

12 January 2013, Kathmandu, Nepal.

UK authorities arrested Nepal Army Colonel Kumar Lama on 3rd January 2013 from Sussex for his alleged involvement in the torture of detainees while commander of the Gorusinge Battalion barracks in Kapilbastu in 2005. The West Minster Magistrate Court has ordered him 20 days detention for further investigation. Similarly, on 5 January 2013 five people accused of killing of journalist Dekendra Thapa were arrested by Nepal Police in Dailekh. Though, implemented late, the arrest of alleged perpetrators of past armed conflict of Nepal is a welcome respite as these incidents have opened door for prosecution against impunity in Nepal.

Colonel Lama has been arrested under the universal jurisdiction in the cases of serious human rights violation and those alleged of murder of Dekendra Thapa have been arrested under the existing criminal law of Nepal. As both of these steps have initiated measures to bring those alleged of "Serious Crime Under International Law" (see Media Note 1) into justice system and prosecution against impunity at the national and international level, Human Rights and Democratic Forum (FOHRID) welcomes these steps.

Nepal government has strongly demanded with the UK government not to forward prosecution against Kumar Lama, and the government is also trying to influence the investigation on the murder of Dekendra Thapa. It is being reported in the media that the Prime Minister and Attorney General have been exerting pressure to stop investigation and prosecution process against the murderers of journalist Thapa. These steps are deplorable as it neglects respect of human rights and active to encourage impunity. FOHRID strongly deplores these steps taken by the government.

Nepal government has stated that the arrest of Colonel Lama and the alleged murderers of journalist Thapa are intended to disturb peace process as such issues shall be addressed by Truth and Reconciliation Commission and Commission on Disappearance. However, these commissions, if formed, will be temporary non-judicial fact finding bodies only and they cannot prosecute on their own. Therefore, there is no alternate of prosecution for the serious crimes under international law that occurred in the past, that are occurring now and that may occur in the future. Therefore, prosecution of those alleged of involvement in such crimes should not be ignored in the name of Truth and Reconciliation Commission and Commission on Disappearance.

Nepal's obligation under international law cannot be fulfilled merely by investigating the incidents of armed conflict through formation of Truth and Reconciliation Commission and Commission on Disappearance. Nepal should prosecute against those accused of involvement in the violation of international human rights and humanitarian law (See Media Note 2).

Ending impunity and promotion of accountability at the domestic level is a must to stop the incidents such as the arrest of Colonel Lama in the UK. The universal jurisdiction shall not be applicable for Nepal if we succeed to effectively address the serious crimes under international law through the Constitution of Nepal (See Media Note 3) and criminal justice system. Therefore, without any further delay, Nepal should criminalize serious crimes under international law through domestic criminal law and strengthen prosecution.

Several political party leaders and officers of security agencies shall have to face the fate of Colonel Lama if Nepal fails or becomes unwilling to fulfill the obligations created by the international human rights instruments ratified and acceded by Nepal (See Media Note 4). The political party leaders, cadres and security officers involved in serious violation of human rights in Nepal shall not get emancipation from the universal jurisdiction in the present circumstances. Prosecution at the domestic level shall save them from prosecution at the international level.

Therefore, FOHRID strongly demands with Nepal government to criminalize serious crimes under international law through domestic law of Nepal and prosecute on the incidents of violation of the past armed conflict through effective investigation. Similarly, FOHRID appeals with the international community to exert pressure and assist government of Nepal for this cause.

For media note:

Media Note 1: United Nations, E/CN.4/2005/102/Add.1, Updated Set of principles for the protection and promotion of Human Rights through action to combat impunity has defined Serious Crimes Under International Law "As used in these principles, 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 torture, enforced disappearance, extrajudicial execution, and slavery.

Media Note 2: The Nepal Conflict Report 2012 published by UN Office of the High Commissioner for Human Rights has documented about 30,000 incidents of past armed conflict, out of which 9000 incidents have been mentioned as incidents of international crime. Both the parties in conflict, government security forces and activists of the then CPN (Maoist) have been responsible for violation. Nepal government should take immediate steps to make the perpetrators accountable as identified and recommended by OHCHR.

Media Note 3: 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 legislature parliament did not recognize the right against impunity as a fundamental right. Impunity was put in the directive principles of the state. 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), "Any person shall have the right to obtain legal remedy against impunity and crimes against humanity." Unfortunately, these provisions were omitted when the constitution was published in the gazette after being passed by the legislature parliament on 2063 Magh 1. Similarly, efforts were made to incorporate this provision in the new Constitution. CA Committee for Fundamental Rights and Directive Principles could not incorporate this provision as a major provision. However, CA Member Pradeep Kumar Gyawali of CPN-UML recommended a proviso to the Clause of non-retroactivity as an additional opinion that reads, "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." CA Member Ramesh Lekhak of Nepali Congress recommended a separate proviso to the same Clause that reads: "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." Hence, as the two major political parties proposed additional opinion with similar motive, there was possibility of incorporating such provision in the new constitution. It requires continuous pressure and lobbying to get complete success in the future. UCPN (Maoist) was against this provision from the beginning, it continues its stand till now.

Media Note 4: Nepal has acceded to the Convention on the Prevention and Punishment of the Crime of Genocide 1948 on 17 January 1967, International Humanitarian Law (Four Set of

Geneva Convention) 1949 on 7 February 1964, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 on 14 May 1990, International Covenant of Civil and Political Rights 1966 on 14 May 1991, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 on 14 May 1990, Optional Protocol of International Covenant of Civil and Political Rights 1966 on 14 May 1991. Apart from these, Nepal is party to more than two dozen other international treaties.

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