In the 20th century, Nepal was known as one of the poorest countries of the world. With the dawn of the 21st century, it has also been made famous by topping the list of countries for making disappearances of the people by the state. Nepal is thus on the international spotlight now both as a country where poverty is perennial and human rights violation is pervasive. Though a measure of poverty alleviation has been achieved in over half-a-century with development cooperation from around the world, yet no concern has been shown by any about the integral link between poverty and human rights. Poverty is largely portrayed as an impediment to development. It is also tagged as the basis for violence and insurgency. Because insurgency, like poverty, is also normally a rural phenomenon, poverty is found among “the very people who are living on the land who are not eating enough” (George, 1977:14). Development discourses are, therefore, geared to achieve economic growth by quantification of material prosperity seeking “salvation” to deficiencies, that is, poverty, through development even at the expense of freedom, dignity, integrity and identity of human beings (George, 1977; Escobar, 1995; Seligson and Passe-Smith, 2003).

Tied to foreign aid, the development model is skewed already in favour of relatively prosperous people and high profile activities of “development diplomats” had mostly negative impact on poor people in areas where “development projects” have been launched. Two examples are worth citing in this connection. First, the Jhapa district of eastern Nepal where a land reform programme was launched under the US aegis in the 1960s turned out to be the first site of the Maoist rebellion in Nepal in the 1970s although this was brutally suppressed by the then Panchayat regime. Second, over $50 million in American aid was funnelled in the name of the Integrated Development of Rapti Valley project initially in 1956 and later from 1980 through 1995 (Gersony, 2003).
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in mid-western Nepal. The consequence, as the USAID phased out the “development project” in 1995, the entire area became the site of the second Maoist rebellion from 1996 as insurgency spread around the country with increasing violence. Paradoxically, the basic intention of US foreign policy administered through foreign aid for attacking poverty and preventing possible communist uprising (which is again attributed to poverty) have failed miserably in Nepal. The Maoist “People’s War” that concerns the livelihood of poor people and demands for human security (Point 27 to 40 of the 40-point Demands of the Maoists) basically relates to the ideational mode of relationship of the poor and impoverished people to the state who are made objects of exploitation and, therefore, at one point assert their rights.

4.1 CONSTITUTION AND LEGAL FRAMEWORK

A change in the mode of thinking on development, however, has already occurred in the broader international milieu. Incessant debates on the format of economic development for decades led the UN General Assembly’s declaration of the “right to development” by comprising civil and political as well as economic, social and cultural rights in 1986. Article 2, paragraph 1 of the declaration focused firmly on the human person as central to development as someone who should be both “participant and beneficiary” of development (CDHR, 2004:255). Article 5 unequivocally directs the state to take resolute action against discriminations of all sorts and against any threat to national unity and territorial integrity in preserving the fundamental rights of the peoples, including rights to self-determination (CDHR, 2004:257). These liberal values are also integral to the Directive Principles of the State in Nepal (Constitution, 1990:16). The fundamental objective of the Constitution promulgated as the law of the land in November 1990 has been to promote the general welfare and liberty of the people by creating an open and just society. Protection and promotion of human rights, thus, has become the pivotal objective of the state in developing a healthy social life by eliminating all types of economic and social inequalities and by encouraging wider participation of the people in governance (Constitution, 1990:16-17).

Constitutionalism as a concept includes the fundamental principles of democracy, human rights and the rule of law. Constitutionalism, in principle, has an empowering role by universalising human rights in the process of the democratisation of the social and political spheres of
the state. In the process of democratising the state, constitutionalism leads to indigenisation of local institutions and adoption of the principles of human rights and making them sensitive to human needs. Adherence to this process is universal although the discourse on human rights is a Western construct with limited applicability in alien social and cultural settings, especially the Asian ones. The discussion that follows is essentially focused on issues of civil and political rights pertinent to human rights and the rule of law in Nepal. In relational terms it also deliberates on how the fundamental rights of the people has been scuttled with constitutional and legislative as well as executive decisions of the government in practice with the provision of immunity. And why has such a situation arisen both to dissipate human development and human security?

In a country where the culture of impunity and violence has long been embedded in the national psyche, where human rights as a concept and practice has yet to take roots, and where rules are meant just for establishing order and control with threats of punishment but not for giving more rights to people, governments take draconian measures to shelve the rights of the people first whenever challenged. The emergency measure that the government of Nepal took in suspending the fundamental rights of the citizenry followed by the adoption of a stringent anti-terrorist ordinance and its effect upon the country including abhorrent violations of civil rights, even to the extent of affecting lives of people who have no connection with any act of terrorism, left its mark on the inalienable rights and fundamentals of human security. As human rights are central to human security architecture (security for whom, security of what values, security from what threats and security and by what means), its violations with the provision of impunity by the state or non-state have been primarily dealt with as direct threats to human security.

This chapter, thus, concerns the fundamental rights of the people, which the Constitution of the Kingdom of Nepal 2047 (1990) has stipulated and conferred on them “in keeping with the desire of the Nepalese people expressed through recent people’s movement...to guarantee basic human rights to every citizen ...on the basis of liberty and equality [to establish an] independent and competent system of justice with a view of transforming the concept of the Rule of Law into a living reality” (Preamble, Constitution, 1990:1). The Constitution further guarantees rights against discrimination on the grounds of
religion, race, sex, caste, tribe or ideological conviction, untouchability, exploitation and denial of personal liberty or any of these. It has disbanded capital punishment and provides freedoms of speech, assembly and association, movement and resident to citizens in any part of the country and the right to carry out any occupation within the bounds of national law.

The Constitution also provides rights regarding criminal justice stating "no person who is arrested shall be detained in custody without being informed ... of the grounds for such arrest;" such a person would have access to defence by a legal practitioner chosen by the detainee, who should be produced before the court within 24 hours of his or her arrest, excluding the time necessary for journey from the place of arrest to the court. Likewise, preventive detention of any person is debarred by the Constitution unless sufficient grounds of evidence exists "of an immediate threat to the sovereignty, integrity or law and order situation" of the country with the promise of the rights to compensation to the person in case the detention contravenes the law and is committed in "bad faith." In the case of preventive detention, Article 88(2) provides the rights to habeas corpus to the detainee (Constitution, 1990:67). The Constitution of Nepal 1990, as the law of land, therefore, is enshrined with all the necessary elements regarding fundamental rights to the citizens of the state found in every democratic constitution of the world. The most notable aspect of the Constitution promulgated after the success of the Jana Andolan (people's movement) in 1990 is the transfer of sovereignty to the people from the crown; it declares that "the source of sovereign authority of the independent and sovereign Nepal is inherent in the people...." (Para 1, Preamble, Constitution, 1990:1). There is no parallel to this feat in the history of constitution making in Nepal. The people are given unprecedented civil and political rights. The fundamental rights guaranteed to the citizens are made perpetual, as they are immutable and impervious to any acts of parliament or any other decree. In sum, the Constitution of 1990 guarantees the following fundamental rights to the citizens of Nepal (Constitution, 1990:8-15).

- Rights to equality (Article 11),
- Rights to freedom (Article 12),
- Press and Publication rights (Article 13),
- Rights to criminal justice (Article 14),
- Rights against preventive detention (Article 15),
- Rights to information (Article 16),
- Rights to property (Article 17),
- Cultural and education rights (Article 18),
- Rights to religion (Article 19),
- Rights against exploitation (Article 20),
- Rights against exile (Article 21),
- Rights to privacy (Article 22), and,
- Rights to Constitutional remedy (Article 23).

Notwithstanding these provisions, there are restrictions imposed by the Constitution against acts committed with malafide intentions, which "may undermine the sovereignty and integrity of the Kingdom of Nepal, or which may jeopardise the harmonious relations subsisting among the peoples of various castes, tribes or communities, or on any act of sedition, defamation, contempt of court or incitement to an offence; or on any act which may be contrary to decent public behaviour or morality" (Constitution, 1990:9-11).

Another critical dimension in relations to the use and abuse of the fundamental human rights provided to its citizens is the functional obligation with which the emergency power is constitutionally conferred on the state (Constitution, 1990:98-100). Provision for emergency power is integral to the Constitution as universally accredited value. The constitutional order describes emergency as a situation caused by the breakdown of social order. Violations of the permissible norms regulating the social relationships with the state which perceptibly condition the situation of abnormality, the emergency power as an instrument of the state is used as an exception with the intention of bringing back the state to normalcy. The situation of abnormality confers the state the act of centralising power by suspending all other attributes of governance. According to the Article 115(1) of the Nepali Constitution, the state is entitled to use emergency power,

If a grave emergency arises in regard to the sovereignty or integrity of the Kingdom of Nepal or the security of any part thereof, whether by war, external aggression, armed rebellion or extreme economic disarray, His Majesty may, by Proclamation, declare or order a State of Emergency in respect of the whole of the Kingdom of Nepal or of any specific part thereof (Constitution, 1990: 98).

Article 115 (8) of the Constitution further asserts that except the rights to the remedy of habeas corpus under Article 23 of the constitution,
the fundamental rights to the citizens of the state will remain suspended as long as the emergency lasts. Pursuant to the suspension of the civil rights in accordance with Article 115(8) of the Constitution “no petition may lie, nor question be raised in any court for the enforcement of the fundamental rights conferred by such an Article” (Constitution, 1990:99).

The question integral to state-society relationships crucially tied to civil and human rights of the citizens are: will the emergency confer an unquestionable prerogative of power to the state? Or has the emergency led to a certain set of rules defining the function of the state in safeguarding the interests of citizens? In definitional terms, the emergency, in general is understood as the occurrence of an unanticipated situation requiring an immediate response; it is not a routine affair, it is rather temporary and it is a situation that cannot be confronted within a regular system. The emergency, therefore, confers the state with extraordinary power. Notionally, the emergency is a phenomenon linked with a violent threat to the state and aimed at protecting the broader interests of state and society. It is consensual as reflected in the Constitution and is thus obligatory for citizens. This interpretation of the use of emergency power suggests that it also as a process of normalisation of the course of a state facing an abnormal situation and jeopardising the citizens’ interests at large.

Taking the emergency as a given, the particular question involving citizens’ interests is how has the use of emergency power by the state affected the citizens’ rights and interests? As an effect of emergency, the first discernible impact on citizen’s rights has been the reversal of the process of empowerment of the people back to the state. The people’s power that laid the foundation of democracy in the state was shaken once the state commands unlimited authority by imposing an order that cannot be challenged legally in any court. Second, this led the state to adopt several laws curtailing the rights of the people, along with the declaration of an anti-terrorist ordinance with the provision of immunity and impunity to protect the interests of government functionaries. All civil rights have been curtailed by the declaration of national emergency on 26 November 2001 and rights pivotal to the interests of democratic dissent have been thoroughly crushed. The question of such actions does arise when international covenants pose barriers; such legal impediments are, however, crossed impudently. The use of emergency power conventionally implies curtailing some of the fundamental rights
of citizens. But on the questions of rights to life, rights against torture and dehumanising treatment, rights to expression and rights against preventive detention in incommunicado in particular, the state is obliged to observe and respect these as inalienable rights even in an emergency situation. Being a signatory to the International Covenant on Civil and Political Rights and party to the Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, it is binding on Nepal to abide by international human rights law.

Nevertheless, the anti-terrorist ordinance accompanying the declaration of the national emergency termed as the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO), ratified later by the parliament as an Act in April 2002 for a period of two years, has several clauses directly contravening constitutional order in the country. Section 3 of TADO allows the security forces unquestionable authority to arrest, search, detain and use necessary force to accomplish their objectives. Section 3 (ii) has broadly defined terrorist as any one who “commits, conspires, encourages, compels, participates, remunerates, publicises or hides persons committing such acts”. Section 5 provides “special authority” to security forces so that they can arrest without warrant any person suspicious of being involved in terrorist and disruptive activities. Under Section 9, people can be arrested and held for preventive detention for up to 90 days and detention for investigation for 60 days. Section 20 provides total immunity to security forces even in the case of extreme violations of human rights if any act or work performed or attempted to be performed is “in accordance with the rules formulated under this ordinance” (Informal, 2002:18-23).

This immunity provision has notionally dissociated the country from normal judicial practices. The coordination committee established under Section 13(5) of the ordinance is to be supervised by the Chief District Officer (CDO) and has compartmentalised the system of justice confining it to the arbitrary decision of the persons comprising the coordination committees. Hectic moves were made by parliament to further empower the CDO to imprison a person even on the most filimsy charge for a seven year period without trial. Although the declaration of national emergency that lasted for a period of 9 months from November 2001 to August 2002 has not suspended the rights to remedy of habeas corpus, persons detained under TADA have yet to enjoy this constitutional rights as the anti-terrorist ordinance has been extended
with a change in Section 9 by the king, further providing rights to the security forces to detain any person under suspicion for a period of one year without any judicial remedy (Nepal Gazette 13 October, 2004:10).

The impunity provision provided by the anti-terrorist ordinance has not only distanced Nepal from normal judicial practices, it has, in reality, killed the norms of constitutionalism. The anti-terrorist ordinance, therefore, has become a source of insecurity to the people, making the state the primary source of oppression in its hegemonic endeavour to remain unchallenged and unassailed by any forces of change. Regulations that the anti-terrorist ordinance has laid are the premises for organising violence fostered by the state. There is, thus, a growing sense among the people about the state’s withdrawal from the task of protecting the rights of its citizenry (Kumar, 2004:3). Instead, the state has asserted its authority under the provision of impunity granting its security forces the power “to literally get away with murder” (HRW, 2004:15). The mobilisation of the security forces under the umbrella of TADO has completely undermined the credibility of the notion of the independence of the judiciary and the “extraordinary power” conferred on it by the constitution in the service of public interests. With the reinforcement of anti-terrorist measures through a Royal ordinance and countervailing measures against “terrorism” Nepal has become a police state in the guise of consolidating national security so that the country can accept the dictates of Royal decrees. Article 31 of the Constitution 1990 is designed to prevent any question “in any court about any act performed by His Majesty” (Constitution, 1990:21).

The countervailing measure as a process is reflected in the Civil-Military National Campaign Plan (CMNCP) that the state pursued after 2003. This has made further dent on the issues of the rights of the citizenry of the Nepali state. In fact, the term CMNCP is used as a ploy by the Royal Nepal Army (RNA) to undermine any attempt to curb the security forces and the supremacy of the civil government that was already disrupted in essence by the assertion of the executive power of the state by the king on 4 October 2002 by ousting the elected government. On 4 November 2003, exactly after a year of the Royal takeover, the government appointed by the king adopted a Civil-Military National Campaign Plan (CMNCP) to “tackle the Maoist problem.” This Plan formulated a strategy encompassing “all elements of national power to include political, economic, information and diplomatic activities” in making a “grand strategic objective” to—
• conduct relentless operations against the Maoists to disarm them in order to stop violence and terrorism;
• negotiate with the Maoists when their military capability has been reduced considerably or if they agree to abide by the present constitution;
• enhance the credibility of the monarchy;
• provide fair and effective governance;
• continuously seek support and cooperation of other political parties;
• continuously seek the faith and support of the citizens;
• disarmament, demobilisation and reintegration; and,
• seek the support and cooperation of the international community, civil society, and the media (Brief, 2003:4).

The CMNCP has clearly stated its ultimate “desired end”: first, at the operational level, it seeks to militarily defeat Maoist capability and second, establish long-term peace and security under a multiparty democracy and constitutional monarchy at the strategic level (Brief, 2003:4). Under the CMNCP, the anti-terrorist measures have become essential in pursuing this objective. The state has taken the term “terrorism” as a convenient word to be used in the public sphere to garner support against counter-state activities. Terrorism has become the most powerful language used by the strategic elites to justify carrying out acts of violence against suspects or so-called anti-government forces with impunity. In such a situation it would be difficult to determine who and what actually becomes the perpetrator of violence. In this context, an Army Brigadier has even gone to the extent of arguing for the inevitability of TADA to continue the force mobilisation, asserting that the army “cannot be deployed by any other laws...[except] TADA” (Ojha and Chapagain, 2004). This assertion made by a soldier who is the chief of the legal section at the Army Headquarters responsible for preventing and protecting human rights violations has not only obscured the position of all existing laws, including Military Acts, but also threatens to put the country under TADA instead of national laws. Such absurdity, unfortunately, has forced the civil authority to be completely subservient to the demands of the security forces, thereby leading it to a suicidal decision to close the public sphere by reorienting national priorities from civilian to military interests.
4.2 HUMAN RIGHTS EMERGENCY

Despite constitutional as well as international commitments, cases of human rights violation occur, as states are inclined to safeguard their interests rather than honouring public pledges. Human rights was never seen as an important value to be preserved by statecraft in Nepal until 1948 when the Government of Nepal Act 2004(1948) incorporated certain fundamental democratic rights for the first time, those rights, however, were withdrawn within a year (Gupta, 1964:38). Constitution and constitutionalism became a reality in Nepal only in 1958 with the representative and civil rights acts conferred on the people but these were destroyed by a Royal coup in 1960. Throughout the panchayat system (1960-1990), the question of human rights, though a critical factor pertaining to the continuing popular struggle against the despotic regime, was pursued in relations to the political system and democracy. As the panchayat regime itself was introduced after the Royal coup in 1960 by dissolving and disbanding the parliamentary government and political parties, and has thus seen as illegitimate in the popular perception, struggle for human rights continued along the political lines reclaiming the space lost for democracy.

Unfortunately, Nepal has a tradition of not keeping the records straight. During the panchayat period, civil and political liberties and the rights of a person were under constant surveillance of what Hannah Arendt called “the invisible terror of a police state.” Atrocities and massacres were committed by the state; the state also found means of controlling dissent efficiently, becoming a serious violator of human rights in the process. Though disappearances and extra-judicial killings of political prisoners were reported during the panchayat period, no records are to be found to establish the case firmly. Evidences were destroyed even in the case of persons arrested under the suspicion of being instrumental in the bomb explosions in different premises in Kathmandu in 1985.

A report of the Committee investigating involuntary or forcible disappearances of the people in the post-1960 period identified the names and addresses of 35 persons who had been made to disappear by the state, of whom 5 were identified as killed (Committee Report, 1992; INSEC, 1994). Extra-judicial killings of political prisoners were the norms during the panchayat period. However, no legal hearings of these cases ever occurred. Even the findings of the Mallik Commission report on excesses committed during the period of Jana Andolan 1990 were
shelved without bringing the culprits to the law by the democratic governments established after April 1990. Under democracy, Nepal had a prime minister who responded to human rights activists saying, "All might have been already killed," when they approached him to investigate the case of disappearance. Presently, Nepal had a prime minister appointed by the king whose public utterances are the ultimate reflections of the type of the regime the state has, when he said those people accused of having been eliminated by the security forces may have left the country for foreign employment! The profound reluctance on the part of "responsible" persons to take the cases of human rights seriously and their common aversion to the question has created a situation that can be seen as an aberration.

In this context, the Interim Cabinet’s decision (composed of the Nepali Congress party, United People’s Front of Communist Parties, royal representatives and the independent intelligentsia) can be recalled here for confirming the trend towards clemency on violations of human rights by the state apparatuses. The Interim Government in February 1991 made the following decision regarding the Mallik Commission report:

Despite some excesses that had been committed by the police during the Jana Andolan [People’s Movement 1990] due to the defective [political] system, no action would be taken on the basis of the findings of the report of the [Mallik] Commission in view of the holding of forthcoming [national] elections in a free and fair and peaceful environment for the commencement of which the police will have a significant role to play requiring to keep the morale of the police forces high and its administrative stability and efficiency undaunted as the police has also to carry the responsibility of internal security (unofficial translation, emphasis added).

The leniency on the part of the establishment, therefore, seems to suggest that human rights violations can be carried out with impunity. The cases of the people who lost their lives in the past 30-years of struggle for democracy and human rights were in the process shelved as inconsequential. The country has experienced numerous violent upheavals, deaths and disappearances engineered by the state. But there is no record on the Nepali Congress and other party rebels who have vanished without a trace or who have been killed by security forces during their campaigns against the panchayat regime. However, there are records of some of the major incidents that occurred in the past in which mostly unarmed people were massacred by state forces. The cases involving severe human rights violations by the state, for

The pattern of killings and disappearances along with other types of human rights violations continued in the post-1990 period. In most cases involving human rights violations the state was the major offender. The mushrooming growth of political protests under democracy and the unrestrained use of police forces by the state have created mayhem and had led to the killings of many innocent adults and children in Kathmandu as well as other major cities of the country in incidents where the government acted irresponsibly. Moreover, there are non-state activists who have violated basic human rights of the citizenry. Table 4.1 indicates the extent of human rights violations in the initial phase of democracy in Nepal beginning with the state's swing towards violence in 1992.

Table 4.1: Statistics on Human Rights Violations between 1992 and 1995

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Rights Violations</th>
<th>Total No. of Victims</th>
<th>Total Killings</th>
<th>Total Arrests/Torture</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>By State</td>
<td>By Non-State</td>
<td>Total</td>
<td>By State</td>
</tr>
<tr>
<td>1992</td>
<td>114</td>
<td>179</td>
<td>293</td>
<td>1,054</td>
</tr>
<tr>
<td>1993</td>
<td>329</td>
<td>523</td>
<td>852</td>
<td>4,493</td>
</tr>
<tr>
<td>1994</td>
<td>247</td>
<td>644</td>
<td>891</td>
<td>4,215</td>
</tr>
<tr>
<td>1995</td>
<td>153</td>
<td>924</td>
<td>1,077</td>
<td>2,286</td>
</tr>
<tr>
<td>Total</td>
<td>843</td>
<td>2,270</td>
<td>3,113</td>
<td>12,048</td>
</tr>
</tbody>
</table>


The human rights situation deteriorated with the onset of the Maoist insurgency on 13 February 1996. Grave threats to rights to life occurred immediately after the CPN (Maoist) declared their "People's War" and violence erupted as they attacked police posts as well as
civilians marked as the “enemies of revolution.” The initiatives for the declaration of the “People’s War” was taken after the split of the United Left Front Party, which had the third largest number of seats in the House of Representatives between 1991 and 1994. The more extreme faction of the party went underground to emerge as the CPN (Maoist) party after the Third Plenum in March 1995 after a decision to initiate a “People’s War.” The party undertook the Sija campaign in their stronghold districts of Rolpa and Rukum for popular mobilisation which led to police retaliation and brutal repression resulting in innumerable deaths. It gave Maoists sufficient reason to declare all out war against the state (INSEC, 1996; Maharjan, 2000; Sharma, 2001; Thapa with Sijapati, 2003; Karki and Seddon, 2003). The ruthlessness of this police operation code named “Operation Romeo” became a turning point in national history had spread the seeds of irremediable violence resulting in a national calamity. According to independent observers, the state suppression was akin to unleashing the reins of state terror. Arsons, atrocities, torture, rape and plunder were the order of the day, driving away nearly 6,000 frightened people from villages (INSEC, 1996: 12).

Following this unfortunate event, another major police operation “Kilo Sierra Two” was undertaken by the government that lasted between 1998 and 1999. It resulted in the highest number of indiscriminate killings totalling 596 deaths in comparison to 102 deaths during Operation Romeo. In both cases, killings by the state were numerically higher than the killings instigated by Maoists. The state killed 71 people against 31 executed by the Maoists during Operation Romeo. Comparable figure of people killed by the state is 457 against 139 people killed by the Maoists in the Kilo Sierra Two operation (Maharjan, 2000:172-173). Police brutality under the façade of democratic polity was no doubt unbridled as they were made the first target of the Maoists insurgency in remote villages.

Nevertheless, Maoists cannot pose simply as victims of state repression. They also become tyrannical, killing without remorse any one who was not with them. They killed the aged by silting their throats for refusing donations and opposing their excesses. They even killed disabled people by chopping their hands and legs if they refused to join them or serve meal to intruders. Scissoring out the tongue of opponents and breaking their backbone are common practice of the Maoists. The savagery of Maoists violence, for instance, reminds one of the manners of Foucault’s description of the treatment of “[t]he body of the condemned” (Foucault,
Robert Gersony has reported the barbarous torture and killings by the Maoists and “how the crowd of Maoists would watch their leaders break every bone in a “class enemy’s” body, then skin him and cut off his ears, lips, tongue and nose, before sawing the body in half or burning it” (Gersony, 2003; Perry, 2004:14). Despite such heinous methods applied by them, the number of victims tortured by the Maoists reportedly lower than (180) attributed to the security forces (1,111) in 2002 (NHRC, 2003:36). As the police and later the security forces become licensed to kill any one calling them Maoists, so have Maoists become free to spread terror by identifying their victims as “enemies of revolution.” Their victims include poor peasants, students and teachers, labourers, petty traders, civil servants, health, social and political workers and the police. Extortions, lootings and forcible entry into private residents both for shelter and succour normally practiced by Maoists have also drawn the security forces’ ire against the common people.

The situation developing in the country, therefore, has hampered efforts to promote human rights practices. Difficulties in preserving the sanctity of the idea of human rights arise as violations of human rights are protected behind the veil of the doctrine of state sovereignty. The crisis of the state, however, has provided the country with a test case to maintain an acceptable standard of human rights commitments under democratic dispensations. Rather than trying to rescue the state from the challenges of militancy by invoking the rights to repression with the use of forces, the state should have tried to absorb political dissent with the power of persuasion than the power of force. As democracy coexists with dissent, respect of civil liberties and human rights understandably make democracy vibrant and coherent. Political repression is neither a palliative nor a panacea for continuing the democratic order. Political repression violates personal rights, including freedom from torture, arbitrary detention, arrest and detention for political views, political killings and the use of abduction. Similarly, it curtails civil and political liberty of citizens. These categories are integral to the democratic practices of the state. The state’s response to the expression of opposition or political dissent, thus, largely determines the human rights situation in the country. No doubt because of this reason, the state becomes the target of both domestic and international human rights watchers for scrutiny whenever violence of any magnitude occurs. The Maoists insurgency has therefore become a test case for Nepal as far as its obligations to human rights is concerned.
The “People’s War” set forth naturally with the Maoists policy of violent opposition to the state. It provided a catalyst for creating a condition of human rights emergency. Being anti-state, violence is embedded in the insurgency as open defiance of the power and authority of the state by members of the same community and cultural groups commonly sharing the territory of a recognised state. The Maoists have claimed that they have taken up arms because all past efforts to reform the state has failed. They have also unflinchingly stated that their ultimate objective is the overthrow of a monarchical and democratic regime through violent upheavals to establish a republican state. They have, thus, no illusion that “Without defeating enemy’s military offensive through the development of appropriately powerful military force, neither local people’s power can be protected nor can it be consolidated. Hence, the first condition for defending local people’s power and its consolidation is the development of people’s military power” (in Karki and Seddon, 2003: 236). Following Mao’s dictum that “political power grows out the barrel of a gun,” the document of the Fourth Expanded Meeting of the CPN (Maoist) convened in August 1998, titled “Experience of the People’s War and Some Important Questions” clearly states that the “experience of the people’s war...has repeatedly shown that people without military power will retain nothing for themselves.... That is why it has become necessary for the Party to concentrate its principle attention on the question of building the army” (in Karki and Seddon, 2003:233).

The revolutionary rhetoric of the Maoists justifies violence as a means to power. Violence and bloodshed are the natural consequences of the insurgency that the Maoists have unleashed to capture power. The use of force has become the unidimensional power of the party. The Maoists have the experiences of the indigenous and the world communist movements behind them as a guide to action. Since they have decided to ignore the electoral path to power and have gone underground cherishing state power, the only logical option remaining is to pursue armed struggle to realise the objective by rationalising violence. Their plan for the initiation of armed struggle is clear as is their statement that “everything is an illusion except state power” (The Worker, 1996). As the Maoists’ violence progresses, their strategy is also becoming increasingly discernible.

One of the basic features of Maoists violence is, therefore, the spread of terror. Terror, as a result, has become indistinguishable from terrorism. Ever since the lessons of the Reign of Terror committed in
the French Revolution have spread, the perpetrators of violence, including Maoists in Nepal, have used terror as a signal to dramatise their resolve to act aggressively. They want to demonstrate that the target is vulnerable, and that the perpetrator can strike at targets at any time of its choosing and cannot be cowed down by any sorts of retaliation. The meaning that the signal conveys to a wider audience is usually “demands for recognition, redress, autonomy, or transfers of power” (Tilly, 2004:9). The “People’s War” in this sense has no dispersed targets other than coaxing the state to transfer power by dethroning monarchy and parliamentary democracy. The Maoist ideologues, in fact, have no other objective—not even the creation of a condition for social equality through their “revolution,”—than asserting power. The Maoists have camouflaged their basic instincts for grabbing power after they discovered that they were not capable of wrenching power in the competitive electoral politics.

The second strategy of the Maoists is to shake up the state by maximising the chances of socio-political and economic destabilisation and by arousing resentment against the government for failing to prevent the institutional and functional collapse of the state. Their activities targeting political, social, economic and service infrastructure have led to political vacuums in villages and districts, closure of industrial and economic activities. They have discouraged tourism and trekking, and forced exodus of people because of lack of work, commensurate with the Maoist objective of establishing “Naya Satta” (new regime) abandoned territories. It is not their policy of weaning out people from the state but of forcing them out from their own domiciles where the Maoists have apparently succeeded in establishing their base areas. The shrinking of the state to district headquarters surrounded by barbed-wire fences and landmines and security forces in defensive positions has provided the Maoists a god-send opportunity to unleash their own reign of terror in areas where people not complicit with their rein cannot survive. The “reactionaries” have either to be expelled from the villages or eliminated through violence. Even the cadres of Jana Morcha—the fraternal party of the Maoists—who dispute the heinous crimes committed by Maoists, have become targets in villages and towns, leading to serious scuffles.

Sharply declining economic activities except for relief work carried out by the World Food Programme (WFP) and other agencies like World Vision in some districts have compounded the plights of the people of
already famine-stricken and food scarce territories, particularly in Western Nepal. The property and land-grab movement, looting of Banks, destruction of civil infrastructure like electric power houses, telecom towers, factories coupled with Nepal bandh and blockades that Maoists occasionally enforce have completely paralysed the state as a whole signalling to the international community the message that Nepal is unsafe. The Maoists have intensified such activities in the country in accordance with the decision reached at the March 1995 Plenum of their Central Committee when they opted for the armed struggle (The Worker, 1997). By undertaking this strategy of conflict, Maoists have thoroughly succeeded in putting the national economy into disarray, though the government claims that the per capita GNP of the Nepali people has increased impressively to $276 in 2003/04 from $250 of the previous year (MoF, 2004:10).

The third strategy remains securing the base area and then to spread out through intimidation, eviction, torture, killings and coaxing the people through extortion and imposition of taxes as well as attacking enemies from their camps. The basic elements in founding the base area are not related to their power of persuasion or coercion but to their policy of ethicising the conflict. Their programme and promises of ethnic and regional autonomy are evident in their announcement of establishing various autonomous and regional “People’s Governments” from the Mountainous to the Tarai regions with the claims of expanding their support base around the country. By issuing a separate budget, introducing a visa system for visitors to the Maoist infested areas, taxing the inhabitants, charging levies on commercial, tourist or trekking transactions and extracting commissions from sale of timber and herbs like yarshagumba, the Maoists have registered a semblance of independence by creating a state within the state.

These three strategies are substantially intertwined with the fourth strategy of undertaking comprehensive military preparation for defeating the state forces and for the planned takeover of the country. Indoctrinated with the concept of “protracted war,” the Maoists have adopted a two-pronged approach through the fusion of military and political and urban and rural action for infrastructure support, always focusing on the target of violent armed confrontation. The method they use is terrorism, which is supplementary to their ultimate strategy of state capture, as Maoists have not even spared ambulances carrying maternity patients from shooting resulting in deaths, bombing of
maternity-child care centres, creating bomb hoaxes in hospital, hurling bombs at peace marchers and shooting indiscriminately at passenger buses by arousing infinite fear. These cases suggest the crimes against humanity that terrorism has unleashed in the social sphere in Nepal.

At the political level, the Maoists have already proven their ability to destroy the authority of the state: first by pushing the state out of almost three-quarters of the territories of the country and by confining the government to district headquarters and then by creating an unpropitious situation in the country and by forcing postponement of parliamentary elections as scheduled for 2002, and again in 2003 by the king's appointed government, thereby derailing the democratically-elected government and questioning the integrity of monarchical power. Though the government had committed itself to holding national elections in April 2005, the possibility that this mandate could ever be implemented without pacifying the Maoists was undermined by the uncertainty of the Royal coup of 1st February 2005.

The Maoists who have also established their political and military acumen by creating the condition for the government to concede to the reality of "two states and two armies" within the state in their secret negotiations with the Palace leading to the "ceasefire" of January 2003, would certainly foil any elections. Thirdly, the Maoists have largely succeeded in undermining state authority, particularly after 4 October 2002, as a consequence of the aspersion in the popular perception against the king's appointed governments that broadly face a severe legitimacy crisis. As the executive as well as the chairperson of the cabinet formed in the aftermath of February 2005, the king has been castigated both by Maoists as well as the political parties representing the people. Depending on the security forces, the monarchy is ruling the roost, beclouding the future of institution by fanning the flames of public antipathy and popular consternation. The direct violation of the rights of the people by the monarchy has plunged the country into disarray. The attempts at establishing a highly unacceptable and incompatible social and political order in a country struggling for democratic rights negate the fundamentals of human rights, thus, subverting national cohesion and delegitimising the personal rule of the monarchy.

The weakening of the government as well as the dissatisfaction with the monarchy has further strengthened the Maoist authority imposed on the society by means of violence and terror. The Maoists prevail not
only in the areas where they have established a quasi-state, but also in areas where the Nepali state generally functions through extortions and threats of armed intimidation. The Maoists' extortion network is not only confined to villages and towns but also to the capital city of Kathmandu and beyond. Perhaps this is the reason why nobody doubts that the Maoists are amongst the richest "terrorist groups" in the world with a "money bag" of $64 to $128 million (Rs. 5 to Rs. 10 billion) in the year 2000 (Lintner, 2000). The business houses in Kathmandu, for instance, are the major targets of Maoists extortions inside the country. Reportedly, the Kathmandu-coordinator of the Maoists' Special Task Force, Prashanta (Sadhu Ram Devkota), had transferred an amount of Rs. 20 million to the Maoist high command before his arrest by security forces in October 2004. Five of the Maoists district level leaders, who had surrendered and were also present at a military press briefing, reportedly admitted that they had collected Rs. 73.5 million as donations from different sources (Rajdhani Daily, 15 June 2005). Mohan Gopal Khetan, one of the top industrialists of Nepal, has publicly admitted that he had not only provided donations to the political parties but also the Maoists as any refusal to do so would be a sure incitement to murder (Nepal Weekly, 1 August 2004:20). The Maoists have ascertained this position not because of their economic or social reform programmes but because of their militaristic prowess and capacity to indulge in violence.

There is thus the probability of a situation developing in Nepal in which the Maoist ideology of revolution would completely be dissolved by greed and the economic benefits derived from violence and intimidation as has been witnessed in other countries engulfed in similar conflicts. Although the Maoists have yet not been associated with illicit trade and trafficking of material and human resources, their involvement in contraband transactions has been reported time and again. This inclination to reap monetary benefits perhaps may lead the Maoists to continue with the violence and threats of intimidation which have already paid dividends for them in different ways. First, with the land confiscated from landlords and exploitations of the labour of teachers, health workers and government officials by charging them 5 to 10 percent and sometimes even 25 per cent of their fixed salaried income as "revolutionary tax," the Maoists have cultivated habits to swell their coffers. Villagers regularly provide free meal and shelter to Maoists under duress. The cost-free use of children and villagers as
porters by Maoists used in different odd jobs like digging trenches and bunkers, felling trees for road blocks and using them as saboteurs are other examples of the way their labour is being exploited.

Second, pillage and plundering have become major sources of income for Maoists. The large-scale looting of banks and households has enriched the Maoists, enabling them even to finance arms purchase and wage war. Between 1996 and 2001, Maoists looted Rs. 451 million from different banks (Kumar, 2003:188). As a report says, Maoists are amassing a big fortune by taxing the yarshagumba traders their collections, amounting to Rs. 180 million in 2004, largely have helped finance their war efforts and have ensured their survival. Collecting taxes from traders on transactions of this herbal plant known as the Himalayan Viagra remains one of the largest sources of income for Maoists. They expect to earn over Rs. 220 million as revenue from the yarshagumba traders in the year 2005/06 for which they have already received a deposit of Rs. 7.5 million from different bidders (Nepal, 2005). Third, they also raise protection money regularly from rich politicians, businesspersons, and industrialists. Protection paycheques are supposed to have been paid by the home minister and some top ranking security personnel to Maoists. Fourth, the Maoists are also stealing resources from relief supplies, charges of work permits from INGOs and NGOs and have been practicing rent seeking by perpetuating conflict. Finally, they are also receiving kickbacks from petty transactions conducted locally by traders and merchants through artificial fixing of prices of commodities. To gain from such economic dimension of conflict does not require Maoists to hold on to the reins of power of the state, it requires merely breaking the laws that the power of the state cannot uphold any more.

4.3 HUMAN RIGHTS DEHUMANISED

When the state leadership and institutions fail, it is the people who suffer most and die unnatural deaths, becoming victims of intimidation and violence. Internal armed conflicts have ugly political and humanitarian repercussions, particularly when anti-state forces unleash violence aimed at seizure of state power, as their objective. The discourse between the people's sovereignty and state sovereignty has long led to legal disputes. But as the state is the embodiment of the sovereignty of a nation, the community of sovereign states casts the defence of state sovereignty as a priority agenda. The accreditation of
sovereignty to the state, however, does not imply that state enjoys unlimited power to do what it wants to do to its own people. Attributes to use of force by the state without restraint is not permissible because sovereignty means responsibility. Hence, the state is primarily responsible for upholding the dignity and basic rights of all the people within a state. Sovereignty as responsibility to protect the rights of the citizenry has led to reconceptualisation of state-society relations in the post-Cold War period. The loaded meaning of terms such as sovereignty as control to sovereignty as responsibility has recharacterised the functions of the state in three meaningful ways. First, state authority has been made responsible for protecting the safety and lives of citizens and promoting their welfare. Second, the responsibility of the authority to the citizens of the state is irremediable. And third, state authority is responsible for its actions, that is, it is accountable for any acts of commission and omission (ICISS, 2001:13; Reisman, 1990:869-872). Such a shift in defining the sovereignty of the state eventuated in making the state primarily responsible for its normative obligations in preserving human rights and human security.

The security practice of the state, however, contradicts such a mode of thinking in state-society relations. States everywhere are driven by the urge to control rather than act responsibly. And the mechanism of control is the use of force by passing various legislations to cover their deeds within the framework of law and order. States have the urge to control and dominate whenever the basic instinct of asserting a power is challenged by oppositional forces. The security of the state is a façade that legitimises those prone to the power of dominance. As the repository of power is synonymous with violence, state functionaries become violent even under a slight pretext, notwithstanding their commitment to contrary causes.

The responses of the Nepali state against the Maoists insurgency can be explained as a way of upholding the repressive power of the state to control and dominate than actions undertaken to prevent further escalation of violence. Notwithstanding the justification for armed rebellion and causes of conflict, the attack on the human rights situation in the country can be largely attributed to a situation created by forces of violence such as when a military post was directly attacked by Maoists and soldiers were killed and there was looting of arms and ammunition on 23 November 2001. The Maoists repeated their feat on 25 November in another place. These actions transformed the situation
from a “law and order” problem to a situation described as a challenge to “national security and integrity,” opportunistically interpreted by the state authority though the declaration of a national emergency on 26 November 2001. By invoking Article 72 of the Constitution of 1990, the government promulgated the anti-terrorist ordinance 2001, declaring the Maoists as “terrorist” and announcing the counterinsurgency mobilisation of the armed forces.

The Royal Nepal Army (RNA), as a matter of fact, was simply an onlooker for almost six years which saw a dramatic rise in bloodlettings. Even after they were released from the barracks for supposedly preserving the “security and integrity” of the country with the provision of impunity under TADO in November 2001 leading to increasing deaths, no change occurred in the material situation on the ground despite the well-oiled military machines both because of the generous arms shipments from friendly countries and the increase in the numerical strength of the armed forces supported by paramilitaries as well as the civil police. The result of counterinsurgency mobilisation with guns, stocks and barrels was, however, unexpected: “By early 2004, the security forces [had] effectively retreated to the heavily fortified bases in the district headquarters, ceding control of much of the countryside to the Maoists” (HRW, 2004:12). This is the situation that the country faces, leading people to be more inquisitive about the claims of the military overpowering the Maoists insurgents.

According to the Himalayan Times, the claims of the RNA spokesperson Brigadier Deepak Gurung that the military had a presence in about 2,000 of the 4,000 villages of the country were wrong. Out of 2,000 villages, military presence was increased to 900 villages after the then government declared a national emergency, while the RNA was preparing to increase its presence in 100 more villages (Himalayan Times, 20 November 2004). Much of the territory of the country, therefore, had become a grey zone where both the military and the Maoists were playing hide and seek.

The data below show that the killings intensified immediately after the declaration of the emergency and the counterinsurgency mobilisation of the armed forces. Between 13 February 1996 and 23 January 2002, the state was responsible for killing 1,683 persons against the 910 people killed by the Maoists, of whom 489 were police personnel, making a total of 2,593 people killed (Informal, 2002:17). A sharp increase in killings by the security forces—nearly twofold in the
year 2002—in comparison to the record available of the past six years suggests the state has become a terror machine in the pursuit of counterinsurgency. Indeed, the year 2002 has been the most violent year so far in the nearly decade-old insurgency. The year 2002 shows the excesses committed by the protagonists, with over 22 major attacks mounted by the Maoists of which only three were successfully foiled by the security forces. The use of landmines, child soldiers and reckless violence has taken the tolls of both civilians and combatants. According to a report, “the same excesses that were once used by the government in Rolpa and Rukum [districts] are being used by the Maoists” on a national scale (INSEC, 2002:5). The records of the Ban Landmines Campaign, Nepal, revealed on 2 December 2004 indicate that some 1,000 people had become the victims of landmines blasts of whom 432 were commoners including (92 children, 45 women) in the six months between January and June 2004. Landmines explosions killed 82 police, 70 APF and 240 RNA personnel. Likewise, 152 Maoists were killed by the blasts. Of the total 976 victims, 280 died on the spot. During 2003, 48 civilians died of landmines explosions. In the first 5 months of 2004, that toll has risen to 120. In 2003, 225 civilians were victims of landmines, 177 survived and 48 died. Of 120 dead by landmine blasts in 2004, 32 were children (Saptahik, 3 December 2004).

The brutal retaliation of the security forces can be seen as a reflection of their understanding of the challenges posed by the types of violence. The mission of the security forces was to “disarm and defeat” the Maoists. In the understanding of the security forces the Maoists are any people, including civilians who give shelter, food or money to the armed guerrillas, irrespective of whether this was done under duress. None other than the Commander of the Armed Services gave this blanket definition of Maoists insurgents to Amnesty International delegates in September 2002 (AI, 2002: 8). Thus it was not unusual for a Police Chief to admit that they had wreaked violence on commoners by killing innocent people indiscriminately and ill-treating the local folks while on patrol (Kathmandu Post, 12 May 2001). Table 4.2 provide a fact sheet on the situation of violations of human rights following the Maoists insurgency.

The total number of killings from the date of the beginning of the Maoist insurgency is 10,693, out of which 6,998 persons were killed by the state and 3,695 persons by Maoists. Rebels have so far abducted 22,084 persons but released a majority of them (INSEC Data, 25
Table 4.2: Statistics on Human Rights Violations between 1996 and 2004

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Rights Violations</th>
<th>Killings Rights Violations</th>
<th>Total Arrests/Torture</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>By State</td>
<td>By Non-State</td>
<td>Total</td>
</tr>
<tr>
<td>1996</td>
<td>438</td>
<td>1,175</td>
<td>1,613</td>
</tr>
<tr>
<td>1997</td>
<td>449</td>
<td>1,939</td>
<td>2,388</td>
</tr>
<tr>
<td>1998</td>
<td>1,020</td>
<td>4,173</td>
<td>5,193</td>
</tr>
<tr>
<td>1999</td>
<td>783</td>
<td>2,240</td>
<td>3,023</td>
</tr>
<tr>
<td>2000</td>
<td>996</td>
<td>2,705</td>
<td>3,702</td>
</tr>
</tbody>
</table>

After Emergency

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Rights Violations</th>
<th>Killings Rights Violations</th>
<th>Total Arrests/Torture</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>By State</td>
<td>By Non-State</td>
<td>Total</td>
</tr>
<tr>
<td>2001</td>
<td>1,458</td>
<td>3,689</td>
<td>5,147</td>
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<tr>
<td>2002</td>
<td>3,663</td>
<td>4,638</td>
<td>8,301</td>
</tr>
<tr>
<td>2003</td>
<td>19,009</td>
<td>6,753</td>
<td>25,762</td>
</tr>
<tr>
<td>2004</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>


These data should be read cautiously only as indicators because of continuing updating of figures from different sources.

Note: *Includes 500 suspected Maoists killed as claimed by the RNA spokesperson on 19 November 2004.

December 2004). As per Table, the total number of the people killed has reached 11,848. This figure does not tally either with INSEC or RNA estimates. According to data released by the Royal Nepal Army Head Quarters and the Home Ministry, security forces killed 2,700 Maoists, 500 suspected Maoists, and injured over 200 Maoists between 27 August 2003 and 19 November 2004. During the period, 1,147 Maoists had surrendered of whom 1,091 were released, 50 are in detention and 258 were sent to jail (Kathmandu Post, 20 November 2004; Himalayan Times, 20 November 2004). This is the official figure even though it does not match the total number of Maoists who have surrendered. In between, an RNA spokesperson states that casualties' figures since 1996 are 6,500 Maoists and 1,593 civilians killed since 1996. Among the security forces killed were 1,265 police since 1996, 254 armed police forces since 2000, and 572 soldiers since 2001. The official record puts the total casualty at 10,184 deaths (Kathmandu Post, 20 November 2004; Himalayan Times, 20 November 2004). However, the estimates
The fighting can be classified into two broad categories: skirmishes against the “enemies of the state” and against the “enemies of revolution” that have degenerated to the level of butchery in which the Maoists and security forces sharing the same cultural, religious, social and economic background have been at each other’s throat. Their killing sprees have made them heroes and brutalities are rewarded, particularly in the security forces, with medals and promotions.
Reports of security forces’ indulgences in “extortions and blackmail, visiting hapless families and demanding money to ensure the safe release of their relatives from custody,” allegedly with the consent of their superiors, have surfaced (HRW, 2004:2). The Chairperson of NHRC, Nayan Bahadur Khatri is on record as having said that industrialists and businessmen have been threatened both by the security personnel and the Maoists with terrorist actions in case they fail to donate money as demanded (Kantipur, 13 August 2005:1). The logical conclusion is that both forces are guilty of extortions. Criminal behaviour of the members of security forces in Kathmandu by killing innocent people, demanding money from restaurant owners at gunpoint and even daylight looting of jewellery shops has led to lawlessness (e.g. Gaunle, 2003:38-43). Attributing its source to a highly placed Home Ministry official, a news weekly has reported that the CDOs (Chief District Officers of the Government) posted at districts infected by the Maoists in eastern and western Nepal are regularly paying “royalty” to army commanding officers of the districts to the tune of Rs. 50,000 per month to buy security (Jana Aastha, 11 August 2004:3), although the take home salary of the CDO is not more than Rs. 12,000, excepting allowances. Several reports have identified the nature of violence committed by security forces, topping the list are rape, killing after rape, forcible eviction, disappearances, torture and extrajudicial killings (AI, 2003; 2002a; 2002b; 2001; 2000; AIR, 2003; INSEC, 2004). These are issues related to direct threats on the human person against which there are no means of redress.

The security forces have in effect converted the entire state into a battle zone. No neutral space exists for any one and every action they commit anywhere is treated with impunity. There are no norms that govern them except the ambition of erasing Maoists out of the national landscape. Perhaps this is the only reason why the security forces have turned so brutally against citizens of the state, equipped with the power of putting them either in the category of Maoists or commoners. This convenient retooling of the categories of the citizens by the organs of the state have made citizens lose the sense of belonging to the state since both the security forces and the Maoists treat them as aliens rather than as compatriots. Endemic violence and sufferings, thus, have led the situation to evolve from a culture of silence to a culture of terror. Rape, torture and abduction are common in the Nepali state and here violence, victimhood and social sufferings are the results of the
defence of the national interest. Maoists have their “sex slaves” in the jungles, and numerous reports have been recorded the cases of rape, torture and abduction perpetrated by the security forces, especially after the imposition of national emergency and the adoption of TADO, privileging the men in uniform to unaccountability. The following episodematic accounts provide a picture of the dehumanising impact on human security in the country at the beginning of the new millennium.

Rape: There is a general unwillingness among the people, particularly among those in government, to recognise violence against women as a problem. Despite rape being legally considered as one of the most heinous crimes committed against women, irrespective of their age, and although even martial rape is punishable by law, such serious offences against women are usually tolerated and goes unpunished; indeed there are cases of women reporting rape being raped by the police within official premises. Rape is not only a social aberration and crime, it is also a deliberate policy choice made in certain circumstance to harm and destroy the virility of the opponents by violating the chastity of women physically, thereby humiliating the sanctity of a people by the dominant group. Killings after rape and gang rape by security forces have been widely reported but have not found any judicial remedy. Although reporting on rape is numerically understated, rape has led to the damage and destruction of the sanctity of women and has pushed them to join the rebel forces if they have survived it. There are stories of some mothers and daughters joining Maoists forces after the security forces raped them repeatedly after having killed the bread earners of the house. Cases of rape against the women of poor and minority groups such as the Dalits and Muslims are frequently reported but data on rape are blurred as is evident in the NHRC, report of 2003. It has recorded 965 cases of reported rape and 211 cases of attempted rape between 1994 and 2001 but failed to classify the perpetrators (NHRC, 2003:75). There are records of 4 cases of rape and 3 cases of attempted rape by security forces in 2001 (INSEC, 2002:177). After the declaration of emergency, the cases recorded have increased manifold. In 2003 there were 9 cases of rape and another 8 cases of rape were attempt reported in which security forces were involved (INSEC, 2004: 339). Cases of rape victims have been registered even at the NHRC, but that Commission is not in a position to pursue these cases in the absence of adequate means and resources (CIJ, 2004:88).

One of the widely reported cases of rape, torture and extortions involve two Muslim girls of Nepalgunj, Banke district in south-western
Nepal, who were taken into custody by the army of Chisapani Barrack on 3 April 2002, detained and repeatedly raped “for the escape of Masgit”—the father of one of the girls—who had not paid the agreed upon sum of Rs. 1.1 million part of his deal with the army. This case is not related to the Maoists insurgency. It involved charges of drug trafficking, though it is difficult to ascertain whether it was fabricated or real. Masgit Maniyar, charged with drug smuggling, was arrested by army officials in February, tortured and released nearly a month after his wife paid Rs. 700,000 to Captain Ramesh Swar on the condition of paying back the remaining money of a total of Rs. 1.8 million agreed upon by Maniyar for his freedom. Maniyar fled to India as he failed to pay back the money to the Army Captain within the stipulated period which was a week from the date of his release. This led to the arrest of Tarnum (16) and Tabsum Maniyar (18), the daughter and the niece of Masgit and unfolding of their trauma and mental agonies as both of them were repeatedly raped and were told to keep quiet (e.g. AI, 31/072/2002:12-13). Their brutalisation, however, came into the spotlight after their release from army custody but was closed after they recasted their stories and said that they had not been raped.

Similar incidents have occurred at different places at different times but most of the charges were similarly withdrawn because of the fear of similar ordeals. The accused being the security forces, the victims of the rape and their families could be falsely charged with being “terrorists” and the bargain could mean the worst consequence for them. Therefore, the people caught in the vortex of conflict become hapless as their plights, ordeals and victimisation continue without any legal recourse. The ordeals of four Kamaiya (bonded labourers) women of Dauji village of the Kanchanpur district of south-western Nepal, raped by four security personnel at gunpoint on 6 December 2003, is another example of how the administration manipulates such cases, humiliating the victims further until the dismissal of the cases related to the heinous crimes.

When they were accused of rape the security forces invited the victims to an army barrack and a police post to identify the culprits. When the women failed to identify the rapists, they said neither the army nor the police personnel were responsible for the alleged crime. On 18 January 2004, however, the victims told stories of their agonies to journalists and publicised the case but to no avail. The CDO, who had been following the case, became furious. He was apparently about
to make compensations of Rs. 10,000 each to the victims. But since the case had been publicised, compensating the victims was not possible any more. Similar rape cases occurred in Tapuwa, Khaskusum and Kohalpur villages. But always the security forces denied their involvement. In most of the rape cases the victims become hostile once pressure mount on them against pressing the case both with incentives and threats as happened in Bardiya district where seven personnel of the Armed Police Forces (APF) raped two underage girls of 14 and 16. These poor girls working at the construction site of the APF building were given some money to close the case. Law professionals feel that only 10 per cent of rape cases are normally filed in the court and even this figure has gone down to 5 per cent because of violent conflicts recently. Such cases involving state power are rarely filed. Thus nobody can imagine the real dimension of the heinous crime being committed in the country (Adhikari, 2004:27-29).

Although in some cases the accused persons admitting to the crime have been dismissed from their job, no one has been subject to legal proceedings and punished appropriately. The army has taken some measures by dismissing some of its personnel for committing rape. But there is no evidence of public trial in civilian cases. On 31 December 2004, the RNA spokesperson, Brigadier Deepak Gurung, told the press that six soldiers found guilty of having raped a 15-year-old girl at Bharaul village of Sunsari district of southeastern Nepal on 8 November would be handed over to civilian court. To the surprise of many, they jumped the jail. The common excuse that the authorities have in such extreme cases of violation of human rights even to the extent of murder after rape, is that security personnel have their own problems. As they are far away from their home and cannot keep their families with them, “such incidents” [of rape], according to the Police DSP Ram Kripal Shah, “could have resulted because of this.” Such a callous reason is provided as a justification for covering up a crime as heinous as rape! (CIJ, 2004: 85-90).

Torture: Although Nepal is a party to the UN Convention on Torture, which it ratified in 1990; there are no legal provisions in the country’s law that make torture a crime. There is no doubt a prohibitive clause against torture in Constitution 1990 of the country. Article 14(4) clearly prohibits “physical and mental torture” or “any cruel, inhuman and degrading treatment” and states, “any person so treated shall be compensated in the manner as determined by law” (Constitution,
As in cases involving rape, the role of the judiciary and medical professional is crucial in proving the impartiality of justice in cases involving torture/custodial deaths/extra-judicial killings. Evidently, the custodial death of Prashanta (Sadhu Ram Devkota) at an army barrack in Kathmandu on 19 December 2004 was certified by medical practitioners as suicide who endorsed the claim of the army. But the situation in which the Lieutenant Colonel of the army described the 5' 6" tall Maoists' Kathmandu coordinator to have committed suicide remains much debatable.

The army stated that Prashanta committed suicide hanging himself by making a loop out of his shoelaces and tying it to the handle of the window, which was just four feet above the ground. He was found dead with his knees touching the ground (Kathmandu Post, 20 December 2004; Dhungel, 2005: 28-29). Several persons recounting their ordeals in the confinement of different army barracks have said that the army has maintained two rules after the abduction or arrest of alleged “Maoists/suspects”: it has practiced blindfolding the person from the moment of his/her arrest and has kept his/her hands tied behind the back throughout the period in custody. A man committing suicide in such a situation is therefore inexplicable. “Suicide” by the Maoists in prison or while under custody, however, has become a common practice, as the case of Deputy Commander Kishor Rajbanshi in Morang District prison suggests (Himalayan Times, 8 October 2005). The reason offered by the state is counterinsurgency. The death of a person arrested for being an “enemy of the state,” that is a Maoist, is seen to have no legal consequence. The NHRC, thus, maintains that torture is a common phenomenon in Nepal. According to the NHRC, Status report, torture is “perhaps the most unacceptable criminal act that takes place in isolated confinement. Torture destroys a person physically, mentally, psychologically and socially, and its consequences are far reaching, because the victims, their families and the society all suffer (NHRC, 2003:34). It, however, has noted that despite the growing concerns about the human rights violations by the state, the number of persons arrested and tortured by the authorities of the state has increased in Nepal. According the Status report of the NHRC,

The data show that except for a slight decrease in the years 1999 and 2000, the number of people arrested and tortured by the state authorities has increased overall. What is quite alarming to note is that while only 68 women were arrested/tortured in the year 1997, a year later in 1998, their number
increased to an amazing 417. It decreased to 101 in the year 2000, but by the year 2002, 252 women were found arrested/tortured by the state authorities. When examining the total number of people arrested/tortured, it is noted that while in the year 2000 the least number of people (1,035) were tortured/arrested, in the year 2002 the largest number of people (3,430) were arrested/tortured (NHRC, 2003:35).

The NHRC, has cited the findings of a report of a nationwide survey conducted by a NGO among 95 per cent of prisoners which concludes that 70 per cent of prisoners have found torture to be common practice, especially in police custody. It also says that the army is not far behind the police in administering torture (NHRC, 2003:35). Two examples, related to a journalist and a lawyer, are sufficient to reveal the measures that the army undertakes while dealing with the people in its custody.

- On September 12, 2003, Sita Ram Baral, a Kathmandu-based journalist was arrested by the security forces in plainclothes who pushed him into a car with hands tied and blindfolded around 1 P.M. and took to an unknown location after an hour long drive. He was kept blindfolded from the time of his arrest until his release five days later. He was questioned for about 7-8 hours from the time of his arrival. He was beaten with truncheons and whipped with his own belt and repeatedly punched in the face. He could neither sit nor stand because of severe beating [as he was a frail person]. Although Baral has repeatedly identified him as a journalist with no political affiliation whatever, he was repeatedly questioned about Maoists leaders. During his confinement the security persons watching him kept telling that it would be easier for them to kill him than to guard him. He was kept handcuffed and blindfolded. He was told not to remove the blindfold because they did not want to be recognised by him. With the pressure mounting from the Nepal Journalist Associations and civil society, the security forces took him to the police station and released him on 16 September to the safety of his family.

- On November 4, 2003, six plainclothes men arrested Gopi Krishna Thapaliya, a lawyer by profession, from his house in Kathmandu. He was blindfolded and taken to a place which he could identify later as Singha Darbar (National Secretariat) premises and interrogated there several times. He was made to stand and was punched severely in the face and whipped with plastic pipes on
his hips and legs, and kicked and punched in between the questioning hours. He fell to the ground several times and was forced to stand again only to receive more blows as well as verbal assaults. His beating continued for at least three hours. Finally he was taken to a tent where between 11 and 20 other detainees were kept. He was never told about the reason for his arrest and detention but made aware of the threats to his life. Thapaliya was interrogated several times with beatings and threats but without any medical aid to treat the wounds he had sustained. He was released after a week of detention with the provision that he should report to the army every week. [Thapaliya had helped the Maoist leader Krishna Bahadur Mahara to travel to Kathmandu during the time of ceasefire to negotiate with government in 2003. Perhaps this was the reason why he was arrested under suspicion of being a Maoist] (HRW, 2004:69-72).

Not all the people are as lucky as Baral and Thapaliya. They were arrested and treated inhumanly for a brief period and released shortly after as they had strong national and international professional support behind them. But there are some 8,000 people according to an estimate, who are still under military confinement. Most of them have been in confinement for over two years. The Human Rights Treaty Monitoring Coordination Committee (HRTMCC) has taken up the issue of torture and disappearances and has recently released an “Alternative Report” on 18 December 2004, revealing the worst forms of mental and physical tortures the detainees have had to undergo in Nepal. The Report was submitted to the UN Committee Against Torture and covers the a period between 1992 and 2004. The report states that rights violations and abuses by both the security forces and the Maoists have escalated in an unprecedented scale. [The situation of] a prolonged imposition of emergency has driven Nepal’s political system to “an unseen military rule.” The report says that the country recorded the highest number of “disappearance” cases in the world in 2002 and 2003. It added, “There are innumerable reports of torture and misbehaviour at the time of arrest.” According to the report the most common forms of torture are:

- Beating on [the sole of] feet;
- Electric shocks;
- Being hooded or blindfolded;
- Rolling of weighed sticks along thighs;
- Burning with cigarettes;
- Forcing detainees to remain in painful posture;
- Animals, insects, and even needles applied as tools of torture;
- Threats, deprivation of food and drinks;
- Forcing to consume [human] excreta;
- Forcing to remove ‘sacred thread’ of upper caste detainees;
- Long-term isolation;
- Confinement in a dark room inflicting noise.

The report also notes that Nepal’s prison conditions are pathetic and run under an old, outdated legal framework that only views prisons as places of punishment. Out of 73 prisons, 36 have more inmates than their capacity. The situation of women in prison is worse than that of men inmates, as there is no separate prison system for female inmates. Women in prison are vulnerable to abuses of different kinds from both the male prisoners and the jailers (NHRC, 2003:30). The Nepali penal system has never received attention from the state despite the lip service paid by the government through adoption of several prison reform acts. The reality, however, is that “prisons have become dumping sites” for socially unwanted people. According to the prison administration in the Central Jail in Kathmandu, “they are compelled to place all kinds of detainees and prisoners, including those infected with Hepatitis B, HIV/AIDS, cholera and typhoid in the same unit” (Poudel, 2003:18). According to the HRTMCC, pathetic indeed is the situation in which judges see their role as identical to that of the police. The “Alternative Report” states, “while discussing the cases of torture in the court, judges think they and police have similarities in discharging the State function.” Further, it says, judges consider ‘the use of force by the police as legitimate action taken by the State to maintain law and order.” It is but an irony to note, “many judges have disregard for human rights instruments and standards, as they believe that human rights is an alien concept” (Draft of Alternative Report, 18 December 2004; AI, 2001:11-12).

The Tables 4.3 and 4.4 provide the trends and pattern of commonly practiced torture and the classification of the perpetrators of torture.
### Table 4.3: Data on Trend Analysis on Torture

#### Age Distribution of Torture Survivor

<table>
<thead>
<tr>
<th>Both Sexes</th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>Total</th>
<th>Per cent</th>
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<td>Below 16</td>
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<td>18</td>
<td>29</td>
<td>3</td>
<td>47</td>
<td>43</td>
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<tr>
<td>16-60</td>
<td>248</td>
<td>368</td>
<td>805</td>
<td>392</td>
<td>1,173</td>
<td>859</td>
<td>3,845</td>
<td>91.55</td>
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<td>Above 60</td>
<td>27</td>
<td>21</td>
<td>47</td>
<td>17</td>
<td>71</td>
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<td>210</td>
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<tr>
<td>Total</td>
<td>280</td>
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<td>881</td>
<td>412</td>
<td>1,291</td>
<td>929</td>
<td>4,200</td>
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#### Types of Perpeptors as Reported by Victims

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<tr>
<th></th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>Total</th>
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<td>Police</td>
<td>260</td>
<td>93.86</td>
<td>247</td>
<td>60.69</td>
<td>714</td>
<td>81.04</td>
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<tr>
<td>PGU</td>
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<td>1.81</td>
<td>7</td>
<td>1.72</td>
<td>2</td>
<td>0.23</td>
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<td>PoMao</td>
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Source: Data compiled from Centre Based Rehabilitation Service, Kathmandu, 2004. Also Spotlight, 5 November 2004.

**Note:** Freq= Frequency, FG= Forest Guard, PGU= Prison Guards, ArPo= Army and Police, ArMao= Army and Maoists, PoMao= Police and Maoists, PoFG= Police and Forest Guards, ArPoMao= Army, Police and Maoist.

**Disappearances:** The UN declaration on Enforced and Involuntary Disappearances, adopted by the General Assembly in 1992, includes four key principles according to which (i) “disappearances” cannot be justified under any circumstance; (ii) “disappearances” are continuing offences, exempt from statutes of limitation; (iii) their perpetrators should not be eligible for amnesty from prosecution, and (iv) their victims and their survivors have a right to compensation (cited in HRW, 2004:25). Although Nepal is not a signatory to the Rome Statute of the International Criminal Court (ICC) that defines “disappearances” as crimes against humanity, such acts of violation of human rights are also
<table>
<thead>
<tr>
<th>Types of Physical Torture</th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>Total</th>
<th>%</th>
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<td>65.85</td>
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<td>228</td>
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<td>135</td>
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<td>97</td>
<td>23.83</td>
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<td>26.78</td>
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<td>93</td>
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<td>77</td>
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(Contd. Table 4.4)
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<th>2000</th>
<th>2001</th>
<th>2002</th>
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<td>22.36</td>
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<td>7.13</td>
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<td>Deprivations Basics</td>
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</tbody>
</table>

Source: Data compiled from Centre Based Rehabilitation Service/Centre for Victims of Torture (CIVICT), Nepal, 2004.
considered crimes by international law when deliberately pursued. “Disappearance” is commonly understood as “deprivation of liberty of a person, perpetrated by agents of the state or by persons or groups acting with authorisation, support or acquiescence of the state, followed by an absence of information regarding the deprivation or refusal to acknowledge it, or by refusal to provide information on the fate or whereabouts of the “disappeared” person or the concealment thereof” (AI, 2003:1fn). The Nepali Constitution of 1990 has provided certain safeguards against such motivated actions against citizens. However, constitutional norms are breached whenever the state sensitivities rule the course of actions regulated through preventive detention and denial of information.

Particularly after the declaration of the state of emergency on 26 November 2001, the entire constitutional safeguards to citizen's fundamental rights, except the right to remedy of habeas corpus in principle, was suspended. Although some rights are made inalienable even under a situation of emergency except for certain rights that can be derogated, the common practice has been contravening principles of humanitarian rule. One of them is that “disappearance” cannot be justified in any circumstance. Perhaps this is the reason why the state has consistently denied the charges until recently by systematically concealing the arrested people in unofficial places of detention such as military barracks, Police Clubs and Police Training Centres. Unlike some of the judges who have recently said that the arrested people can be detained at any place of the state's choosing, the law prohibits such detentions as these are not identified as recognised places for detention and imprisonment. Again, the military is not authorised to hold persons under detention under the Military Act. It is required to transfer the detainees to civilian authorities within 24 hours of their arrest. But, according to the police, the army never follows this rule. Whenever the army transfers the detainees after months of arrest, the police are obliged to prepare a fake report of their arrest within 24 hours to honour the legal provision (Gaunle, 2004:39).

Another galling situation that Nepal is facing in the context of disappearances of the people is the covert operations undertaken by the security forces. These operations conducted by the unidentified state security agencies, include dumping the abducted persons in unmarked vehicles with covered number plates and then leading them to unidentified destinations, believed to have been initiated by the “anti-terrorist units,”
have raised the prospects of intensifying the state’s secret operations to escape from any responsibility, notwithstanding the legal and overt measures taken under the legislative provisions. Most witnesses to abduction by the unknown people identified as army/police with usual mid-night knocks at the door report that their intention appear to be induced maximum fear among family members and to apprehend and kill, if necessary, the target person and remain incognito. Such highly secretive acts committed by the state provide it with the leeway for initiating violence never to be recorded by identifying the culprits. The question “where are they” therefore will never be answered. This has led to a serious squabble between the government/security forces and the judiciary/human rights community, which will be discussed in the appropriate part of this work.

Table 4.5: Disappearances

<table>
<thead>
<tr>
<th></th>
<th>Year 2000</th>
<th>Year 2001</th>
<th>Year 2002</th>
<th>Year 2003</th>
<th>Year 2004</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>By the State</td>
<td>03</td>
<td>042</td>
<td>250</td>
<td>284</td>
<td>655</td>
<td>1,234</td>
</tr>
<tr>
<td>By Maoists</td>
<td>-</td>
<td>047</td>
<td>034</td>
<td>030</td>
<td>220</td>
<td>0,331</td>
</tr>
<tr>
<td>Unknown</td>
<td>006</td>
<td>006</td>
<td>007</td>
<td>035</td>
<td>0,054</td>
<td></td>
</tr>
<tr>
<td>Grand Total</td>
<td>03</td>
<td>095</td>
<td>290</td>
<td>321</td>
<td>910</td>
<td>1,619</td>
</tr>
</tbody>
</table>


These data are based only on the record of petitions of family members or friends to the NHRC, since it was established in 2000. It does not include thousands of school children and commoners abducted by Maoists for military training and forcible conscription into their guerrilla forces; most of the people conscripted are released after indoctrination. Abductions by Maoists, irrespective of the age of the children for use as child soldiers, have led to the exodus of thousands of people from the villages as well as closure of hundreds of primary and secondary schools. The Maoists have abducted people both for ransom as well as to use them as to bargain with the government to exchange against Maoist detainees. This happened twice: first during the period of negotiations in 2001 and once again in 2003. The Maoists have also committed summary execution of people, including teachers, who refused to cooperate.
Massacres: Numerous incidents related to summary executions and massacres committed both by the security forces and the Maoists are vividly described in the Human Rights Watch Report 2004 and the INSEC Yearbook 2004 (HRW, 2004:56-59; INSEC, 2004). In this section three bizarre episodes are described of which the first is related to the killings in cold blood of Nepali Congress party workers, the second killings of labourers at an airport construction site, and the third killings of unarmed Maoists. None of these was encounter killings and all of those killed were unarmed. In all three cases the security forces’ claimed that the Maoists were killed in cross fires as the Maoists opened fire on the security forces. Although investigations have belied the claims of the security forces, justice has yet to be done.

- **Khara Massacre**, Rukum District, 22nd February 2001: A Maoist who was nabbed after he had fired at a police personnel was beaten up severely and asked to identify his accomplices in the village. He was led to point out the houses where Maoists were supposed to be residing. On the basis of the information provided by the culprit, the police set the houses on fire and shot at the people running out of their homes indiscriminately resulting in the killings of 15 persons, most of whom later turn out to be Nepali Congress cadres. Although the parliamentary committee formed under the convenorship of an MP raised serious questions about the violations of human rights, the Nepali Congress government looked away despite the arson and killings of its own party workers in the incident (INSEC, 2001:69).

- **Kotbada Airport Massacre**, Kalikot District, 24th February 2002: On 16th February Maoists successfully mounted attacks on Mangelsen and Safebagar areas of the Accham district, killing 138 people, including a CDO. Intensifying their “search and destroy operations,” security forces reached the adjoining Kalikot district on 24th February and cordoned and started firing at the residences of the airport petty contractor and the houses rented by the labourers at the vicinity of the airport construction site. Altogether 35 people, including 8 villagers were killed in cold blood. The labourers had been contracted to work in Kalikot and were from different villages of Nepal. Their wages were Rs. 150 ($1.80 cents) per day. They were working there for 3 months and were about to return home. 3 months
after their death, the contractor paid back the recurring wages of the labourers to their family along with a month’s wages as funeral expenses although the dead bodies were never returned to the family members.

When questions were raised about these grotesque murders both in parliament and the media, Prime Minister Deuba replied that the government had taken precautions to avoid the death of innocent people in the military operation. In case there were some accidental deaths of innocent people, they would be adequately compensated and care would be taken to avoid further calamities in the future. But the position that the army took in the case was different. An army top brass reportedly told the press, “all of them had [already] become Maoists” by coming into contact with the Maoists. A dismayed MP of the Kalikot district retorted frustratingly, “If this is to be the case, all the citizens of Kalikot can be considered as Maoists” (Mainali, 2002:26-35). No further enquiries were made in this case.

Doramba Massacre, Ramechhap District, 17th August 2003: The most critical episode directly involving the security forces and the Maoists concerns the Doramba incident in which 17 unarmed Maoists along with two commoners were massacred in cold blood (Kathmandu Post, 19 August 2003; NHRC, 2003) when the country was under ceasefire. As per the information obtained, the massacre occurred on the day the government and the Maoists negotiators were holding their third round of talks in Nepalgunj and as the people at Doramba had all gathered for a wedding ceremony. They were thus caught unaware. They were shot dead at close range and their hands were tied behind after they had been marched several hours away from their village. According to an eyewitness account, troops lined up the captives and shot them with a round of bullets (HRW, 2004:29; ICG, 2003:4-5).

It was not unusual for the army to publicise the cooked up story about the skirmishes provoked by the Maoists resulting in the deaths. Because of the public uproar, the army reportedly investigated the case and said that the “security forces had to retaliate in self-defence” and had refused to accept the facts uncovered by the on-the-spot investigation report of the NHRC.
Until recently, the army has refrained from taking any responsibility for the gruesome murder that has stained its image both nationally and internationally. Meanwhile, it has succeeded in breaking away from the negotiation process and pushing the Maoists “back to the gun” (ICG, 2003).

The violence that resumed after the breakdown of negotiations on 27 August 2003 has intensified the killings as the data presented by the RNA spokesperson reproduced above show. Eventually it led to the expansion of the security forces around the country and the surge in budgetary allocations along with tightening the noose of the TADO further, complicating the process of credible judicial administration in the country. The degrading of the human rights situation in the country has in fact put the judiciary on trial, the only institution to which the people look with twilight of hope in the situation of hopelessness.

4.4 CHALLENGES TO THE JUDICIARY

In fact, the judiciary has to confront such challenges and deliver justice in a situation of abnormality when the declaration of the national emergency and subsequent adoption of TADA has robbed the people of their rights. The emergency led to suspension of sub-clause a, b, d of Clause 2 of Articles 12 (Right to Freedom), Clause 1 of Article 13, and Article 15, 16, 17, 22 and 23 of the fundamental rights stipulated in Constitution 1990 for nine months. As noted above, under the state of emergency, TADA was provided with wider latitude with the inclusion of several clauses or sections directly contravening the constitutional order in the country. According to the 2002 Annual Report of the Supreme Court, the apex court has received 107 writs on habeas corpus, 252 mandamus, 45 prohibitions, 3 quo warranto and 3,410 certiorari, totalling 3,817 cases (cited in Poudel, 2003:17) under the provision of fundamental rights as stipulated in Article 88(2) of the Nepali Constitution. The role of the judiciary has become pivotal in the absence of the elected parliament and the presence of ordinance regulating the law of the land without any regard to the constitutional process.

The total disregard for the human rights of the people therefore is a denial of human security by the state. Reports on excessive violations of human rights released by the National Human Rights Commission (NHRC) are being ignored. Hence the NHRC, has been forced to disclose the record of human rights violations by publishing the details
of the disappearance of 709 persons on the 55th International Human Rights Day (Kantipur, 10 December 2003:10-11). Of the total, the report said that the state was responsible for the disappearance of 579 persons, the Maoists for 111, and 19 for unknown group. The NHRC, has further disclosed that the record on the number of disappearances has increased to more than 1,619 persons till 10 December 2004. In addition, there is a record of 176 journalists arrested and detained by the security forces during the emergency period between 26 November 2001 and 25 August 2002 (FNJ, 2003:161-66). In addition to the death in custody of Krishna Sen, three more journalists were killed by the security forces after 27 August 2003 while whereabouts of ten journalists are yet to be traced (Himalayan Times, 19 April 2004). The comparable figure for journalists killed by the Maoist is 6 and the whereabouts of 3 held by them are still unknown.

The cases of law practitioners who have been threatened, arrested, detained and tortured by the security forces are comparable to that of the journalists. The security forces have arrested and detained some lawyers for their alleged complicity with the Maoists. According to the Nepal Bar Association, of the ten arrested lawyers, two were released but the whereabouts of eight are yet unknown (Rajdhani, 28 February 2004). The latest report on the human rights situation in Nepal accounts for the average killings of 12 persons a day after the breakdown of the second truce on 27 August 2003. This suggests that the culture of violence is deepening its roots in Nepali soil. In the year 2003 the recorded deaths by the state were 1,163 in comparison to the 646 deaths by the Maoists. Similarly, the security forces arrested 2,716 people and 368 disappeared in their custody, which, according to Amnesty International, was the highest number of recorded appeal from Nepal in a year in comparison to those registered from different countries of the world (Kantipur, 21 March 2004).

Sensitive human rights issues, particularly, illegal detention and disappearance made by the security forces have become the core of contention between the judiciary and the security sector. Numerous cases of illegal detention and disappearance filed at the 16 Appellate Courts and 75 District Courts as well as habeas corpus petitions filed at the Supreme Courts have in fact remained filed due to the lack of cooperation from the related agencies. As noted by Amnesty International in its recently released report of 28 July 2004, Nepal: Human Rights Defenders Under Threat, the situation has become so
frustrating that the country has really plunged into lawlessness and anarchy. The defenders of human rights and their family have been increasingly becoming targets of the security forces as well as the Maoists. And the judicial remedy to the issue so far has been disappointing. Although the judiciary has moved to examine some cases of illegal detention with success, it has failed to uncover the cases of disappearance related to the security forces and this has led to the dismissal of the cases filed. The helplessness of the judiciary is understandable as the law enforcing agencies are themselves operating in contravention to the court orders in many cases. Blatant disrespect of the court order and disregard of the law has been observed in several instances of arrest of persons released by the court within its premises by the police without any warrant order. Although the judiciary has been activated to lead some modicum of sanity to proceedings, the tragedy, as noted by INSEC (2004:50), is that the judiciary has not been able to successfully probe the cases on the “legality of arrests [even] of legal practitioners” by the security forces. Further, INSEC reports,

[The] security forces [have] disobeyed, cheated, lied [to] the Supreme Court on the information sought by it regarding the whereabouts of many people. This sort of contempt of court must immediately stop. The security agencies have downplayed the spirit of rule of law, human rights and democratic system... The denial of the army to accepting letters issued by the Supreme Court and telling lies when asked about the whereabouts of people and later releasing them from the army custody makes it look as if the army is trying to bring the judiciary under its control (INSEC, 2004:49).

Certain differences have recently occurred between the judiciary and the army regarding the investigation on *habeas corpus* cases over the issue of not letting the investigation team inside the barracks to search for the illegally held person. The army’s denial of the right to enter the sensitive premises of the barrack has been interpreted as instances of contempt of court, further straining the already unpleasant relation between the judiciary and the security forces. The COAS responded to this issue by ordering the military to respect the rights of the judiciary as a damage control measure. The military has, however, asked the investigation team to visit the barrack premises through proper channels. The Army has even refused to register the letter of intent for investigating the case either of the Supreme Court or the NHRC,. In another instance, the army has not responded to the Supreme Court order regarding military affairs. This refers to a report “Army Headquarters did not response to the inquiry of the Supreme
Court,” published in a newspaper concerning an inquiry made by the apex court to submit the audit report of the last 30 years of the Royal Nepal Army’s (RNA) income and expenses on its involvement in peacekeeping missions abroad. The Supreme Court has repeatedly asked the Army HQ to submit the audit report following a writ petition filed by the chairperson of the Nepal National ex-Army Commission along with some former army personnel invoking Article 16 of the 1990 Constitution on rights to information (Rajdhani, 16 March 2004).

The Army has argued that certain cases falling within the jurisdiction of the military court conferred by the Military Act 1959 cannot be reviewed or investigated by the Supreme Court. Article 86 of the Constitution 1990 exempts the military court from the judicial orbit of the Supreme Court. Clause 2(a) of Article 88 of the Constitution restricts the Supreme Court from interfering in military affairs except in the case of the involvement of a non-military person tried by the military court for offences not related to the Army (Constitution, 1990:67-68). In the tense atmosphere of counter-insurgency mobilisation, a problem in defining the “offence relating to the army,” however, has occurred. The army has arrested and detained many civilians, as the data of the NHRC, and INSEC cited above reveal, under the pretext of being Maoists under TADO. In numerous cases the army has rejected outright the allegations that it has ever held any person incommunicado and made them disappear. The chief of the human rights cell at the RNA, Brigadier B. K. Kumar Sharma, has usually responded to such allegations by saying, “It is baseless that we are responsible in disappearances of anybody” (Dhakal, 2003:12).

The persistent probe on the habeas corpus issue made by different human rights organisations along with the hunger strikes of the family members of “disappeared” persons supported by law practitioners and the international pressure, however, has finally led the Home Ministry to constitute the Malego Committee, which accordingly disclosed the condition of 24 out of 36 persons involving the cases of disappearance documented by the state in its first report (Kantipur, 12 August 2004). In its subsequent second report, the Malego Committee published the names of 54 persons “disappeared” by the state. Further, in its third report the Committee disclosed the names of 126 persons detained by the security forces under the TADO, whom the security forces had refused to arrest previously (Himalayan Times, 12 October 2004). These disclosures are proof of the outright lies being told by the army
to the Supreme Court, which is incredible, says Sambhu Thapa, the President of the Nepal Bar Association (Basnet, 2004:1). Further, the Supreme Court has ordered the army to immediately supply it information on the whereabouts of 447 persons “disappeared” by the state (Himalayan Times, 7 October 2004; Himalayan Times, 19 October 2004).

The release of lawyer and journalist Jitman Basnet from the Bhairabnath Military Barrack, Maharajgunj, after ten months of ‘disappearance’ on 18 October 2004 (Kantipur Daily, 19 October 2004) has consequently belied the army’s repeatedly denial of any knowledge about the whereabouts of the person leading the Supreme Court to repeal the writ petition on habeas corpus filed on behalf of the person. This case has thoroughly shaken the credibility of the army. But this is the tip of the iceberg, if the number of disappearances made by the state as indicated in the NHRC, document, is taken as evidence. Hence the cooling-off of relations between the judiciary and the security sector will surely continue unless a “truth commission” honestly investigates the cases of violations of the law of the land. But the establishment of a “truth commission” can only be an agenda for the future. Also, it will depend on the type of regime established in the future. Given past precedents, it is doubtful that the “truth commission” will ever be able to dig out the truth. And even if the truth is disclosed, the law may not punish the wrong doers.

4.5 INTERNATIONAL CONCERNS

Cases of disappearances and excesses committed by the security forces have been widely publicised by Amnesty International and the UN Working Group on Enforced and Involuntary Disappearances (WGEID), identifying Nepal a country topping the list of human rights violators in the world. As a result, the thrust of donors and the international community has gradually shifted from their unquestionable support of the Nepali state’s “war against terrorism” to forcing it to honour its human rights obligations. The deliberations of the 60th Session of the UN Human Rights Commission in Geneva earlier in March 2004 led to unfolding of measures prioritising human rights as a precondition for avoiding a rouge state status. Under heavy criticism for a dismal record of human rights violations, Nepal was, however, been saved from being declared a pariah state with the deft handling of the issue by some powerful states, namely India and the United States. But the proceedings did not hide the dissatisfaction contained in the aborted
Swiss resolution collectively reflecting the concerns of the majority of the European Union countries for the utter disregard shown by the Nepali state about the criminal offences committed by the state security forces against human rights as well as its failure to prevent the criminal follies of its non-statutory forces.

Prior to the Geneva meeting, the human rights concern was fully highlighted by the annual country report of the US Department of State issued on 25 February 2004. The report asserts, “The RNA (Royal Nepal Army) has continued to kill civilians.... The RNA was [also] responsible for a number of killings, including death in custody in which torture was credibly alleged.” It has noted that the security forces had used “arbitrary and unlawful lethal force” claiming that all those killed were Maoists. The report concludes that the “Government’s human rights record remains poor, and it continues to commit numerous serious abuses” (Department of State, 2004). The HRW has recorded more than 2,000 cases of unlawful killings and summary executions committed by the security forces after the breakdown of the truce on 27 August 2003. Attributing the figures to NHRC, and other indigenous human rights organisations, the HRW has also exposed numerous other cases that clearly indicate that summary execution of captured combatants and detained civilians are “troublingly common in Nepal” (HRW, 2004:27). It has also been alleged that the security forces are following a “take no prisoners” principle. Therefore, the number of “Maoists killed in encounters” has increased than the number of “disappearances” people after the international opprobrium.

Concerned about the human rights excesses committed by the security forces against its own nationals, a question was raised by Time magazine’s Alex Perry to King Gyanendra in an interview, to which the following answer was given:

Well, I hope you will also mention the documented human rights abuses by the Maoists.... Do you mean to tell me that earlier on, when other so called governments of the day were in power, there were no human rights abuses? It's all cropping up (as an issue) now. But it is because the security agencies are becoming effective that these questions are being asked, or because they are failing? Is it success that is leading to this? In the case of the army alone, they were not deployed before 2001 and now they are. But which country does not have friendly fire [?], which does not have accidents? Many people have told me that the Fourth Estate is being unkind to the security agencies (Time Online Interview, 26 January 2004).
The answer given is characterised by the respondent's insensitivity to the question posed but sensitivity to the action disposed. First, the king has shown his dismissive inclination to the question raised by equating the human rights abuses committed by the legitimate and law-abiding arms of the state, the military in this case, to the identical abuses of an illegitimate anti-state force branded as “terrorists” by the state. Second, sensitive to his ownself and the authoritarian mode of governance presided over by him; the king has brushed all previous parliamentary governments with the texture of the so-called adjective, revealing his mindset about democratic dispensations. Third, the king has dismissed the sensitivity underlying the question in relations to human rights situation in the country, apparently computing it with the successes of the army operation in counterinsurgency forays. The counter-questions he posed were not only defensive but also arcane and absurd to an alert mind when he asked, “which country does not have friendly fire?” without being clear of the meaning of the term “friendly fire” used in the military lexicon. The question that Alex Perry raised in relations to the human rights abuses was not related to the friendly fire. Neither was the question about deaths caused by the crossfire. Rather it was related to the army's deliberate and indiscriminate killings and abuses of human sanctity. His distaste and apprehension towards the press/media for being critical about the security forces is also an instance of his inherent desire of censoring press freedom by manipulating information.

This implicit desire of the king to curb information was later virtually carried out by the “executive order” of the Home Ministry sent to the National Human Rights Commission (NHRC) pressurising that independent body to comply with the security forces. This is evident in a letter sent by the Home Ministry to the NHRC, on 29 March 2004 criticising the works of the NHRC, and alleging that the NHRC, has been “preparing one-sided reports sending message to the people and also to the international community that the security forces are causing atrocities, thereby tarnishing the images of the security forces.” Referring to a letter sent by the Ministry of Defence on 23rd March, the Home Ministry has instructed the NHRC, and other organisations to “compulsorily inform the local security forces and include a representative from security forces in the investigation team” while examining the cases of complaints on human rights violation and excesses caused by the security forces (HMGN Home Ministry, 2004). While blaming the
NHRC, for maintaining partisan interests, the letter has itself seriously eroded the chances of the Commission’s impartiality through imposing conditionalities for investigating the cases of human rights violation. Pressing charges in front of security personnel would be an act of rare courage for the people to risk their own safety. The government has therefore discouraged any independent investigation of cases involving human rights violations. Such a situation thus has definitely raised the necessity for interrogating the systemic process to make some prognostic assessment of political development in Nepal to situate the agenda of reform as well as peace and development in the country.

The Maoist insurgency has, indeed, become a good harvest for the security apparatuses of the state. Political violence caused by non-statutory forces has led to militarisation of conflict as the protagonists rely heavily on military means to advance their causes. In such a situation, state repression becomes a critical factor in expanding conflict. The immunity and impunity provided initially by Article 20 to the security forces under the Terrorist and Disruptive Activities (Control and Punishment) Ordinance 2001 (TADO) has certainly been a death knell to the fundamental rights of the people and betrays the expression of the fascist mentality of a government which has been scuttling the legal order. This is what the security forces have achieved, particularly the RNA, through its intensive but reluctant bargaining with the civil government. With this expediency, the political salience of the military has profoundly increased in Nepal. As the RNA is responsible to none but the king, there is no other agency of the government to maintain operational control.

Perhaps the extension of the TADO by the king through an ordinance adopted on 13 October 2004 can be understood as a means to further this goal. It is ironic, however, to note that the security forces have again been provided with impunity by an ordinance issued even after the government had earlier publicised its 25-point commitment to protect human rights in Nepal (Rising Nepal, 27 March 2004). Following the announcement made by the Prime Minister, the Office of the Prime Minister and Council of Ministers adopted a National Human Rights Action Plan in April 2004 guaranteeing “inalienable fundamental rights” to the people with the commitment to “increase awareness and understanding” on the issue (HMG/NHRAP, 2004:1-2). The double irony, however, is that of a government that expresses commitment to increase awareness and understanding of the human
rights issues even when the evidence of human rights violations by the government security forces is in plenty. The case to be made here is not for increasing awareness; the case is for decreasing and discouraging the violations of human rights and enforcing accountability and imparting of justice on the part of the government. The Status Report issued by the National Human Rights Commission in 2003 is enough to make both the government and the people of Nepal aware of the human rights situations (NHRC, 2003).

Therefore, the first prerequisite of the action plan should be removing the blanket impunity provided to the security forces under Article 20 of TADO, making the security forces themselves aware of their limitations in counterinsurgency operations. The second requirement is that government in Nepal should work. The serene detachment of the government appointed by the king in violation of the constitutional norms of the state without representative and governing legitimacy has itself become a problem the resolution of which requires the king to confer democratic rights to the people and enabling them to uphold rights that cannot be conceived in the absence of democracy. Until then there will be no respite. Facts prove that all these concerns and commitments pledged by the government for human rights issues have been merely a façade under which the government hides its crimes.

This is exemplified by the National Human Rights Commission Act 1997 according to which the National Human Rights Commission was established in 2000. Article 10(a) of this Act has firmly restricted the jurisdiction of the NHRC, to investigate “any matter” related to the Military Act-1959 (NHRCA, 1997). This has clearly emasculated the operational scope as well as capacity of the NHRC,. The NHRC, is not a law-enforcing agency. Sections b, c, and d of Article 10 are also equally incompatible to the functioning of the NHRC, prohibiting it to make any inquiry sensitive to the interests of the government. And the ground reality in the country is that the most serious violator of human rights is the government—to be precise none other than its security forces. Serious cases of rape, torture, custodial killings, arbitrary arrests and disappearances and “atrocities” occur “virtually every day somewhere in the country during these bloody days of violence.... The situation [has] worsened, because the brutality is being sanctioned officially” (INSEC, 2004:106-07; AI, 2003; 2002; 2001). Extrajudicial executions have risen to harrowing proportions as security forces have unlawfully killed nearly half of the “Maoists” officially declared as
killed since November 2001. According to Amnesty International, “Those unlawfully killed included civilians suspected of providing shelter, food or financial assistance to the Maoists. They also included members of the CPN (Maoist) killed in circumstances where they could have been taken into custody or where they had already been taken prisoners” (AIR, 2003:184). Comparably, Maoists are also not lagging behind in sinful acts of killings by torture, mutilation and beheading of victims. A confidential report has, therefore, observed, “People are terrified, of both the RNA and the Maoists.” The author of the report says: “I have worked in a number of countries in conflict—and Nepal ranks among the worst human rights situation I have ever seen” (O’Neill, 2004:1).

The report authored by O’Neill is, in fact, a critique of the duplicity with which donors approach the question of human rights. He has specially chided UN complicity with the government in promoting the human rights awareness project by funding the drafting of the National Human Rights Action Plan (NHRAP) rather than focusing on “enhancing the government and Maoist accountability for human rights violations.” He has opined that the “UN’s credibility is at risk if it fails to recognise this need and is diverted into funding projects that have little or no visible impact on the rapidly deteriorating human rights situation in the country.” Further, O’Neill has stringently stressed that “Nothing the UN does should permit the weakening or marginalisation of the National Human Rights Commission (NHRC).” He has also questioned the “wisdom” behind the launching of NHRAP in a country in conflict and without a parliament and a genuine representative government (O’Neill, 2004:1).

The point that O’Neill has stressed is relevant in the context of the functioning of the NHRC, which has become a problem for the government. This has led the government to establish a separate Human Rights Promotion Centre at the Prime Minister’s Office so as to marginalise the independent role of the NHRC. Indeed, the human rights issue has become a war of nerves between the government and various advocacy groups, including the media. This resulted in the controversial expulsion of John Bevan, the human rights special advisor to the resident representative of the UN, as his role in strengthening the NHRC, become offending to the government (Nepal Weekly, 9 May 2004:26). The UN has no alternative but to comply.

The government is not only reluctant but also intolerant to arguments contrary to its functions. It has publicised its displeasure
against working of certain EU diplomats stationed in Kathmandu as unwarranted interferences in the affairs of an independent and sovereign state. The government has not even hesitated to blame some diplomats as being the Maoist sympathisers. The government is also not feeling the pinch of the barrage of criticism it faced during the Nepal Development Forum (NDF) meetings on 4-5 May 2004. Instead, the agency role of the government has become disparaging the roles of human rights agencies by blaming them to be an association of leftists, thus disputing their claim of human rights violations by the state. The HRW has noted that the RNA spokesperson has told it that “human rights organisations are leftists, anti-government and they make allegations without evidence” (HRW, 2004:20). The king's appointed Prime Minister Sher Bahadur Deuba had also taken the lead in refraining from any responsibilities for human rights violations. His arrogance had surfaced repeatedly in stating that it is irresponsibility on the part of human rights organisations to blame the government and its security forces for violating human rights but never pointing a finger at the Maoists' excesses. Why blame government when being afraid of the Maoists? On the 56th anniversary of the International Human Rights Day, Deuba had repeated this charge publicly asking the human rights agencies funds for building a convenient place where prisoners of conflict can be housed comfortably (Kantipur, 11 December 2004).

Irrespective of what the government says the human rights situation has deteriorated sharply in the country, which is reflected in the statements of various international agencies investigating the case through their direct participation in different occasions. A majority of international agencies are seriously concerned over the cases of disappearances and reports on this situation have become critical agenda for deliberations during the 61st Session of the UN Human Rights Commission in Geneva in March 2005. Despite the universal condemnation of the 1st February Royal coup and intensified debates over the adoption of Item -9 on Nepal, the country was again saved from being a pariah state through striking a compromise on establishing the presence of the United Nations Office of the High Commissioner for Human Rights (UNOHCHR) in Kathmandu to monitor the progress, according to the Item-19 adopted as Geneva Consensus. The Memorandum of Understanding (MoU) signed by Nepal on 10 April 2005 along with the passage of Item-19 has clearly stressed on
unconditional lifting of emergency, restoration of civil and press freedom, releasing political detainees and restoration of democracy along with stopping the arbitrary arrests, involuntary disappearances, extra-judicial killings in the country. Several statements issued earlier on the International Day of Disappeared by different agencies needs to be reproduced here for an understanding of the horrendous situation that the people of Nepal face regarding the “disappearances”. The United Nations has observed that,

The number of reported cases of persons who “disappear” in Nepal in circumstances connected to the conflict continues to climb to shocking heights. The Working Group on Enforced or Involuntary Disappearances, which was established in 1980 by the United Nations Commission on Human Rights, reported in its 2004 report that Nepal had the highest number of new cases received in 2003. Since then, the situation has become even more grave. The Working Group has urged the Government of Nepal to “undertake all necessary actions to prevent further disappearances, to clarify outstanding cases, and to bring the perpetrators to justice.”

Disappearances are among the cruellest of crimes and have a devastating impact not only on the victims but [also] particularly on their families, friends and colleagues.... The Rome Statue of 1998 lists enforced disappearance as a “crime against humanity” that is punishable by the International Criminal Court. Victims of disappearances may be subject to torture or extra-judicial, summary or arbitrary executions, which are also among the gravest offences to international human rights and humanitarian law. Regrettably, we believe that these grave offences are happening in Nepal on both sides of the conflict.

On the International Day of Disappeared, the United Nations System in Nepal calls on all parties to the conflict to respect international law, cease all acts of disappearance, including toleration of those acts, and bring the perpetrators to justice [in order to] reverse the deadly trend that continues to cause so much suffering to the people of Nepal (UN, 2004:3).

The “escalating number of disappearances” has been a cause of deepest concern also to Amnesty International. Its report released on the International Day of Disappeared on 30 August 2004 has recorded 622 cases of disappearances since 1998, half of which were recorded following the termination of Second Ceasefire on 27 August 2003. The cases of disappearances as recorded by INSEC are 2,000 and 11,000 respectively against the state and the counter state (Himalayan Times, 31 August 2004). The Amnesty International, Human Rights Watch and the International Commission of Jurists have, in their joint statement of 19 December 2004, said: “A number of human rights defenders, journalists, lawyers, officials of NHRC, and local human right activists, have faced
increasing harassment" from security forces and Maoists. “Human rights defenders have been killed, detained under anti-terrorist legislation, abducted, tortured and threatened, and offices of human rights organisations have been raided.” The security forces and Maoists have committed “appalling abuses,” said the statement. They have also noted the UN Working Group on Enforced or Involuntary Disappearances have received “more reports of Disappearance cases than any other country of the world” when it visited Nepal in the first week of December.

A European Union delegation—the EU Troika led by the Netherlands—which also visited Nepal in the same month, noted a “rapid deterioration of human rights situation” (Himalayan Times, 20 December 2004). At a press conference, the Troika has clearly categorised its preferences and reservations regarding Nepal, noting that it does not support the “authoritarian regime.” Although it says the EU is not against military aid to RNA because it does not want Maoists overrunning the country, there must be a functioning parliament and NHRC, must be given unhindered access to all places of detention. The EU Troika has also expressed its serious misgivings about TADO and said that the continuing intimidation and harassment of human rights defenders as unacceptable to it. It has also announced that EU would “revisit the human rights situation [of Nepal]” in Geneva at the 61st Session of the UN Commission of Human Rights meetings (Kathmandu Post, 16 December 2004, emphasis added).

In their recent visit to Nepal from 4 to 7 October 2005, the EU troika opined that the government has not adhered to its previous commitment on human rights made on 26 March 2004. The desperate situation in the country in the aftermath of 1st February and increasing political polarisation has made them “very depressed” and wonder whether the country is heading towards political collapse, a euphemism for a failed state (Pradhan, 2005:1). Louise Arbour, the UN High Commissioner for Human Rights, in her visit to Nepal in January, has also insisted on the government’s commitment on human rights and asked it to abide by the obligations of 26 March 2004 to avert the pathetic human rights situation in the country (Arbour, 2005). Subsequent weeklong visit to Nepal by the closest Special Advisor of the UN Secretary-General Kofi Annan, Lakhdar Brahimi in July 2005, and his pointed remarks about the need of returning to the constitutional process and restoration of multiparty democracy for the peaceful resolution of conflict, has exposed the sharply deteriorating human
rights situation as well as intense dissatisfaction with the rule of monarchy (Dhungel, 2005:21-23). Pointing out that the "RNA must continue to improve its performance in respecting the human rights of both civilians and combatants" to become eligible for US military assistance under the Leahy amendment, Senator Tom Daschle, in the strongest statement ever made by any American leader, said that "corrupt individuals and convicted criminals should have no place in His Majesty's Government" and urged the king to come to terms with the political parties by rescinding political differences and his personal ambition to consolidate the power of the monarchy because "a return to Panchayat style governance is unacceptable" to the United States (Daschle, 2005:4). In a subsequent statement made in the US Senate on 28 July 2005, Senator Patrick Leahy advised the US government to "reject the King's imperial ambition" built on the reliance on an army that "lacks an effective counterinsurgency capability" but "has abused and alienated the very people it is supposed to protect." The RNA, thus, is unworthy of any support from the United States (Leahy, 2005a:4). Further, he maintained that the "ruthless Maoist insurgency and a corrupt, repressive monarchy have brought the country to the brink of disaster.... The army's abusive conduct coupled with the king's repressive actions since February 1, have contributed to a political crisis that threatens not only the future of democracy but the monarchy itself" (Leahy, 2005b:4).

Earlier, a Joint Statement issued by 15 Embassies and donor agencies in Kathmandu stated that the information conveyed by the NHRC, leaves no doubt that both sides have scant regard for human rights. The signatories to the statement include US, British and Canadian Embassies, European Union, United Nations, Swiss Agency for Development and Cooperation. The statement has pointedly noted: "The current situation in Nepal portrays a climate in which no one is free from fear and insecurity." It further says that they were "dismayed" that "little has happened" to implement the government's commitment on human rights made on 26 March 2004 for the benefit of the people from which "the government draws its legitimacy and the state its sovereignty" (Himalayan Times, 25 September 2004). The Amnesty International researcher Clare Castillejo, after visiting Surkhet, Dang and Banke districts as a part of her investigation, said, "We found that most of the women in villages are in a vulnerable situation as their husbands are either killed by security personnel or Maoists." Pointing
out at the irony involved in investigating the facts, she said at a press
conference in Kathmandu that “The NHRC, and we human rights
activists have to request the RNA headquarters and fill forms before
visiting those detention centres. If it is not a surprise visit, we won’t be
able to get the real facts.” Thus human rights organisations including
NHRC, should be given “unfettered access” to RNA barracks and
detention centres (Kathmandu Post, 7 October 2004).

These developments have led the US Senate to reconsider the
Foreign Assistance Act to block military assistance to Nepal in view of
the growing violation of human rights by security forces. The Principal
Deputy Assistance Secretary for South Asian Affairs, Donald Camp
said at a press conference in Kathmandu that: “As for the proposed
Congressional action, the proposed amendment indicates how seriously
our Congress, and the American people in general, feel about the
importance of human rights situation in countries such as Nepal”
(Kathmandu Post, 8 and 9 October 2004). This is a follow up position of
what his immediate superior at the State Department, Christina Rocca,
the Assistant Secretary of State for South Asia, had said earlier: “We
cannot equate the terrorism of the Maoist with the government efforts.
We do hope that the government respects the human rights” (Spotlight,
26 December 2003).

This change in the American stance along with increasing national
and international pressure against the government in Nepal to make it
honour its human rights obligations has perhaps led the RNA to soften
its position on the issues relating to disappearances and the excesses
committed by its soldiers that was previously brushed aside as the
works of some “miscreants” within the army. The army spokesperson,
Brigadier Deepak Gurung has, for the first time, admitted that 47
civilians are in army detention and 61 others have been detained in the
newly formed Sundarijal detention centre. A disclosure was made on
the very occasion stating that the RNA has taken disciplinary actions
against soldiers for 39 cases of human rights violations. In the process
43 guilty personnel were jailed, 30 dismissed from service and 11
demoted from their ranks (Kathmandu Post, 9 December 2004). There
is also a report on the General Military Court of RNA taking actions
against a Colonel and two Captains on the custodial murder of a 15
years old girl; the procedure, however, remains cosmetic because none
of the guilty was put in jail even for a day (Kathmandu Post, 28
September 2005:1; Pokharel, 2005:1). Thus the distrust that the RNA
has sown in the popular psyche remains because the military court is not liable to look after cases involving civilian offences committed by army personnel. The showcase trials, conducted in camera, are hardly measures that will improve the credibility of the army, and were held perhaps to appease international opinion, since it coincided with the visit of the representative of the UN High Commissioner to Nepal to further probe cases of excessive violations of human rights by security forces.

Not surprisingly, NHRC, has come down heavily both on the RNA and the government for failing to cooperate with the Commission and for not rectifying their “mistakes.” The Chairperson of the NHRC, Nayan Bahadur Khatri, has lamented that both the government and the RNA have failed to adopt corrective measures although they have conceded to some rights violations cases on the basis of the Commission’s report on monitoring of 58 districts in the country. According to him, the army chief had declined to attend the NHRC, meeting citing his busy schedule. It is worrisome that the army chief was not inclined to discuss the human rights situation in the country. Further, he added, “That is not all. The government is not serious to address the growing number of disappearance cases though the Commission has drawn the prime minister’s attention to the issue. Likewise, the Committee set up under the Home Ministry to look into disappearance cases has disregarded the complaints registered at the NHRC,” he added (Himalayan Times, 25 September 2004). This sense of frustration on the part of the national human rights agency is reflected in the remarks of the British Special envoy to Nepal, Sir Jeffrey James, at the conclusion of his seventh visit. In an interview to a Kathmandu weekly, he said, “Given the worsening conflict, the respect for human rights becomes ever more necessary. We underline once more the responsibility of the government and the security forces to exercise their powers in full compliance with domestic and international law.” Further, he observed “There is still serious concern at the evidence of widespread violations by the security forces, including extra-judicial killings, illegal detention, disappearances, abuse of prisoners, and the failure to observe due process of law” (Spotlight, 17 December 2004). Concerns over continued disappearances and police brutality are being reiterated by OHCHR; systematic practice of torture is being pointed out by the visiting Special Rapporteur of the UN Commission on Human Rights, urging the government to repeal legislations providing impunity to such barbarous acts (Himalayan
The underlying concerns reflected in the donors' and friendly countries' views in relations to Nepal as a state in conflict have been human security rather than state security. Human sufferings through human rights abuses are the issues being addressed by the international community. They have insisted that causes of grave violations of human rights by security forces should be reflected in rethinking the government's anti-terrorist strategies and that it was necessary to bring wrong-doers under the rubric of national laws. Human rights have, therefore, become an issue both for donors and the recipient country's accountabilities to protect the rights of the people even when the state is embroiled in a violent conflict. Perhaps this is the reason why the EU parliament has recently adopted a proposal to impose sanctions on Nepal if the situation does not improve.

4.6 HUMAN RIGHTS AND HUMAN SECURITY

Does the case of excessive violations of human rights provide any useful indication towards the understanding of the human security situation in Nepal? Scholars on this issue posit some contending views because they place the concepts of human rights and human security in different categories. In this context, Taylor Owen notes, "[H]uman rights and human security are very different concepts. While rights signify the basic legal entitlements of individuals, security involves personal safety. Rights generally depict conditions in which all people are entitled to live; security addresses the very survival of these people" (Owen, 2002:22). Accordingly, not all human rights abuses qualify as threats to human security. Owen has introduced the concept of threshold of severity whereby human rights abuses manifest into something that might be termed as human security threat, inviting international humanitarian intervention to preserve a group's human rights. But who retains the rights to determine the threshold of severity? Is it the people and society that suffer or some others who firstly watch the unfolding drama of inhumanity insensibly, and cry foul only after maximum damage has been done? And, who else is also to define the nature of the pervasive threats critical to human lives and human security?

Defining and determining the threshold of severity is, therefore, a matter of perception for some but a fact of life for others. Definitions cannot be universally summative. But when security is defined as
involving personal safety, it is cumulative, featuring the individual rights affecting the freedom of a people. It relates therefore to human rights; the vulnerability of human rights in extremity in various forms increases the insecurities of people and impinges on human security. The vulnerabilities of the people in conflict are not simply confined to the physical hurt or the death of the protagonists in a conflict. The forcible ejection of the people from their domiciles, human exodus fearing reprisals, involuntary disappearances, turning schools and lands owned by the people into sites for military barracks, shrinking jobs and means to livelihood and increase of the social costs of conflict all relate to the rights of citizenry—rights to freedom and rights to development. Perhaps this is the reason why Owen suggests that what is most important is the recognition that protection from human rights abuses is one component of ensuring human security. Individuals also need protection from poverty, disasters, conflict and disease. Protection from gross violations of human rights is a necessary, but not sufficient, condition of human security (Owen, 2002:23, emphasis original). Although Owen agrees that the “mass human rights abuses against a group in a society are clearly a threat to human security” he has failed to qualify the suppression of religious freedom [of minority] as a human security threat in most cases (Owen, 2002:22).

The confusion surrounding Owen’s discourse on human security is obvious. His deliberation on human rights within the framework of “basic legal entitlements of individuals,” and not as fundamental rights of citizenry for a secure life with personal/physical safety pursuant to one’s own faith and cultural practices are far from being desirous. As a matter of fact, assertion of cultural, religious, linguistic and even racial rights, inflamed by ethnic passion is the essence of intrastate conflicts. In other words, the rights to identity caused by the burgeoning sense of insecurity of the minority have put nation-states in turmoil in the post-Cold War world. These are all rights motivated conflicts related to human insecurity. Though Owen’s assertion that all human rights abuses cannot be qualified as threats to human security is undisputable, violations of human rights under the legal provision of immunity the state professes cannot be considered under the rubric of the threshold of severity concept to human security. Impunity, in other words, is a provision for barbarity. Protecting human rights, as argued by Owen, is, therefore, not just a component; it is fundamental to human security in Nepal.

Arguments posited in favour of the rights approach to human security are comprehensively dealt with in Human Security Now
While clearly establishing the complementarity between the concept of human rights and human security, Amartya Sen argues, "the society should [at least] acknowledge, safeguard and promote" the basic freedoms of the individual. Viewing individual freedoms as a component of human security and "as a class of human rights is the associative connection that rights have with corresponding duties of other people and institutions." The mutuality of "duties" and "obligations" that frames the human rights inventory inculcates the perspective of human security, guaranteeing certain freedoms for survival of the individual citizens (Sen, 2003:9). One of such freedoms can be the "cultural liberty" of the people, as asserted by the Human Development Report 2004. It relates to the politics of identity of a person, the recognition of which element has become an imperative for evolving a cohesive and enduring society. Embracing multiculturalism and securing and not suppressing cultural diversity is a measure pursuant to human rights, and ultimately guarantees the crucial elements of human security. As Richard Falk has noted, protecting individuals and groups from systematic violations of human rights is the primary responsibility of the state. Failing this, state sovereignty would merely be a posture of bankruptcy (Falk, 1981). Although state sovereignty remains essential for preserving international order, it has been noted that the "frontiers" of the state cannot be the line of "actual defence" (Annan, 1999) in case the people's sovereignty is crushed internally (Boutros-Ghali, 1992; Reisman, 1990) and human security is denied. The "imagined temple of law" enshrined in the concept of national sovereignty must be coterminous with justice to humanity as international law does not permit eluding human rights for national sovereignty (Glennon, 1999:2-7).

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