

Rights of Armed Conflict Victims in Nepal

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Abstract

The conflict affected victims are those people who are subject to enforced disappearance, killings of the people in the civil war, women from lower caste are exposed to sexual violence, children are subject to recruitment by the Maoist, torture survivors and the people displaced from the conflict affected area in the ten-year armed conflict in Nepal. The family of the conflict affected victims have right to know the status of their loved ones either they are alive or dead as per the Constitution of Nepal. The Government have ratified the several International Human Rights Conventions. This article aims to critically analyze the implementation status of the International Human Rights Instrument, Geneva Conventions, national legislations about the rights of armed conflict victims as well as the landmark judgment preceded by the Supreme Court of Nepal for advocating the guarantee of the justice to the armed conflict victims. Nepal is state party of the Geneva Conventions, 1949 but it has not ratified the Protocols of the Geneva Conventions, 1977. Nepal has not ratified the Convention on Protection of All Persons Against the Enforced Disappearance, 2006. The national legislations have addressed the rights of the victim of the armed conflict, but they are not implemented properly by the regulatory authorities such as Enforced Disappearance Enquiry, Truth and Reconciliation Commission, Attorney General and National Human Rights Commission etc. Despite of their institutionalization the voices of conflict affected victims of Nepal are not heard and they are not benefitted by the justice system.

Keywords: Armed Conflict, Transitional Justice, Investigation, Prosecution, Punishment, Reparation, Compensation.

1. History of Armed Conflict in Nepal:

The Maoist has declared the people's war. (Advocacy Forum, 2021) In the course of ten-year armed conflict, they have attacked the members of the political parties and landlords. (Adhikari, 2014) In the one hand the disappearances of the people, infliction of the torture and arbitrary detention were widely practiced by the security forces of Nepal. (Human Rights Watch, 2020) On the other hand, the Maoists has committed the numerous crime such as extortion, forcible

recruitment of the children into the combat etc. (Human Rights Watch, 2004). On February 1, 2005 the state of emergency was declared by the then King Gyanendra. (Human Rights Watch, 2014) The activists, journalists, and human rights defenders were kept on illegal detention. (Khatri & Hoena, 2023) Later on the Seven-Party Alliance and the Maoists adopted a 12-point Letter of Understanding on 2005. (Sharma, 2019) The election of the Constituent Assembly and the commitment of the Maoists to join the multi-party democracy was made for the protection of human rights. (Rajamohan, 2006) The Comprehensive Peace Agreement (CPA) between Nepal's government and the Maoist was signed on November 21, 2006. (Gellner & Hutt, 2004) The international community worked for the establishment of United Nations Mission to Nepal (UNMIN) (Bhattarai & Khatri, 2015).

Methodology:

The author has reviewed the several doctrinal resources such as the constitution, other legislative enactment as well as the articles, journals and reports published by the various national and international bodies relating to the rights of armed conflict victims in Nepal. The landmark precedents of Supreme Court are critically analyzed in this article. The author has cited the references materials in accordance with the American Psychological Association (APA) 7th edition citation rules.

2. Rights of Armed Conflict Victims in Nepal:

A. International Legal Framework:

The Government of Nepal has acceded the Geneva Conventions, 1949 which protects the soldiers, prisoner of war and civilians etc. (Geneva Conventions, 1949) However, the Protocols of the Geneva Conventions, 1977 is not ratified by Nepal. There is application of the Second Protocol for the armed conflict of non-international nature. The Government has ratified the several International Human Rights Convention due to which national legislation must be enacted. Similarly, there is code of conduct for the officials engaged in the law enforcement. There is certain standard principle for the force and firearms officials. The issues relating to the prisoners are addressed by the minimum rules for the treatment of the prisoners.

B. Universal Declaration of Human Rights, 1948:

Since Nepal is state party to this Declaration, it is stated that the right to life, liberty and security of the people are protected. The fundamental rights of the people were violated in ten years armed conflict (United Nations, 1948).

C. Twin Covenant for the Protection of Civil & Political Rights as well as Economic, Social and Cultural Rights, (1966):

The Government of Nepal has ratified this Covenant on 14th May 1991. The right to life, freedom of speech, opinion and press etc. were violated due to the armed conflict in Nepal. Similarly, the right to freedom of movement from one place to another place was restricted. Further, the right to privacy and right to assemble peacefully in an association was prohibited. There was wide practice of the kidnapping of the teachers and students for the recruitment in the Maoist combatants (Khanal, 2017). Under the international obligation, the infliction of the torture is prohibited by the state parties. As a consequence, the victims of the torture are entitled to the compensation within the right to an effective remedy (Ramírez v. Mexico, 2012).

In the course of armed conflict, there was violation of the right to food, right to employment, right to social security and the right to property etc. Most of the people are compelled to leave their origin and move to the foreign countries for the employment opportunities due to displacement caused by the armed conflict. There was practice of the forceful donation of the money from the citizens. The property right of the citizens was infringed. The child right was violated by the civil war of Nepal. It is evident that there is deprivation of the basic education to the children. Although, it is restricted by the international law to use the children for political purpose, the children are used by the political parties in the protest.

D. There is introduction of Convention for the Elimination of Discrimination Against Women on 1979:

It has guaranteed the special rights of the women. Whereas, it is evident that several rights of the women are violated during armed conflict. It is reported that the women are prone to sexual violence. It has created the obligation for its state parties for the implementation of the reproductive rights of the women in the national level. The violent activity against the women is strictly prohibited by the law. There is lack of the implementation of the property rights of the women in comparison to men (United Nations, 1979).

E. Convention Against Torture, Cruel, Inhumane, Degrading Treatment and Punishment (CAT) 1984:

The provision enshrined on Article 14.1 creates the obligation to the state parties for the assurance of the redress, fair and adequate compensation as well as full rehabilitation for the victims of torture as per the needs of the victim and the gravity of the human rights violations.

Basically, Article 32 has guaranteed the access to justice and mechanisms for obtaining the redress. The compensation must not depend on the financial capabilities of the perpetrator, otherwise there is discrimination between the victims of rich and poor perpetrators (United Nations, 1984).

F. Principles Relating to Reparation for the Victims of Violations of International Human Rights Law and International Humanitarian Law, 2005:

It requires state parties for the assurance of the domestic law is consistent with their international legal obligations by providing adequate, effective, prompt and appropriate remedies along with the reparation. Further, they should ensure the prevention of the re-traumatization of the victim during the legal procedures. The principle 18 establishes that victims of gross violations of international human rights and international humanitarian law must be awarded with the reparation as per the gravity of the violation of the human rights (Advocacy Forum Nepal, 2009).

G. The Convention is concluded for the protection of the rights of children on 2000.

This Convention was acceded by Nepal. The children were not safe during the armed conflict. The children were kidnapped by the Maoist. The children were employed as spy, porter and the combatants. The minors were recruited in the Maoist. As a consequence of the war, the rights of the children such as right to education, health and nutrition were badly affected (United Nations, 2000).

H. The Convention for the Protection of All Persons against the Enforced Disappearance is concluded on 2006:

This Convention is not ratified by Nepal. It is the responsibility of each state party to search, locate and release the disappeared person along with the remains of the dead body. It has created the obligation to provide the reparation and compensation to the victim. It must provide the rehabilitation to the victim and guarantees the non-repetition of the act of the enforced disappearance (United Nations, 2006).

I. There was Declaration made for the protection of all persons from enforced disappearance on 1992:

The state must take the legislative, administrative, judicial measures for the prevention of the enforced disappearance of the people even during the state of war or the public emergency. There must not be extradition where there is eminent danger of the enforced disappearance. The detained person must be produced before the judicial authority. There must be penalties for the officials acting without any legal justification of detention. The states are obliged for taking any

lawful action for providing the justice. The persons alleged for the commission of the offences as per the article 4, are not provided amnesty (United Nations, 1992).

3. National Legal Framework:

a. Constitution of Nepal 2072:

Every citizen has freedom to live with dignity. There is protection of the personal liberty of the citizens except in accordance with the law. All citizens are equal before law. The person is informed while detaining in the custody about the ground for his or her arrest. The detainee can consult with the lawyer of their choice. There must be court presence of the accused within twenty-four hours of the arrest. This Constitution has guaranteed the right to a fair trial. Any indigent party are entitled to free legal aid. The victim must be informed about their case and they are compensated via court. The accused must not be subject to physical or mental torture. The child must not be recruited in army, police or any armed group and exposed to abuse or physical, mental, sexual or other form of exploitation. The physical or mental torture in home or school is prohibited for the child. The families of the martyrs, disappeared persons, disabled and injured from the people's movements are given priority for the education, health, employment, housing and social security for. One can file case in the court as per the right to constitutional remedy for the infringement of the fundamental rights of the citizen (Government of Nepal, 2072).

b. Muluki Criminal Code 2074:

It has defined the several elements of the rape. The adult cannot have sex with the female without her consent. The sex is prohibited with the minor. The consent of the minor is not lawful. If the consent is sought by the coercion, undue influence, intimidation, threat, misrepresentation and kidnapping etc., it is invalid in the eye of law. The punishment is sixteen to twenty years for the rape of the girl below the ten years whereas, there is seven years punishment for the rape of adult woman above the age of eighteen years. The government employee must not have sexual intercourse with the person held in detention or facilitate another person for sexual intercourse. The offender is kept on prison for three years. The offender of the rape is not provided with the facility of the amnesty (Government of Nepal, 2074).

c. Enforced Disappearance Enquiry, Truth and Reconciliation Commission Act, 2071:

Reconciliation between Victim and Perpetrator: The perpetrator must apologize with the victim. The victim is entitled to the reasonable compensation. It organizes the reconciliation with the participation of the perpetrator, victim and their family. In case of the death of the victim

the Commission brings the reconciliation between the perpetrator and the family of the victim. If the recommendation is not made for amnesty, it would not make reconciliation between the victim and the perpetrator (Government of Nepal, 2071).

Reparation: The compensation includes the free education, medical treatment, skill-oriented training, loan facilities without interest, arrangement for settlement and facility of the employment etc. There are certain criteria and standard for the determination of the compensation, facility or concession. The compensation is provided to dependents, if the victim has died.

Return of the Property: If there is loss to the victim due to the forcible capture of the property, the adequate compensation must be provided to the victim.

Recommendation For Taking Action Against Perpetrator: It makes the recommendation to the Government of Nepal for taking the action against the person involved in the offence of gross violation of human rights. It does not make recommendation for taking the action against the perpetrators who has entered into reconciliation with the victim as well as who were recommended for amnesty. If the perpetrator is found guilty in more than one offence and is not recommended for amnesty for any one particular offence, such perpetrator is recommended for action with regard to that offence not recommended for amnesty. There is prosecution for the gross violation of human rights after getting the recommendation of the Commissions. If any person holding the public office is guilty, it must write to the concerned authority to take departmental action against such a person, along with the appropriate punishment.

Conditions of Granting Amnesty to The Perpetrator: There is exception to amnesty rule such as amnesty is not granted to the offence of rape and offence of grave nature. There is mandatory provision of application by the perpetrator to the Commission for receiving the amnesty. The perpetrator must provide the disclosure of truth and facts about the activities during the course of the armed conflict and must record the statement with the Commission. The application must include the confession of the offender about the crimes committed during the armed conflict. One must show regrets and apologize with the victim. One must commit for non-repetition of such act. It must decide to make recommendation for the amnesty. It asks the perpetrator for providing the reasonable compensation to the victim. If an amnesty is granted by the Government of Nepal, the name of such a person is published in the Nepal Gazette (Government of Nepal, 2071).

The amendment of Enforced Disappearance Enquiry, Truth and Reconciliation Commission Act 2071.

The tripartite agreement was concluded for the listing of intentional and arbitrary killings within the serious violations of human rights. In accordance with the agreement, there is reduction of seventy five percent while providing the sentence. There is right of the victim to visit the court who is unwilling to conclude the reconciliation with the perpetrators. There is arrangement of reparation and compensation to the disqualified Maoist combatants, including the families of security personnel who died or were injured during the armed conflict (Report on TRC Bill, 2024).

d. Enforced Disappearance Enquiry Commission Rules 2072:

The complaint may be filed by the victim or any person on behalf of the victim via email, post or appearing physically in the concerned authority. There is special provision of filing the complaint of women, children, senior citizen or disabled people through the office of Government of Nepal or local level with the help of women official. The detail investigation is carried by the investigating officer by coordinating with the concerned Ministry. There is arrangement of the closed hearing, sign language and the child psychologist. The investigating officer collect the information from the victim and it is kept confidential. The perpetrator must write apology while concluding the agreement of the reconciliation. The application must be filed to the Commission for the security, temporary safe home in co-ordination with the authority for the security. There are several grounds for the determination of the compensation, facilities and concession. There is provision relating to amnesty application which states regret of inhuman act and apology from victim. The amnesty is granted after getting written consent of the victim (Government of Nepal, 2072).

e. Compensation Relating to Torture Act 2053:

The government doctor examines the detainee. The complaint must clearly state the reason and time period of detention along with the amount of compensation to be provided to the victim. The Government of Nepal have to provide the compensation of one hundred thousand rupees to the victim, if there is order by the District Court. There is imposition of the fine of five thousand rupees, if the complaint is found to be fake. The departmental action is taken for government employee. If the physical or mental injury is incurable, the age factor of victim and their family obligation, expenses for the treatment are taken into consideration. If the victim died, the number of the family members dependent on their income and minimum expenses for their livelihood are taken into consideration for determining the compensation. The chief district officer must provide compensation within thirty-five days if the application is made within one year. If the request is

made by the concerned office In-charge, The Government Attorney must appear in the court for making defense on the complaint filed (Government of Nepal, 2072).

f. Crime Victim Protection Act 2075:

The victims of the crime are categorized into the first-grade victim, second grade victim and family victim. The first-grade victim is the dead person or person suffering from the damage due to the offence. The family victim includes the mother, father, husband, wife of the victim living in the joint family. The victims of the crime are entitled to several kinds of the rights such as right to get fair treatment, right against discrimination. The right to privacy is guaranteed to the victims of the rape, incest, human trafficking, sexual harassment etc. The victim must be updated about the hearings and the outcome of the case. The victim has the right to be protected from the attack of the accused. The victim has right to express their opinion about the charges against the suspect, agreement for the plea bargaining, for making additional claim in the chargesheet and for determining the sentence of the offender etc. The victim has right to appoint the lawyer of their choice. The appeal can be made in the High Court in case of dissatisfaction. There is provision of medical treatment or interim relief for the victim. The compensation is provided from the Fund. The court has right to attach the property of the offender for providing compensation to the victim. The compensation is determined on the basis of the financial loss, loss of income generation capacity, damage caused to physical, intellectual, sexual or reproductive capacity, negative effect of rape to family prestige of the victim and the mental damage borne by the victim are taken into consideration. If the victim died, the compensation is provided to the dependents of the victim (Government of Nepal, 2072).

g. National Human Rights Commission Act 2068:

The complaint can be filed within six months at the Commission. The investigation report must be prepared by the investigation team. The reconciliation cannot be conducted, if the joint petition of the victim and the perpetrator are not registered. The economic compensation is maximum three hundred thousand rupees. The Office of Attorney General must inform the commission if the case cannot be filed. There must be co-operative relation with the national and international organizations. The Commission give recommendation to the victim to file the case in the court for seeking the justice (Government of Nepal, 2068).

4. Concerned Authorities for the Protection of Victims of Armed Conflict:

a. Ministry of Peace and Reconstruction was established:

The requirement of the new law is decided by the Ministry. The Ministry make arrangement for the compensation to the victim.

b. Commission relating to Enforced Disappearance Enquiry, Truth and Reconciliation Commission:

It has a power to investigate the offences relating to the violation of human rights. There is provision of the reconciliation. It makes recommendation for legal action against the perpetrators to whom amnesty is not granted. It consults with the concerned court and investigate into the cases sub-judice under various courts. It investigates about the incidents of gross violations of human rights. It makes the separate arrangement for the facilitation of children, senior citizens, person with disability and the victim of sexual violence for filing the complaint with the Commission. If an investigation is conducted against any person holding public office, the Commission writes to the concerned authority in order to suspend the accused for three months in maximum. It has power to excavate the place systematically and find out the facts about the human remains and must test DNA or autopsy examination (Government of Nepal, 2071).

c. The Office of Attorney General:

The Ministry must inform the Attorney General for the prosecution in case of the gross violation of human rights. The Attorney General or the Government Attorney decides whether the perpetrator must be prosecuted or not. The Attorney General have to mention the basis and reason of the prosecution. The concerned Government Attorney bring the prosecution against the perpetrator in the Special Court (Government of Nepal, 2072).

d. National Human Rights Commission (NHRC) :

It is a Constitutional Body set up for the protection and the promotion of the human rights. It investigates the complaints of violations of human rights of an individual or group or abetment and make recommendation for the action against the perpetrators. It makes recommendation to the concerned authority to take departmental action against such official who fails to fulfil the responsibility. There is provision of departmental action against the human rights violators. It conducts monitoring of the implementation of the International Conventions. If it is required to take action immediately, the officials have right to enter any government office or elsewhere without notice and can rescue such person. The compensation is provided to the victim. (Government of Nepal, 2072). It inspects the prisons for the protection of human rights. It conducts investigations about the claims of the human rights violation. It monitors the implementation of the existing human rights legislations of Nepal. It recommends the Government to formulate new legislations or for amendments or to become a party to any International or Regional Conventions of Human Rights (Government of Nepal, 2068).

5. Judicial Response on Conflict Affected Victims:

Colonial Kumar Lama was arrested by United Kingdom on the basis of the Universal Principle on 2013. There was registration of charges of torture against him. On August 2016, he was acquitted from the charge of torture of Karam Hussain after conducting the long trial. The jury was unable to provide the judgment relating to the charges of Janak Raut (Bowcott, 2016). On September 2016, The Crown Prosecution Service informed the court that there is no retrial for the second charge (Massage & Sharma, 2018). The victims have right to plead for justice around the world, if the serious cases are not prosecuted in their home countries. The prosecutors may bring the cases of crimes committed long years back, if the allegations amount to international crimes for example the infliction of torture. The Nepali perpetrator Colonial Kumar Lama was kept on trial for the serious conflict era human rights violations (Lama, 2018).

Mira Dhungana v. Prime Minister, Council of Minister, states that the main objective of transitional justice is to prevent serious crimes against humanitarian law or violation of human rights during the conflict, to prevent the recurrence of those crimes, to create an atmosphere of national reconciliation that instills a sense of self-respect in the victims, and to contribute to the path of peace by restoring the rule of law. There should not be provision for granting the amnesty to the perpetrators of serious crimes (*Mira Dhungana v. Prime Minister Council of Minister*, 2072).

The case of *Govinda Prasad Bandi v. Attorney General, Mukti Narayan Pradhan* states that it cannot be said that the regular criminal justice system was suspended or inactive when the transitional justice system was not arranged to investigate and prosecute cases of human rights violations during the armed conflict. There is absence of a law regarding the formation of a high-level Truth and Reconciliation Commission. The regular criminal justice system cannot remain inactive for investigations and prosecutions of the crimes during the armed conflict. In a democratic country, law and justice system are never dormant (*Govinda Prasad Bandi v. Attorney General, Mukti Narayan Pradhan*, 2070).

In another case *Madhav Kumar Basnet v. Office of the Prime Minister*, states that the statute of limitations of filing the cases relating to the gross violations of international human rights law and humanitarian law are against the principles of the criminal law. The Supreme Court has issued the order of *Mandamus* in the name of Government of Nepal for the investigation of the enforced disappearances (*Madhav Kumar Basnet et al v. Office of the Prime Minister*, 2070).

In the case of *Dev Maharjan v. Government of Nepal*, the plaintiff was subjected to enforced

disappearance and torture during the conflict. It is suggested for the amendment of the national legislation in order to comply with the ICCPR. It is for the extension of the statutory limitations and repealing those laws which grants impunity to the alleged perpetrators of torture and enforced disappearance. The establishment of the Enforced Disappearance Inquiry Commissions and the compensatory measures are not sufficient for the effective remedies under the ICCPR (Dev Bahadur Maharjan v. Government of Nepal, 2069).

The case of Liladhar Bhandari v. Government of Nepal, is about the forceful eviction and confiscation of the land by the armed groups. The Supreme court has ordered the return of the unlawfully seized property and provide the compensation for the losses. The right to life and right to property are not suspended during the conflict. (Liladhar Bhandari v. Government of Nepal, 2065)

The Supreme Court of Nepal has stated the act of enforced disappearance has violated the right to life, right to freedom, and right relating to justice. In the case of Rajendra Prasad Dhakal v. Government of Nepal, the Supreme Court has issued the order for the incorporation of the international principles in the national legislation such as the remedial right. There is facility of the interim relief for the families of the victims of the armed conflict. The person convicted of the enforced disappearance are not provided with the facility of the Amnesty. (Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal v. Government of Nepal, Ministry of Home Affairs, 2064.)

6. Challenges of the Armed Conflict Victims in Nepal:

The majority of the crimes committed during the armed conflict are not addressed by the Transitional Justice. The criminals are granted amnesty which tarnishes the effectiveness of the transitional justice. It dissatisfies the victims of the armed conflict. The prevailing laws and policies of Nepal fails to incorporate the victim centric approach. The reconciliation approach is ineffective. The functions of the Truth Reconciliation Commission and the Enforced Disappearance Inquiry Commission are not carried out smoothly in the current scenario. There is non-fulfillment of the vacancies of the authoritative positions in the Commissions.

7. Conclusion and Suggestions:

It is concluded that the victims of the ten years armed conflict have not sense the justice. There is formation of the Truth and Reconciliation Commission and Enforced Disappearance Enquiry Commission by Nepalese government. These Commissions are unable to address the issues of the victim. As a consequence, it is very difficult to achieve the goals of Transitional

Justice. There must be educational and medical services to the family of the disappeared people. There must be enforcement of the laws by the Government of Nepal for holding the offenders accountable.

A. Suggestions To the Government of Nepal:

There must be enactment of the law for the establishment of the principle of command responsibility in criminal law. The transitional justice and criminal justice are separate mechanisms they must be independent. There must not be role of the ministries about the prosecutions or withdrawal of the cases. There must be incorporation of the reparation's mechanisms and proportionate sentences in the prosecution. The ratification of the Rome Statute must be done by the Nepalese Government. Similarly, it is suggested that the Government of Nepal must ratify the Convention Against the Enforced Disappearances, and the Optional Protocol of the Convention against Torture. The Government of Nepal is obliged for the amendment in the laws against the torture and enforced disappearances as per the international standards.

B. Suggestions To Commission of Investigation of Enforced Disappeared Persons (CIEDP) and the Truth & Reconciliation Commission (TRC)

There must be implementation of the directives of the Supreme Court. The appointment of the Commissioners must be transparent. The investigation of the rape and sexual violence in the course of armed conflict must be carried out. The right to privacy and the dignity of survivors must be taken into consideration. They must refer survivors and their families for the psychosocial counseling. The offender must be punished as per the gravity of the offences.

C. Suggestions For the National Human Rights Commission:

It must carry out the investigation and recommend to the Government of the human rights violations' cases. It must keep record of the list of human rights violators. There must be recommendation to the government and security forces for withholding the promotion of the alleged offender.

D. Suggestions To the Office of Attorney-General:

The police and the public prosecutors must strictly register the first information report and prosecute the cases of the enforced disappearance, torture, rape or other grave human rights violations. The disciplinary action must be taken against them in case of non-compliance with the orders of the court. The office of the Attorney General must form the special unit for the

investigation of ill-treatment in the custody. The Attorney General has duty to conduct the independent investigations and prosecutions for the international crimes.

E. Suggestions To the Judiciary:

The precedent must be on the basis of the International human rights treaty. There must be incorporation of the international standards for the punishment. The provision of the amnesty should not be implemented for the cases of the human rights violations and the crimes of international nature. There must be compulsory prosecution of the war crimes and crime against humanity.

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