

Supreme Court Division Bench
Hon. Justice Khilaraj Regmi
Hon. Justice Kalyan Shrestha
Order

Re: Habeas Corpus

Writ no 3775 registration date 2055/10/7/5 B.S. (Jan 21, 1999 A.D.)

Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal (Advocate)
permanent resident of ward no 8 of Harmi V.D.C. and then residing on a rented – Petitioner
room at ward no 1 of the Prithwi Narayan Municipality of Gorkha District

v.

Nepal Government, Home Ministry and Others – Respondents

1. The Summary of the Petitions

This petition was heard by the bench along with batches of other petitions such as the one filed by Yek Raj Bhandari on behalf of **Bipin Bhandari**, writ no 100, registered on 2059/3/5/4 B.S. (June 19, 2002); Udaya Bahadur Rai on behalf of **Dil Bahadur Rai**, writ no 104, registered on 2059/3/19/4 B.S. (July 3, 2002); Krishna Kumari Rai on behalf of **Navin Kuman Rai** and **Ishwar Kumar Lama**, writ no 323, registered on 2059/12/5 B.S. (March 19, 2003); Sitasharan Mandal on behalf of **Shree Ram Tharu**, writ no, 500 registered on 2060/3/4/4 B.S. (June 18, 2003); Sitasaran Mandal on behalf of **Jagana Tharu**, writ no 45 registered on 2060/4/26 B.S. (Aug 12, 2003); Sitasaran Mandal on behalf of **Hariram Chaudhari** writ no 41, registered on 2060/4/26 B.S. (Aug 12, 2003); Sitasaran Mandal on behalf of **Tateram Tharu** writ no 155, registered on 2060/8/14 B.S. (Nov 30, 2004); Sitsaran Mandal on behalf of **Biharilal Godia**, registered on 2060/10/6/3 B.S. (Jan 20, 2004); Sitasaran Mandal on behalf of **Ayodhya Prasad Godia**, writ no 164, registered on 2060/10/6/3 B.S. (March 22, 2004); Sitasaran Mandal on behalf of **Dhak Bahdrur Basnet**, writ no 167, registered on 2061/6/28/5 B.S. (Oct 14, 2004); Ranju Darnal on behalf of **Ranjit Darnal, Amrit Darnal** and **Rajendra Chaurel**, writ no 97, registered on 2062/4/28 B.S. (Aug 12, 2004); Chandra Kumari Basnet on behalf of **Dhirendra Basnet** and **Pushparaj Basnet** writ no 110 and 111, registered on 2062/5/7/3 B.S. (Aug 23, 2005); Shanta Sedhain on behalf of **Mukunda Sedhain**, writ no 142, registered on 2062/5/27 B.S. (Sept 12, 2005); Manorama Nakarmi on behalf of **Nischhal Nakarmi**, writ no 211, registered on 2062/7/13 B.S. (Oct 30, 2005); Srijana B.K. on behalf of **Amar B.K.**, writ no 250 registered on 2062/8/9/5 (Nov 24, 2005); Chandra Bahadur Dulal on behalf of **Renuka Dulal**, writ no 223, registered on 2062/7/22 B.S. (Nov 8, 2005); Om Prakash Singh on behalf of **Chatur Man Rajbanshi aca Shyam**, writ no 378 registered on 2062/8/22/4 (Dec 7, 2005); Krishna Rai on behalf of **Purna Paudel, Gyanendra Tripathi, Rupam Adhikari, Rajendra Thapa, Ramchandra Kafle, Suchendra Maharjan, Bhim Giri, Rebkala Tiwari, Bhavanath Dhamala, Arjun Maharjan, Kusalya Pokherel, Dipendra Panta, B.K. Shrestha, Lila Pandey,**

Hemnarayan Shrestha, Praksah Lama, Hira Bahadur Roka, Tejman B.K. Jalandhar Bastola, Lila Acharya, Bhim Maharjan, Rajendra Mali, Anuman Shrestha, Deshbhakta Chapagain, Kamala Waiba, Amarraj Bajracharya, Hira Bahadur Sharumagar, Amrit Kandel, Satyanarayan Prajapati, Gangaram Shrestha Babukaji Shrestha, writ no 378 registered on 2062/11/01 (Feb 13, 2006); Debraj Dhungana on behalf of **Chetnath Dhungana**, writ no 418 registered on 2062/11/8/2 (Feb 20, 2006); Krishna Rai on behalf of **Arun Nepali** writ no 485, registered on 2062/12/22 (April 4, 2006); Ramila Lama on behalf of **Bishal Lama**, writ no 617, registered on 2063/2/10 (May 24, 2006); Bimala Katwal on behalf of **Chakra Bahadur Katwal**, writ no 362, registered on 2063/3/19/2 (July 3, 2006); Dharmaraj Mali on behalf of **Baburaja Mali**, writ no 635, registered on 2063/3/32/1 (July 16, 2006); Sirasaran Mandal on behalf of **Hari Prasad Luintel**, wtie no 54 (002), registered on 2063/4/7/1 (July 23, 2006); Gamala Shrestha on behalf of **Arjunlal Shrestha**, writ no 0004, registered on 2063/4/18/5 (Aug 3, 2006). Similarly a Mandamus petition **Lekhnath Neupane, Krishna K.C. Himal Sharma and Bina Magar**, writ no 2588/0038 (Mandamus), registered on 2063/4/11 (July 27, 2006) was also heard by the bench.

These petitions were filed on different dates under Art 23 and 88 of the Constitution of the Kingdom of Nepal 1990. The main prayers of the petitioners in these petitions *inter alia* included the release of the petitioners, declaration of their status and legal action against those officers responsible for gross and systematic violation of human rights and for ending the state of impunity.

In these batches of petitions the petitioners claimed that persons they represented were picked up by security forces on different dates between 2055/9/24 B.S. (Jan 8, 1999) and 2061/9/3 B.S. (Dec 19, 2004), (a great majority of them between Nov 2003 to Feb 2004 either from their houses, work places, colleges or from the streets and taken into custody. For instance, Baburaja Mali was picked up from his residence at midnight, Purna Paudel and Ishwar Lama from Kuleswar, Gyanendra Tripathy from Santinagar Gate, Rupak Adhikari from Maharajgunj, Rajendra Thapa and Ramchandra Kafle from their residence, Buddhi Lama, and Surendra Maharjan from the neighborhood of their residence while returning from the college, Bhim Giri from New Baneswar, Rebkala Tiwari from near Chabahil while returning form college, Bhabanath Dhamala from his shop at Chabahil, Arjun Shrestha [Maharjan] from Kirtipur, Kausalya Pokherel from Pulchowk while returning form college, Dipendra Shrestha from Nayabazar while returning from college, B.K. Shrestha from his won shop, Lila Pandey while returning from college, Hemnarayan Shrestha from Basundhara, Prakash Lama from Old Baneswar, Hari Bahadur Rokka from Dhokatol in Lalitpur, Tejman B.K. and Jalandhar Gautam (Bastola) from Chabahil, Lila Acharya from Chabahil while returning from college, Bhim Maharjan from his own residence, Rejendra Mali from his own house in Lalitpur, Anuman Shrestha from his grocery shop, Surendra Khadki from his own house in Lalitpur, Deshbhakta Chapagain from his grocery shop in New Baneswar, Kamala Waiba while returning from college, Amarraj Bajracharya from his own residence in Lalitpur, Renuka Dulal from Chabahil, Chetnath Dhungana from Kalikasthan, Hirabahadur Saru Magar while returning to his rented room from the college, Amrit Kandel from Bagbazar while returning to his rented room from the college, Babukaji Shrestha from his grocery shop in Ward no 35 of Kathmandu Metropolitan City,

Satyanarayan Prajapati from his residence in Samabhanjyang and Gangaram Shrestha from his residence at Sallaghari in Bhaktapur. Similarly Dhirendra Basnet was picked up by the security forces from Kalanki, Pushparaj Basnet from Kalimati, Nabin Kumar Rai and Ishwar Kumar Lama (leaders of the student wing of the Maoists) from their rented room in Kalimati and, Dil Bahadur Rai from Gyaneswar. Similarly Hari Prasad Luintel was woken up and arrested from his house by security forces from Bairani Barrack in Dhading district. Chaturman Rajbanshi was arrested from Tazing Norghey Bus Park in West Bengal with the assistance of Indian Police and brought to Nepal. Similarly Chetnath Ghimire was initially required to be present at the military battle on (Garuddal Gulma) several times and latter arrested and kept in the barrack. Arun Nepali was arrested from Putali Sadak. Shree Ram Tharu was arrested from his house at Deudakala in Bardia district, Tateram Tharu, Hariram Tharu and Jagana Tharu from their houses at Magaragadhi V.D.C in Bardia by army men from Rambhapur check post. Arjunlal Shrestha was picked up from his maternal uncle's house in Manamajju by plain cloth army men who came from No 1 Division, Balaju. Similarly, Dhak Bahadur Basnet was picked up from his house at Narethanti V.D.C, Baglung by Joint Security Force at Hari Chaur. Biharilal Godia, Ayodhya Prasad Godia (a tenth grade student) were arrested by security forces from Joint Security Base Camp, Banke. Bishal Lama was arrested from his factory where he worked as laborer and taken to the Police Post at Tinkune where his family members met him in the presence of ICRC and after a week he was put in a vehicle in the presence of his wife where she was told that he will be taken to the District Police Office, Bhaktapur. Similarly, Ranjit Darnal, Amrit Darnal and Rajendra Chaurael (all tailors) were arrested either from their rented rooms or restaurant where they worked. Amar B.K who lived at a rented room and worked at an utensil shop at Basantapur all of a sudden did not come back for lunch, and after four days his name appeared among those arrested in a daily newspaper called "Samachar Patra." Mukunda Sedhain was arrested from Raju Khaural's tea shop in Bhimsensthan. Later Achyut K.C. one of the detainees who was later released told that he saw Mukunda at a military barrack (Jagadal Gulma) at Chhauni around December 2003 and Jan 2004. Later, he had also sent a letter to his wife from the detention center. Nischal Nakarmi was picked up by the security forces led by Colonel Raju Basnet of the Bhairabnath Gan from Dillibazar where he was sitting with friends. He was also spotted by other detainees at Bhairabnath Gan and once on 2061/8/22 (Dec 7, 2004) he himself called up and informed the family that he was detained.

Chakra Bahadur Katwal has a little different story. He was the chairman of Nepal Teachers Association, Okhaldhunga. After being arrested he was kept at local military barrack called "Ranadal Gulma" and later transferred to the District Police Office where he was allowed to meet his family. After some days he was again transferred to District Police Office, Saptari and then to Central Jail in Kathmandu but family members was not allowed to meet him. Bipin Bhandari, a student was arrested by forced led by D.S.P Bikram Singh Thapa from Baneswar and taken to the police office at Hanuman Dhoka and kept incommunicado. Rajendra Prasad Dhakal, an advocate, was arrested from Khaireni Tar in Tanahun, and was kept incommunicado.

In Writ no 2588/0038 Lekhnath Neupane and Others, who prayed for an order of mandamus claimed that they were arrested by the security forces after the imposition of emergency on 2058/8/11 (Dec 26, 2001) for the reason of their political faith and taken to the military barrack in Maharajgunj. While in the custody they were blind folded and subjected to extreme torture such as immersing in the water and hot water, compelling to urinate on a burning electric heater, penetrating pin in the nails etc by Lieutenant Colonel Raju Basnet, Major Bibek Bista, Captain Indiber Rana and the Chief of Military Intelligence Dilip Rayamajhi on the order of Pyar Junj Thapa. Due to torture a few of their friends Padam Narayan Nakarmi, Khadka Bahadur Gharti Magar and Kiran Rayamajhi succumbed to death. During the same period a number of our other friends such as Rajendra Tripathi, Madhav Adhikari, Dharendra Basnet, Jalandhar Bastola, Lila Acharya, Rupak Adhikari, Pushpa Basnet, Shantiram Bhattarai, Durga Bisankhe, Tejman Bishwakarma, Deshbhakta Chapagain, Janak K.C., Chandra Kumar Dhakal, Bhawanath Dhamala, Chetnath Dhungana, Renuka Dulal, Bhim Giri, Amrit Kandel, Buddhi Lama, Nima Dorje Lama, Doleswar Limbu, Arjun Maharjan, Rejendra Mali, Nishchal, Gokul Niraula, Lila Pandey, Dipendra Panta, Arjun Pokherel, Kausalya Pokharel, Hira Bahadur Rokka, Hira Bahadur Tharu, Babukaji Shrestha, Rabindra Sheresha, Ashok Sunuwar, Rajendra Thapa, Rebkala Tiwari, Purna Paudel, Bipin Bhandari, Dil Bahadur Rai, Nabin Rai and Astaraj Bajracharya were arrested and brought to the same barrack. They were subjected to extreme torture by the same officers who also said time and again to these detainees that they will be exterminated. On 2060/9/5 (Dec 20, 2003) these people were loaded on a truck and taken away and since then they had not seen them. The petitioners claimed that an order of mandamus should be issued for declaring public the status of the detainees and if necessary constituting a high level inquiry commission and for taking legal action against the officers mentioned above.

2. Show Cause Notice and Responses

Upon being asked to show cause, the respondents in most of the petitions declined that the petitioners were arrested or any of their rights violated. However, in a couple of written submissions, some important facts were disclosed. For instance, in writ no 632 the District Education Office admitted that Chakra Bahadur Katuwal was asked to appear to the District Administration Office vide letter no 505, and after he went to the said office he did not return. Similarly, the District Administration Office admitted that after Mr. Katuwal appeared in the office he was sent to the local military barrack (Ranasingh Dal Gulma) and later transferred to the District Police Office. On 2058/9/2 (Nov 17, 2001) he escaped from the detention by breaking open the window of the toilet. Similarly, in response to the writ no 378 the Ranadal Gan military barrack (Chhauni) stated that among the petitioners Suchendra Maharjan, who was detained at the Inquiry and Research Center at Sundarijal was released from the detention as per the order of the Supreme Court dated 2061/8/16 (Dec 1, 2004). Similarly, Bhairabnath Military Barrack in its reply stated that among the petitioners Anuman Shrestha and Surendra Maharjan after being arrested were handed over to Rajdal Gan military barrack at Lagankhel. Similarly, the Nepal Army Headquarter in its reply stated that Anuman Shrestha and Surendra Khadki were released in the presence of Lalitpur District Court by the Rajdal Gan on 2060/12/30 (April 12, 2004) and entrusted to

Jit Govinda Maharjan and no other persons were arrested. Similarly, in writ no 54 the Nepal Army Headquarter stated that Hariprasad Luintel was arrested by the Number Six Division of the Nepal Army on 2059/4/29 (July 20, 2002) and handed over to District Police Office, Dhading whereupon he was issued an order of preventive detention on 2059/5/4 (Aug 20, 2002) to be valid for 90 days. Upon expiry of the said 90 day period the detention was renewed for another 90 days. On 2059/11/7 (Feb 19, 2003) he was released and entrusted to his elder brother Ram Prasad Luintel and thereafter he was not arrested. Similarly, in the reply to writ no 0015 the Nepal Army Headquarter denied that Chetnath Ghimire was summoned or arrested by the Military barrack, what appeared in the correspondence was only a clerical error.

Similarly, in its reply to writ petition no 418 the National Human Rights Commission (NHRC) stated that on visit to the famous Mahendra Dal Gan military barrack in Gorkha, the NHRC officials met Mr Krishna K.C. who narrated to them that he had met Chetnath Dhungana (C.N. Dhungana) at Youddha Bhairab Military Barrack. This was also corroborated by Ganesh Dhakal who in his statement to NHRC said that he saw C.N. Dhungana at Bhairabnath Gan Military barrack. He also said that on 2060/9/5 (Dec 20, 2003) the said detainee was loaded on a truck and taken to an undisclosed location following which they did not know that he returned. On this basis the NHRC submitted that this gave reasonable ground not to believe that Mr Dhungana was not detained in military detention.

In the reply to writ no 2588 (Mandamus) the respondents denied that the persons mentioned in the petition were arrested or tortured or disappeared but Bhairabnath Gan admitted that among the persons stated in the petition one Khadka Bahadur Gharti Magar died in detention due to disease and not torture.

In order to locate the status of the persons mentioned in various petitions the Supreme Court on different dates issued orders seeking information, requiring reply from the persons alleged to be involved in the arrest but in all the petitions the concerned office or officers denied that the petitioners were arrested or detained.

3. Constitution of Detainee Investigation Team

The court on 2063/5/12 (Aug 20, 2006) constituted a Detainee Investigation Team led by a judge of the appellate court and comprising the representative of the Attorney General's Office and the Bar to inquire into the cases of disappearance which was asked to find out their actual status, identify persons and the office which were involved in the arrest or issued the order of arrest, and their present designation, whether or not any cases were pending against the detainee, till when the status of the detainee was known and since when it became unknown and which institution or the officer was involved in the act and other relevant facts in the context of the habeas corpus.

4. Other Reports and Submissions

Further, with a view to trace the status of the detainees the court took cognizance of at least four reports.

The first was the report of Baman Prasad Neupane, Joint Secretary at the Ministry of Home Affairs which was constituted on 2062/2/11 [May 25, 2005]. This committee was asked to inquire into the status of 776 disappeared persons. It traced the status of 174 of them and thus reduced the number of disappeared as 602. According this report, among those whose status was identified were Chetnath Ghimire, who was as per the letter of the Department of the Military Operations in touch with the Nepal Army barrack at Borhetar, Chandra Kumar Dhakal who was said to have been released on 2059/11/1 [Feb 13, 2003] from the Jail at Jagannath Dabal, Arjun Prasad Neupane who was released from Nakkhu Jail on 2063/2/30 [June 13, 2006] and Bishal Lama, Jalandhar Bastola, Madhav Adhikari and Khadka Bahadur Gharti Magar, who are stated to have died. The status of other writ petitioners is stated as unknown and unidentified.

The second was the report of the OHCHR Kathmandu which had inquired into the allegations of arbitrary detention, torture, and disappearance from the Bhairabnath Gan military barrack of the Nepal Army between 2003 and 2004. In the course of investigation the OHCHR had interviewed more than 50 people including the family members, former detainees and other eye witnesses. On the basis of this and its visit in person of the said barrack and Yodhha Bhairab Military barrack, at listed the names of the people who were kept in secret detention. The office concluded that in the arrest, inquiry and other activities the Bhairabnath Gan Military barrack had played a central role. The report gave the list of 49 people, who according to it got disappeared from the barrack, on whose behalf writ petitions are filed in Supreme Court. The OHCHR, while continuing with the investigation on the case of other disappeared persons also suggested that a reliable, efficient and independent inquiry should be conducted on these cases and those army units responsible for the violation of human rights should be identified and those persons found to be guilty of criminal responsibility should be tried in the civilian court. It further recommended that until such inquiry is made those persons should be suspended and not proposed to be sent to any peace keeping operations under United Nations, that the eye witness and former detainees should be free from any threat or fear, and that the result of such inquiry should be publicly disseminated.

The third is the report of the National Human Rights Commission (NHRC). Upon being asked by this court a number of times as to what did it do with the petitions filed to it by writ petitioners the NHRC stated that by taking interview of the family members, eye witnesses, those released from detention it collected necessary information. In the course of investigation the NHRC had also made a visit to the alleged place of detention and had sought information with the security units involved in the detention. In several petitions it also recommended to the government to take necessary action against officers who are found to have been involved in serious violation of human rights and publicize the status of the detainees.

The fourth is the report of the Detainees Investigation Team (DIT), 2007. After the investigation, the DIT is found to have reached to the conclusion that among those investigated Chakra Bahadur Katuwal was taken into custody by the Army and died on account of the cruel torture given to him. Similarly, it also concluded that among the petitioners Rajendra Prasad Dhakal, Bipin Bhandari and Dil Bahadur Rai were arrested by

security forces and caused their disappearance in a planned way. The DIT in its report also recommended that a high level investigation commission should be formed to impartially and independently inquire into the cases of those disappeared during the armed conflict, that retro active laws in matters such as crimes against humanity should be enacted, that appropriate judicial directives should be issued for stopping the repeated arbitrary arrest and detention. Further the DIT also suggested that those involved in the violation of human rights should be tried according to law and that the victim family should be given appropriate compensation.

5. Issues to be Decided by this Court

A consideration upon the statement of the writ petitioners in totality, matters stated by the respondents in their written statement, orders rendered by this court in course of the proceedings of the case and additional facts revealed therefrom, and also including the questions raised by the legal practitioners of the writ petitioners and respondents during their pleadings, this court deems that the following questions are to be decided:

1. On the basis of the facts revealed till date, what is the condition of the persons who are stated in these petitions as arrested by security persons and disappeared?
2. In matters pertaining to disappeared or missing persons, what would be the obligation of the state especially during the condition of conflict? What would be the possibility of judicial remedy to carry out such obligation and what would be the role of the court in the matters concerned thereto?
3. How and what machinery has been applied till date while making efforts in course of inquiry of disappeared persons as well as making their status public? Whether or not these efforts have been effective, what would be appropriate in this regard?
4. What are the prevailing legal provisions with respect to finding out the situation of disappeared citizens through research and inquiry? Whether such legal provisions are sufficient and effective? If not, how and what legal provisions and initiations are necessary?
5. Whether any interim measures are desirable to render immediate relief considering instant pain, the loss and effect to the families of the persons who are said to be disappeared and facilitate the search to them and for the purpose of mitigating the pain and loss to them? If yes, whether such orders can be issued with respect to now prevailing petitions?
6. Whether or not the respondents have fulfilled their legal obligation pursuant to the demand of the petitioner. Whether or not the orders need to be issued as per the demand? What kind of orders are to be issued for appropriate remedy?

Regarding Question No. 1

The statement of all petitions filed in this court claim that the persons stated in the writ petition were arrested by security persons in different dates and places, they were not in contact with their family and their status was unknown till date.

The respondents have basically stated in their written statement that the said persons are not arrested by security persons; and the court, considering the matter

whether the said persons were arrested by the security persons, has inquired different intuitions along with pertinent orders. In course of the order, it seems that the report of the National Human Rights Commission with respect to search of said person was demanded, the Ministry of Home of erstwhile His Majesty's Government was made to inquire the truth and submit the report. The report of the inquiry of the Government of Nepal in this respect [Baman Prashad Neupane Committee] was also demanded and included in the file.

In the same question learned advocates Mr Satish Krishna Kharel, Mr Harikrishna Karki, Mr Kedar Dahal, Mr Milan Kumar Rai and Mr Hari Phuyal appearing on behalf of the petitioners submitted that all persons stated in the petition were arrested by security persons in different dates and places. Various national and international human rights organizations have stated the fact that the said persons were detained in different custodies of police and army. Krishna K. C and Himal Sharma who were together with them in various detentions and later freed have given their statement in the Court of Appeal, Patan that the persons stated in the petition were there kept in the detention. The fact is verified even through a letter written by Krishna K. C. from the detention. The counsels also argued that by virtue of the statement recorded at the National Human Rights Commission by the witness who saw security person arresting the petitioners and the persons who were detained together with them in the custody the fact that their condition is still unknown, it is proved that petitioner were illegally arrested by the security persons and therefore, the state has illegally and forcefully disappeared the persons.

Learned Deputy Government Attorney Mr. Bharat Mani Khanal, who appeared on behalf of the Government of Nepal, submitted that the concerned security agencies have claimed that they have not arrested the petitioners. There is no reason why such written statement should not to be believed. Even by the orders of the court rendered from time to time, and subsequent probes done pursuant to the orders, the fact of the petitioners' arrest has not been proved. During the course of armed conflict many people have gone abroad and in view of the fact that hundreds of thousands of people were found safe, it is not appropriate to conclude without any ground that the petitioners were arrested, he pleaded.

Learned senior advocate Mr. Khem Narayan Dhungana, appearing as amicus curie pursuant to the order of this court, submitted that the facts deliberated therein till date have established that the petitioners were arrested by the security persons. The fact that their whereabouts is still unknown proves that they were disappeared but the responsible persons of the Police and the Army could not disclose information known to them due to organizational discipline and the oath of secrecy taken by them, he pleaded.

Learned advocates duo Mr. Bashudev Bajgain and Mr. Om Prakash Aryal appearing as amicus curie on behalf of the National Human Rights Commission argued that a total of 2032 applications were filed at the Commission as being disappeared by the state and out of them the whereabouts of 646 was still unknown. Regarding the complaints lodged at the Commission and investigation carried out on the same and subsequent facts established therefrom, the Commission could not conclude that the persons mentioned in the petitions were not disappeared; and the Commission has decided to recommend for legal action against the culprits who were involved in serious violation of human rights, they pleaded.

Considering the facts stated in the petition, written statement and the above mentioned pleading, it is beyond dispute that the persons stated in the petition were not in contact of their families and relatives. Except for the provision of the main body of the writ No. 378 of Harisharan Maharjan and others, in most of the petitions, the date, time and place of the arrest of the petitioners and the manner how they were arrested is expressly stated. Even as the written statement has stated that the petitioners were not arrested, it seems that this court, with respect to many writ petitions including writ No. 3575 has, time to time, ordered a search warrant to furnish with this court the whereabouts of petitioners if they were not arrested. Regarding the writ petition 617 that states about Bisal Lama who was met by his families at the ward police office Tinkune on 9 June 2002 with the cooperation of ICRC; and that he was boarded on a vehicle to get him to Bhaktapur DSP office in the presence of his wife Menuka Lama, and it is mentioned that while being inquired on the same evening the Bhaktapur District Police Office denied knowing anything about the same. As it is seen in this way, the written statement of the respondent stating that the petitioners were not arrested, can not be found to be reliable and trustworthy.

The respondents in their written submission have stated that Mukunda Sedai who is mentioned in writ No.142 was not arrested by them. However, Achyut K.C while giving statement on 20 December 2004 pursuant to the order of this court in connection with habeas corpus writ petition No.193 filed at this court on 15 December 2003 and which remained pending pursuant to the order of this court dated 25 May 2005 has stated that he had met Mukunda Sedai on 2060 Poush [December 2004/January 2005] while being detained together with him at Jagdal battalion at Chauni. The letter written by detainee Mukunda Sedai on 16 January 2004 to petitioner Shanta Sedai shows that he was in Chauni. The decision of National Human Rights Commission dated 6 May 2006 which is enclosed in the file herewith deems that Mukunda Sedai as stated in the petition was arrested by security force and was kept incommunicado in illegal detention at Jagdal battalion Chauni.

Concerning writ No. 262 of detainee Chaturman Rajbansi, the transcript copies of the letters enclosed in the file which were sent by him to his family from Batukdal barrack 8 April 2003, 15 July 2003 and 5 December 2003 state fact that he was in custody at army barrack. However, the respondents including Batukdal battalion in their written statement stated that he was not arrested. As his family has not been able to establish contact with him till date and as it is formed seems that his where-about remain unknown even after proceedings of this court, the condition of Chaturman Rajbansi is found to be unknown.

While it is the contention of petition of writ No. 111 that detainee Pusparaj Basnet was arrested and detained in Bhairab Nath Battalion, the respondents including Bhairab Nath battalion in the written statement have claimed that he was not arrested. It seems from the transcript copy of report of National Human Rights Commissions that after carrying out an investigation with respect to this detainee, National Human Rights Commission has made the concluding observation that Pusparaj Basnet was arrested by security force and was detained in Bhairav Nath battalion which is under the Nepal Army.

The analysis of facts mentioned here above is just a trend analysis of all cases in totality. As these examples expose and represent similar facts in other cases, it is not

necessary to mention facts in detail of all cases and additional proceedings carried out for the purpose of finding out the condition of detainees.

The report of Baman Prasad Neupane constituted by the Government of Nepal for the purpose of probing and investigation of the disappeared persons and preparing a report that explained their real condition and also to recommend necessary measures that needed to be taken with respect to those whose condition remained unknown, states the name of 602 persons in the list of persons whose condition was still unknown.¹ The fact that most of the persons who have filed writ petition in this court including Amrit Kandel, Arjun Maharjan, Baburaja Mali were listed in the report as being the persons whose whereabouts was still unknown, shows that the whereabouts of the persons stated in the petition was not determined till date.

In the list² of the persons whose whereabouts was determined, the same report citing the letter of Karyarathi Department of Nepal Army mentions Chet Nath Ghimire, about whom the petition has been filed to this court as being the person who was in contact with the barrack of Nepal Army at Borletor. Taking note of the report as a basis, when this court ordered to present Mr. Ghimire [Dhungana] before it, the court received an answer that the fact stated therein was just a typological error, giving thereby a feeling that the status of the persons mentioned in the petition was getting more complicated. Even though the same report states that petitioner Chandra Kumar Dhakal and Arjun Prasad Neupane were freed on 13 February 2003 and 13 June 2006 respectively from Jagannath Nath Debal branch and Nakhu branch of the prison, it does not mention any specific information and detail regarding their present states and condition in connection to the proceeding of the case filed in this court. A mere reiteration of the correspondence that mentioned about their release does not help in reaching conclusion that their status was known. The same report states that Bisal Lama, Jalandhar Bastola and Madhav Adhikary were killed in cross firing. However, this is not corroborated by the post mortem report or receipt of the corpse by the family or identification of the place where the corpse was dumped. As such things could not be shown in the file, this court only on the basis of the said report can not conclude that they were killed, or if they were killed, without further inquiry as to how they were killed and whether law was duly complied with at that time, reach to a conclusion against undertaking such inquiry.

A report of the investigation carried out by the United Nations Office of the High Commission for Human Rights in Nepal with respect to persons disappeared by security force from custody during the time of conflict has been submitted to the file in writ No. 2588. The report has mentioned the name of 49 persons as being disappeared from the Bhairab Nath battalion of Nepal army; and writ petitions concerning most of them including Madhav Adhikari, Dharendra Basnet, Desbhatka Chapagain have been filed with this court. The report mentions that it was prepared after the Office had taken interviews of over 50 persons including families of disappeared person, former detainees and witness and after the visit to Bhairab Nath battalion and Uddha Bhairab Nath battalion.

¹ The probe committee to formed to make public the condition of disappeared citizens (Baman Prasad Neupane) report,2063.

² Id, Annex 3

The erstwhile His Majesty's Government, Ministry of Foreign Affairs and the Office of the High Commissioner for Human Rights have signed an agreement on 10 June 2005 with respect to the establishment of the Office of the High Commissioner for Human Rights in Nepal. The agreement has given a mandate to the Office to monitor the situation of human rights under certain determined standards and thereby make report of the same.³ As the Office has made the report public even by specifying the methodology therein, this bench has deemed appropriate to take the report in reference as a background material for the purpose of analyzing the facts during the hearing of the case.

As the said report in the course of its investigation also states that 49 persons were disappeared and that additional investigation was being undertaken with respect to the list of other people who were said to be disappeared; it deems that the contention in the written statement and the pleading of the Deputy Government Attorney that the persons were not arrested does not concord with the said report and hence not reliable and trustworthy; the status of those persons is still found to be unknown.

As it seems from the reports submitted in connection of the cases before us that since army barracks were also used to keep the detainees it was further made difficult to determine the condition of the detainees. If the detention was made by officers authorized by law by duly fulfilling the procedures prescribed by the constitution and laws, no such condition would arise to detain persons in the places like Bhirab Nath Gan which is purely an army barrack. An argument may be raised that army barrack was used for safe detention for the purpose of containing terrorism at the time of conflict but this should be preceded by formation of certain policy based on law to use the army places for criminal proceeding of civilian persons.

In the case of persons taken into custody for the purpose of criminal law, several of their rights get affected and these rights are to be enforced while they are in detention. The rights of the detainees such as the rights to meet family members, to consult a law practitioner, the guarantee as to the non-occurrence of mental and physical torture, the right to adequate food, information, access to justice for legal remedy is to be respected.

When detainees are put in army barrack where infrastructures are not developed keeping in mind the human rights, it creates a situation where gross violation of human rights of the detainees might occur. In the present case many problems have generally arisen precisely for the reason that civilian persons were put in army barracks.

Since even for institutions like United Nations Office of the High Commissioner for Human Rights and the National Human Rights Commission access for the inspection of the detainees' room of the Bhairab Nath Battalion was granted only after special initiations, it would not be possible for the kin of detainees to have access or reach to such place of detention. On the basis of the reports received, and from description of the place of detention as mentioned in the statement of the persons who were already detained there, the condition of the detention, physical facility and treatment meted to detainees seems to be far lower than the treatment to be done to a human being and, hence, degrading, objectionable, torturous and terrifying. It is a matter of shame to both government and the

³ See in detail: Agreement Between the United Nations High Commissioner for Human Rights and the Government of the Kingdom of Nepal Concerning the Establishment of an Office in Nepal held on 10/04/05.

state that such degrading treatment was done to human being just because of being in detention.

Notwithstanding the gravity of offence treatment to human being should be humane and within accepted standards. The physical condition of the place where the detainees are kept and the treatment meted to them expresses overall attitude of the concerned office to them and the difficulties faced by the detainees and treatment to them in the detention further clarifies ground for their disappearance. As detainees are put in such difficult and inadequate place, it might give rise to loss of life and property due to adverse effect on physical and mental health. Further, where the matters like record keeping, dissemination of information etc. do not exist, they indicate a situation where there is possibility of disappearance. As a matter of fact, the policy and practice of putting civilians in army barracks for the purpose of detention is unfortunate. A separate research needs to be carried out by the government as to what was the thinking and policy behind the activities of putting detention in army barracks which have arisen therefrom.

In reality, on the basis of above mentioned reports and information given by the persons who were detained in the Bhairab Nath barrack, it is now beyond dispute that a large number of detainees were detained there. There does not seem any reason for all these reports and persons to make baseless allegation against the army organization. If an agency which is supposed to remain a pure army organization is used for other purposes, the concerned agency and officials should bear the challenges and responsibility to the extent such responsibility and challenge arises therefrom. Whereas such responsibility was to be borne naturally, a defense on the same can not be established through adamant denial of all basic claims stated in the petitions. As is claimed in the petitions, in matters corroborated by the reports pertaining to persons who are seen to have been taken into custody, the responsibility clearly lies with the army and ultimately with the government.

Applications were also filed at the National Human Rights Commission subject to several persons stated in the writ petition and the details of investigation received from the Commission mentions that the Commission had carried out investigation on this matter. As per the information received from the Commission, persons mentioned in the petition including Puspa Raj Basnet and Mukunda Sedain were illegally put in army detention for a long time, and therefore, it seems that the Commission had recommended for legal action by identifying responsible official. The statement recorded at the National Human Rights Commission, by persons freed from the custody of the security force reveal that they had met several persons stated in the petitions in the custody. Those statement, the applications and information furnished by the families of the disappeared person to the National Human Rights Commission and the concluding decision of the Commission on the basis of the investigation and field visits of the potential places where the detainees might be kept; portray that the condition of the persons including those stated in the petition as unknown.

This court had constituted an investigative team from within the machinery of this court itself for the purpose of determining the condition of persons mentioned in writ No. 3575,100,104, 632 from among the several writ petitions filed with it. The investigation undertaken by the Detainees Investigation Team (DIT) reveals that Mr. Chakra Bahadur

Katuwal of writ No. 632 had appeared at the office of Chief District Officer in person on 13 December 2001 and he was put in illegal detention first by the order of the Chief District Officer at the District Police Office and then in the army barrack and he was killed on 16 December 2001 due to cruel torture given by those including army officials.

Besides, with regard to Rajendra Prasad Dhakal who is stated in the writ petition, the report conclusively states that he was arrested on 10 December 1998 by a police team comprising 10 to 12 policemen, deputed under the command of erstwhile Police Inspector Kush Bikram Rana of Area Police Office, Belchautara, Tanahaun at the time when he was taking bath at Jamdi river of Khaireni Village Development Committee of Tanahaun. He then was brought to Area Police Office, Belchautara along banks of Jamdi River which was a round about and lesser used route. [The DIT has] reached the conclusion in that he was systematically disappeared from the same date.

In the report submitted to this court the DIT conclusively states that petitioner Bipin Bhandari and Dil Bahadur Rai were arrested on 2059/3/3 (June 27, 2002) from their rented room at Sukedhara, Kathmandu by a police team under the command of Deputy Police Inspector Vijaya Pratap Shah from Area Police Office, Balaju and they were handed over to the Area Police Office Balaju and as both of them were affiliated to All Nepal National Free Students Union Revolutionary (ANNFSU-R) sister organization of Communist Party Maoist, they were disappeared due to their political faith⁴.

In this way, it seems that the present condition of most of the detainees could not be determined even by the investigations of this court and different agencies. It seems that the DIT constituted by this court has concluded that Mr. Chakra Bahadur Katuwal of writ No. 632 was died on 16 December 2001, Rajendra Prashad Dhakal of writ No. 3575 Bipin Bhandari of writ No. 100 and Dil Bahadur Rai of writ No. 104 were forcefully and illegally disappeared by the security forces. Since the investigation was a judicial one carried out by the DIT constituted as per the order of this court, this court has deemed the conclusion of the report of the DIT as the final regarding the condition of the petitioners. Pursuant to the report, the condition of Chakra Bahadur Katuwal, Bipin Bhandari, Rajendra Prasad Dhakal and Dil Bahadur Rai has been determined as stated in the report itself and condition of all other persons stated in the writ petition except these ones could not be determined on the grounds of the facts and thereby seems still unknown and confusing, and therefore, the truth on their condition need to be investigated and determined.

Regarding Question No. 2

From the deliberation on question No. 1 made above, it seems that the persons who were claimed to have been disappeared by security force were basically denied by the respondents of having arrested by them, and thus, the conditions of those persons is found to be fundamentally unknown.

As our judicial practice till date has been that the order of habeas corpus is issued in the situation when the condition of a detainee is determined and he/she is found detained illegally, owing to the situation of conflict a pertinent question has been raised as to what would be the responsibility of the state towards citizens and what would be the role

⁴ Supreme Court, Detainees Investigation Task Force, 2063 Report pages 126-127

of the court especially in the condition when a lot of complaints are filed claiming illegal arrest of persons in huge number but the state denies having arrested these persons, and therefore, written notes of pleadings were also demanded from the counsels present on this question.

Appearing on behalf of the petitioners learned advocates Mr Milan Kumar Rai and Mr Kedar Dahal submitted that forceful disappearance is a continuous crime. Article 2 of U.N. Covenant on Civil and Political Rights which is ratified by Nepal entrusts to the state a obligation to carry out investigation on each incident of Human Rights violation including forceful disappearance. If the state does not fulfill this responsibility, the court may; considering the gravity of incident of disappearance, concern of international community, concern and wishes of victim family and also the need of ending impunity; issue an order to find out the real condition of disappeared persons and punish the culprit even by making laws with retrospective effect if so calls for, they pleaded.

Appearing on behalf of petitioners learned advocates Mr Hari Krishna Karki, Mr. Satish Krishna Kharel, and Mr. Hari Phuyal argued that the Constitution of the Kingdom of Nepal, 1990 and the Interim Constitution, 2007 guarantees right to life and personal freedom of every person. Similarly, Human Rights related international instruments ratified by Nepal have also guaranteed the same thing. The state should respect and implement this obligation created by several national and international laws. If the state does not fulfill such obligation, an inherent right is vested in the court itself to consider all possible ways for the protection of the civil liberty, they submitted.

Learned advocates appearing as *amicus curie* argued that the government has the responsibility to find out the condition of the persons who were missing, disappeared or whose status was unknown. The government can not escape from its responsibility just by stating that it has not arrested them. The court may issue appropriate order to clarify the status of such persons, they submitted.

Similarly, appearing on behalf of respondents Joint Government Attorney Mr. Yubaraj Subedi and Deputy Government Attorney Mr. Brajesh Pyakurel argued that solution of such question should, in the changed context, be sought through political consensus. The judicial inquiry to be undertaken by the judiciary at its own initiation may not be practical or result oriented. If the orders of the court are not executed they make the matter more complex. As a consensus has already been made to establish Truth and Reconciliation Commission for the purpose of eradicating the problems evolved during the time of conflict, this aspect should also be considered, they submitted.

Considering the above mentioned facts and submissions made and the context therein, it seems that the cases from among those presented for decision here today, the oldest one is registered on 2055/10/7 (Jan 21, 1999), however, it seems that it is interrelated with the circumstances created prior to it out of the armed rebellion between the government and CPN (Maoist), and therefore, it seems tenable to consider as to what would be the responsibility of the state in such unusual circumstance.

There is no dispute that the first among the duties of the state is to provide security to its frontiers and protect rights of its citizens. Whatever complex or easier circumstances may appear for the conduct of its affairs, a state can not exempt itself from

its responsibility of protecting person and property of its citizen and also addressing the concerns related thereto with responsibility and priority. If a state fails to fulfill such primary responsibility, peace of such state would be disturbed through internal rebellion and eventually the state may face the crisis of its existence. Modern political science has accepted the state as the protector of citizens. The state has special responsibility towards its citizens even during general circumstances and state can not exempt itself from such responsibility howsoever especial or difficult the circumstance might be. From this philosophical stand point also it does not provide a basis and condition to conclude that there would be no responsibility of the state for the circumstances created out of the past conflict.

Several initiatives have been taken at the international level for ensuring the protection of fundamental human rights of persons. The United Nations' Universal Declaration of Human Rights has accepted the right to life and freedom as fundamental human right and thereby made a declaration that the international community should respect and protect the same⁵.

As the traditional international law had put the incidents of disappearance during the time of conflict under the category of violation of human rights, this alone could not minimize incidents of disappearance, and therefore, the United Nations deemed incidents of disappearance as crime against humanity and issued a declaration on 18 December 1992 for the purpose of saving all persons from forceful disappearance⁶. In line with the obligation imposed on the state party by the declaration, the General Assembly of the United Nations on 20 December 2006 has issued the International Convention for the Protection of All Persons From Forced Disappearance⁷. Even as the international convention has not come to force till date and Nepal has also not ratified it, this convention has determined a fundamental standard concerning the obligation of the state with respect to security of disappeared persons; and also in the condition that the convention has been accepted by international community, it is expedient to accept the standards of the conventions as the standards of international law and thereby carry out activities by the states pursuant to the same.

As stated in the preamble to the said convention the principles enumerated in Charter of the United Nations, the human rights and basic freedoms indicated by Article 55 of the Charter, the Universal Declaration of Human Rights, the convention is supposed to promote universal respect for, and observance of, human right and fundamental freedoms. From among the principles stated in the Universal Declaration of Human Rights, it seems that the core principles in all conventions, covenant and instruments are directed by friendship, justice and peace on the basis of inherent dignity, respect and inalienable rights of all members of human society. From among them, the Universal Declaration of Human Rights, Covenant of Civil and Political Rights and Convention against Cruel Inhumane and Degrading Treatment or Convention against torture are related to present matter and hence especially related.

⁵ Article III, Universal Declaration of Human Rights, 1948, UN.

⁶ General Assembly Resolution 47/133 United Nations

⁷ General Assembly Resolution 61/177, United Nations

For the purpose of enforcement of the above mentioned conventions, covenant and instrument, it seems that some rules and code of conduct of law enforcement authorities such as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the Standard Minimum Rules for the Treatment of Prisoners are used as yardstick.

Since the above mentioned instruments appear to be concerned with the implementation of the human rights conventions signed by Nepal, the Convention for the Protection of Enforced Disappearance passed in 2006 should also be seen in the same footings. This convention has not established separate values other than prevailing international human rights laws rather it has reinforced the values enshrined in the mainstream human rights laws, and therefore, the fact of non-ratification of this convention does not provide any ground to consider that the state responsibility created by mainstream human rights instrument are minimized to any extent. Thus, even as the 2006 convention is yet to be ratified, there are no barriers to take the provisions of the convention principally as embodied guiding elements, rather it is also seen necessary on the basis of the obligation created out of conventions ratified by Nepal together with the principles of prevailing international human rights law for the protection of human rights.

There seem to be no problem in internalizing the principles laid down in the said Convention for the sake of respecting and promoting the life, dignity and freedom of its citizens; and our legal system can also include this as it is useful for us. It is not objectionable in both our law and practice rather it is seen to be essential. It is expected that state should, within its constitutional framework, proceed further as soon as possible to ratify such conventions.

This will demonstrate our sensibility towards our citizens and the feeling of responsibility of the state towards the international community in the process of protection of human rights. Now, let us consider some fundamental provisions of the convention.

Article 2 of the convention considers the act of enforced disappearance as an arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or a person or group of person acting with authorization, support or acquiescence of the state followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law⁸.

The convention has prescribed the following obligations to a state party to guarantee that persons would not be disappeared forcefully by state party:

- No body to be disappeared forcefully and kept in secret detention,
- The act of enforced disappearance to be made criminal act through enactment of law, it will not be considered as political offence and in order to ensure the presence of the alleged person arrangement of extradition or rendition will be made,

⁸ For the purposes of this Convention, enforced disappearances is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or a persons or groups of person acting with authorization, support or acquiescence of the state followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

- Research on forced disappearance to be carried out and responsible person will be brought to justice,
- Right to effective remedy to be guaranteed to the victims of enforced disappearance,
- An impartial investigation for alleged incidents of disappearance to be ensured,
- Arrangement for the protection of complainant, witness and relatives of victim to be made.

It is found that some states in the American continent have, before the commencement of the convention, issued in 1994 an Inter American Convention on Forced Disappearance of Person and countries such as Colombia, Guatemala, Paraguay, Peru and Venezuela have made separate law in accordance with the convention and thereby have defined such act as criminal act⁹.

In the International Covenant on Economic, Social and Cultural Rights, 1966 which is ratified by Nepal and Nepal has become a party to the same, the parties to the Covenant have accepted the responsibility of the state to provide widest possible security and cooperation to establish a family and take care as well as education of children.¹⁰ Similarly, Article 6 of the International Covenant on Civil and Political Rights states that every human being has inherent right to life and this right shall be protected by law.¹¹ The expression 'right to life' used in this Article has been interpreted by the United Nations Office of the High Commissioner on Human Right as the highest right of person which can not be suspended in any kind of emergencies.¹² The same Covenant has also provided state parties with the responsibility to protect the right of citizens.¹³

- Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law
- Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
- Anyone who is arrested or detained on criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.
- Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
- Anyone who has been the victim of unlawful arrest or detention shall have the an enforceable right to compensation.

While interpreting Article 2 of the Covenant, the Human Right Committee, the Office of the High Commissioner for Human Rights has stated the act of forced

⁹ Report submitted by Mr. Manfred Nowak to 58th Session of Commission on Human Rights, Item 11 of the Provisional Agenda at January 2002.

¹⁰ Article 10, International Covenant on Economic, Social and Cultural Rights, 1966

¹¹ Every human beings have the inherent right to life. This right shall be protection by law. No one shall be arbitrarily deprived of his life.

¹² CCPR General Comment No.14, Office of the High Commissioner for Human rights, Twenty-third Session,1984

¹³ Article 9 International Covenant on Civil and Political Rights,1966

disappearance would violate Articles 6, 7 and 9 of the Covenant and the act shall also be a crime against humanity.¹⁴

The state parties to the Covenant have accepted obligation that necessary legislative measures shall be applied to respect and guarantee these rights if the prevailing legislative measures do not appear to be enough; and effective remedy will be ensured even if these rights are violated by the persons who work in official capacity.¹⁵

Similarly, the Convention against Torture and Cruel, Inhumane and Degrading Treatment, 1984 has also prohibited any kind of inhumane torture to the person in custody or detention.

As Section 9 of Treaty Act, 2047 provides for that the treaties or agreements ratified by Nepal will be applied as Nepal law, there is no ground for the state to get itself absolved from the responsibility determined by these instruments.

While having a look to foreign courts as to how they have practiced in such cases, it is found that the Indian Supreme Court has, in the case of *Rudal Sah V. Union of India*, not only freed Rudal Sah from illegal detention but also ordered monetary compensation from the same petition of *habeas corpus*. The court has taken the decision to compensate not as compensation under ordinary jurisdiction rather viewed it as the compensation for depriving enjoyment of basic fundamental right of the citizen guaranteed by the state; and held that "the refusal of the Supreme Court to pass an order of compensation in favor of the petitioner will be doing mere lip-service to his fundamental rights to liberty which the state government has so grossly violated".¹⁶

Similarly, in the case of *Sebastian M. Hongray V. Union of India*, where the petitioner had claimed that C. Daniel and C. Paul were arrested and disappeared by security forces and where the respondents had furnished written statement that they had not arrested them, the court however, ordered compensation of one hundred thousand rupees each to the widows of the deceased persons and also issued an order of mandamus to Superintendent of Police to carry out necessary investigation on the incident on the ground that the petitioners had had an unnatural death and the state had not fulfilled its obligation towards the incident.¹⁷

Regional Courts on Human Rights have also decided on matters pertaining to incidents of enforced disappearance. The Inter- American Court of Human Right has enunciated the principle in the case of *Velasquez Rodriguez V. Honduras* that the responsibility of the state would remain even in situations when full and direct evidence of enforced disappearance by the state is lacking. It was claimed in the case that a student named Manfredo Velasquez was arrested by armed police of Honduras. Even as direct evidence of the same was lacking, the court enunciated on the basis of the circumstantial and presumptive evidence that state has the responsibility to create a machinery for full enjoyment of human rights by the citizens¹⁸.

¹⁴ CCPR General Comment No. 31, Office of the High Commissioner for Human Rights, Eightieth Session, 2004.

¹⁵ Article 2 *Ibid*

¹⁶ 4 SCC(1983) 141

¹⁷ AIR (1984) 3 SCC 83

¹⁸ *Velasquez Rodriguez V. Honduras* Petition No. 7920/1981, judgment of 29 July 1988

Another case, *Trujillo Oroja V. Bolivia*, filed at the same court in 1999 had claimed that a war victim Jose Carlos Trujillo Oroja was arrested by security forces in 1971 December and was disappeared since February 1972. In the case the Bolivian government on the basis of the report following judicial inquiry accepted that it had caused Jose Carlos Trujillo Oroja disappear, and therefore, begged pardon to the families of the victim, made necessary arrangements to amend the laws to punish the culprit and to ensure non-recurrence of the incidents of forced disappearance and had also proposed US\$ 4000 compensation to the families of the victim. Even as the court quashed the case (put in *tameli*) as the Bolivian government had accepted the responsibility towards its citizen, it was, however, declared that the Bolivian government had infringed the obligation of the state towards its citizens to protect human rights as protected by the Inter American Convention on Human Rights.¹⁹

Regarding forceful disappearance, the case *Kurt V. Turkey* decided by the European Court of Human Rights, established under the European Convention for the Protection of Human Rights and Fundamental Freedom 1950, is hailed as landmark. The case started after the mother of Uzeyir Kurt filed an application at the European Commission of Human Rights claiming that Kurt was arrested by security authorities of Turkey in 1993 and was disappeared from the detention. The court in the case observed that the government of Turkey had seriously violated its liability under the European Convention for the Protection of Human Rights and Fundamental Freedom, 1950 by putting Kurt's mother in pain and distress by not giving the information about his condition for a long time and for not doing anything substantial on behalf of the government to carry out investigation on his disappearance, and therefore, the court ordered compensation of 10,000 Pound Starling for the pain and distress borne by the petitioner and 15,000 Pound Starling for disappearing her son.²⁰

In the above mentioned decisions, the Inter-American Court of Human Rights and European Court of Human Rights have made interpretation of the obligation of state established by regional conventions as determined by the same conventions. Even as Nepal has not become party to a separate regional convention, it has remained an active member of the United Nations, accepted several conventions related to human rights and has repeatedly expressed its commitment towards human rights and freedom of citizen through constitution and other legal provisions. In this context, it seems that this court may take standards and principles established pursuant the above mentioned foreign and human rights related decisions made by the regional courts as **recognized principles of justice** embodied in our constitution. There would be no reason to take them otherwise.

While considering what would be the obligation of the state to its citizens during the time of conflict or normal situation, the preamble to the Constitution of the Kingdom of Nepal, 1990 has made commitment to guarantee basic human rights of the people and thereby transforming the concept of rule of law into living reality. The fundamental rights stated under Part III, Article 12 (1) of the same constitution has the provision that no one shall be deprived of personal liberty save in accordance with law. Similarly, right to criminal

¹⁹ Trujillo Oroja V. Bolivia judgment of 26 January 2000

²⁰ Kurt V. Turkey, Application No. 24276/94 Judgment of 25 May 1998

justice provided in Article 14 in clause (4) states that anyone who is detained in course of investigation, trail or for any other reason shall not be subjected to any physical or mental torture, nor shall he be treated with any cruel, inhuman and degrading treatment. Clause (5) of the same Article, states that no person who is arrested shall be detained with out being informed, as soon as may be, of the ground of arrest; and Clause (6) of the same Article states that every persons who is arrested and detained in custody shall be produced before a judicial authority within twenty-four hours after such arrest, excluding the time necessary for the journey from the place of arrest to such authority, and no such person shall be detained in custody beyond the said period except on the order of such authority.

The basic fundamental rights provided by the 1990 Constitution are made more secure by the Interim Constitution of Nepal, 2063. A full commitment is made to civil liberty, fundamental rights, human rights and the concept of the rule of law has been expressed in the preamble to the Constitution itself.

Clause (1) of Article 12 of the Constitution has in clear terms protected right to life of person and thereby provided every person the right to live with dignity. Regarding the right to justice, Article 24 (1) states that no person shall be detained without giving the information of arrest stating the reason therefor. Clause (2) of the same Article states that a detained person shall be produced before the judicial authority within 24 hours of the arrest excluding the time necessary for the journey from the place of arrest to such authority, also guarantees that the arrested person shall not be put in detention except by the order of the judicial authority. Clause (8) states that each person shall have right to be informed of the proceedings against him and Clause (9) states that each person shall have right to fair trail from competent court or judicial authority.

Similarly, Article 26 of the Constitution which provides for right against torture in Clause (1) states that anyone who is detained in course of investigation, trail or taken into custody or for any other reason shall not be subjected to any physical or mental torture, nor shall he be meted with any cruel, inhuman and degrading treatment. Clause (2) of the same Article makes the act pursuant to Clause (1) punishable by law and also provides that the person treated in that manner shall be entitled to compensation as prescribed by law. Further, the proviso of Clause (7) of Article 143 of the Constitution by providing that such rights can not be suspended even during the period of state of emergency in the country remains constitutionally sensitive to the right to life of the person.

It is beyond dispute that during normal times the liability to protect fundamental rights of persons and their right to live with dignity vests upon the state. As civil liberties would be at greater risk during the time of conflict, the liability of the state would be more sensitive and responsible during such unusual circumstances. The protection of human rights and compliance with international humanitarian law has during the time of conflict remained a challenge even at the international level. A study report has shown that during the year 2003 and 2004 in Nepal the trend of enforced disappearance and illegal detention were found to be highest in the world.²¹

²¹ Amnesty International Report, the State of the World's Human Rights, 2005, P. 23

It seems that the above mentioned Declarations, Conventions and Covenants have pointed out that the practice of enforced disappearance would seriously violate the right to live with dignity, the right against torture, the right to personal freedom, fair trial, the right to easy access to justice and rights related to family life.

Even as there has not been separate legal provision on forced disappearance in Nepal, some of the provisions of the Interim Constitution, 2007 have accepted existence of such incidents during the time of conflict. The political consensus made in several stages between the seven political parties and CPN (Maoist) in the course of peaceful transformation of conflict which have remained as the background for the formation of this constitution and which are accepted by this constitution as its part as well as the detailed peace agreement entered between the government of Nepal and CPN (Maoist) on 2063/8/5 (Nov 21, 2006) have also expressed commitment to international humanitarian law, principles of basic human rights and standards. It seems that the state has accepted its obligation towards disappeared citizens due to its commitment to the compliance of basic human rights and international humanitarian law as expressed in clause 5.2.3 of the aforementioned peace agreement which has been put as annex 4 of the Constitution, it states that both parties agree to make public the real name, family name and address of home of those who were disappeared and killed during the time of war within 60 days of signing of this agreement and thereby apprise the same to their family also; and clause 5.2.5 states that both parties have agreed to establish a high level Truth and Reconciliation Commission to explore truth on those who violated human rights during the armed conflict and clause (7) by providing that both parties commit to respect human right and international humanitarian law the state seems to have accepted the fact that it has the liability for disappeared persons.

The Interim Constitution, 2007 has also endorsed the commitments expressed through the peace agreement and various other political consensus. Article 33 (L) in Part IV of the Constitution under Directive Principles and Policies, provides that victim families of the disappeared person will be provided relief on the basis of the report of the Inquiry Commission constituted to investigate into disappeared persons during the conflict; Article 33 (N) states about establishing a high level Truth and Reconciliation Commission for exploring truth on those who violated human rights during the armed conflict and those who were involved in crime against humanity, and for creating an environment of reconciliation in society.

Even as Article 36 states that the question relating to the implementation or non implementation of provisions stated under Part IV of the Constitution can not be raised in any court of law, there is no dispute that that provisions in these articles are commitments of the state. The principle enunciated in the case of *Yogi Narahari Nath v Cabinet Secretariat and Others*²² where this court held that the directive principles and policies of the state are not mere show piece and they can not be overlooked even as they can not be implemented through court, and therefore, the state cannot overlook the matters mentioned in the Directive Principles.

²² Nepal Law Reporter 2053 Vol. 1 Decision No, 6127, page 33

As the incident of disappearance is taken as the violation of fundamental rights of persons such as the right to life, freedom and justice, and therefore, the legal investigation and proceedings on disappearance are objectively considered as a part of remedy against the breach of fundamental rights, and thus, the process of truth finding can be considered as part of the implementation of the same. The state may take a stand that formation of a Commission with respect to matters pertaining to directive principles and policies are to be done as per its own convenience putting in its own priority. The state may also contend that the implementation of directive principles of the state is a matter of its own discretion. But the legal investigation, prosecution and remedy to be carried out with respect to a remedial mechanism as a part of fundamental right can not be a matter of second priority and, also can not be a matter outside the jurisdiction of the court.

In fact, on matters relating to the investigation of truth and giving remedy in respect of disappeared person, no reason can be seen that gives rise to conflict between the jurisdiction of the court and any other organ of the state. Rather, it can be accepted that the obligation of the state with respect to this matter is an obligation to be borne jointly. At the time when, the nation is making a leap forward with great hope and confidence in the direction of democratization, if the present state power does not become serious on matters relating to disappeared person, the rationale of change, and the direction beacons by the change might wither away. The first step to provide a feeling that conflict management has taken a path of resolution is the assessment and remedy of the loss of life and property that occurred during the time of conflict. For this reason also this matter is seen to be appropriate for judicial resolution from the very point of view of law besides social, economic and political point of view. Thus, this court can and should provide a judicial evaluation as to whether or not the state has complied with its liability.

In the light of the above mentioned constitutional provision there is no dispute as to the fact that the state has the responsibility to situations created by the conflict. Naturally, during the time of armed conflict than during normal times incidents of violations of human rights and humanitarian laws take place more. The state has the responsibility to address the incidents and realities of the degrading situation of human rights and violation of humanitarian law during the time of conflict in a serious and responsible manner for the purpose of peaceful transformation of conflict. The state can not remain silent towards the incidents of infringement of the right to live with dignity and civil liberties of persons during the time of conflict.

It seems that our judicial system has adopted the approach that the court can give necessary directives if state can not demonstrate sensibility and responsibility with regard to the violation of human rights committed during the time of conflict. In the case of petitioner *Bhim Prakash Oli v Prime Minister and Cabinet Secretariat* writ No. 3394 of the year 2061, this court has ordered that it is the responsibility of the state to determine a clear policy concerning the relief to be given to the people who have been victim of disappearance and riddled with the conflict and thereby distribute the relief on the basis of equality without any discrimination.

In the present context, as the condition of the most of the persons as deliberated in above mentioned question No. 1 seems to be unknown, **the state can not** by virtue of the

international legal instruments as mentioned above, foreign and human rights related decisions made by regional courts and our constitutional provision **escape from its responsibility to identify the condition of the disappeared persons and make them public, initiate legal action against those responsible person who appear to be culprit and thereby provide appropriate remedy to the victim party.**

Now, considering on the aspect whether or not the state has taken steps to fulfill its obligation, it is found that the written statement received from the respondent or the Joint Government Attorney who appeared on behalf of the Office of the Attorney General provided no factual situation and details with concrete ground as to what they had carried out as steps to fulfill the same. Even as the state has accepted its responsibility in the peace agreement signed on 2063/8/5 (Nov 21, 2006) between the government and CPN (Maoist) and also in the Interim Constitution, 2007, it does not seem that any concrete steps are taken to fulfill the responsibility. **Life is significant precondition for enjoying all freedoms. Other preconditions, such as capacity for autonomy, and social and economic structure which allow people to choose between realistic options, are valuable only while we continue to enjoy life.**²³ As the forceful disappearance makes the very existence of person unknown and doubtful, there would be no condition for such person to have an access to basic and fundamental human rights guaranteed by national and international law. In the countries with written constitutions, there would be no division of opinion that the primary responsibility rests on the state to guarantee the civic right expressed by the international instruments to which the state or constitution has made commitment. But the Constitution has provided a responsibility to this court as the guardian of the constitution and a watchdog of civil rights, when other organs of the state can not fulfill their responsibility; it seems that this court can issue appropriate order to make them fulfill their responsibilities.

Regarding Question No. 3

Evaluating the outline of the efforts made so far with respect to making public the condition of disappeared persons and sufficiency [of such efforts] and also considering what more steps would be necessary and appropriate in this regard, learned advocates Mr. Hari Krishna Karki and Mr. Hari Phuyal submitted that the fact that the Baman Prashad Neupane Committee could not carry out good probe appropriately is shown from the very limitations stated in the report itself. The formation, function, powers and duties of the Commission to be formed pursuant to the Commission of Inquiry Act, 2026 rests upon the discretion of the government, and therefore, a Commission constituted pursuant to this Act can not carry out effective investigation in this respect. And thus, it calls for a separate Act that confirms to international standard and a high level Commission should be formed pursuant to the same Act, they argued.

Also appearing on behalf of the petitioners learned advocates Mr Milan Kumar Rai and Mr. Kedar Dahal submitted that the petitions now filed at the court with respect to the disappeared person are just representative ones. A separate high level judicial Commission should be constituted to probe and investigate in this matter and the jurisdiction of such

²³ David Feldman, *Civil Liberties and Human Rights in England and Wales 2nd ed*, Oxford University.

Commission should not be limited to the cases filed at the court, rather it should be made capable enough to include broadly within its jurisdiction all incidents of forceful disappearance, they pleaded. Advocate Mr Satish Krishna Kahrel further submitted that it is appropriate to entrust the recently formed DIT to determine the facts of all petitions in accordance with the procedure of 'Criteria for Commission of Inquiry on Enforced Disappearance' given by the Office of the High Commissioner for Human Rights.

Appearing as amicus curie learned senior advocate Mr Khem Narayan Dhungana submitted that a Commission constituted pursuant to the Commission of Inquiry Act can not carry out probe to inquire the truth, and therefore, appropriate alternative need to be sought therefor, and advocate Mr. Praksah Raut submitted that High Level Judicial Inquiry Committee could be established for this purpose.

Appearing on behalf of the office of the Attorney General Joint Government Attorney Mr Yubaraj Subedi and Deputy Government Attorney Mr. Bharat Mani Khanal submitted that the government has realized its duty of finding out condition of disappeared persons and thereby making their condition public. As a political consensus has already been reached to establish a high level Truth and Reconciliation Commission, there is no need for this court to issue additional order requiring the formation of a Commission.

From among the petitions filed at this court, the oldest one seems to be the habeas corpus petition of Rajendra Prasad Dhakal filed on 21 January 1999. Then, it seems that habeas corpus petitions were filed on behalf of several persons on several dates and a writ petition was filed on 27 July 2006 demanding the order of mandamus to make public the conditions of detainees and for taking action against the culprits. In all the abovementioned cases, the respondents have furnished written statement that they had not arrested the petitioners, nor, had they put them in custody. The content of the petitions also reveal that they had also filed application at various organizations including National Human Rights Commission. The reports received from these organizations or agencies reveal that they had tried through their own machinery for determining the condition of the detainees.

Even as the respondents furnished the written statement that the petitioners were not arrested, this court not being satisfied with such reply had asked several explanations and supplementary questions. Even as the National Human Rights Commission, in many of the cases, after reaching to the conclusion that detainees were in illegal detention and thereby asked to put the detainees into legal proceedings and take action against those responsible officials who were seen culprit. But those decisions do not seem to have been executed.

This court has used several recourses for finding out the status of detainees. It seems that the eye witness who saw the detainees being arrested, the person who were said to be together in the detention and freed later and several security persons who were said to be responsible for arrest were brought to this court and their statements were recorded. In case of person stated in writ No. 3575 this court had ordered to make an investigation through the level of a joint secretary in the Ministry of Home Affairs and submit a report to determine whether or not the person was arrested. Further, it is also seen in the file that in the same petition, the registrar of the appellate court was made to

furnish a report after seeing the record of the office which had supposed to have arrested together with a field visit to determine whether or not he was arrested and also that if he was arrested, where was he transferred. However, none of these attempts have helped to determine the status of the detainee.

While the aforementioned petitions were sub-judice in this court it is seen that the government constituted a one-member probe committee led by the joint secretary at the Ministry of Home Affairs, Mr. Baman Prashad Neupane to find out the status of the citizens disappeared by the government of Nepal. The Committee has, from various sources, produced a list 776 persons who are said to be disappeared. From among them, the condition of 102 has been determined and the condition of other 602 is said to be unknown. The name of most of the persons mentioned in the writ petitions in this court are found in the list of the persons who are stated as unknown.

The report has accepted that the task of determining the status of disappeared person is challenging as the name, surname, address, date, place and time of arrest, agency to arrest etc. are not clear and in some cases, the security agency replied that the record did not show such arrest by security agencies. It seems that the committee comprised of only one member, the procedure was short and the report was made on the basis of information given by security agencies even without making field visit, investigation and research. Since the report was prepared on the basis of the details provided by those agencies which are alleged to have disappeared the citizens after arresting them, it is found that the report has not been able to disclose the detailed facts pertaining to disappeared persons.

The report has also not given enough evidence to support its views in case of the persons whose status is said to be determined or detail explanation in case of those whose status is said to be unknown. Considering the limitation of the Committee and gravity of the issue, the report has made a recommendation that it would be appropriate²⁴ to legally summon concerned persons, record their statement, collect evidence and carry out investigation through field visits. But however, no initiations have been taken towards additional investigation by the government for implementing the report.

It is also found that the Office of the High Commissioner for Human Rights in Nepal has also carried out an investigation on the contention that several persons were detained for a long time in Bhairabnath and Uddhabhairab barracks, Maharajgunj and were disappeared therefrom; and made the report of the same public. The report states name of 49 persons as being disappeared and also states that investigation was going on with respect to other persons who were said to be disappeared. The report has recommended for a reliable, competent and independent investigation concerning such persons and for determining the responsibility of the army unit involved in violation of human rights and bringing those who are found to be guilty of criminal liability to civilian court. The report further states that they should be suspended till such investigation is carried out, should not be proposed in peace keeping operations of the United Nations, should ensure that witness and former detainees are free from threat and intimidation and make public the

²⁴ Recommendation section of the Report, stated in annex 3.

conclusion of the investigation to be undertaken. However, it does not seem that government of Nepal has taken any further action or investigation in this regard.

Besides, it is also seen from the submission of the National Human Rights Commission made to this court that the Commission had found out serious violation of Human Rights taking place with respect to persons stated in the petition and other similar incidence of disappearance, and thereby, recommended the government to take necessary action against concerned responsible officials and also make public the status of the detainees. The Commission has also written to the Government to implement the decision of the Commission. However, it does not seem that any initiative of additional research is undertaken or action taken by the Government for determining the status of persons alleged to have been disappeared.

In course of determining the status of detainees, this court had, through the formation of a DIT, ordered to find out real fact with respect to writ Nos. 3575, 100, 104 and 632 whether or not the persons stated in the petition are arrested and [required the DIT] to submit an opinion as to what would be proper to do with respect to other cases of similar nature; and the DIT has submitted the report after conducting inquiry.

Even as the status of most of the persons stated in the petition has remained unknown and the aforementioned Committee including human rights related institutions and organizations have recommended additional investigation on the same, the responsibility to carry out investigation fundamentally rests on the Executive. In the situation that the Executive had not taken any initiative to carry out such investigation till date, this court carried out investigation of some representative cases at its own initiatives. Owing to reasons including the jurisdiction of the court and limitation of the resources, it is not possible for this court to carry out separate investigation with respect to the all the persons stated in the petitions. It is found, however, on the ground of the conclusion of the report of the investigation carried out on the cases it is necessary that additional investigation should be carried out in totality by establishing a mechanism on matters relating to the persons who are alleged to have been disappeared.

In this way, even as the government of Nepal has taken limited initiation with respect to disappeared persons by constituting the Baman Prashan Neupane Committee, that the report of the Committee itself has concluded on the need of additional research on disappeared person, that National Human Rights Commission and the Office of the High Commissioner for Human Rights have recommended additional investigation in this matter which has not been implemented till date and that it is also not possible for this court to carry out investigation with respect to all cases of disappearance, and therefore, it does not seem that the efforts made till date with this respect on behalf of the government are enough and effective. It is imperative to carry out effective investigation on behalf of the state itself to determine the status of the persons stated in the petition and other citizen who were disappeared in similar manner during the time of conflict.

Regarding Question No. 4

It has been portrayed from the deliberation made in the abovementioned questions that there has not been enough and effective efforts on behalf of the state for the purpose of determining and making public the status of the forcefully disappeared persons. The political will power is certainly necessary for the purpose of determining and making public the status of the forcefully disappeared persons and taking action against the culprit and providing relief to the victims; it is equally necessary to have a legal mechanism in place. The Interim Constitution, 2007 that has come as the product of political consensus in course of transforming the past conflict to peaceful settlement, has rested the responsibility on the state to establish a Probe Commission with respect to the persons disappeared in the past and to provide relief to the families of victim.

In order for the state to put into action the commitments made through political consensus and constitution, effective legal and institutional mechanisms are necessary. Concerning the prove of the disappeared citizens, the Government of Nepal has, through its executive order, constituted a one man Committee of Baman Prasad Neupane and this court constituted DIT, but however, it seems that an Probe Commission to investigate a matter of public importance could be constituted only in accordance with the Commission of Inquiry Act, 1969. It seems in accordance with the Act that the formation, functions, power and duties of the Probe Commission will be as prescribed by the Government of Nepal through a notification in the Nepal Gazette. Even though the Act has laid down grounds for the formation of a Probe Commission it has not expressly mentioned the procedure for the formation of the Commission, nor has it expressly mentioned the grounds for competence and neutrality of the Commission, or provided for necessary jurisdiction, or guaranteed the representation of concerned parties in the formation of the Commission. It has also not guaranteed the security of victim, witness, plaintiff, legal practitioner and investigator.

Given that the act of determining the status of disappeared person is internationally accepted as an act to be continuously pursued, the probe commission constituted under the Commission of Inquiry Act cannot embrace such a norm. By the very nature of the act of disappearance, whereas it is necessary that the families and relatives of the disappeared person are provided with the concluding decision of the probe and it is also imperative that the report is made public, the Commission of Inquiry Act does not seem to be ensuring this.

The task of finding out real situation of the disappeared person during the time conflict is certainly a complex and challenging task. There would be little possibility to get success in such act unless there are clear and effective legal provisions. The Commission of Inquiry Act that we have seems to have been issued only for establishing Probe Commission on the matter of public importance in normal situation. The Act does not seem to have imagined to include within its sweep special types of incidents arising during the time of conflict. This Act was not enacted to include such kinds of events. After studying the Act in totality, it seems to us that there are not reliable grounds to believe that an Inquiry Commission constituted in accordance with this Act to find out the status of disappeared citizens would be capable enough to carry out effective probe.

Even as some limited provisions are found in Civil Liberties Act, 1955 and Torture Compensation Act, 1996 with respect to obtaining remedy by the person who has become victim of state machinery, unless the status of the disappeared person is determined, the victim party can not receive effective remedy pursuant to the aforementioned Acts; and no separate legal mechanism is seen to exist to address matters relating to disappearance.

The act of forceful disappearance deprives of any person the right to equal protection of law. His personal liberties are snatched away and minimum values of humanity are violated. Such act brings all his personal liberties to an end at the very point itself. Therefore, any state which has accepted the obligation for universal respect, compliance and promotion of human rights and fundamental freedom need to be serious and sensitive to such incidents of human rights violation. It is urgent for the state to become additionally vigilant as impunity may flourish during the time of conflict.

In the situation where there is no separate law in Nepal to especially address disappearance as deliberated hereinabove, it seems to us that a special law having all major provisions on disappearance including inquiry into the incidents of forced disappearance, determining the status of disappeared person and making them public, taking action against those who are found guilty and providing relief to the victim is necessary. It is also the responsibility of the state to create an environment of trust and respect by the victims to the justice system of the state and the feeling among state officials who are guilty that they would not enjoy any immunity from the liability that is created out of their action. This is not a separate and special responsibility of the state rather it is a responsibility in concord with the commitment of the state towards basic fundamental rights and human rights. This bench has reached the conclusion that in order to fulfill this responsibility the state needs to make such especial law.

The Interim Constitution of Nepal, 2007 has provided exclusive power to the Legislature-Parliament as to whether a particular law is to be made or not. The Legislature-Parliament is competent enough to make law in this manner and it is expected that highest level of prudence will, for the purpose of fulfilling the responsibility vested in it by the Constitution, be used while making law in this manner. This Bench takes the view that to suggest that such a law on this subject is needed is not to interfere with or encroach upon the jurisdiction of the Legislature-Parliament, rather it should be taken as a legitimate expression of judicial concern to make additionally effective law in view of the internationally established standards for the protection of civil liberties for which the state has made commitment.

Thus, it seems to us that while enacting the law as mentioned above the state should take note of the commitments made concerning disappeared person expressed in the constitution, fundamental rights and freedom of citizens, international instruments ratified by the state concerning human rights and humanitarian law, and take cognizance of several international instruments accepted by international community such as the Charter of the United Nations, the Universal Declaration of Human Rights, Declaration Concerning the Protection of Persons Against Forceful Disappearance, 1992 and the International Convention for the Protection of All Persons from Enforced Disappearance, 2006 as standard, and desirably make law in concordance with the same.

Regarding Question No. 5

The writ of habeas corpus filed at this court on behalf of persons including Bihari Lal Godia with writ No. 162 states that the families of the disappeared persons were dependent on them and they had to bear additional expenses for their search and legal proceedings. As the members of family had to undergo mental torture due to their disappearance, and therefore, [they have] demanded in the petition that their family members including their minor children should be provided with compensation. This court had inquired with the counsels whether or not it is appropriate to order for any **interim relief** in the form of compensation or similar other relief from this very petition which has the main claim of freeing several persons stated in the petitions from illegal detention through the order of habeas corpus.

Appearing on behalf of the petitioner learned advocate Mr Kedar Dahal submitted that the petitioners have lost member of their family and have borne additional physical, mental and economic costs during their search. The dilatory legal proceeding has further increased the economic expenses of the petitioners whereas the state is spending from the state coffer and defending the culprits who are supposed to be subject to action. Compensation and relief are necessary to mitigate mental and economic grief of the families and also to guarantee easy access to justice, he pleaded.

Appearing on behalf of the petitioners learned advocate Mr Hari Krishna Karki submitted that the Supreme Court of India has, by using the provision of Article 32 of the Indian Constitution that empowers the Supreme Court to render necessary order, ordered compensation in hundreds of such cases. As the Article 88 (2) of the Constitution of the Kingdom of Nepal, 1990 and Article 107 (2) of the Interim Constitution, 2007 state that the Supreme Court may render appropriate order in the cases including habeas corpus to provide full justice, this court can render necessary order to provide compensation pursuant to the same, he pleaded. Appearing on behalf of the petitioner learned advocate Mr Hari Phuyal submitted that it is an established fact that the persons stated in the petition are disappeared. Different regional courts related to human rights have made decisions to provide compensation to the victims of forceful disappearance. This court can take those decisions as examples. As the Convention on Protection of Persons from Enforced Disappearance has provided for provisions of compensation and interim recourses, this court by evaluating emotional attachment of the families, economic expenses, productivity lost due to the time given for search and loss caused to the family and society can order for appropriate compensation, he pleaded.

Appearing on behalf of the respondents Deputy Government Attorney and Joint Government Attorney of the Office of the Attorney General submitted that some of the persons who were said to be disappeared have also come to public. It can not be concluded on the basis of presumption that enforced disappearance has taken place and on the basis of such presumption this court can not order any compensation. The government has realized its duty towards citizens. As the government is active to provide appropriate remedy through its own machinery, there is no need to order compensation, they pleaded.

After listening to the submissions of the aforementioned learned advocates, as we consider whether or not the order of compensation can be issued through these

petitions, we find from the deliberation of abovementioned question No. 4 that there is no separate law existing for probing the status of disappeared persons and providing compensation and other remedies to the victim party, but however, it can not be denied that compensation and relief to the victim party could be taken as one of the aspects of other appropriate remedy to be provided in case of violation of civil liberties.

It has been established from the various questions deliberated heretofore that the act of disappearance violates civil liberties of persons including the right to life as well as several fundamental rights provided by the constitution. Article 88 (2) pursuant to Article 23 of the Constitution of the kingdom of Nepal, 1990 and Article 107 (2) pursuant to Article 32 of the Interim Constitution, 2007 have guaranteed remedy in case of violation of fundamental rights provided by the Constitution. Article 88 (2) of the previous Constitution and Article 107 (2) of the present Constitution states, "The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution, for the enforcement of any other legal right for which no other 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, have the extra ordinary power to issue necessary and appropriate orders to enforce such rights or settle the dispute. For these purposes, the Supreme Court may, with a view to imparting full justice and providing the appropriate remedy, issue appropriate orders and writs including the writs of *habeas corpus*, *mandamus*, *certiorari*, prohibition and *quo-warranto*." It seems from the above mentioned provisions of the Constitution that an inherent power is vested in this court to issue, for the purpose of effective protection of basic fundamental rights of the people through aforementioned provisions of the constitution, necessary order to enforce prevailing right of the people. It is also a constitutional responsibility of this court to issue such type of order.

Similarly, Article 100 of the constitution has empowered this court to exercise judicial power pursuant to the constitution, other laws and recognized principles of justice and has also provided that this court shall remain committed to the constitution abiding by the values of independent judiciary and thereby adopting the spirit of democracy and people's movement. As the term "spirit of people's movement" is used in a political sense, it is not easy to derive its legal meaning and consequences. **The present constitution which has been issued on behalf of the people as the expression of the decisions of the important political forces which made a call and participated in the people's movement should, in totality, be considered as embodying the spirit of the people's movement. If the spirit of the people's movement is tried to be understood otherwise than the structure and spirit of this constitution, this would contradict the very fact that the constitution has declared itself as the fundamental law of the land.** The structure of present constitution and the principles enshrined in it can throw enough light on the spirit, values and assumptions of the constitution. **It is not possible for anyone bound with constitutional system to decipher the spirit of the peoples' movement beyond the constitution, and therefore, it is even more impossible for the judiciary. If any agency has carried out any act pursuant to this constitution and laws made hereunder, it can not be concluded in any way whatsoever that the act is against the spirit of the peoples' movement. Therefore, the**

spirit of the peoples' movement should be understood in the relativity of constitutional system and in the context of legal consequences.

Human rights, peace and justice are the foundation of democracy. There had been people's movement in the past for the purpose of peaceful transformation of conflict and establishment of a just society and the constitution issued thereafter has made commitment to the same values and ideals. **It is in fact an act of paying respect to the spirit of the peoples' movement to implement the provisions of the constitution that provide for a proper assessment of the loss of lives and property that occurred during the time of conflict and bring the culprits to justice and provide appropriate remedy including reparation to the victims.** Considering the above mentioned constitutional provisions, it does not seem to us that this court can not order for appropriate remedy and reparation to the petitioners who claim that persons mentioned therein have remained unknown in the course of conflict.

Similar to our constitutional provisions, Article 32(2) of the Indian constitution also empowers the Supreme Court of India to render appropriate remedy for effective protection of fundamental rights provided by the constitution.²⁵ By applying and interpreting the same provision, it is found that in *Rudal Sah v. Union of India*, discussed above in question no. 2, the Indian Supreme Court decided to provide compensation to Rudal Sah through the petition of habeas corpus as it was found that he was in illegal detention and it was also held that the decision of the Supreme Court to provide compensation would not have any adverse effect on the right of the petitioner to claim compensation under ordinary jurisdiction.

Similarly, it seems in the case of *Smt. Postasangbom Ningol Thokchom and Others v. General Officer Commanding and Others*²⁶ where three people including the sons of petitioners were arrested by the Police only one of them was released and other two were disappeared, and it seems that a writ of habeas corpus was filed on their behalf. As the respondent furnished written statement claiming that the detainees were freed from the detention, the Supreme Court of India constituted a probe committee led by a judge of the concerned district court to inquire into the case of disappeared persons. The committee had, basing on the statement given by former detainees and other evidence, had submitted the report stating that there was lack of evidence of the release of the detainees. The Supreme Court of India had, basing also on the report, took the view that where private law does not provide for compensation, the Court can order compensation while the proceeding on a case pursuant to Article 32 of the constitution for the purpose of doing full justice. It is found in the case that the court had in addition to ensuring interim resources had also ordered to provide compensation to the victims. In the case of *Nilabati Behera v. Stae of Orissa*²⁷ which has similar facts, the Supreme Court of India has made interpretation of Article 32 of the Constitution and provided compensation to the victim.

²⁵ "The Supreme Court shall have power to issue direction or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this part"

²⁶ WWW.jodis.nic.in/supremecourt/ website visited on 28 May 2007

²⁷ 2 SCC (1993)746

A reference has already been made, while deliberating on question no 2 above, to the decisions by the Inter-American Court of Human Rights in the case of *Velasquez Rodriguez v. Honduras*, [and] *Trujillo Oroja V. Bolivia* and the decision by the European Court of Human Rights in the case of *Kurt V. Turkey* where the court had ordered for compensation against enforced disappearance.

Article 24[2] of the International Convention for the Protection of all Persons from Enforced Disappearance, 2006 which has been accepted by international community has imposed responsibility on each state party to ensure in its legal system measures for reparation, prompt, fair, and adequate compensation to the victims of enforced disappearance.²⁸ Similar provision is found in Article 19 of the Declaration to provide protection to all disappeared persons, accepted by the General Assembly of the United Nations through proposal No.47/133 in 18 December 1992.²⁹ It seems that the UN Working Group on Enforced or Involuntary Disappearance, while interpreting the Article, has recommended that while providing monetary compensation to the victims of enforced disappearance [factors such as] physical or mental loss, lost opportunities, loss of property, loss of income, effect on prestige or dignity and expenditure incurred in hiring expert or legal service should be taken into consideration.

Article 7 of the proposal No. 71 (A) passed by the 60th meeting of the General Assembly of the United Nations,³⁰ provides that persons who are victim of serious violation of human rights and international humanitarian law should have equal and effective access to justice, for the loss to be born, the victim should get prompt, effective and adequate reparation; and has proposed that the victim should have access to the information of the same; and, as Nepal is also a member of the United Nations, there does not seem a condition for her to remain indifferent towards such commitments.

It seems that the Human Rights Committee of the United Nations while interpreting Article 2 and 9 of the Covenant on Civil and Political Rights to which Nepal is a party, has mentioned that the state should, in addition to other remedies, provide compensation in situation of violation of rights of persons and should also adopt interim measures as immediate steps.³¹ It has been accepted that as enforced disappearance during the time of conflict not only affects the disappeared person rather the families and relatives of the disappeared persons would also be victim of the same, and therefore, provision should be made that the relief and compensation to be provided by the state goes to the disappeared person as well as their kith and kin.³²

In this way, on the basis of the constitutional provision of Nepal, decisions of foreign courts and human rights related regional courts, international instruments related to human rights to which Nepal is a party as well as the documents and proposals issued by the United Nations and international community; it is hereby established that the state

²⁸ Each state Party shall ensure in its legal system that the victim of enforced disappearance have the right to obtain reparation and prompt, fair, and adequate compensation.

²⁹ The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete rehabilitation as possible. In the event of death of the victim as a result of act of enforced disappearance, their depends shall also be entitled top compensation.

³⁰ WWW.hri.ca/forthecord1998/vol1/disappearances.htm website visited on 27 May 2007

³¹ Resolution No 60/147: Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violation of International Human Rights Law and Serious Violation of International Humanitarian Law.

³² General Comment No. 31(80) The Nature of the General Legal Obligation Imposed on State Parties to the Covenant adopted on 29 March 2004. WWW.unhchr.ch/tbs/doc.nsf Visited on 27 May 2007

has the obligation to provide immediate relief and adequate compensation to the victims of serious violation of civil as well as human rights. On the grounds deliberated here above it is found that the persons stated in the petitions were disappeared during the time of conflict and it has been established that the state has special responsibility towards such persons. It seems, now therefore, appropriate to provide an immediate relief of interim nature to the victims considering the physical and mental torture as well as economic loss that the families of the victim have had to undergo during their search and taking recourse to the process for obtaining justice.

Regarding Question No. 6

It is seen concerning various questions here above that on the basis of the study report commissioned till date by the National Human Rights Commission, Office of the High Commissioner for Human Rights in Nepal, and the report of the investigation team constituted by this court under the co-ordination of the judge of appellate court especially in case of four persons including Rajendra Dhakal and also from the written statement of the respondent regarding the persons, that the status of most of the persons stated in the petitions as disappeared is unknown. **It is conclusively seen from the report of the investigation team constituted by this court concerning Chakra Bahadur Katuwal that he had died in the custody, and concerning others Rajendera Prasad Dhakal, Bipin Bhandari and Dil Bahadur Rai that their status up to the point of arrest by the security has been determined, but however, the status then after has not been clarified till date.** It is a general responsibility of the state to protect and keep vigilance on its own citizen. This responsibility of providing security and protection of their right would be further increased in the situation when the arrest is made with the involvement of state's own instrumentalities. Among the petitions of various dates considered under this decision, the first one seems to have been filed in 1999, even after filing the petitions and being asked show cause no serious efforts are found to have been made from the government level such as commissioning search, improving or strengthening the legal system, providing relief and remedy to the victim, managing and making the investigation process effective and systematic etc. with regard to persons who are in the petition stated to have been disappeared. It does not seem that the report and recommendations given by the National Human Rights Commission and the Office of the High Commissioner for Human Rights have also attracted serious attention. It is not found that the decision of this court in the case of Bhim Prakash Oli is considered for solving the problem pursuant to the status of conflict victim. Even as the Ministry of Home has internally conducted a process of probe at the level of joint secretary, it is not found that necessary efforts were made to make the report independent and reliable. It is not found that matters to be done pursuant to the report were completed. Even as different Articles of the present Interim Constitution has made commitment to address this problem even by fixing the date, that is also not done till date. As deliberated here above in this way, the task including the search of disappeared persons, giving protection, providing remedy and ending impunity by terming the act of disappearance as an act of serious violation of human rights remains to be an indivisible responsibility of the state. The matter should have attained first priority in course of solving the conflict. However, this problem has not been prioritized

appropriately. This shows that the state has not exerted a sense of security to the society at the level that is supposed to be done by guaranteeing the security to life and property of the disappeared persons and their families.

Among the persons stated in the petition except for the person whose death is proved, the status of others remains unknown as witnessed from the written statement and probe, and, the questions including whether they are alive or not, if alive in which condition they are etcetera remain unresolved. Continuation of such unresolved situation does not seem to be a defensible matter for the state. As the number of disappeared persons seems to be huge, and as it has remained a serious question, rather than limiting the problem as a matter for the issuance or non-issuance of habeas corpus as claimed by the petitioner, it seems that legal, structural and remedial aspects in various stages need to be holistically considered keeping in mind these petitions and other similar petitions that might come.

While there is no relevance of issuing an order of habeas corpus with respect to Khadga Bahadur Karki who during the discussion of the case was said to be dead as the condition of other petitioners also remains unknown even today, it does not seem to us that the writ of habeas corpus could be issued in respect of them. Petitioners including Lekh Nath Neupane have, among other demanded that a writ of mandamus be issued to make the status of the persons stated in the writ petition public. Further, in the additional submission, interim relief and compensation have also been demanded. A directive order in the name of Government of Nepal has also been sought to improve legal and legislative aspects to probe the case such persons and provide remedy therefor. Considering in the light of the submissions also, subject to the petitioners Chakra Bahadur Katuwal, Rajendra Prasad Dhakal, Dil Bahadur Rai and Bipin Bhandari for whom the investigation team of this court had carried out research as well as those for whom such investigation is yet to be carried out it seems expedient to provide for special measures, and therefore, we hereby decide to issue the following orders in the name of the respondent Government of Nepal to address the same by providing for the following with respect to the demands of the petitioners.

- a) Among the persons said to be disappeared, it is seen from the report of the DIT constituted by this court that Chakra Bahadur Katuwal was died in the custody due to torture, and subject to others Rajendera Prasad Dhakal, Bipin Bhandari and Dil Bahadur Rai the initial point of the arrest by the security person has been determined as stated here above, but however, the condition then after has not been clarified till date. Thus in case of Chakra Bahadur Katuwal who died in custody in this manner, now as it is necessary that due process of prosecution has to be adopted pursuant to prevalent laws a writ of mandamus is deemed to be issued subject to him in the name of respondent Ministry of Home as well as the Government of Nepal ordering that and any agency, official or employee and any other person who were involved in the process in some way or other be investigated on their crime, and that process of departmental action and punishment subject to concerned office chief and employees be initiated and finalized. This order is also issued to render necessary order to the concerned agency or employees there under that seem to be necessary in course of implementation of the same.

In case of Rajendra Dhakal, Bipin Bhandari and Dil Bahadur Rai also who are identified by the judicial investigation team that they were arrested by security force but their status remained as unknown till date, it is seen that officials or employees involved in the process should be prosecuted on the basis of additional research to be completed subject to them and thereby justice be provided to the victims. But in order to launch immediate prosecution sufficient measures such as defining the crime of disappearance and sanctioning the same and providing compensation should be ensured absent which there is no possibility of obtaining full justice, now therefore, subject to them an order is issued in the name of the respondent that necessary action be taken for prosecuting the erstwhile chief of security agency as well as other employees who were responsible and that concerned person and victims be provided compensation after the law pursuant to section (B). Hereunder is made and also completing additional necessary investigation as suggested by the report of the DIT constituted by this court.

Further, as it has been the conclusion of the DIT that they were arrested by the security force and taken to a certain point and thereafter their status remained to be unknown, as it is not appropriate to let the responsible persons remain in impunity and unaccountable, a writ of mandamus is hereby issued in the name of respondents including Ministry of Home as well as the Government of Nepal to take immediate departmental action against the chief and employees who are identified as responsible by the report of DIT and other necessary probe to done pursuant to the same.

- b) This court has taken note of the petitions by Lekhnath Neupane praying for mandamus, and other cases of habeas corpus where additional investigation is yet to be carried out, also similar demands of other prospective petitioners in similar circumstances who may come up with the claim of disappearance and that in case of such persons also the petitioners have prayed for special provisions.

The written statement furnished subject to the persons who are said to be disappeared did not help to determine their status and a formal investigation has not been undertaken from anywhere, in a situation where investigation remains yet to be undertaken it is not easy to make certain opinion on the status of these person. Further, in the situation where legal, structural and remedial measures are not enough to especially address the effects caused to the disappeared persons and their families, it does not seem possible that the prevailing legal structure is enough to address the problems. Therefore, a directive order is hereby issued in the name of the respondent Government of Nepal to address their problems by making the provisions as mentioned hereunder.

i. It is found that there is lack of law in our country with respect to addressing the series of disappearance during the time of conflict and at other times also on matters pertaining to disappearance such as arrest, detention, hostage taking, care to be taken during the time of detention and measures related thereto, the rights of the victims, the remedies available to them and their families, the provisions for effective investigation on matters pertaining to them etcetera. Even though there is an Act for carrying out probe on a matter of public importance, as this Act is not made for the

inquiry on matter pertaining to disappearance, it is seen that in the absence of law, no real, effective and practical investigation can be carried out. Further, under the existing criminal law also no provision is found addressing legal and institutional questions relating to this matter. Therefore, for the purpose of addressing this problem effectively, it is felt necessary to make a law with priority by including the provisions that the act of disappearance should be maintained as offence, defining the act of disappearance pursuant to the definition as stated in the International Convention for the Protection of All Persons from Enforced Disappearance, 2006, incorporating provisions such as the right of detainees, responsibility of those who keep in detention, determination of the place of detention and the relationship and access of the lawyer and families to the detainees, the right of the detainees to be informed of the reason of detention, provision regarding judicial remedy of the detainees, the right to remedy of the detainee who is put in illegal detention or concerned persons and families who have become victim of illegal detention or disappearance including the right to compensation, a flexible provision of limitation that does not adversely affect investigation process, complaint hearing agency and its liability with respect to illegal detention or disappearance, provision for the creation of a formal detention center and the provision for putting only in such detention center while detaining people, provision of humane treatment while in detention, descriptions such as time of the detention while putting him in detention, condition, name, title, address and other relevant details of the person who ordered detention, the liability of making arrangement pursuant to the same while transferring the detainee, the right of the families to know all conditions of the detainee and development of the process to make easy access of the same, provision of the terms that really reflects the condition of being released at the time of being released from the detention, the provisions including the record keeping regarding his/her mental and physical condition. It is also equally important to attract the attention towards the international standard that no pardon can be granted with respect to persons who are prosecuted for allegedly being involved in the act of disappearance and the person who is convicted for the same and for making appropriate provision relating thereto. For this purpose, it is expedient to adopt the International Convention for the Protection of all Persons from Enforced Disappearance as guideline.

ii. For the purpose of implementation of the Act made pursuant to here above, for the purpose of protection of the persons forcefully disappeared, it is also expedient to provide for an arrangement in the same Act or separately for a separate probe commission with respect to such disappeared persons. Given that separate powers, skills and procedures are deemed necessary for probing such kinds of problems, it is expedient to refer to the Criteria for Commission on Enforced Disappearance developed under the auspices of the United Nations Office of the High Commission for Human Rights as guidelines for determining criteria.

Under this, in addition to other matters, it is expedient to include provisions such as that all related incidents are inquired into, that jurisdiction of the Commission is clarified, that the inquiry does not replace the jurisdiction of the court, that the

persons nominated for such commission are appropriate and competent for the work, that provisions for terms of office and conditions of service and facilities are provided for the same, that representation of women or other caste or communities are provided, that the powers, duties and functions of the Commission are prescribed in the Act itself, that considering the nature of the problem probe could be initiated on the basis of the information received from any source. It is necessary to have provisions such as continuous probe until the status is made clear, provision of security to victims, witness, plaintiff, advocate and investigator so as to solicit their continuous assistance in the probe, provision for the right and opportunities to the victims for recording their statements and raising their concerns, and provisions for keeping their statements confidential if so called for, the power of the commission to inspect necessary place, office etc question all persons who it deems necessary to inquire. It is also necessary to ensure the availability of means and resource necessary for such Commission to accomplish its performance. It is expedient to consider all these matters while enacting the law.

It can be expected that while enacting law in a wise manner under legislative power entrusted by sovereign Nepali people if the above mentioned things are given expedient scope the people facing problems will be benefited to a certain extent in one way or other.

- c) A directive order is hereby issued in the name of respondents government of Nepal, Ministry of Home Affairs and the Office of the Attorney General to take decisions to enact an Act for the protection of the disappeared person, making provision for Inquiry Commission in the Act for inquiring into the causes of their disappearance, and their status by forming a powerful commission to carry out in-depth and comprehensive inquiry of the said persons and thereby submit the report of the same, and thus accomplish a criminal investigation on the basis of the report and thereby decide to prosecute concerned persons on the basis of the propriety and necessity.
- d) It will certainly take a long time to complete the stages as mentioned here above such as making law, constituting probe commission, taking report from the same and launching prosecution on that basis. But, considering the complexities of the problem and the imperative to resolve it at the earliest, the solution of the problem would be facilitated if only the Executive and Legislature put this matter on high priority. As it is the responsibility of all organs of the state to protect the disappeared persons and provide them justice, we therefore, take the view that it is a natural and valid in connection with the case to make expectation and be confident about playing positive role by responsible organs for a work delineated by the constitution. It seems necessary in this connection that the government of Nepal takes special initiation to expedite the process of making law.

As it seems that the persons stated in the petitions and their families can feel the sense of justice only when the above mentioned stages are completed it is imperative to put forward this process with expedient priority.

- e) As stated in section [D] here above, whereas the petitioners of this case have been demanding various kinds of remedies from this court for a long time [several since

1999) and waiting for the same, it is likely to take some more time to provide them effective remedy by completing the above mentioned stages. In addition to the effect that the concerned person has to bear due to disappearance, the family members have to continuously face several social, economic and mental suffering due to the disappearance of their own. If factors such as the time spent for the search of disappeared person, labor and expenditure, peace of mind lost in this course and burden borne therefor and the loss of labor productivity and security due to the absence of disappeared person are assessed far reaching social and economic results would surface. In the one hand the state has not been able to make public the status of the persons who are said to be disappeared while on the other the families have been continuously bearing the loss and liability in connection to the same, and as, the pain created out of this will continue until the status of the person who are said to be disappeared becomes decisively final, and hence it seems essential to address this problem in some way or other.

The demands of the petitioners can be appropriately addressed and their final status clarified in the course of implementation after the enforcement of the Act as mentioned here above. In other words, if the status of concerned person is clarified, and the culprit is also determined, he would get the punishment determined by the law and if the petitioner is entitled compensation the petitioner may receive it as per the procedures determined by the same law. However, it does not seem possible for the family members who are searching for their loved ones to travel the long road to justice with their own resources and with a disturbed mind. This bench is confident that immediate relief even if it is partial should be provided in order to save them from discarding the tiring the path of justice owing to frustration, to provide support and cooperation in adopting the legitimate path of searching their loved ones.

Even as it is not possible to provide specific legal remedy like punishment or compensation in the situation when the real condition of detainee is not clarified, **it hereby seems expedient to provide relief as a grant even though in symbolic form in view of the situation at the time of deciding this case, with the limited purpose of assisting the victim family to bear the liability undertaken by them while seeking access to justice on condition that it will not affect the amount and nature of the remedy to be provided as per the law as to be found by the investigation later.**

The incident of violation of right to freedom and security of life is not a matter to be compensated in monetary and economic terms. However, this court has, in view of the responsibility of the state to provide assistance to the victim even in smallest manner though, and that the rights would be meaningless in the absence of effective remedy, and also for respecting the right of victim family to seek remedy has positively considered the need of providing immediate relief of interim nature.

In this connection, this order is hereby issued in the name of the Government of Nepal as well as the Cabinet Secretariat pursuant to Article 100 and 107 (2) of the Interim Constitution, 2007 to provide immediate relief of two hundred thousand rupees subject to the nearest claimant of Chakra Bahadur Shahi who is said to be dead and whose death is verified by the investigation of the DIT constituted by the order of this court and two

hundred thousand rupees each subject to the families of those who are declared dead; one hundred fifty thousand rupees each subject to Rajendra Prasad Dhakal, Bipin Bhandari and Dil Bahadur Rai in whose case the probe of the DIT constituted by this court has concluded that they were arrested by security forces and were disappeared; and one hundred thousand rupees each subject to remaining other persons stated in the petition whose status has not been clarified.

Further, a directive order is hereby issued in the name of the government of Nepal to frame and implement appropriate relief package including employment without any adverse effect whatsoever to matters mentioned here above, and considering the status of the victims till date and also the loss and difficulties that might have to be continuously borne due to the cause of disappearance.

Be the notice of this order sent to the government of Nepal and the secretariat of the Council of Minister through the Office of the Attorney General for its implementation.

This bench wishes to extend special thanks to the National Human Rights Commission and the Office of the High Commissioner for Human Rights which have cooperated this court in course of the deciding and proceeding of the cases that are decided today by providing details of the reports of their investigation with respect to the petitions which is decided today, the Supreme Court Detainees Investigation Team and Hon. Lokendra Mallik, Joint Government Attorney Mr. Saroj Gautam and advocate Mr Govinda Bandi who were associated with it as well as Nepal Bar Association and Supreme Court Bar Association which cooperated the court by sending lawyers as *amicus curie*, legal practitioners who were present during the hearing, Assistant Secretaries Mr Prakash Kharel, and Mr Nahakul Subedi of the supreme court who have rendered especial cooperation to this court by conducting research and the agencies and persons who cooperated during the proceeding of the petitions deserve special thanks from this court.

.....
(Judge Kalyan Shrestha)

I concur the decision.

.....
(Judge Khilaraj Regmi)

Bench Officer to prepare the decision:

Prakesh Kharel (Gazetted Second class)

Nahakul Subedi (Gazetted Second class)

Computer typing:

Sundar Bahadur Karki, (Non- gazetted First Class)

Date: 1 June 2007

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- Strengthens national research publications.
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(URL: www.blackwell-synergy.com)
 - Oxford University Press
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How to access full text?

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Yours'
Kedar Ghimire

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The National Judicial Academy (NJA), a member of International Organization for Judicial Training, was established in 2004 to serve training and research needs of the judges, government attorneys, government legal officers, private law practitioners and others who are directly involved in the administration of justice. Originally established by an Ordinance, it is now governed by the NJA Act, 2006. The NJA works under the broad policy guidelines of the Sixteen Members Governing Council headed by the Chief Justice. Executive Director heads the Executive Board.

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