



Nepal Supreme Court Judgment on Enforced Disappearances: Achievements & Challenges

By: Atty. Gabriela Citroni

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General Context

Nepal is situated in the south of Asia between China and India, with a population of about 25.7 million. It is a Hindu kingdom and a constitutional monarchy. Since 1990, Nepal has seen 14 changes of government and ongoing political instability. In May 2002, King Gyanendra Bir Bikram Shah Dev, at the recommendation of Prime Minister Sher Bahadur Deuba, dissolved the House of Representatives and scheduled elections on 13 November 2002. The Prime Minister recommended that the King postpone elections for a year because of the Maoist violence. In October 2002, the King dismissed the Council of Ministers.

Since that time, the political situation has become increasingly unstable. Elections have not been held, reportedly because of the internal security problem caused by insurgency. In May 2003, the five main political parties began a campaign for the reinstatement of the parliament. In April and May 2004, thousands of people took to the streets of Kathmandu in daily protests. A coalition government, consisting of several leading political parties, was finally formed on 5 July 2004.¹ In February 2005, King Gyanendra seized executive authority and imposed increasingly severe restrictions on freedoms of assembly, association and expression. On 24 April 2006, King Gyanendra announced the reinstatement of the House of Representatives. Within days, the House convened for the first time since 2002 and endorsed a proposal to hold elections for a constituent assembly to rewrite the country's 1990 Constitution and decide the fate of the monarchy. The CPN (Maoist) announced a three-month ceasefire on 26 April. The SPA government reciprocated with an indefinite ceasefire on 3 May. Negotiations, starting on 26 May resulted in a series of agreements that paved the way for the Comprehensive Peace Agreement signed on 21 November 2006. The Peace Agreement ended Nepal's decade-long armed conflict and included provisions on political, social and economic transformation.

Nepal is a State party of the International Covenant on Civil and Political Rights and its First Optional Protocol (since 14 August 1991), as well as of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment (ratified on 13 June 1991) and of the Convention on the

Rights of the Child (ratified on 14 October 1990). Nepal neither signed nor ratified the International Convention for the Protection of All Persons from Enforced Disappearance. It has not ratified the 1998 Rome Statute for the Establishment of an International Criminal Court. In 1990, the Constitution of the Kingdom of Nepal was adopted and in January 2007 an interim Constitution was issued.

The Practice of Enforced Disappearance in Nepal



The problem of enforced disappearances in Nepal over the past ten years of conflict has been among the worst anywhere in the world. Between May 2000 and January 2007, the National Human Rights Commission received 2,028 cases of enforced disappearance. Over 600 of these cases remain unsolved. In its annual report for 2005, the United Nations Working Group on Enforced or Involuntary Disappearances (UNGWEID) stated that Nepal was the source of the largest number of urgent actions cases transmitted by the Working Group to one country in 2004. The UNGWEID carried out a country visit to Nepal from 6 to 14 December 2004. In the report issued after that visit, the phenomenon of disappearance in the country was described as widespread and arbitrary used by both Maoist insurgents and the Nepalese security forces.² Accordingly, perpetrators were shielded by political and legal impunity. Referring to disappearances perpetrated by the security forces, the UNGWEID described the practice as follows:

In many of the cases attributed to the security forces, and especially to the army, a clear pattern has emerged. A person suspected of Maoist sympathies, or simply of having contact with Maoists, is seized by a large group of known military personnel out on patrol. He or she is blindfolded and his or her hands tied behind the back. The victim is put into a military vehicle and taken away. The security forces often appear in plain clothes so that no personal names and/or unit names are visible. Very commonly, the victim is later seen being driven around in an army vehicle, reportedly to point out the homes of other “suspects.” In almost all cases, the victim is held incommunicado in army barracks, with no access to family or legal counsel. The Working Group heard many reports of physical abuse and torture of persons detained in army custody. Indeed, the Working Group saw credible physical evidence of such torture, and detailed descriptions that were consistent from one victim to another. Patterns include beatings with plastic pipes and sensory deprivation, including the blindfolding of victims for the entire period of incommunicado detention, often lasting months.³

The UNGWEID further noted that the vast majority of disappeared in Nepal are men and that frequently, women are left alone with small children, suffering from devastating economic, social and psychological effects. In November 2006, the Comprehensive Peace Agreement committed to prepare and publicize, within 60 days, the details of the “disappeared” persons or those killed in the conflict and inform the family members concerned. The interim Constitution of January 2007

recognized past enforced disappearances and requested relief to be provided to the families of the victims. In May 2007, amendments to the Civil Code regarding “disappearances” and abduction or hostage taking were introduced in the interim Legislature-Parliament. Up to the present, no one has been held accountable, prosecuted and sentenced as perpetrator of an enforced disappearance. Indeed, this fosters the culture of impunity in the country and does not help preventing the perpetration of such a heinous crime.

The Judgment of the Supreme Court of Nepal

On 1 June the Supreme Court of Nepal ruled on a large number of enforced disappearance cases, including 80 *habeas corpus* writs filed under Articles 23 and 88 of the 1990 Constitution.⁴ The writs referred to people allegedly abducted and disappeared by the Nepalese security forces between 8 January 1999 and 18 December 2004 (the peak of disappearances being between November 2003 and February 2004), at their residence, returning from college or at their work. The respondents in most of the petitions denied that the petitioners were ever arrested or any of their rights violated. On 28 August 2006, the Court constituted a Detainee Investigation Task Force (DITF), led by a judge of the Appellate Court and comprising a representative of the Attorney General’s Office and the Nepal Bar Association, mandated to inquire into the cases of disappeared people, finding out their status, identifying the people and office which were involved in the arrests or that issued the order of arrest. In 2007, the DITF published its report in which it was stated that among the cases investigated, it could be concluded that one of the petitioners, Mr. Chakra Bahadur Katuwal, was taken into custody by the Army and died on account of the torture inflicted on him and that, among the other petitioners, Mr. Rajendra Prasad Dhakal, Mr. Bipin Bhandari and Mr. Dil Bahadur Rai were arrested by the security forces and their disappearance was planned. Further, in order to rule on the writs, the Supreme Court referred to a number of different reports issued on the phenomenon of enforced disappearance at the domestic level. First, the report of Mr. Baman Prasad Neupane, Joint Secretary at the Ministry of Home Affairs, in which the fate of 174 people out of 776 was traced. Second, the report of the Office of the High Commissioner for Human Rights in Kathmandu, in which a list of 49 people disappeared from the Youdhha Bhairab Military barracks was included. Finally, the Court also referred to the report released by the National Human Rights Commission on the subject.

In its judgment, the Court deemed it appropriate to address six fundamental questions.

1) What is the status of persons who, according to the petitions, have been arrested and disappeared by the security forces?

While the petitioners alleged that their relatives had been arrested and disappeared by the security forces, the respondents strongly denied such charges, generically mentioning “releases or deaths in crossfire” without providing any concrete detail. The Supreme Court set an important criterion for the evaluation of evidence, clarifying that “*a mere reiteration of the correspondence [mentioning] their release does not support the conclusion that their status is known. [As for those allegedly killed in crossfire], this is not corroborated by post mortem reports, receipts of the corpses by their respective families, or the identification of the locations where the corpses were discarded.*” The Supreme Court further detailed the inadequacy of the use of army detentions, which should only be permitted after the formation of just policies to detain civilians for criminal proceedings, based on the rule of law. Accordingly, as detainees were subjected to degrading treatment in inadequate detention centers, the risk of their loss of life and the deterioration of their physical and mental health remained quite high. As a result, the security agencies’ violations of the detainees’ human rights were incentives for these agencies to disappear the detainees. For the Court, “*if an institution*

is being used for different purposes other than its original purpose of establishment, the officials and institutions should be held accountable for any adverse outcomes. In this context, it is the responsibility of the Nepalese Army and, ultimately, of the government, to respond to all allegations.”

Referring to the abovementioned official reports on disappearance and, in particular to the findings – of a judicial nature – of the DITF, the Supreme Court could consider as clarified the status of four of the petitioners (one arbitrary killed and the other three forcefully and illegally disappeared by the security forces), while *the status of all the other petitioners could not be determined on the basis of the available facts and, as such, the truth still needed to be investigated and determined.*

2) What are the obligations of the State towards disappeared people and their relatives during an armed conflict and what are the potential remedies that could fulfill such obligations?

To deliver its views on this question, the Nepalese Supreme Court referred to the 1992 United Nations Declaration for the Protection of All Persons from Enforced Disappearance and also to the new 2007 International Convention for the Protection of All Persons from Enforced Disappearance (in spite of the fact that Nepal has neither signed nor ratified such an instrument), pointing out that “*even as the Convention is yet to be ratified, there should be no barriers to use the provisions of the Convention as guiding principles. Moreover, it should be considered necessary on the basis of the obligations created out of the conventions ratified by Nepal, together with the principles of prevailing international human rights law for the protection of human rights. [The Nepalese] legal system can also include these principles as it is beneficial for the country and it should be seen as essential. Moreover, it is expected that the State should, within its constitutional framework, proceed further as soon as possible to ratify the Disappearance Convention.”*

The ruling also refers to relevant provisions of the International Covenant on Civil and Political Rights and of both the Nepalese Constitution of 1990 and of 2007 which can be considered as violated by the practice of enforced disappearance.⁵ In general, for the Supreme Court, acts of enforced disappearance amount to serious *violations of the right to live with dignity, the right against torture, the right to personal freedom, the right to fair trial, the right to easy access to justice and the right related to family life.* For the Supreme Court of Nepal, the State cannot escape from its **obligations to identify and make public the status of the disappeared persons, to initiate legal action against those persons who appear to be the perpetrators, and to provide appropriate remedies to the victims.**

Finally, remembering that the interim Constitution of 2007 has entrusted the Supreme Court with the obligation to serve as a guardian of the Constitution itself, the Court deems itself to be competent to issue appropriate orders to make the State fulfill its responsibilities.

3) What measures have been adopted to investigate the fate of disappeared persons? Are such measures adequate and effective?



The Supreme Court analyzes the work carried out by the different commissions set up in order to clarify the fate and whereabouts of disappeared people and their results and limitations. Moreover, the Supreme Court recalls some of the obligations related to this matter according to the 2006 Peace Agreement. The conclusion is that “*the efforts carried out by the government to date have not been sufficient or effective and therefore it is necessary that an additional, complete investigation be carried out by establishing a mechanism on matters relating to persons who were allegedly disappeared.*” Such an obligation lies with the government.

4) What domestic legal provisions are available to determine the whereabouts of disappeared people, bring perpetrators to justice and provide reparation to the victims? Are such provisions efficient or are inherent legal reforms needed?

Referring to the one-man Commission of Inquiry for disappeared people established by the government, the Supreme Court found that the latter had “*neither provided for sufficiently robust jurisdiction, nor guaranteed the representation of concerned parties in the formation of the commission. It has also not guaranteed the security of victims, witnesses, plaintiffs, legal practitioners and investigators.*” The Supreme Court accordingly declared that the government must enact “*a special law stipulating all major aspects of disappearance, including inquiry into the incidents of enforced disappearance, the determination of the status of disappeared persons, the guarantee that their status is made public and that action is taken against those who are responsible, and the provision of relief to the victims.*” The Court also indicated a number of international legal instruments which shall be taken as references while drafting such law, among which the 2007 Convention has a prominent position. Notably, the Court also clearly pointed out that the provision must “*uphold the international standard that pardon cannot be granted to persons who should be prosecuted for their alleged involvement in the act of disappearance as well as to persons who are convicted for their direct responsibility or complicity in the act of disappearance.*”

5) Are interim measures necessary in order to render immediate relief and mitigate the suffering of the relatives of disappeared persons?

Under the Nepalese legal framework, there is no specific provision establishing the right to obtain compensation. However, the existence of such a right can be derived from the interpretation of relevant provisions of the Constitution (Article 88.2 of the 1990 Constitution and Article 107.2 of



the 2007 Interim Constitution). Accordingly, the Court has an extraordinary power to issue necessary and appropriate orders to enforce fundamental rights and for the settlement of disputes.⁶ The finding of the Court is that: “*the State has an obligation to provide immediate relief and adequate compensation to the victims of serious violation of civil and human rights. It is therefore 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 have suffered during their search and attempts to obtain justice.*”

6) What kind of orders are to be issued to deliver an appropriate remedy to the petitioners?

Having established that the efforts undertaken by the Nepalese government have neither been serious nor effective and that the perpetuation of the unknown status of the petitioners is not a defensible position for the State, the Court, also decided to:

- a) initiate a **criminal prosecution** against those responsible for the death in custody of Mr. Chackra Bahadur Katuwal, also ordering that any agency, official or employee or any other person who was involved in the disappearance, torture and death of the petitioner be investigated. Also those State agents involved in the arrest and disappearance of the other three petitioners according to the findings of the DITF, must be investigated and sanctioned. While the investigations take place, the government should take **administrative actions** (in particular suspension) **against members** of the security forces under investigation for involvement in Mr. Katuwal’s death;
- b) establish a separate **commission of inquiry**, adopting as guidelines the Criteria for Commissions on Enforced Disappearance, developed under the auspices of the United Nations Office of the High Commissioner for Human Rights;
- c) provide **interim relief**, even in symbolic form, in the light of the situation at the time of deciding the case, with the limited purpose of helping the victims’ families bear the pains suffered by them while seeking justice, on the condition that this *will not affect the amount and nature of the remedy to be provided as per the new law on enforced disappearance to be enacted. The Court stressed that “the incidents of violations of the right to freedom and security of life are not matters to be merely compensated in monetary and economic terms.”* However, as a measure of immediate relief of an interim nature, it ordered to the Nepalese government to pay **two hundred thousand rupees**⁷ to the nearest relatives of Mr. Shahi and to the relatives of all the disappeared people who have been declared dead; **one hundred fifty thousand rupees** to the relatives of those who, according to the DITF, have been arrested and disappeared by the security forces; and **one hundred thousand rupees** each to all the remaining persons stated in the petitions whose status has not been clarified; and

d) frame and implement an **appropriate relief package including employment**, without any adverse effect whatsoever to the provisions of the special law on enforced disappearance.

Conclusions

Apart from the fact that the fate and whereabouts of a significant number of disappeared people still remain unknown, it has to be pointed out that the rate of cases clarified before the UNGWEID (206 according to the Annual Report of 2006) is the highest in the world.⁸ In addition, the cases clarified in the reports of Baman Prasad Neupane, the Office of the High Commissioner for Human Rights, the National Commission on Human Rights and the DITF must be considered. At present, about 600 cases are still pending. However, it is noteworthy to point out that some 1,400 cases, which is more than double, have been clarified. The fate and whereabouts of each and all the disappeared people in Nepal will be ascertained, therefore, an imperative task is pending. The number of cases clarified must be appreciated as a significant step forward. Comparing it with results obtained all over the world, it is a considerable victory and heartens hopes for the future. Overall, the judgment delivered by the Nepalese Supreme Court on 1 June 2007 can be welcomed as a substantial achievement and as a sound basis for future developments and claims. First, the fact that the Court has already referred to the **International Convention for the Protection of All Persons from Enforced Disappearance** in spite of the present lack of ratification by Nepal, can be seen as a positive reference and this approach can be followed by other tribunals in the Asian region. Indeed, the reasoning of the Nepalese Supreme Court allows application at the domestic level some of the most advanced provisions as enshrined in the new United Nations instrument. However, it has to be remembered that the Court has also clearly called on the Nepalese government to sign and ratify the instrument within the shortest time. Second, the Court has declared that the Nepalese State has some fundamental and inescapable **obligations** towards victims of enforced disappearance and their relatives: identify and make public the status of the disappeared, initiate legal actions against perpetrators and provide appropriate remedies to the victims. The Court will monitor the full implementation and respect of such obligations. It is the role of the civil society to attentively watch over the government and to call on all involved actors to comply. Third, the indication to enact a **special law on enforced disappearance** has already been partially addressed by the order issued on 28 November 2007 by the Parliamentary Committee on Law, Justice and Legislative Relations to draft such special legal provisions. Indeed, the order must now be implemented and the drafting process shall be as inclusive, transparent and consultative as possible. It has to be noted that the Nepalese Supreme Court has already clearly established that **no amnesty measures** can be issued in favour of those involved in the commission of serious human rights violations during the conflict. This indication, if duly respected, will avoid Nepal going through decades of impunity, as has occurred in other countries, such as Argentina and El Salvador. Finally, the interim orders to

provide **compensation** and, in particular to frame and implement a **relief package** can be hailed as fundamental steps forward and must be taken as a reference on these issues throughout the Asian region. Definitely, through its decision, the Nepalese Supreme Court of Justice has demonstrated the important role any judiciary can play in upholding respect for the rule of law and international human rights principles, even in a country just emerging from conflict and this judgment must be a source of inspiration to other



Nepalese children farm to earn a living.

judiciaries in the world. Some shortcomings have followed the judgment of the Court and attention must also be paid to them. In particular, one may recall that the Bill to establish a Truth Commission issued in August 2007 failed to meet international human rights standards. In particular, the commission's proposed mandate would not address serious violations of international humanitarian law. The draft bill also failed to clarify that the terms "gross violation of human rights" and "crimes against humanity" must be defined and applied in a manner that meets international standards. In the draft bill, contrary to the Supreme Court judgment, amnesties could be granted even for gross human rights violations if these acts had a political motivation, if the perpetrator made an application indicating regret, or if victims and perpetrators agree to a reconciliation process. Such a mechanism could result in protection from criminal prosecution for even the gravest of crimes.⁹ However, there should now be open and transparent consultations with the civil society, including at the regional level, in order to determine the real composition and future of the Commission: these consultations must be carried out in an open manner not using the draft bill as the only starting point for discussions. Further, the Nepalese government's failure to duly protect the site of alleged armed killings at Shivapuri National Park signals an unwillingness to investigate past atrocities and may result in seriously impairing the identification of the human remains of some of those disappeared.¹⁰

In conclusion, small but significant victories in the struggle for truth and justice must be recognized and celebrated, without taking eyes off the several challenges ahead. Civil society as well as international community must be watchful and conscious.

Endnotes:

1 See doc. E/CN.4/2005/65/Add.1 of 28 January 2005, *Report of the country visit to Nepal of the United Nations Working Group on Enforced or Involuntary Disappearances*, para. 11. See also Amnesty International 2007 Annual Report on Nepal: <http://www.amnesty.org/en/region/asia-and-pacific/south-asia/nepal>; and Human Rights Watch 2007 Annual Report on Nepal: <http://www.hrw.org/englishwr2k7/docs/2007/01/11/nepal14706.htm>.

2 See doc. E/CN.4/2005/65/Add.1, para. 25.

3 *Ibid.*, para. 27.

4 See International Commission of Jurists: http://www.icj.org/ws.php3?id_article=4234&lang=en.

5 The Court also refers to international case law on the subject, in particular: Indian Supreme Court, case Rudal Sah v. Union of India, and case Sebastian M. Hongray v. Union of India; Interamerican Court of Human Rights, case Velásquez Rodríguez v. Honduras and case Trujillo Oroza v. Bolivia; and European Court of Human Rights, case Kurt v. Turkey.

6 Interesting references are made to international case law on the matter. In particular, Supreme Court of India, case Rudal Sah v. Union of India, case Smt. Postasangbom Ningol Thkchom and others v. General Officer Commanding and Others, and Nilabati Behera v. State of Orissa.

7 It is about 3,500 US dollars.

8 See doc. A/HRC/4/41 of 25 January 2007, Annual Report for 2006 of the United Nations Working Group on Enforced or Involuntary Disappearances, para. 303.

9 See International Commission of Jurists: http://www.icj.org/news.php3?id_article=4201&lang=en.

10 See Human Rights Watch: <http://www.hrw.org/english/docs/2007/12/28/nepal17667.htm>.



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