

Transitional Justice and New Constitution  
*An Exception of Non-Retrospective Criminal Law To Address International Crimes*

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# Transitional Justice and New Constitution

## *An Exception of Non-Retrospective Criminal Law To Address International Crimes*

### 1. Context

Nepal is in the process of formulating a new constitution since election to the Constituent Assembly in April 2008. From the past to the present time, perpetrators involved in serious crimes are not punished and the victims do not get justice because impunity is not addressed properly through constitution and domestic law. Increased impunity and lack of accountability in the serious incidents of rights violation reflects inadequacy of existing Nepalese legal system. Removing impunity, promoting accountability, guaranteeing human rights and strengthening the rule of law are the challenges before us. The prevalence of widespread impunity has challenged the public's conscience, human tolerance and human rights culture. Due to existing impunity, the perpetrators of serious crimes of international concern are not brought into the justice system by defining them as *hostes humani generis*.

Nepal, compared to other countries in South Asia, has signed a significant number of international instruments pertaining to human rights and humanitarian law. Such international instruments have clearly denounced impunity. Nepal, as a state party to these instruments, should follow legal and constitutional measures to end impunity. As a state party, it is obligatory for Nepal that such instruments are implemented at the domestic level. However, from the past to the present, Nepalese constitution and other domestic laws have not addressed impunity properly.

Perpetrators are not punished, and the victims do not get proper justice because impunity has not been addressed properly through the constitution and domestic laws till now. Nepal has not acceded to the Rome Statute of ICC that has hindered the country from fulfilling international obligations. Those responsible for gross violation of human rights laws and serious violation of humanitarian laws have not been brought to justice resulting in increased impunity and decreased accountability. Similarly, zero tolerance to impunity is necessary for strengthening the rule of law and democracy. We cannot attain an improved human rights situation unless we take effective, adequate and concrete measures to end impunity. Increased impunity in such serious incidents is evidence of the inadequacy of the Nepalese legal system.

Absence of accountability, flourishing impunity and escape from justice are occurring in the context of a severe human rights crisis and breakdown in the rule of law and the justice system, and it has grown since the 1990s ultimately hindering the promotion of human rights and peaceful conciliation in Nepal. The challenge for Nepal in promoting human rights, the rule of law and democracy is the immunity being enjoyed by perpetrators.

The Interim Constitution Drafting Committee headed by former justice Laxman Prasad Aryal had included a provision in the draft interim constitution for taking action against perpetrators by formulating a law with retroactive effect. But the legislative parliament did not recognize the right against impunity as a fundamental right. Impunity was covered under the directive principles of the state. Hence, effective action is necessary to address properly the issue of impunity in the constitution by learning from past efforts.

The committee had recommended a provision on impunity as a fundamental right in Part 3, Article 25 (4) of the Interim Constitution which states, "Provided that this shall not hinder prosecuting and punishing in the war crimes and crimes against humanity by formulating a law with retroactive effect." The same draft had recommended rights regarding justice in Article 25 (5) which states, "Any person shall have the right to obtain legal treatment against impunity and crime against humanity."

Unfortunately, these provisions were omitted when the constitution was published in the gazette after being passed by the legislature parliament on Magh 1, 2063. However, Article 33 (c) of the constitution has accepted the concept of fundamental human rights stating "... to maintain good governance by eliminating corruption and impunity" will be the responsibility of the state." Though this is a landmark achievement at the policy level, there is still a big question about how and when it will be implemented as it is kept under Part 4 Responsibilities, Directive Principles and Policies of the State. Paragraph 7.1.3 of the Comprehensive Peace Accord concluded between the Government of Nepal and the CPN

(Maoist) on Nov. 21, 2006 states, "Both sides express the commitment that impartial investigation and action shall be carried out in accordance with the law against persons responsible for creating obstructions to exercise the rights stated in the Accord and ensure that impunity shall not be encouraged. Apart from this, they also ensure the rights of the victims of the conflict and torture and the rights of the family of disappeared persons to obtain relief."

On Chaitra 18, 2063, the government issued its minimum programme of consensus with the signatures of the top leaders of eight political parties. Paragraph B (7) of the programme states, "Crimes and anarchy shall be controlled by strengthening the situation of peace and security. Law and order will be maintained and impunity eradicated by ending continued strikes, bandhs, gheraos, blockades and uncertainty." Paragraph D (2) of the same programme states, "Good governance will be guaranteed by ruling the state according to the principle of the rule of law and access to governance and services will be expanded through administrative reform. The civil service and security agencies will be made professional, capable and committed, impunity will be ended and the Commission for the Investigation of Abuse of Authority and law enforcement authorities shall be strengthened and made effective."

Till now, there is neither a constitutional nor legal provision in Nepal to address impunity. No effective effort has been made in the past to discourage impunity through such provisions either. State organs like the government, governance system, leadership, security forces and policymakers have the primary responsibility to mitigate the problem of impunity. However, they have not shown any clear vision or adopted concrete measures in this regard till now. Therefore, a concerted effort by organizations working to eliminate impunity from the face of Nepal is required to insert provisions in the constitution to end impunity and promote accountability. These efforts should be taken together with the campaign to create the perfect constitution.

## **2. Definition of impunity**

Impunity or *dandahinata* has become a buzz term for the last few years; and in particular from commencement of the peace process in Nepal. People commonly blame impunity for every type of disorder in the society from price hike to corruption, insecurity to murder, theft to robbery, strike to ban on vehicular movement, and abduction to extortion. However, while we define this term in light of the international human rights and humanitarian law, it has a more serious connotation that points to the serious breaches of international law. A bill against impunity drafted on behalf of civil society has defined impunity as a condition of "impossibility or failure or unintended or unsuccessful to carry out an investigation, prosecution, trial and action against a person who violates human rights and humanitarian laws."<sup>1</sup>

Impunity has been defined by international instruments as "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims."<sup>2</sup>

When there is prevalence of impunity, the persons accused of involvement in the incidents of grave breaches are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties due to the power they hold in the political sphere or in the name of conciliation and fresh start. This situation invites impossibility to make reparations to the victims which neglects the possibility of providing justice, the major aim of law.

## **3. Crimes of international concern**

Serious crimes under international law are the crimes of international concern. "The phrase "serious crimes under international law" encompasses grave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol I thereto of 1977 and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international

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<sup>1</sup> FOHRID, Bill Relating to the Prohibition of Impunity, 2007, Section 4 (a)

<sup>2</sup> UN Economic and Social Council, Updated set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1

law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution and slavery."<sup>3</sup>

Such crimes challenge peace, security and well being of a state and hinder the progress of democracy. Therefore, the international community is concerned towards these types of crimes. Such crimes and the perpetrators or those convicted for involvement in the crimes should not go unpunished. For this, the State should ensure effective prosecution measures and provisions to claim justice under the national level criminal justice system. This is subject to determination under criminal justice system. The sphere of right regarding justice should be expanded to address this.

#### **4. General obligations of the State against impunity**

General obligations of the State against impunity to promote accountability have been determined by international human rights law. International principles developed against impunity have guided State's obligations for regulation of serious crimes and effective action against impunity under international law. It is the responsibility of the State to take measures for investigation of incidents of serious violation of international law, adopting appropriate measures against perpetrators for justice, prosecution, trial and punishment for the offenders suspected of criminal liability, providing effective remedy to the victims, ensuring provision of reparation for the loss borne by victims and taking necessary steps for non-recurrence of incidents of violation. Right to justice cannot be establish till the State fulfills its obligations regarding administration of justice. Criminal justice remains incomplete till the right to justice is established. Therefore, the States should "undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished."<sup>4</sup>

As a Member State to the UN, Nepal should take effective measures to attain the goal to ensure respect and protection of human rights and basic freedom for all as set forth in the Article 55 of the UN Charter. Nepal cannot remain aloof from fulfilling this to materialize the objectives of the UN. Nepal is a State Party to the 6 Core Conventions and has ratified 16 other Conventions. Nepal has acceded to dozens other human rights instruments including Geneva Conventions and the ILO Conventions. Nepal has participated and agreed to the Vienna Programme of Action. This Programme of Action calls upon the States to adopt legal and theoretical measures against impunity. Right to legal remedy in the incidents of impunity and crimes against humanity can be effective to implement these commitments. Justiceable society and lasting reconciliation cannot be ensured without effective fulfillment of the needs of justice. The ideal of peace, humanity and democracy cannot be attained without stopping the sequence of emancipation through impunity.

The Convention against Slavery has determined State's responsibility to bring the related crimes and criminals into justice system.<sup>5</sup> The Genocide Convention,<sup>6</sup> the first human rights convention adopted by the UN General Assembly, is related to formulation of law, obligation of criminal prosecution and the secondary issues emanating from it. Likewise, the Apartheid Convention<sup>7</sup> and CAT<sup>8</sup> are other Conventions on the similar issues. There are provisions to take action in the offences that fall under the grave breaches<sup>9</sup> under international law.

A modern State cannot remain out of the above obligations because accountability is the basic condition for a modern State. The State must fulfill its obligations for ensuring accountability; however, the general citizens also have their inevitable role in this process. The State fulfills its responsibilities in favour of citizens; similarly, the citizen's right to prosecute as individual or in group against serious crimes must be guaranteed. In this way, the State obligations can be fulfilled through the steps allowed by the law of the

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<sup>3</sup> Updated set of principles for the protection and promotion of human rights through action to combat impunity, UN Economic and Social Council, Commission on Human Rights, Sixty-first Session, Item 17 of the provisional agenda, E/CN.4/2005/102/Add.1, 8 February 2005. Extracted from International Instruments developed against Impunity, First ed. FOHRID, 2064, P. 101.

<sup>4</sup> Ibid. P. 108.

<sup>5</sup> Nepal signed Convention against Slavery, 1926 in January 1970.

<sup>6</sup> Nepal signed Genocide Convention of 1948 on 17 January 1969.

<sup>7</sup> Nepal has signed Apartheid Convention of 1973 on 12 July 1977.

<sup>8</sup> Nepal has ratified CAT, 1948 on 14 May 1991.

<sup>9</sup> Geneva Conventions of 12 August 1949 and of Additional Protocol I thereto of 1977.

State itself. Therefore, the State must guarantee the citizen's right to legal remedy in the incidents relating to impunity and human rights violations.

## **5. Right to legal remedy against impunity**

The World Conference on human rights held in Vienna in June 1993 deplored impunity. The conference urged that to give a firm ground for rule of law the States should repeal the laws that guide those responsible in the serious violation of human rights such as torture.<sup>10</sup> Prior to this also individual's right to seek effective remedy against human rights violation was guaranteed.<sup>11</sup> The State should guarantee through law and constitution the rights of victims to get legal remedy in any serious crime defined by international law. The CAT has emphasized this obligation. The right to prosecute and get legal remedy in the serious crimes under international law should be guaranteed under right regarding justice. As Nepal has already ratified the CAT, Nepal should guarantee right to prosecute against torture and impunity for any incident of torture within her territory. Besides, Nepal should ensure right to fair and adequate reparation including rehabilitation for torture victims from within its legal system. The victim's families must get compensation if the victim dies due to torture.<sup>12</sup> Nepal should take effective measure under right regarding justice to fulfill this responsibility. Victim's right to prosecute against perpetrators is an inalienable component of criminal justice system. The right to prosecute against perpetrators involved in human rights violation and to seek justice should be addressed from the criminal justice system.

## **6. Right regarding criminal justice**

The established provision of criminal justice system, 'no person shall be punished for an act which was not punishable by law when the act was committed, and no person shall be subjected to a punishment greater than that prescribed by the law in force at the time of the offence' is not suitable to address impunity and crimes of international concern. This is because the serious crimes under international law and impunity are related to past, present and future. In the Nepalese context, such crimes occurred during the past armed conflict, they are occurring in the present transitional phase and may continue in the future also. Prevention of impunity is an indispensable component of criminal justice system. We have to address the crimes of past, present and future to end impunity. The crimes of past cannot be addressed and the victims of those crimes do not get justice if we follow the traditional principle of the right regarding criminal justice. Therefore, we must adopt retroactive law to regulate impunity and serious crimes of international concern.

Though the international human rights have forbidden retroactive provision in the criminal law, the ICCPR, Article 15(2) has the express provision of retroactive law, "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

This provision provides an important exception. Gross violation of international human rights law and serious violation of international humanitarian law are regarded as criminal offence. Hence, formulation of retroactive law to define such acts and omissions as crime will not be against the obligation under ICCPR. This ensures justice for those who have been victimized of gross violation of international human rights law and serious violation of international humanitarian law.<sup>13</sup>

## **7. Jurisprudence of retrospective law**

The already defined crimes and serious crimes under international law which are of international concern should be dealt with through criminal justice system. As these crimes fall under the purview of national and international criminal jurisdiction, the right to seek justice in such offences should be guaranteed as the right to criminal justice. The serious crimes under international law have been already defined at the international level. The phrase "serious crimes under international law" encompasses grave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol I thereto of 1977 and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as

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10 Vienna Declaration and Programme of Action, U.N. Doc. A/CONF. 157/24 (Part I), chap. III (1993), 14 Human Rights Law Journal 352 (1993).

11 Part 2, Article 2.3(a) of the ICCPR.

12 Article 14 of the CAT.

13 Remarks and suggestions of OHCHR on the Disappearance Bill of Nepal (May 2007).

torture, enforced disappearance, extrajudicial execution, and slavery.<sup>14</sup> As these crimes have been defined from 1948, we can incorporate provision to take action on such crimes with a law having retrospective effect.

The right regarding justice practiced by us should be in accordance with the international criminal justice system. For this, we must expand the principle and jurisdiction of the existing right regarding justice. The already defined crimes and impunity should not be obstructed from bringing into justice in the name of established norms of criminal justice system that says, "No person shall be punished for an act which was not punishable by law when the act was committed, and no person shall be subjected to a punishment greater than that prescribed by the Law in force at the time of the offence."

Generally speaking, the criminal justice system cannot have retrospective effect, but the international community<sup>15</sup> and national laws<sup>16</sup> have accepted that the already defined crimes and crimes under international laws can be prosecuted through law with retrospective effect. Therefore, it will not be against the principles established by international law if we incorporate a provision to prosecute and punish through a law with retrospective effect by preparing a list of certain crimes.

Use of retrospective effect is sought in the already established crimes. The law with retrospective effect addresses the crimes of international concern such as war crime, crimes against humanity and genocide. It does not deal with other types of crimes. Impunity must be brought under the periphery of criminal justice system if we wish to make the state accountable for the crimes of international concern in the past, present and future. There should be a clear demarcation regarding use of retrospective effect. Number of countries that went through conflict followed by peace process in the post 1990 have the provision to prosecute the crimes against humanity of a certain period in the national and international court.<sup>17</sup> Such a provision prevents states from assuming unlimited power and misusing this provision.

Retrospective provision and right to legal remedy in the serious crimes under international law and impunity fall within the concept of rule of law. This is not limited to indicate only towards the incidents that occurred during armed conflict. This is a strong preventive mechanism for any such possible incidents in the future. For instance, the state and the then insurgent group have agreed<sup>18</sup> to separately address through Truth and Reconciliation Commission the incidents that occurred during Falgun 2052 to Mangsir 5, 2063. Hence, incidents of this period fall upon the jurisdiction of the Truth and Reconciliation Commission.

Statutory limitation is not applicable to the serious crimes under international law, regardless of when they have occurred. Such crimes in which statutory limitation is not applicable, action with a law having retrospective effect can be formulated. International law has established that the statutory limitation is not applicable to war crimes and crimes against humanity.<sup>19</sup> Some national constitutions have incorporated provision not to allow amnesty and non-applicability of statutory limitations against those

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<sup>14</sup> Updated set of principles for the protection and promotion of human rights through action to combat impunity, United Nations, Economic and Social Council, Commission on Human Rights, Sixty-first Session, Item 17 of the provisional agenda, (E/CN.4/2005/102/Add.1), 8 February 2005, International Instruments developed against impunity, FOHRID, Kathmandu, 2064, p. 211.

<sup>15</sup> Proceedings of Nuremberg and Tokyo Tribunals had retrospective effect. Similarly, provision of Article 15(2) of ICCPR 1966 states, "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

<sup>16</sup> Constitution of the Republic of Kosovo, Article 13 states, "No one shall be charged or punished for any act which did not constitute a penal offence under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law". Similarly, Article 31 (1) of the Croatian Constitution states, "No one shall be punished for an act which before its commission was not defined as punishable offence by law or international law, nor he may be sentenced to a penalty which was not defined by law." Likewise, South African Constitution, Article 35(I) states, "every accused person has a right to a fair trial, which includes the right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted."

<sup>17</sup> East Timor Constitution, Article 170 has the provision to prosecute the incidents of crimes against humanity that occurred between 23 April 1974 and December 1999 in the national or international courts.

<sup>18</sup> Comprehensive Peace Accord, Section 5.2.5 concluded between the Government of Nepal and the Communist Party of Nepal (Maoist), has the provision "Both sides agree to maintain peace in the society while normalizing the adverse situation created by the armed conflict and to form a National Peace and Rehabilitation Commission to carry out relief work for the people victimized and displaced by the war and to rehabilitate them."

<sup>19</sup> See for detail Convention on the non-applicability of Statutory Limitation to war crimes and crimes against humanity. (Adopted and open for signature, ratification and accession by General Assembly Resolution 2391 (XXIII) of 26 November 1968).

involved in the crimes against humanitarian law.<sup>20</sup> Therefore, it will not be against established jurisprudence and standard if Nepal incorporates provision with retrospective effect and right to legal remedy in the serious crimes under international law. Retrospective provision and right to legal remedy should be incorporated in the new constitution to implement this principle.

## 8. Human rights violations of the past and context of continuous crime

Almost 13,000 people were killed, hundreds were disappeared and thousands of people were displaced during the past conflict. The incidents of serious violation of human rights such as extrajudicial killing, torture, unlawful detention, rape as well as forced recruitment, abduction, extortion, and use of force demanding food and shelter were commonplace. Within this, almost five years (2058 Mangsir to 2063 Mangsir) of the later conflict period were gravest in terms of widespread and systematic violation of human rights. The years 2058 and 2059 were the worst to enlist Nepal as a country having the most number of cases of enforced disappearance in the world. Various study reports have shown that both the state and insurgents were involved in the crimes against humanity, war crimes and serious violation of human rights during this period. The incidents of Doramba, Madi, and Bhairabnath Barrack are some examples.<sup>21</sup>

Continuing violation is also described as continuous nature of violation, and this theory has evolved in connection with the limitation of time to lodge a case. Several reasons hinder the filing of case within designated time for the victims of serious human rights violation. Insecurity, threat, financial problem, lack of knowledge and lack of legal aid are some of the major reasons for this. Considering this situation, several principles have been developed at the international, regional and national level. Such principles include the Doctrine of Continuing Violation or Crime, Doctrine of Retroactive Effect, Doctrine of Equitable Tolling. However, this paper explores only the principles of continuing violation and continuous crime. While considering the treaty based international law, the Inter-American Convention on Human Rights and International Convention on the Protection of all Persons from Enforced Disappearance have held that the act of enforced disappearance, till the whereabouts of the person disappeared is known, is a crime of continuing violation. The treaty laws have not spoken anything regarding other incidents of human rights violation. However, international mechanisms authorized to watch, monitor, interrogate, investigate, and explain have developed jurisprudence to regard some human rights violations of serious nature such as torture, unlawful detention, abduction, rape, slavery, genocide, war crimes, crimes against humanity as continuing crime.

### Continuing violation and crime: International experience

Doctrine of Continuing Violation has become an issue of debate and discussion among scholars of jurisprudence for the last five decades.<sup>22</sup> International, regional and national justice systems have interpreted and discussed this doctrine. However, a general and concrete definition of continuing violation is still lacking. There is tradition to define and apply it according to time and circumstances. However, almost all the legal systems have viewed this by linking continuing violation with the statutory limitation. Major objective of this doctrine is that statutory limitation is not applicable in the continuation of violation or such crimes cannot be subject to statutory limitation.

The doctrine of continuing violation has been first used by European Commission for human Rights (European Commission) in the *De Becker Case*<sup>23</sup>. This case is related to the death penalty imposed by Belgium to *De Becker* in 1946 for treason during Second World War. The sentence was later transformed to life imprisonment and *De Becker* was released in 1961 with some conditions. The case reached to the European Commission as sanction was imposed in some freedoms including right to

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<sup>20</sup> Ethiopian Constitution does not allow amnesty in the crimes against humanity and statutory limitation is also not applicable in such cases. Article 24 of the Constitution states, "Criminal liability of persons who commit crime against humanity so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitation. Such offences may not be committed by amnesty or pardon of the legislature or any other state organ."

<sup>21</sup> Gobinda Sharma Bandi, *Culture of Impunity in Nepal: An analysis*, HRTMCC, 2065 Chaitra, P. 2

<sup>22</sup> More than fifty years ago, a seminal Harvard Law Review article on statutes of limitations discussed the problems associated with "[c]ontinuing or [r]epeated wrongs." Note, *Developments in the Law – Statutes of Limitations*, 63 HARV. L. REV. 1177, 1205-09 (1949-1950) Cited from, Kyle Grahm, *The Continuing Violation Doctrine*, GANZAGA Law Review, Vol. 432.2 page 273.

<sup>23</sup> *De Becker v. Belgium*, ECHR, 27 March 1962, Application No. 215/56.

expression. Referring to the Article 26 of the European Convention on Human Rights, Belgium government claimed that the case does not fall within the jurisdiction of the Commission as the complaint was not lodged within 6 months. Dismissing the claim of Belgium government regarding statutory limitation, the Commission stated that this is a case of continuing violation as the sanction comes with imprisonment. This decision of the European Commission developed a principle that statutory limitation cannot defend in the case of continuing violation.<sup>24</sup> Similarly, it also held that the state party cannot claim for the situation before the entry into force of the Convention when the incident has originated before that date but another incident has been committed after enforcement. This perspective of European Commission regarding continuing violation was later adopted by European Court also in the cases of human rights violation. The doctrine of continuing violation was mainly used for forced extortion, continuing occupation of property without compensation and use of house without paying rent during the Second World War.<sup>25</sup>

Similarly, the international judicial mechanisms have also defined the acts of enforced disappearance as continuing violation since a long time.<sup>26</sup> In 1992, UN General Assembly held this as a continuing crime in its Declaration for the Protection from enforced Disappearance<sup>27</sup>, and later the International Convention on the Protection of all Persons from Enforced Disappearance introduced in 2006 also defined this as a continuing crime.<sup>28</sup>

On the basis of the international law, jurisprudence and various legal systems, we can say that certain types of human rights violations can be defined as continuing crime when there exist certain conditions. The European, Inter-American and UN judicial mechanisms have consensus to term the incidents of enforced disappearance as continuing violation till the whereabouts of the disappeared is known; and therefore, the UN Declaration, Inter-American Convention on Enforced Disappearance and the recent UN Convention against Disappearance have also defined it as a situation of continuing violation. Similarly, the Human Rights Committee and European Court of Human Rights have concluded that the violation regarding right to property is also subject to continuous crime. Violation of other rights may also be a situation of continuing violation, but there is lack of international law in this regard.

Continuing crime, rather than being an independent crime, is so defined based on the nature, situation and cause of a crime. Which crime is continuing and which is not is a complex issue. Therefore, unless a law considers a crime as continuing crime, it must be determined on the basis of the circumstances linked to a certain crime.

The use of the doctrine of continuing crime is often viewed by linking it to the doctrine of statutory limitation. The doctrine of continuing crime can be attracted, if trial in an offence is impossible due to prescription or if prescription is not appropriate due to the nature of the offence or crime. Some justice systems have administered justice in such problems through the doctrine of equitable tolling. However, this is not understood only as a way out to resolve the problem created by prescription but as a nature of crime itself.

## **Continuing crime in the laws of Nepal**

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<sup>24</sup> The Convention organs have accepted to extend their competence *ratione temporis* to cases in which there is a continuing violation, which originates before the entry into force of the Convention but continues after that date (*De Becker v. Belgium* (dec.), no. 214/56, 9 June 1958, 2 Yearbook 214, p. 232-233).

<sup>25</sup> The doctrine of continuing violation has been applied in several cases concerning the right to property by the European Court of Human Rights: the continuing unlawful occupation of land belonging to the applicants by the Navy without compensation (*Papamichalopoulos and Others v. Greece*, judgment of 24 June 1993, Series A no. 260-B, § 40); the denial of access to the applicant's property in Northern Cyprus (*Loizidou v. Turkey*, judgment of 18 December 1996, Reports of Judgments and Decisions 1996-VI, § 46-47); the failure of the State to discharge its obligation to compensate owners dispossessed of their land and properties beyond the Bug River after the Second World War (*Broniowski v. Poland* (dec.) [GC], no. 31443/96, ECHR 2002-X); and the continued impossibility for the applicant of regaining possession of her property and of receiving the adequate rent for lease of her house, stemming from laws which were in force before and after the ratification of Protocol no. 1 by Poland (*Hutten-Czapska* [GC], no. 35014/97, § 152-153, ECHR 2006-...)

<sup>26</sup> For details please see *Cyprus v. Turkey*, ECtHR 10 May 2001, Application no. 25781/94 from European system and also see *Velásquez Rodríguez v. Honduras*, IACtHR 29 July 1988, Ser. C No.4 (1988).

<sup>27</sup> Article 17 of the Declaration states that (A)cts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified.

<sup>28</sup> Article 8 of the Convention against enforced disappearance states that states should take into account the continuous nature of offence while criminalizing the act of enforced disappearance.

The laws of Nepal do not have clear provision regarding continuing crime. However, while considering the provision of limitation in some crimes we can say that the laws of Nepal have accepted the concept of continuing crime. Muluki Ain, On Court Administration, no. 36 states that complaint may be lodged at any time in the cases where the limitation is not mentioned. This provision has been practiced in the civil cases, particularly on partition and claiming provision of food. Similarly, we can say that the case where the offender accepts crime has been considered as a continuing crime as there is no statutory limitation to such incidents.

However, laws of Nepal have not defined the continuing crimes under international law such as rape, homicide, torture, enforced disappearance, abduction, war crimes, crimes against humanity, ethnic cleansing or genocide, terrorism as continuing; and certain crimes among them such as enforced disappearance, war crimes, crime against humanity, terrorism, ethnic cleansing or genocide are yet to be recognized as crimes.

While discussing about whether or not the past incidents of serious violation of human rights can be defined as continuing violation, we must take into account to which international laws Nepal was a state party when the human rights violations were committed in the past and to which extension the obligations have been fulfilled.

The officials refuse to register the cases relating to unlawful killings and disappearance, the cases are not investigated even if the case is registered through the order of the court and the procedure is forwarded just to save the face of the court without arresting the perpetrator or taking the case seriously. This trend shows that Nepal is unable to fulfill its obligations under international law. As these incidents are committed at a certain time and are not isolated incidents, the unwillingness of the state to fulfil its obligation on such incidents gives way to the continuation of the violations of the past. In this backdrop, such incidents can be defined as continuing violation. By nature, these crimes can be termed as crimes against human rights; hence continuing crimes.

The past incidents relating to enforced disappearance, killing, rape, torture, continuing occupation of land and other immovable property that are not investigated or not intended to be investigated, crimes under international law such as torture, inhuman treatment, rape, gender or sexual violence, systematic killing, war crimes, crimes against humanity, ethnic cleansing, terrorist activities, collective detention, extrajudicial killings can be defined as continuing crimes.

## **9. Hurdles of prosecution in Nepal**

Respect to human rights and humanitarian law is a major question of contemporary world. This is an indicator and standard of civilized world. We cannot envisage stable and fair peace without full respect of human rights. The serious crimes threatening peace, justice and benefits are banned through national and international law. The national and international law has not allowed the crimes of serious consequence and immunity to the perpetrators even in the name of war. Prosecution and punishment is necessary to regularize the serious crimes that have consequences to the whole community. Ending impunity and contributing in the prevention of serious crimes under international law is impossible without prosecution and punishment in such crimes. Therefore, constitutional provision for effective prosecution is necessary to ensure use of criminal jurisdiction by the state in the serious crimes.

Nepal has been unsuccessful to prosecute against those who are accused of human rights violation. We do not have an instance of measures for prosecution whether during Panchayat era or after the reinstatement of democracy or under republic Nepal. The Mallik Commission, Rayamajhi Commission and other several commissions were formed to investigate serious violations of human rights in Nepal but the Nepalese people have not been able to feel rule of law as prosecution is not made according to the recommendations of these commissions. Lack of action against the convicted has created crisis of confidence towards state and state system. The perpetrators involved in extrajudicial killing, torture, enforced disappearance, rape are roaming openly and even assuming important public positions as the government has failed to prosecute despite existence of enough evidence against them. General Toran Jung Bahadur Singh, who is accused of enforced disappearance of 49 citizens from Bhairabnath Barrack is not prosecuted rather he has got promotion. Hundreds of cases have been filed demanding action against those involved in extrajudicial killings and enforced disappearance. Neither the police have conducted effective investigation for prosecution nor did the court play its due role. The whole

justice system has become unsuccessful to ensure effective prosecution. Under such circumstances, it is necessary to incorporate provision of prosecution under right regarding justice in the new constitution.

Security force and armed groups have been encouraged to pursue the incidents of serious human rights violation as they are not prosecuted for their offences. Therefore, new constitutional provision and policy is necessary to uproot the trend and activities of human rights violation. Only the commitments for not allowing the incidents of violation and reform of policy cannot make any change. The perpetrators must feel that they shall be prosecuted, punished and imprisoned for their crimes. Only this shall end impunity and promote accountability in Nepal. Major challenge in Nepal is that impunity exists with legal as well as practical support. Prosecution has become difficult due to impunity.

## **10. Criminalization of serious crimes under international law**

Crimes under international law cannot be addressed till we expand the sphere of justice. To achieve this, the national justice system must criminalize serious crimes under international law. The jurisdiction of international criminal justice system is attracted towards the crimes of international concern. It would be easier to go further in collaboration with international community if the domestic laws criminalize serious crimes. The main issue is that a modern state should not allow the crimes of international concern to go unpunished. Criminalization of war crimes, crimes against humanity and genocide is necessary to fulfill this obligation. In this backdrop, the criminal justice system of new Nepal should criminalize the serious crimes under international law. Constitutional provision that ensures bringing the perpetrators of war crimes, crimes against humanity and genocide is an effective measure in this regard. A law with retroactive effect is a must for this, which is not targeted only to the armed conflict of the past. This is a measure that can tackle the violations of present time and avert any such occurring in the future. The provision to make retroactive law in the war crimes, crimes against humanity and genocide shall work more effectively for tomorrow than for today. We can see that Nepal is heading towards ethnic politics. This provision is necessary to address the risk of tomorrow, the lust for ethnic autonomous state may invite in the future. We must think about addressing possible serious crimes of future when an ethnic community may massacre against another after a decade. This risk is present in Nepal. Therefore, the serious crimes under international law must be criminalized by incorporating a provision that allows retroactive law in the Right regarding justice of Fundamental rights in the new constitution.

Insurgency or movement arises when the rights cannot be enjoyed freely. The insurgency and movement is initiated for rights. People participated in the people's movement II to establish their right against serious human rights violation and impunity. Nepali society wishes to establish the judicial and legal rights against serious crimes under international law and impunity. We want freedom from the bad trend of impunity in the serious crimes. The provision to formulate retroactive law to address serious crimes of past, present or future may help to take action against the perpetrators involved in such crimes. The provision to formulate law is not enough till we guarantee right to seek justice and legal remedy against such crimes. Therefore, the right to seek legal remedy in the serious crimes must be ensured alongwith the criminalization of serious crimes under international law and provision to formulate retroactive law.

We must ensure now that our future generation shall not have to be victimized of serious crimes under international law. We can ensure this through new constitution. We cannot ensure that the future generation shall not face the serious crimes, threat of war and conflict, if we fail to set in place solid working policy, constitution and legal provisions as well as mechanism against serious crimes and impunity. We must strengthen our justice system against serious crimes. Therefore, it is the need of the hour to formulate new constitution having a provision that allows law with retroactive effect and non-applicability of statutory limitations in the serious crimes.

The serious crimes that occurred in the past, are occurring at present and may occur in the future should be regularized through national criminal justice system. We need to establish a system that allows prosecution, trial and punishment within the national criminal justice system in the crimes of genocide, war crimes and crimes against humanity. Provision for retroactive law is an important basis to strengthen national jurisdiction against such crimes. The inadmissibility of war crimes, crimes against impunity and genocide should be established in the constitution. Nepal must accept the universal jurisdiction in such crimes.

## 11. Addressing impunity for reconciliation

Reconciliation is an important step in a post conflict society. However, it is meaningless without addressing impunity. Currently, Nepal is in a post conflict situation. Therefore, we have the responsibility to ensure fresh start in the whole state mechanism with the responsibility to promote reconciliation. Impunity must be addressed for promotion of state transformation, justice and reconciliation. Addressing impunity and reconciliation means addressing serious crimes under international law through justice system. The past, present and future must be encompassed in this process. This is an appropriate opportunity to strengthen state transformation and constitution making. Therefore, the measure to bring the serious crimes under international law must be taken alongwith the constitution making process. Our major target is ending impunity and promotion of accountability by guaranteeing justice and rule of law through new constitution.

Democracy cannot be strengthened without promotion of rule of law as rule of law is the foundation for democracy. Rule of law is impossible without addressing impunity and crimes under international law. State becomes weak in the absence of effective law. Our legal system has always failed to address serious human rights violations. This has encouraged the politics of weapons. Under these circumstances, we are working to formulate new constitution and reconstruction of society. We have to guarantee a situation where there will not be repetition of impunity and serious violations of human rights. Then only reconciliation can succeed in its true sense. We have to bring impunity and serious crimes of international concern within justice system to ensure rule of law and strengthen democracy in the future Nepal. The current constitution making process is the appropriate opportunity to address impunity and serious crimes. Reconciliation and expectation of sustainable peace is possible only if we ensure a constitutional provision to address these provisions. Addressing past is not enough; we have to strengthen our justice system against such violations in the future. Therefore, constitutional provision to address serious crimes under international law and impunity is necessary.

Our current efforts must address the need to prevent possibility of human rights violation and impunity in the future. More than 20 countries that emerged after conflict have already incorporated constitutional provision to avoid human rights violation and impunity in the future, alongwith reconciliation. Nepal is also in the post conflict situation. Therefore, we need to make special constitutional arrangements to promote reconciliation and avoid possibility of human rights violations in the future. Ethiopia that went through conflict like ours has made such arrangements. Constitution of the Federal Democratic Republic of Ethiopia, 1994 has dedicated its Article 28 to provision on Crimes Against Humanity. To comply with the international conventions ratified by Ethiopia and other laws of Ethiopia, it does not allow "period of limitation on persons charged with crimes against humanity". The legislature or any other organ of state does not have any power to pardon or give amnesty with regard to such offences.

Constitution of the Republic of Croatia, 1990 in its Article 35 ensures that no one shall be punished for "an act which before its perpetration was not defined by law or international law as a punishable offence, nor may he be sentenced to a punishment which was not defined by law." If after the perpetration of an act a less severe punishment is determined by law, the constitution allows to impose such punishment.

In this way, both of these constitutions have criminalized the serious crimes under international law. They refuse amnesty and statutory limitation in the in such crimes. This has addressed transition in the future, by avoiding possibility of the past criminal incidents. Therefore, as practiced by Ethiopia and Croatia, Nepal should also address the serious violations of human rights by bringing them into justice system. Our criminal justice system may fail to address the serious human rights violations in the future, if we do not incorporate provision against serious crimes under international law and impunity in the new constitution. Therefore, in the traditional provision of "No person shall be punished for an act which was not punishable by law when the act was committed, and no person shall be subjected to a punishment greater than that prescribed by the law in force at the time of the offence," we must add a provision "Retroactive law can be formulated and punishment imposed in the offences that are crimes under international law that can be punished for criminal liability."

Reconciliation is not possible without addressing past and ensuring future. Reconciliation is not just forgive and forget. It must address the past and ensure justice for the future. Reconciliation encompasses the state obligation to investigate violations, prosecute and punish the perpetrators. Reconciliation does not bar from bringing the human rights violations before a civilian court.

Reconciliation can work effectively when the violation of international human rights and humanitarian law is decided through civilian courts. The efforts of reconciliation should not be a basis for pronouncing amnesty, pardon or any other forms of emancipation to the perpetrators. The obligation under reconciliation should ensure full reparation (not only compensation) to the victims of human rights violation. The state is accountable to address past, ensure reconciliation and just future as well as to investigate and legally punish in the offences relating to human rights performed by their authority.<sup>29</sup> Therefore, emphasis in reconciliation comes alongwith addressing past and ensuring just future.

## 12. Conclusion /Recomandation

There are significant differences in the perspectives of political parties regarding the issues incorporated in the drafts of thematic committees in the Constituent Assembly (CA). The high level task force formed by 27 political parties is trying to forge consensus out of these differences. Discussion is being held on the draft of the CA Committee for Fundamental Rights and Directive Principles. There are 2 additional opinions in the draft that can open door for formulating retroactive law to address impunity and serious crimes under international law. Members of the high level task force have not developed consensus on those additional opinions. In this context, it is necessary to develop a single opinion out of those additional opinions, and to incorporate an effective constitutional provision against impunity and serious crimes under international law through consensus in the high level task force.

**Efforts within the Constituent Assembly (CA):** The issue of incorporating provision to formulate retroactive law to take action in the serious crimes under international law in the fundamental rights has drawn attention of human rights and civil society. Efforts were made to recommend retroactive provision within fundamental rights; however, consensus could not be built in the concerned thematic Committee to incorporate such provision. Due to opposition from UCPN-Maoist, Nepali Congress and CPN-UML included this provision as additional opinion. Binda Pande, President of the Committee for Fundamental Rights and Directive Principles submitted draft of her Committee to the CA Chairperson Subash Chandra Nemwang on 8 November 2009. The committee organized fundamental rights into 31 groups. **Article 5 Right relating to justice, Clause (4)** in the draft reads, "No person shall be punished for an act which was not punishable by law when the act was committed, and no person shall be subjected to a punishment greater than that prescribed by the law in force at the time of the offence."<sup>30</sup>

Nepali Congress and CPN-UML recommended two separate proviso to this Clause as additional opinion in the draft of CA Committee for Fundamental Rights and Directive Principles. None of these are perfect; however, their theoretical implicatiion is to ensure retroactive provision and to address serious crimes under international law. Therefore, an effective provision should be incorporated in the new constitution to take action against impunity and serious crimes under international law based on the recommendation of the Interim Constitution Drafting Committee, additonal opinions presented in the draft of CA Committee for Fundamental Rights and Directive Principles and the jurisprudence established and practiced at the international level. Following options can be considered in this regard:

Additional opinions	Unified provision
On behalf of CPN-UML, CA Member Pradeep Kumar Gyawali –	<b>Option 1:</b> 1.1 Unless the act is an offence under international law including genocide, war crime, crime against humanity, enforced disappearance or torture, no person shall be accused or punished for

<sup>29</sup> Constitution of Venezuela, 1999, Article 29.

<sup>30</sup> [www.can.gov.np](http://www.can.gov.np) visited on 11 January 2010

<p>"Provided that this Clause shall not be deemed to prevent punishment by formulating retroactive law in the crimes such as crime against humanity, war crimes and genocide."<sup>31</sup></p> <p>On behalf of Nepali Congress CA Member Ramesh Lekhak - "Provided that this Clause shall not be deemed to prevent formulating retroactive law and punishment in the crimes to be punished under applicable international laws."<sup>32</sup></p>	<p>an act performed which is not an offence according to existing law when the act was committed.</p> <p>1.2 Every person shall have the right to seek legal remedy against impunity or offence of genocide, war crime and crime against humanity.</p> <p><b>Option 2</b></p> <p>2.1 No person shall be accused or punished for an act which is not an offence according to the existing law. Provided that this provision shall not apply to the act if it is an offence under international law including genocide, war crime, crimes against humanity, enforced disappearance or torture.</p> <p>2.2 Every person shall have the right to seek legal remedy against impunity or offence of genocide, war crime and crime against humanity.</p> <p><b>Option 3</b></p> <p>3.1 No person shall be convicted for committing any act which is not punishable offence according to national or international law and shall not be punished more than what is applicable at the time of offence. Provided that this will not hinder from investigating, prosecuting and punishing on the issue of the violation of human rights and humanitarian law.</p> <p>3.2 Every person shall have the right to seek legal remedy against impunity or offence of genocide, wars crime and crimes against humanity.</p> <p><b>Option 4</b></p> <p>4.1 No person shall be convicted for committing any act which is not punishable according to existing law and no person shall be punished more than what is applicable at the time of offence. Provided that it shall not hinder prosecution and punishment by formulating law with retrospective effect in the offences relating to genocide, war crime and crimes against humanity. This provision shall be applicable for the crimes listed in Annex ... that may occur after the date of enforcement of this constitution.</p> <p>4.2 Every person shall have the right to seek legal remedy against impunity or offence of genocide, war crimes and crimes against humanity.</p>
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Above policies, political agreements and initiatives can be fruitful if the provision regarding impunity is incorporated in the new constitution under fundamental rights. On the basis of such efforts, we must ensure that the right against impunity is incorporated in the new constitution.

<sup>31</sup> Ibid  
<sup>32</sup> Ibid