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# DISAPPEARANCES IN NEPAL

Madeleine Fullard



## About the ICTJ

The International Center for Transitional Justice (ICTJ) assists countries pursuing accountability for past mass atrocity or human rights abuse. The Center works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unsolved.

In order to promote justice, peace, and reconciliation, government officials and nongovernmental advocates are likely to consider a variety of transitional justice approaches including both judicial and non-judicial responses to human rights crimes. The ICTJ assists in the development of integrated, comprehensive, and localized approaches to transitional justice comprising five key elements: prosecuting perpetrators, documenting and acknowledging violations through non-judicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and facilitating reconciliation processes.

The Center is committed to building local capacity and generally strengthening the emerging field of transitional justice, and works closely with organizations and experts around the world to do so. By working in the field through local languages, the ICTJ provides comparative information, legal and policy analysis, documentation, and strategic research to justice and truth-seeking institutions, nongovernmental organizations, governments and others.

## The ICTJ's Work in Nepal

Since May 2007, the ICTJ has been involved in the transitional justice process in Nepal. The local office has primarily been involved in capacity building initiatives, providing technical assistance and developing policy based interventions on a range of transitional justice issues. In order to assist in building capacity for a just transition, ICTJ has been working closely with civil society organizations, government bodies and international organizations.

The center has conducted a series of workshops, courses and exchanges with a broad range of stakeholders in Nepal, including government representatives, victims' groups, international organizations, and the donor community.

In collaboration with a local partner, Advocacy Forum, the center released a survey report - *Nepali Voices*- which for the first time gathered information about victims' perceptions and opinions about the transition in Nepal.

The Center has also provided analysis and comments on transitional justice issues in draft legislation and proposed programs, including the TRC, the Commission on Disappearances and development of reparations programs.

## About the Author

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COVER PHOTO: Suka Maya Chepang, wife of 60-year-old Chitra Bahadur Chepang, with her young granddaughter in their corn field in Jogimara. Chitra Bahadur was oldest of the 17 who left for Kalikot. He left Jogimara because there was no work, the family's debts were piling up and they had no more cattle, goats or crops to sell. So shocked was Suka Maya when she heard about her husband's disappearance that she did not speak for months and her teenage son had to take care of her and four other siblings.

Photo by Kishor Kayastha/ICRC





## DISAPPEARANCES IN NEPAL

This report arises out of a perceived opening or window of opportunity for transitional justice intervention around the specific gross human rights violation of enforced disappearances and abductions in Nepal. This issue connects powerfully to several dominant concerns within the transitional justice field, and thus offers challenges and opportunities for the ICTJ.

The brief of this report was to develop an understanding of the disappearances and transitional justice landscape in Nepal and to consider the emergent legal and policy opportunities, challenges and priorities in advancing the issue of addressing disappearances.

The report was drafted in the months following a ten day period of consultations in Nepal in November/December 2007 with various groups, individuals and organizations. It was supplemented with further reading of reports and articles related to the issue of transitional justice in Nepal.

I extend my grateful thanks to ICTJ Nepal staff Carla Fajardo, Warisha Farasat and Vasuki Nesiya for facilitating the visit and this report with the greatest efficiency and hospitality, as well as for the particular help offered by Advocacy Forum, particularly Mandira Sharma, Jitendra Bohara and Kopila Adhikari. The organizations and representatives that I met with in Nepal, as listed at the end of this report, were extremely helpful and generous in sharing their knowledge and experiences.

**Madeleine Fullard, June 2008**

**First Published by**  
International Center for Transitional Justice (ICTJ) - Nepal  
Jhamsikhel, Lalitpur,  
P.O. Box: 8975, EPC 2125  
Kathmandu, Nepal  
Tel : 977 01 5013546/ 5013572



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**ADDRESSING  
DISAPPEARANCES  
IN NEPAL**

**A**



# OVERVIEW OF DISAPPEARANCES IN NEPAL

Enforced disappearances were seen in small numbers in Nepal as early as 1985. However, it was the start of the ten year long Maoist insurgency in 1996 aimed at the abolition of the Constitutional Monarchy and the establishment of a People's Republic that ushered in state repression and counter-insurgency strategies and saw a decade of sustained enforced disappearances unfold. Conflict intensified from 1998 with increasing repressive measures such as the imposition of a State of Emergency from November 2001 to August 2002, the establishment of a Unified Command after the deployment of the Royal Nepalese Army (RNA), the promulgation of the Terrorist and Disruptive Crimes Ordinance (TADO), resulting in increasing numbers of 'disappeared' or abducted persons. The UN Working Group of Enforced and Involuntary Disappearances (UNWGEID) reported that Nepal was the country with the highest number of new reported enforced disappearance cases for 2002 and 2003.<sup>1</sup> A more limited number of abductions by members of the Maoist insurgency accompanied this growing phenomenon. With the emergence of a peace process in 2006, the numbers of both enforced disappearances and abductions sharply declined and only isolated episodic instances have been reported since then.

## 1.1. Terminologies

In Nepal, the term '*enforced disappearance*' applies strictly to cases where the state is the perpetrator, while the term '*abduction*' is used when the perpetrator is a non-state actor, chiefly the Communist Party of Nepal – Maoist (CPN-M). This is in line with international human rights terminology, and reflects the close intersection of domestic human rights organizations in Nepal with international human rights law concepts.

The International Committee for the Red Cross/Red Crescent (ICRC), in Nepal as elsewhere, operates within a humanitarian framework and uses the term '*missing persons*' in its work. This refers to all those persons whose whereabouts are unknown as a result of the armed conflict. For the ICRC, the term 'missing' has the same meaning as 'disappearance', although not the same meaning as 'enforced disappearance'. The term 'missing' does not necessarily include or exclude the possibility that a crime was committed. It embraces all those who were forcibly disappeared or abducted, as well as those who disappeared as a result of a war situation (such as in an armed encounter where the human remains were not collected). International Humanitarian law obliges states to strive to obtain information regarding such missing persons and, if required, to conduct exhumations, identifications and return such remains to the affected families.

<sup>1</sup> Report of the Working Group on Enforced or Involuntary Disappearances, E/CN.4/2003/70\*, 21 January 2003.

## 1.2. Scale of Enforced Disappearances and Abductions

The ten year conflict in Nepal resulted in thousands of temporary disappearances through the practice of unofficial detentions by the security forces and abductions or kidnappings by the Maoists. Despite the efforts of families, NGOs, lawyers and courts, denials of custody were usually the response by the security forces and/or the CPN-M, to a lesser degree. For example, the Informal Sector Service Center (INSEC) in Nepal recorded 17,963 disappearances<sup>2</sup> from the start of the conflict in the form of secret arrests and secret detention, often accompanied by torture. However, the majority of these disappearances were resolved through the release or re-appearance of the detained or abducted person.

A more limited number of these disappearances became permanent. There is a tacit agreement or acknowledgement by parties concerned with the issue that the vast majority of those who have not re-emerged by this stage (2008) are probably deceased.

While some estimates of the numbers of unresolved disappearances range from 600 to 3000, interviews with key relevant organizations suggest that the figure is more realistically set at **roughly 1000 enforced disappearances and abductions**.

The table below indicates the range of numbers of cases received and still listed as unresolved with several organizations that work on the issue of disappearances. No organization claims to have a complete or definitive list, and all acknowledge that the numbers are subject to change and probably should be regarded as minimum numbers.

### NUMBERS OF ENFORCED DISAPPEARANCES AND ABDUCTIONS IN THE RECORDS OF ORGANIZATIONS IN NEPAL

ORGANIZATION	TOTAL DISAPPEARANCE CASES RECEIVED	UNRESOLVED ENFORCED DISAPPEARANCES REMAINING	UNRESOLVED ABDUCTIONS REMAINING	TOTAL UNRESOLVED CASES REMAINING
ICRC	3000 (+ -)			1127
NHRC	2800 cases	600	300	900
ICJ	209	195	14	209
Advocacy Forum				417
OHCHR - Nepal				600
INSEC <sup>3</sup>		828	105	933
Society of Families of the Disappeared <sup>4</sup>		1162		1162
UNWGEID <sup>5</sup>				320
Ministry of Home Affairs <sup>6</sup>				600

<sup>2</sup> Figure cited in K Adhikari, "The Making of Nepal's Anti-Disappearance Law", August 2007, available at [http://www.afad-online.org/voice/aug\\_07/themaking.htm](http://www.afad-online.org/voice/aug_07/themaking.htm) online.

<sup>3</sup> Figures taken from INSEC website, [www.inseconline.org](http://www.inseconline.org)

<sup>4</sup> "Foundation takes up to help Martyrs' Families" in [The Rising Nepal](#), 30 November 2007.

<sup>5</sup> Cited in their 2007 report.

<sup>6</sup> IRIN Asia, [www.irinnews.org](http://www.irinnews.org), report dated 5 November 2007, UN Office for the Coordination of Humanitarian Affairs.

### 1.3. Victim Profile

The 'victim profile' of *enforced disappearances* includes in general

- (a) Maoist sympathizers,
- (b) people who supported the Maoist guerillas logistically with food or housing, and
- (c) poor, marginalized and rural persons.<sup>7</sup>

There is also an ethnic component to those targeted for disappearance. For instance, human rights groups claim that many individuals who disappeared during the conflict belonged to the Tharu community. The reported victims are also overwhelmingly young males. Less than 10% are female.<sup>8</sup> The UNWGEID described the range of victims of enforced disappearances as including "women, students, businessmen, farmers, workers, a writer, a government employee, journalists and human rights defenders".<sup>9</sup>

In the case of *abductions* by Maoist insurgents, the victims too were mainly young males, such as local teachers and farmers. Only a few women were abducted. It appears that these abductions were often motivated by moral or punitive reasons (as in the case of suspected informers), and for financial reasons in order to obtain ransom payments. Abductions were also carried out as a form of forced recruitment. The UNWGEID noted that the Maoist insurgents were "more likely to kill perceived opponents outright than to make them disappear".<sup>10</sup>

### 1.4. Perpetrator Profile

The 'perpetrator profile' for *enforced disappearances* includes

- (a) the Nepalese Police,
- (b) the Armed Police Force, and
- (c) the Royal Nepalese Army.

These statutory agencies would however often operate in civilian dress. As the conflict unfolded, different state agencies became the dominant repressive force at different stages. A close understanding of the command and control structures of the security forces as well as their deployment and co-operation is required.

The CPN-M, as a rural insurgent movement, obviously had a far more fluid and decentralized structure with local level decision making, as well as a wider range of affiliations and degrees of control over its membership. Further research will be necessary into its structures, methodologies and forms of command and control.

<sup>7</sup> NBA estimations.

<sup>8</sup> NHRC estimations.

<sup>9</sup> Report of the UNWorking Group on Enforced or Involuntary Disappearances Report, Mission to Nepal, 6 – 14 December 2004. Report E/CN.4/2005/65/Add.1, page 6.

<sup>10</sup> Report of UNWGEID, 2004, page 12.

## OVERVIEW OF RECENT DEVELOPMENTS REGARDING DISAPPEARANCES<sup>11</sup>

The peace process that commenced in 2006 has seen a number of critical developments around the issue of disappearances within both the government and the judiciary, placing the matter at the forefront of transitional justice issues in Nepal. These developments offer both challenges and opportunities to civil society, national and international human rights organizations as well as victim groups.

### 2.1. Comprehensive Peace Accord

The commitments made in the November 2006 Comprehensive Peace Accord (CPA) by the Seven Political Party Alliance (SPA) and the Community Party of Nepal – Maoist (CPN-M) included several transitional justice mechanisms, several of which concerned disappearances. The CPA included an agreement by the two main parties to the conflict to make public the names and fate of persons who were forcibly disappeared or abducted within 60 days of the signing of the Accord.<sup>12</sup> However, no such disclosures have been forthcoming by any parties.

### 2.2. The Interim Constitution

The subsequent adoption of the January 2007 Interim Constitution also saw the recognition of enforced disappearances as a feature of the conflict and requested relief for the affected families.

### 2.3. Judicial Interventions

At the same time, significant developments took place within the judiciary which offered the most positive and path-breaking intervention on the issue. However, these important judicial interventions, outlined below, have generally been followed by inadequate and deficient government responses which have failed to satisfy the judicial orders or meet international standards.

<sup>11</sup> This overview is based upon interviews conducted as well as the press releases and documentation issued by human rights organizations and press reports on the process.

<sup>12</sup> See point 5.2.3. "Both sides also agree to make public within 60 days of signing of the agreement the real name, caste and address of the people made 'disappeared' or killed during the conflict and also inform the family members about it." Also, point 7.3.2. "... both sides agree to make public the status of every individual kept 'disappeared' and held captive and inform about this to their family members, legal advisor and other authorized person." Point 7.1.3. also specifies that "they shall also guarantee the right to relief of the families of the conflict and torture victims and the disappeared." Comprehensive Peace Agreement, 21 November 2006.

During the conflict and ensuing ongoing peace process, families affected by disappearances embarked on legal action primarily in the form of habeas corpus applications, most of which were dismissed following denials by the alleged perpetrators and the difficulty faced by the applicants in securing substantial evidence.

As a result of these applications, in August 2006 the Supreme Court established a three member committee as a Detainee Investigation Team to investigate the disappearance of four detainees.

The comprehensive report issued by the Team contained significant recommendations to the government, firstly the formation of a competent investigative commission on disappearances and secondly the formulation of new legislation outlawing enforced disappearances. It also recommended criminal charges be brought against the named perpetrators and that relief be granted to the affected families.

Further, in November 2006 the Supreme Court ordered its Administration Department to collate all the numerous habeas corpus petitions together for final hearing.

In May 2007, the Interim Legislature-Parliament tabled a Bill to amend the Civil Code which would criminalize the offences of causing disappearance and abduction. This Bill, which had not involved any consultation of non governmental groups, was found to be severely deficient by human rights organizations and victim groups. Several organizations submitted a comprehensive critique of the Bill proposing changes and highlighting areas where international standards were missing.

## 2.4. June 2007 Supreme Court Judgment

It was the 1 June 2007 landmark 129 page judgment by the Supreme Court that set the bar for government action. The judgment noted that government had failed to undertake any serious effort to address the issue of disappearances and made the following orders.<sup>13</sup>

- ◆ It ordered government to form an all-powerful Commission to probe the fate of disappeared persons and to formulate a specific anti-disappearance law. Importantly, the commission and the new legislation were to be based on international standards, namely the Criteria for Commission on Enforced Disappearances and the UN's International Convention from the Protection of All Persons from Enforced Disappearances.
- ◆ The government and Home Ministry were also ordered to file criminal charges of murder against all the officials implicated in the death of detainee Chakra Katuwal.
- ◆ In addition, following the recommendations of the Detainee Investigation Team, the Supreme Court ordered government to provide compensation to those affected, and interim relief to the families of all 89 disappeared persons cited in the writ petitions.

The immediate government response in June 2007 was to form a "High Level Probe Commission on Disappeared Persons" headed by former Supreme Court Justice Neupane. Again, this generated significant criticism by NGOs, as this Neupane Commission did not comply with either the Supreme Court directives or international standards.

<sup>13</sup> In July 2004, the government established the 5 member Malego Commission, made up of security force or government officials, to clarify the whereabouts of disappeared persons. The Commission however has been regarded as markedly ineffective as it reportedly investigated only 36 cases of disappearance and clarified the whereabouts of 24 people.

## 2.5. Truth and Reconciliation Commission Bill

The August 2007 tabling of a Bill to form a Truth and Reconciliation Commission drew much the same critical response from NGOs, as it too fell dramatically short of international standards and little consultation had preceded it. The proposed TRC lacked operational independence and transparent appointment procedures. It dealt inadequately with victims' right to remedy and reparations. It contained unclear definitions of gross violations of human rights. Most importantly, however, it contained clauses offering amnesty to perpetrators for a wide range of offences, several of which transgressed international norms. The government, through the Ministry of Peace and Reconstruction conducted three regional consultations between December 2007 and February 2008 on the TRC draft Bill. However, these consultations were hastily conceived and carried out and need to be redesigned in order to be effective and legitimate.

## 2.6. Subsequent Developments

The Interim Legislature-Parliament ordered the government to withdraw the Disappearances Bill in November 2007 and produce a new version compliant with the Supreme Court. Despite this welcome development, it was given only one month to do this and could simply issue an ordinance in this regard. The challenge of consultation remained.

The 23 point agreement signed by the Comprehensive Peace Accord (CPA) signatories in December 2007 did at least include an ongoing commitment to the issue of disappearances and a TRC.

Yet government efforts have generally shown a pattern of an absence of consultation of any affected or interested groups, a lack of transparency and inclusivity, and an unwillingness, refusal or incapacity to adopt international standards as the benchmark for any transitional justice initiative. Significantly, the amnesty component of the proposed truth commission attempts to ensure that the parties to the conflict do not have to face criminal justice consequences. These deficiencies and components in the realm of challenging impunity and the lack of consultation and transparency mark the process throughout and remain the central challenge to advocates of transitional justice for Nepal.

During the first half of 2008, the attention of the policy makers and the political parties shifted to the April 2008 Constituent Assembly elections effectively relegating transitional justice issues to the backburner. It is clear that the interim Parliament failed to follow through the commitments enshrined in the CPA, including the urgent demands of the families of the disappeared. In a changing political context wherein the newly formed Constituent Assembly would be mandated to write a democratic Constitution for the country, it is inevitable that new challenges would emerge for those struggling for truth and justice in Nepal.

## POSITIVE FACTORS AND ADVANTAGES IN CURRENT SITUATION

Nepal currently faces both positive and negative factors in any effort to address disappearances. The positive factors include both historical and current dimensions as follows, all of which must remain key components of the effort to achieve the best possible outcome on the issue of disappearances in Nepal.

### 3.1. Powerful international attention and mobilisation

Firstly, the very prominence of the issue of disappearances and abductions in Nepal is an indication of successful mobilization and advocacy. In particular, there has been powerful *international intervention* on the matter, leveraged by key domestic human rights players. There was ongoing and repeated international condemnation from bodies such as the United Nations, Human Rights Watch (HRW) and Amnesty International (AI). The establishment of the OHCHR delegation and office in Nepal in May 2005, the largest ever established, was similarly a reflection of this international concern. Nepal has featured strongly in the work and reports of the UN Working Group on Enforced Disappearances. This international tool was very effectively used to highlight the issue, to the extent that it is now an international commonplace that Nepal was responsible for the highest number of new cases reported to the UNWGEID for several years. Nepal was also the subject of a visit by the UNWGEID in December 2004 due to the dramatic increase in reported cases. In May 2006 the UNWGEID requested a further visit to Nepal to follow up on its recommendations of its 2004 mission but no response has been received as yet by the Nepal government.<sup>14</sup>

All those interviewed for this report agreed that the international intervention of bodies such as OHCHR and ICRC played a significant role in scaling down the numbers of enforced disappearances. In response, the Nepal government also set up a structure, albeit ineffective, to clarify the whereabouts of missing persons, namely the Malego Commission<sup>15</sup>. There are strong local representatives of international organizations which have intervened on the issue, including the ICJ, AI, ICRC, and ICTJ, although these structures are not permanent and must be utilized rapidly and effectively.

<sup>14</sup> Report of the Working Group on Enforced or Involuntary Disappearances to the Human Rights Council, Seventh Session, 10 January 2008. A/HRC/7/2 (Advance Edited Version).

<sup>15</sup> On 1 July 2004 the Nepali government established a short term commission to investigate disappearances termed the Malego Commission. Set up under the Home Ministry, it was chaired by the then Joint Secretary for Home Affairs, Mr Narayan Gopal Malego and consisted of five members from Home Ministry, Defence Ministry, Police Headquarters and the National Investigation Department. The Commission issued a number of reports.

Given that Nepalese troops also participated in UN peacekeeping forces, a matter of some importance to the Nepalese government in terms of income and status, international probation and condemnation held weight.<sup>16</sup>

In this sense, the international struggle for recognition of the issue and international support has largely been very successful, and this remains a critical site for ongoing pressure.

### **3.2. Effective integration of local mobilization and international concepts**

The effective integration of local human rights defenders with international human rights concerns and law is equally a powerful positive indicator. The fact that enforced disappearances are clearly identified in Nepal as a stand-alone violation of grave concern, rather than being merely a component of the wider landscape of violations similarly marks a history of powerful mobilization on the issue. This, together with the distinguishing of enforced disappearance (by the state) from abductions (by the CPN-Maoist forces) points to a sophisticated integration of the lexicon and categories of the international human rights movement. The very fact that a Disappearance Commission is on the agenda of the peace process, however unsatisfactory the early draft bills are, equally points to the impact of pressure from international and local organizations.

### **3.3. Critical Domestic Agreements and Directives**

There are important domestic agreements, orders and commitments that have or must become part of the mantra of demands around the issue of disappearances. These were outlined in (2) above. The CPA commitments and the Supreme Court directives are among the most important.

While some are somewhat pessimistic that the Nepalese government will implement this directive, others are of the view that they will be unable to avoid implementation, and that it is only its form and content that will require strenuous intervention by civil society. The fact that two draft Bills have been developed tends to support this.

### **3.4. International Agreements and Directives**

It is not necessary to recite here all the international human rights and humanitarian laws that would lend weight to the demand for accountability regarding past human rights violations, many of which Nepal is a signatory to.<sup>17</sup> However, aside from the more challenging demands for accountability and criminal justice, international humanitarian law demands that all parties to a conflict must take all feasible measures to account for persons reported missing as a result of the armed conflict, and must provide information as to their fate. This is surely the barest minimum demand concerning the fate of the disappeared.

<sup>16</sup> Personal communication with former UN High Commissioner for Human Rights representative in Nepal David Johnson. This point was emphasized by Richard Bennett, the Representative of the UN High Commissioner for Human Rights in Nepal in February 2008 when he remarked at a public gathering to commemorate the death of Maina Sunuwar: "1,100 Nepali soldiers serving as UN peacekeepers in Haiti were awarded peacekeeping medals last week. It would be regrettable if the positive image earned by the Army through such service abroad were to be tarnished by resistance to accountability at home." Four Years Later – Still No Justice for death of 15 year old Maina Sunuwar,

<sup>17</sup> See [http://www.inseconline.org/download/Nepal\\_treaties.pdf](http://www.inseconline.org/download/Nepal_treaties.pdf) for a full list of the treaties Nepal has signed.

### **3.5. Civil Society as a Role Player in the Peace Process**

Despite the institutional weaknesses, divisions, and severe and disabling multiple inequalities and exclusions in Nepalese society, civil society groups have managed to mobilize in dynamic ways around the peace process and demonstrate commitment to the issue of disappearances. The April 2006 People's Movement, Janandolan II although not specifically concerned with disappearances, inserted civil society and civic mobilization as a key player impacting on the peace process. The current protests and ethnic violence episodes in the Terai also point to civic upheaval, although this is not necessarily directed at positive aspects of the peace process.

### **3.6. Victim organization**

Although the level of victim organization is not as strong as it could be, the mere fact of clusters of organization which publicly mobilized around the issue of disappearances is a critical aspect of the prominence of the issue of disappearances.

### **3.7. Process of Constituent Assembly**

The democratization process implied by the Constituent Assembly has raised questions of representativity and inclusiveness to a greater level. In addition, the CA elections represent an opportunity to pressure political parties to state their position and commitment to the issue of disappearances and transitional justice more broadly.

### **3.8. Ratification of UN Convention against Enforced Disappearances**

The December 2006 adoption of the UN Convention against Enforced Disappearance offers particular pressure opportunities for the issue of disappearances. Although the convention is not retrospective,<sup>18</sup> efforts to get Nepal to first sign and then ratify the Convention can play a role in building momentum, visibility and accountability around the issue of disappearances.

### **3.9. Compensation**

The concept of compensation by the state is entrenched in Nepalese society, and it is widely accepted that some form of redress is due to the victims of the past conflict, including disappearances. This will undoubtedly assist in ensuring that this forms a key and implementable component of a transitional justice program in Nepal.

### **3.10. Passing of Abductions Bill**

In November 2007, the Interim Parliament passed a bill to amend the Civil Code provisions on abductions, an important first step in the legislative process of specifically outlawing all forms of disappearances.

<sup>18</sup> The question of the absence of retrospective application of the Convention is a complex one. At present, several organizations are arguing that due to the continuous nature of the crime of disappearance, a retroactive application may be possible. This issue will be a key challenge to address in the coming period.

## OBSTACLES IN THE CURRENT PROCESS

### 4.1. Absence of inclusive processes and consultation

There is not a strong political tradition of either civil society consultation and inclusivity in Nepali politics. Nepal is a highly segmented society along caste, ethnic, linguistic and gender lines, with poor representation in both political and economic spheres of marginalized groups and communities. These stratified and segmented social relations are apparently reproduced at all organized levels, be it the state, the economy or civil society groupings, and are reinforced in geographical terms by a center-periphery dynamic between Kathmandu and the remote plains.

The longer term challenge for transitional justice work in Nepal will be to address these persistent and structural inequalities, which perhaps could be termed both identity and politico-economic conflicts requiring social justice. At present it seems the transitional justice and political debates in Nepal are increasingly inflected with these concerns, with the emergence of protest, rebellion and dissent along ethnic-regional lines in the Terai areas apparently placing this more strongly on the agenda. A class based and caste blind approach to transitional justice work would persist in entrenching these discriminations and would obscure the systemic continuities of 'transition' in Nepal. Careful thought must be given to include these dimensions in the emerging transitional justice discourses and practices in Nepal. The debates around the formation of a Constituent Assembly have strong relevance in this regard.

### 4.2. Negative history of commissions of inquiry

Historically, prior Nepalese commission of inquiry have often been weak structures whose reports and recommendations have either not been released or implemented. They also have a legacy of political interference. There is accordingly public cynicism towards a state-initiated structure that mimics these past initiatives or does not arise out of a consultative process with broader structures of civil society. Such initiatives have historically had a lack of legitimacy.

### 4.3. Elite Pact Politics

Perhaps the strongest factor mitigating against any effective transitional justice program is the nature of the 'elite pact' that has formed the basis of the Interim Government. Neither the Nepalese state nor the CPN-M will be enthusiastic about an impartial scrutiny of their actions, the disclosure of the grim facts of disappearances, or the potential for criminal justice proceedings against them or their members. Both parties have indicated support for some kind of amnesty that will cover

actions undertaken in pursuit of political goals. Despite rhetorical commitments to the contrary, Maoist leadership structures reportedly also reproduce the unequal social relations that compose Nepalese society, and as a result there may be a 'class compact' to close the door on disappearances. As a result, it is questionable whether either side has the political will to seriously pursue a project of accountability for disappearances and past crimes. Instead, they may attempt to construct, manage and direct a process that 'passes for' or mimics transitional justice in form rather than substance.

#### 4.4. Constrained compensation approach

Although the 'compensation culture' in Nepal enables the possibility of some form of redress for victims, it is historically conceived and applied in narrow monetary terms. It may also be used to 'buy off' the victims concerned or to build patronage systems. Further, the 'compensations' that have taken place thus far to victims of the conflict have been arbitrary, unequal and unfair in several ways.<sup>19</sup> The challenge in this regard will be to broaden the concept to one of reparations and to extend the debate accordingly in Nepal. A great deal of work will be required to engage with and diversify this into a wider notion of reparations.

#### 4.5. History of Impunity

Despite the widespread practice of compensation, it is not usually accompanied by criminal justice proceedings. The judiciary is described as weak, corrupt and open to political influence with a historically passive and conservative approach to justice. Recent political changes, particularly following the April 2006 civil revolt, have led to signs of more independent judicial thinking, reflected for example in the June 2007 benchmark ruling.

However, there have been no successful prosecutions related to political violence of the past, although significant evidence exists in a number of cases, primarily the Maina Sunuwar case, where only small judicial steps have been taken.

#### 4.6. Dominance of Covert Secret Burial Sites

In many war or conflict situations, bodies of deceased individuals are simply dumped, after which they are collected and buried in formal cemeteries or cremated according to customs by local authorities responsible for managing the dead. In these types of cases it is often possible to trace and identify human remains or to trace their method of disposal.

However, in a context where secret covert burials at sites known only to the perpetrator(s) are the norm, it is extremely difficult, if not impossible to locate burial sites without some inside information from the perpetrators or those close to them. In South Africa, the only secret burial sites that were located were those pointed out by the relevant perpetrators through the individual disclosure-based amnesty process linked to the Truth and Reconciliation Commission (TRC). No efforts independent of the amnesty process to locate covert burial sites have been successful in locating remains.

<sup>19</sup> For example, several organizations interviewed cited vastly different amounts granted to, for example, families members of the armed forces, civilians and those disappeared or killed by the state or the Maoists.

## 4.7. Long Term Nature of Disappearance Work

Work on disappearances and missing persons is a long term commitment. While it may appear to be the simplest avenue for NGOs and human rights organizations to challenge the question of impunity, it also offers the dangers of abandonment of victim families when the possibility of prosecutions has faded away and the interests of NGOs and human rights organizations have moved on to other matters. In Argentina, families of the disappeared are still mobilized and work on recovering remains is still taking place, more than three decades after the conflict. In the former Yugoslavia, despite the massive resources available for the excavation of graves and DNA identification on an unprecedented scale, work is still continuing. This places a burden of commitment on those organizations who take up this work: it may never end. Ad hoc interventions, programs and exhumations are to be avoided. Affected families may end up feeling abused for short term political or judicial goals only to be abandoned when conditions change. Long term goals, commitments and perspectives are critical to any disappearance work. The psycho-social needs dimension persists even long after the exhumation is over. Moreover, any proposed Disappearance Commission cannot be short term in nature, unlike a TRC.

## BALANCING ADDRESSING IMPUNITY WITH THE RIGHT TO KNOW

At present, the chief articulated demand of the human rights and NGO community in Nepal is an end to impunity, envisaged as taking place largely through criminal justice for perpetrators of gross human rights violations, with disappearances as the overwhelming candidate violation of choice. Impunity is rightly identified as the key fault line in Nepal society that enables multiple forms of violence, both structural and physical.

The chief articulated demand of families affected by disappearances in Nepal, as is the case in every country affected by disappearances, including South Africa, is clearly to know what happened and to locate the remains. The author of this report was only able to speak to three different victim clusters – two in Kathmandu and one cluster in Dhading. In each case, the victims were asked to specify what their most important need and demand was. Without fail, each wanted to find out what had happened and to recover the remains of the disappeared person. Justice was their second demand. However, the form of justice demanded did not involve court cases but more direct retributive physical punishment. Given the problems with the judiciary in Nepal, it appears that the court room concept of justice is somewhat remote for victim communities and individuals.

Since a Disappearance Commission should primarily serve the needs of those affected by Disappearances, it is therefore a given that the question of finding out what happened to the disappeared and where possible locating the remains must be one of its central goals. Careful thought must then be given to the question of what mechanisms can be used to achieve this goal. Confessions from perpetrators are almost never forthcoming without some form of incentive. Cases of genuine remorse and a wish to make disclosure are silenced by fear of the consequences.

Given the expressions of support for an amnesty from the parties to the conflict, the concept of amnesty and its proposed application must be critically engaged with. Several individuals (mainly legal) interviewed broached the concept of an avenue through which lower level and vulnerable perpetrators, grappling with loyalty and fear, may be able to make disclosures and receive witness protection accordingly. It may be possible to engage with the proposed amnesty clause in the TRC and fashion it in a way which structures accountability along lines of command responsibility. 'Incentives and protection' was a phrase used by one legal practitioner, although not for the principal culprits. Incentives may involve early pension possibilities, while protection may involve transfers to other employment sites.

Despite a rejection of amnesty in its present guise, it must be asked whether the concept can be tackled, ameliorated, limited and defined in a way which offers some answers for the families of

the disappeared. In many cases, this will be the only measure that may lead to the recovery of remains. Provision could also be made for anonymous provision of information by the public and certain officials.

In particular, should any amnesty clause survive the present debates, it must be made conditional upon disclosure of the fate and the recovery of the remains of the disappeared. In Colombia at present, paramilitaries are able to make certain disclosures but are not required to assist in locating remains, a serious shortcoming of an already deficient process. In South Africa, significant battles were waged around its form and content in order to ensure it did not function as a 'blanket' amnesty. These struggles were able to ensure that amnesty hearings were to be held in public. The amnesty hearings thus involved public individual disclosures by perpetrators giving details on every single act and the location of remains.

## INTER-RELATION OF DIFFERENT TRANSITIONAL JUSTICE MECHANISMS

At present, diverse aspects of transitional justice are underway in Nepal albeit in an uncoordinated fashion. These include:

- ◆ Draft Bill for the Disappearances Commission
- ◆ Draft Bill for the Truth and Reconciliation Commission.
- ◆ Ad hoc compensation payments or promises of such payments
- ◆ Legal efforts such as habeas corpus applications on behalf of victim's families
- ◆ Victim mobilization
- ◆ Increasing NGO and human rights focus on the issues of transitional justice and disappearances

There are not many examples of Inquiries into Disappearances in other countries whose examples can be analysed for comparative purposes, as disappearances have come to form part of the wider mandate of truth commissions. The Nepal proposal is thus fairly unique. The early Argentine CONADEP experience and the Chilean Truth Commission are obviously the key examples, although both have come to define the classic 'truth commission' mode as opposed to a Commission of Inquiry. It may be worth obtaining copies of their reports in English for comparative purposes.<sup>20</sup> The Sri Lanka experience of two commissions focusing on disappearances also has direct relevance.

### 6.1. Similar Functions and Methods

The inter-relationship between the proposed Disappearance Commission and the Truth and Reconciliation Commission is unclear and will require significant and careful delineation.

How will they differ in modus operandi? Both will be receiving and gathering information and statements relating to victim experience and perpetrator responsibility. Quite probably both will involve victims telling their stories, with information preserved for possible use in court, and each will produce a public report. Yet disappearances don't happen in a vacuum – they are often associated with torture and other family arrests, and they may be a culmination of other abuses, which would overlap with the TRC. Given that families and individuals may have experienced multiple violations including disappearance, some will find themselves having to engage with both

<sup>20</sup> The report of the CONADEP commission was published in English as a book under the name *Nunca Mas (Never Again)*, published by Farrar Straus Giroux, New York. It was also published in London by Faber and Faber Ltd, 1986. ISBN 0374223505. It could not be established whether the entire report is available online in English. The Chilean Report is more widely available in English.

structures with significant overlap. This could be tremendously confusing to victims whose engagement with state structures is already weak.

Other countries who have experienced concurrent transitional justice formations (such as the Sierra Leone TRC and the co-existing hybrid Criminal Tribunal) have struggled to manage the relationship and interaction without hostility, competing agendas and rivalry. Worse, unlike Sierra Leone where the TRC was conceived of as a non-judicial mechanism while the court exercised prosecutorial powers, both the envisaged TRC and Disappearance Commission in Nepal would be non-judicial mechanisms functioning in the same victim and violation domain.

## 6.2. Sequencing

'Sequencing', a popular current concept in transitional justice, advocates a planned staged approach in which different aspects of transitional justice can be introduced or implemented according to different needs and changing contexts. However, given the disconnected nature of the transitional justice initiatives in Nepal and the uncertainty of their implementation, it is difficult to propose an appropriate 'sequencing'. Although demands for criminal justice and challenging impunity are presently uppermost on the agendas of human rights organizations – going straight for the jugular - some suggest that an argument could be made for placing prosecutions further down the road of transitional justice in Nepal, once the process is more stable and mature. As has been seen in several countries, a delay in prosecutions does not necessarily push them off the national agenda permanently. Given the weakness of the judicial system at present, it may be worth considering a period of strengthening and reform of the judiciary.

## 6.3. Victim-Friendly and Secure Process

A key challenge will be to ensure that the work of the Disappearance Commission is victim friendly. When lawyers and legal minds accustomed to particular court room practices design a process, it tends to mimic or reproduce known modes of testimony, questioning and the often hierarchical practices of courts. A more creative injection of ideas and concerns from diverse disciplines is required.

Given the absence of firm security in many areas of Nepal, a witness protection component may be critical. ICJ has indicated that it is conducting research in this area.

**CRITICAL AREAS FOR  
ENSURING STRONG  
DISAPPEARANCE  
WORK**

**B**



## DOCUMENTATION

### 7.1. Developing a single data collection site

Developing an accurate and integrated case list with associated records is an important foundation for any mobilization on the issue of disappearances. A collated 'single site' collection would form a strong foundation of data for a Disappearance Commission.

No state structure aside from the National Human Rights Commission (NHRC) appears to have developed a list of disappearances. However, there is relatively good documentation of cases of missing persons in Nepal amongst non-state groupings and organizations although this is scattered and not integrated. Most groups who have engaged with enforced disappearances have kept some form of records regarding the cases that have come to their attention. There will obviously be significant overlap between the documented clusters of information.

The forms of case recording differ. Some reportedly have a single sheet of paper with sketchy information. Some have databases. However, the criteria and types of disappearances recorded are not uniform. Each recording method is different and there is no common methodology or categorization. The information sources consist of files, diverse computer databases, diverse hardcopy questionnaires, court records and newspaper reports.

There is without doubt the need for case consolidation and the development of a single list to focus campaign work on disappearances. This is both a project that would require a commitment from all involved parties and could include a research and database component. The integration of this data or the development of a common database or file collection will be a difficult challenge. In other countries' experience, this has been a notoriously difficult task due to issues of confidentiality, rivalry, incompatible data and so on, but is a key priority.

Once a single source or site of data exists, a mapping project of the geography of disappearances could be developed, which could be overlaid with data concerning the location and movements of security forces active in each area.

## 7.2. Existing Data on Disappearances

The following groups or sites have significant data on disappearances:

NEPAL BAR ASSOCIATION (NBA)	<p>The NBA set up a human rights monitoring program (called the Human Rights Project) in 2003 with the goal of documentation. There is however no <i>national</i> database or collection of information. Cases are therefore primarily located at the regional offices, of which there are five in the country. Each of the 82 Bar units reportedly have a human rights committee that performs monitoring at local level and sends reports to regional level, where they are compiled into a report and sent to the Central human rights committee. The NBA used a standard form developed by the UNWGEID which was adapted and modified to local conditions. The NBA also reports having sent cases to Amnesty International and the UNWGEID too.</p> <p>The NBA case files are obviously legal cases with client privilege that cannot be accessed by external parties at this stage. However, the organization was of the view that their files could be shared if there was an official investigation.</p>
COURTS	<p>Court cases (eg habeas corpus applications) containing significant data and court judgments, would also be available. The NBA would be able to supply the relevant court reference numbers for purposes of documentation collection.</p>
NHRC	<p>The NHRC has an electronic database (Excel spreadsheet) containing summary data on each of the approximately 900 unresolved cases, which is updated regularly. A paper file for each case containing relevant documentation also exists. The NHRC has a general form for victims to complete although this is not specific to disappearances.</p> <p>The unit also gathers ante-mortem (pre-mortem) information about the disappeared person, using a customized ICRC form. It appears to be the only organization presently doing this.</p>
ICJ-CVC	<p>They have confined their work to advocacy and documentation training around the issue of disappearances. Cases are generally referred to the Legal Aid Board of the NBA. They have documentation relating to 209 cases of permanent disappearances. Fourteen of these are abductions by Maoist forces. The documented cases are in paper files with the CVC.</p>
OHCHR	<p>OHCHR-Nepal has more than 600 disappearance related cases in its electronic databases which includes names and case summaries. Many of these cases were submitted to Nepali authorities (such as a list of 300 cases to the RNA) and also to the UNWGEID. They have a list of roughly 200 cases from the Bardiya area. The OHCHR has also published several short brochures and booklets dealing with disappearance and related emblematic cases.</p>
ICRC	<p>The ICRC has an electronic database and paper files. Their list of unresolved disappearances has been published on their website although this contains minimal information.</p>
Advocacy Forum	<p>This organization has significant case documentation with a common checklist of questions. They have also supplied lists and cases to the UNWGEID.</p>
INSEC	<p>This organization has documented cases of disappearances.</p>
Record Collection Task Force for Conflict hit Individuals, Family and Physical Structure	<p>This grouping was not interviewed, but a newspaper report indicates that they have collected data (The Rising Nepal, 30 November 2007)</p>
Government Structures	<p>Records of the Malego Commission and the Neupane Commission would probably contain some data on disappearance cases.</p>

## VICTIM ORGANIZATION AND MOBILISATION

### 8.1. Critical role of Victim Organization

Victim mobilization and organization around disappearances – i.e., by the affected families themselves – is one of the most critical components of any effort to secure state accountability on the issue. Their participation and leadership is a critical and decisive marker of success or failure. Once a formal state structure is implemented and appointed professionals commence work, it is easy to lose marginalized victims in the process and forget who the whole venture is for. As articulated by a victim representative in the joint AF/ICTJ workshop held in December 2007, “the government must not form anything without including victims”. Victim organization is not only important for the purpose of ongoing mobilization and the ‘long haul’ nature of disappearance work, but also for peer support in the absence of any program of psycho-social work. ICRC places emphasis in encouraging these informal family associations in its work with victims, particularly in remote regions, given the non availability of psychologists etc.

Victim organization has been constrained by a number of factors. Firstly, victims are largely divided along lines of political affiliation. Secondly, they are overwhelmingly from poor and marginalized communities with few resources or education, occupied with the daily struggle for subsistence, and not a political force. They are often located in distant remote rural areas, mitigating against easy mobilization and unity.

### 8.2. Existing Victim Organizations and Structures in Nepal

Victim organization in Nepal appears to exist in both general (all types of violations) and specific form (disappearances only). There are advantages and disadvantages in ‘separating’ the issue of disappearances into a separate organizational form. Victim organizations are vulnerable to fragmentation, rivalry and division, and thus creating separate structures risks introducing such splits directly. Nevertheless, there are specific issues and needs faced by families of disappeared persons (and indeed, each other type of violation such as torture) which may benefit from a focused group approach. A ‘Missing Persons’ or ‘Disappearances’ movement may ultimately be able to straddle political and ideological divides.

There was no national victim structure in Nepal or anything approximating a co-ordinating structure by late 2007 although some significant structures and progress in this regard were being made. Thus far, aside from a Maoist-led victim organization, it has been NGOs rather than victim organizations that have driven the process. This is different to the Latin American context, for

example. Given the marginalized, scattered and rural locations of affected victims in Nepal, it is probably unlikely that a highly centralized structure will be possible. Partnerships with NGOs and other organizations will probably remain critical to sustain them.

Victims of state violence were the first to be mobilized into a victim structure, largely under the direction of the CPN (M). This group, the Society of Families of those Disappeared by the state (SOFAD), has been the most effective and vocal lobby group, whose leadership and membership is largely CPN (M), and has some kind of national dimension, presence and mobilization. The group staged an occupation of the OHCHR parking lot to highlight their grievances. This organization has however reportedly suffered serious internal splits around issues of leadership, which has constrained its activities in the more recent period.

There are also some local victim group initiatives, such as the Center for Social Justice victim group in Lamjung. Newspaper reports also indicate an organization called the Maoist Victims Association (ie victims of Maoist violence). Conflict Victim Group (CVC) is an independent victim group, currently based only in Bardiya but aiming to expand its presence.

Most NGOs or organizations have had some interaction with victims and/or their groupings. This interaction has ranged from documentation training, monitoring of cases, legal assistance in cases, to the building of victim organization.

Advocacy Forum (AF) is the organization with the most sustained program of victim capacity building and the facilitation of groups. This is still largely regionally focused, through its 15 offices across the country. There are some 70 victim groups that fall within the AF program. The groups are made up of between 10 and 40 individuals, both men and women. These fall within 15 wider districts. These are not only victims of disappearances but all gross human rights violations, including deaths and torture. The group is tentatively called Pressure Group for Justice. Efforts are underway to build a more national consciousness, through the hosting of national meetings of the 15 district victim groupings. While Advocacy Forum expresses the desire for a national umbrella victim organization that is inclusive and cuts across political affiliation, they also avoid any forced togetherness. The victim organization would require registration with government as an NGO. Ultimately, the aim would be for the victim organization to be independent, and to limit the role of the AF.

### 8.3. Building Victim Organization Capacity

Victim organization itself requires support since they usually exist with few resources and limited capacity. Strengthening victim organization through partnerships with NGOs is a critical component.<sup>21</sup> This support can take many different forms: financial, logistical, training, joint projects and so on. This partnership however runs the risk of instrumentalization, where victim groups function as a form of legitimation or as 'shock troops' for the interests of the partner NGOs.

In terms of training, victim organizations and NGOs could also benefit from learning how to record physical information about the missing persons along with the details of the disappearance. This

<sup>21</sup> By means of comparison, a South African NGO named the Center for the Study of Violence and Reconciliation (CSVR) was instrumental in establishing a national victim organization named Khulumani in the period leading up to the South African Truth and Reconciliation Commission (TRC). After years of a bumpy relationship, Khulumani sought to create a more independent presence and limit its relationship with CSVR. Khulumani remained an organization for all victims (regardless of affiliation) of all violations. However, it does have some special sub-groups of families affected by disappearances within its structures.

is a critical but currently absent area that may enable identifications without the use of DNA. Further, learning how to take and store genetic information and DNA samples from family members of the missing persons for use in future exhumations is something that can be done now while relatives are still alive, regardless of the pace and nature of legislative developments. This however needs to be done in a centralized manner.

The ICTJ/Advocacy Forum's survey on victim perceptions conducted in late 2007 sharply highlights the absence of a strong sense of victim rights and access to justice, both as citizens and as victims of political violence.<sup>22</sup> This points to the important connection between disappearance work and a sense of equal citizenship, which lies at the heart of the political violence in Nepal.

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<sup>22</sup> "Nepali Voices: Victims' Perceptions of Justice, Truth, Reparations, Reconciliation, and the Nepali Transition Process" published in March 2008, available at <http://www.ictj.org/images/content/8/3/830.pdf>

## STRONG FORENSIC PROGRAM OF INVESTIGATION AND EXHUMATION

*“Various international bodies have established two basic criteria for this kind of [forensic human rights] investigation, namely that it must be conducted free of any form of political pressure and that it must use scientific methods agreed to by the international community”.*<sup>23</sup>

### 9.1. Cultural Attitudes and Practices around the Dead

In Nepal, the vast majority of the population conduct ceremonial cremation of the dead almost immediately after death at special sites usually beside a river, after which the burnt remains (‘cremains’) are scattered into the river. Only a small minority of the population in Nepal buries their dead. In all instances there are associated cultural rituals, and these funerary rites are personally and socially compulsory, with social consequences for the family that does not perform them. In the absence of a body, families sometimes perform a cremation of a grass effigy that represents the individual. In some cases, families of the disappeared have performed these ‘substitute’ rituals. For example, many of the fifteen families from Jogimara, Dhading, whose sons and husbands were killed while working at the Kalikot airport in a well known attack by Nepalese security forces in February 2002 were ‘compelled’ by discriminatory social consequences to complete funeral rites in the absence of their bodies.<sup>24</sup>

The fact that cremation and dispersal of the burnt remains is the dominant practice, as opposed to burial, does not in any way diminish the importance of locating the body. All groups and individuals spoken to were adamant that the absence of knowledge or receipt of the remains left the affected family in a terrible personal and social limbo and uncertainty, and thus that locating and identifying these remains was of paramount importance.

### 9.2. Tracing human remains of the disappeared

It is clear that the vast majority of the remains of disappeared individuals in Nepal will have been disposed of in secret or clandestine informal burial sites whose locations are known only to the perpetrators or those involved in the disposal itself.

<sup>23</sup> Luis Fondebrider, Argentine Forensic Anthropology Team (EAAF) and Maria Cristina de Mendonça, National Institute of Legal Medicine, Portugal, Model Protocol On The Forensic Investigation Of Deaths Suspected To Have Been Caused By A Human Rights Violation, Prepared for the Office of the United Nations High Commissioner for Human Rights, Mexico, May 2001

<sup>24</sup> The case is presented in the ICRC-Nepal film documentary “The Wait Continues” produced by Mr Mohan Mainali.

The disposal methods are likely to be predominantly burial and a more limited number of cases of burning. In most burial cases, it is likely that the remains are skeletonized by now.

Given that the burning of a human body is a lengthy process and cannot be easily, quickly or so secretly done, most remains would probably have been buried or dumped in neighboring outlying areas or in sites within reach of the security force bases.

ICJ member Govinda Sharma related a case where the deceased detainees were reportedly first buried in a children's graveyard area, then exhumed by the perpetrators a few days later and the bodies burnt on the edge of a river, after which the burnt remnants were pushed into the river.

Even in such cases involving the burning of remains, some form of verification is possible through archaeological confirmation of the burn site. In addition, it is also unusual for the perpetrators to dispose of all burnt bone fragments effectively. Burning a body for four hours on a wood fire will not reduce the human body to ashes and significant quantities of burnt bone material will remain. If the burnt remains are thereafter removed, small finger or feet bones are often left behind.

### 9.3. Recent Excavations and Exhumations In Nepal

A small number of exhumations and investigative excavations have been conducted in Nepal over the last few years. These exhumations or excavations have generally been conducted under the auspices of the National Human Rights Commission (NHRC), although other bodies have also been involved as monitors or partners.

Only the Nepalese Police have the legal authority to conduct exhumations. However, the NHRC has undertaken exhumations as part of its investigative mandate, although there are some doubts expressed about their rights in this regard. In one instance, the Supreme Court ordered the exhumation.

The course of action should ideally follow the following steps:

1. Preliminary investigation and site identification ("Investigation Stage")
2. Excavation of site and exhumation of remains using archaeological techniques ("Archaeological Stage")
3. Forensic examination of the recovered remains by forensic anthropologists to establish injuries, cause of death and physical data ("Anthropological Stage")

**Investigation Stage:** The preliminary investigation and location of potential burial sites was largely done by the NHRC and, in one instance, the ICRC. The quality of the investigations could not be evaluated. However, perusal of some of the NHRC files indicated a well organized and documented process.

**Archaeological Stage:** Nepalese forensic pathologists together with the police and mortuary officials conducted the exhumations and forensic examinations of the remains. In most cases this appears to have been a rapid removal operation as opposed to an excavation using archaeological principles. In two instances, international expertise was used to conduct the excavation.

**Anthropological Stage:** The recovered remains and/or items were, aside from the two cases mentioned above, generally examined by the forensic pathologists who also prepared the post mortem reports. It was indicated that in politically sensitive cases, more than one forensic doctor

would be involved and sign the report. The NHRC reports that the police themselves have conducted two exhumations, which were monitored by the NHRC.

The following table provides some information about the various cases and organizations involved.

#### EXCAVATIONS AND EXHUMATIONS CONDUCTED

ORGANIZATION CONDUCTING EXHUMATION	PERSON(S) EXHUMED	CIRCUMSTANCE OF ENFORCED DISAPPEARANCE	EXPERTISE CONDUCTING THE EXHUMATION	IDENTIFICATION AND RETURN OF REMAINS TO FAMILY
NHRC (This was an on site post mortem examination rather than an exhumation)	18 persons (5 females and 13 males)	2 civilians and 16 Maoist guerillas were marched off by Royal Nepalese Police to a remote area and shot dead near Doramba on 17 August 2003.	Nepalese forensic pathologist Dr H Wasti and others conducted the examination of the remains ten days after the killings.	Reburied at site of killing after in situ post-mortem forensic examination. One of the deceased had been removed for cremation by his family.
NHRC (ICRC involved in finding burial site)	Ms Sarala Sapkota, 16, killed near Dhading on the night of 15/16 July 2004.	Abducted by security personnel, cause of death determined to be blunt force trauma.	Exhumation of skeletonised remains conducted on 11 January 2006 by Nepalese forensic pathologists Dr Wasti and Dr PK Shrestha	Not yet returned to family for burial. Efforts to obtain DNA identification through samples sent to a lab in India were not successful.
NHRC	Christian male in Kavre Palanchowk district	No information obtained	Exhumation conducted by Nepalese forensic pathologists on 5 July 2006	Family has reburied the remains.
Police, OHCHR and Advocacy Forum	Ms Maina Sunuwar, 15	Arrested, tortured and killed in February 2004 by Nepalese Army. Her remains were buried at Birendra Peace Keeping Training Center in Panchkhal, Kavre District.	Colombian forensic pathologist Ms Maria Dolores Morcillo was brought by OHCHR to conduct the exhumation with Dr Wasti in March 2007	Pending.
Nepalese Police, monitored by NHRC	Details not obtained	Details not obtained	Details not obtained	Details not obtained
Nepalese Police, monitored by NHRC	Details not obtained	Details not obtained	Details not obtained	Details not obtained
NHRC	Excavation of site at Shivapuri National Park	Possible burial site of 49 Maoist cadres detained in the Bhairav Nath Battalion of the Nepal Army at Maharajgunj	Finnish experts together with Nepalese forensic pathologists	Tests underway although no human remains appear to have been found.
NHRC	Excavation of alleged burial site of Mr Chaman Singh Bam at Dhangadi	Abducted by Maoists in May 2003.	Dr H Wasti and Dr Jiwan Rizal from the National Academy of Science and Technology on 2 Jan 2008	Unconfirmed – report found in newspaper online report ( <a href="http://www.kantipuronline.com/kolnews.php?&amp;nid=133041">www.kantipuronline.com/kolnews.php?&amp;nid=133041</a> )

## 9.4. Expertise Involved in the Exhumation and Forensic Examination

A widespread concern exists amongst many organizations interviewed regarding the methodology – or absence thereof - of the exhumations currently being conducted in Nepal and the consequent possible loss of evidence. Given that a great deal of hope is being placed upon disappearance cases to generate potential prosecutions, this is a particularly worrying concern that must be addressed.

Records of the exhumations including photographs, videos and forensic reports are generally in the possession of the agencies listed above. These were not perused for the purposes of this report, although the NHRC kindly permitted viewing of some of their files and photographs.

Certain observations can be made. In general, despite the best intentions and efforts, these exhumations are taking place in the absence of (a) an internationally approved protocol and (b) appropriate forensic archaeological and anthropological expertise.

Despite the considerable experience of the forensic pathologists involved in pathology examinations and post mortems, they do not have the requisite specialist skills or training to conduct an appropriate *archaeological* excavation and exhumation, particularly in respect of informal clandestine burials.

In addition, their chief forensic examination expertise will be with fresh bodies and soft tissue as opposed to *skeletonized* remains.

Further, given the limited number of forensic personnel to conduct ongoing regular post mortem examinations, the Nepalese forensic pathologists are overworked and unable to devote the kind of *time frame* required to conduct appropriate exhumations.

A combination of **forensic anthropologists and forensic archaeologists** is the ideal and necessary basis for an effective and successful program of exhumations that is able to generate determinations of cause of death and possible identifications, particularly in potential criminal justice cases.

### EXAMPLE: EXHUMATION OF MS S SAPKOTA

The reports concerning the exhumation and forensic examination of the presumed remains of Ms Sapkota were obtained and photographs and aspects of video footage of the exhumations were viewed. While the forensic examination report is appropriate and reflects the expertise of the forensic pathologists, the exhumation was wholly inadequate. It is clear that appropriate archaeological and anthropological techniques were not used.

To point to a few problems, only two hours elapsed between arrival at the site and departure. This time frame is inadequate to conduct an archaeological excavation and exhumation and make appropriate recording of the process. The skeleton was apparently removed in rapid action, rather than bone by bone. As a consequence, a number of small bones of the hands and feet were seemingly left behind in the grave. There is no full inventory of the remains recovered. There is no diagram or description of the grave in its context with points of reference.<sup>25</sup> Without careful archaeological excavation, crucial evidence or artifacts may not have been recovered.

## 9.5. Ensuring the adoption of ‘Best Practices’ regarding disappearance work

Given the numbers of disappeared persons and the indications of large numbers of informal and improper burials of deceased Maoist guerrillas, it is likely that a program of investigation, exhumation and recovery of human remains in Nepal could last for many many years. Such an extensive program should therefore be built upon or should draw upon best international practices developed in the field of human rights and forensic science.

<sup>25</sup> I am grateful for the insights of Ms C Bisso and Mr L Fondebrider of the Argentine Forensic Anthropology Team (EAAF) in this regard.

There has been significant international development and documentation of 'best practices' in respect of excavations, exhumations and forensic examination. In recent years the UN and the ICRC have developed literature drawing on a range of international experiences, which is freely available.

Other international forensic anthropology teams have developed similar documentation and model protocols. The introduction of this literature and its practices is a critical need in Nepal.

#### EXAMPLES OF LITERATURE ON 'BEST PRACTICES' REGARDING WORK ON DISAPPEARANCES

The Missing And Their Families: Documents Of Reference (ICRC)

Operational Best Practices Regarding The Management Of Human Remains And Information On The Dead By Non-Specialists - For All Armed Forces And Humanitarian Organizations (ICRC)

Missing People, DNA Analysis And Identification Of Human Remains- A Guide To Best Practice In Armed Conflicts And Other Situations Of Armed Violence (ICRC)

United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, U.N. Doc. E/ST/CSDHA/12 (1991)

Model Protocols On The Forensic Investigation Of Deaths Suspected To Have Been Caused By Human Rights Violations, developed for the UN High Commissioner for Human Rights, Mexico, 2001

## 9.6. Training and Partnership Options

It was not possible in the time available to conduct interviews or assessments of the forensic expertise available in Nepal. However, there are at least the following resources available which could play a role in developing an integrated and improved local capacity.

- ◆ Four forensic pathologists, who have been very supportive of the process
- ◆ Two ballistic experts
- ◆ A Government Department of Archaeology which may employ archaeologists skilled in the archaeological recovery of human remains
- ◆ Medical schools, such as the Teaching Hospital in Kathmandu can provide X ray facilities, wet and dry lab rooms and so on.
- ◆ A local DNA lab which can process soft tissue samples
- ◆ A willingness to contract international experts: In two cases (Maina Sunuwar and the Shivapuri site), international experts have been brought in to conduct the excavation and forensic examination of recovered remains.
- ◆ At least one of the forensic pathologists has participated in two training courses relating to best practices regarding the recovery of human remains indicating a willingness to learn and engage with international best practices.

While it may be possible to continue in the current format in the short term (local forensic pathologists with occasional foreign expertise brought in on certain cases), it is not ideal for the type of extensive disappearance work that may unfold in Nepal.<sup>26</sup>

<sup>26</sup> It is also preferable to avoid importing ad hoc anatomical experts who may be able to do excellent bone work in the laboratory but have not applied their skills in the tracing of covert burial sites.

Developing an ideal scenario for Nepal could be done in a number of ways. For example:

Step 1: Technical evaluation by persons experienced in the field of the forensic anthropology and human rights investigations, which could assess the forensic system in Nepal and propose a methodology that ensures forensic investigations and exhumations are conducted in accordance with scientific international standards.

And/or

Step 2: Training and methodology workshops organized in Nepal by persons working in this field that would also aim to establish basic principles, organizational and forensic procedures for such work, in conjunction with involved persons and parties.

Any such initiatives should be embarked upon with great sensitivity to and inclusiveness of local role players.

Further, families of victims, victim organizations and NGOs are also key in this regard and also should be consulted and involved in ensuring a methodology that is appropriate to their needs as well. The families may well have concerns about the independence of disappearance investigation and exhumation processes driven largely by the state. In addition, a process that is purely court driven and focused on legal concerns may further violate the affected families.

In the context of long term and extensive exhumation work in Nepal, it is rational to plan to develop a local network of skills or team that is able to undertake this work. Ultimately, it would be ideal to develop a local multi-disciplinary scientific team trained in appropriate techniques of exhumation and analysis of human remains working according to specified protocols. Such a team would include archaeologists, anthropologists, dentists, geneticists (DNA) and so on. This team would be able to work with investigation structures, be they the NHRC or a Disappearance Commission. This would be an ongoing resource to the region as well.

## 9.7. Training Options

The *ICRC* is able to provide a systematic training program and may be able to assist in the possible steps outlined above. However, the Head of the *ICRC* in Nepal has indicated that such training is generally only provided in the context of a government-established program with clearly delineated areas of responsibility, or with strong indicators that this is going to take place, such as a Disappearances Commission. This does not yet exist in Nepal although the NHRC has some responsibilities and powers in this regard. The *ICRC*, as an established presence in Nepal that has already facilitated one Nepalese forensic pathologist attending an *ICRC* training course, needs to be part of whatever actions are undertaken.

There are a number of *international forensic anthropology teams*, such as the Argentine Forensic Anthropology Team (EAAF) who could also assist in advising appropriate steps, conducting the technical evaluations or workshops suggested above. They are also able to develop short or medium term partnerships with relevant NGOs or state structures, such as the NHRC.

<sup>27</sup> Further attempts at DNA testing may have been undertaken on this case since the time of writing.

A wider group of trainees should also be identified beyond just the forensic pathologists. The Archaeology Department and its students, Anatomy students and the like could also be drawn in.

## 9.8. DNA AND GENETIC INFORMATION

Nepal does not currently have the capacity to process and analyse bone samples for DNA, only soft tissue. It is probably premature to introduce the possibility of developing DNA testing capacity in Nepal. At present Nepal would have to rely on sending samples to external DNA labs to produce results. DNA tests have been attempted in one case, namely the Maina Sunuwar case. Samples were sent to a lab in India which was not able to generate results.<sup>27</sup>

Nevertheless, the taking of samples from family members of missing persons may be done at present for future purposes and future exhumations. Training around the taking and storage of samples and genetic information could be done with an appropriate organization.

Given that appropriate exhumations and identifications are often a critical component of prosecutions and reparations, it is in the interests of those who seek to address issues of accountability, impunity and redress for victims that these exhumations are conducted appropriately and without undue delay.

## CASE STUDY: BUILDING A LOCAL EXHUMATION TEAM

The following case study of the process followed in South Africa in building the Missing Persons Task Team illustrates key aspects of building local capacity.

### CASE STUDY: DEVELOPMENT OF AN EXHUMATION TEAM IN SOUTH AFRICA

In South Africa, a local exhumation team has been developed over the last two years from the following components:

- Post-graduate Anatomy students
- Post-graduate Archaeology students
- Forensic Pathologists
- Anatomy Professors
- Partnership with the Argentine Forensic Anthropology Team (EAAF)

The above have worked together with members of the Argentine Forensic Anthropology Team (EAAF) on particular cases and projects. The EAAF was able to train, manage and direct the exhumation, lab analysis and report writing work in accordance with international best practices. There is now one international EAAF member with both archaeological and anthropological expertise based in South Africa on a long term basis who works together with the investigation team and the local exhumation team. With this approach, the local exhumation team is becoming increasingly able to tackle projects independently. Recently a group of 10 individuals involved in this work formed the African Forensic Anthropology Team (AFAT).

Exhumations of fifty individuals (mostly in individual burial sites) have been conducted in South Africa, of whom 25 have been returned to families while the others are awaiting the results of DNA testing and/or other complications.

A paternity testing DNA lab based at a local South African university was trained in extracting DNA from old and damaged bone. Thus far they have managed to generate results from most of the case samples sent to them.

The key components of developing this successful situation was the following:

1. Partnership with an international forensic anthropology team. The team was brought to South Africa to conduct exhumations from time to time once investigations were complete. They worked in conjunction with locals with an emphasis on training.
2. Partnership with local institutions in the fields of anatomy, anthropology and archaeology.
3. Recruitment of their post-graduate students with a dedicated and committed interest in this field of work and human rights application of their skills. They were offered moderate payments for their work. Some will be sent abroad for short intensive field training this year.
4. Training and upgrading of a local DNA lab to process bone samples.
5. Liaison with local government and political structures regarding the return of remains to affected families.

South Africa has not used the ICRC for training purposes thus far, but this is part of future plans.

Although South Africa does not have thousands of missing persons cases, the above network of skills will be made available to the sub-region and continent more broadly, and the recruitment and training of other persons on the African continent to join AFAT.

## CONCLUDING COMMENTS

Work on disappearances clearly constitutes a key dynamic and fruitful site of future transitional justice activity in Nepal. This report has sought to highlight some of the challenges, problems and opportunities confronting this field in both conceptual and concrete terms. It is hoped that these will make a humble contribution to deepening and advancing the already strong work underway by various role players in Nepal.

Despite this report's numerous criticisms, Nepal offers tremendous potential and hope and has demonstrated significant advances regarding disappearances, built upon excellent work by numerous NGOs, international human rights organizations, and nascent victim groups. There is undoubtedly the potential for Nepal to develop path breaking approaches to addressing disappearances, which will have significant and long term impact on the region at large. The ICTJ can play a key role in setting the bar higher in many parts of the debates, programs, laws and practices.

Disappearances can constitute a dynamic intervention on the notion of an inclusive citizenship. The very act of disappearance is an abnegation of citizenship, usually of persons whose social, economic and political status is marginal. Investigations, exhumations, prosecutions and reparations all constitute an act of inclusion and a profound challenge to the discriminatory practices and hierarchical citizenship which made disappearances possible. In this way, tackling disappearances is not only about solving individual cases but challenging the very limits of a narrowly defined and highly stratified citizenship. This is, after all, at the heart of the challenge to ending violence and impunity in Nepal.

**LIST OF  
ORGANIZATIONS AND  
INDIVIDUALS  
INTERVIEWED**

**C**



**LIST OF ORGANIZATIONS AND INDIVIDUALS INTERVIEWED****International Center for Transitional Justice (ICTJ)**

Carla Fajardo  
Vasuki Nesiah  
Warisha Farasat

**Office of the High Commissioner for Human Rights (OHCHR)**

Sandra Beidas  
Annemarie Devereux  
Lucia Withers

**Former OHCHR staff member**

John Tynnella

**Former member of Detainee Investigation Team**

Govinda Bandi

**Deputy Attorney General, Nepal**

Narendra Pathak

**Advocacy Forum (AF)**

Kopila Adhikari  
Jitendra Bohara  
Mandira Sharma

**Nepal Bar Association (NBA)**

Balkrishna Devakota  
Govinda Bandi  
Hari Upreti

**National Human Rights Commission (NHRC) (Disappearance Unit)**

Basudev Bajgain  
Shyam Babu Kafle  
Gita Kumari Dahal  
Regam Maharjan

**International Commission of Jurists (ICJ)**

Sue Appleyard  
Hari Phuyal  
Satish Kharel  
Govinda Bandi

**ICRC**

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