruthless kidnappings and killings as it is a responsibility of all human beings, to commemorate the disappeared according to religious activities. In 27th October 1992 the commemoration was held for the second time in the same place and about 1000 people including politicians, priests, family members of the disappeared, organizations and human rights activists came for the ceremony. They acted as “Mahajana Vinishaya Sabhawa” within the organization of “Kalapaye Api” and commemorated the disappeared according to five requests.

With this beginning of the memorial function, the commemoration continued annually by being together as “the familial group of the disappeared”. About 60, 000 Sri Lankans who were disappeared, without a date of death, place of death, and even burial, are commemorated annually in the ceremony of “the 27th October.”

The foundation for the monument of the disappeared was placed in 10th December 1999 in Raddoluwa junction in Seeduwa. For that the “Asian Human Rights Commission” in Hongkong and “18th May Commemoration committee” in Gwangju city lent their hands. The monument was built by the artist Chandraguptha Thenuwara and it was made public on 04th of February 2000 with a collection of the disappeared photographs. About 700 disappeared persons’ photographs are displayed on that weeping wall.

The wall with the photographs of the disappeared is the only monument built in remembrance of the disappeared. “Innocent’s Aramaya” which was built to commemorate the disappearance of the students of Ambilipitiya that was sponsored by the government was torn down with the governments consent.

In a country where there’s no public commemoration for disappearances, this commemoration was held as a national celebration together with Sinhalese and Tamils for the 22nd time. Through the “Right to Life” organization which is a human rights center, this commemoration is held in order to remind the people that something like this happened in the history of Sri Lanka and we should close the doors for these kinds of pathetic situations in the future, and to say we should enact a law against disappearances within Sri Lanka to prevent something like this in the future.

Chapter Four: Analysis of findings

Here attention is paid to the analysis of information taken from the family members of disappeared people in 1987-1989 who participated in the October 27th commemoration, the family members who participated first and later gave up their participation ,members of the other non-governmental organizations, politicians, people who work in relation to Human Rights, people who have participated in this ceremony continuously, committees of disappeared peoples’ families and people who work in relation to Human Rights defenders in Right To Life organizations.

The information taken from the fifty people is analyzed in general here and consists of two parts. First the importance and the influence of celebrating the disappeared people on October 27th is taken into consideration. Secondly, the fact of, whether this ceremony should be continued or not and the reasons for this will be considered. Here another noteworthy fact is that the details taken from the interviews will be discussed, considering the biased and non-biased ideas from these two parts separately.

The people who participated in the commemoration of disappeared people on October 27th.

We can see that a lot of women from the families of the victims have joined this ceremony. They are the mothers, the wives and the sisters. There are some families with both mother and father. Also husbands participate due to the bad health of a wife while in some families, sisters or brothers participate since the parents are quite old. However women participation is higher in the families of the victims. According to the information taken from the interviews, it is clear that due to the pain of losing their child, husbands and brothers participate in this ceremony.

Among the people who participated in this ceremony, most of the males could be identified as those from other non-governmental organizations, members of political parties and people who work in relation to human rights. They participated in this ceremony due to several reasons such as, being an employee of this organization, being an employee of an organization which has been connected with Right to Life Human Rights Organization that organizes this ceremony, being a politician and acting as a person who works in relation to human rights.

Women are higher, among the family members of the victims who have refrained from participation. There are several reasons for this. They think that it is useless to participate in this ceremony continuously since nothing can be done and they can do the religious rituals on their own including alms giving and also the case of bad health. The common alms giving in this ceremony is a main reason for the continuous participation of the family members of the victims.

Also a person who has avoided participation said that due to some conflicts of political party members' who have been involved in the disappearances in 1987-1989, he doesn't participate in this ceremony. A politician as well as a minister of the present government who has contributed a lot to this commemoration in 1990s said that these commemorations for disappeared people are not suitable for the present and there has not been any disappearances in Sri Lanka recently.

The nature of disappeared people

When the family members of the victims were questioned about their disappeared people, they said that these disappeared young people who were very innocent and didn't have any connection with JVP. Due to family problems, political problems, mistakes and wrong details these young males have been disappeared.

Further among these young people there were students who were in school, young people who were doing jobs and also unemployed young males. Most of them were from ordinary families and they were doing government jobs or were engaging in self-employment. Many people mentioned that they were innocent. Some people criticized the behavior of JVP at that time.

When they were asked about their disappeared people, everyone said that the intermediate time period was very unpleasant for them and a lot of innocent lives were lost for nothing.

How people were enjoined to this the commemoration

Most of the people who participated in this ceremony received information about the ceremony through Mrs. Jayanthi Diddeniya who worked in relation to these things in Gampaha district. Through the awareness of the committee of disappeared people and through the letters which were sent to them, these people have known about the ceremony and joined it.

Besides the family members of the victims, some other people have participated in the ceremony due to some other reasons. Being employees of the human rights organization which organizes this ceremony, paying attention to work pertaining to that organization and getting details about this ceremony can be identified as those reasons. Through these reasons people have participated in the ceremony at first and after that they have continuously given their participation.

How the commemoration is connected to the present condition.

Most of the parents participate in this ceremony alone. One reason for this is the lack of a second generation in this ceremony. They did not want their other children to join the ceremony due to the bad condition of the country at that time. They did not try to convince the other children to participate in the ceremony because they believed that by participating in the ceremony they will have to face some threats.

“We didn’t motivate the mothers to bring their other children here, because if the disappearance of one child brings problems for the other children, the situation could be worse. If there’s no second generation from their families, whoever will continue the ceremony?”

(Mr. Brito Fernando- Interviews)

A person who lost his brother gave opposite ideas for the above mentioned sentences and he said that he continuously participates in the commemoration. He says:

“I join this ceremony with my children because they should know what happened in the past. If it’s not so, the generation will not know what happened during the last two decades in this country.”

(Mr. Rathnayake- Interviews)

The politician, Mr. Wickramabahu Karunartathne who has raised his voice for human rights for a long time, and carries the issue of disappearances into his political life has contributed to the establishment of Parents- Children Committee of disappeared people. He gives his opinion in this way:

“My opinion is, mothers for their children, wives for their husbands, children for their fathers should raise their voices. If it’s not so, there’s no one to talk about those people. These things may not continue when people don’t raise voices for the justice in the abuse of rights.

(Mr. Wickramabahu Karunaratne- Interviews)

Accordingly, though this commemoration was held in the memory of the disappeared during 1987-1989, it was discovered that not only the family members of the victims but others who are interested in this also should join and the necessary steps should be taken to propagate this with the help of human rights defenders.

Comment on disappearing in 1987-1989 and disappearing in the North-East during the war time.

Most of the family members of the disappeared held the notion that the tragedy that happened during 1987-1989 was due to the raising the voice of youth for patriotism. They insisted that the steps that were taken by the youth were wrong and the innocent youth who had not joined JVP political views also had to pay with their lives.

“My son is Victor Lenin Marasinghe. He was an Air force soldier. At this time he was taking medicine for his illness. But he was taken away by the government to be interrogated by stating that my son had taught the JVP cadres to shoot. He was my only son.. I lost him forever.”

(Mrs. Aani Theresa-Interview)

Most of the family members of the disappeared insisted that the children who were taken away never came again and after sometime they stopped searching for them after realizing that their attempts were utterly useless. Most of the family members never knew the facts surrounding the disappearance or deaths of their loved ones.

“Both Ranjith and Lionel were killed and burnt in October 27th in 1989 at Raddoluwa junction in Seeduwa. We identified those two with the help of a slipper of Ranjith.”

(Mrs. Jayanthi Dandeniya-Interview)

The rulers of the country wanted to destroy the life of Ranjith who spoke on behalf of the problems of the laborers in the trade zone and it seems that it was on this basis that he and his legal instructor, Lionel, were brutally killed. The family members of the victims had the idea

that the disappeared were the ones who tended to criticize the existing ruling system and they were taken away and killed by suspecting them or in order to take revenge on them.

When probing the family members of the disappeared in the Northern area about the disappearance that occurred in the Southern area, their response was that they are unaware of detailed information about that situation. They were unable to get more details due to less media facilities and the prevailing war in the North.

When probing the family members of the disappeared in 1987-1989 about the disappearance that happened in North and East, what they said was:

“Our children are too innocent. My son disappeared when he was returning from school. People disappeared in the North because of terrorism. Tamils can go to Tamilnadu, if they want. But this is our country. We cannot look at these two situations as equal.”

(Mrs. Sheela Gannoruwa- Interview)

“Whether it is in the North or South, our children did disappear. For every mother the child is a child but not a terrorist. The children went on this path due to the fault of the society.”

(Mrs. P. Yasohami- Interview)

The human rights defenders’ and politicians’ views of the disappeared in 1987-1989 are,

“UNP ruled the country during the period of 1987-1989. The innocent youths were killed from the repressing actions of the existing government. We gave shelter to many youths in our own home and protected them.

But in the North there was a different type of disappearance. No one can put blame on the government about the situation of the disappeared in the North.”

(Minister Prasanna Ranathunga- Interview)

“The rulers are totally responsible for the disappearance that happened in 1987-1989 in both North and South. These things happened in history because of the weaknesses of the ruling system and the ruling principles. Also things got worse and made people disappear in the North and East still today because the government did not take steps to offer a solution for the 1987-1989 tragedy and the government tends to continue its dominating power forever. Moreover, still no solution has been given to these problems.”

(Mr. Wikramabahu Karunarathna- Interview)

Mr. Prasanna Ranathunga came to power from the Sri Lanka Freedom Party and earlier was a person who gave the necessary help for this commemoration with his father. In the period of

1987-1989 the UNP governed the country. The protests and walks against the disappeared made the party lose its power. Then the Sri Lanka Freedom Party came into power by using the disappearance and Mr. Mahinda Rajapaksha who played a major role in protesting against the pervading problem of enforced disappearance is the current President in the country. During the period of his ruling, many people disappeared in North and East. But it is very sad to see that Minister Prasanna Ranathunga is trying to rationalize that. It depicts the crooked political system and the non-existence of policies in the country.

Accordingly, some people in the South are trying to rationalize the disappearances that happened in the North. By stating that terrorism is the cause for this, they try to escape from their responsibilities. The guides who run the political system in the country were able to make this as the general social understanding among the public.

Opinions on commemoration of the disappeared

People came up with different ideas at the annual 27th of October ceremony to commemorate the disappeared. The idea that this ceremony will never make the families forget about their children and husbands who were disappeared. During the commemoration, flowers were placed on their names and alms giving will be shared .

“We don’t know at what time my child got kidnapped and in which place. My child doesn’t have a grave even. It is precious to have this kind of monument for those who faced a destiny like my child’s.”

(Mrs. Ariyawathi Silva – Interview)

Mothers, fathers, wives, and siblings commemorate their children, husbands, and siblings in this ceremonial day without any difference in religions as Buddhist and Catholics. Further, this monument has become a public place for them as they all have faced the same experience.

They did not expect to make any changes in the society neither did they believe that they can make any changes today. Because nothing was done in the past neither from the commission that was appointed neither regarding the disappearances nor from any political party nor from any other way were they not given justice. So people believe that this commemoration will not make any difference in the society in the future as well. Their ambition is to commemorate them and do what they can do for their loved ones.

“There is no grave for my child. I am a Catholic mother. On 2nd November we celebrate the day of the dead. I believe this is my son’s place.”

(Mrs. Anne Fernando- Interview)

Some believe that this is a discussion that goes beyond a simple commemoration.

“Though this is a commemoration for the disappeared this gives a message to the society that this tells the society that these kinds of pathetic incidents occurred in the past.”

(Mr. Sirithunga Jayasooriya- interview)

According to them the idea came up that these kinds of incidents happened in the past and we have to stop it happening in the future. Moreover, without letting the memories fade away and especially without forgetting what happened in the past and instead of being shy about that this makes people remember to work against these kinds of violations.

“This monument puts forward a question to those who do not know about this dark past and people will ask why this kind of monument was built and what happened in the past to build such a monument as well as the ceremony. It can be said that this memorial is organized to raise a voice for justice, and to say that justice should be given to those who became victims.”

(Mr. Pilip Dissanayake- interview)

“I am a person who has participated in this memorial from the beginning. A voice should be raised for the injustices that are happening in the society. Otherwise, what happened today to someone else will happen to me or somebody tomorrow. So I think this is something that goes beyond just a memorial.”

(Rev. Terrence Fernando- interview)

According to the above opinions it has been proven that this commemoration goes beyond a simple memorial to various ideas. Moreover, this memorial can be shown as a commemoration held to raise a voice against social injustices, to commemorate the people who disappeared, to take action to avoid the same kind of pathetic situation in the future, and to line up people against injustices.

The points against this memorial can be pointed out as below.

Parents from the North and East said that this is an important celebration and it has the effect of their disappeared children but they did not like to take part in offering flowers and alms giving.

“My elder son was disappeared. He was 16 years old. LTTE took him. Later at the time when the war was ending, we handed him over to the Army as we were asked to. My child who was sick cannot be found until today. Without knowing what happened to my child I can’t offer flowers for him. I can’t have an alms giving. We are Catholics and in our religion that is done for

the dead. My son is not dead. He is alive somewhere. People in the South can commemorate that because for them it was a long time back. This ceremony is good for their commemoration but my wish is to have an influence with the government from this to get any information about my child.”

(Mr. M. Nageswaram- interview)

Even though there is no commemoration for those who disappeared in the North and East, Rev. Father Jayabalan who is a human rights activist holds the mass asking from God to find the disappeared for their loved ones.

The opinion of those who celebrated and do not celebrate the day of the disappeared in the South.

“Today the commemoration day of the disappeared has been politicized. Those who killed my brother speak of human rights today. Freely they come to the stage. This is contradictory. Though the Sri Lanka Freedom party said that they are against disappearances, they did not take any action against it. I feel like these have become an event in their agendas.”(Mr. Rathnasiri-interview)

“As an NGO, what should be done is to have an influence in the society without limiting this memorial to just a ceremony. Without taking any action it is not successful to commemorate.”

(Mrs. Jayanthi Dandeniya- interview)

“We don’t like to commemorate our children along with LTTE people. Our children are not terrorists. So I am commemorating my child in my way and do what I can.”

(Mrs. Sheela Gannoruwa – interview)

“This must be a people’s business. Otherwise, the influence it makes will not be felt by the society.”

(Mr. Prasanga Fernando)

Though there are opinions like that, the main idea about this function is that the memorial should be continued and nationally it is significant because this is the only memorial and the ceremony for disappeared.

Some of the ideas about the influences against abductions emerged during the memorial ceremony, such that there is a resistance versus abductions. This has to be continuously carried out not only by commemoration, but also diplomacy, preservation of human rights, discussions about abductions. Also, this affirms that abductions are illegal and it contradicts basic human rights.

“This will not make any huge influence either on people or the government. But for even once a year it is important to hold a memorial like this as it makes people aware and interested in this issue.”

(Mr. Basil Fernando- interview)

“The concept of a monument is very important. People built monuments to remind themselves what happened in the past without forgetting it. By seeing those monuments people’s conscience will speak to them. They will be able to understand that this past was a mistake. Even the thought can influence this.”

(Mr. Chandraguptha Thenuwara)T

This, the memorial would commonly influence the society, law in the country, and protect human rights.

The current situation of this Memorial

The ceremony on the 27th October memorial functions for the disappeared turned 22 years old. In the past this ceremony was a turning point in Sri Lankan politics.

“In the past the protests against abductions resulted in changing the government. Within the prevailing conflicting situation people were able to raise their voices”

In the past this memorial was able to change the government and though each party came to power by saying that they will do justice but it is clear they did not fulfill their promises once they came to power. Moreover, even though the government of Mr. Mahinda Rajapaksa went to the Human Rights Commission in Geneva before he came into power, the disappearances keep on happening during his period of governing which is really pathetic.

Likewise, parents of those who disappeared during the war time in the North and East participated in this memorial celebration today

“This country has lost a number of valuable lives, even though they are Sinhalese or Tamils. Therefore, this is very important because all mothers of those who died have gathered in this special moment.”

(Leenas Jayathilake)

“My child was lost. I have seen wives and mothers coming to this place for the past few years. It is good to see that mothers and wives from North and East coming to this place. The pain we feel is just the same as theirs. I have felt by the way they talk that they feel the same pain as mine.”

(Mrs. Anne Fernando)

Mrs. S. Velu who lived in Kandy is a mother of a young boy who was abducted during the period of 1987-1989. She has come to this memorial for a long time and she died a few days ago. We were told that as she was a Tamil, she was labeled as a terrorist by the Sinhalese people. The participation of Veluamma adds to the participation of North East members and was viewed by her from a terrorism viewpoint. Her view was that this commemoration should be done without the participation of these people.

Unlike in the past, the number of the mothers who attend this ceremony is gradually decreasing. Deaths, old age, health issues and the decrease of sorrow are some reasons for this.

“My son was lost 20 years ago. He was studying to be a doctor. I cried for so many years. I went to one commemoration. I’m still suffering. But now I never come to the commemoration because it makes my pain greater. It is useless to worry about that for the whole life. I have made up my mind now.”

(Mrs. Senanayake-Interview)

However this commemoration directly affects the existing government and the lives of the general public. Through this commemoration one can recognize that making people disappear is a crime whether it happens in the North or South.

“The effect of this commemoration should be expanded to patriotism or protection of human rights. Also this should be done with a connection to political parties with the viewpoint of basic principles.”

(Mr.Sudarshana Gunawardhana-Interview)

Accordingly, it seems that the effect of this commemoration has spread widely.

The idea of the monument of the disappeared people

The monument in the memory of the disappeared was opened in 4th February of 2000 and nearly 700 photos of the disappeared were created on the Wailing Wall of the monument. Building such monuments will help to give a moving message to the world.

“When such incidents happen in the world, people tend to build monuments in order to memorialize the incidents. From these monuments, not only the people are memorialized. By that not only are they commemorated but also the fact that these kinds of crimes happened in the past and also to remind that these crimes shouldn’t be repeated in the future.”

(Mr. Chandraguptha Thenuwara)

“Ranjith and Lionel are the only ones who were killed in this place. But this is a common place for all the victims who do not have a place of death and a date of death. This is not a property of the church but a public property.”

(Rev. Father Siril Anthony)

This monument has become important because it was built during a period when nobody built monuments in Sri Lanka for commemorations and also it reminds us of the pathetic past. Especially a monument which was built for commemorating the disappeared has an effect on the future as well.

The actions that were taken by the governments who were in power from 1987 to 1989, NGOs and civil social activists were not satisfactory but this memorial was important to the society nationally as well as to the private lives of the ordinary person at a time like what was mentioned above and it should be admired. Moreover, people believed politicians used these disappearances as a weapon to get power. It was revealed that those who took part in the commemorations continuously are apart from politics and they really are concerned about human rights.

The Idea on the Actions of the Union of Families of Disappeared

Organizations of the disappeared such as the Union of Parents and Children and the Mother’s Front originated in society during 1987-1989. With the opening of the monument named Union of Families of Disappeared in year 2000, the function was established in the country mostly in Gampaha, Kandy, Kaluthara, and Gall districts. A lot of activities were held especially to collect information, to organize meetings on those areas, to make people aware of the memorial, and to make them participate in the ceremony.

“Acting as a group is more influential than being a single person to avoid these kinds of situations in the future. It cannot be done without politics. It’s important to have a conditional agreement on disappearances, and we should have an idea about what we will do in another three to five years.”

(Mr. Wasantha Ranil)

“To organize this memorial, this Union of Families does a great job. To organize this kind of an event is not an easy task. So I feel that it is very important and influential to organize this kind of a memorial by this union.”

(Mrs. Seetha Gamage)

Furthermore, another idea that came out is that the union is acting with the purpose of money other than a commemoration. The reason behind this perception was that this union has the sole objective of organizing the day of memorial. Another reason is that in this particular union there is no one from the families of the victims.

Opinion on whether this memorial should be continued or not

This October 27th ceremony is important and should be continued to commemorate the disappeared and to avoid those kinds of tragic situations in the future, and to keep in mind that we have faced this kind of dark past as well. Also this memorial can be used as a weapon to encourage people to take necessary actions to avoid these circumstances, to pressure the politicians to make new principles and make laws to protect human rights.

The opinion that NGOs should make people aware of this situation and take necessary legal and constitutional actions for these came up.

Moreover, the view that the parents’ contribution is very important emerged as well. And also necessary actions should be taken to engage victimized parents in this memorial.

The idea of those who were against this commemoration was this should be going beyond a memorial and should stay away from political influence. Further, the opinion was brought out that this is something that happened 26 years ago, so what we should do now is take action for the welfare of the families of the victims.

Weaknesses in the Commemoration

One of the weaknesses is that this is limited to the 27th October. An idea came up that we should hold this commemoration for at least a week including events such as cultural events, awareness programs, educational programs, and others.

Commonly, people bear the belief that this should be a social campaign. This should be transformed to a social campaign including politicians, intellectuals, and professionals.

Also, the space should be given to the families of the victims to take an active part in this commemoration. In organizing, more importance should be given to them. This is a weakness which is noticeable in today's ceremony.

In addition, without thinking that this commemoration is a mere political or NGO project, people should give more importance to this.

Also politicians should distance themselves from this commemoration, so that they cannot intervene and also if the government changes it will have no effect on the principles of the memorial and it is more powerful.

The public should be aware of this memorial and each and every human being should know about this.

Another weakness is that Sinhalese and Tamils are both involved in this memorial but there is no opportunity to share ideas of the two ethnic groups.

Besides, guest speeches are not enough for this occasion, organizers should take actions to put this forward into the society.

Chapter Five: Conclusion and Recommendations

Conclusion

The memorial of disappeared people in Raddoluwa junction, Seeduwa and the October 27th ceremony have become the only ceremony to commemorate the disappeared people in Sri Lanka. Though it was created by a non- governmental organization and the civil social community, it has become an important ceremony at the national level.

The youth massacre which resulted in more than 60, 000 deaths and left a dark spot in Sri Lankan history in 1987-1989 can be identified as a great tragedy. The memorial gives the message that such incidents had happened, they should be memorialized without forgetting and steps should be taken not to allow such disappearances to occur again.

The ideas were presented to continue the ceremony and the souvenir properly, though there were some weaknesses and to collect the facts which have been proposed, by emphasizing the influence of it on our society.

Also there were opinions that this ceremony should be continued and improved from its weaknesses and it should be lengthened to at least more than a one day ceremony.

Further through a ceremony against disappearances, the necessity of reforming the legal and social system of the country needs to be highlighted and government, non-government, civil society organizations, victims and the general public should get together and work towards the attainment of this vision. .

Recommendations

It was emphasized that this 27th October Commemoration should be continued in the future as well. Further, it was emphasized that this should be organized with the remembrance of the tragic incidents which occurred in the past, and we should avoid these in the future.

It was suggested that we should expand the participation of the public in this commemoration and should expand the area of the ceremony.

Also, a suggestion was presented that this memorial should include intellectuals. The inclusion of politicians had a mixed response. Some see their importance, while others think politicians just use the issue to put themselves to a position of power. .

Moreover, rather than being a one day celebration, this should be a commemoration that goes beyond a day including cultural programs, awareness campaigns and so on.

Further, memorials should be organized on regional levels in order to make people pay attention to this matter.

Another suggestion was presented as to build this monument somewhere that has peaceful surroundings rather than the place at present.

Furthermore, the opportunity must be given to Sinhalese and Tamils to exchange their ideas, and for discussions, and to have conversations in order to build their mutual understanding, so that their misunderstandings will be addressed.

Another suggestion was made to involve the next generation to this memorial. It is important to make them know that enforced disappearance is not a fact to be forgotten.

Moreover, posters, newspaper articles and others should be published to make the public aware of the 27th October commemoration, with a strong basis.

Further, the intellectuals and politicians who take part in this memorial should be aware of the fact that this is not an event to attain power. State principles, rules and regulations should extend in order to make this memorial stable without changing with every the change of government.

A suggestion came up that people who are responsible for the abductions or disappearances should apologize to the society for their faults.

Furthermore, this campaign should go around the country and should be continued in the future. Also with a more organized way and a future plan, the monument should be preserved and the commemoration should be held.

Survey Questionnaire

1. For families of the disappeared persons:

- a. What kind of economic difficulties have you faced?
- b. What efforts have you made for justice? Please Specify.
- c. Have you been provided with any kind of reparation or compensation? If yes, then please specify.
- d. Could you name the problems that you have faced from the society?
- e. Have you faced any obstacles in terms of getting justice/reparation/interim relief? Please specify.

2. For disappearance survivors:

- a. What are the threats you have faced/been facing as a survivor of disappearance?
- b. Please specify about your physical and mental condition at present.
- c. What sort of torture was inflicted upon you?
- d. Where have you approached/been approaching for justice? (Government Agency/ NGO's/ INGO's) Please specify.
- e. What do you think the Government of Nepal should do to ensure justice to victim and the family of disappearance?

3. For National Human Rights Commission (NHRC):

(With the Theme Head)

- a. What kind of recommendation have you made regarding the disappearance cases?
- b. How far the recommendations have been implemented?
- c. How is NHRC following up its recommendations it has made?
- d. Have such methodologies applied proved to be effective? If yes/no, then how?

4. For Ministry of Peace and Reconstruction & Local Peace Committee:

(With the Secretary of the Ministry and the Coordinator of the Committee)

- a. To what extent does the Ministry make an outreach among all categories of victims of conflict?
- b. Do you see any sort of irregularities in distributing the interim relief package among the victims of conflict?
- c. How many complaints have the Committee received from the victim families?

- d. Can you please specify the nature of the complaints that you received from the victim families?

5. For District Administration Office & District Development Committee:

(With Chief District Officer and Local Development Officer)

- a. Is the interim relief made accessible to all categories of victims of conflict?
- b. Are the interim reliefs, which have been provided to the victim or their family, appropriate?
- c. What further programs/plans the Government needs to bring, in your view, for ensuring justice to victim of disappearance and their family?



ADVOCACY FORUM- NEPAL

[The level of awareness on and the critical aspects of enforced disappearances in Nepal]

[Year-2013]

[GAIRIDHARA, NAXAL, KATHMANDU]

Acknowledgement

This report was researched and written by Rabindra Gautam with inputs from Ambar Raut, Mandira Sharma (Chairperson of AF), and Ingrid Massage.

Thanks go to all the individuals who offered assistance, analysis, or information that made this report possible. We particularly wish to thank the families of the victims who shared their experience with us, as well as to different stakeholders, including NHRC, Ministries of Peace and Reconstruction, DAO, DPO, Local Peace Committee, Home Ministry, separately. Several of their names do not appear in this report at their request because they feared reprisals.

Content

1. Introduction.....	2
2. Methodology.....	3
3. Objective.....	3
4. A Brief History of Enforced Disappearances in Nepal.....	4
<i>Enforced Disappearances between 1950 and 1990</i>	5
<i>Enforced Disappearances between 1990 and 1996</i>	5
<i>Enforced Disappearances during the Conflict (1996-2006)</i>	6
5. Statistics and Pervasiveness of Disappearances during the Conflict.....	6
6. Patterns of Enforced Disappearances in Nepal during the Conflict.....	8
7. Police Aiding Arbitrary Detentions leading to Disappearances.....	9
<i>The State</i>	9
<i>The Maoists</i>	11
8. National Remedies.....	12
<i>Habeas Corpus</i>	12
<i>The NHRC</i>	15
<i>The Courts</i>	16
<i>Interim Relief</i>	18
9. Measures to Address Disappearances: A Chronology.....	19
10. Enforced Disappearances a Crime in Nepal.....	25
<i>Torture and Enforced Disappearances</i>	30
<i>Enforced Disappearances and Murder</i>	31
11. The Pain and Suffering of victims and their families.....	33
<i>Disappearance Survivors</i>	33
<i>Families as victims, and their struggle for subsistence and for justice</i>	35
<i>Disappearance of Arjun Lama (Case Study as an Emblematic One)</i>	36
<i>Disappearances of Mukunda Sedhai (Case Study as an Emblematic One)</i>	36
12. Reparations.....	40
<i>Reparations in Nepal</i>	42

13. Conclusions and Recommendation.....	49
<i>To Government of Nepal.....</i>	49
<i>To International Community.....</i>	50

1. Introduction

"First of all, disappearance means fear and shock. I was shocked and trembled with fear when the security forces took my husband away. Then the fear slowly changed into tears and lamentations, and then a sort of mental and physical strangulation. In the midst of that frenzy, hatred and anger grew side by side and we developed an intensified feeling to kill the perpetrators. During the course of time, the anger subsides and a hope emerges. Then we start to act – visiting human rights defenders and that entire quest. When nothing happens, frustration starts to envelop us and a sense of resignation comes. After that, a different kind of pain starts to twinge in the innermost recesses. That pain again rejuvenates into a new hope. This is what disappearance is – a mixture of pain and hope."

- Ruku¹

¹ Advocacy Forum, Interview with Ruku, 12 August 2008

Methodology

Advocacy Forum (AF) Conducted research in twenty different districts where it operates. The research was undertaken via the medium of interviewing the stakeholders, including conflict victims (families of disappeared), members of civil society, police, government officials and political parties. Besides, the staff of AF made frequent field visits during the time of research. Much of the information is from Advocacy Forum legal interviews conducted as part of the families' litigation attempts to obtain justice, as well as from the community based discussion program conducted by AF in districts. They took place in private as well as public with the full consent of those involved. This report was researched and written by Rabindra Gautam with inputs from Ambar Raut, Mandira Sharma (Chairperson of AF), and Ingrid Massage.

Advocacy forum remains in direct contact with the families, witnesses and other informants, including state stakeholders concerned. AF conducted

All efforts have been made to understand and bring out the history of the practice of enforced disappearances in Nepal. Besides, the report analyzes the trend/pattern of the practice of enforced disappearances and depicts the struggle being carried on by the families of disappeared persons for justice. The report was made possible on the grounds of AF's continuous monitoring in developments in relation to the practice of enforced disappearances vis-à-vis relentless advocacy and campaign carried on by AF in order to address this issue.

Advocacy Forum wishes to acknowledge and express its sincere thanks to all the individuals who provided information, analysis and assistance in the preparation of this report. We particularly wish to thank the families of the victims who shared their experiences with us.

Objective

This report is particularly built into tracing the history as to how enforced disappearances have been taking place and what the trends and patterns of this violation are in different timeframes. Besides, it aims to bring to the fore the critical depiction of the struggle that the families of the disappeared have been undertaking for justice. The foundational objective of this report is to compare and contrast and bring to the front the true picture of statistics of this particular kind of violation and the systematic move that the governments formed after Constituent Assembly (CA) election, held in 2008, have been undertaking to add more insult to the victim families. Hence, it narrates and critiques the policy of the government of Nepal vis-à-vis the struggle the families have been undertaking. Critically narrating all the developments in relation to the practice of enforced disappearances and the current situation of the families of victims, the report aims to initiate discussion on all aspects revolving around this particular kind of human rights violation.

2. A Brief History of Enforced Disappearances in Nepal

Enforced Disappearance between 1950 and 1990

The history of enforced disappearance in Nepal can be traced to the beginnings of democracy in the 1950s. It is thought that disappearances were widely used to subdue the democratic uprising of 1950 which ultimately resulted in the overthrow of 104-years' direct rule under the Ranas, a Hindu Rajput Dynasty, though there are no historical or archival records about the intensity and pervasiveness of enforced disappearances during the authoritarian oligarchy.

The first recorded instance is the enforced disappearance of Ram Prasad Rai², who was one of the protestors against the Delhi Agreement of 12 February 1951.³ His whereabouts still remain unknown. Likewise, the status of Sukhdev Singh, who was arrested by the police from Inaruwa, Saptari District in 1956, could not be established to date.

Enforced disappearance in Nepal was systematically practiced during the partyless *panchayat* system following coup d'état by the then King Mahendra on 15 December 1960. For the next three decades of royal authoritarianism, opponents of the regime and adherents and sympathizers of underground pro-democratic political forces were arrested and subsequently disappeared. A probe committee after the restoration of democracy in 1990 reported 62 incidents of disappearances during the *panchayat* regime. The report mentions that most of those disappeared were killed while being transferred between prisons.

Enforced Disappearance between 1990 and 1996

The restoration of democracy in 1990, however, saw a clear decline of enforced disappearances in Nepal. Between 1990 and the beginning of the armed conflict in 1996, only two cases of disappearances were reported. This included the forcible arrest and subsequent disappearance of

² L. Bhandari, *Uniharu Kaha Chhan?*, Vol. 2, Informal Sector Service Center, Nepal (1999)

³ Mediated by the government of India, the consociational agreement was hailed to be a tripartite agreement between the then King Tribhuvan, the Nepali Congress party and the Rana Government. However, representatives of the Nepali Congress were not allowed to actually participate in the negotiations. The agreement made way for the formation of a new 14-member cabinet consisting of seven representatives from the Nepali Congress and the Old Regime each. Enraged by this compromise, some leaders and cadres of the Nepali Congress staged protests in Kathmandu and other parts of the country. It was during one of these protests that Ram Prasad Rai was arrested and subsequently disappeared.

two individuals , Bhuwan Lal Thapa Magar , an inhabitant of Ramechhap arrested by police during local elections of 1992 from his home in Doramba VDC, and Prabhakar Subedi, who was actively involved in a protest program organized by the Communist Party of Nepal – United Marxist Leninist (CPN-UML) on June 25,1994. Their whereabouts remain unknown but the media had published a photograph of an unconscious Subedi being carried away from a demonstration by police. A *habeas corpus* petition filed in 1993 regarding the disappearance of Subedi was nullified by the Supreme Court in 1998.⁴ The United Nations Working Group on Enforced or Involuntary Disappearances (WGEID) still accounts this case that remains unclarified.

Incidents of disappearances were also reported during local elections in mid-1992 in Rolpa district. However, because of the limited capacity of the capital-based human rights community, these incidents were undocumented. In its Concluding Observations on Nepal’s initial report under the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee said:

*The Committee is deeply concerned with the cases of summary and arbitrary executions, enforced or involuntary disappearances, torture and arbitrary or unlawful detention committed by members of the army, security or other forces during the period under review which have been brought to its attention. It deplores that those violations were not followed by proper inquiries or investigations, that the perpetrators of such acts were neither brought to justice nor punished, and that the victims or their families were not compensated. It regrets that the draft bills against torture and ill-treatment of the person as well as on the compensation of victims of torture have not yet been adopted. Moreover, the quasi-judicial authority of the Chief District Officer and the insufficient protection of the independence of the judiciary undermine the efforts aimed at preventing the occurrence of similar acts.*⁵

⁴ INSEC, *Impaired Accountability: State of Disappearance in Nepal (A Brief Assessment of Implementation of UN-WGEID Recommendations)*

⁵ Concluding Observations of the Human Rights Committee: Nepal (1994), para. 10, available at <http://www.unhchr.ch/TBS/doc.nsf/0b2627a0b2f3c07d8025677e004ba618>

Enforced Disappearance during the Conflict (1996 to 2006)

After the initiation of a “people’s war” against the monarchial and parliamentary system by the Communist Party of Nepal-Maoist (CPN-Maoist) in 1996, the government launched a police operation called “*Kilo Sierra-II*” followed by another operation called “*Romeo*” to restrain the uprising giving rise to new patterns of pervasive arbitrary and forcible arrests and that resulting into disappearances. Immediately after the failure of peace talks in November 2001, the government declared the CPN-Maoist a terrorist organization, imposed the state of emergency and introduced the Terrorist and Disruptive Activities Ordinance (TADO), which was later adopted by the parliament in the form of the Terrorist and Disruptive Act (TADA).

The TADA proved to be Nepalese ‘*Night and Fog Decree*’⁶ and the trend of arbitrary arrests and disappearances by both the warring groups surged dramatically and reached its peak in 2002. In 2003 and 2004, Nepal attained the reprehensible distinction of recording the highest number of enforced disappearances in the world reported to the WGEID. After receiving 267 cases of disappearances, the WGEID visited Nepal from 6 to 14 December 2004 and made a set of recommendations including for the immediate annulment of TADA and promulgation of national legislation criminalizing disappearances.⁷

Although meant to be enforced for two years from the date of its promulgation, TADA was repeatedly extended every six months. After the imposition of direct rule by King Gyanendra on 1 February 2005 till the restoration of democracy in April 2006, arbitrary arrests and disappearances continued at the hands of security forces.

In the same vein, the CPN-M was also responsible for disappearances especially in rural areas where they exercised *de facto* control throughout the conflict. Those taken under their control ‘were held for extended periods . . . before being released or killed’ and in some cases ‘the body of the missing person has been seen by villagers and in many cases the CPN-M has made a

⁶ The earliest instance of state-sponsored enforced disappearances is ascribed to Night and Fog Decree under the Third Reich in Germany.

⁷ Report of the WGEID after its visit to Nepal, E/CN.4/2005/65/Add.1, 28 January 2005,

public statement about the death of the missing person.⁸ Although presumed to have been executed owing to their policy of annihilation (discussed in later section in detail), the whereabouts of many people abducted by the Maoists could not be established till date.

3. Statistics and Pervasiveness of Disappearance during the conflict

Statistics vary regarding the actual number of enforced disappearances during the conflict in Nepal. Although supposed to be carried out in thousands⁹, a substantial number of them were released or reportedly killed. Most of the detainees were released by the government after interventions by human rights organizations. During the time of the conflict, Advocacy Forum filed petitions of habeas corpus in different Appellate courts and the Supreme Court on behalf of 576 persons to challenge unlawful preventive detention orders. 26 persons were rearrested by the security forces in spite of release orders being issued by the court.

According to the latest data available, there is a consensus that the fate of more than 1000 individuals is yet to be confirmed. A recent report by ICRC states that 1401 individuals during the conflict are still missing,¹⁰ while a government-formed taskforce has determined 1327 individuals as disappeared.¹¹

Likewise, the report of the NHRC mentions that 190 persons are confirmed dead out of total 3,444 persons disappeared at the hands of both security forces and rebels. Similarly, the status of 1561 persons out of 2325 persons disappeared the state has been established but the remaining 619 are still missing, and the status of 170 out of 1119 persons disappeared by then CPN-Maoist is still unknown. Similarly, INSEC¹² reports 931 incidents of enforced disappearances (821 by the state security forces and 110 by the Maoists). Advocacy Forum (AF) has documented 648 cases (577 by the state forces and the remaining by the Maoists).

⁸ See Simon Robins, *An assessment of the needs of families of the Missing in Nepal*, The University of York, April 2009, <http://www.simonrobins.com/NepalMissingReport-Robins.pdf>

⁹ NHRC and OHCHR, "Enact Law on Enforced Disappearances," Joint Press Statement, 29 Aug, 2011, available at http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202011/August/2011_08_29_Joint_PR_NHRC_OHCHR_Intl_Disapperance_Day_E.pdf

¹⁰ The report further mentions that ICRC has received information on death of 375 persons out of 1401 but their human remains are still missing. (See ICRC, *Missing Persons in Nepal: Updated List 2012*, Kathmandu (2012)

¹¹ As reported by the Ministry for Peace and Reconstruction on 29 March 2011, see report by 'Nepal Monitor' at http://www.nepalmonitor.com/2011/07/recording_nepal_conf.html.

¹² INSEC, *Profile of the Disappeared*, August, 2011

Statistical analysis of data procured from different sources show that enforced disappearances were pervasive and widespread during the conflict. Even the latest reports maintain the disappearances from 70 out of 75 districts of the country. However, the degree and pervasiveness was intense in some districts in comparison to others. The following chart, based on reports of ICRC¹³ and INSEC, shows the district-wise distribution of disappeared persons whose status is still unknown:

	Regions	INSEC Report	ICRC Report
Eastern Region	Ilam	2 (1 by SF & 1 by Maoist)	4
	Udayapur	3 (SF)	4
	Okhaldhunga	11 (SF)	6
	Khotang	1 (SF)	2
	Jhapa	12 (SF)	13
	Taplejung	2 (Maoist)	1
	Dhankuta	2 (Maoist)	2
	Panchthar	2 (1 SF & 1 Maoist)	-
	Bhojpur	7 (SF)	3
	Morang	13 (8 SF & 5 Maoist)	15
	Sankhuwasabha	4 (SF)	6
	Saptari	8 (7 SF & 1 Maoist)	17
	Siraha	11 (9 SF & 2 Maoist)	22
	Sunsari	15 (14 SF & 1 Maoist)	16
Solukhumbu	3 (Maoist)	-	
Central Region	Kathmandu	20 (19 SF and 1 Maoist)	54
	Kavrepalchok	20 (15 SF and 5 Maoist)	18
	Chitwan	14 (SF)	26
	Dhanusha	10 (8 SF & 2 Maoist)	3
	Dhading	26 (25 SF & 1 Maoist)	23
	Nuwakot	18 (SF)	22
	Parsa	2 (1SF and 1 Maoist)	4
	Bara	1 (Maoist)	6
	Bhaktapur	5 (SF)	11
	Makwanpur	12 (SF)	5
	Mahottari	2 (SF)	3
	Rasuwa	1 (SF)	1
	Ramechhap	9 (8 SF & 1 Maoist)	9
	Rautahat	5 (4 SF and 1 Maoist)	13
	Lalitpur	8 (6 SF and 2 Maoist)	15
	Sindhupalchowk	17 (12 SF and 5 Maoist)	19

¹³ ICRC does not mention in its report whether the reported disappearances were carried out by the state security forces and the Maoists. The data reproduced here excludes 375 individuals for whom ICRC claims to have received information on death but whose human remains remain missing.

	Sindhuli	14 (13 SF & 1 Maoist)	7
Western Region	Arghakhachi	2 (SF)	4
	Kapilvastu	11 (7 SF & 4 Maoist)	19
	Kaski	16 (15 SF & 1 Maoist)	20
	Gorkha	23 (SF)	20
	Tanahu	10 (SF)	11
	Nawalparasi	13 (10 SF & 3 Maoist)	15
	Parbat	4 (SF)	4
	Baglung	19 (17 SF & 2 Maoist)	17
	Myagdi	2 (SF)	2
	Rupandehi	2 (SF)	6
	Lamjung	18 (16 SF & 2 Maoist)	9
	Syangja	8 (5 SF & 3 Maoist)	13
Mid-Western Region	Kalikot	25 (19 SF & 6 Maoist)	15
	Jajarkot	21 (18 SF & 3 Maoist)	9
	Jumla	2 (SF)	14
	Dolpa	2 (SF)	5
	Dang	70 (61 SF & 9 Maoist)	52
	Dailekh	1 (Maoist)	7
	Bardiya	219 (206 SF & 13 Maoist)	180
	Banke	61 (57 SF & 4 Maoist)	73
	Mugu	1 (Maoist)	6
	Rolpa	27 (23 SF & 4 Maoist)	36
	Salyan	27 (25 SF & 2 Maoist)	16
	Surkhet	14 (11 SF & 3 Maoist)	15
Far Western Region	Achham	3 (SF)	12
	Kanchanpur	26 (SF)	27
	Kailali	12 (9 SF & 3 Maoist)	18
	Dadeldhura	4 (1 SF & 3 Maoist)	9
	Doti	3 (2 SF & 1 Maoist)	2
	Bajura	1 (SF)	-
	Baitadi	4 (1 SF & 3 Maoist)	15

4. Patterns of Enforced disappearances in Nepal during the Conflict

In most of the cases of enforced disappearances by the state security agents, persons suspected to have institutional, ideological and personal links (in some instances familial) with the Maoists were arbitrarily arrested and caused to disappear. In most of the cases, security forces (masked and uniformed) numbering 40-60 used to lay siege to the house of the suspected member of

Maoist in the middle of the night; victims were woken up from their sleep (and in many instances roughed up before their family members in the event of some defiance) and the families were told that s/he was taken away for the purpose of some interrogation with an assurance that s/he would be released the next day. Victims were taken with their hands tied on their back and blindfolded. The arrest of the victims during the day, however, was mostly carried out by plainclothes security personnel. In other instances, people who provided (or were forced to provide) food, shelter and any kinds of assistance to the Maoists were arrested and subsequently disappeared. Also, people who were found walking alone or in small numbers in jungles or isolated places during security patrols and search operations were also detained on suspicion of being rebels and subsequently disappeared.

Similarly, the Maoists specifically targeted off-duty security personnel, civil servants, landlords, and members of mainstream political parties. They declared such people as "class enemies" and "spies" for not supporting their cause. In the incidents of disappearance by the rebels, the targeted victims were often taken away from their residence following an order from the party or in the pretext of settling some personal deals or having some chat. Most of such abductions by Maoists were followed by the execution but in some instances abductees were made to disappear without any trace.

5. Policy Aiding Arbitrary Detentions leading to Disappearances

The State

Although there has never been an explicit government policy that allowed disappearances in Nepal, security forces resorted to massive arbitrary detentions leading to disappearances during the conflict by abusing a set of 'vaguely defined'¹⁴ laws on policing. After the initiation of armed conflict, local authorities widely used especially the Public Security Act (PSA)-1991 to contain the increasing assertiveness of the rebels. The PSA allowed the chief district officer (or an authority who discharges the functions of chief district officer in his/her absence) to issue order to keep persons '*acting in any manner prejudicial to the sovereignty, integrity or public peace*

¹⁴ For a comprehensive analysis of security-related legislation in Nepal see AF & Redress, *Held to Account: Making the Law Work to Fight Impunity in Nepal*, December, 2011

*and order of Nepal'*¹⁵ under preventive detention for 90 days¹⁶, with a possibility of extension up to 12 months¹⁷ Moreover, the act also maintained that '*no question may be raised in any court concerning an order under the Act'*¹⁸, except preventive detention for *mala fide* reasons¹⁹.

After formally tagging the CPN-Maoist as a terrorist organization and imposition of state of emergency, the government simultaneously promulgated an anti-terrorist legislation called the *Terrorist and Disruptive Activities (Control and Punishment) Ordinance* (TADO) in November 2001. The ordinance provided sweeping powers to security forces to keep suspected members of rebel groups under preventive detention up to 6 months without judicial scrutiny²⁰. In April 2002, the TADO was adopted by the parliament as *Terrorist and Disruptive Activities (Control and Punishment) Act* (TADA). The legislation, to be effective till next two years, was responsible for widespread abuses and violations by the security forces as the NHRC commented: "TADA aids and abets those who, under the guise of maintaining law and order or security concerns, continue to violate the human rights of the citizens of Nepal."²¹ Among 9,900 people arrested between November 2001 and August 2002, 1,722 remained in custody²². According to Asian Human Rights Commission (AHRC), 2000 cases of disappearances were reported till the expiry of the TADA.

After the expiration of TADA, the government introduced a more severe version of the same legislation – *Terrorist and Disruptive Activities Ordinance* (TADO) – in October 2004. In its new avatar, the TADO provisioned for preventative detention up to a year²³. Following the royal

¹⁵ PSA-1991 Section 3.1

¹⁶ Ibid., Section 5.1

¹⁷ Ibid.

¹⁸ Ibid., Section 11.

¹⁹ Ibid., Section 12 A.

²⁰ Section 9 of TADO said:

1. If there is reasonable ground for believing that any person has to be prevented from committing any acts that could result in the terrorist and disruptive act, the Security official may issue an order to detain such a person in any particular place for a period not exceeding ninety days.
2. If it appears to detain any person for a period of time in excess of the period referred to in sub-section (1), the Security Official may, with the approval of His Majesty's Government, Ministry of Home Affairs, detain such person for another period of time not exceeding ninety days

²¹ The National Human Rights Commission, *Human Rights in Nepal: Status Report 2003*, 16.

²² Amnesty International, *Nepal: A Deepening Human Rights Crisis*, December 2002, p. 15

²³ Section 9:

"In case there exist appropriate grounds for believing that a person has to be stopped from doing anything that may cause a terrorist and destructive act, the Security Officer may issue an order to keep him under preventive detention for up to six months in a humane place. If there are reasonable grounds to believe that the person has to be prevented from committing any terrorist activities for longer than that, on the approval

coup of 1 Feb 2005, the TADO was re-promulgated new every six months till it was scrapped in 12 June 2006 by the transitional seven-party government after the successful democratic movement in April 2006. Although the practice of systematic disappearances significantly lessened between 2005 and 2006, thousands of pro-democracy leaders, journalists, lawyers and human rights activists were either arrested or put under house arrest during the April uprising under the PSA and the TADO.

The Maoists

The Maoists, too, did not have the explicit policy of disappearances. The basic policy adopted by the Maoists to deal with the people perceived to be working against their cause was *safaya* (annihilation or execution).²⁴ This policy was avowedly expressed in the party's resolution dating back to 2003,²⁵ which stated:

As per the physical liquidation of class enemies and spies, our Party's policy has been: to practice it on the selected ones and to the minimum, by informing the masses and obtaining their consent as far as possible and by not resorting to any ghastly methods.

Although there were numerous instances of targeted and on-the-spot killings of people considered to be working against their cause, many people abducted under the policy of *safaya* by the Maoists were presented to their Kangaroo Courts. According to the gravity of the crime determined by those courts, the abducted persons were either released (mostly after torture and intimidations) or executed or held hostages for longer period of time, kept at labor camps and in some instances forced to join the Maoist fold. In an interview with BBC, Maoist Chairman Prachanda said:

Our policy is that if he is an informer, we'd capture him, stand him in front of the people's court, and take action as per the verdict of the court. Considering the degree of the crime, he could be given a labour punishment for a certain time, or

of His Majesty the Government's Home Ministry, the Security Officer can issue an additional six months' order of preventive detention."

²⁴ Correct Handling of Contradictions, *Supplementary Resolution to "Present Situation and Our Historic Task"* adopted by the Politburo of the Central Committee of the CPN (Maoist, October 2003, p. 6, available at <http://www.ucpnm.org/english/doc10.php> (Hereinafter Resolution 2003)

²⁵ Ibid',

*for a while kept under the custody of people, and if the crime is big, he could even be executed.*²⁶

The OHCHR Nepal Report equates abductions by Maoists as "arbitrary arrests."²⁷ Although having a policy of immediately making the reasons behind the arrest (abduction) of people,²⁸ the Maoists did not inform about the fate of many of those abductees leading to their disappearances. Also the policy of informing about the arrest and execution was not strictly followed as per the Maoist policy. Indiscipline at the lower echelons marred the party as it rapidly grew in numerical strength²⁹. In this connection, the 2003 resolution rues that '*some of the annihilations have taken place flimsily on the grounds of not giving enough donations, not providing shelter & food, having politically opposed our movement, suspicion of being a spy, or having enmity with our local team members.*' Such occasional aberrations and deliberate attempts to cover-up such incidents were also the reasons why whereabouts of many people arrested/abducted by the Maoists, though presumed to be dead, remains unclarified.

INSEC has recorded altogether 84,969 incidents of abductions by the Maoists during the period of insurgency, including mass abductions of children, teachers and women to attend their party's various functions and programs.³⁰ Advocacy Forum has documented 320 cases of abductions of people by the Maoists.

6. National Remedies

Habeas corpus

The writ of habeas corpus³¹ remained in effect during the armed conflict, including during the state of emergency declared by the government in November 2001. However, the wording - '*notwithstanding anything contained in the prevailing law*'- of the section 17(5) of both the TADO-2001 and TADA-2002 that granted security forces *carte blanche* to arrest and detain people was 'interpreted as overriding the right to bring an application for habeas corpus under the

²⁶ BBC interview with Prachanda, available at http://news.bbc.co.uk/2/hi/south_asia/4707482.stm

²⁷ OHCHR Nepal Report, p.

²⁸ Resolution 2003

²⁹ International Crisis Group, *Nepal Maoists: Their Aims, Structure & Strategy*, Asia Report No. 104, 27 October, 2005, p. 15

³⁰ Inseconline.org, Impact of Conflict in Women, available at <http://www.inseconline.org/index.php?type=opinionforums&id=25&lang=en>

³¹ Article 14(7) of the Constitution of Kingdom of Nepal-1990

constitution on the basis that continued detention is authorized by the TADA and is judicially determined.³²

Besides, the writ of habeas corpus was rendered ineffective due to consistent court dismissals, practical difficulties in filing the writ, perjury laws sympathetic to government officials, and the military's refusal to comply with Supreme Court orders. Even in a case filed³³ challenging the constitutionality of the preventive detentions under the TADO, the Special bench of Supreme Court, though divided³⁴, quashed the petition and held that the provision was in line with the constitution as the PSA, which was promulgated by the parliament, allows preventive detentions by the authorities. However, a landmark 2007 Supreme Court decision (discussed below) regarding 83 habeas corpus petitions was a success for those involved, most families of the disappeared found the writ of habeas corpus of little use.

Some families reported difficulty submitting habeas corpus petitions due to strict procedural requirements. Habeas corpus petitions could only be filed at an Appellate Court or at the Supreme Court, which are more difficult to reach than local courts.³⁵ As a result, those who wished to submit habeas corpus petitions sometimes had to travel for days in order to file the petition.³⁶ Reports also indicate that Nepal's laws regarding perjury prevented habeas corpus petitions from being successful:

“A central difficulty that repeatedly has manifested itself during habeas corpus cases is that the Nepalese law on perjury and contempt of court is defective. Although “witnesses” can be liable for perjury under *Section 169 of the Muluki Ain*, government officials when giving evidence are not obliged to provide the

³² ICJ, *Attacks on Justice Nepal*, Concept Paper, p.7 available at <http://icj.concepto.ch/dwn/database/NEPAL.pdf>

³³ *Raju Prasad Chapagain v His Majesty's Government*, Verdict No. 7641, 24 March, 2006, N.K.P 2063

³⁴ Dissenting with the majority view, Justice Bal Ram KC wrote:

"The Provision contravenes the constitution . . . TADO is a penal law but the provision in question is preventative law. Preventative law cannot be incorporated in penal law. . . if the provisions were not declared contradictory to the constitution, the state could both prosecute and keep citizens in preventive detention at the same time'

³⁵ Advocacy Forum and Human Rights Watch, *Waiting for Justice. Unpunished Crimes from Nepal's Armed Conflict*, October 2008, p. 51, available at <http://www.advocacyforum.org/downloads/pdf/publications/waiting-for-justice-sep-10.pdf> (hereafter, *Waiting for Justice*).

³⁶ *Waiting for Justice*, p. 51.

information obtained in their official capacity as per Section 44 of Evidence Act, 1974.”³⁷

The biggest concern during the conflict was the Supreme Court’s outright dismissal of habeas corpus petitions. In its 2008 Bardiya Report, the OHCHR noted that, “the courts normally dismissed habeas corpus writ petitions where detention was denied by the authorities and the petitions proved ineffective. Families were thus left searching in vain for any news of their disappeared relatives. Human rights defenders who intervened in such cases at the time did so at considerable risk.”³⁸ The same report noted that, “in cases where the arrest was acknowledged by the security forces, habeas corpus writ petitions were effective in securing the release of detainees in some cases. However, where the authorities denied the arrest, the Supreme Court normally dismissed habeas corpus writ petitions, and they proved ineffective.”³⁹

In analyzing the writ’s effectiveness in Nepal, the International Commission of Jurists concluded that, “[t]he remedy of habeas corpus is not effective to address widespread instances of arbitrary detention, as on numerous occasions police and military authorities have disregarded judicial orders for release, refused to accept service of applications and summonses issued by the Supreme Court or simply re-arrested detainees immediately following their release from custody.”⁴⁰

Even where the Supreme Court issued a writ of *habeas corpus*, the military’s refusal to cooperate with Supreme Court orders left disappearance victims and their families with little hope for truth: “The Supreme Court has played a significant role in relation to cases of illegal detention and “disappearances” by ordering the relevant security agencies to produce prisoners in court in cases of habeas corpus. However, the army’s lack of cooperation with the court was and continues to be a major concern.”⁴¹

³⁷ *Waiting for Justice*, p. 51.

³⁸ OHCHR, *Conflict-related Disappearances in Bardiya District*, December 2008, p. 7, available at http://nepal.ohchr.org/en/resources/Documents/English/reports/HCR/2008_12_19_Bardiya_Report_Final_E.pdf (hereinafter, *OHCHR Bardiya Report*),.

³⁹ OHCHR Bardiya Report, p. 44.

⁴⁰ International Commission of Jurists, *Attacks on Justice – Nepal*, 2005, p. 8, available at: <http://www.icj.org/attacks-on-justice-2005-nepal/>

⁴¹ *Waiting for Justice*, p. 36.

In 2007, the Supreme Court published a landmark decision involving eighty-three habeas corpus petitions.⁴² The court concluded that, “it is beyond dispute that the persons stated in the petition have not been in contact with their families and relatives since the time of their arrest.”⁴³ Further, “the status of all other persons stated in the writ petitions cannot be determined on the basis of the available facts, and as such, the truth of their status needs to be investigated and determined.”⁴⁴

In deciding the government’s obligations to the families of the disappeared, the Court ordered the government to create a commission to investigate conflict-era disappearances, criminalize disappearances, and prosecute those responsible for disappearances.⁴⁵ Finally, the Court stated that, “Even as it is not possible to provide specific legal remedies like punishment or compensation in the situation when the true status of a detainee is not known, it is hereby ordered to provide interim relief, even in symbolic form, in light of the situation at the time of deciding this case, with the limited purpose of helping the victims’ families bear the pains suffered by them while seeking justice, on the condition that it will not affect the amount and nature of the remedy to be provided as per the law to be enacted ... and any subsequent investigations.”⁴⁶

While this strong judgment of 2007 is welcomed, it is to be noted that the courts did not deliver such favorable judgments during the time of the armed conflict itself as the *Dhakal* case. For many families of the disappeared the writ of habeas corpus was ineffective when it was needed most. Even for the families of the 83 disappeared people considered in the *Dhakal* judgment the impact is ultimately limited as the government has not implemented the judgment and has not initiated the independent investigations the court ordered and the fate or whereabouts of the 83 remains unknown.

The NHRC

The National Human Rights Commission (“NHRC”) was and continues to be another source of aid for conflict victim families. The National Human Rights Commission Act of 1997 created

⁴² Rajendra Dhakal and Others v. The Government of Nepal, writ no.3575, registration date 21 January 1999: Order rendered by Hon. Justice Khila Raj Regmi and Hon. Justice Kalyan Shrestha issued on 18 Jestha 2063 (2007). For an unofficial translation of the judgment, see 1 National Judicial Academy Law Journal (2007), 301–339.

⁴³ Rajendra Dhakal and Others v. The Government of Nepal, p. 10.

⁴⁴ Rajendra Dhakal and Others v. The Government of Nepal, p. 15.

⁴⁵ OHCHR Bardiya Report, p. 62.

⁴⁶ Rajendra Dhakal and Others v. The Government of Nepal, p. 42.

Nepal's National Human Rights Commission. In 2007, the role of the NHRC was solidified within the Interim Constitution. Article 132 of the Interim Constitution provides that the NHRC shall have the power to conduct inquiries into human rights abuses, forward recommendations to other branches of government, make recommendations to lodge petitions in the courts, enhance awareness of human rights, analyze domestic laws and make recommendations regarding human rights issues, including for the government to become party to international treaties.⁴⁷

During and after the conflict, victim families turned to the NHRC after failed attempts to discover the whereabouts of their loved ones. Between 2000 and 2010, the NHRC received many complaints of disappearances.⁴⁸ The complaints led to NHRC investigations and recommendations for the government to investigate cases and prosecute those responsible as well as provide compensation. However, reports indicate that the government more often than not ignored the NHRC's recommendations: "According to the NHRC's own figures, overall 86 per cent of its recommendations have not been implemented."⁴⁹ The NHRC is a mainly investigative and analytical body; it can investigate abuses and make recommendations to the government, but has no authority to prosecute perpetrators or award compensation to conflict victims and/or their families. As such, recommendations provided for by the NHRC do not qualify as the judicial remedy; Nepal is required to provide victims with remedy under international obligations such as the ICCPR.⁵⁰ As a result, the NHRC has played a limited role in bringing justice to conflict victims and/or their families.

On 20 January 2012, the National Human Rights Act 2012 replaced the National Human Rights Commission Act 1997. Analysis of this new legislation indicates that the NHRC is now significantly less independent from the government. It is unclear what effect this new legislation will have on disappearance investigations going forward.

The Courts

Despite the failures of the writ of habeas corpus during the conflict, in the years after the conflict the Courts have become the strongest branch of government supporting human rights in Nepal.

⁴⁷ Interim Constitution, Article 132, 2007.

⁴⁸ NHRC, 'Summary Report of NHRC Recommendations upon Complaints in a Decade (2000-2010)' (November 2010) available at: http://nhrcnepal.org/nhrc_new/doc/newsletter/Sum-Report-NHRC-Recommendation.pdf

⁴⁹ The Himalayan Times, 86 percent of NHRC recommendations have been ignored, July 6, 2010.

⁵⁰ *Giri v. Nepal* (1761/2008), Human Rights Committee, Views of 24 March 2011, para. 6.3.

As noted above, the *Dhakal* case was instrumental in laying out Nepal's obligations to conflict-era victims. Further, the courts have rejected the government's argument that conflict-era cases must be dealt with under transitional justice mechanisms rather than under normal criminal law.⁵¹ In addition, when political parties have attempted to provide amnesties to perpetrators of war time abuses, the Supreme Court has ruled that to do so violate international law.⁵² Further, the court has also ordered the government to frame vetting laws strictly regulating the promotion and transfer of state officials implicated in human rights violations.⁵³

Still, without cooperation from the police and military, many of the Supreme Court's important decisions fail to be implemented. Advocacy Forum and Human Rights Watch's reports, including *Waiting for Justice*, *Still Waiting for Justice*, *Indifference to Duty:.....* and *Adding Insult to Injury: Continued Impunity for War Time Abuses* documented the impunity that prevents victims and their families from obtaining justice. In 2011, Advocacy Forum reported that: "many victims' families have identified alleged perpetrators of extrajudicial killings and enforced disappearances, and provided evidence to the police. But time and again, the police have been derelict in their duties, and failed to conduct investigations, even in the face of Supreme Court orders."⁵⁴

According to the UN Secretary General's 2009 report on Nepal: "No progress has been made towards fulfilling the commitments made by the previous Government and the leaders of the political parties to end impunity in Nepal and ensure that the perpetrators of human rights violations and abuses, both past and present, are held to account. Similarly, no progress has been observed in the criminal investigations of allegations of human rights abuses by members of the Nepal Army and Maoist army."⁵⁵

⁵¹ Advocacy Forum, *Adding Insult to Injury*, 2011, available at <http://www.advocacyforum.org/downloads/indifference-to-duty-english-version.pdf> (hereinafter, "Adding Insult to Injury").

⁵² *Adding Insult to Injury*, p. 27.

⁵³ See Advocacy Forum, *SC Directs Government to Vet Officials*, 13 Aug, 2012, available at <http://www.advocacyforum.org/news/2012/08/sc-directs-government-to-vet-officials.php>

⁵⁴ *Adding Insult to Injury*, p. 1.

⁵⁵ Report of the Secretary General on the Request of Nepal for United Nations assistance in its peace process, UN Doc. No S/2009/351 of 13 July 2009.

“Interim Relief”

Amidst the failures of the writ of habeas corpus, the NHRC, and the Supreme Court in revealing the truth, providing justice and reparations for the families of the disappeared, the government has awarded some “interim relief” to victims of the conflict and their families. While initially being awarded 25,000 rupees; then 100,000 rupees under the government’s Interim Relief Program, disappearance victims or victim families are now entitled to 300,000 rupees (US\$3,352). The policy has more been launched as inclination to shut up the victims asking for justice. Besides, it is designed to quell the pressure exerted by the victims' groups as well as the civil society for their demands of reparation.

The Interim Relief Program administered by the Ministry of Peace and Reconstruction at the national level and the district administrations is far from fulfilling the needs of victims and their families. Victims and their families report practical difficulties in obtaining relief, from lack of information to bureaucratic delays in accessing awards.⁵⁶ Further, the wives of disappearance victims experience a discriminatory system: whereas wives of men known to be deceased as a result of the conflict receive an additional 25,000 rupees (\$US 282) for the “single women subsistence allowance”, these funds were withheld from the wives of disappearance victims⁵⁷ but later provided to them through an amendment in the interim relief guidelines in 27 September 2011.

Further, it is important to note that the Interim Relief Program does not absolve Nepal of its obligations under international law to provide reparations to conflict victim families. The Interim Relief Program does not address specific medical, legal, or economic needs of the families, instead it provides a lump sum to families regardless of the individual circumstances of the family. As set out later in the report, the Interim Relief Program fails to fulfill the elements of reparations, which include restitution, compensation, satisfaction, rehabilitation, and guarantees of non-repetition.⁵⁸

⁵⁶ From Relief to Reparations, p. 2, 19.

⁵⁷ Advocacy Forum, ‘Discrimination and Irregularities: The Painful Tale of Interim Relief in Nepal’, 2010, p.16 (hereinafter “Interim Relief in Nepal”).

⁵⁸ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 (hereinafter the “Basic Principles”).

7. Measures to Address Disappearances: A Chronology

Pre-Conflict

- After the restoration of democracy in 1990, the government formed a commission to find out the whereabouts of the disappeared person following the royal coup of 1960. Headed by Surya Bahadur Shakya, the commission produced a report which showed that during the three decades of one-party *panchayat* regime 62 persons disappeared after arrest by state security forces. However, there was no effective implementation of the recommendations by the committee. Most of the disappeared were reported to have been killed during jail transfers.

Conflict

- On June 2004, relatives of the disappeared met the then Prime Minister Sher Bahadur Deuba and demanded to immediately make the status of their loved ones public. On 21 June, 33 relatives of the disappeared undertook a week long hunger strike followed by a fast-unto-death strike by four mothers of the “disappeared”. Under pressure, the government announced on 1 July 2004 to establish an Investigative Committee on Disappearances under the Home Ministry. Chaired by the Joint Secretary for Home Affairs, Mr. Narayan Gopal Malego, the preliminary findings of the five-member committee was highly disappointing.
- The WGEID visited Nepal in December 2004 and made a series of recommendations for the government to prevent and address disappearances. Among them was a recommendation for the United Nations Department of Peacekeeping Operations to evaluate the future participation of Nepalese security forces in United Nations peacekeeping missions, assessing the suitability of such participation against progress made in the reduction of disappearances and other human rights violations attributed to the Nepalese security forces.
- The United Nations Office for the High Commissioner of Human Rights in Nepal (OHCHR-Nepal) carried out an investigation into arbitrary detention, torture and disappearances at the then RNA Bhairabnath Barracks at Maharajgunj, Kathmandu, in

2003-2004 and made its report public on 26 May 2006. The report confirmed the disappearance of 49 persons but also said that its continuing investigation suggested that the actual number is significantly higher.

Post-Conflict

- On 1 June 2006, a committee headed by Joint Secretary at the Home Ministry, Baman Prasad Neupane was constituted to report the incidents of disappearances during the conflict. The committee made public the status of just 104 individuals and concluded that there is a need for additional investigations on the disappeared persons.
- The Comprehensive Peace Accord (CPA) signed between the seven party government and the NCP-Maoist on 21 November 2006 stated: "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." However, nothing happened as agreed in the peace agreement.
- On January 2007, the Interim Constitution of Nepal was promulgated. It identified as a government responsibility the duty to "[t]o 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."
- In April 2007, the investigations carried out by the Supreme Court-constituted Detainees Investigation Task Force recommended that the Supreme Court issue a directive to the Government to set up a high level commission of inquiry into disappeared persons. The Task Force suggested that the Supreme Court direct the Parliament and the Interim Government to enact a law to punish the guilty, in accordance with international standards categorizing disappearance as a crime against humanity. The report also advised the Court to issue judicial strictures to the government and the police to stop illegal arrest and detention.

- On 20 April 2007, the Ministry of Law, Justice and Parliamentary Affairs registered a bill to amend the *Muluki Ain* with respect to disappearance and abduction (“the Bill”) at the Interim Legislature-Parliament. This step, according to the government, was a fulfillment of the Government’s obligations under international human rights and humanitarian law, in line with the recommendations of the WGEID following its mission to Nepal in December 2004. However, the Bill was criticized by national and international human rights organizations on the grounds that it did not fully meet applicable international human rights standards. The lawmakers of the legislature-parliament put forward more than 130 proposals for amendments to the bill.
- The Supreme Court's verdict of 1 June 2007 on enforced disappearances said 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 gave directives to the Government to introduce new legislation to ensure the establishment of a credible, competent, impartial and fully independent commission. The order also stated 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 Commissions of Inquiry developed by the United Nations Office of High Commissioner for Human Rights.
- A three-member "High Level Investigation Commission on Disappeared Persons" headed by ex-justice Narendra Bahadur Neupane was formed on 26 June 2007. However, the commission became defunct as various human rights organizations criticized the government's move as against the spirit of the 1 June judgment of the Supreme Court.
- On 28 December 2007, the Parliamentary Committee on Law, Justice and Legislative Relations directed the government to take appropriate steps in connection to the issue of disappearances and the Minister of Home affairs provided assurances that a bill on disappearances would be published by 6 January 2008.
- Point no 8 of a 23-point agreement between the government and CPN-Maoist of 23

December 2007 stated: "As per the Comprehensive Peace Accord, relief shall be provided to the families of those who were killed as a result of the armed conflict by mid-February, 2008. With regard to the disappeared, relief shall be provided based on the report of the Investigation Commission. The preliminary report shall be submitted within a month after the Investigation Commission begins work."

- On January 2008, a high-level task force under the Ministry of Peace and Reconciliation recommends to the government to establish a Truth and Reconciliation Commission (TRC) and a Commission on Disappearances via two separate ordinances. The government abandoned the idea after widespread condemnations.
- On 15 November 2008, the Government of Nepal unveiled the draft bill on Enforced Disappearances (Charge and Punishment) Act 2008. The bill was formally publicized amidst a consultation program organized by the Ministry of Peace and Reconstruction (MoPR) in the presence of media, representatives from selected human rights organizations and family members of victims.
- On 19 November 2008, the Council of Ministers approved the bill to be finally tabled in the interim legislature.
- On 5 February 2009, the cabinet passed the ordinance on Disappearance.
- On 10 February 2009, the President promulgated the ordinance.
- On 27 February 2009, the government formed a three-member committee headed by CA member and the chair of the Parliamentary International Relations and Human Rights Committee Padam Lal Biswakarma to recommend five members for the commission.
- On 3 April 2009, the Supreme Court in its judgment in *Babu Ram Giri v Government of Nepal* reiterated its directives to the government to investigate and furnish whereabouts of those disappeared during the decade long conflict.

- In October 2009, the Cabinet approved the Disappearance Commission Bill.
- In May 2010, the bill was tabled in the Legislature Parliament. 24 lawmakers put forward 77 amendment proposals in relation to the bill. The amendment proposals raised by them voiced some genuine concerns, including the need to regard disappearance as a non-amnestible crime. The bill was sent to the Legislative Committee for further deliberation.
- After the completion of section-wise discussion in April 2011 at the Legislative committee of the Legislature Parliament the bill was supposed to have been tabled for adoption; however, differences of opinion regarding some provisions in the bill including amnesty, reconciliation and definitions of human rights violations prevailed among the committee members. To iron out differences and to resolve problematic clauses in the Disappearance bill, a five-member sub-committee was formed.
- The Sub-Committee was expanded with two additional members in May 2011. Initially provided a ten-day time-limit to finalize the bill, the Sub-Committee failed to meet the deadlines even after repeated extensions. A standoff between the UCPN-Maoist and the Nepali Congress⁵⁹ stalled the process.
- In November 2011, the political parties signed a 7-point agreement and agreed to for the commission without further ado. As a result, a high-level political Task Force consisting of representatives from the three main parties was formed to finalize the bill.
- In January 2012, the Task Force submitted a 'Suggestion Paper' proposing merger of the Disappearance commission and TRC and stressed on truth-seeking. Regarding amnesty, the paper offered contradictory view in that it stressed on ruling out amnesty for crimes of serious nature and granting amnesty at the same time.
- In May 2012, the government submitted a motion in the parliament to withdraw both the

⁵⁹ The issue of the standoff was which commission should be established first: the UCPN-Maoist were rooting for Disappearance commission as most of the victims were their cadres and the Nepali Congress was in favor of prioritizing the TRC as this would ensure return of the property confiscated by the Maoists during the conflict.

draft bills with a proposal of merger of both the commissions. With the dissolution of the parliament on 28 May, the process stalled. On 27 August 2012, the caretaker government forwarded an ordinance for the formation of a Disappearance, Truth and Reconciliation Commission to the President for promulgation. The ordinance granted broad amnesty powers to the future transitional justice mechanism, including for those who might have committed gross human rights violations, in breach of international law and Nepal's international human rights obligations. This move was widely condemned by national and international NGOs, the diplomatic community and the UN High Commissioner for Human Rights. The ordinance currently remains shelved at the president's office.

- On 12 March 2013, the three major political parties and the United Democratic Madhesi Front (UDMF) reached a 11- point agreement to form an election government under the leadership of Chief Justice Khilraj Regmi. And the on the day, the ordinance of Truth Commission was also endorsed by the President.
- National and international human rights organizations too have taken strong exception against the content and process of TRC Ordinance. OHCHR chief Navi Pillay on 20 March issued a statement saying that the passing of the TRC Ordinance with amnesty provisions is regrettable. Accountability Watch Committee, a loose network of national human rights organizations in Nepal, announced that it will boycott the Commission as it was made as a part of the "opaque political deal" aiming at granting general amnesty even to those involved in cases of serious human rights violations.
- On 2 April 2013, responding to two writ petitions filed separately on 24 March 2013, the Supreme Court (SC) of Nepal has issued a stay order yesterday asking the Chairman of Council of Minister not to form Truth and Reconciliation Commission under the recent TRC Ordinance which empowers the commission to grant amnesty even to those involved in serious human rights violations.

8. Enforced Disappearances as a Crime in Nepal

Nepal does not have a substantive law in prevention, investigation and prosecution of enforced disappearances. However, it has been implicitly recognizing disappearance as a crime since

1990; the formation of a probe committee after the restoration of democracy in 1990 and the subsequent efforts (as discussed in previous section) to find out the whereabouts of the disappeared throughout the period of conflict testifies to this. Especially, the government's commitment on the implementation of Human Rights and International Humanitarian Law announced on 26 March 2004, issued on the eve of the visit by UN Working Group on Enforced or Involuntary Disappearances (UNWGEID), contains a host of promises including prevention of arbitrary arrests and enforced disappearances and prosecuting those who are responsible for such acts⁶⁰.

Although not legally binding, such a comprehensive commitment can serve as a basis on which it can be said that the government of Nepal had acknowledged enforced disappearances as a criminal offence even during the conflict. Above all, the momentous verdict of the Supreme Court of Nepal on 1 June 2007 comprehensively established that the Nepali state has obligations to prosecute even though there is not any separate legislation criminalizing disappearances:

⁶⁰ Relevant provisions in the statement include:

No one shall be subjected to arbitrary arrest or detention. Measures will be undertaken to prevent illegal or arbitrary detention and forced disappearances.

A detainee shall be informed of the reason for the arrest. No one shall be arrested during the night except in accordance with the prevailing laws. Information about the whereabouts of the detainee and his/her transfer shall be made available to the members of his/her family, legal practitioner and the person eligible to receive such information. Every place of detention will maintain a register containing the name of every person detained and the dates of entry, discharge or transfer.

Right to unhindered legal defence shall be honored and protected. The detainee shall be allowed to speak with the family, legal practitioner and any other person within prescribed legal provisions. The accused shall have the right to present himself/ herself during the hearing of the case. He/she shall have the right to defend by himself/herself or by the legal practitioner of his or her choice. He/she shall have the right to seek counsel from such practitioner openly and secretly.

Any detainee shall be held in an officially recognized place of detention. Detained persons shall be kept in humane conditions and provided with adequate food, drinking water, appropriate shelter, clothing, health and sanitation facilities and security.

The accused shall have the right to be tried in the court that has all the attributes for conducting free and fair proceedings within a reasonable period of time in accordance with law.

The accused held in detention shall not be subject to torture or to cruel, inhuman or degrading treatment or punishment. Any person so treated shall be provided with the compensation stipulated by the law and any person responsible for such treatment shall be prosecuted and punished according to the law.

While releasing from detention, the dignity and rights of the person shall be guaranteed providing credible evidence of the release from detention.

For the effective judicial remedy, the orders issued by the Court, including the writ of habeas corpus shall be honored. The right to verify the status of the detainee, his/her health condition, and the right to identify the authorizing and arresting authorities shall be guaranteed. Any malicious exercise against such rights to remedy shall be punishable by law

See : His Majesty's Government's Commitment on the Implementation of Human Rights and Humanitarian Law, Announced on 26 March, 2006, Unofficial translation available at

<http://www.satp.org/satporgrp/countries/nepal/document/papers/implement.htm>

"Even as there has not been a separate legal provision on enforced disappearance in Nepal, some of the provisions of the Interim Constitution, 2007 speak to the issues raised by such incidents during the time of the conflict. The political consensus achieved between the Seven Political Parties and CPN (Maoist) leading to the Comprehensive Peace Agreement (CPA) entered between the Government of Nepal and CPN (Maoist) on 2063/8/5 (Nov. 21, 2006), was the background for the promulgation of the Interim Constitution. The CPA also expressed commitment to international humanitarian law and principles and standards of basic human rights. It seems that the State has accepted its obligation towards disappeared citizens due to its commitment to comply with basic human rights law and international humanitarian law, as expressed in Clause 5.2.3 of the aforementioned peace agreement, which has been included as Annex 4 of the Interim Constitution. The clause states that both parties agree to make public the real names, family names and home addresses of those who were disappeared and killed during the time of war within 60 days of signing of the agreement and thereby apprise this information to their families also. Clause 5.2.5 states that both parties have agreed to establish a high level Truth and Reconciliation Commission to investigate those who violated human rights during the armed conflict. Clause 7 provides that both parties commit to respect human rights and international humanitarian law. Therefore, the State seems to have accepted the fact that it holds legal obligations with respect to disappeared persons."⁶¹

Indeed, the enforced disappearance has attained a *de facto* recognition of a criminal offense in Nepal. Moreover, disappearance is often regarded as 'octopus crime'⁶², and might involve a set of minor and gravest offenses ranging from summary arrests and illegal detentions to torture, murder and rape. Further, the crime of disappearance violates a host of civil and political rights including the right to life, the right to liberty and security of the person, the right not to be subjected to torture and other cruel, inhuman and degrading treatment or punishment, the right to

⁶¹

⁶² Dalia Vitkauskaitė-Meurice, Justinas Zilinskas, "The concept of Enforced Disappearances in International Law," *Jurisprudence*, 2010, 2(120), p. 205

fair trial and the right to an effective remedy⁶³. As the rights enumerated above were enshrined in then Constitution of the Kingdom of Nepal-1990 and the Nepalese law had criminalized offenses related to disappearance, there is enough room to establish disappearance as a crime.

However, it is difficult to prove the crime because of the lack of evidence. The authorities involved in the crime do their best to conceal and destroy all sorts of evidence that might establish the crime. As discussed in the previous chapter, the only available remedy for the victims of disappearance is the writ of habeas corpus. However, this has been found very ineffective in the case of disappearances as the court has limited the scope of the writ of disappearances only to test the legality of detention. When the writ of habeas corpus filed, the courts asked respondents (the army, police, CDO) to answer to the case, these agencies always lied to the court and provided that they have not arrested the person concerned. Then victims (those who filed the writ) were asked to provide the evidence of the arrest and where the person is detained. As a result, most of writs got quashed during the conflict.

Therefore, the issue of burden of proof remains the most fundamental problem in initiating criminal prosecution through regular courts. Although the landmark decision of the Supreme Court has established disappearance as crime⁶⁴, Nepalese courts are found to be increasingly swayed by arguments that the transitional justice mechanisms are an appropriate substitute for normal criminal investigations and trials.⁶⁵ This has rendered relatives of the disappeared bereft of any legal remedies via criminal justice system in Nepal.

There are at least some avenues that can help relatives of the disappeared to initiate legal actions through regular courts. As discussed above, the issue of burden of proof remains the major obstacle in establishing disappearances. However, this can be partly addressed via some evolving jurisprudence on the issue of enforced disappearances. Expressing its views related to submissions regarding disappearance in Nepal, the UN Human Rights Committee has consistently said that “the author and the State Party do not always have equal access to the evidence and frequently the State party alone has the relevant information”⁶⁶

⁶³ Office of the United Nations High Commissioner for Human Rights, *Enforced or Involuntary Disappearance*, Fact Sheet No. 6/Rev.3, p. 3

⁶⁴ Dhakal v GON

⁶⁵ Advocacy Forum, *Evading Accountability by Hook and By Crook*, 2010

⁶⁶ Sharma v Nepal; see also Giri v Nepal, Maharjan v Nepal

Taking this cue, there is possibility of filing cases of disappearances. This is particularly true with regard to disappearance survivors who can claim legal remedies in other crimes which precede or follow disappearance. In *Maharjan v Nepal*, the HRC viewed:

“In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information that is solely in the hands of the State party, the committee may consider author’s allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. In absence of any convincing explanation from the state party in this respect, due weight must be given to the author’s allegations”

As disappearance survivors are themselves the proof of their disappearance and maltreatment, it is possible to move courts. The disappearance survivors can also act as witnesses to their fellow inmates thereby creating possibilities of criminal prosecution. Besides, there is possibility of filing cases under offence of homicide. ICRC⁶⁷ claims that 375 individuals among 1401 reported to be missing are already dead. As international criminal law does not require the dead body as *corpus delicti*⁶⁸, considers circumstantial evidence admissible and the burden of proof rests on the defendants, filing a case of murder in individual cases can also be considered.

Another legal avenue could be the invocation of provision of the Evidence Act (1972)⁶⁹ which holds that a person may be declared dead if ‘it is proved that such person has not been heard of for a period of twelve years by those who would naturally have heard of him/her if he/she had been alive’ and ‘the burden of proving that he/she is alive is shifted to the person who affirms it.’ This ‘*death in absentia*’ provision can be used to file cases of murder (extra-judicial execution) after disappearances regarding those who were forcibly disappeared before the year 2000.

Nepal ratified all four Geneva Conventions on 7 February 1964 but has not ratified Additional Protocols I and II. The conventions require states parties to ‘enact any legislation necessary to

⁶⁷ ICRC, *Missing Persons in Nepal: Updated List 2012*, Kathmandu (2012)

⁶⁸ ICTY, Krnojelac (Trial Chamber), 15 March 2002, para 326 : “ Proof beyond reasonable doubt that a person was murdered does not necessarily require proof that the dead body of that person has been recovered”; see also Halilovic (Trial Chamber), 16 November 2005, para 37: “Relevant factors [for inferring death in absentia) include, but are not limited to, the coincident or near coincident time of death of other victims . . . when, where and the circumstances in which the victim was last seen, and the behavior of soldiers in the vicinity, as well as towards other civilians, at the relevant times”

⁶⁹ Section 32

provide effective penal sanctions for persons committing grave breaches of international humanitarian law.⁷⁰ Although the Supreme Court of Nepal directed the government on 9 January 2004 to take appropriate legislative measures to implement the obligations under the Geneva Conventions,⁷¹ Nepal has failed, even after 48 years of their ratification, to enact comprehensive legislation to enforce them. However, the Geneva Conventions are incorporated into and are enforceable as part of Nepal's domestic law under the Treaty Act.⁷² Therefore, Nepal is obliged to address grave breaches of international humanitarian law including enforced disappearances which were pervasive during the armed conflict in Nepal. Besides, international law requires the observance of international humanitarian law not only by the high contracting parties (i.e. states) but also by rebels and insurgent groups.⁷³ The CPN-Maoist during the conflict had repeatedly reiterated its commitments to abide by the Geneva Conventions and other relevant international human rights law.

Reports from the UN and NGOs indicate that enforced disappearances in Nepal were often accompanied by torture and at times murder. Thus, those who committed enforced disappearances may be tried for the crimes of torture or willful killing under the Rome Statute, where applicable.

Torture and enforced disappearances

⁷⁰ Art. 49 GC I, Art. 50 GC II, Art. 129 GC II, Art. 146 GC IV

⁷¹ Ram Raja Dhakal & Raju Gurung vs HMGoN ,Writ No. 2942 (2059), (Summary available at: <http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/cf4f47f94e214e42c1256e8c002a8d79!OpenDocument>)

⁷² Treaty Act 2047 (1990), Section 9.

⁷³ In Nicaragua V the United States, International Court of Justice ruled: "The conflict between the Contras [rebel force] and those of the government of Nicaragua is an armed conflict which is not of an international character. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character. (1986 Nicaragua case, ICJ Reports, p. 114, available at: www.icj-cij.org/docket/files/70/6503.pdf.) Taking reference of the case, the Appeals Chamber of the ICTY reiterated that certain minimum humanitarian standards apply during internal armed conflict (See Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, at para. 101-2 (Oct. 2, 1995)).

UN bodies and NGOs have collected ample data regarding the connection between torture and enforced disappearance during Nepal's armed conflict.⁷⁴ In 2004, for instance, Human Rights Watch investigated human rights abuses during the armed conflict and concluded that:

“As with many cases of arbitrary arrest and detention, torture and ill-treatment are common in custody. Human Rights Watch interviewed many persons who had been released after the government denied holding them in custody, as well as family members and colleagues of persons who remain among the disappeared. These interviews consistently showed that the government is denying those in its custody due process and communication with family and counsel. Many persons who were released described [having] been tortured or physically abused during interrogation, and some died from the abuse they suffered.”⁷⁵

The OHCHR's investigations into the Maharajgunj Barracks and disappearances in the Bardiya district also revealed that torture frequently accompanied enforced disappearances. The report indicated that, “Hundreds of individuals were arrested in the Kathmandu Valley and held in unacknowledged detention”⁷⁶ Though many of these individuals remain disappeared, “[s]ome of these individuals...later gave public accounts of what happened during their unacknowledged detention and torture while held in Maharajgunj barracks.”⁷⁷

These witnesses described a common pattern of torture. The OHCHR reported that:

“Witness testimony describes a pattern of severe torture during the early days and weeks of an individual's detention, which extended as long as the RNA believed that the victim could provide useful information. Such torture was also applied later in 2004 in order to induce some detainees to renounce their allegiance to the CPN-M. In addition to this systematic and deliberate torture, former detainees describe how they were subjected to “informal” or “unofficial” torture consisting of regular beatings given either arbitrarily on

⁷⁴ Between a Rock and a Hard Place; Disappearances in Nepal; OHCHR Bardiya Report; OHCHR Maharajgunj Report.

⁷⁵ Between a Rock and a Hard Place, p. 65.

⁷⁶ OHCHR Maharajgunj Report, p. 47.

⁷⁷ OHCHR Maharajgunj Report, p. 49.

a whim, sometimes under the influence of alcohol or hashish, or as punishment for disobedience.”⁷⁸

Similarly, in the Bardiya district the OHCHR documented the “consistent refusal by the RNA to acknowledge arrests, the systematic use of torture in at least one place of detention and secret killings in custody.”⁷⁹ In particular, the OHCHR found that the Chisapani Barracks, “operated as a centre for intelligence collection, where detainees were systematically held in unacknowledged detention and subjected to torture and cruel, inhuman and degrading treatment in violation of international law, with the involvement, knowledge and/or acquiescence of commanding officers. Most detainees were held handcuffed and blindfolded almost continuously for the duration of their detention.”⁸⁰ AF has authentic reports that indicate that where detainees were held incommunicado, they were also often subjected to torture.⁸¹

Similarly, many people abducted by the Maoists reported to have been tortured or ill-treated. Torture methods reported include severe beatings, kicking, falanga, belana and cuts with knives⁸². They forced the abductees to work in their labor camps and even did not care to provide medical treatment to torture survivors.

Enforced Disappearances and Murder

According to a report by the ICTJ, “There is a tacit agreement or acknowledgement by parties concerned with the issue [disappearances] that the vast majority of those who have not re-emerged by this stage [2008] are probably deceased.”⁸³ Analysis of disappearances during the conflict shows that “summary executions of captured combatants and detained civilians [were] troublingly common in Nepal.”⁸⁴ In addition, specific investigations into the fate of the

⁷⁸ OHCHR Maharajgunj Report, p. 54.

⁷⁹ OHCHR Bardiya Report, p. 6.

⁸⁰ OHCHR Bardiya Report, p. 6.

⁸¹ Advocacy Forum & Asian Human Rights Commission, *Missing and maimed: Case studies of forced disappearances and torture committed by the Nepalese security forces*, available at <http://www.humanrights.asia/resources/journals-magazines/article2/0306/missing-and-maimed-case-studies-of-forced-disappearances-and-torture-committed-by-the-nepalese-security-forces>; Advocacy Forum, *Torture Still Continues*, 2007 available

⁸² Amnesty International, *Nepal: A Spiraling Human Rights Crisis*, 4 April, 2002, p. 39

⁸³ International Center for Transitional Justice, ‘Disappearances in Nepal’, 2008, p. 4.

⁸⁴ *Between a Rock and a Hard Place*, p. 27.

disappeared have often led to the conclusion that the individuals involved were killed while in the custody of the security forces.⁸⁵

In particular, the OHCHR's investigation into the Maharajgunj Barracks shows that some detainees may have been killed while in unacknowledged custody:

“Among those former detainees whose whereabouts are still not clarified are three individuals who were reported very ill when last seen by many former co-detainees in 2004 and in early 2005. Khadka Bahadur Gharti Magar, a middle-aged businessman, Padam Narayan Nakarmi and Kiran Rayamaji, both students, are believed to have died while in custody in early 2004 and in early 2005 as a result of ill-treatment and torture and related health problems that were allowed to worsen without necessary medical treatment.”⁸⁶

The report also noted that detainees witnessed a large group of individuals taken from the Maharajgunj Barracks who were never to be heard from again (though most of the detainees interviewed suspected the individuals had been executed).⁸⁷ Investigations by the NHRC into the fate of the 49 individuals who remain disappeared suggest that they are likely deceased.⁸⁸

The OHCHR's Bardiya report into enforced disappearances similarly revealed that many victims may have been killed: “A significant number of individuals who disappeared from army barracks are believed to have been secretly killed in custody – including several young people aged between 15 and 17 - and that the authorities attempted to cover up the killings.”⁸⁹ Further, “OHCHR gathered independent testimonies regarding extra-judicial executions in detention. It also documented a pattern of removal of detainees from custody in Chisapani Barracks in vehicles sometimes equipped with digging equipment. On occasions, these were followed by the sound of gunshots after which vehicles returned empty.”⁹⁰ The OHCHR investigations indicate that, “a number of detainees were extra-judicially executed by security forces in detention.”⁹¹

⁸⁵ OHCHR Bardiya Report, p. []; OHCHR Maharajgunj Report, p/ []; *Between a Rock and a Hard Place*, p. 65.

⁸⁶ OHCHR Maharajgunj Report, p. 65.

⁸⁷ OHCHR Maharajgunj Report, p. 65.

⁸⁸ Advocacy Forum, ‘Exhumations of Bodies of the Disappeared – in Need of a Policy Framework’, 2011, p. 19.

⁸⁹ OHCHR Bardiya Report, p. 12.

⁹⁰ OHCHR Bardiya Report, p. 7.

⁹¹ OHCHR Bardiya Report, p. 44.

Similarly, the Maoists were also responsible for summary executions of abductees using ghastliest of methods. Such methods were "unimaginably brutal, involving mutilations such as cutting out the tongues of victims, breaking individual's bones until the death of the victim, and burning victims alive"⁹² These extremely brutal methods were deliberately used to terrorize the population.⁹³

As these reports indicate, enforced disappearances by both the State forces and the Maoists were often accompanied by other violations of international humanitarian law, including torture and murder. Though Nepal has not ratified the Rome Statute, the House of Representatives on 25 July 2006 had unanimously adopted a motion directing the government of Nepal to proceed to the ratification of the Rome Statute of the International Criminal Court (ICC). According to Nepalese law, this motion is to be followed compulsorily by the executive.⁹⁴ Responding to the recommendations made by Germany to ratify the Rome Statute during the Universal Periodic Review⁹⁵, the government of Nepal had agreed to accede to the Rome Statute after ensuring adequate infrastructure and capacity building. It had further identified the proposed Penal Code Bill, Sentencing Legislation Bill and Criminal Procedure Code Bill, among others, as preparatory infrastructure to accede to the Rome statute.

9. The pain and suffering of victims and their families

Disappearance Survivors

Though the whereabouts of many disappearance victims remain unknown, some disappearance victims were eventually released from detention and reported their experiences. Over and over again, those released reported torture and cruel, inhuman or degrading treatment while in detention. The OHCHR for instance, reported that, "Torture and ill-treatment of detainees during interrogation at Maharajgunj barracks was routine and systematic, with a special team carrying

⁹² Between a Rock and a Hard Place, p.

⁹³ Ibid.

⁹⁴ Section 4.3/4 of the Treaty Act:

- After approval from the House of Representatives, Government should deposit the instrument of ratification to the concerned authority, and
- Despite the non-requirement by international treaty for ratification, accession, approval or acceptance, the Nepal Government cannot be a Party of a treaty establishing an international organization or becoming a Member to an international organization unless the House of Representatives approve it.

⁹⁵ Responses of the Government of Nepal (GON) to the recommendations contained in the report of the Working Group on the Universal Periodic Review, Part II, Paragraph 108, A/HRC/17/5/Add.1

out the tasks of torture and interrogation.”⁹⁶ Methods reportedly used included: “beating with plastic pipes on the lower back, legs, and soles of the feet, submersion in water (‘submarino’), and electric shocks.”⁹⁷

As told by one disappearance victim detained in the Maharajgunj Barracks: “There was physical torture and mental torture, like when they showed you how they were beating someone else. I was usually taken to the tents in front of the Hall where a hood was put over my head. They would ask questions before and after torture but sometimes just tortured me. They used to beat me with plastic pipes until I fell to the ground.”⁹⁸

The effects of torture are in many cases long-lasting. During detention, “most of the detainees experienced depression in addition to fluctuating levels of fear, believing that they would eventually be killed.”⁹⁹ According to the OHCHR, “Former detainees continue to suffer the psychological and physical consequences of ill-treatment. Physical consequences include chronic pain in joints and in the lower back, partial loss of bladder control, and other symptoms.”¹⁰⁰

Petitions to the UN Human Rights Committee involving cases of enforced disappearance showed similar experiences of torture while detainees were held in incommunicado detention (one form of enforced disappearance). The Human Rights Committee has considered several cases of enforced disappearance from Nepal as violations under the ICCPR. An illustrative case is that of Yubraj Giri, who successfully brought a petition to the HRC after he was the victim of enforced disappearance and torture. In *Giri v. Nepal*:

“The author [Yubraj Giri] was detained at the Immamnagar Army Barrack incommunicado from 29 April 2004 to 12 May 2005, i.e. for almost 13 months. At no point during his detention was he allowed to contact his family or a lawyer. RNA soldiers tortured him and subjected him to cruel, inhumane and degrading treatment. He was tortured daily for one week, usually during the day. After one week, the torture stopped for three or four days, was resumed for a few days, and then stopped again for a few days...Torture occurred during interrogations, and would include beatings on the

⁹⁶ OHCHR Maharajgunj Report, p. 54.

⁹⁷ OHCHR Maharajgunj Report, p. 54.

⁹⁸ OHCHR Maharajgunj Report, p. 57.

⁹⁹ OHCHR Maharajgunj Report, p. 55.

¹⁰⁰ OHCHR Maharajgunj Report, p. 59.

shoulders, the back and legs with a plastic pipe and a hard wooden stick. The author was also slapped in the face, punched on the head and ears with the fist, kicked in the back with army boots, including on parts that had been beaten the previous day.”¹⁰¹

After his release, Mr. Giri continued to suffer from the torture inflicted upon him while in detention:

“As a result of the torture, he continues to suffer from constant headaches and dizziness, pain in his jaw, head, shoulders, back, hips and legs and was diagnosed with spinal osteoarthritis. He also experiences post traumatic symptoms such as depression, difficulty concentrating, episodes of anger, fear and anxiety, including fear of uniforms, and has flashbacks”¹⁰²

The Human Rights Committee concluded that Nepal’s actions towards Mr. Giri, in addition to the government’s failure to bring to justice those responsible for Mr. Giri’s torture and disappearance involved violations of Articles 7 (prohibition against torture), 9 (right to liberty and security of person), and 10 (right to respect of inherent dignity as a person) of the International Covenant on Civil and Political Rights.¹⁰³

Families as Victims, and their struggle for subsistence and for Justice

International law recognizes that the “victims of disappearances” are not only those physically taken away, but also the families of the disappeared.¹⁰⁴ This view is supported by Human Rights Committee jurisprudence. Where the HRC concluded that an enforced disappearance occurred, it also concluded that family members were subjected to torture by virtue of the State’s failure to inform the victim families of their loved ones’ whereabouts.¹⁰⁵ As such, the State’s failure to assist the victims’ families amounts to a violation of the ICCPR’s Article 7 prohibition against torture with respect to the families.

¹⁰¹ Giri v. Nepal (1761/2008), Human Rights Committee, Views of 24 March 2011, para. 2.5.

¹⁰² Giri v. Nepal (1761/2008), Human Rights Committee, Views of 24 March 2011, para. 2.6.

¹⁰³ Giri v. Nepal (1761/2008), Human Rights Committee, Views of 24 March 2011, para. 8.

¹⁰⁴ UN Working Group Report, para. 28.

¹⁰⁵ Quinteros v. Uruguay (107/1981) Human Rights Committee, Views adopted 21 July 1983, para. 14; Sarma v. Sri Lanka (950/2000), Human Rights Committee, Views adopted on 31 July 2003, para. 9.5.

Interviews with victim families show that the effects of disappearances on the victims' families last to this day. On 27 July 2012, Advocacy Forum interviewed the wives of two disappearance victims. While unique in their individual details, these two stories are representative of many disappearance victim families in Nepal.

Disappearance of Arjun Lama

On 29 April 2005, Arjun Lama was attending a ceremony at the Sri Krishna Secondary School in Chhatrebas, Kavre district to celebrate his appointment to the management committee of the school. Maoist cadres abducted him on that day. After waiting for six days without word from her husband, on 5 May 2005, Purnimaya Lama filed a complaint with the NHRC. During the course of its investigation, the NHRC concluded that Arjun Lama had been killed while in Maoist custody. Mrs. Lama then attempted to file a First Information Report ("FIR")¹⁰⁶ with the Kavre District Police Office. Though at first denied, the Kavre District Police Office ultimately registered the FIR by order of the Supreme Court on 11 August 2008. Despite the registration of the FIR, however, the Kavre District Police Office continues to delay investigation into Mr. Lama's disappearance.

Disappearance of Mukunda Sedhai

Around 4pm on 30 November 2003, three armed security personnel in plain clothes arrested Mukunda Sedhai. Though his wife, Shanta Sedhai, visited the barracks numerous times in search of her husband, to this day Mukunda Sedhai's whereabouts remain unknown.

The struggles faced by Purnimaya Lama, Shanta Sedhai, and their families are echoed in other reports of the challenges facing victim families. Conflict victim families continue to suffer emotionally and financially as a result of crimes committed during the armed conflict. Reports by NGOs indicate that the three greatest wishes of these families are to obtain an answer regarding the fate of their loved ones, to get economic support, and achieve justice for the

¹⁰⁶ Under Nepali domestic law, the FIR is the first step in initiating investigations into an alleged crime.

perpetrators of the crime.¹⁰⁷ Though families may suspect that the victim is dead, important funeral rites cannot be completed without a body.¹⁰⁸

“Seven years later, we are still experiencing financial and emotional pain. There is a lot of suffering without having my husband’s body returned to me. We have never been able to perform funeral rites for my husband, and this continues to cause me pain today. It is difficult to live with this uncertainty – not knowing where his body is.”¹⁰⁹

- Mrs. Purnimaya Lama

“Eventually, I realized that he was not coming back. I’ve visited lots of families of disappeared victims and I know what happens. Though I know he won’t come back I still cannot confirm he is dead because the body has never been returned to me. Though I hold little hope for his return I do not dress as a widow, because it has never been confirmed that he is dead.”¹¹⁰

- Mrs. Shanta Sedhai

Many family members are left with emotional distress, and are often marginalized by society:

“When my husband disappeared it was an extremely difficult time. I experienced such severe sadness during that period of our lives, and was crying all the time. I found it hard to move, to even take care of my body or my family’s needs. What was also so painful during that time was our community’s behavior towards us. My husband had lent money to many of our neighbors, but when he was gone for good they refused to return the money to me. They told me just move on and forget about him, but of course I could not do that. Sometimes I dream of my husband and we are happily walking and talking together. When I wake up and realize it is only a dream, I am overcome with sadness.”¹¹¹

-Mrs. Purnimaya Lama

¹⁰⁷ International Committee of the Red Cross, ‘Families of Missing Persons in Nepal: A Study of Their Needs’, 2009, p. 9 (hereinafter “Families of Missing Persons”).

¹⁰⁸ Ibid, p. 14; International Center for Transitional Justice and Advocacy Forum, ‘Nepali Voices: Perceptions on Truth, Justice, Reconciliation, Reparations and the Transitional Process in Nepal’, 2008, p. 36.

¹⁰⁹ AF interview with Purnimaya Lama, 27 July 2012.

¹¹⁰ AF interview with Shanta Sedhai, 27 July 2012.

¹¹¹ AF interview with Purnimaya Lama, 27 July 2012.

“I was extremely depressed at the time. I could not forget the days with my husband or what had happened to him. My children often think of him as well. They say to me, ‘If our father was here, we would be happy.’

My children and I felt abandoned by society. My neighbors taunted me for continuing to wear red, which as a widow you are not supposed to do. They gossiped about everything I did, spreading rumors that I was an immoral woman. But I never knew if my husband was dead or alive. “¹¹²

- Mrs. Shanta Sedhai

As most disappearance victims from the conflict are men, ¹¹³ many women were left to take on the responsibility of breadwinner:

“My husband made good money so we were of a medium economic status and I never had to worry about our children’s wellbeing. At one point after my husband’s disappearance the Maoists threatened to kill my children and me if I didn’t give them everything. I eventually gave them everything I had: our family cupboard, all of my jewelry and all of my daughter’s jewelry. My family and I were left with no support. We no longer had a place to live, and became displaced. My two elder children out of five had to leave school because we had no money left to pay for their education. We ended up on the streets of Kathmandu. My husband had been the sole breadwinner for our family but soon my son had to take great responsibility for our family. He bears the burden of supporting us all.”¹¹⁴

- Mrs. Purnimaya Lama

“Though we were not rich, when my husband was alive we felt secure. Now I feel all of the responsibility for supporting my family. In the years since his disappearance I have started a small livestock business to manage our livelihood.”¹¹⁵

- Mrs. Shanta Sedhai

¹¹² AF interview with Shanta Sedhai, 27 July 2012.

¹¹³ Families of Missing Persons, p. 2.

¹¹⁴ AF interview with Purnimaya Lama, 27 July 2012.

¹¹⁵ AF interview with Shanta Sedhai, 27 July 2012.

Though the government has provided moderate payments of “interim relief,” this relief is often inadequate for the needs facing victim families.

“I received 300,000 (US\$3,330) in interim relief from the government, but this has not been enough to help us with our financial troubles. What is really important to me now is financial assistance to help my children attend school.”¹¹⁶

- Mrs. Shanta Sedhai

Despite the hardships faced by these families, the government continues to refuse to investigate disappearances, depriving families of the truth regarding their loved ones.¹¹⁷

“We know who the perpetrators are and see them walking the streets freely, because the government refuses to prosecute them. If a member of political parties is hurt in an accident, the government immediately provides them with 1 million rupees (US \$11,000). But my family has only received 300,000 rupees (US \$3,330) in interim relief. The government does not pay attention to the victims of the conflict.

I strongly believe the Nepalese government must do something for the conflict victims’ families. I am hoping for justice, but I have lost faith. The political leaders do not care about the conflict victims. We need the international community to put pressure on the government of Nepal.”¹¹⁸

- Mrs. Purnimaya Lama

It is therefore likely impossible for the families of disappeared under the existing Nepalese legal system to seek redress for the disappearances of their loved ones, as the existing legal system lacks the necessary mechanisms to allow the families to submit a complaint to the competent authorities. However, the families have been lobbying and making advocacy to enact national legislation that criminalizes the acts of enforced disappearances and to ratify the International Convention on the Protection of All Persons from Enforced Disappearances in order to guarantee the non-repetition of such crimes.

¹¹⁶ AF interview with Shanta Sedhai, 27 July 2012.

¹¹⁷ AF interview with Purnimaya Lama, 27 July 2012.

¹¹⁸ AF interview with Purnimaya Lama, 27 July 2012.

Torn between hope and despair, the families struggle on a daily basis with the ambiguity of their loss and a host of other problems. The reactions to the loss of family members created feelings of frustration, sadness, rage and depression and they feel they are losing touch with reality. It is also seen that the events endured are so traumatic that they lost their purpose in life. *"I had lost all hope of receiving any kind of justice," said Yashoda Sharama, wife of Surya Prasad Sharma, who was disappeared in 14 January 2002.*¹¹⁹

10. Reparations

Nepal's ten-year armed conflict left the citizens of Nepal devastated by violent crimes constituting violations of international law. Under international law, states have an obligation to prevent gross violations of international human rights humanitarian law,¹²⁰ investigate and take action against those responsible for such violations, ensure access to justice, and provide reparations for the victims of human rights abuses.¹²¹

According to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the "Basic Principles"): "States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him."¹²² The Basic Principles further stipulate that no statute of limitations shall apply to serious violations of international humanitarian law that constitute crimes under international law.¹²³ Importantly, it is recognized today that the obligation upon the State applies to non-state actors. It is therefore incumbent upon the government of Nepal to provide a remedy and reparations to victims of crimes committed by both the RNA and the Maoists.

¹¹⁹ *Yashoda Sharma: A wife's fight for justice, a report carried out by Advocacy Forum, which can be accessed on: <http://www.advocacyforum.org/downloads/pdf/publications/impunity/yashoda-sharma-a-wife-fight-for-justice-english.pdf>*

¹²¹ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 (hereinafter the "Basic Principles").

¹²² Basic Principles, para. 4.

¹²³ Basic Principles, para. 6.

The Basic Principles establish that victims entitled to reparations include those who have individually or collectively suffered “physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights.”¹²⁴ Victims may also include “immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”¹²⁵

The Basic Principles set forth that reparations include the following: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹²⁶

Restitution should return the victim his or her situation before the violation occurred. Restitution may include “restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.”¹²⁷ Especially for the victims of enforced disappearances, restitution means the following things: if the disappeared person is still alive, s/he must be immediately released; if killed, it includes the exhumation and identification of the body and the restoration of the mortal remains to the next of kin for the purpose of a decent burial in accordance with the religious practices of the victim and the family¹²⁸

Compensation should be appropriate and proportional to the violation. It should consist of economically assessable damage, including physical and mental harm, lost opportunities (which may take account of loss of employment, education, and social benefits), material damages and loss of earnings and earning potential, moral damage, legal fees, medical services, medicine, and psychological and social services.¹²⁹

Rehabilitation should include medical and psychological care as well as legal and social services.¹³⁰

Satisfaction may include the cessation of violence, verification of facts and disclosure of the truth, public apology, commemorations, and an official declaration or a judicial decision

¹²⁴ Basic Principles, para. 8.

¹²⁵ Basic Principles, para. 8.

¹²⁶ Basic Principles, para. 18.

¹²⁷ Basic Principles, para. 19.

¹²⁸ United Nationsl, *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances*, E/CN.4/2002/71, 8 January 2002, p. 85

¹²⁹ Basic Principles, para. 20.

¹³⁰ Basic Principles, para. 21.

restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim.¹³¹

Guarantees of non-repetition should include effective civilian control of military and security forces, ensuring proceedings abide by international standards, strengthening the independence of the judiciary, protecting legal, medical, and health-care professionals as well as human rights defenders and the media, promoting ethical norms on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces, and reforming laws to prevent further violations of international human rights law and international humanitarian law.¹³²

Reparations in Nepal

Compensation: Under the existing Nepalese legal system, families of disappearance victims may be awarded compensation through a Supreme Court judgment or pursuant to an NHRC recommendation.¹³³ On rare occasions, the Parliament has also awarded compensation to be paid after it has investigated incidents of grave human rights violations.

Compensation has been awarded by the court through the landmark Supreme Court judgment in 2007 involving 83 habeas corpus petitions that resulted in compensation to the families of these disappeared. Lacking explicit legislation ensuring compensation for disappearance victims, the Supreme Court instead drew on its constitutional power to provide justice to the victims.¹³⁴ Still, cases such as this have been exceptional. Most conflict victims have not been successful in accessing compensation through the courts.

Economic assistance is essential for disappearance victim families as many of them struggle to survive. According to ICRC's surveys of families of the missing: "The overall livelihood of families of the missing is reduced by disappearance: families that were coping may begin to

¹³¹ Basic Principles, para. 22.

¹³² Basic Principles, para. 23.

¹³³ Many statutory avenues of relief, the Public Security Act (PSA), and the Civil Rights Act 1955, which are open in theory are unavailable in practice due to their statute of limitation provisions. For families of the disappeared still seeking justice, these laws provide no avenue for redress.

¹³⁴ *Rajendra Dhakal and Others v. The Government of Nepal*, writ no.3575, registration date 21 January 1999: Order rendered by Hon. Justice Khila Raj Regmi and Hon. Justice Kalyan Shrestha issued on 18 Jestha 2063 (2007). For an unofficial translation of the judgment, see 1 National Judicial Academy Law Journal (2007), 301–339.

struggle, and families that were already struggling are plunged into extreme poverty.”¹³⁵ Many disappearance victims were the main breadwinners; with other family members forced to take on new roles, victim families find themselves in economically insecure situations.¹³⁶

Under the government’s 2009 guidelines regarding interim relief for disappearance victims, families can obtain “interim relief”.¹³⁷

Though this Interim Relief Program is a step in the right direction, it cannot substitute for the full compensation required by international law. The Interim Relief Program’s one-size-fits-all approach fails to take into account the individual needs of the victims, for it does not address specific medical, legal, or economic needs of the families. Further, according to the ICRC, “In many of the discussions with families they made it clear that they did not envisage compensation or reparation consisting of a single payment, but long-term support in specific areas, including support for medical expenses and education for the missing persons’ children.”¹³⁸ As such, the current system’s one-time-payment fails to meet the on-going needs of the families. Finally, as noted above, the discriminatory nature of the Interim Relief Program prevents the interim relief from fulfilling the requirement for reparations. In relation to the exclusion of disappearance victim wives who remarry, for instance, the ICTJ notes, “a harm-based approach would not consider that remarriage would affect a person’s right to reparation.”¹³⁹ Thus, the funds currently awarded under the Interim Relief Program do not absolve Nepal of its obligations to compensate the families of the disappeared.

Nepal’s judicial system has adopted the approach that the Supreme Court can give necessary directives if the State does not demonstrate sensibility and responsibility with regard to violations of human rights committed during the time of the conflict. In the case of petitioner *Bhim Prakash Oli v Prime Minister and Cabinet Secretariat*, writ No. 3394 of the year 2004, the court ordered that it is the responsibility of the State to determine a clear policy concerning the relief to be given to people who have been victims of disappearance during the conflict, and thereafter distribute relief on the basis of equality without any discrimination. This was also

¹³⁵ Families of Missing Persons, p. 21.

¹³⁶ From Relief to Reparations, p. 11.

¹³⁷ Guidelines for Providing Relief to the Beneficiary of a Disappeared Person Pursuant to Cabinet Decision, January 12, 2009.

¹³⁸ Families of Missing Persons, p. 23.

¹³⁹ From Relief to Reparations, p. 16.

explicitly recognized by the Supreme Court in its landmark judgment of June 2007, where it found that the persons stated in the petitions were disappeared during the time of the conflict and held that the State has a special obligation to such persons and therefore found it appropriate to provide “interim, immediate relief to the victims, in light of the physical and mental torture, as well as economic loss, that the families of the victims have suffered during their search and attempts to obtain justice.”¹⁴⁰ Article 33 (L) in Part IV of the Interim Constitution (Directive Principles and Policies) also provides that families of disappeared persons will be provided with relief on the basis of the report of the Commission of Inquiry to investigate the status of disappeared persons during the conflict.

The Interim Relief Program remains the most accessible means for victims to obtain often urgently needed financial assistance, though the money paid does not amount to compensation as defined under international law. Even more, this interim relief fails to address any of the legal requirements of reparations under international law. As reported by the ICTJ, by 29 June 2012, the government’s interim relief program task force has granted additional 200,000 rupees as per the new guidelines to 1000 disappearance victims, out of which 588 has already received the amount. In line with the revised guidelines, the report further states that the ministry has already sanctioned extra 25,000 to 500 wives of the disappeared, out of which 139 have already received the amount. The new guideline proposes to provide a total of 1,000,000 rupees to the victims of disappearance. However, the disappearance survivors are excluded from the scheme.

Reports indicate that practical difficulties prevent conflict victims from receiving their funds in a timely and effective manner. Victim families may not have adequate information regarding the program to actually access relief.¹⁴¹ Even if victim families do access relief, they experience difficulties in receiving the awarded money. According to an ICTJ survey, as of late 2010, 23.7 percent of victims awarded interim relief had yet to actually receive their awards.¹⁴² Due to delays in processing, many victims had to wait at the district headquarters, forcing them to spend 15-20% of their award on transportation and accommodation.¹⁴³ In addition to the practical difficulties, reports show that political influences may prevent victims from receiving interim relief. Conflict victims report that crimes committed by the RNA are less likely to be

¹⁴⁰ Rajendra Dhakal and Others v. The Government of Nepal, p. 36.

¹⁴¹ From Relief to Reparations, p. 2.

¹⁴² From Relief to Reparations, p. 19.

¹⁴³ Interim Relief in Nepal, p. 23.

compensated than those committed by the Maoists.¹⁴⁴ Further, reports indicate that the interim relief process is much more accessible to those with political links.¹⁴⁵¹⁴⁶

Reports also show that the interim relief scheme is discriminatory against disappearance victim families, prohibiting them from accessing the full benefits available. Widows of those killed in the conflict are entitled to 300,000 rupees (US \$3,391) and an additional 25,000 rupees (\$US 282) under the “single women subsistence allowance.”¹⁴⁷ In contrast, wives of the disappeared receive no subsistence allowance. The interim relief program is also designed with provisions that discriminate against women. Interim relief is unavailable to wives of the disappeared who remarry but is silent regarding the effect of remarriage for a man.¹⁴⁸ Thus, though the system is supposed to provide relief to disappearance victims, it results in lower sums of economic assistance to disappearance victim families and can therefore be argued to be discriminatory.

Nepal’s current interim relief system is inadequate to address the needs of disappearance victim families. The system prevents disappearance victim families from accessing the full scope of interim relief, and the relief that is awarded can be difficult to obtain. According to the ICTJ, the focus of the Interim Relief Program (IRP): “is on monetary forms of assistance, medical treatment, and a skills development training program to be implemented in the future. In this way relief is distinct from reparations, because the IRP does not include the following forms of satisfaction: truth-seeking; searching for the disappeared; public apologies (including acknowledgement of the facts and acceptance of responsibility by the government); prosecuting those who committed violations; commemorations and tributes to the victims; and other victim-centered responses.”¹⁴⁹ To fulfill its obligations to the victims of the disappeared, the government of Nepal must ensure it provides the full scope of reparations to the families of the disappeared.

Restitution: Restoration of liberty is clearly a concern for those disappearance victims who may still be alive. For many of the victim families, return to one’s place of residence is a major

¹⁴⁴ Interim Relief in Nepal, p. 18.

¹⁴⁵ Interim Relief in Nepal, p. 25.

¹⁴⁶ Republica, *Conflict Victims Complain of Discrimination in Relief Distribution*, 8 September 2012, http://www.myrepublica.com/portal/index.php?action=news_details&news_id=41323.

¹⁴⁷ Advocacy Forum, ‘Discrimination and Irregularities: The Painful Tale of Interim Relief in Nepal’, 2010, p.16 (hereinafter “Interim Relief in Nepal”).

¹⁴⁸ From Relief to Reparations, p. 16.

¹⁴⁹ From Relief to Reparations, p. 6.

concern. According to the ICTJ, the government of Nepal identified 78,708 internally displaced persons resulting from the conflict.¹⁵⁰ Data indicate that among those internally displaced as a result of the conflict are families of the disappeared. According to an ICRC report, “For many families of those missing at the hands of the CPN-M, displacement has been an additional consequence of their victimization: fear of ongoing Maoist control of their home area has induced the family to leave their fields and move either to the district headquarters, a town in the Terai, or to Kathmandu.”¹⁵¹ AF’s own records corroborate displacement as a concern among some families of disappearance victims.¹⁵²

Rehabilitation: As detailed earlier in this report, ample evidence points to the occurrence of war crimes and crimes against humanity during the conflict, specifically with respect to the crime of enforced disappearance. These crimes amount to serious violations of international humanitarian law¹⁵³ and trigger Nepal’s obligation to provide a remedy and reparations to the victims of the abuses.¹⁵⁴ With families of disappearance victims still suffering the effects of enforced disappearances, the government of Nepal must ensure that it fulfills its obligations to these victims.

Though no organization has undertaken a medical evaluation of conflict victims and their psychological needs, interviews indicate that many victims may be in need of psychological services.¹⁵⁵ According to ICRC interviews, “The lack of information about the missing person plunges the family members into a state of distressing uncertainty...In many family members the disappearance gave rise to constant thoughts about the missing person, disturbed sleep, repeated dreams of that person and sudden feelings of anxiety. Such symptoms resulting from the disappearance were described by 55% of those met.”¹⁵⁶

¹⁵⁰ From Relief to Reparations, p. 7.

¹⁵¹ Families of Missing Persons, p. 3.

¹⁵² AF interview with Purnimaya Lama, 27 July 2012: “We no longer had a place to live, and became displaced.”

¹⁵³ In determining what constitutes a “serious violation of international humanitarian law,” records indicate that: “The authors had in mind the violations constituting international crimes under the Rome Statute of the International Criminal Court.” Audiovisual Library of International Law, available at http://untreaty.un.org/cod/avl/ha/ga_60-147/ga_60-147.html. Although the Basic Principles focus on grave violations of international human rights law and serious violations of international humanitarian law, the document is careful to clarify that victims of all violations of international human rights law and international humanitarian law have the right to a remedy and reparations. Basic Principles, para. 26.

¹⁵⁴ Basic Principles, Article 3.

¹⁵⁵ Families of Missing Persons, p. 18.

¹⁵⁶ Families of Missing Persons, p. 18.

Satisfaction: Of particular importance to disappearance victims is the right to truth. The right to truth is recognized not only in the Basic Principles but also by Protocol I to the Geneva Conventions,¹⁵⁷ the International Convention for the Protection of All Persons from Enforced Disappearances, the Human Rights Commission,¹⁵⁸ the WGEID and many other international and regional bodies.¹⁵⁹ Interviews with families of the disappeared in Nepal indicate that knowledge regarding their loved ones' fate is often one of the most important wishes of the family.¹⁶⁰

The Basic Principles also specifically note that satisfaction includes: "The search for the whereabouts of the disappeared...and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities."¹⁶¹ Families who seek the truth regarding disappeared loved ones often express a need to possess the body in order to perform funeral rites.¹⁶² Thus the recovery of the body is particularly important for Nepal's victims.

Nepal's failure to criminalize disappearances and prosecute those responsible for conflict-era crimes prevents families of the disappeared from obtaining justice. According to the ICRC, "In Nepal, most of the missing persons disappeared after their arrest and families can indicate those allegedly responsible."¹⁶³ Instead of investigating those accused of human rights abuses during the conflict, Nepal has at times promoted the alleged perpetrators.¹⁶⁴ Without prosecuting those responsible for enforced disappearances Nepal cannot ensure justice for the victims' families. Similarly, until it criminalizes enforced disappearance, Nepal cannot guarantee non-repetition to the victims of the disappeared.

¹⁵⁷ Protocol I to the Geneva Conventions, Article 32.

¹⁵⁸ Human Rights Commission Resolutions 2005/66 of 20 April 2005.

¹⁵⁹ UN Office of the High Commissioner for Human Rights, *Study on the Right to Truth*, E/CN.4/2006/91, 8 February 2006.

¹⁶⁰ Families of Missing Persons, p. 9.

¹⁶¹ Basic Principles, para. 22.

¹⁶² From Relief to Reparations, p. 36.

¹⁶³ Families of Missing Persons, p. 2. This feeling is corroborated by AF interviews. AF interview with Purnimaya Lama, 27 July 2012: "We know who the perpetrators are but see them walking the streets freely."

¹⁶⁴ UN concerned over recent Govt. decisions to appoint, pardon and promote officials implicated in human rights violations, 10 November 2011.

11. Conclusions and Recommendations

The governments formed after the Constituent Assembly (CA) election, held in 2008, have not been victim-friendly and have not initiated any correct preparation to truly address the needs of conflict victims. The governments and political parties have not been affirmative towards enacting national law criminalizing the acts of enforced disappearances; neither has undertaken assenting steps towards signing and ratifying the International Convention for the Protection of All Persons from Enforced Disappearances. And it's been urgent to address these problems promptly envision the sustainable peace in the country. Advocacy Forum encourages the families of the disappeared to step up their campaigning for truth, justice and reparation and to insist on being consulted about their needs and expectations and any questions they may have during the process of setting up Truth Commissions.

- ✓ The obligation to **provide an effective remedy and reparations** to victims of gross human rights violations and serious violations of international humanitarian law and, where applicable, to their families.
- ✓ The obligation to **prevent instances of recurrence of human rights violations**, which also constitutes a form of reparation.

To Government of Nepal:

- Enact the national legislation criminalizing the acts of enforced disappearances,
- Bring back the Ordinance to Council of Ministers and initiate consultations with civil society and victims' networks to make it at par with International Standard,
- Need to proceed the cases of human rights violations filed at the DPOs and Courts in the existing criminal justice system,
- Sign and ratify the International Convention for the protection of all persons from enforced disappearances,
- Sign and ratify the Rome Statute of the International Criminal Court,

- Ensure that an effective system of vetting is in place for any members of the security forces who are proposed for promotion, overseas UN peacekeeping duties, or specialized training abroad,
- Support the establishment of transitional justice institutions as required by the Comprehensive Peace Agreement and Interim Constitution, including a truth and reconciliation commission and a commission to investigate enforced disappearances, but ensure that such institutions are meant to support, rather than displace, the criminal justice system,
- Issue a clear policy on property transformation in between family members of disappeared persons,
- Make the specific policy that ensures the proper support to children of disappeared persons in terms of their education and medical support.

To International Community

- Improve vetting procedures to ensure that persons suspected of involvement in serious human rights violations are banned from being deployed on peacekeeping missions and training abroad,
- Actively follow up on the steps the government of Nepal has taken in regard to establishing Truth Commissions. Make a pressure to amend the Ordinance endorsed by the President and to initiate consultations with the civil society organizations concerned and victims' groups,
- If Nepal displays an indifference to bring those responsible for widespread or systematic enforced disappearances to account, then there is a duty upon the international community to step in and set up an international mechanism to deal with these international crimes.

We would like to acknowledge the support in the form of financial assistance that *EED* has provided for, without which this research has not been possible to get published. And we would also like to thank AFAD for its constant support in all rounds for taking up the issue of enforced disappearances as a main agenda in Nepal.