

**Study Report  
On  
Execution Status of Supreme Court and  
Appellate Court Orders/Judgments relating to  
Transitional Justice  
2016**



**National Judicial Academy, Nepal**  
Manamaiju, Kathmandu



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## **Study Group**

Hon'ble Rishikesh Wagle, District Judge, Kathmandu District Court  
Mr. Sanjeeb Raj Regmi, Joint Govt. Attorney, Office of the Attorney General  
Mr. Raju Prasad Chapagain, Advocate  
Mr. Shreekrishna Mulmi, Deputy Director, National Judicial Academy  
Mr. Paras Poudel, Deputy Director, National Judicial Academy  
Mr. Rajan Kumar KC, Program Manager, National Judicial Academy

## **Hon. Dr. Hari Bansh Tripathi - Translator - Nepali to English**

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The conclusions and recommendations of the study Report on the implementation status of the orders and judgments issued by the Supreme Court and the Appellate Courts in regard to transitional justice have been prepared taking into consideration also the recommendations made by the stakeholders. Notwithstanding the fact that the coordination and publication of the study was undertaken by National Judicial Academy, the conclusions and recommendations of the study belong exclusively to the study Group, and, in no way, it reflects the viewpoints of NJA.

## **PREFACE**

National Judicial Academy, Nepal is an autonomous corporate body with perpetual succession established with the objectives of enhancing the functional competence and professional efficiency of the human resources involved in judicial administration, conducting study and research in the area of law and justice and disseminating judicial information.

It is the responsibility of NJA to assist in making the services provided by the judicial system more effective and ensuring people's access to justice by increasing the professional competence and efficiency of the human resources through judicial education. It is highly necessary to enhance the competence and efficiency of the judicial human resources including the judges so as to address the increasing expectations of the people from the court and the judicial bodies and to maintain people's trust towards it. No public institution can increase its effectiveness without the enhancement of professionalism and competence of the human resources. Taking this fact into consideration, NJA has been conducting trainings, talk programs and publication and research related activities for the enhancement of knowledge, skill and competence of the judicial human resources ever since its establishment.

There had been extensive and serious violations of human rights during the decade long armed conflict raged in Nepal. Hundreds of petitions and cases were lodged in various courts seeking criminal prosecution of the perpetrators of human rights violations as well as reparation for the victims. In course of disposal of those cases, the judiciary has delivered some significant judgments and orders. Through those orders or decisions the courts have issued directives to take legal action against the perpetrators of human rights violations, to grant reparation to the victims, to find out the truth and to introduce institutional reforms. This Academy had entrusted an expert group with the objective of conducting a study and research to acquire information about the implementation status of those judgments and orders and to find out the reasons of non-implementation of the judgments and orders which could not be implemented, and to make recommendations in that regard. The present Report has been published with the objective of bringing this Report submitted by the Study Group to public notice.

The Academy extends its thanks to International Commission of Jurists (ICJ), Nepal which provided technical and financial support for this study, its Senior Legal Adviser Mr. Govinda 'Bandi' and National Legal Advisers Mr. Kashiram Dhungana and Ms. Laxmi Pokharel who provided support and feedback as facilitators. The Academy also extends its gratitude to the transitional justice experts, the representatives of the bodies relating to implementation of judgments, the conflict victims and human rights activists who had provided their feedbacks in course of the study. Thanks and appreciations of the Academy are also due to the expert participants who gave their invaluable opinions and suggestions in the consultation meetings organized with a view to giving final shape to the study Report.

NJA also extends its appreciations to Hon'ble District Judge of Kathmandu District Court Rishikesh Wagle, Joint Govt. Attorney of Office of the Attorney General Mr. Sanjeeb Raj Regmi, Advocate Mr. Raju Prasad Chapagain, Deputy Directors of NJA Mr. Shreekrishna Mulmi and Mr. Paras Poudel and Program Manager of NJA Mr. Rajan Kumar KC. Likewise, the Academy is also thankful to Registrar of NJA Mr. Bimal Poudel for coordinating the present study report.

**National Judicial Academy**



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# CHAPTER – 1

## Preliminary

### 1.1 Introduction:

Following a negotiated settlement of the decade long armed conflict (1996-2006), the concept of transitional justice became a topic of discussion in the context of Nepal. The armed conflict between Nepal Government and Nepal Communist Party (Maoists) accounted for the death of more than 13,000 people, enforced disappearance of more than 1000 persons and thousands of victims of torture and displacements, besides hundreds of thousands of people have been victimized in various form. It has been recognized as a State obligation to address the serious violations of human rights and abuses committed during the armed conflict, and to provide reparation to the victims. It is for this reason that this issue has occupied a place for discussion on the basis of the obligation of the State.

The State should not deny justice to anyone in course of an armed conflict. Everybody guilty of violations of law should come under the orbit of criminal prosecution whereas the victims are entitled to right to justice, reparation and rehabilitation. In this very context, the Supreme Court and some subordinate courts have delivered some significant orders and judgments in cases relating to transitional justice, impunity and accountability. In some judgments the perpetrators have been found guilty whereas in some cases orders have been given to carryout further investigation and prosecution. In a few other cases orders have been issued to make provisions for creating transitional justice mechanisms and to make necessary arrangements for providing reparation and rehabilitation to the victims.

The Court has also spoken on the issue of formation and mandate of transitional justice mechanisms such as the Truth and Reconciliation Commission and the Commission on Investigation of Disappeared Persons. All the judgments seem to be focused on protection of human rights, ending impunity and holding the perpetrators accountable for violating human rights in course of the conflict. Implementation of those judgments is necessary for achieving those goals. The issues that have been incorporated in this study are related to: What is the status of implementation of those judgments? Why some of the judgments could not be implemented? And what and how reforms should be made in the present state of affairs?

### 1.2 Objectives of the Study

Following are the objectives of the present research which has studied about the implementation status of the orders and judgments issued by the Supreme Court and Appellate Courts in respect of transitional justice, impunity and accountability:

- To collect various judgments and orders issued by the Supreme Court and Appellate Courts in the context of transitional justice and analyze the contents of the orders and the bodies entrusted to execute those orders.
- To undertake discussion with the experts, concerned governmental and non-governmental agencies and conflict victims and human rights activists about implementation of the judgments and orders issued in the context of transitional

justice and to collect their views and opinions regarding reasons for non-implementation of the orders and the judgments.

- To analyze the legal provisions and standards existing at the international level including those of Nepal and the orders issued by the Nepali courts and their execution.
- To identify the status of implementation of the judgments delivered by the Supreme Court and the Appellate Courts in the context of transitional justice and to make necessary recommendations for reform.

### **1.3 Method and Limitations of Study**

Theoretical and Empirical methods have been adopted in the present study. The concepts of transitional justice developed so far, national and international provisions and available literature of research-oriented articles and reports have formed the basis of information of this study.

Focus group discussions had been conducted with the target groups at Pokhara, Hetauda and Nepalgunj in a bid to study the state of the stakeholder bodies and conflict victims' access to justice. Judges, judicial Officers, Government Attorneys, Officers of the Nepal Government, an Officer of Human Rights Commission, social activists, Police Officers and law practitioners had participated in those interactions. In the preliminary phase of the study, focus group discussion had been organized in Kathmandu Valley involving thematic experts, representatives of the judgments implementing bodies, conflict victims and human rights activists, and their views and suggestions had been collected. The knowledge acquired from those interactions has been used as information or statistics in the study.

In order to analyze of the status of implementation, the judgments and orders have been classified in three categories: judgments and orders which have been executed, those which have been partially executed and those which have not been executed. In case only one matter has been executed whereas the judgment or order required execution of more than one matter or in case only one order could not be executed out of all the orders which required implementation, such a case has also been placed in the category of partial execution.

There are also some limitations of the study. This study is confined only to 21 judgments/orders delivered by the Supreme Court and eight judgments/orders delivered by Appellate Courts. The judgments/orders issued by the Supreme Court have been selected on the basis of gravity of the issue involved in the matter. As regards the decisions/orders made by Appellate Courts, it has been possible to study only those decisions/orders which could be collected. The decisions made by District Courts in the context of transitional justice have not been included in this study. The completeness or incompleteness and merits and demerits of the judgments and orders have not been made a matter of analysis in this study.

Though adequate discussions were made and suggestions collected at the places selected for the study, it could not be possible to reach other places because of time and recourse constraints. As a result, what is the status of the cases about which petitions or complaints

were not filed and of those cases which could not come before the court has thus remained outside the purview of this Study?

#### **1.4 Structure of the Study**

For the sake of convenience, the Study Report has been divided into five Chapters. Chapter 1 deals with the objectives, methodology and limitations of the study. Chapter 2 is devoted to the context of the transitional justice process in Nepal. Chapter 3 analyzes the state of execution of the judgments. Chapter 4 mentions about the causes accountable for non-execution of the judgments. And finally, Chapter 5 presents the conclusions, the recommendations and the Annexes.



# CHAPTER – 2

## Transitional Justice and the Context of Nepal

### 2.1 Concept and Meaning of Transitional Justice

Transitional justice comes to play a role in the context of end of armed conflict or after a negotiated settlement to provide justice for gross violations of human rights committed before. Its objective is to ensure justice to the victims by addressing the serious violations of human rights committed during the conflict. If it so happens, it will help strengthen the rule of law and a system of governance prone to respecting the human rights. However, the society, which has recently emerged from an armed conflict and is moving towards peace, may encounter numerous difficulties including economic stability in order to address the violations of the existing human rights law and the humanitarian law. In fact, how to address the past violations of human rights, how to ensure justice to the victims and how to create an environment for sustainable peace and reconciliation in the society are particularly the major challenges of transitional justice.

The victims, their families or children who suffered from the human rights violations or excesses can hardly forget the pain of injustice experienced by them. In that sense, not only the victims, even their children and even the generation to come continue to look for justice. State should not also forget this. If any section the society or community is gripped by a sense of injustice or is afflicted by some grievance in this regard, it will be counterproductive for both the society and the State. Therefore, after the entry of the State into a human rights friendly regime in course of resolution of the armed conflict or war, the State must restore its credentials by addressing the pains and sufferings and injustice underwent by the victims. It is this belief which has led to the evolution and practice of transitional justice in the world.

Notwithstanding the established belief that the past serious violations of human rights must compulsorily be addressed, uniformity can be hardly found in the practices and standards applicable in this regard. As it's scope is too wide, it is not possible to formulate the standards. It has been stated in a report commissioned by Secretary General of UN, "Transitional justice ... the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvements (and none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof."<sup>1</sup>

A State may not be able to address gross violations of humanitarian law and human rights abuses while autocratic rule, Military rule, armed conflict or state of war is going on. State may not have adequate legal frame work to deal with such situation.. Thus, in this context, as the regular mechanisms responsible for public administration and peace and order seem to

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1 Report of the Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies Report of the Secretary General," UNDOC S/2004/61623 (Aug. 2004).

be inadequate to serve the purpose, various countries have developed a practice of establishing special mechanism for transitional justice.

In addition to formal justice administration, some additional measures are also adopted in transitional justice system. Those measures are guided by the objectives of truth-seeking, bringing perpetrators to justice, reparation for the victims and institutional reform. Therefore, transitional justice refers comprehensive measures which aim to address past the violation humanitarian law, human rights laws, including abuses, injustice and sufferings Those measures include establishing truth, bringing violators of humanitarian law to justice, reparation for harm and loss, and various kinds of institutional reforms for guarantees of no repetition.<sup>2</sup> In fact, transitional justice should be focused on addressing the past human rights abuses, and ensuring accountability, guaranteeing justice and reconciliation. In this sense, the scope of transitional justice looks wider than that of the regular criminal justice system.

Even though the transitional justice mechanisms may consist of both judicial and non-judicial measures, there cannot be divergence of views about the presence of impartiality, fairness, transparency and accountability in all the mechanisms. Basically, the main objective of transitional justice is the prevention of recurrence of violations of human rights and the humanitarian law that occurred in the past and in order to make sure that the society could move forward for peace and development and also creating a sense of justice also among the people who had felt injustice due to the past incidents. Thus the transitional justice is combination of process and mechanism for post conflict justice embedded with fundamental value of justice.

## 2.2 International Practices Relating to Transitional Justice

The practice of transitional justice at the international level is not very old. The practice of punishing responsible for abuses during war is believed to have started only after establishment of Nuremberg and Tokyo Tribunals following the Second World War. The concept of transitional justice has evolved from this very practice.<sup>3</sup> Although this practice holds the senior officials of German and Japanese Armies involved criminally accountable, those Tribunals were subjected to widespread criticism in regard to fairness of the trial proceedings. Some people described it as "Victor's Justice."<sup>4</sup> The legal principles developed by the said Tribunal were finally codified by the International Law Commission as the Nuremberg Principles.<sup>5</sup> Thereafter, some members of the Greek Army were prosecuted in 1975 for the abuses committed by them.

Even when there was no scope of prosecuting the perpetrators, the practice of investigating human rights violations and finding out the truth through Truth Commission was started from

2 See at What is Transitional Justice? <https://www.ictr.org/about/transitional-justice> (accessed on Jan. 3, 2016)

3 Govinda Sharma "Bandi," "Introduction to Transitional Justice," Transitional Justice in Nepal, Editor Govind Sharma "Bandi," Nepal Bar Association, First Issue, 2013.

4 Is Victor's Justice in Nuremberg Trial Justified or Not, uploaded by Salman Kazmi, Quaid-e-Azam Law College, Lahore, Pakistan, International Law, Faculty Member, See at: [https://www.academia.edu/66881861//Is\\_victors\\_Justice\\_in\\_Nuremberg\\_Trial\\_Justified\\_or\\_not\\_](https://www.academia.edu/66881861//Is_victors_Justice_in_Nuremberg_Trial_Justified_or_not_) (accessed on Jan. 3, 2016)

5 The International Nuremberg Principles Academy, See at: [http://www.nurembergacademy.org/the\\_nuremberg\\_legacy/the\\_nuremberg\\_principles/](http://www.nurembergacademy.org/the_nuremberg_legacy/the_nuremberg_principles/).

Argentina in 1983, and later on other Latin American countries also adopted it. Subsequently, the South African Truth and Reconciliation Commission set up in 1994 became an indispensable institution of transitional justice.<sup>6</sup> At present, the Truth and Reconciliation Commission has evolved as a complementary, participatory, reconciliatory and appropriate process for peace and development.

Since 1990, different forms of transitional justice measures came into practice. In the context of the global political system gradually moving towards democratization from absolute system of governance prevailing earlier in various countries of the world, different types of more intensive practice have been made in regard to transitional justice. The nations which became independent from the former Soviet Union started the practice of vetting of the persons involved in human rights violations during the earlier rule by vetting them from holding any public office. This very practice is treated as an additional measure of transitional justice.

Even though efforts were made after 1950 to hold perpetrators criminally accountable for violations of human rights law and humanitarian law committed in course of armed conflict and during the autocratic regime, it could not acquire concrete form due to the political wrangling of the Cold War. Even though there had been widespread violations of human rights after the Second World War in countries like Russia, Vietnam, Chile, Philippines, Congo, Bangladesh, Uganda, Iraq, Indonesia, El Salvador, Burundi, Argentina, Somalia etc., nothing was done to make the perpetrators accountable for their criminal liability.

It was only after the end of the Cold War that UN Security Council provided for addressing the widespread violations of human rights committed in former Yugoslavia<sup>7</sup> and Rwanda<sup>8</sup> through criminal prosecutions. Similarly, it has been practiced in Sierra Leone, Kosovo, East Timor and Cambodia to conduct criminal prosecution and adjudication through hybrid tribunals comprising judges from international level from the concerned countries. After the establishment of International Criminal Court in 2002 in accordance with the Rome Statute, a permanent mechanism<sup>9</sup> was created to prosecute and try the guilty of gross violations of human rights law and humanitarian law in the International Criminal Court in case of unable or unwillingness to make them accountable for their criminal liability through the national judicial system.

### 2.3 International Legal Provisions

The Charter of the United Nations and the Universal Declaration of Human Rights may be universally treated as the basic international documents relating to justice. UN was established with the objective of world peace, protection of human rights and security. The UN Security Council has been empowered to adopt necessary measures for world peace and

6 Christian Triantaphyllis, *Transitional Justice: Are Truth and Reconciliation Commissions Worth It?* See at <http://periodicos.unb.br/index.php/redunb/article/viewfile/7096/5593> (accessed on Jan. 3, 2016)

7 International Criminal Tribunal for the former Yugoslavia (ICTY)

8 International Criminal Tribunal for the Rwanda (ICTR)

9 International Criminal Court, See at [http://www.icc-cip.int/en\\_menus/icc/about%20the%20court/pages/about%20the%20court.aspx](http://www.icc-cip.int/en_menus/icc/about%20the%20court/pages/about%20the%20court.aspx).

security, if so needed.<sup>10</sup> As it has been mentioned in Article 1 of the Charter that international cooperation shall be mobilized for promoting a sense of respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, this reflects UNO's commitment to justice.

The provisions relating to the need of dignified treatment to human beings, every body's right to life, right to freedom, right to equality and the right to justice enshrined in the Universal Declaration of Human Rights promulgated in 1948 recognize the significance of human beings. Recognizing the provisions enshrined in the Declaration as the basic pillars, various legal mechanisms have been developed by the UN in order to ensure human rights and to address the violations of human rights.

The international community promulgated the Convention on the Prevention and Punishment of Crime of Genocide, 1948 realizing the need of immediately addressing the abuses committed against humanity during the Second World War, especially targeting a special group.<sup>11</sup> Genocide has been defined in this Convention to mean any of the following acts committed with an intent to destroy, in whole or in part, a national, ethnic, racial or religious group, such as: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent birth within the group, and forcibly transferring children of the group to another group. It has been described as the obligations of a State to make such acts punishable, to provide for effective control and punishment in the Constitution and law of the State party, to make the provision about a competent court for awarding punishment and not to grant any concession on any ground whatsoever. Likewise, the Convention has made a provision about extradition of a person accused of genocide and also recognized the interventionist role of the United Nations.

The Tribunals established in Yugoslavia and Rwanda in the 1990's at the initiative of UN for prosecuting the guilty of violations of human rights and the humanitarian law have set a precedent that the UN could intervene in case of failure to prosecute the guilty for those offences at the local level so as to ensuring justice.

Even before the establishment of UN, the Hague Conventions had been adopted in regard to weapons and method used in war. The warring parties are required to comply with them as the Code of Conduct. In 1949, the four Geneva Conventions were adopted. There are four Geneva Conventions, namely, (i) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,<sup>12</sup> (ii) Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Force at Sea,<sup>13</sup> (iii)

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10 Article 24 of the UN Charter

11 Convention for the Prevention and Punishment of Crime of Genocide, 1948

12 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August, 1949

13 Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12, August 1949.

Convention Relating to the Treatment of Prisoners of War,<sup>14</sup> and (iv) Convention Relating to the Protection of Civilian Persons in Times of War.<sup>15</sup> As the Geneva Conventions have made provisions concerning protection of the rights of the civilians, those provisions are also directly related to transitional justice. The common Article 3 of the said Conventions has mentioned about the provisions which shall be applicable in the minimum to the parties involved in armed conflict of non- international character. It has provided that the persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention or any other cause shall in all circumstances be treated humanely and without discrimination on the basis of cast, race, religion, sex etc. To this end, the following acts have been prohibited and described as the obligations of the parties to the conflict, such as, causing violence to life and person, in particular murder or all kinds mutilation, cruel treatment and torture, taking of hostages and, outrages upon personal dignity, and affording all the judicial guarantees which are recognized as indispensable by civilized peoples and providing medical treatment and protection to the wounded and sick.

Some significant international Conventions were adopted in 1960's with a view to addressing important aspects of human rights. Those Conventions have rendered significant assistance to the State parties in respect of their role of protection and promotion of human rights. The International Convention on the Elimination of All Forms of Racial Discrimination (1965) has prohibited racial discrimination and provided for treatment and compensation by safeguarding human rights and freedoms. Thereafter, ensuring an individual's civil and political rights, the International Covenant on Civil and Political Rights, which was adopted in 1966, obligated the State parties to guarantee compulsorily the right to life, the right to equality, the right to freedom, the right to justice etc.

The UN Human Rights Committee has adopted a General Comment in 2001 that the right enshrined in Article 4 of the Convention could not be derogated even during the time of emergency, and various rights including the right to equality and the right to fair trial shall be guaranteed. The Convention on the Rights of the Child adopted in 1989 and especially the Optional Protocol to the Convention on the Rights of the Child (2000), having provisions regarding children's involvement in armed conflict are very significant. It has provided that the State parties shall ensure that the members of the armed forces below the age of 18 shall be prohibited from taking direct part in rebellion.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted in 1984 has provided that in order to prevent torture of any type whatsoever each State party shall take effective measures to prevent the acts of torture in any territory under its jurisdiction, and no State party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger

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14 Convention Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949.

15 Convention Relative to the Protection of Civilian Persons in Times of War, Geneva, 12 August 1949.

of being subjected to torture.<sup>16</sup> The Convention has also recognized a torture victim's right to obtain relief and have an enforceable right to measures of rehabilitation, besides the right to justice and compensation. The Convention has defined the act of torture as an international crime.

The principles of international criminal justice and their interpretation evolved in relation to grave violations of human rights and humanitarian law have basically evolved on the basis of the treaties and the Conventions discussed above, and, hence, they are considered to be equally significant in the context of traditional justice. The Nuremberg Tribunal had already laid down some significant principles, such as, a person acting against international criminal law shall be liable to punishment; there shall be no immunity from criminal liability only on the ground that there is no such provision in the national law; criminal prosecution cannot be suspended on the basis of official status; there shall be no immunity from punishment only on the plea of compliance with the order from a superior officer. The subsequent international law has cogently codified those principles.

Some principles developed in the context of transitional justice, in later days, through international practices have been deemed as significant.<sup>17</sup> It has been stressed as the first principle to prosecute the violators of human rights and humanitarian law. As a second principle, protection of the right to know the truth through institutions like Truth Commission has been accorded high priority. Guarantee of access to justice and ensuring the right to reparation has been provided in the third principle. Similarly, identifying perpetrators of crime through administrative means, examining them and vetting them have been incorporated in the fourth principle. The fifth principle lays down emphasis on building historical monuments for creating awareness in the honor and memory of the victims.

The goal of the sixth principle is to adopt the system of reconciliation and to restore the historical, traditional and religious belief and system to their earlier position. The seventh principle lays emphasis on institutional reform relating to awakening people's trust in the institutions responsible for enforcement of the rule of law, promoting fundamental rights, adopting the principle of inclusion and establishing good governance.<sup>18</sup>

Transitional Justice and International Criminal Justice are closely related. The International Criminal Court is a permanent judicial body having jurisdiction for imposing punishment in cases of genocide, crime against humanity and war crimes. The proceedings under this court may start after a country becomes a party to the Status of Court or if UN Security Council recommends for initiating action in regard to some crime or if a country, which is even though not a State party, recognizes the jurisdiction of the court.

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16 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (Adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of December 10, 1984, Entry into force June 26, 1987, in the accordance with Article 27(1).

17 The Chicago Principles on Post- Conflict Justice, A Joint Project of International Human Rights Law Institute Chicago Council on Global Affairs, istituto Superior Internazionale de Scienze- Criminal Association Internazionale De Droit Penal 2007, See at [http://www.concernednestorians.org/content\\_files/file/to/213.pdf](http://www.concernednestorians.org/content_files/file/to/213.pdf) (accessed on Jan. 3, 2016)

18 Ibid.

The International Criminal Court does not replace the jurisdiction of a national court rather it only complements the latter. If a State party does not take action on the grounds pointed out by the Rome Statute or lacks the competence for taking such action or is unwilling to take action or takes it only for a cosmetic purpose, the International Criminal Court may activate its jurisdiction and start the criminal proceedings. Therefore, the International Criminal Court is capable of exerting pressure on the State parties to proceed with the legal action.

Similarly, while discussing the context of evolution of international criminal law, in addition to provisions enshrined in the statute of the International Tribunal established for punishing the guilty of violations of human rights and humanitarian law following the dissolution of former Yugoslavia and the provisions enshrined in the statute of the International Tribunal established for punishing the guilty of genocide committed in Rwanda, the principles laid down by those Tribunals in course of the judgments delivered by them, are very significant. Likewise, the judgments given by regional courts like Inter-American Human Rights Court, European Human Rights Court etc. and the Hybrid Tribunal of East Timor constituted for addressing the violations committed in course of conflict are equally significant.

#### **2.4 Inter-Relationship among Transitional Justice, Accountability and Impunity**

Even though it is challenging to holding the perpetrators of gross violations of human rights and humanitarian law occurred in course of conflict or war accountable for their acts in transitional justice process, the issues like satisfaction of the victims, sense of justice, end of impunity and the prosecution and legal action against the guilty are inherent elements of it.. Its main objective is to ensure non-recurrence of such crimes in the future. It is, therefore, also the duty of the State to arouse a sense of respect for the rule of law by ending impunity, preventing the emergence of a feeling of revenge among the victims, maximum use of due process of law, providing justice and satisfaction to the victims and expressing respect towards them, adopting effective measures aimed at prevention of the incidents of violations of human rights in the future, and denunciation of the incidents of human rights violations by the State and displaying respect towards the victims and creating a sense of security among them.

The international community views the incidents of gross violations of the international human rights law and the humanitarian law with serious concern. Crimes against humanity, genocide and war crimes are such crimes which are treated as the subject matter of customary International Law. Besides, the State always undergoes the pressure of conducting investigation or undertaking prosecution in regard to other crimes of human rights violations such as torture, extra-judicial killings, enforced disappearance, rape, act of enslaving, racial discrimination etc.

State has an obligation to conduct serious investigation of such crimes and prosecute the guilty in accordance with the jurisprudence developed at the international level.<sup>19</sup> In such a situation, the acts like failure to investigate and prosecute and to provide immunity to the guilty of such crime by making law granting immunity to them hurt the sentiments of the

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19 Ibid.

victims on the one hand, and on the other it causes negative impact on its image among the international community. Ultimately, such a situation promotes impunity. Impunity may lead to a dangerous situation in the future. As the international practice calls for – 'Either Prosecute or Extradite', the chances of prosecution against the perpetrators even in other countries always remain viable.<sup>20</sup> Therefore, if in such type of crimes a State does not address the issue with sincerity, if the State itself is unwilling or unable, or if the State indulges in the act of sponsored prosecution only for external consumption of the international community or the general public, actual prosecution can be started again.<sup>21</sup> This has been recognized both by the international criminal legal practice as well as in the Rome Statute.

It is never easy to take action against the perpetrators of the war or conflict which was concluded through a Peace Accord or Agreement. In fact, this issue has always remained as a matter of great challenge for transitional justice. If a party to the conflict is seated in the saddle of power as is the case in Nepal, the issue of criminal prosecution naturally becomes all the more problematic. In such a situation the process of investigation and prosecution does not move forward. Rather the acts of amnesty and remission are initiated, and attempts are made to provide relief by simply adopting other measures of transitional justice like reparation or symbolic legal action. It may create a situation where there arises a situation of non-compliance of an order issued or likely to be issued for conducting investigation or undertaking prosecution.

In such a situation, it may be an appropriate measure for all the parties to move forward on the basis of the peace agreement and the constitutional provisions. Therefore, in order to make the perpetrators of gross violations of human rights accountable for their acts committed in the past, it is necessary to abide by the constitutional and legal provisions made right from the time of the Comprehensive Peace Accord till date.

## **2.5 Transitional Justice during Armed Conflict and Nepal's International Obligation in Regard to Ending Impunity**

International Law can be broadly classified into two main categories- based on customary and treaties or agreements. Therefore, transitional justice and Nepal's obligation to address impunity should be also classified and viewed accordingly. Customary International Law comprises of the rules established by the conduct of States. Those rules are indispensable for conducting the affairs among the civilized States. Therefore, such rules are supposed to be automatically applicable to all the States. A State is not required to express its commitment to abide by such rules as in the case of treaties or agreements.

The four Geneva Conventions are supposed to be made by codifying the conventional law in particular. Because those Conventions have been made by integrating and codifying the customary rules, the rules enshrined in those Conventions are also treated as a part of the customary law. Therefore, the rules of war may be described as automatically applicable to

20 The obligation to extradite or prosecute (autdedereautjudicare), Final Report of the International Law Commission 2014, see at [http://legal.un.org/ilc/texts/instruments/english/report/7\\_6\\_2014.pdf](http://legal.un.org/ilc/texts/instruments/english/report/7_6_2014.pdf).

21 Anthony D' Amato, National Prosecution for International Crimes. See at: [http://anthonydamato.law.northwestern.edu/Adobefiles/national%20prosecutions-int%20Crimes 3<sup>rd</sup> 08. Pdf](http://anthonydamato.law.northwestern.edu/Adobefiles/national%20prosecutions-int%20Crimes%203rd%2008.Pdf).

both the parties in the context of armed conflict in Nepal. Specially, in the context of internal armed conflict, the provisions made in common Article 3 of the Geneva Conventions are viewed not only as a treaty law rather also as customary law. However, there has not been any example of the use of the rules of Customary International Law in the justice system of Nepal. Without speaking anything clearly about the customary law, the Supreme Court of Nepal has already issued an order in the name of Nepal Government to make national law for enforcing those provisions.<sup>22</sup> It is an obligation of the concerned State party to fulfill all the obligations created by a treaty after it becomes a party to that treaty. Therefore, the obligations of Nepal created especially by the human rights Conventions, to which Nepal has become a party, are significant in the context of the violations of human rights during the conflict period. In this context, the provision made in Article 2 of the International Covenant on Civil and Political Rights, 1966 is also significant. That Article has ensured a victim's right to effective remedy in the event of infringement of the human rights guaranteed by the Convention. The obligation of the State to provide relief to the victims of human rights violations committed during the conflict and to make the perpetrators of violations of those rights accountable for their crime is supposed to accrue from this very right. If it is so done, the ground for ending impunity is created. On the contrary, the practice of not making the perpetrators accountable for their crimes and not providing relief to the victims helps to promote the culture of impunity.

As mentioned in that Article, an effective remedy available to the victims of violations of rights primarily includes the right to truth, justice and reparation. The right to know the truth such as why, how and by whom those rights were violated fall under those rights. Furthermore, State has an obligation to conduct effective and prompt investigation in relation to the violations of the rights and to prosecute the persons found accountable in Court. Similarly, Article 2 of the Convention against Torture, to which Nepal is also a party,<sup>23</sup> imposes an obligation to each State party to take effective legislative, administrative and judicial measures to prevent the acts of torture. Likewise, Article 4 imposes an obligation on each State party to ensure that all acts of torture are offences under its criminal law which shall be punishable by appropriate penalties. Because Nepal is not a State party to the International Convention for the Protection all Persons from Enforced Disappearance, Nepal is technically not under compulsion to comply with the obligations provided by this Convention. However, the Supreme Court of Nepal has interpreted<sup>24</sup> that as the provisions of this Convention are a continuity of the provisions of other Conventions, it shall be the duty of Nepal Government to abide by the obligations created by this Convention. The Convention for the Protection all Persons from Enforced Disappearance, provides for declaring the act of enforced disappearance as an offence and providing for punishment which is proportionate to the gravity of the offence.

Article 28 of the International Covenant on Civil and Political Rights, 1966 provides for a Human Rights Committee to be established for a monitoring State parties' implementation of the Covenant. The First Optional Protocol to the Covenant allows victim of the human rights

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22 Rajaram Dhakal Vs. Office of the Prime Minister and Others, Writ No. 2942 of the year 2059 B.S., Date of 2060/09/25 (BS)

23 May 14, 1991.

24 Rajendra Dhakal vs. Nepal Government, Writ of Certiorari/Mandamus (2059), No. 2942, Date of 2064/02/18

violation to be heard by the Committee. As Nepal is a party to that Protocol, Nepal has recognized the competence of the Committee to entertain complaints of the persons who have become victims of infringement of the rights guaranteed by the International Covenant on Civil and Political Rights. On this very ground some complaints relating to violations of human rights occurred during the armed conflict have reached before that Committee. Some of those complaints are still under consideration while in some cases the Committee has already made its decision. Those decisions (opinions) can be helpful to see whether or not Nepal has complied with its obligations under the said Covenant.

The incident of enforced disappearance of petitioner Yashoda Sharma's<sup>25</sup> husband in 2008 showed the infringement of the rights guaranteed by Articles 7, 9 and 10 of the Covenant. However, because there had been no effective investigation about the violation of those rights, the Human Rights Committee opined that Nepal Government failed to discharge its obligation under clause (2) of Article 2 of the Covenant. Acting on Ram Kumar Bhandari's petition<sup>26</sup> of a similar nature, it was observed that the State was obligated to provide the following type of reliefs to the petitioner:

- a) To carry out intensive and effective investigation about the disappearance of the father of the petitioner, and to provide to the petitioner detailed information about the result of the investigation,
- b) To find out the mortal remains of Tej Bahadur Bhandari and to transfer the same to his family,
- c) To prosecute, to conduct trial and to award punishment to the persons accountable for causing his enforced disappearance resulting in infringement of his rights,
- d) To provide adequate compensation to the petitioner for undergoing infringement of his rights, and
- e) To ensure the availability of necessary and adequate psychological rehabilitation and medical treatment to the petitioner.

Similarly, acting upon the petition of Kedar Chaulagain<sup>27</sup> in regard to the arbitrary arrest of his daughter Subhadra and her extra-judicial killing, the Human Rights Committee arrived at the conclusion that Nepal Government caused infringement of the rights guaranteed by Articles 6, 7, 9 and 10 and, in the case of the petitioner, it infringed the right guaranteed by Article 7 of the Covenant. It was also decided that the State was obligated to provide effective relief for the petitioner pursuant to Section (a) of clause (3) of Article 2 of the Covenant in lieu of infringement of those rights. Under that relief it has been also mentioned to provide full reparations to the petitioner and arrange for the means of giving satisfaction to him, besides prosecuting the perpetrators and subjecting them to punishment. Likewise, the Committee also mentioned that it shall also be an obligation of the State to undertake appropriate measures to prevent such violations of human rights in the future. In all the cases discussed above, the Government was given a time limit of 180 days to provide remedy to the victims.

25 Human Rights Committee, Communication No. 1469/2006, Yashoda Sharma vs. Nepal, (Views adopted on Oct. 28, 2008)

26 Human Rights Committee, Communication No. 2031/2011, Ram Kumar Bhandari vs. Nepal, (Views adopted on Oct. 29, 2014)

27 Human Rights Committee, Communication No. 2018/2010, Kedar Chaulagain vs. Nepal, (Views adopted on Oct. 20, 2014)

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violation of International Humanitarian Law<sup>28</sup> adopted by UN General Assembly in 2006 also mentions about the state obligation to address violations of human rights law and humanitarian law during situations like internal armed conflict. Those Guidelines have mentioned about three types of rights of the victim. First, there should be an easy and effective access to justice. This right includes the right to get both judicial and administrative remedy. It also includes the provision about dissemination of adequate information by the State about the available reliefs in the event of violations of human rights provided in the international human rights law. Likewise, the state has also an obligation to take necessary measures to minimize the difficulties faced by the victim, his representative, family members and witnesses in course of their involvement in judicial, administrative and other proceedings; to take measures to prevent potential unlawful interference in privacy, and protect them from any form of reprisal. Secondly, the right also includes the right to get adequate, effective and speedy reparation for the harms undergone. Reparation also includes rehabilitating the victim in the earlier state before his rights were infringed. Similarly, compensation and the facilities needed for rehabilitation of the victim are also included in this. Reparation also incorporates a victim's satisfaction and guarantee of non-recurrence of such violations. The act of holding accountable a person involved in such violations through judicial and administrative action is also viewed as reparation. The right to know the truth about the violation and its causes is the third element of right.

Though, it requires a lot of evidence and analysis to determine whether or not Nepal has complied with its obligations under aforesaid international Conventions, a preliminary assessment can be made in this regard through perusal of the judgments incorporated in this study.

## 2.6 Legal Structure and Bodies Relating to Transitional Justice in Nepal

Transitional justice mechanism and regular justice mechanism are not alternative rather complementary to each other. For this reason, while considering the legal framework and mechanism relating to transitional justice the existing law and justice mechanisms are also considered and included. Due to failure to address gross violations of human rights during a particular time period in the country, some additional legal and judicial mechanisms need to be established in addition to regular justice mechanism so as to address such violations. Therefore, for the management of the transitional period in Nepal as well, the Truth and Reconciliation Commission and the Commission on Enforced Disappearance have been established to serve this objective. The Investigation of Disappeared Person, Truth and Reconciliation Commission Act, 2071 (2014) which has been enacted aiming to address the past violations of human rights. According to the said Act, the following mechanisms have been in place.

**A) Truth and Reconciliation Commission:** A causal look at the international practices shows that in the context of transitional justice a Truth and Reconciliation Commission is constituted with a view to conducting extensive investigation of the past human rights

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28 Resolution adopted by the General Assembly on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (21 March, 2006), UNDOC, A/RES/60/147.

violations to find out the truth and to create an environment for reconciliation in the society.<sup>29</sup> Inspired by this very concept, the Truth and Reconciliation Commission has been established in Nepal as well for the management of the transitional period.<sup>30</sup>

The primary function of the Commission is to investigate and bring out the truth before the common people about the violations of human rights during the period of armed conflict. Besides, causing reconciliation between the victims and the perpetrators, making recommendations to the Government for amnesty for the perpetrators, making recommendations about reparations for the victims and preparing and submitting a report describing its activities and the measures aimed at ensuring prevention of human rights violations in the future are some other functions of the Commission. The Commission has generally a term of two years. An extension of one more year in the event of incompleteness of its business during the said period. On February 10, 2015, Nepal Government constituted the Truth and Reconciliation Commission comprising one Chairperson and four members.

- B) Commission on Investigation of Disappeared Persons:** The Investigation of Disappeared Persons, Truth and Reconciliation Commission Act, 2071 (2014) has provided for the Commission on Investigations of Disappeared Person of a similar mandate and organizational structure as of the Truth and Reconciliation Commission. Except the jurisdiction, other provisions relating to both the Commissions are similar, and both Commissions were constituted by Nepal Government on the same day. The Truth and Reconciliation Commission shall conduct investigation of different types of human rights violations committed during the conflict period whereas the Commissions on Investigation of Disappeared Persons shall conduct investigation about only the act of disappearance.
- C) Reparation:** Various types of compensations, concessions and facilities to be provided to the victims for violations of human rights suffered by them in course of the armed conflict have been described as reparations in the said Act. The Commission is required to make recommendations to the Government for providing reparations to the victims after also ascertaining their wishes and demands. It has been provided that the reparation shall be made available to the victim, if he or she is alive and to his/her nearest kin, if the victim has become deceased.<sup>31</sup>
- D) Reconciliation:** The term “*Melmilap*” is the Nepali translation of the English term “Reconciliation.” Reconciliation denotes a peaceful resolution of a dispute between two parties leading to their cordial existence in the society respecting each other’s existence. Reconciliation has been defined in a very narrow term in the Investigation of Disappeared Person, Truth and Reconciliation Commission Act, 2071 (2014) limiting it to a mediation process between a victim and the perpetrator as in the court of law, In such a state of reconciliation, the provision about not making recommendation for prosecuting such a perpetrator seems to have given it another form of amnesty.

29 UN Office of the High Commissioner for Human Rights “Rule of Law Tools for Post Conflict States: Truth Commissions”, (New York and Geneva, United Nations, 2006).

30 The Preamble to the Investigation of Enforced Disappearance, Truth and Reconciliation Commission Act, 2071 (2014)

31 Section 23(6) of the Act

- E) Amnesty or Pardon:** Amnesty is also viewed as a measure of transitional justice.<sup>32</sup> However, there is no uniformity in the scope and form of the practices prevalent in different countries. On the basis of the International Criminal Law that has evolved during the last two decades and the practices of various countries, Jurisprudence has emerged prohibiting amnesty for crime under international law.. In the case of Suman Adhikari,<sup>33</sup> the Supreme Court has also held that amnesty cannot be granted in such type of serious crimes, and it has quashed some provisions of Section 26 of the Investigation of Disappeared Person, Truth and Reconciliation Commission Act, 2071 (2014) and also limited the scope of amnesty. Consequently, the Commissions may make recommendation for amnesty to the Government, within the limitation delineated by the judgment, and following the procedure prescribed by the Act.
- F) Criminal Prosecution:** There remains a limitation on criminal prosecution in regard to the practice of transitional justice. The Supreme Court has given the judgment that there shall be no amnesty to a perpetrator found involved in a serious crime through the investigation made by the Commission.<sup>34</sup> The Commission shall be required to send the name of persons not included in the recommendation for amnesty and those who have not entered into reconciliation with the victims to the Attorney General for the purpose of prosecution. Thereafter, the Attorney General shall make a decision whether or not to institute a case.
- G) Special Court:** Section 29 of the Act has provided that the proceedings of the cases instituted against the persons found accountable for violations of human rights during the conflict period through investigations made by the Commission shall be conducted and the decision shall be made by a Special Court and not by regular courts. For this purpose, Nepal Government shall be required to constitute a Special Court as per the Special Court Act, 2059 (2002).

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32 UN Office of the High Commissioner for Human Rights, "Rule of Law Tools for Post – Conflict States: Amnesties" (New York and Geneva, United Nations, 2009).

33 Suman Adhikari and Others vs. the Office of Prime Minister and Council of Ministers & Others, NKP 2071, Issue 12, Decision No. 9303.

34 Ibid.



# CHAPTER – 3

## Judgments Relating to Transitional Justice and the Status of Their Execution

### 3.1 Introduction

There is a constitutional provision that the power relating to justice in Nepal shall be exercised by courts and other judicial bodies in accordance with the provisions of the Constitution, other laws and the recognized principles of justice.<sup>35</sup> A decision made by the court providing resolution of any dispute becomes meaningful only after the execution of the decision or order. The objective of a decision cannot be achieved in the absence of execution of that decision. A look at the constitutional and legal provisions in Nepal shows that generally it is the Judiciary which assumes the duty of execution of decisions. Nevertheless, the responsibility of execution of the orders or judgments delivered under the writ jurisdiction of the Supreme Court or Appellate Courts is of Nepal Government, any agency of Nepal Government or the concerned authority.<sup>36</sup> Besides, the Attorney General is charged with the duty to monitor, or cause to be monitored, whether or not the legal principles laid down in course of disposing cases or the interpretation made in the process have been implemented.<sup>37</sup> The Supreme Court and Appellate Courts decide the disputes under their jurisdiction in accordance with the prescribed legal procedures.

### 3.2 Jurisdiction of the Supreme Court

The Constitution of Nepal has entrusted the Supreme Court with the final authority to interpret the Constitution and law.<sup>38</sup> Besides, there is a constitutional provision to file a petition in the Supreme Court to have any law declared void if it imposes any unreasonable restriction on the enjoyment of any fundamental right or it is inconsistent with the Constitution for any other reason, and the Supreme Court shall have the jurisdiction to declare that law to be void or invalid either '*ab initio*' or from the date of its decision.<sup>39</sup> Similarly, the Supreme Court has got, for the enforcement of the fundamental rights conferred by the Constitution or for the enforcement of any other legal right for which no other legal remedy has been provided or for which the remedy, even though provided, appears to be inadequate or ineffective or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, the extra ordinary power to issue necessary and appropriate orders, to provide appropriate relief, to cause enforcement of such right or to end the dispute. Under its extra-ordinary jurisdiction, the Supreme Court may issue appropriate orders including the writs of habeas corpus, mandamus, certiorari, prohibition, and *quo warranto*.<sup>40</sup> In addition, the Supreme Court has also got the jurisdiction to hear appeals and the petitions seeking revision of cases in accordance with the law.

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35 Article 126, of the Constitution of Nepal and Article 100 of the Interim constitution of Nepal, 2063 (2007)

36 Article 126(2) and Article 128 (4) of the Constitution of Nepal

37 Article 158 (2) of the Constitution of Nepal

38 Article 128 (2) of the Constitution of Nepal

39 Article 133 (1) of the Constitution of Nepal

40 Article 133 (2), (3)

All shall abide by the orders or decisions made by the Supreme Court in course of hearing a lawsuit, and the Supreme Court is also vested with the authority to initiate contempt proceedings against any person who refuses to comply with such order or decision and penalize him. This provision seems to emphasize that a decision or order of the court must be implemented. It is the duty of the Government, concerned bodies of the Government and every individual to abide by the decisions or orders made by the Supreme Court.

### 3.3 Jurisdiction of Appellate Courts

There is a constitutional provision that the Appellate Courts shall exercise the jurisdiction as determined by law. Accordingly, the judicial Administration Act, 2048 (1991) has granted authority to Appellate Courts to issue various writs including the writs of *habeas corpus*, *mandamus*, *certiorari*, *prohibition*, and *quo warranto* for the enforcement of the rights of citizens guaranteed by law.<sup>41</sup> Moreover, the Appellate Courts also have the jurisdiction to hear appeals on the decisions of subordinate District Courts and other judicial bodies.<sup>42</sup> The Constitution of Nepal (2015) has made a provision about having High Courts in the place of Appellate Courts and granted writ jurisdiction to High Courts. As in the context of the present Study the execution status of the orders or judgments delivered by Appellate Courts with respect to transitional justice under the authority granted by the prevalent law has been studied, the Appellate Courts have been mentioned in that very context.

### 3.4 Evolving Transitional Justice Jurisprudence

On the basis of the study and analysis of the judgments delivered by the Supreme Court and the Appellate Courts with respect to transitional justice, impunity and accountability, the jurisprudence which has evolved in the process can be described as follows:

#### A) Supremacy of Criminal Justice System

The Supreme Court has established the principle that Transitional Justice System cannot replace the Criminal Justice System. In the judgments given in Devi Sunuwar's<sup>43</sup> case, Purnimaya Lama's case,<sup>44</sup> and Jay Kishor Labh's case,<sup>45</sup> a principle has been developed that, pending the provision about creating a transitional justice mechanism, law should be exercised on the basis of general Criminal Justice System and the pace of Criminal Justice System should be taken forward. Also in Suman Adhikari's case,<sup>46</sup> the Supreme Court has laid down the principle that only by the act of investigating and prosecuting the incidents of grave human rights violations committed during the conflict period the victims can get justice and the Criminal Justice System can be strengthened.

#### B) Pardon Not Acceptable in Crimes of Serious Nature

Serious types of crimes also constitute serious violations of human rights. The perpetrators of such serious crimes should be brought to justice and punished. The

41 Section 8(3) of the Judicial Administration Act, 2048 (1991)

42 Section 8, Ibid

43 Devi Sunuwar vs. District Administration Office, Kavrepalanchowk and Others, NKP 2064, Decision No. 7857

44 Purni Maya Lama vs. District Administrative Office, Kavrepalanchowk and Others, Writ No. 1231 of the Year 2063, Date of Order: 2064/11/27 (BS).

45 Jaya Kishor Labh vs. District Administration Office, Dhanusa and Others. Writ No. 0681 of the Year 2063, Date of Order: 2065/10/20 (BS).

46 Suman Adhikari and Others vs. The Office of Prime Minister and Council of Ministers and Others, NKP 2071, Issue 12, Decision No. 93.3

Supreme Court has laid down the principle in Suman Adhikari's case<sup>47</sup> that it is not expedient to look for grounds and reasons for granting pardon amounting to amnesty without determining the offense or making the prosecution. It has been also observed in this case that in the context of serious violations of human rights, measures relating to pardon and amnesty shall be unacceptable.

**C) Truth and Reparation: Right of the Victim**

The acts of providing compensation and reparations to the victims of violations of humanitarian law and human rights committed during the conflict and truth seeking about the incidents of the conflict period are considered to be significant elements of transitional justice. Even though it is the obligation of citizens to pass on to the concerned agencies of the State the information in their knowledge about the incidents occurred in course of the conflict, the act of finding out the truth (truth seeking) falls under the duty of the State. The Supreme Court has propounded the principle that it is also the duty of the State to provide financial compensation and extensive reparations to the victims. In Rajendra Dhakal's case,<sup>48</sup> the apex court has established that the right to truth seeking about the incidents of the conflict period is an integral part of the right to life, the right to freedom and the right to justice.

The court has laid down the principle that the act of truth seeking is not a matter of discretionary right of the State rather it is a mandatory duty of the State. In Buddi Bahadur Praja's Case,<sup>49</sup> the apex court has instructed to make separate law for providing compensation in respect of the innocent citizens killed as a result of violation of humanitarian law. Likewise, in Kale Tamang's case,<sup>50</sup> the court has issued an order to make a law entitling the heir of the deceased to stake a claim for compensation. In Rajendra Dhakal's case,<sup>51</sup> the court has issued a directive to make a law to provide reparation to the victim and instructed the Government to ensure availability of financial relief pending enactment of such law. Similarly, in the case of Liladhar Bhandari,<sup>52</sup> an order has been issued to return the property of the owner captured unlawfully and to provide compensation for the loss assessing the damage caused by such seizure of the said property. Those judgments seem to have recognized the victim's right to reparation.

**D) Victim's Consent Required in the Process of Reconciliation and Amnesty**

In the case of JuRi Nepal<sup>53</sup> and in the case of Suman Adhikari,<sup>54</sup> the Supreme Court has laid down the principle of obtaining voluntary and mandatory consent of the victim for any reconciliation to be made by the Truth and Reconciliation Commission between the perpetrator and the victim under transitional justice process in respect to any incident of grave violation of human rights occurred in course of conflict. Reconciliation cannot be made unilaterally by ignoring the victim, and, for accomplishing this, independent and conscious consent of both the parties is indispensable. Reconciliation cannot be made forcibly nor can it be made hurting the self-respect of the victim. The process of

47 Ibid

48 NKP 2064, Issue 2, Date of Order: 2064/2/18 (BS).

49 Decision No. 3448 of 2063 B.S., Date of Order: 2065/1/30 (BS).

50 Kale Tamang vs. Nepal Govt. & Others, Writ No. 0238 of 2063 B.S.

51 NKP 2064, Issue 2, Date of Order: 2064/2/18 (BS).

52 NKP 2065, Issue 9, Liladhar Bhandari vs. the Office of Prime Minister and Council of Ministers and Others.

53 NKP 2070, Issue 9, Decision No. 9051.

54 NKP 2070, Issue 2, Decision No. 9051.

reconciliation can prove its meaningfulness only if it is motivated or invited by the victim. Apart from all this, it has been also established that reconciliation cannot be used as a means to grant amnesty to the perpetrators of gross violations of human rights.

**E) Need of Criminalizing the Act of Enforced Disappearance of Persons**

The act of enforced disappearance of persons is viewed as a gross violation of human rights under International Law. Because there is no separate law in Nepal addressing the issue of enforced disappearance, the Supreme Court has issued an order to Nepal Government in the case of Rajendra Dhakal<sup>55</sup> to make a special type of effective law to conduct investigation of enforced disappearance, to publicize the status and to bring the perpetrator to justice. The Ordinance on Investigation of Enforced Disappearance, Truth and Reconciliation Commission, 2069 (2013) had provided simply for constituting a Commission for conducting investigation of enforced disappearance of persons but did not declare that act as a crime. Hence, the Supreme Court had issued an order asking for constituting separately a Commission on Investigation of Disappeared Persons and a Truth and Reconciliation Commission, and for enacting a law, inter alia, criminalizing the act of enforced disappearance.<sup>56</sup> The Investigation Disappeared Person, Truth and Reconciliation Act, enacted in 2071 B.S. (2014) also simply defined the act of disappearance but failed to criminalize it.

**F) Impunity Need Not Be Promoted**

After filing of the First Information Report following the murder of any person or occurrence of any criminal incident, the authorized body or official is required to take forward the process of investigation about that criminal incident in accordance with law. Even if the alleged person is an official working in the security wing of the State, it is not proper to shield that person against criminal accountability on various pretexts. Every official engaged in the conduct of State affairs is required to discharge their duties in accordance with law. It is also a matter of legal accountability.

If criminal proceeding or investigation process is not initiated against such persons only because of their engagement in the security wing, it shall impact on the law and order situation, and promote impunity. In Purna Bahadur Gurung vs. District Police Office, Kaski and Others, the Supreme Court has observed that the State should not do any act which may promote impunity, and it does not allow an investigator to idle away his time improperly on the pretext of conducting pretended investigation.<sup>57</sup> This principle has been also reaffirmed by the Supreme Court in the case of Bhakta Bahadur Sapkota.<sup>58</sup>

**G) Constitutional Test of Transitional Justice Related Law**

Some of the provisions of the Truth and Reconciliation Commission Ordinance, 2069 (2012), the Investigation of Disappeared Person, Truth and Reconciliation Commission Act, 2071(2014), and Section 15 of the Manual on Providing Relief to the Heirs of Disappeared Person, 2068(2011) have been examined by the Supreme Court while disposing the petitions challenging those provisions.

55 NKP 2064, Issue 2, Date of Order: 2064/2/18 (BS).

56 On behalf of JuRi Nepal, Madhav Kumar Basnet vs. Nepal Government, Council of Ministers, NKP 2070, Issue 9, Decision No. 9051.

57 Purna Bahadur Gurung vs. District Police Office, Kaski and Others, Writ No. 0908 of the year 2066, Date of Decision: 2071/12/22 (BS).

58 Bhakta Bahadur Sapkota vs. District Police Office, Dhading, Writ No. 064 of the year 2061, Date of Decision: 2067/2/17 (BS).

Nepal Government has been instructed to undertake review of Section 15 of the Manual on Providing Relief to the Heirs of Disappeared Person, 2068 (2011) in the light of international human rights law, Interim Constitution of Nepal, 2007 and the judicial principles enunciated by the Supreme Court with respect to transitional justice. Similarly, the phrase "sufficient grounds and reason not found by investigation of the Commission" used in Sub-Section (2) of Section 26 of the Investigation of Disappeared Person, Truth and Reconciliation Commission Act, 2071 (2014) and some terminologies used in Sub-Section (1) of Section 29 of the Act have been quashed on account of being inconsistent with Articles 12, 13, 24 and 135 of the Interim Constitution of Nepal, 2007.<sup>59</sup>

The Supreme Court has also quashed and invalidated some provisions of the Human Rights Commission Act, 2068 (2011) which narrowed down the role of Human Rights Commission in the context of transitional justice. In the case of Om Prakash Aryal, the Supreme Court invalidated the restrictive provision of Section 10(4) of the Act creating a limitation of six months for filling a complaint in the Commission in regard to violation of human rights and the discretionary power of Attorney General in respect of prosecution in accordance with the recommendations made by the Commission.

#### **H) Reference to International Human Rights Law and Its Impact**

Notwithstanding the impact of International Law on national law, whether or not International Law can be enforced directly in Nepal is still unclear. In resolution of the disputes relating to transitional justice, the Supreme Court has delivered judgments citing international human rights and humanitarian laws. Various provisions of Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1966), Geneva Conventions (1949) and Convention against Torture (1984) have been cited in such type of cases.<sup>60</sup> Instructions have been also issued to make legal provisions in the national law on the basis of international human rights related Declarations and Covenants.<sup>61</sup>

#### **I) Mandatory Criminal Investigation of Grave Crimes**

The Supreme Court has issued an directive order in the case of petitioner Rita Giri regarding the killing of Dhananjay Giri,<sup>62</sup> the case of Purni Maya Lama regarding the killing of Arjun Bahadur Lama,<sup>63</sup> and the case of Krishna Bahadur Rasaili regarding the killing of Reena Rasaili<sup>64</sup> directing the concerned District Police Offices to register the First Information Reports and to conduct investigation in accordance with the procedure mentioned in the State Cases Act, 2049 (1992) and directing the concerned District Government Attorney Offices to make decisions about prosecution and take forward the regular judicial proceedings.

59 NKP 2071, Issue 12, Decision No. 9303 and Ram Dulari Tharu and Others vs. Nepal Govt., the Council of Ministers, Writ No. 0729 of the Year 2069 (BS), Date of Decision: 2071/10/21 (BS).

60 NKP 2065, Issues 9 and 10, Raja Ram Dhakal vs. the Office of Prime Minister and Council of Ministers; Rajendra Ghimire vs. the Office of Prime Minister and Council of Ministers, NKP 2066, Issue 3.

61 Rajendra Ghimire vs. the Office of Prime Minister and Others, NKP 2066, Issue 3; Rajendra Dhakal vs. Cabinet Secretariat and Others, NKP 2064, Issue 2.

62 Reeta Giri vs. District Police Office, Morang, Criminal Appeal No. 0852 of the Year 2064, Date of Decision: 2067/1/9 (BS).

63 Purni Maya Lama vs. District Police Office, Kavrepalanchowk & Others, Writ No. 1231 of the Year 2063, Date of Order: 2064/11/27 (BS).

64 Karna Bahadur Rasaili vs. District Police Office, Kavrepalanchowk and Others, Writ No. 0339 of the year 2064, Date of Order: 2066/8/9 (BS).

Although those cases related to the incidents occurred in course of the conflict, the Supreme Court laid down the principle that as the Truth and Reconciliation Commission was not yet constituted the legal proceeding in those serious type of crimes shall be conducted in accordance with the regular criminal procedure. Even though it was contended on behalf of the Government that such cases will fall under the jurisdiction of the Truth and Reconciliation Commission after its constitution, the apex court enunciated the principle that the State cannot evade the prevalent legal procedure and its own duty. In the writ petition challenging the validity of the then Attorney General's instruction to stop investigation about the killing of journalist Dekendra Raj Thapa of Dailekh<sup>65</sup> stating that it shall fall under the jurisdiction of the Truth and Reconciliation Commission, the Supreme Court stayed the implementation of that instruction by issuing an Interim Order on 15 January 2013 allowing the continuity of the Police investigation. Following the issuance of that Interim Order issued by the Supreme Court, a prosecution charge sheet was lodged in Dailekh District Court, and subsequently the District Court convicted the accused on them on 7 December 2014.<sup>66</sup>

### **3.5 Provisions Relating to Judgment Execution and Judgment Execution Bodies**

Article 126 (2) of the Constitution of Nepal has provided that any order or decision made by the court in the course of hearing a lawsuit shall be binding on all. Similarly, Article 128(4) of the Constitution has stipulated that any order or decision or any legal principle laid down by the Supreme Court in course of hearing a lawsuit shall be binding on all. According to those constitutional provisions, it shall be the duty of Nepal Government and its subordinate bodies to abide by and to implement, and cause to be implemented, the orders or decisions made by the Supreme Court and other courts.

Under the provision about compliance with the orders or decisions made by the courts also falls the act of their implementation. For this work there are provisions about various bodies. The following bodies are significant in respect of implementation of the decisions made by the Supreme Court and other courts;

#### **a) Judgment Execution Directorate**

The Supreme Court Rules, 2049(1992) has provided for the creation of a separate Directorate to monitor the execution of decisions and to function as the central body. That Directorate has been entrusted with the following responsibilities in regard to the implementation of the court judgments:

- To execute and monitor the judgments and final orders of the Supreme Court and the subordinate courts (Rule 105 (e) of the Supreme Court Rules, 2049),
- To act as the central body of judgment execution, and
- To issue policy directives to quasi-judicial bodies in regard to judgment execution.

65 Govind 'Bandi' vs. Attorney General and Others, Writ No 069-WO-0740, Date of Order: 2070/12/19 (BS).

66 The Annapurna Post Daily dated 2072/6/1 (BS).

### **b) Office of Attorney General**

The Constitution has entrusted the Attorney General with the duty to monitor, or cause to be monitored, whether or not any interpretation given to a law or any legal principle laid down by the Supreme Court in course of hearing lawsuits has been implemented.<sup>67</sup> Under this provision for effective execution of any order or judgment delivered by the Supreme Court, the Office of Attorney General shall send to the concerned stakeholder the order/judgment along with the concerned case file within three days of the receipt of the order or judgment.<sup>68</sup>

In the Government Attorney Rules, 2055 (1998), there is a provision entrusting the Office of Attorney General to draw the attention of the concerned Ministry, Secretariat, Department or Office for effective implementation of the orders and judgments issued by the Supreme Court. The responsibility of this task has been entrusted to the Research, Monitoring and Evaluation Directorate of the Office of Attorney General. Even though the Office of Attorney General has been entrusted with the constitutional responsibility of monitoring the execution of the orders or judgments of the Supreme Court, its effective monitoring has not been undertaken.

In some cases the subordinate District Government Attorney Offices have been also entrusted with the task of execution of some of the orders. Of the cases included in this study, in the writ petitions of Purnimaya Lama, Bhakta Bahadur Sapkota, Karn Bahadur Rasaili and Kedar Chaulagai, the Supreme Court has issued orders in the name of the concerned Police Offices and District Government Attorney Offices to register the First Information Reports (FIRs) of the incidents mentioned in the writ petitions and conduct investigation in accordance with law and make a decision whether or not to institute a case.

### **c) Nepal Police**

It is the major responsibility of Nepal Police to execute the orders or judgments made by the Supreme Court in respect of transitional justice. The Government Cases Act, 2049 (1998) has entrusted Nepal Police with the responsibility to register the complaints (FIRs) about gross violations of human rights committed during the conflict, to conduct investigation in that regard, to collect evidence, and to submit the case file before the Government Attorney with its opinion for making a decision whether or not a case should be instituted on the basis of the investigation and evidence collected in the case. Where the Police had refused to entertain the FIRs in most cases of gross violations of human rights including killings, in the writ petitions filed with such claims the Supreme Court has issued orders in the name of the concerned Police Offices to register those FIRs and conduct, and cause to be conducted, effective investigation in those cases as per the law. The responsibility to execute those orders rests with the concerned Police Offices.

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67 The Constitution of Nepal, Article 158 (6) (b).

68 The Operational Manual of the Office of Attorney General, 2068 (2012), Section 7(17).

### 3.6 Execution Status of Judgments

In this study, the execution status of the orders and judgments issued by the Supreme Court in 21 cases relating to transitional justice and 8 orders issued by the Appellate Courts in that regard have been analyzed. Of those orders and judgments, whereas some have been executed, some of them seem to have been partially executed. Similarly, some of the orders have not been executed. Those orders have been classified into three categories of Executed, Partially Executed and Not Executed, and the status of execution has been studied on that basis.

Where all the works have been completed as mentioned in the orders or judgments, such orders or judgments have been placed in the category of "Executed". Likewise, if some of the works mentioned in the orders or judgments have been executed and some of them have not been executed or are in the process of execution, such orders or judgments have been placed in the category of "Partially Executed". But where none of the works pointed out by the order or judgment have been executed, such orders or judgments have been categorized as "Not Executed". The status of judgment implementation has been described as follows:

#### A. Judgments Executed

1. **Karna Bahadur Rasaili vs. District Police Office, Kavrepalanchowk and Others:**<sup>69</sup> Acting upon the FIR filed by Karna Bahadur Rasaili regarding the rape of Reena Rasaili followed by her murder, the apex court ordered to conduct immediate investigation of the incident. Subsequently, prosecution charge sheet was lodged in Kavrepalanchowk District Court on 17 September 2010 against Lieutenant Saroj Basnet and Corporal Kaji Bahadur Karki seeking punishment pursuant to the Chapter on Homicide. Thus the order issued by Supreme Court in this case has been executed.
2. **Devi Sunuwar vs. District Police Office, Kavrepalanchowk and Others:**<sup>70</sup> In this case the court had ordered to complete effective investigation about Captain Amit Pun and others regarding the incident of murder of Maina Sunuwar. Accordingly, after completing investigation of the incident, the prosecution charge sheet was lodged in Kavrepalanchowk District Court on 31 January 2008 against the four accused including Captain Amit Pun. The filing of that charge sheet shows that the order issued by the Supreme Court has been executed.
3. **Advocate Govind Sharma 'Bandi' vs. Attorney General Mukti Pradhan and Others:**<sup>71</sup> In the case relating to the murder of journalist Dekendra Raj Thapa of Dailekh, the Attorney General had issued on 11 January 2013 an instruction to the concerned District Government Attorney Office and District Police Office to stop immediately investigation of that murder. According to the order of the Court dated January 15, 2013 quashing the impugned order of Attorney General and directing

69 Karna Bahadur Rasaili vs. District Police Office, Kavrepalanchok and Others, Writ No. 0339 of the Year 2064, Date of Order: 2066/8/29 (BS).

70 Devi Sunuwar vs. District Police Office, Kavrepalanchowk, NKP 2064, Decision No. 7857.

71 Advocate Govind Bandi vs. Attorney General Mukti Pradhan and Others, Writ No 069-WO-0740, Date of Order: 2070/12/19 (BS).

the concerned officials to continue the investigation, the investigation was completed and the charge sheet was filed in the District Court. Thus this is also an example of one of the orders which have been executed.

4. **Sukdev Ray Yadav vs. Nepal Government, the Office of Prime Minister and Council of Ministers and Others:**<sup>72</sup> This murder case had been withdrawn exercising the power granted by Section 29 of the State Cases Act, 2049 (1992). Addressing the issue of disparity and mutually contradictory grounds resorted to while withdrawing cases filed in the court of law, the apex court issued an Order of mandamus in the name of Nepal Government, and, in regard to the said case of Sukdev Ray which was *subjudice* before the court, in the name of Bara District Court, not to make a decision to withdraw serious cases including intentional murder, crime against the State, war crime, cruel and inhuman crime against humanity, organized crime, crime against women and children, genocide, crime against public interest etc., to develop a practice of making decision to withdraw cases only after having consultation with the Attorney General or his subordinate Public Prosecutor about reasonable grounds for making such decision prior to case withdrawal, and to make necessary improvements about the norms and the procedure to be adopted for withdrawal of criminal cases in which the State is the plaintiff. Following that order, the Case Withdrawal Standards, 2071(2014) had been issued incorporating necessary amendments, and it was also provided in the Constitution of Nepal to have consultation with the Attorney General while withdrawing any case. This shows that the order issued in this case has been executed.
5. **Nepal Government as per FIR of Pawan Kumar Patel vs. Gagandev Ray Yadav and Others:**<sup>73</sup> In this case, the decision of Nepal Government to withdraw this case was quashed, and the order was subsequently executed.
6. **Rajendra Ghimire vs. the Office of Prime Minister and Council of Ministers and Others:**<sup>74</sup> The Supreme Court had issued an order of mandamus in this case on 2064/9/2 directing the government to make a law criminalizing the act of torture and providing for reasonable compensation to be given to the torture victims. Nepal Government has submitted before the Legislature Parliament the Criminal Code, 2071 (2014) (proposed), which criminalizes torture and provides for giving reasonable compensation to the torture victims, and a Bill on Prevention of Torture, and Cruel, Inhuman or Degrading Treatment, 2071 (2014).<sup>75</sup> And the proposed Code and the Bill are under consideration before the Parliament. Even though the law has not been enacted, Nepal Government seems to have executed the court order. However, as the provisions made in those Bills have not made any provision

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72 Sukdev Ray Yadav vs. Nepal Govt., the Office of Prime Minister and Council of Ministers and Others, Writ No. 2066-WO-1333, Date of Order: 2069//1/5 (BS), NKP 2069- Decision No. 8789.

73 As per the FIR of Pawan Kumar Patel, Plaintiff Nepal Govt. vs. Gagandev Ray Yadav & Others, C.A. No. 3302 of the Year 2061, Date of Order: 2065/9/29 (BS).

74 Rajendra Ghimire vs. the Office of Prime Minister and Others, Writ No. 2066-WO-3219, NKP 2066, Issue 3, Date of Order: 2064/9/2 (BS).

75 Sections 169 and 171 of the Criminal Code, 2071 (2014) (Proposed).

regarding providing justice by investigating and prosecuting the criminal acts of torture committed in the context of past armed conflict, there is a need of introducing reform in them in the light of international legal obligation of Nepal.

**(The relevant parts of the above mentioned cases/judgments or orders have been mentioned in Schedule 1)**

## **B. Partially Executed Judgments**

### **1. Purnimaya Lama vs. District Police Office Kavrepalanchowk and Others:<sup>76</sup>**

An order was issued in this case to register the FIR on the killing of Arjun Lama, to conduct the investigation and to make a decision whether or not a case can be instituted in accordance with law. Accordingly, District Police Office, Kavrepalanchowk registered the said FIR. However, investigation of the crime and decision about whether or not to institute a case has not been made as yet.

### **2. Kale Tamang vs. Nepal Government, the Office of Prime Minister and Council of Ministers and Others:<sup>77</sup>**

The apex court had issued an order in the writ petition directing the State to constitute a high level Task Force under the convenership of an independent and impartial person within two months to do the necessary works after conducting study and research about determining and providing reasonable and respectable compensation to the dependent family members of the deceased and to conduct independent investigation of the incident and to pay compensation and relief as suggested by the Task Force to the dependent family members of the deceased within three months of receiving the report. In this context, each of the heirs of the deceased have been already paid Rs. 100,000/- through cheque as compensation. However, the order about constituting a Task Force has not been executed as yet.

### **3. Leeladhar Bhandari and Others vs. the Office of Prime Minister and Others:<sup>78</sup>**

In this case, the apex court issued an order of mandamus in the name of Nepal Government, Council of Ministers to return, and cause to be returned, to the owners their confiscated property during the conflict period, within three months along with compensation in view of the damage caused by the unlawful seizure of their property. Following that order, only a high level Task Force on return of public and private houses, landed property and other property and a District Execution Committee have been only constituted according to the decision of the Council of Ministers made on 27 September 2011.

76 Purnimaya Lama vs. District Police Office, Kavrepalanchowk & Others, Writ No. 123 of the Year 2063, Date of Order: 2064/11/27 (BS).

77 Kale Tamang vs. Nepal Government & Others, Writ No. 238 of the Year 2063, Date of Order: 2066/7/9 (BS).

78 Leeladhar Bhandari vs. the Office of Prime Minister and Council of Ministers, Writ No. 0863 of the Year 2064, NKP 2065, Issue 9.

#### **4. Rajendra Dhakal vs. Nepal Government, Ministry of Home Affairs and Others:<sup>79</sup>**

In this case, the apex court issued an order directing the government to make a special law addressing the act of enforced disappearance of persons and providing Rs. 100,000/- to Rs. 200,000/- as interim relief to the heirs of disappeared persons or those killed. A Manual on providing relief to the heirs of the deceased was prepared in 2065 (2008) which provided for giving Rs. 100,000/- to Rs. 200,000/- to the heirs of the deceased. Similarly, a decision was made by the Council of Ministers to provide Rs. 100,000/- as financial assistance to the heirs of the deceased in accordance with the Financial Assistance Manual, 2065 (2008), and thus that order seems to have been executed. Nepal Government has also presented before the Legislature Parliament the Criminal Code, 2071 (2014) (proposed)<sup>80</sup> criminalizing the act of enforced disappearance. The said bill is still under consideration before the Legislature Parliament. But because there has been made no specific provision in the said Bill about conducting investigation and making prosecution and providing justice in regard to the crime of enforced disappearance of persons in the context of the conflict in the past, it is necessary to introduce such a provision in the light of international legal obligation of Nepal.

#### **5. Buddi Bahadur Praja and Others vs. Nepal Government, the Office of Prime Minister and Council of Ministers:<sup>81</sup>**

The apex court issued an order in this case to make a separate comprehensive law for providing compensation in the case of innocent persons killed by responsible agencies of the Government violating the humanitarian law and for providing advice or suggestions for carrying out impartial investigation and effective relief in this regard. Following this order, Financial Assistance Manual, 2065 (2008) meant for providing Rs. 100000/- as immediate relief to the nearest kin of the deceased was approved by Nepal Government. But no separate comprehensive law could be enacted to make a provision for compensation in the case of innocent persons killed during the conflict, and to carry out impartial investigation and to provide advice and suggestions in regard to effective remedy in this type of disputes.

#### **6. Constitute Separate Commissions**

Responding the writ petition filed by Madhav Kumar Basnet on behalf of the Conflict Victims<sup>82</sup> demanding for the enactment of a law for constituting separately the Commission on Investigation of Disappeared Persons and the Truth and Reconciliation Commission, the Supreme Court issued a relevant order in this regard. In accordance with that order, the Investigation of Disappeared Person and Truth and Reconciliation Commission Act, 2071(2014) provided for constituting separate Commissions as

79 Rajendra Dhakal vs. Nepal Government, Writ: Certiorari/Mandamus, Writ No. 3575 of the Year 2059, Date of order: 2064/02/18 (BS).

80 Section 207 of the Criminal Code, 2071 (2014) (proposed) has criminalized the act of enforced disappearance.

81 Decision No. 3448 of the Year 2063, Date of Order: 2065/1/30 (BS).

82 NKP 2070, Issue 9, Decision No. 9051.

mentioned above, and those two Commissions have been already constituted and are now functioning. However, the following components of the order issued in this case have not been executed such as amending the law allowing for amnesty to be granted only with the consent of the victim, enacting the law providing for punishment for the acts like enforced disappearance, torture and extra-judicial killing, criminalizing the act of gross violations as suggested by an expert committee<sup>83</sup> comprising conflict victims and conflict experts and laying down specific norms of amnesty in the law itself.

#### **7. Suman Adhikari and Others vs. Nepal Govt., the Office of Prime Minister and Council of Ministers and Others:<sup>84</sup>**

In this case, the Supreme Court quashed the phrase "sufficient grounds and reasons not found for granting amnesty in the investigation made by the Commission" contained in Section 26 and the provision "the Ministry to institute a case against the perpetrator if a recommendation has been made before Nepal Government" – contained in Section 29(1) of the Investigation of Disappeared Person, Truth and Reconciliation Commission Act, 2071 (2014). Thus constitutionally those provisions have been invalidated and rendered ineffective and, therefore, the said order has come into immediate execution. However, as an order was also issued in the name of Nepal Government to introduce necessary amendments in the law in view of some unclarity present in a few provisions of the Act, the necessary amendment is yet to be made.

**(The relevant parts of the aforesaid cases/judgments/or orders have been mentioned in Schedule 2)**

### **C. Judgments Not Executed**

#### **1. Jay Kishor Labh vs. District Police Office, Dhanusa and Others:<sup>85</sup>**

In this case, the apex court issued an order on 2 February 2009 directing the District Police Office of Dhanusa to formally register the FIR of the petitioner and conduct investigation in accordance with law because the court had found that the FIR of the petitioner should have been duly registered and investigation conducted accordingly but the respondent had failed to do so. However, the FIR was not registered and the investigation was not carried out as directed by the said order.

83 As directed by the Supreme Court in the verdict given in the case of Madhav Basnet on behalf of JuRi Nepal on Poush 18, 2070 (BS), a thematic expert Task Force constituted on Chaitra 13, 2070 (BS) had given a Report on Chaitra 20, 2070 (BS) with a recommendation for preparing two separate Bills for constituting the Commission on Investigation of Disappeared Persons and the Truth and Reconciliation Commission.

84 Suman Adhikari & Others vs. the Office of Prime Minister and Council of Ministers and Others, NKP, 2071, Issue 12, Decision No. 9303.

85 Jay Kishor Labh vs. District Administration Office, Dhanusa and Others, Writ No. 0681 of the Year 2063, Date of Order: 2065/10/20 (BS).

## **2. Bhim Prasad Oli and Others vs. the Office of Prime Minister and Council of Ministers and Others:<sup>86</sup>**

In this writ petition, the apex court issued a directive order asking the government to make a clear legal provision without contravening equality in regard to the services or facilities provided by the State, and to make proper and necessary arrangements in this regard. However, no legal provision has been made as mentioned in the petition and the order of the court.

## **3. Bhojraj Timilsena vs. Nepali Congress party & Others:<sup>87</sup>**

The apex court issued an order of mandamus in this writ petition to constitute a high level Enquiry Committee also involving participation of the victims to collect statistics of the persons killed or maimed in course of the conflict, to recommend compensation for those who had suffered loss or damage and to return the property unlawfully captured, to identify the perpetrators and bring them to justice, to provide compensation to the families of those killed or maimed and to make law at the earliest for providing subsistence and employment to the helpless victims. But neither such high level Enquiry Committee has been constituted nor has been the said law made.

## **4. Purna Bahadur Chaudhari vs. District Police Office, Bardiya and Others:**

Appellate Court Nepalgunj issued a writ of mandamus stating that whereas a decision should have been made to institute or not to institute a case after having conducted effective investigation of the alleged murder committed by Nepal Army by firing gun bullet as claimed in the FIR registered on 30 July 2006, effective investigation had not been made for long in regard to such a sensitive matter like homicide. Therefore, the Appellate Court issued an order of mandamus on 18 November 2009 for the completion of investigation at the earliest as demanded in the petition. However, still the case has not been instituted after completing investigation.

## **5. Bhumisara Thapa vs. District Police Office, Banke & Others:**

The act of investigation had not been completed even after the lapse of more than two years in respect of the FIR registered on 4 August 2007 alleging the incident of murder committed by Nepal Army by firing gun bullet. Appellate Court Nepalgunj, therefore, issued an order of mandamus on 13 January 2010 directing District Police Office, Banke to initiate immediately the act of investigation in accordance with law and complete the investigation fulfilling all the procedures prescribed by the State Cases Act, 2049 (1992) within three months of the receipt of the order. Such an order for completing the work within a specified period has not been executed till date. So far there does not appear any prospect of instituting the case after completing the investigation.

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86 Writ No. 3394 of the Year 2061, Date of Order: 2062/10/28 (BS).

87 Writ No. 0920 of the Year 2063, Date of Order: 2064/9/2 (BS).

**6. Ghumniya Chaudhari vs. District Police Office, Bardiya & Others:**

This case related to a FIR seeking investigation and legal action for the murder of Surya Lal Chaudhari who had been allegedly dragged out of his house by security forces on the allegation of being a Maoist leader and was subjected to torture and subsequently shot dead. When the FIR was refused to be registered, the complainant approached the court with his petition. Appellate Court Nepalgunj issued an order of mandamus in the name of District Police Office, Bardiya on 21 April 2010 to register the FIR and initiate the investigation in accordance with law. In spite of the issuance of an order of the court the investigation was not completed nor was the case instituted. Thus the said order has not been executed.

**7. Sukum Raj Chaudhari vs. District Police Office, Bardiya and Others:**

An FIR was presented seeking investigation and legal action for the murder of Sohanlal and Surajlal of Bardiya who had been dragged out of their house and killed by the security forces. As the FIR was neither registered nor refused to be registered with written endorsement on the back of the FIR, a petition was moved in the court seeking an order of mandamus for registration of the FIR and initiating the legal action. Appellate Court Nepalgunj issued an order of mandamus on 21 April 2010 in the name of District Police Office, Bardiya directing it to register the FIR and initiate legal proceedings in accordance with law. Though subsequently the FIR was registered, still investigation of the incident could not be completed nor was any decision made whether or not to institute the case in the court.

**8. Ramkishan Tharu vs. District Police Office, Bardiya and Others:**

An FIR was filed in District Police Office, Bardiya on 15 November 2007 seeking investigation and prosecution for the murder of 11 year old Rupa Tharu who had been shot dead by the security forces. Investigation could not move forward even after the lapse of one year following registration of the FIR. Then after responding to a writ petition filed in this regard, Appellate Court Nepalgunj issued an order in the name of District Police Office, Bardiya directing it to complete the act of investigation at the earliest in accordance with law. But as the process of investigation could not be taken forward and as no decision could be made whether or not to institute the case, this order has not been executed as well.

**9. Nandram Khatri vs. District Police Office, Banke & Others:**

The petitioner had presented an FIR before District Police Office, Banke on 10 December 2009 alleging that Jay Kala Khatri and Hit Kala Dangi had been forcibly taken out by the security forces at night and sexually assaulted and tortured resulting in their extra-judicial killing, and their dead bodies were dumped on the bank of Dumribas River. But the Police Office refused to register that FIR. Appellate Court Nepalgunj issued an order of *mandamus* in the name of District Police Office Banke on 29 October 2010 directing it to complete the process of investigation at the earliest because the issue was highly sensitive. Although the FIR was subsequently registered pursuant to the said order, the investigation could not be

completed and the decision about instituting or not instituting a case was not taken. Thus that order has not been executed.

**10. Bhagiram Chaudhari vs. District Police Office, Bardiya and Others (Decision No. 75):**

The petitioner approached District Police Office, Bardiya with an FIR on 4 October 2013 alleging that the security forces of Chisapani Company had captured Kanhaiya Lal Tharu of Bardiya on 14 March 2002 and tortured him to death, and later on refused to hand over the dead body to his family members. But the Police refused to register his FIR. Then the petitioner approached the court with his petition. The court observed that the District Police Office Bardiya was vested with the power to decide whether or not to register the FIR of the complainant, and if someone approaches the Police Office for registering any FIR and there is something missing in that FIR, the Police Office should ask the complainant to supplement the missing information, and if the FIR was not worth registering for any reason, the complainant should be informed about the reason. So Appellate Court Nepalgunj issued an order of mandamus on 5 November 2014 directing the Police Office to either register that FIR or, if it did not meet the criteria of registration, the petitioner should be informed about the ground of refusal to register the FIR. But even after the issuance of the order by the court, District Police Office Bardiya did not register the FIR. Instead, it endorsed its refusal on the back of the FIR stating that the case did not fall under the jurisdiction of the Police as per the Investigation of Disappeared person, Truth and Reconciliation Commission Act, 2071 (2014). The petitioner approached the court for a second time with a petition. This time the court issued a specific order to register the FIR and start the legal proceedings. In spite of that order the Police did not register the FIR. The petitioner has lodged a contempt petition seeking action against the contempt of court. Thus the order of the court has not been executed.

**11. Bhagiram Chaudhari vs. District Police Office, Bardiya and Others (Decision No. 79):**

District Police Office, Bardiya refused to register the FIR on 4 October 2013 and conduct investigation of the act of abduction of unarmed civilian Dilbahadur Khadka by Maoist activists. Even District Administration Office, Bardiya did not agree to register the FIR. Thereafter, a writ petition was lodged in the court seeking an order of mandamus for directing the Police to register the FIR, to conduct the investigation and to initiate the necessary legal proceedings. An order of mandamus was issued by the court on 5 November 2014 directing the Police to register the FIR of the petitioner and, if it was not worth registering, to endorse on the back of the FIR stating the reason for the refusal. But District Police Office, Bardiya refused to register that FIR even after the issuance of the court order. Instead, District Police Office endorsed its refusal on the back of the FIR stating the reason that a conflict era incident did not fall under jurisdiction of the Police in accordance with the Investigation of Enforced Disappearance, Truth and Reconciliation Commission Act, 2071 (2014). The petitioner approached the court a second time with another petition. This time the Court

issued a specific order to register the FIR and initiate the necessary legal proceedings. None-the-less the Police did not register the FIR. The petitioner has moved the court seeking punishment for committing contempt of the court. Thus the order has not been executed.

### **12. Advocate Sunil Ranjan Singh and Others vs. the Office of Prime Minister and Council of Ministers and Others:**<sup>88</sup>

This is a leading case involving Kuber Singh Rana in which the apex court had issued an order for making a policy and law on vetting. However, no meaningful work has been done till date for making a policy or law on vetting. Therefore, even in this case the court order has not been complied with.

### **13. Nepal Government vs. Balkrishna Dhungeland Others:**<sup>89</sup>

In the homicide case of murder of Ujjan Kumar Shrestha of Okhaldhunga, defendant Balkrishna Dhungel was acquitted by Appellate Court Rajbiraj. Disposing the appeal on the acquittal judgment given by Appellate Court Rajbiraj on 5 October 2009, the Supreme Court reversed the decision of the Appellate Court and sentenced defendant Balkrishna Dhungel to life imprisonment along with forfeiture of his entire property. However, as the sentence of imprisonment slapped on defendant Balkrishna Dhungel has not been executed so far, the court judgment remains unexecuted.

### **14. Rita Giri vs. District Police Office, Morang:**<sup>90</sup>

This case also involved the issue of refusal by the Police to register the FIR. The Court issued an order in the name of the Police to register the FIR presented by the petitioner and initiate the process of investigation as soon as possible. However, the order of mandamus has not been executed so far.

### **15. Bhakttā Bahadur Sapkota vs. District Police Office, Dhading**<sup>91</sup>:

An order of mandamus was issued on 31 May 2010 in the name of District Police Office Dhading to complete all the investigation regarding the killing of Sarla Sapkota and make a decision whether or not to institute the case, and, if the decision was made in favor of instituting the case, to file the charge sheet in the court. The investigation should have been completed followed by the decision whether or not to institute the case as had been directed in the order of mandamus. However, as no such decision was made, the order of mandamus could not be executed.

### **16. Purna Bahadur Gurung vs. District Police Office, Kaski and Others:**<sup>92</sup>

The Supreme Court had passed an observation in this case that it did not behoove of an investigator to idle away the time in an improper manner on the pretext of conducting

88 NKP 2069, Issue 12, Decision No. 8933.

89 Criminal Appeal No. 063-CR-0932, of the Year 2063, Date of Decision: 2066/9/19 (BS).

90 Criminal Appeal No. 0852 of the Year 2066, Date of Decision: 2067/1/9 (BS).

91 Writ No. 064 of the Year 2061, Date of Order: 2067/2/17

92 WO-0908 of the Year 2066, Date of Decision: 2071/12/22 (BS).

investigation. The Court had also issued an order of mandamus in the name of District Police Office, Kaski on 5 April 2015 to complete the necessary investigation within three months and to inform the writ petitioner about its result. But neither the investigation was completed nor was the petitioner informed about it as directed by the order of mandamus. Thus the said order has not been executed.

**(The relevant parts of the aforesaid cases/judgments or orders have been mentioned in Schedule 3)**

### 3.7 Statistical Analysis of Execution of Judgments

The statistical position of the writ petitions filed in the Supreme Court in respect to transitional justice and the decisions made in such cases is as follows:

**Table No. 1: Statistical Description of the Decisions and Orders under Study**

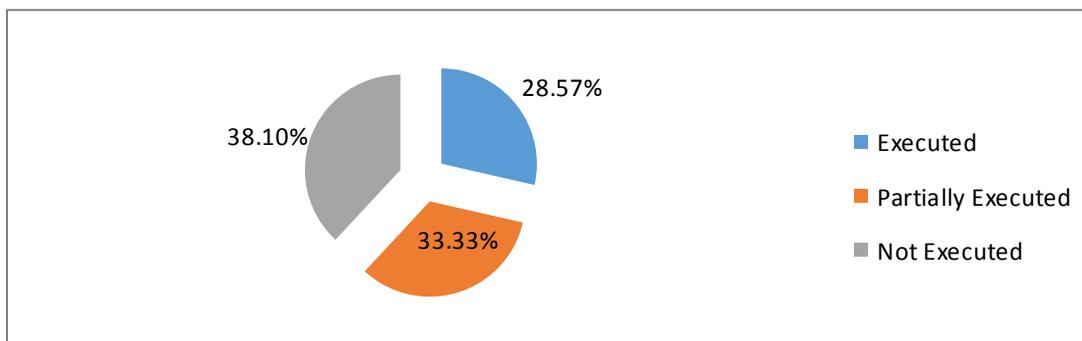
S. N	Court	Decision	Orders	Total
1	Supreme Court	2	19	21
2	Appellate Court	0	8	8
	<b>Total</b>	<b>2</b>	<b>27</b>	<b>29</b>

The execution status of the above mentioned cases is as mentioned below:

**Table No. 2: Execution Status of the Decisions/Orders**

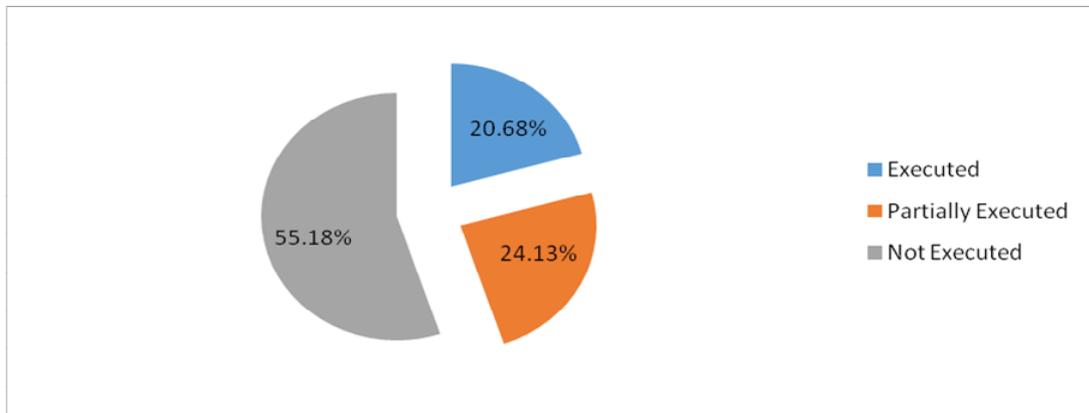
S. N	Court	Executed	Partially Executed	Not Executed	Total
1	Supreme Court	6 (28.57%)	7 (33.33%)	8 (38.09%)	21
2	Appellate Court	0	0	8 (100%)	8
	<b>Total</b>	<b>6 (20.68%)</b>	<b>7 (24.13%)</b>	<b>16 (55.18%)</b>	<b>29</b>

**Chart No. 1: Execution Status of the judgments/orders of the Supreme Court**



The study of the execution status of the orders and judgments delivered by the Supreme Court in 21 cases from among the cases relating to transitional justice shows that 8 orders, i.e., 28.57%, have been executed. Similarly, 7 orders, i.e., 33.33%, have been partially executed. Likewise, 8 orders, i.e. 38.10%, have not been executed. On the other hand none of the 8 orders issued by the Appellate Court have been executed. Thus the orders have not been executed hundred percent.

**Chart No. 2: Execution Status of the Judgments/Orders of the Supreme Court/Appellate Courts**



A look at the execution status of 29 orders and judgments delivered by the Supreme Court and the Appellate Courts shows that only 6 orders, i.e., 20.68%, have been executed. 7 orders, i.e, 24.13%, have been executed only partially. Similarly, 16 orders, i.e., 55.18%, have not been executed.

## CHAPTER – 4

### Reasons behind Noncompliance with the Orders and Judgments and Its Impact

The judgments and orders delivered by the Supreme Court and the Appellate Courts have played a crucial role in the institutionalization of issues of transitional justice in Nepal. Those orders and judgments have helped to give clarity to the concept of criminal accountability in the context of transitional justice. Thus, in this way the judicial outlook on transitional justice can be described as analytical on the whole.

The orders seem to have pointed out the greater significance of criminal investigation and prosecution. The orders issued for making law to criminalize gross violations of human rights including enforced disappearance and torture have definitely created a significant foundation for advocacy of transitional justice. However, the execution or enforcement of those orders or judgments remains as a challenge. In this chapter, the jurisprudence established by the judicial interpretations, the status of their enforcement and the reasons behind their noncompliance and the impact caused by such noncompliance has been discussed.

#### 4.1 Jurisprudential Value of the Orders and Judgments Relating to Transitional Justice

The orders and judgments, which have been studied, have established significant jurisprudence on various aspects of transitional justice. Those jurisprudences have established clarity in regard to various vague issues of transitional justice.<sup>93</sup> Specially, now it has been established through judicial interpretations<sup>94</sup> that the State cannot evade its responsibility of providing practical protection to a victim's right to an effective remedy by conducting independent and impartial investigation and prosecution of the incidents of human rights violations committed in course of the conflict. Similarly, It has been clarified that amnesty cannot be acceptable in serious violation of human rights.<sup>95</sup> It has been also been

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93 Particularly, the issues like whether or not amnesty is acceptable in serious type of crimes and what type of relation should exist between criminal justice system and transitional justice mechanisms have been resolved.

94 International treaties and Conventions have guaranteed the right of the victims of violation of human rights or liberties to get effective legal remedy. This right has been guaranteed particularly by Article 8 of UDHR, Article 2 of ICCPR, Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 39 of the Convention on the Rights of the Child, Geneva Conventions of 1949 and Articles 68 and 75 of the Rome Statute of International Criminal Court.

95 In the case of Madhav Basnet on behalf of JuRi Nepal and Others vs. the Council of Ministers and Others, the Supreme Court has held, "Section 23 of the Ordinance relating to the provision about amnesty and pardon has not guaranteed that there shall be no recommendation for amnesty in regard to the crimes mentioned in Section 2(4) of the Ordinance, and it has been made a matter of the process of amnesty. Also, the participation and consent of the victim in the process of amnesty has been made subsidiary and not mandatory. So as all this seems to be contrary to the victim's right to justice including the rights to life, liberty and information and the right against torture and against the recognized principles of justice, those provisions need to be reviewed and amended and reformed as mentioned above." Likewise, in the case of Suman Adhikari, the Supreme Court declared unconstitutional the clause "sufficient grounds and reasons not found in the investigation of the Commission used in Section 26(2) of Investigation of Enforced Disappearance, Truth and Reconciliation Commission Act, 2071 (2014) and described the serious crimes as not eligible for amnesty.

established that statute of limitation shall be irrelevant in serious crimes including the act of enforced disappearance of persons. In order to provide justice to the victims of such crimes and also to discourage the tendency of committing such crimes, the jurisprudence of addressing the incidents of gross violations of human rights in the past by enacting ex-post facto law as an exception has been recognized.<sup>96</sup>

Resolving the debate of whether criminal justice system and transitional justice system are complementary or whether they are substitutes of each other, the judgments given by the court have established the complementarity of these two types of justice.<sup>97</sup> Similarly, the consent of the victim has been made mandatory for granting amnesty to the perpetrator in a case, which is eligible for granting amnesty.<sup>98</sup> It has also established that no procedural obstruction creating delay in prosecution and curtailing the prosecutorial power of the Attorney General shall be acceptable.<sup>99</sup>

In summary, giving clear direction to the transitional justice process trapped in confusion, the established jurisprudence has laid down a solid jurisprudential basis for the State to fulfill its duty of providing justice. These judgments are highly significant in the context of replacing the culture of impunity by accountability and the rule of law. The judicial interpretations seem to have internalized the international legal thought evolved in the context of management of transitional justice in the post conflict period.<sup>100</sup>

96 In Rajendra Prasad Dhakal vs. Nepal Govt, Ministry of Home Affairs, the Supreme Court issued an instructive order "to constitute a Commission for conducting investigation about the persons mentioned in the petition and to present the report and to complete the investigation on that basis and also to make, and cause to be made, decisions as required and suitable to make prosecution against the concerned person". This order of the apex court has established the unacceptability of amnesty in grave offenses.

97 In Suman Adhikari's case, explaining the complementarity of transitional justice and criminal justice, the Supreme Court has observed, "In fact, the Commission is in itself only for assisting the judicial process. The truth dug out by it and the grave violations of human rights shall be decided only by the court on the basis of evidence, and so it is necessary to differentiate between an institution of temporary nature created for assisting in the judicial process and a permanent structure of the State like the judiciary and to understand both in the proper perspective."

98 In Suman Adhikari's case, the Supreme Court has held, "Similarly, the provision contained in Sub Section (5) of Section 26 of the Act- "if any petition is made for amnesty, the Commission shall be required to make decision about making recommendation after also taking into consideration the consent, disapproval and gravity of the incident' is also disputable. The concurrent use of the term 'disapproval' immediately after the phrase 'consent of the victim' tends to give double meaning to the term 'disapproval'. But as it has been repeatedly addressed by this court that there can be no amnesty in the absence of consent of the victim and in serious types of offenses, the Commission must undertake it as a guideline." Thus it has become certain that reconciliation cannot be made without the consent of the victim.

99 The Supreme Court has observed that "the provision about sending the recommendation made by the Commission for prosecution to the Attorney General in a circumlocutory way tends to create unnecessary complexity and skepticism. Its indirect purport shall be only to help the accused to escape from prosecution." The apex court has thus quashed the impugned provision contained in Section 29(1) of the Act stating that the impugned clause "if a recommendation is made before Nepal Government, the Ministry may write for starting prosecution" appears voidable.

100 In the case of Madhav Basnet on behalf of JuRi Nepal, the Supreme Court, stressing on the observance of the International Law, has observed, "As Section 9(1) of the Nepal Treaty Act, 2047 (1990) provided that the provision of the international Convention shall be enforceable at par with the Nepal law, it shall be the duty of the State to investigate and find out the truth about the offences falling under those Conventions so as to prosecute the perpetrators and bring them within the ambit of justice and provide reparations to the victims.

## 4.2 Constitutional Obligation for Execution of Orders and Judgments and Compliance with the Established Jurisprudence

The compliance with judicial judgments having jurisprudential significance has remained as a mandatory constitutional obligation. The Interim Constitution of Nepal, 2007 had prescribed the constitutional obligation that everyone shall abide by the orders and decisions made in the course of hearing a lawsuit by the courts and that any interpretation given to a law or any legal principle laid down by the Supreme Court in the course of hearing a lawsuit shall be binding to Nepal Government and all officers and Courts.<sup>101</sup> Moreover, the Interim Constitution had also granted the authority to bring within the ambit of contempt proceedings disobedience of the judgments or orders issued by the Supreme Court which functions as a court of record.<sup>102</sup> In addition, the Constitution had entrusted the Attorney General with the special constitutional obligation to monitor, or cause to be monitored, whether any interpretation given to a law or any legal principle lay down by the Supreme Court in the course of trying lawsuits has been implemented.<sup>103</sup> Following the previous provision, the Constitution of Nepal (2015) has also made it mandatory to abide by the jurisprudences and the principles propounded by the Supreme Court. In this context, all the issues interpreted in the form of precedents have been described as being mandatory for all. The binding effect of the judicial decisions is equivalent to law.<sup>104</sup> There can be no way for evading or discarding the compliance with such judicial principles and precedents on any pretext whatsoever. It is tantamount to dishonesty towards or an insult to the Constitution to deliberately ignore execution of the judgments or to disobey them.

## 4.3. Reasons behind Noncompliance of Court Orders or Decisions

Even though the judicial decisions are significant from the jurisprudential viewpoint in the context of taking forward the transitional justice process, their observance and execution appear to be challenging. The acts including failure to enact domestic law prescribing punishment for enforced disappearance, torture and war crimes, lack of displaying promptness towards effective investigation and prosecution in respect to FIRs relating to conflict era serious crimes, failure to enact law on vetting, failure to return the captured property belonging to individuals, appointment and promotion to a higher post to the persons who does not have good human rights record, displaying lack of cooperation with the criminal justice system and obstructions caused to it by responsible bodies and repeating the drawbacks of the earlier Ordinance in the Act relating to the formation of the Truth and Reconciliation Commission and the Commission on Investigation on Enforced Disappearance have illustrated the state of disobedience or non-compliance with the court orders, decisions

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101 The Interim Constitution of Nepal, 2007, Article 116.

102 The Interim Constitution of Nepal, 2007 Article 102(3): "The Supreme Court shall be a court of record. It may initiate proceedings and impose punishment in accordance with law for contempt of itself and of its subordinate courts or judicial bodies."

103 The Interim Constitution of Nepal, 2007 Article 133(3)(b), "To monitor, or cause to be monitored, whether any interpretation given to a law or any legal principle laid down by the Supreme Court in the course of trying lawsuit has been implemented."

104 The Constitution of Nepal (2015), Article 128(4).

or judicial interpretations. It is difficult to say what the exact reasons behind such disobedience and noncompliance are. Nevertheless, the following matters have emerged from the study and the discussions held among the various stakeholders in course of the study.

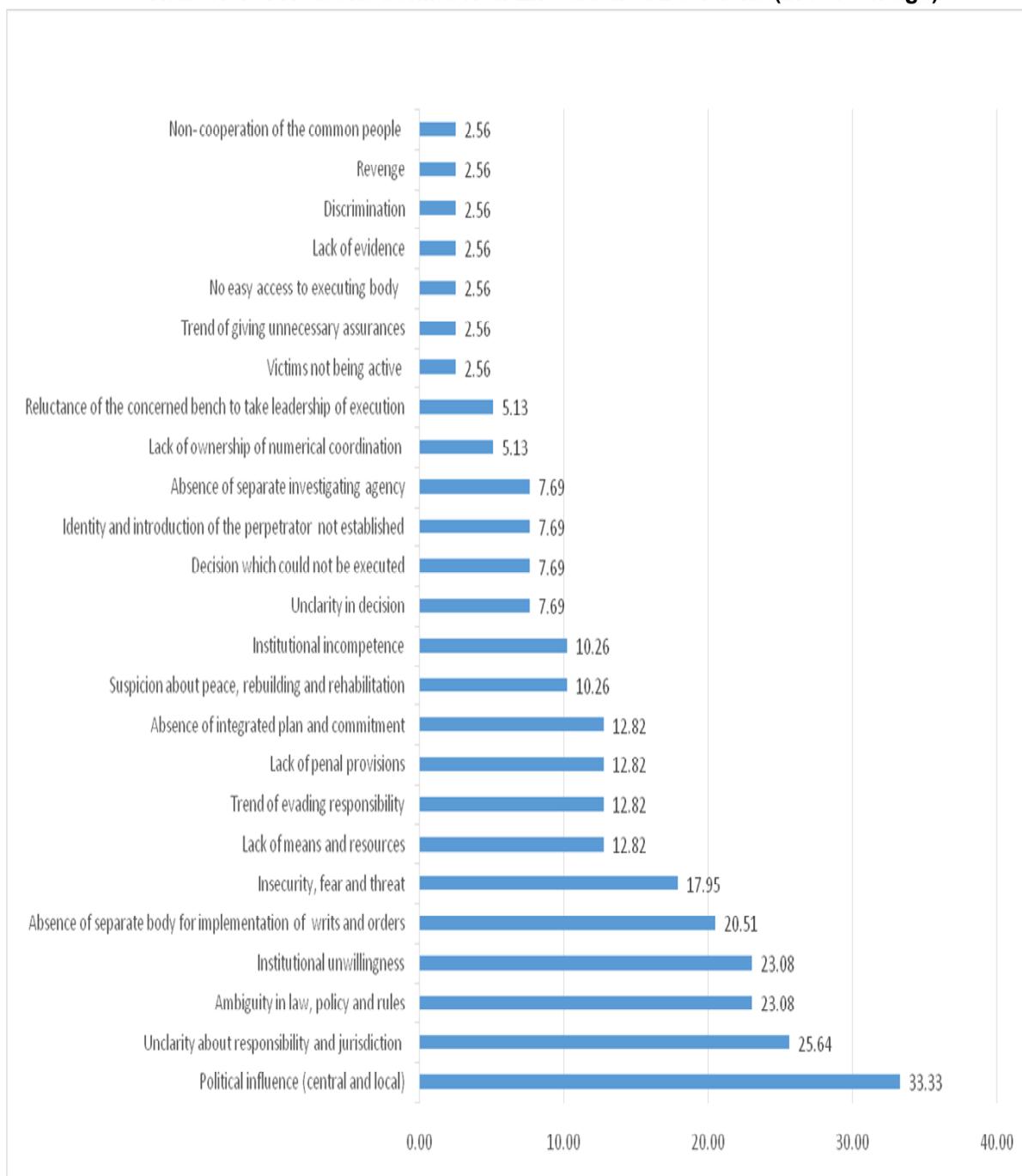
In the interaction held at Nepalgunj, Pokhara and Hetauda, two judges, nine officers of the judicial Service, six government attorneys, one officer of Nepal Government, two officers of the National Human Rights Commission, four social activists, three Police Officers and eleven private law practitioners had participated.

**Table No.3 Details of Number of Participants in the Focused Group Discussions**

S. N	Place	Women	Men	Total
1	Nepalgunj	1	17	18
2	Pokhara	1	14	15
3	Hetauda	2	3	5
	<b>Total</b>	<b>4</b>	<b>34</b>	<b>38</b>

In the experience of the participants of the focused group discussions, the following 25 reasons were described behind the lack of effective execution of the orders and decisions given by the courts during the transitional period. The highest number of participants, i.e., 33.33% of them expressed the opinion that the decisions and the orders could not be executed due to political influence or pressure. Likewise, 15 to 25% of the participants pointed out the reasons like ambiguity about the jurisdiction, ambiguity prevalent in the law, policy and rules, unwillingness, fear, threat to security, lack of separate body for execution of the orders issued in writ petitions etc.

The participants also pointed out several other reasons for non-execution of the court orders and decisions delivered during the transitional period, such as, incompetence, ambiguity in the decisions, some decisions which could not be executed by their very nature, lack of cooperation by the common people, retribution, discriminations, lack of means and resources, transfer of responsibility for rehabilitating peace, failure of one body to appreciate and internalize the works done by another body, failure to identify the perpetrators, lack of evidence, lack of easy access, lack of any provision for legal action, unnecessary assurances, dearth of integrated plan and commitment, complacency of the concerned bench to follow up with reminders, the absence of a separate investigating agency and the lack of activism on part of the victims. The detailed description of those reasons can be found in Chart No. 3 as given below:

**Chart No. 3: Reasons behind Non-Execution of Decisions (In Percentage)**

An integrated analysis of the viewpoints of the Supreme Court and the Appellate Courts as expressed in their orders and decisions shows the following reasons behind non-execution of those orders and decisions:

### **1. Lack of Political Will**

Nepal Government as well as the political parties, both expresses their commitment to end impunity and ensure transitional justice. Political agreements made from time to time, government policies and programs and different reports presented by Nepal Government in various UN bodies and mechanisms<sup>105</sup> also displays such commitment. Thus as the State's formal commitment is reflected at the political level in favor of accountability, there does not seem to be any reason why ideologically there should not be political will power for recognizing the precedents and principles propounded by the Supreme Court.

However, in practice questions have been raised since the past in regard to fulfillment of such commitment. It has not been practically proved that there exists political will power for ensuring transitional justice as directed by the judicial decisions. In this context, the absence of political will power for ensuring criminal accountability for grave violations of human rights committed in course of the conflict seems to be the main reason behind non-execution of the judgments/orders. The focus groups/stakeholders who participated in the discussions during the study have also pointed out political pressure and influence as the main reason in this regard.<sup>106</sup> More than 33% of the participants have cited political influence as the main reason of non-executions of the order and decisions.

As directed by the Comprehensive Peace Accord and the Interim Constitution of Nepal, 2007 the Commissions have been established, thus treating it as the final act relating to the implementation of the Peace Accord. And all this has been guided by an ulterior objective of removing all other matters from the agenda. Apart from that, the political parties and the government do not seem to have made transitional justice as the main agenda as required by the Supreme Court judgments and in a way so as the victims realize it. The political parties are found to have expressed their interest in taking forward the transitional justice process only with the objectives of giving priority to the matters like reparation and reconciliation, and sidelining the issue of justice and accountability.<sup>107</sup>

Article 20 of the Constitution of Nepal (2015) has provided, "No person shall be punished for an act which was not punishable by law when the act was committed nor shall any person be subjected to punishment greater than what was prescribed by the law in force at the time of the commission of the offence." Thus the Constitution has guaranteed against ex-post facto

105 For example, the acceptance expressed by Nepal Government in the report and the recommendations presented in Human Rights Council in the context of the First and Second Universal Periodic Review of human rights.

106 Focused Group Discussions held for this purpose at Nepalgunj, Pokhara and Hetauda.

107 In a consultation program organized by National Judicial Academy, Nepal on "the Challenges Relating to Execution of Transitional Justice Related verdicts," the stakeholders had pointed out the absence of political will power as the main reason.

law. No exceptional provision has been made in accordance with international humanitarian law and comparative constitutional practices.<sup>108</sup>

On the basis of all this, the civil society, the victims community and the international human rights organizations and associations demand that the new Constitution should expand the path of transitional justice by recognizing the exceptional provision relating to ex-post facto criminal law in case of serious crimes in accordance with the obligation of the international human rights law and the spirit of the jurisprudence established by the Supreme Court. But the unwillingness shown by the major political parties and their political leadership to address this demand clearly reflects the lack of political will power for accepting the responsibility.

In spite of the variance of opinions within the political parties, on the whole there seems to be a consensus among the major political parties. It is not that some leaders of the political parties have not made any efforts to take forward transitional justice as guided by the judicial decisions and principles. Nevertheless, as those efforts could not be streamlined, they exist even within the parties only as a marginalized opinion. In spite of the issuance of an order by the Supreme Court in the case of Rajendra Dhakal to criminalize the act of enforced disappearance by enacting a criminal law in accordance with the international norms and standard that matter has been sidelined even till now. Even though a Bill criminalizing an act of enforced disappearance was presented before the Parliament in 2011 (2066 BS), it was subsequently withdrawn, and putting the issue of criminalizing the act of disappearance on hold, an Ordinance was issued to address transitional justice.

Although the need of enacting concurrently a law criminalizing the act of enforced disappearance and another on establishing transitional justice mechanism was pointed out,<sup>109</sup> only the Act on Investigation of Enforced Disappearance, Truth and Reconciliation Commission has been enacted. On the other hand, the Government, which is responsible for execution of the orders of the Supreme Court, is not satisfied with a few aspects of the judicial decisions and filed application for revision of that decision. This has revealed that there was lack of political willpower in the context of ensuring accountability, and that state of affairs still does exist. This reflects the disagreement of the political leadership and the Government with the judicial outlook that it was an indispensable responsibility of the State to bring to justice those involved in the serious crimes so as to make criminally accountable.

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108 Article 15(2) of ICCPR has provided for an exceptional provision according to which even though an act was not considered to be a crime at the time of commission according to the national law, ex-post facto criminal law could be enforced in accordance with "the legal principle recognized by the community of nations". Article 12 of the Constitution of Kosovo (2008) provides that ex-post facto national law can be enacted and prosecution can be made in respect of an act deemed as crime in accordance with International Law.

109 The report of the thematic Expert Task Force constituted by Nepal Government according to the order of the Supreme Court had also separately drafted and submitted a Bill to declare the act of enforced disappearance as a punishable criminal offence. Moreover, it had also suggested the government to draft concurrently a law to declare torture and war crime as punishable in accordance with the treaty obligation of Nepal.

## 2. Interpreting the CPA According to One's Own Convenience

There is no disputing the fact that the Comprehensive Peace Accord has given expression to the commitment to end impunity,<sup>110</sup> restoration of the rule of law and protection of human rights.<sup>111</sup> However, the political parties of Nepal have moved forward misinterpreting the Peace Accord in favor of impunity. The Supreme Court has made judicial interpretation of the legal and constitutional status of the Peace Accord in several judgments including in the case of Liladhar Bhandari.<sup>112</sup> The apex court has also directed to view the Peace Accord not in a unilateral manner rather in the context of the Interim Constitution and the International Conventions and treaties. However, the political leadership didn't want to come out of the interpretation of the Peace Accord made according to their convenience. Consequently, all this cast adverse impact on the execution of the Supreme Court judgments.

The worst victim of misinterpretation was the provision made in the Peace Accord which stated, "Both parties guarantee to withdraw accusations, claims, complaints, and *subjudice* cases made or filed against various persons on political grounds, and immediately make public the status of detainees and release them at once."<sup>113</sup> While talking about the cases filed purely "on political grounds", this provision was used to provide immunity from accountability for the perpetrators concerned with political parties. Moreover, some attempts were made to bring it into forcible execution as a mandatory constitutional provision. And thus in practice this was used to withdraw cases against the leaders of political parties to give them immunity from criminal accountability. Even in the case of grave violations of human rights during the conflict period, giving political value to the thought "No criminal accountability, only reconciliation", the central issue of the Peace Accord was diverted in another direction. Thus the one-sided and unilateral interpretation of the understanding of the Peace Accord created hurdles in regard to the execution of the judicial decisions delivered with a view to promoting transitional justice.

## 3. Lack of Conceptual Clarity about the Interrelation between Criminal Justice and Transitional Justice System

In the initial period, there was lack of clarity about the interrelation between transitional justice and criminal justice. There seemed to be a trend of interpreting it according to one's own

110 Article 7.1.3. of the Comprehensive Peace Accord: Both parties express the commitment that in accordance with law, impartial investigation shall be carried out in respect of, and action taken against, those persons who were responsible for obstruction in the enjoyment of the rights mentioned in this Peace Accord and insure the right of the victims of conflict and torture and the right of the family of the disappeared person to obtain relief.

111 Article 3.4 of CPA : to adopt a political system which is full of compliance with the universally accepted basis human rights, competitive multi- party democratic system, sovereignty inherent in the people and supremacy of the people constitutional checks and balances, rule of law, social justice and equality, independent judiciary, periodic election , monitoring by the civil society, complete press freedom, right of the people to information, transparency and accountability in the activities of political parties, public participation and concepts of impartial, efficient and fair bureaucracy.

112 Liladhar Bhandari and Others vs. Nepal Govt., (Writ No. 0863 of the Year 2064 BS). The Supreme Court has clarified through judicial interpretation that the provision of the Peace Accord could not be enforced as law without incorporating them in the Constitution or law.

113 See OHCHR – Nepal Legal Opinion: Remedies and Rights Revoked: Case Withdrawals for Serious Crimes, June 2011, page 1, 16 and 17.

convenience. The tendency was developed to deny victim's right to get justice under the prevalent law by advancing the plea of the provision relating to the formation of a Truth and Reconciliation Commission as provided in the Interim Constitution of Nepal, 2007. The transitional justice mechanism was interpreted as an alternative to the criminal justice. Taking recourse to that plea, the Human right Commission's initiatives for investigation were disobeyed. In some cases even the judicial body issued orders with the objective of relegating the acts of criminal investigation and prosecution to pending<sup>114</sup>. A provision was included in the Act relating to transitional justice to transfer the cases being *subjudice* before a judicial body to a non-judicial body like the Truth and Reconciliation Commission, which lacks the power of prosecution and adjudication.

Although it has been made clear through interpretation in Govind Bandi's case and Suman Adhikari's case, the Government has lodged a review petition in the Supreme Court expressing its dissatisfaction in this regard. The *subjudice* petition is focused on the interpretation that the conflict era cases which are *subjudice* before a court can't be transferred to the Truth and Reconciliation Commission. It is manifestly clear that the execution of some judicial decision has been also obstructed due to erroneous understanding about the interrelation between the criminal justice and transitional justice systems.

#### **4. Transitional Justice Becoming a Matter of Political Influence**

In the past, transitional justice was viewed more as an issue of politics than justice. Transitional justice was also viewed from the political angle along with political equation, army integration and unresolved issues in the Constitution. As usual, transitional justice became as agenda of political bargaining. As a result, obstacles emerged in the execution of judgments. The bodies accountable for judgment execution were also influenced by such political bargaining. On the pretext of arriving at a political agreement in package, the execution of the judicial order relating to enacting a law for the establishment of Truth and Reconciliation Commission and Commission on Investigation of Enforced Disappearance was stuck into continuing delay. The issue of providing justice to the victims of human rights violations was never considered as an independent agenda beyond politics, and thus the issue of getting justice was made a hostage of political bargaining.

#### **5. Lack of Active Role of the Civil Society and the Victims Community**

Although the necessity of transitional justice acquired extensive attention following the Comprehensive Peace Accord, it could not become a collective agenda of the human rights movement of the country. The civil society didn't streamline it by making a collective agenda. As collective civil pressure and awareness couldn't be built up for execution of the issues judicially resolved, even such judicially resolved issues also receded into the backdrop. All this has further promoted the attitude of ignoring compliance with the court orders and

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<sup>114</sup> see OHCHR Nepal's Legal Opinion, "The Relationship Between Transitional Justice Mechanism and the Criminal Justice System: Can Conflict related Human Rights and Humanitarian Law Violations and Abuses be Deferred or Suspended on the Basis of Commitments to Establish a Truth and Reconciliation Commission?", March 2011, Page 3.

decisions. If still the civil society and the human rights organizations and associations don't become united to internalize the need of the binding value of judicial decisions, it is apparent that the execution and compliance with the judicial decisions are bound to be weaker.

#### **6. Inadequacy of the Role of Human Rights Commission**

It can't be disputed that the role of Human Rights Commission is significant in regard to providing a solid basis for the advocacy of the civil society and the marginalized community in respect to transitional justice as well as to promote positive judicial role. It was also expected of the Commission to play a strong role to make the State organs accountable for practical implementation of the orders and decisions made by the judiciary with regard to transitional justice. However, for various reasons, the Commission couldn't make adequate efforts in this regard. Although a strategic role of the Human Rights Commission has been quite necessary for the execution of the orders and decision, based on the recommendations of the Commission, the Commission couldn't act as required.

#### **7. Absence of Specific Executive Body and Monitoring Mechanism**

Some grievances are expressed about the failure of the Judgment Execution Directorate in regard to effective execution of the court judgments. In regard to the execution of the court judgments engaging greater interest and concern at the political level, it was not felt necessary to adopt a different outlook and a separate procedure and strategy, and to arrange for a specialized mechanism. Even the role of the Attorney General could not be independent and effective in regard to enforcement and observance of such type of decisions and precedents. An institutional attitude could not be developed in regard to recognizing the task of judgment execution and compliance with court judgments and precedents as an obligation of the Attorney General. Moreover, the constitutional guarantee of prosecutorial independence in regard to transitional justice also became weak. Thus, due to political influence the issues pointed out by the Supreme Court for conducting investigation and making prosecution could not be executed.

#### **8. Lack of Enforcing Accountability on Those Indulged in Noncompliance**

No one has been accountable for disobedience of or noncompliance with the court orders/judgments. Thus, this practice of not undergoing any punishment for unaccountability promoted the trend of non-compliance with the court orders or decisions. There is no legal provision for ensuring the system of enforcing accountability on the officials except in the case of contempt of court. Even though the noncompliance with the court orders used to be in the obvious knowledge of the courts, no steps have been taken even by the courts to initiate contempt proceedings against such attitude of non-compliance.

#### **9. Structural and Practical Problems**

The stakeholders have pointed out the presence of several reasons behind non-compliance of the judgments. The structural and practical reasons have been pointed out during the group discussions. Such problems include lack of clarity in the interpretations made in the judgments, unavailability of the full text of the judgments on time, delay in arrival of the full

text to the concerned body even though the full text comes on time, lack of follow up for the implementation, lack of interest displayed even by the petitioners towards the execution of the judgments etc.

#### **4.4. Consequence of Non-Execution of Judgments**

Every decision made by a judicial body must be executed. Only after the effective execution of judgments the common people can realize about the implementation of the responsibility. Effective execution of judgment does not only increase public trust in justice rather it also helps in strengthening the rule of law. Failure to execute the judgments may lead to the following consequences:

##### **1. Increasing Internationalization of Nepal's Transitional Justice**

The National Human Rights Commission and the United Nations Office of the High Commissioner for Human Rights had observed in a report published in June, 2011 that the act of case withdrawal had been misused in Nepal for the sake of giving immunity from criminal accountability to the persons having political connections, and had cautioned against the emergence of a culture of impunity in practice.<sup>115</sup> The attention of the international community gradually got focused on the state of increasing culture of unaccountability to the perpetrators of human rights violations for criminal ability as a result of case withdrawals in contravention of the decision of the court. Similarly, even during the first universal periodic review of Nepal in the UN Human Rights Council in 2011 the issues like noncompliance with court orders and the trend of withdrawal of cases involving serious crimes were raised intensively<sup>116</sup>.

The issues of non compliance of court orders was strongly raised by Nepal Conflict Report<sup>117</sup> made public by the United Nations Office of the High Commissioner for Human Rights in 2012 and the Universal Periodic Review of the state of human rights in Nepal made in UN Human Rights Council in 2015, are also indicative of the extensive internalization of the issue of transitional justice in Nepal.

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115 National Human Rights Commission and OHCHR, Remedies and Rights Revoked: Case Withdrawals for Serious Crimes in Nepal, 2011. See page No. 2 of the Report –Case withdrawals have effectually served to protect politically connected individuals from criminal accountability, promoting a policy of de facto impunity.

116 See UPR Report: Its Recommendations, Action Plan and Implementation Status, Government of Nepal, Office of the Prime Minister and Council of Ministers, page 70 (eg. Recommendation No. 106.8: Ensure that all decisions from the judiciary, regarding those presumed responsible for serious human rights violations during and after the conflict are fully respected by all concerned institutional actors, particularly by the Army and the Police force (France); Tackle impunity by investigating and prosecuting human rights violation and abuses committed by State and non-State actors during and since the conflict, implementing court orders including on the Nepal Army, and ending political interference (United Kingdom).

117 Nepal Conflict Report of the Office of UN Office of the High Commissioner for Human Rights, 2012(2069 BS), Pages 198 to 200., For example the Report has made recommendation to the Ministry of Defense to provide full assistance to police investigation conducted according to judicial orders and the proceedings to be conducted by the prospective transitional justice mechanism.

## 2. Increasing Trend of the Victims using the Mechanism including the Human Rights Committee

There are some examples of some cases taken to the UN Human Rights Committee and the State made accountable by it in some incidents where national legal remedy had been declined under the legal system of Nepal or where the remedy provided had not been effective. For example, the cases of Yashoda Sharma vs. Nepal Government (October 8, 2008), Yuvraj Giri vs. Nepal Govt. (March 24, 2011) and Dev Bahadur Maharjan vs. Nepal Government (July 27, 2012)<sup>118</sup>, the Committee have reminded Nepal Government of its obligation to investigate human rights violations including enforced disappearance and torture and to bring the perpetrators to justice and provide effective remedy to the victims.<sup>119</sup>

## 3. Attraction towards Invoking Universal Jurisdiction

Enforcing criminal accountability for gross violations of human rights is not a discretionary power of any organ of the State nor can it be made so. As such crimes are targeted not only against the victims rather also against the entire human community and humanity, granting immunity from criminal liability cannot be possible on the basis of the consent of the victims alone. In such cases, amnesty, pardon, case withdrawal or statute of limitation (timeframe to lodge cases), which promotes impunity, are not applicable. No special circumstances can be a ground to exclude or evade from criminal accountability. If those matters are not properly addressed in the country, exercising universal jurisdiction can only be the option in such offenses.

Nepal is a member of UN and also a State party to various international human rights Conventions and Treaties. Therefore, Nepal is also guided by the international legal system. Under the International Law, the grave violations including genocide, crime against humanity, war crime, torture and enforced disappearance are treated as serious crimes. It is a universally recognized principle of the customary law that if such offenses are not prosecuted, the perpetrators should be extradited. Therefore, even if Nepal grants immunity in such offenses, the State cannot prevent the prospective prosecution that may take place in another jurisdiction.

The criminal proceedings started against Colonel Kumar Lama under Section 134 of the Criminal Justice Act, 1988 of the United Kingdom on the charge of torture is an example.<sup>120</sup> There is no disputing the fact that this criminal proceeding is a consequence of giving

118 For the detailed accounts of the views adopted by the Human Rights Committee and the status of their execution, see the website: [http://realrightsnow.org/en/jointly operated jointly by the organizations like Advocacy Forum Nepal, JuRI Nepal, Trial and REDRESS](http://realrightsnow.org/en/jointly%20operated%20jointly%20by%20the%20organizations%20like%20Advocacy%20Forum%20Nepal,%20JuRI%20Nepal,%20Trial%20and%20REDRESS).

119 Human Rights Committee has also commented on Nepal's obligation in Shanta Sedhai, Ram Kumar Bhandari (Represented by counsel, Track Impunity Always- TRIAL, Kedar Chaulagai (represented by counsel, Advocacy Forum- Nepal, and Carla Ferstman, Redress Fund), Jitman Basnet and Tope Bahadur Basnet (represented by counsel Track Impunity Always – Trial), Sharmila Tripathi (represented by counsel, Track Impunity Always – TRIAL).

120 International Commission of Jurists (ICJ), Nepal: the Case of Colonel Kumar Lama: The Application of Universal Jurisdiction, Questions and Answers. Available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/09/LAMA-leaflet-print-final.Pdf>.

continuity to impunity due to the failure to exercise the national criminal jurisdiction in compliance with international legal obligation. Therefore, if the judgments given by the Supreme Court and the subordinate courts in regard to the human rights violations committed during the conflict period are not executed, there may still emerge greater threat of prospective criminal prosecution of Nepali citizens in other countries for their involvement in serious human rights violations or abuses.



# CHAPTER – 5

## Conclusions and Recommendations

It is the duty of the Government and all citizens to abide by the decisions and orders made by the Courts. The realization of remedies granted by the court depends on the execution of decisions. Judicial remedies shall become meaningless in the absence of their implementation. There shall be no possibility of the rule of law in the absence of execution of the court decisions. The failure of execution of the court orders ultimately may disturb the basic pillars of democratic system of governance. Through analysis of the court decisions and orders, this Study has reached at the following conclusions and made some specific recommendations:

### 5.1 Conclusions

The factual analysis and examination made in this Study of the execution status of the decisions made by the Supreme Court and the Appellate Courts shows that the situation of transitional justice in Nepal is not fully positive. Based on the accounts presented and the analysis made above, the conclusions of the Study are as given below:

- a. As out of total 29 judgments included in this Study 16 have not been executed, the victims have failed to get justice according to the court judgments. Such a state (of non-execution of judgments) also bears closeness to the state of execution of some judgments given earlier by the Supreme Court in disputes of public interest or concern.<sup>121</sup>
- b. Out of the decisions included in the Study, six decisions were found to have been executed whereas seven decisions were found to have been partially executed. Comparatively, the decisions not executed were found to be in majority.
- c. After the end of the armed conflict in Nepal, even though there has been a practice of the political party getting majority in the election, which is, of course, a democratic practice, leading the Government, the practice of respectfully abiding by the court judgments, which remains as its another dimension, has not been adopted in a positive way.
- d. It has been the understanding of the researchers that the main reason of non-execution of the court judgments lies in the interference caused at the political level. And this understanding has matched with the experience of a majority of the stakeholders. The stakeholders pointed out that such interference used to be started from the centre as a policy matter, and it persisted in course of execution even at the local level.

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121 National Judicial Academy, Nepal has found that out of 200 instructive orders collected in course of a Study, 72 orders have been fully executed. 9 orders have been executed partially and 67 orders are still in the process of execution and 22 orders have not been executed at all whereas no information is available about the state of execution of 30 orders. (See Shyam Kumar Bhattarai and Umesh Koirala, the Status of Execution of the Instructive Orders Issued by the Supreme Court: A Research Study Report, 2072 (2015), National Judicial Academy, Nepal.

- e. The reason behind non-execution of the orders issued under the writ jurisdiction lies in inadequacy of the existing structure and the lack of legal authority even in the existing structure whatsoever. There seems to be a lack of necessary law, rules or structure required for exercising the constitutional obligation of the Attorney General.
- f. This Study has also brought to light some interesting facts. During the interactions with stakeholders about the implementation of court decisions, some of the victims of the conflict period expressed the opinion that even non implementation of some court orders for prosecuting some perpetrators was also good. In their views, the criminal prosecution may cause adverse impacts on pushing forward the emerging process of rehabilitation and rebuilding by maintaining the state of reconciliation and peace in the society.
- g. The serious consequences of non-execution of the decisions made by the courts in respect of transitional justice have already surfaced. Internally, it seems to have granted immunity from criminal accountability to those involved in serious violations of human rights. Finally, it has further entrenched the impunity. Consequently, a belief is getting deeply rooted that the state cannot punish the criminal offenses committed by any government official or any leader or activist of some political party or some specific groups. It was also stated that such crimes have also led to the creation of increasing loss of trust of the common people including the victims in the State mechanism.
- h. External influence was also identified as a reason behind non-execution of court verdicts. It was manifested in the prosecution started by some other country invoking the power granted by the principle of universal jurisdiction regarding an Official of Nepal Army for having committed human rights violations in Nepal during the armed conflict in the past. There is possibility of increasing this practice. Majority of individual communications filed at the UN Human Rights Committee are related to incidents of human rights violations occurred during the armed conflict.
- i. The major concern of the international community, particularly of the United Nations, regarding Nepal relates also to the apathetic attitude towards addressing the issue of human rights violations committed in the past. Particularly, despite the issuance of a court order no law has been enacted or amended criminalizing the act of enforced disappearance of persons, those organizations have expressed their reluctance to provide assistance to the Commission on Investigation of Disappeared Persons and the Truth and Reconciliation Commission on the same ground.<sup>122</sup>

## 5.2 Recommendations

In order to translate the concept of the rule of law into reality through effective execution of the court judgments relating to transitional justice, provide remedies to the victims and disseminate a positive message to the international community regarding human rights protection in Nepal, this Research Study has made the following recommendations:

- a) The political leadership does not seem to be conscious of the need of execution of the judgments and the possible serious negative impacts caused by non-

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122 Nepal: OHCHR Position on UN Support to the Commission on Investigation of Disappeared Persons and the Truth and Reconciliation Commission (16 February, 2016).

implementation of the court judgments. So it is necessary that the Government should conduct awareness raising programs targeting the political leadership.

- b) The lack of implementation of the court judgments may develop a negative perception among the people towards the democratic system and its government. So, for the sake of ensuring the democratic system, the Government should accord a high priority to the execution of the court judgments and establish necessary mechanism for their execution.
- c) Most of the decisions relating to provide compensation or relief have been implemented. However, there is very low rate of implementation of the decisions related to criminal investigation. It is necessary to enhance the competence of the investigators, prosecutors and also the courts so as to make the criminal proceedings more effective.
- d) It is necessary to further strengthen the Judgment Execution Directorate and establish a separate Division for execution of the decisions relating to transitional justice and to take forward this act of execution of such judgments as a campaign for judgment execution. It is also needed to increase the existing power of this Directorate, and it shall be appropriate to give power to the Directorate for taking departmental action against the officials found delinquent of not implementing the court orders so as to make them more accountable.
- e) As there appears a lack of some legal and structural provisions in respect to implementation of the orders issued under the writ jurisdiction, it shall be expedient to create such a structure.
- f) It is necessary that the Office of Attorney General recognizes the function of implementation of court decisions as its responsibility. It also seems necessary to create a special mechanism to monitor and, to cause to be monitored, the decisions relating to transitional justice.
- g) While discharging their functions, it is necessary on the part of the Commission on Investigation of Disappeared Persons and the Truth and Reconciliation Commission to incorporate the guidelines issued by the decisions in their Operational Rules and to carry out its implementation accordingly. Only if the commissions themselves abide by the court judgments relating to transitional justice and carry out the duty of monitoring whether or not other bodies have also complied with those judgments, the legitimacy of the Commissions will be increased.
- h) There is also a need of harmonious execution of the conclusions drawn by the investigations made by the Human Rights Commission in regard to human rights violations committed during the conflict period and the decisions made by the courts. It seems necessary that the Office of Attorney General should play a coordinating role in this regard.
- i) The international community has displayed serious concern in the human rights violations occurred in the past. In order to translate that interest into reality, it shall be necessary to provide assistance to enhance the competence of the bodies (agencies) involved in the execution of the court judgments.

- j) In this Study the cases have been analyzed treating them as units. Treating the functions to be performed as per the order as units an extensive research can be further undertaken including additional judgments of the court.

## Schedule – 1

### Description of Fully Executed Judgments/Orders

S. N.	Petitioner /Respondent	Facts-in-Brief	Contents of the Order	Executing Authority	Status of Execution	Comments
1.	Karnbahadur Rasaili vs. District Police Office, Kavrepalanchowk & Others	Acting upon the FIR filed by Karnabahadur Rasaili, the Supreme Court issued an order for conducting investigation at the earliest. After completing the investigation, the prosecution charge sheet was filed in Kavrepalanchowk District Court on 17 September 2010 against the accused including Second Lieutenant Saroj Basnet and Corporal Kaji Bahadur Karki.	As the aforesaid District Police Office had not discharged its legal duty to conduct effective investigation of the crime, an order of mandamus was issued in the name of the respondents to complete immediately the act of investigation in accordance with the said FIR.	District Police Office Kavrepalanchowk and Others	The court order was executed	
2.	Devi Sunuwar vs. District Police Office Kavrepalanchowk & Others	Some army men in uniform belonging to Birendra Shanti Training Center Panchkhal went on 17 February 2004 to the house of Maina Sunuwar aged 15, arrested her and brought her to the Army Center and subjected her to torture in the Army Barrack. The Headquarters of the Army had issued a public notice stating that as a result of the action taken by Colonel Babi Khatri, Captain Amit Pun and Captain Sunil Adhikari working then at Panchkhal Camp of the Army, Maina Sunuwar had died and so they had been court martialled and punished. The law clearly excluded the jurisdiction of Military Court to try such criminal cases. Such cases	The court order stated that it was clear even from the decision of the Military Court that the death of Maina Sunuwar had occurred as a result of the wrong method and technique adopted by the Nepal Army in course of her interrogation. In such a situation no matter how her death had occurred, it was the result of a criminal act and it should have been decided whether or not there was a scope of instituting a criminal case, and to institute a charge sheet if there seemed to be any ground for prosecution as provided in the State Cases Act, 2049. But as no effective investigation had been conducted so far in regard to the FIR of November 13, 2005 even after a lapse of such long time, the concerned respondents were ordered to complete the necessary	District Police Office Kavrepalanchowk	Executed	

		<p>need to be tried by regular courts at par with ordinary cases. An act of deliberate killing was contrary to Section 1 of the Chapter on Homicide in the State Code and falls under Schedule 1 of the State Cases Act, 2049 (1992). When the complainant went to District Police Office Kavreplanchowk seeking legal action against the guilty on 13 November 2005 as per Section 3(1), (2) of the State Cases Act, 2049 (1992), the complaint should have been registered in the complaint register as per Section 3(4) of the Act. But as the Police refused to register the complaint against the Army personnel, the complaint was registered on that very date in the District Administration Office, Kavreplanchowk as per Section 3(5) of the Act.</p> <p>The petitioner prayed for the issuance of an appropriate order including the order of mandamus in the name of the concerned respondents pursuant to Art. 88(2) of the Constitution to initiate immediately the act of investigation on the basis of the FIR and arrest the accused and fulfill their duty as specified by the State Cases Act, 2049 (1992) including the duty of instituting the case in the court.</p>	investigation within three months of receiving the order.			
3.	Advocate Govind Sharma	Following the investigation conducted regarding murder of journalist Dekendra Thapa in	The apex court issued an Interim Order and also instructed the concerned officials to continue with the process of	Nepal Police and Government	The order was executed and a case was	Executed

	'Bandi' vs. Attorney General MuktiPradhan and Others	Dailekh during the conflict period and the arrest of some defendants and the police remand granted by the court, as the Attorney General had issued an instruction to the Police Headquarters to stop the investigation, the writ petition was filed seeking annulment of the impugned order of the Attorney General.	investigation pursuant to Rule 41(1) of the Supreme Court Rules, 2049 (1992).	Attorney	instituted in the District Court which has been already disposed.	
4.	Sukdev Ray Yadav vs. Nepal Government, the Office of Prime Minister and Council of Ministers and Others	As respondent Nepal Government, the Office of Prime Ministers and Council of Ministers made a decision on 30 June 2010 to withdraw the case which was already under trial, the apex court held that the impugned order was unconstitutional, illegal and violative of the fundamental rights, and so the impugned order was quashed.	As the Council of Ministers exercised time and again the power granted by Section 29 of the State Cases Act, 2049 (1992) to withdraw some <i>subjudice</i> State cases, and different and mutually contradictory criteria were adopted in the application of the law, the apex court issued an order of mandamus in the name of the respondents including Bara District Court to take into account the following matters before exercising the said Section 29 of the Act: <ul style="list-style-type: none"> <li>Besides, the offenses mentioned in Para 4 of the Policy, Norms and Procedure to be adopted Regarding Withdrawal of Criminal Cases, 2055 (1998), not to make any decision about withdrawing cases such as deliberate serious type of murder, crime against the State, war crime, human rights related crimes and inhuman type of crimes against humanity, organized crime, crimes against women and children, genocide and crime against public interest.</li> <li>Prior to making a decision about withdrawing any case, to develop a</li> </ul>	Nepal Government, Ministry of Home Affairs	Section 3 of the Case Withdrawal Procedure Regarding State Cases, 2071 (2014) has prohibited withdrawal of the cases including genocide, war crime, crime against humanity etc. Likewise, Section 7 provides for having mandatory consultation with the Office of Attorney General before withdrawal of a case filed on behalf of Nepal Government.	As required by the order, some of the matters have been provided in the Procedure Relating to Case Withdrawal and in the new Constitution. However, it is yet to be observed how they are complied with in practice. The practice of case withdrawal

			<p>system of case withdrawal after also having consultation with the Attorney General or his subordinate Public Prosecutor who had instituted the case in regard to valid reasons for case withdrawal.</p> <ul style="list-style-type: none"> <li>• If there is also a legal provision about giving compensation to the victim, to pay attention to making arrangements about not causing any adverse impact on getting such compensation while withdrawing the case.</li> <li>• Not to consider the issue of withdrawal in case of a person who is absconding and has not appeared before the court in response to the court summons.</li> <li>• In order to enable the informant or the victim to be able to participate in the process of case withdrawal, to inform him/her and to grant an opportunity to present his/her views.</li> <li>• For effective implementation of the aforesaid matters, to make necessary amendments to the Norms and Procedures to be Adopted Regarding Withdrawal of State Criminal Cases, where Nepal Government is the plaintiff, adopted by Nepal Government, the Council of Ministers on 17 August 1998.</li> </ul>		<p>Similarly, Article 158(3) of the Constitution of Nepal (2015) has provided for seeking opinion of the Attorney General before withdrawal of a case filed on behalf of Nepal Government.</p>	<p>has been encouraged generally due to political influence and erroneous interpretation of the Peace Accord.</p>
5.	Nepal Government vs. Gagandev Ray	The Homicide case involving six defendants including Gagandev Ray Yadav regarding the criminal offense that had occurred on 23 January 2000 was disposed by	A perusal of the facts of the appeal filed in the apex court showed that it could not be proved objectively that the alleged criminal offense had resulted from a political reason. In such a situation, only	Office of the Prime Minister and Council of Ministers	Executed	Executed

	Yadav and Others	Rautahat District Court and also by Appellate Court Hetauda, and was now <i>subjudice</i> before the Supreme Court in the form of an appeal. As the defendants had been implicated in that case as a result of political revenge in course of the Maoist people's war, the Office of Prime Minister and Council of Ministers decided to withdraw that case on 17 December 2008 on the basis of Article 5.2.7 of the Comprehensive Peace Accord contained in Schedule 4 relating to Clause (3) of Article 166 of the Interim Constitution of Nepal, 2007, and a letter to this effect was produced by the Office of Attorney General before the Supreme Court.	because of mentioning about the legal and constitutional provision relating to case withdrawal it cannot be treated as a valid ground for case withdrawal so as to grant immunity to the defendants from punishment, and thus permission cannot be granted for withdrawal of the present case.			
6.	Rajendra Dhakal vs. Nepal Government, Ministry of Home Affairs and Others	In response to the writ petitions of habeas corpus filed separately on behalf of 80 persons about their alleged enforced disappearance by the State during the conflict period, the Government had submitted the written reply denying to have arrested them. The Supreme Court ordered to club together all those writ petitions for collective hearing. Also, as it was not considered appropriate to proceed with the hearing only on the basis of the writ petitions, it also constituted a Prisoners Investigation Committee under the chairmanship of the Chief Judge of the Appellate Court to conduct an investigation in that regard. Accepting the report	The apex court issued an order regarding the case of custodial death of Chakra Bahadur Katuwal to conduct investigation and institute a case and complete the process of departmental action and punishment against the concerned office chief and other employees. As for Rajendra Dhakal, Bipin Bhandari and Dilbahadur Rai, whose whereabouts were still unknown, it was directed to make necessary law to conduct investigation, prosecute and provide justice, to institute case against those accountable for causing enforced disappearance and to provide compensation to the concerned persons and the victims. It was also ordered to take departmental	Nepal Government, Council of Ministers, Ministry of Home Affairs, Office of Attorney General, Ministry of Law and Justice	Relief has been provided to the victims to some extent. Rules and Manual regarding relief and compensation have been made and implemented. The Commission on investigation of Disappeared Persons has been	Interpretation of Comprehensive Peace Accord according to one's convenience, lack of political will to ensure accountability and lack of monitoring of judgment execution status.

		submitted by that Committee, the apex court had issued the final order based also on that very report.	<p>action and punish the chief of the concerned body and other employees involved in arresting and subsequently causing disappearance of the arrested persons.</p> <p>It was further ordered to accept the International Covenant on the Protection of All Disappeared Persons as a guideline and to make law on that basis.<sup>123</sup></p> <p>Also, to make a suitable legal provision for constituting commission on Investigation of Disappeared Persons in accordance with the Criteria for Commission on Enforced Disappearance<sup>124</sup> developed under the aegis of the office of UN Human Rights Commissioner.</p> <p>In order to conduct investigation in</p>		constituted in accordance with the investigation of Disappeared Persons, Truth and Reconciliation Commission Act, 2071. However, no law criminalizing enforced disappearance has been made as yet as directed by the judgment. The	
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- 123 The judgment has issued the guidelines that such law should incorporate provisions about : arrest, detention, taking hostage, precautionary matters to be considered before detaining anybody, rights of the victims and their families, the remedies available to them, provision addressing the gap in the investigation about them, criminalizing the act of disappearance, defining the act of enforced disappearance in accordance with the definition contained in the International Convention on the Protection of All Persons from Enforced Disappearance, 2006, provisions relating to the rights of the detainees, obligation of the detaining authority, specifying the place of detention and the provision about the contact and access of the Counsel and the family members to the persons in detention, the right to information about the cause of one's arrest, the detainee's rights to judicial remedy, the unlawfully detained person's and the victim's family's rights to remedy including compensation for such illegal detention and enforced disappearance, provision about flexible limitation without rendering the process of investigation ineffective, a complaint hearing body and its responsibilities regarding hearing of issues of illegal detention or enforced disappearance, keeping prisoners only in formal prisons after making arrangements for such prison, humane treatment during detention, obligation about keeping record of relevant information including time and condition of keeping in detention, name and address of the detaining authority and similar obligation about making arrangements during transferring a prisoner, every family member's right to know about whole condition of the detainee and developing an easy procedure in this regard, provisions relating to terms and conditions reflecting the actual release of the detainees from prison while releasing them and keeping a record of their physical and mental state, and making provision prohibiting granting pardon to those who have been awarded punishment.
- 124 The criteria mentioned in the judgment include grounds like investigation of all incidents relating to enforced disappearance, clarifying (explaining) the jurisdiction of the Commission, such investigation not to displace the court, persons nominated to the Commission need to be appropriate and competent, independent and impartial necessary service conditions and benefits to be spelt out, representation, directions, duties and powers of the Commission to be spelt out in the Act itself, investigation to be conducted on the basis of information received from any source depending on the nature of the particular problems, continuous investigation till the situation becomes clear, providing security to the victim, witnesses and complainants, who are important from the viewpoint of investigation and also to the Counsels and the investigators so as to secure their cooperation in course of investigation, victim's right to present their views and the opportunity for it, provision about maintaining confidentiality of their statements, inspection of place and Office necessary for the Commission, the right to enquire the persons who are considered necessary from the viewpoint of investigation etc.

			<p>accordance with the legal provisions, to constitute a powerful suitable Commission for conducting investigation about the persons mentioned in the petition and submitting the report, and to complete the criminal investigation on that basis, and to make necessary decision including the one about prosecution in regard to the concerned persons as required and appropriate. Without affecting in any way the remedy to be provided in accordance with the law and with the limited objective of assisting for the time being the victim families as a recompense for the liabilities incurred in their bid for seeking access to justice, to provide, as interim relief, Rs. 200000/-to each of the families of those who have been declared as dead, Rs. 150000/- to the families of each of those who were arrested by the Security forces and disappeared and Rs. 100000/- each in the case of other persons mentioned in the petition whose whereabouts are not clear as yet. Also, to design and implement suitable relief package for the victims.</p>		<p>victims' society complains that the Commission could not be constituted in a victim friendly way as required by the judgment. Likewise, no criminal investigation or prosecution or departmental action could be taken to enforce accountability as ordered by the said judgment.</p>	
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## Schedule – 2

### Description of Partially Executed Judgments or Orders

S. N.	Petitioner/ Respondent	Facts-in-Brief	Contents of the Order	Executing Authority	Status of Execution	Comments
1.	Purnimaya Lama vs. District Police Office, Kavrepalanchowk and Others	While ArjunBahadur Lama was participating in a welcome ceremony at Shree Krishna Secondary School on 29 April 2015, a group of Maoists arrived there and abducted him from the program venue saying that they had to talk to him about some matter. Thus taking him away, the Maoists took him to different Village Development Committees of the district and finally killed him in Budakhani Village Development Committee in the last week of June, 2005 Such unlawful act of his killing was contrary to Section 1 of the Chapter on Homicide in the State Code and the offenders were liable to punishment as mentioned in Section 13(3) of the same Chapter, So an FIR specifying the name of the offenders was presented before the District Police Office on 5 July 2007as per Section 3 of the State Cases Act, 2049 (1992). Whereas the FIR should have been registered by the concerned District Police Office as per Section 3(4) of the Act, the Police employee refused to register or	The letter written by District Administration Office to respondent District Police Office on 8 July 2007 and also the act of informing the petitioner through a letter dated July10, 2007 about endorsement of the FIR were contrary to the law, and so such unlawful decision and act are quashed by an order of certiorari. Also, an order of Mandamus is hereby issued in the name of the respondents including District Police Office Kavrepalanchowk to register the FIR produced by the petitioner on 5 July 2007 as per Section 3 of the State Cases Act, 2049 1992) and to carry out other proceedings in accordance with the law	District Police Office Kavrepalanchowk and Others	Partially executed	

		<p>endorse on the back of the FIR the reason of refusal to register the FIR, Thereafter an application was made before the defendant District Administration Office as per Section 3(5) of the Act. On 8 July 2007 as the District Administration Office sent a CC(information for reference)of the letter to the kin of Lama instructing the District Police Office to endorse the FIR (stating the reason of refusal of registration), the applicant was subsequently informed about the reason of not registering the application.</p> <p>Because respondent District Police Office's act of not registering the FIR rather endorsing the FIR instead on 10 July 2007 following the instruction of the District Administration Office dated 8 July 2007 was contrary to Section 3 of the State Cases Act, 2049 (1992) and Article 13 of the Interim Constitution of Nepal, 2007, the petitioner prayed for quashing the impugned order and the other related matters pursuant to Articles 32 and 107(3) of the Constitution by issuing the writ of Certiorari and also an order of Mandamus in the name of the respondents to register the said FIR and conduct effective investigation.</p>				
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2.	Kale Tamang vs. Nepal Government, the Office of Prime Minister and Council of Ministers	The security forces shot dead five innocent persons including Pariman Tamang at Balgaun, Ward No. 4 of Kahule VDC of Nuwakot district while they were returning home during the night of 27 November 2002. A writ petition was filed seeking an order for conducting investigation of the incident and sentencing the security personnel involved in the unlawful killing to punishment besides providing appropriate compensation to the concerned.	An order was issued to provide compensation to the victims for the damage and impacts caused to the dependent families of those shot dead unlawfully by the State party, to conduct independent enquiry into that incident and, for this purpose, to constitute a high level Task Force under the convenership of an independent and impartial person for carrying out the necessary works and to provide compensation and relief to the dependent families of the killed within three months of submission of the report. Also, a directive was issued to make, and cause to be made, a Compensation Act which shall make it feasible to claim and get the compensation.	The Office of Prime Minister and Council of Ministers, and Ministry of Home Affairs	On 15 April 2003 Rs. 100000/-(one lakh) each was provided as compensation. However, no legal provision has been made so far in this regard.	
3.	Leeladhar Bhandari and Others vs. the Office of Prime Minister and Others	Even though it was mentioned in Article 5.1.8 of the Comprehensive Peace Accord contained in Schedule 4 of the Interim Constitution, 2007 promulgated following the signing of the Comprehensive Peace Accord to return the property captured in course of the armed conflict, the petitioners were deprived of their right to property and the right to life due to failure of getting back the property captured from them. So the writ petition was filed seeking issuance of an order of mandamus in the name of the respondents including Nepal Government.	An order of mandamus was issued in the name of the respondents including the Office of Council of Ministers to constitute a Property Return Committee at the district level in the districts facing the problem of captured property comprising at the most five members including a representative of the petitioners and the victim community, representatives of the law enforcing agency and political persons to review the records of specific properties of the petitioners, their enjoyment and the income accruing from those properties and also the damage caused to it in order to free the unlawful capture of those properties and return, and cause to be returned, such property to their rightful owners with appropriate compensation on the basis of the	Office of Prime Minister and Council of Ministers, The Office of Attorney General, Ministry of Land Reform and Management and its subordinate Departments and Offices		

			damage and loss caused to such captured property and assessment of the loss caused to the income accruing from such property within three months of receiving this order, and also to create a Compensation Fund.			
4.	Rajendra Dhakal vs. Nepal Government , Ministry of Home Affairs	In response to the writ petitions of habeas corpus filed separately on behalf of 80 persons allegedly detained by the State during the conflict period, the Government had submitted the written replies denying the allegation about their arrest. The Supreme Court ordered to club together all the writ petitions for the purpose of collective hearing of the cases. Moreover, as the court did not think it appropriate to proceed with the case only on the basis of the nature of the case, it constituted a Prisoners Investigation Committee under the convenership of the Chief Judge of the Appellate Court to conduct enquiry in that regard. Accepting the report submitted by that Committee, the court issued an Interim Order on the basis of that report as well.	Investigate the crime and institute a case in favor of Chakra Bahadur Katuwal and initiate and complete the process of departmental action and punishment against the concerned Office Chief and the employees. Make necessary law to institute a case and give justice in regard to Rajendra Dhakal, Bipin Bhandari and Dilbahadur Rai, who have been identified as persons whose whereabouts were not known as yet, prosecute those accountable for causing disappearance and provide the concerned persons and the victim families with compensation in accordance with law. Also, take departmental action and punish the Chief and other employees of the concerned organizations (bodies) involved in the act of enforced disappearance after arrest. Make law recognizing the International Convention for the Protection of All Persons from Enforced Disappearance as the guideline. <sup>125</sup>	Nepal Government, the Council of Ministers, Office of the Attorney General and Ministry of Law and Justice	Relief has been provided to the victims to some extent. Rules and Manuals have been made and enforced in regard to relief and compensation. The Investigation of Disappeared Persons, Truth and Reconciliation Commission Act, 2071 (2014) has been enacted, and the Commission on Investigation of Disappeared Persons and the	Understanding of the Peace Accord according to one's own convenience, lack of political will power to ensure accountability and absence of monitoring of the status of judgment execution

125 The judgment has instructed that the said law should contain provisions about the following matters like arrest, detention, making hostage, caution to be adopted while detaining somebody and provision in this regard and the rights of their families, remedies available to them, effective investigation in their case, criminalizing the act of enforced disappearance, defining the act of enforced disappearance in accordance with the definition contained in International Convention for the Protection of All Persons from Enforced Disappearance, rights of the detainees, obligation of the detaining authority, specifying the place of detention, contact and access of the detainee with his/her lawyer and family members, right of the detainee to be informed about the cause of detention, provision about judicial remedy for the detainees, the right to remedy including compensation in case of a person kept in unlawful detention and the family for the suffering caused by such detention or the act of enforced disappearance, flexible limitation

			<p>Make suitable legal arrangements for constituting a Commission on Enforced Disappearance in accordance with the Criteria for Commission on Enforced Disappearance developed under the aegis of the Office of UN Human Rights Commissioner.<sup>126</sup></p> <p>Constitute a high powered suitable Commission in accordance with the legal provision and cause to be investigated and presented a report in regard to the persons mentioned in the petitions and complete criminal investigation on its basis and make, and cause to be made, a decision about prosecution against the concerned persons according to the need and appropriateness.</p> <p>Without affecting the remedial treatment to be provided in accordance with law, with a view to helping the victim families for the time being in bearing the liabilities in their bid to search for access to justice, provide as interim relief Rs.</p>		<p>Truth and Reconciliation Commission have been already constituted. Nevertheless, an Act criminalizing the act of disappearance as required by the judgment is yet to be made. The victims and the civil society complain that the Commission could not be constituted in a victim friendly manner as instructed by the judgment.</p>	
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without rendering the process of investigation ineffective, the body entrusted with the duty of entertaining the complaints about illegal detention or enforced disappearance and its responsibility, making arrangements for formal prison houses for the purpose of keeping persons in detention, and detaining detainees only in such prison houses, meting out humane treatment while keeping in detention, obligation regarding maintaining relevant details about the time of keeping in detention, condition, name and address of the detaining authority, and making such arrangements even while transferring the detainees, the right of the families to know about every condition of detainees, and developing easy procedure in this regard, providing for the conditions reflecting the state of release in actuality while releasing any detainee, and maintaining a record of his physical and mental state, and providing for not giving amnesty to those who have been awarded punishment.

126 The Criteria recognized by the judgment includes the following things: to investigate all incidents of enforced disappearance; to clarify the jurisdiction of the Commission; such investigation not to replace the regular court; the persons nominated to the Commission should be appropriate; competent, independent and impartial provisions should be made for their service conditions and benefits; representation of women and other races or communities in such Commission should be ensured; the function, duties and powers of the Commission should be prescribed in the Act, depending on the nature of the issue, investigation should be conducted on the basis of any information received from any source whatsoever; provision for continuous investigation until the situation becomes clear; making provisions about the security of important victims, witnesses, complainants, lawyers and investigators so as to secure their cooperation in the investigation; provision about the right of and the opportunity for the victims to put forward their concerns and views; provision about maintaining confidentiality of their statements; necessary space required for the Commission; inspection of offices; power of summoning and recording the statement of the concerned persons etc.

			200,000/- to each of the families of the deceased, Rs. 150,000/- in case of those made disappeared by the security forces and Rs. 10,000/- each to those whose whereabouts are not clear as mentioned in the petitions. Also, design and implement suitable relief program for the victims.		As directed by the judgment, criminal accountability could not be made or non-criminal accountability could not be enforced by taking departmental action against the concerned.	
5.	Budhi Bahadur Praja & Others vs. Nepal Government, the Office of Prime Minister and Council of Ministers	Describing it as an encounter with the terrorists, on 24 February 2002 the then Royal Nepal Army had resorted to firing and mass killing of the innocent relatives of the petitioners in an unlawful manner who were employed at Kalikot Kotwada Airport. The writ petitioners prayed for the issuance of an order in the name of the respondents for giving appropriate compensation for the damage caused to the dependent families, and for enacting a separate law for giving compensation to the victims for the damage caused to them and for awarding maximum punishment to the security personnel who resorted to arbitrary and indiscriminate firing upon the innocent civilians without caring a fig for the minimum criteria prescribed by the law, and	An order of mandamus was issued in the name of the respondents to take initiatives at the earliest for making a separate comprehensive law providing for appropriate compensation to the victims in regard to the killings of the innocent civilians violating the humanitarian law from the viewpoint of Victimology, ending impunity and providing for a body to provide necessary advice for impartial investigation, and effective remedy in disputes of such nature.	Nepal Government, the Office of Prime Minister and Council of Ministers.	Partially executed	

		also to the security officials who gave such order.				
6.	JuRi Nepal and Others vs. Nepal Government , the Council of Ministers	Two writ petitions were filed, one on behalf of JuRi Nepal and another on behalf of the victims community and human rights activists, challenging the constitutional validity of the Investigation of Disappeared Persons, Truth and Reconciliation Ordinance, 2069 (2013). The petitioners prayed for voidance of the provision contained in Section 23(2) of the Ordinance regarding granting amnesty even in serious crimes, and asked for making the provision relating to the scope of reconciliation even in serious crimes and non-mandatory consent of the victim for granting amnesty and causing reconciliation in accordance with the International Law.	<ul style="list-style-type: none"> <li>The provisions relating to enforced disappearance in the Ordinance seem to be contrary to the constitution law and the legal principles enunciated by this court, and so an order of certiorari is hereby issued in the name of the respondents invalidating those provisions, and the Ordinance cannot be implemented in its present form. It is hereby ordered to issue another Ordinance at the earliest containing necessary legal provisions for constituting a separate Investigation Commission or making necessary provisions whatsoever for carrying out investigation about the acts of enforced disappearance in accordance with the Constitution, law and the decision made and the principles enunciated by this court in the case of Rajendra Dhakal. The provision relating to amnesty and pardon contained in Article 23 does not seem to give any guarantee against not giving amnesty in the crimes mentioned in Section 2(j) of the Ordinance, and as it has been turned into a subject of the amnesty process and as the participation and consent of the victims in the process of amnesty has been made subsidiary, not mandatory, it is necessary to review those provisions and refine and amend them.</li> <li>Due to the provisions made in</li> </ul>	Nepal Government, the Council of Ministers, Ministry of Home Affairs, Office of Attorney General and Ministry of Law and Justice	The Investigation of Disappeared Persons, Truth and Reconciliation Commission Act, 2071 (2014) has been enacted providing for the constitution of two separate Commissions on Enforced Disappearance and Truth and Reconciliation as had been directed by the judgment. In order to comply with the order, an expert thematic Task Force was constituted comprising some victims and human rights law experts for drafting the concerned bill. However, the recommendatio	Interpreting the Peace Accord according to one's own convenience, dearth of political will power to ensure accountability and lack of monitoring of implementation of the judgments .

			<p>Sections 25 and 29 of the Ordinance the criminal prosecution of the perpetrators of gross violations of human rights has not been made certain, easy and unobstructed rather it has been placed at the discretion of the Executive and made uncertain, and thus as it seems to be obstructing justice, it is necessary to reorient it in accordance with the Constitution and law.</p> <ul style="list-style-type: none"> <li>• As the 35 day limitation of instituting a case as per the recommendation of the Commission may lead to a state of impunity in regard to the incidents of violations of human rights law, it is necessary to amend and modify it so as to make it compatible with the Constitution and justice. Apart from the above mentioned provisions, it is also necessary to modify the law and to adopt practical measures at the implementation stage for the sake of comprehensive management of truth seeking and reconciliation.<sup>127</sup></li> <li>• To modify and fine-tune the Ordinance with the assistance of a thematic expert committee comprising a conflict expert, victims or an organization representing the</li> </ul>		<p>ns made by the Task Force do not seem to be followed. No law could be made criminalizing the act of enforced disappearance, torture and violation of humanitarian law. Thus still there exists a state of legal lacuna.</p>	
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127 The judgment directed to make provisions about the following: to make legal provisions criminalizing serious criminal acts contrary to human rights, to conduct an extensive campaign to promote the spirit of reconciliation, to provide for reparation for the families of the victims including provisions about adequate financial, legal and institutional arrangements in order to ensure autonomy and impartiality of the Truth and Reconciliation Commission, to constitute such a Commission based on internationally recognized criteria and comprising persons except those not involved in any way in favor of armed rebellion or involved in suppression or administration of such rebellion during the conflict period and those not having a negative record of human rights violations, to design and implement a victim and witness protection program with the purpose of enabling the victims to tell the truth and to defend themselves effectively and to protect their personal introductory details, to make suitable arrangements including for in-camera hearing or distance hearing through audio-visual means etc.

			interests of victims, a human rights law expert and concerned stakeholders in regard to making provisions including prescribing the basic matters in the law itself regarding the criteria to be adopted by the Commission relating to the matters including amnesty.			
7.	Suman Adhikari and Others vs. Nepal Government , the Office of Prime Minister and Council of Ministers and Others	A PIL petition was filed by 234 victims challenging the legality of a few provisions of the Investigation of Disappeared Persons, Truth and Reconciliation Commission Act, 2071 (2014). The petitioners sought for the annulment or modification of some provisions of the impugned Act which were country to the Interim Constitution of Nepal and also the verdict given by the Supreme Court on January 2, 2014, as those provisions directed the acts of amnesty, reconciliation, prosecution and the inter relation between the Commission and the court in contravention of the precedent laid down in the case of the JuRi-Nepal and Others vs. Nepal Government.	The judgment has made amnesty unacceptable in serious crimes by invalidating the phrase contained in Section 26(2) of the Act. "Where adequate grounds and reasons are not found for granting amnesty following investigation made by the Commission." Serious crimes including rape, enforced disappearance, extra-judicial killing and torture cannot become a subject matter of amnesty on any pretext whatsoever. As a result of the judgment, the provision contained in Sub Section (2) of Section 26 now exists as follows: "Notwithstanding anything mentioned in Sub Section (1), the Commission cannot recommend amnesty for the perpetrators involved in rape and other types of serious crimes." Similarly, the victims have got veto power in regard to granting amnesty even in the crimes eligible for amnesty due to the rule prohibiting amnesty without the consent of the victim. Interpreting Section 22 of the Act, the court has further clarified that even reconciliation cannot be possible without the independent and conscious consent of the victim based on the principles of coexistence and equity.	The Council of Ministers, the Office of Prime Minister and Council of Ministers, Office of Attorney General, Ministry of Peace and Reconstruction , the Truth and Reconciliation Commission, and the Commission on Enforced Disappearance	Necessary adjustment and modifications have not been made in the Investigation of Disappeared Persons, Truth and Reconciliation Commission Act, 2071 (2014) in accordance with the interpretation made by the court. Nepal Government's commitment towards compliance with the legal principles and precedents laid down by the interpretations has not been reflected. Not satisfied with	Interpreting the Peace Accord according to one's own convenience, lack of political will for ensuring accountability and lack of monitoring of the status of verdict execution.

			<p>The court has made an interpretative review of the provisions contained in Section 13(2) and (4) of the Act about transferring <i>subjudice</i> cases in courts and other bodies to the Commission in consultation with the concerned court or body and about deciding whether or not some incident had occurred in course of armed conflict. The court has established through interpretation that the Truth Commission cannot displace the jurisdiction of a judicial body by taking recourse to those provisions. By resolving the issue of complementarity between the court and the Commission, it has been ensured that the final resolution of all the cases <i>subjudice</i> before a judicial body shall be done through the judicial process. Moreover, it has been also clarified that so far as the <i>sub judice</i> cases running in the courts are concerned, the power shall be vested in the court to decide whether or not those cases had occurred in course of conflict.</p> <p>Besides, the judgment held that the provision made in Section 29(1) of the Act about making recommendation before Nepal Government for prosecution and the concerned Ministry corresponding to the Attorney General for instituting a case tended to control the constitutional power of the Attorney General, and so it has been rectified through judicial review. Now the Commission shall be required to send the recommendation for starting prosecution directly to the Attorney</p>		<p>the judgment, a petition has been filed in the Supreme Court seeking review of the judgment. That review petition is still under consideration before the court.</p>	
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		<p>General.                  Apart from this, an order has been also issued instructing Nepal Government and the Commissions to duly comply with the precedents and judicial principles laid down by the Supreme Court earlier in several cases. Observing that "to say that a perpetrator of serious violations of human rights cannot escape from the accountability for the acts committed by him means that even others also should not try to let such person escape from accountability on this or that pretext. If someone tries to let the perpetrator escape from accountability or somebody becomes an accomplice to such act, he must be prepared to bear the consequences resulting from that act. This bench is confident that the Commissions duly established in accordance with law shall not indulge in such act. The court also cautioned to consider the issue of making the perpetrators of serious crimes accountable for their acts.</p>			
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## Schedule –3

### Description of Judgments or Orders Not Executed

S. N.	Petitioner/ Respondent	Facts-in-Brief	Contents of the Order	Executing Authority	Status of Execution	Comments
1.	Jay Kishor Labh vs. District Police Office, Dhanusa and Others	It was learnt that on 8 October 2003 at 10 a.m. a Police team arrested ShailendraYadav, Jitendra Jha, Pramod Narayan Saut, Durgesh Kumar Labh and Sanjeev Kumar Karna from Kataiya Chaur (field) of Janakpur Municipality, Ward No. 5 and handed them over to Army Barrack Bhiman in the evening. When requested to investigate and make their whereabouts public, the human rights Branch of Operational Department of the Army informed that all the five persons including Sanjeev Kumar Karna were killed in Police action in Janakpur area on 7 October 2004, the day of their arrest. As innocent persons had been subjected to extra-judicial killing with deliberate intention, and an FIR had been lodged seeking investigation and arrest of the persons involved in the offense of criminal homicide committed in contravention of Section 1 of the Chapter on Homicide in the State Code. The petitioner prayed for the issuance of an order of mandamus in the name of the respondents including District Police Office Dhanusa directing them to fulfill their legal duties by arresting the accused and conducting the act of investigation pursuant to the State Cases Act, 2049 (1992).	The order of mandamus was issued directing the respondents to duly register the FIR and initiate the process of investigation in accordance with law in regard to the FIR seeking legal action pursuant to the Chapter on Homicide in the State Code for the alleged premeditated murder without any ground, and disappearance of the dead bodies of Sanjeev Kumar Karn and other five persons following their arrest.	District Police Office, Dhanusha , District Attorney Office Dhanusha and Police Headquarters.	No action has been initiated so far in this regard.	
2.	Bhim Prasad Oli and Others vs. the	Contending that as there were no legal provisions and infra-structural arrangements for providing relief to the conflict victims who had been displaced and were taking refuge in	An instructive order was issued to make clear legal provisions not contravening equality in giving the facilities	The Office of Prime Minister and	No law has been made so far for this purpose.	

	Office of Prime Minister and Council of Ministers and Others	the houses of their relatives in Kathmandu, the petitioners prayed for the issuance of an order of mandamus in the name of the respondents to make easy legal provisions for competent and strong institutional infrastructure right from the central level to the local level.	provided by the State to the conflict victims, and to make proper and necessary management accordingly.	Council of Ministers		
3.	Bhojraj Timilsena vs. Nepali Congress Party and Others	The petitioner prayed for the issuance of an order of mandamus to constitute a high level Investigation Committee involving also the participation of victims in order to give compensation and damage for the persons killed or made physically handicapped due to mutilation and to return the property captured during the Maoist armed conflict, to identify and prosecute the perpetrators and to make law at the earliest for providing subsistence and employment to the helpless victims.	An order was issued in the name of the respondent Office of Prime Minister and Council of Ministers to constitute a Committee comprising political representatives one each from all the five development regions, one representative from the conflict victims and the persons deemed appropriate by Nepal Government in case of other remaining members and the Chairperson for giving suggestions to provide relief after identifying the condition of the really displaced persons within six months of constituting the Committee meant for addressing the problems of the citizens suffering for long from the conflict and, if it is not possible to complete the work within those six months, to do the same by extending the specified period, and thus to act in accordance with the recommendation of that Committee.	The Office of Prime Minister and Council of Ministers	The Committee has not been constituted as yet.	

4.	Purna Bahadur Chaudhari vs. District Police Office, Bardiya and Others	An FIR had been filed charging the Nepal Army with the alleged murder of Bhauna Tharu of Bardiya by shooting her dead suspecting her to be a Maoist activist. As the act of criminal investigation was not initiated even until three years of lodging the FIR, a writ petition was filed in Appellate Court Nepalgunj seeking an order of mandamus for conducting investigation in regard to the FIR. The District Police Office submitted in its written reply that the accused belonged to Nepal Army and the accused did not appear even after corresponding to the Army Headquarters nor they could be arrested, and the act of investigation shall be completed once they were arrested. The Government Attorney Office replied that the process of prosecution shall be started once the police report was submitted following investigation.	An order of mandamus was issued on 18 November 2009 to complete the process of investigation as sought for by the petitioner because the investigation had not been conducted effectively in regard to a sensitive case like murder whereas effective investigation should have been made about whether or not to institute a case in regard to the FIR registered in July 30, 2006.	District Police Office and District Attorney Office Bardiya	Even till now the case has not been instituted after completing the investigation.	Investigation was affected due to noncooperation by Nepal Army to arrest the accused involved in the incident.
5.	Bhumisara Thapa vs. District Police Office, Banke and Others	A writ petition of mandamus was filed stating that even though an FIR was registered, following an order of the court, in the Area Police Office Kohalpur on 4 August 2007 seeking investigation of the incident in which a search party of security personnel had killed the petitioner's son and daughter-in-law while they were asleep in their room at home and her granddaughter had been injured, the process of investigation had not been started for long. And so the court was requested to issue an order to arrest the accused as soon as possible on the basis of the FIR and to file the prosecution charge sheet within three months. In their written replies, the District Police Office stated that investigation was being conducted, and the District Attorney Office replied that as the case file had not been received after	As the act of investigation had not been completed even after expiry of more than two years of registration of the FIR on 25 July 2007, an order of mandamus was issued by Court of Appeal Nepalgunj to initiate the process of investigation immediately in accordance with law and complete all the formalities prescribed by the State Cases Act, 2049 (1992) and to complete the act of investigation within three months of receiving that order. While making the decision, reference was also made to	District Police Office Banke, District Attorney Office Banke	The act of filing the prosecution charge sheet has not been instituted following completion of the investigation.	The alleged persons were security personnel and, hence, there was indifference towards conducting investigation against them.

		completing the investigation, the process of prosecution could not be started.	Universal Declaration of Human Rights, the context of effective legal remedy prescribed by International Covenant on Civil and Political Rights and the order issued by the Supreme Court in regard to the incident relating to Maina Sunuwar. Moreover, it was also mentioned that if the process of investigation was not started, it would affect the public trust in the court and it shall also cause the failure of the Five Year Strategic Plan.			
6.	Ghumaniya Chaudhary vs. District Police Office, Bardiya and Others	A writ petition was filed alleging that District Police Office Bardiya had refused to register an FIR alleging that the security personnel took Surya Lal Chaudhary away from his home and shooting him dead on the allegation of being a Maoist leader, and, subsequently, even District Administration Office also had declined to register that FIR, and so an order of mandamus was sought for registering the FIR. The District Police Office submitted in its written reply that as the FIR did not specify the name of the accused and also because the fictitious FIR sought to implicate the District Police Chief, the FIR was not entertained. The District Administration Office replied that the petitioner had approached the Office and only verbally informed about the incident. He was sent back with information that the office will try to ascertain whether or not the FIR could be registered after two years of the occurrence of the incident but the informant did not turn up after that.	An order of mandamus was issued in the name of District Police Office Bardiya observing that the respondent did not seem to have fulfilled its legal duty to register the FIR pursuant to Section 3(5) of the State Cases Act, 2049 (1992) and, therefore, directing it to register the legal proceeding as per the law.	District Police Office, Bardiya	The FIR had been registered but investigation was not completed and so the case could not be instituted.	The accused were security personnel, and so there was an attitude of indifference displayed in conducting investigation against them.

7.	Sukumraj Chaudhari vs. District Police Office, Bardiya and Others	<p>Dragging out Sohanlal and Radhakisun of Bardiya from their home, the security personnel thrashed, tortured and finally killed them on the bank of river Kothiyaghat. A writ petition was filed seeking an order of mandamus in the name of District Police Office Bardiya to register the FIR as the District Police Office neither registered the FIR nor endorsed the ground of its refusal to register the FIR when approached for its registration on December 10, 2009. And the FIR could not be registered even when the petitioner approached the District Administration Office. In their written replies, the District Police Office stated that the petitioner had not come to the Office for registering the FIR, and the District Administration Office stated that it had sent back the petitioner stating that it would ascertain whether or not the FIR could be registered after expiry of the two year time limit prescribed by Section 20 of the Chapter on Homicide in the State Code.</p>	<p>Issuing an order of mandamus on 21 April 2010, Appeal Court Nepalgunj held that it was not proper to enter into interpretation of Section 20 of the Chapter on Homicide in the State Code prior to registration of the FIR and without conducting investigation of the incident. So the court ruled that both District Police Office and District Administration Office Bardiya had infringed their duty under Section 3 of the State Cases Act, 2049 (1992), and directed it to register the FIR and complete the act of investigation in accordance with law.</p>	District Police Office, Bardiya and District Attorney Office, Bardiya	<p>The FIR was registered but the case was neither investigated nor was a charge sheet instituted in the court.</p>	<p>As the accused were security personnel, there was indifference towards conducting investigation against them.</p>
8.	Ramkisan Tharu vs. District Police Office, Bardiya and Others	<p>A writ petition of mandamus was filed stating that some armed security personnel had entered into the house, dragged out 11 year old RupaTharu making her blindfolded and then brutally shot her dead. Her dead body was received by them from Area Police Office, Mainapokhari. Even though an FIR was registered in the District Police Office on 15 November 2007 asking for investigation and prosecution on the charge of murder, the investigation was not initiated even after lapse of more than one year following the registration of FIR. So the petitioner prayed for the issuance of an order of mandamus in the name of the respondents to complete the investigation as per the law and institute the</p>	<p>The crime of killing being a very sensitive matter, investigation of such a case should have been done promptly and in a responsible and effective manner. But as even after lapse of considerable time following registration of the FIR on 15 November 2007 investigation did not seem to have started, an order of mandamus was issued in the name of the respondents District Police Office and District Attorney Office Bardiya on 18</p>	District Police Office, Bardiya and District Attorney Office, Bardiya	<p>Even though a general investigation was started following registration of the FIR, the investigation could not have been completed and prosecution could not be made.</p>	<p>The act of investigation could not be continued because the accused belonged to Nepal Army, and the Army Headquarters did not cooperate in arresting the accused and bringing</p>

		charge sheet within three months.	November 2009 to complete the investigation at the earliest as demanded by the petitioner.			them within the orbit of criminal investigation
9.	Nandram Khatri vs. District Police Office, Banke and Others	<p>The District Police Office Banke refused to register an FIR dated December 10, 2009 alleging sexual assault, torture and extra-judicial killing of Jaykala Khatri and Hitkala Dangji of Mahadevpuri VDC of Banke by the security personnel after forcibly taking them away from the cattle shed where they were sleeping during night, and their dead bodies had been dumped on the bank of Dumribas river. A complaint was lodged also at National Human Rights Commission. The Commission issued a directive to the Government on that very basis to provide compensation and to conduct investigation and to file a prosecution charge sheet.</p> <p>When approached, even though the District Administration Office wrote to the District Police Office to register the FIR if it was duly produced, the instruction was not complied with. So the writ petition was filed seeking an order of mandamus in the name of the respondent to register the FIR and conduct investigation accordingly. The respondent submitted in its written reply that the investigation was in progress in regard to the FIR.</p>	As the alleged offense of killing is a highly sensitive matter, such a matter needs to be investigated with utmost promptness in a responsible and effective manner. Therefore, the FIR should have been duly registered and the investigation started. But as nothing had been done in that direction, an order of mandamus was issued in the name of District Police Office Banke on May 26, 2010 to register the FIR and start the investigation at the earliest.	District Police Office, Banke	Although the FIR was registered, the investigation could not be completed and the charge sheet was not filed.	The accused were security personnel, and that led to indifference in conducting the investigation against them.
10.	Bhagiram Chaudhari vs. District Police Office Bardiya and Others	District Police Office, Bardiya refused to register an FIR dated 4 October 2013 regarding the incident of brutal murder of Kanhaiyalal Tharu of Bardiya by a team of security personnel who had come from Chisapani Gulm (Division) and taken him in their custody at 12 noon on 14 March 2002	An order of mandamus was issued on 5 November 2014 stating that District Police Office, Bardiya was vested with the power to decide whether or not to register an FIR; if someone comes to	District Police Office Bardiya and District Administra	Even after the issuance of an order of mandamus, District Police Office, Bardiya did not register the	The accused are security personnel and so indifference has been shown in

	<p>(Decision No. 75)</p>	<p>and who had later on refused to hand over his dead body to the family. Subsequently, even District Administration Office, Bardiya had also refused to register the FIR. So the writ petition was filed seeking an order of mandamus to register the FIR and initiate the criminal proceedings after completing the investigation.</p> <p>The District Police Office stated in its written reply that the petitioner had produced only the FIR without any accompanying documentary proof, and so no such case could be registered without any documentary proof. And he was informed to go to District Administration Office in case there was any issue of compensation.</p>	<p>register an FIR, the Police Office was obligated to inform the concerned person to fulfill the missing requirements in regard to the FIR, if any, and if the FIR was not fit for registration, to inform about the reason in black and white, and if it was fit for registration, to register it and to start the legal proceedings.</p>	<p>tion Office Bardiya</p>	<p>FIR. It endorsed the FIR stating that a conflict era case did not fall under the jurisdiction of the Police according to the Investigation of the Disappeared Persons, Truth and Reconciliation Commission Act, 2071 (2014). The petitioner approached the court with a petition for a second time. The court issued a clear order directing the Police to register the FIR and initiate further proceedings in accordance with law. Even then the Police did not register that FIR. The petitioner filed a contempt petition in the court. Thus the order has not been executed.</p>	<p>conducting investigation against them.</p>
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11.	Bhagiram Chaudhari vs. District Police Office, Bardiya and Others (Decision No. 79)	<p>A writ petition was filed seeking an order of mandamus to register the FIR and initiate the legal proceedings following completion of the act of investigation. Because the District Police Office Bardiya had refused to register the FIR on 4 October 2013 asking for investigation of the abduction and murder of an unarmed civilian named Dilbahadur Khadka by Maoist activists, and even the District Administration Office, Bardiya had also refused to entertain that FIR.</p> <p>The District Police Office stated in its written reply that the petitioner had come only with the FIR without attaching any documentary proof, and such an FIR not accompanied by some documentary proof could not be registered. So the petitioner was informed to contact the District Administration Office if there was any issue of compensation.</p>	<p>An order of mandamus was issued on 5 November 2014 stating that District Police Office, Bardiya was vested with the power to decide whether or not to register an FIR; if someone comes to the Police Office to register an FIR, it is obligated to inform the concerned person to fulfill the missing requirements, if any, in the FIR and, if the FIR was not fit for registration, to inform about such reason in black and white, and, if it was fit for registration, to register the FIR and initiate the proceedings in accordance with law.</p>	District Police Office Bardiya and District Administration Office Bardiya	<p>Even though an order of mandamus was issued, District Police Office Bardiya did not register the FIR. It endorsed the FIR stating that a conflict era case did not fall under the jurisdiction of the Police according to the Investigation of Disappeared Persons, Truth and Reconciliation Commission Act, 2071 (2014). The petitioner approached the court for a second time with a petition. The court issued a clear order directing the Police to register the petition and initiate further proceedings in accordance with law. Even then the Police did not register that FIR. The petitioner then filed a contempt petition</p>	<p>The accused are Maoist activists and on account of political patronage indifference has been displayed in conducting the investigation against them.</p>
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					in the court. Thus the order has not been executed.	
12.	Advocate Sunil Ranjan Singh and Others vs. the Office of Prime Minister and Council of Ministers and Others	A writ petition was filed against Superintendent of Police, Dhanusha, Kuber Singh Rana contending that, on the basis of the recommendation made by National Human Rights Commission on 8 February 2008 to the Office of Prime Ministers and Council of Minister about the involvement of SP Kuber Singh Rana during the period of Maoist conflict in a heinous crime like extra-judicial killing, thereby committing dereliction of his duty, the report submitted by a five member Committee chaired by the then DIG of Police Deependra Bahadur Bista holding him responsible for arresting the individuals from Katiya Chauri of Janakpur and disappearing them simply on the allegation their alleged faith in the Maoist party and also the FIRs filed by the victims, it was clear that if SP Kuber Sing Rana was allowed to continue in his office, he may cause disappearance of proofs and misuse his office to exert undue influence on the Police, and he may also influence the decision in his favor resulting in deprivation of justice for the victims. So the writ petition also sought for an Interim Order staying his continuation in the capacity of AIG until resolution of the aforesaid dispute.	An instructive order was issued directing the concerned respondents to make and implement a law and criteria for the vetting process regarding entrusting any person to a public office only after taking into consideration whether or not such person was involved in the act of human rights violations and whether or not he had faith in the rule of law.	The Office of Prime Minister and Council of Ministers	The order has not been executed.	
13.	Nepal Government vs. Balkrishna Dhungel and Others	The defendant was charged with the murder of Ujjwan Shrestha of Ramechhap district and prosecuted seeking punishment for him pursuant to Section 13(1) of the Chapter on Homicide in the State Code.	As the involvement of the defendant in the killing of Ujjwan Shrestha was proved, Ramechhap District Court awarded him with life imprisonment along with confiscation of his entire property, and the decision of	Judgment Execution Directorate and Nepal Police	The Judgment has not been executed till now.	

			the trial court was subsequently confirmed by the apex court.			
14.	Rita Giri vs. District Police Office, Morang and Others	The petitioner contended that the security forces from Bhawani Dal Gan, Itahari, falling under Eastern Pritana Army Headquarters, who were deputed for patrolling, arrested her husband Dhananjay Giri on 18 December 2004 from west of Mayalu Chowk located at the border of Ward No. 3 and 4 of Pathari VDC, tortured and shot him dead, and then placed his dead body at Mangalbare Health Centre wherefrom she had recovered it. When she went to District Police Office Morang on 5 June 2007 with an FIR specifying the name of the accused and seeking immediate investigation and prosecution of the guilty for awarding them maximum punishment and giving her justice, the District Police Chief and others at the Police Office refused to register her FIR as they had not got any instruction from their superior Office regarding registration of such type of incident and advised her to go to elsewhere to start some other legal proceedings. Thus they refused to either register or endorse the FIR. When she approached the District Administration Office Morang with an application containing information about that matter as per Section 3(5) of the State Cases Act, 2049 (1992), the District Administration Office also neither registered the FIR nor agreed to indorse the ground of refusal. Therefore, as such an act infringed Section 13 of the Civil Liberties Act, 2012 (1955), the petitioner prayed for the issuance of an order of mandamus to register the FIR brought by the petitioner.	As the respondents were obligated to register the FIR presented by the petitioner and to conduct investigation accordingly but as they had not done so, an order of mandamus was issued in the name of the respondents to summon Rita Giri to the Office and register her FIR and start immediately investigation of the case.	District Police Office Morang	The order has not been executed.	

15.	Bhakta Bahadur Sapkota vs. District Police Office, Dhading and Others	<p>On 15 July 2004 during night at 11 p.m. nearly 12 Army personnel of the then Nepal Army carrying weapons and wearing black raincoats knocked at the door to open it stating that they had come from Baireni Army Barrack. After the door was opened, they woke up Sarala Sapkota, the daughter of the petitioner, and tied her with a rope used for carrying load and tried to take her away. When they were asked about the reason of arresting her, they replied that there was something to be enquired from her and she would be returned after 2 to 3 days.</p> <p>When he went to Division No. 6 of Baireni Army Barrack Dhading on 16 July 2004 searching for his daughter, he was informed that she had not been brought to that Office. In course of searching his daughter he was informed by villagers in the morning of 7 December 2005 that foul smell of corpse was coming out from a thorny bush near Maidan Chautara of Ward No. 8 of a nearby village Kewalpur and so they suspected that the corpse may be of Sarala. In the presence of the representatives of ICRC and the villagers when the ground was dug up at the place pointed out by the villagers, the skeleton of his daughter Sarala and the clothes she was wearing on the day of her arrest were recovered from that place.</p> <p>An FIR had been filed by the petitioner on 28 June 2006 in District Police Office Dhading through Baireni Army Barack seeking investigation and punishment as per Section 13(3) for the offense under Section 1 of the Chapter on Homicide in the State Code. The petitioners, therefore, prayed for the issuance of an order of mandamus in the</p>	An order of mandamus was issued in the name of the respondents to start immediate investigation regarding the FIR, and to make a decision whether or not a case should be instituted following completion of the whole investigation as stipulated by the State Cases Act, 2049 (1992), and to institute the prosecution charge sheet immediately.	District Police Office, Dhading and Others	The order has not been executed.	
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		name of the respondents to comply with their legal duties prescribed by the above mentioned Sections of the State Cases Act, 2049 (1992) and to immediately start investigation and fulfill their legal duty by arresting the accused.				
16.	Purna Bahadur Gurung vs. District Police Office, Kaski and Others	The writ petition was filed for issuing an order of mandamus directing the respondent Police Office Kaski to expedite the investigation process effectively.	In this case, issuing an order of mandamus in the name of District Police Office, Kaski on 5 April 2015, the Supreme Court observed that it does not be hove of an investigator to idle away time by acting unwillingly in the name of conducting investigation, and directed the District Police Office to complete the necessary investigation process and inform the petitioner about its result within three months.	District Police Office, Kaski and Others	The order has not been executed.	

## Schedule 4

### Name List of the Participants of Focused Group Discussions

**Program** : Focused Group Discussion  
**Date** : September 17, 2015  
**Place** : Hetauda

#### Name List of the Participants

S. No.	Name	Designation	Office
1.	Mr. Ishwor Adhikari	Advocate	Makwanpur District Bar Association
2.	Mr. Chandra Bahadur Karki		District Police Office, Makwanpur
3.	Mr. Dipendra Dahal	Social Activist	Peace Committee, Makwanpur
4.	Ms. Maya Lama	Social Activist	Maiti Nepal
5.	Mr. Tej Prasad Chaulagai	Victim	Makwanpur
6.	Ms. Samjhana Adhikari	Social Activist	Peace Committee, Makwanpur

**Program** : Focused Group Discussion  
**Date** : September 11, 2015  
**Place** : Pokhara

#### Name List of the Participants

S. No.	Name	Designation	Office
1.	Mr. Narayan Prasad Pandit	Section Officer	Appellate Govt. Attorney Office, Pokhara
2.	Mr. Dinbandhu Baral	District Court Registrar	Kaski District Court
3.	Mr. Mahendra Prasad Aryal	District Court Registrar	Gorkha District Court
4.	Mr. Ganesh Babu Aryal	Joint Govt. Attorney	Appellate Govt. Attorney Office, Pokhara
5.	Mr. Yugnath Dhakal	District Govt. Attorney	District Govt. Attorney Office, Kaski
6.	Hon'ble Prakash Kumar Kafle	District Judge	Manang District Court
7.	Mr. Narayan Bahadur Thapa	District Govt. Attorney	District Govt. Attorney Office, Lamjung
8.	Mr. Rajendra Adhikari	Police Inspector	District Police Office, Lamjung
9.	Mr. Mukunda Acharya	District Court Registrar	Syangja District Court
10.	Mr. Dharm Raj Poudyal	District Govt. Attorney	District Govt. Attorney Office, Syangja
11.	Mr. Narayan Prasad Regmi	Advocate	Syangja District Bar Association
12.	Ms. Sarala Pandey	Advocate	Advocacy Forum, Kaski
13.	Mr. Tirtha Bahadur Bhandari	Advocate	Lamjung District Bar Association
14.	Mr. Shailesh Regmi	Sub Inspector of Police	Regional Police Office, Pokhara
15.	Ms. Anita Gurung	Advocate	Appellate Court Bar Association, Pokhara

**Program** : Focused Group Discussion  
**Date** : September 28, 2015  
**Place** : Nepalgunj

**Name List of the Participants**

S. No.	Name	Designation	Office
1.	Mr. Shalikram Sapkota	Advocate	Banke District Bar Association
2.	Mr. Hari Prasad Joshi	Joint Govt. Attorney	Appellate Govt. Attorney Office, Nepalgunj
3.	Ms. Sunita Sharma	Advocate	Banke District Bar Association
4.	Mr. Rameshwar Regmi	Registrar	Court of Appeal, Nepalgunj
5.	Mr. Sunil Shrestha	Advocate	Appellate Court Bar Association, Nepalgunj
6.	Mr. Dandpani Lamichhane	District Court Registrar	Banke District Court
7.	Mr. Bishwajit Tiwari	Advocate	Appellate Court Bar Association, Nepalgunj
8.	Mr. Karna Mahat	Assistant Govt. Attorney	District Attorney Office, Banke
9.	Mr. Kewal Singh Tharu	Advocate	Appellate Court Bar Association, Nepalgunj
10.	Hon'ble Dal Bahadur KC	District Judge	Banke District Court
11.	Mr. Bikash Acharya	Advocate	Banke District Bar Association
12.	Mr. KhimBhadurThapa	Deputy Registrar	Court of Appeal, Nepalgunj
13.	Mr. Khimnath Karki	Tahasildar (Judgment Enforcement Official)	Banke District Court
14.	Mr. Lok Bahadur Shah	Advocate	Appellate Court Bar Association, Nepalgunj
15.	Mr. Khimraj Giri	Advocate	Banke District Bar Association
16.	Mr. Hikmat Bahadur Bohara		District Police Office, Banke
17.	Mr. Basant Gautam	Social Activist	Law, Research and Resource Development Centre, Nepalgunj
18.	Mr. Murari Prasad Kharel	Representative	Human Rights Commission



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## **National Judicial Academy, Nepal**

**Manamaiju, Kathmandu**

**Phone No. 977-1-4027449/4027451 Fax No. 977-1-4027140**

**Post Box No. 24865**

**Email : [info@njanepal.org.np](mailto:info@njanepal.org.np)**

**URL: [www.njanepal.org.np](http://www.njanepal.org.np)**

**City Office:**

**Hariharbhawan, Lalitpur**

**Phone No. 977-5537516/5549057**