Identifying Challenges, Assessing Progress, Moving Forward: Addressing Impunity and Realizing Human Rights in South Asia

International Conference Report

Kathmandu, 2018
Identifying Challenges, Assessing Progress, Moving Forward: Addressing Impunity and Realizing Human Rights in South Asia

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Kathmandu, 2018
Commissioners of NHRC

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FOREWORD

The adoption of *Kathmandu Declaration on Addressing Impunity and Realizing Human Rights in South Asia 2018* together with the publication of this report evinces the enjoyment of independency of the National Human Rights Commission of Nepal. The success of the conference has boosted our efforts on implementing the broad mandate of the commission for upholding international human rights standards.

Anxious to meet our expectations, we have, as a constitutional commission for ensuring basic human rights situation in the country, been reflecting on the need for ending impunity and reinforcing the states accountability in respecting and promoting the fundamental human rights of the citizenry. We are strongly of the view that state can neither adopt active steps of human rights violations or can passively abstain itself from accountability to protect rights from any sort of its violation.

As we rigorously discussed about the culture of impunity and its consequential impact during the conference, we are of the view that impunity for violence against women and the marginalized communities, and hostilities toward migrants, refugees and asylum seekers in the post-conflict societies are some of the serious challenges of our times. The culture of impunity not only impedes the pursuit of just, fair and inclusive communities but also the commitment to eliminate all kinds of violence against women, marginalized communities, migrants and refugees is depressingly influenced. Across South Asia, violence against women seems to be socio-culturally legitimized by a culture of silence and impunity.

Mainly the post-conflict countries, wherein the process of democratization is ongoing, the plight of the minority communities and their role in development are overlooked. In interpretation to minority rights, inclusive development process and equal treatment of marginalized communities is expected to further defining the barometer of a healthy democracy and inclusive state structure.
We solemnly recognized that it is important for National Human Rights Institutions and human rights defenders to understand the risk of vulnerability and discrimination at different levels of the society. We have recognized the need to reflect such issue in the areas of policy and practice further exemplifying the roles women and marginalized communities in growing democracy.

We have successfully achieved the aim of the conference, as to embrace the success stories of participating countries and discuss on new approaches to cope up with existing challenges in the working environment.

I would like to congratulate the members of the National Human Rights Commission and all helping hands, for making the event a remarkable one.

Anup Raj Sharma
Chairperson
We are pleased to present this report of the International Conference on “Identifying Challenges, Assessing Progress, Moving Forward: Addressing Impunity and Realizing Human Rights in South Asia”. This initiative on Impunity has provided a platform for National Human Rights Institutions (NHRIs) to come together as an attempt to identify challenges and share good practices in combating impunity and promoting and protecting human rights in South Asia.

The founding goal and the continuing purpose of the conference and this report contribute in developing legal and political remedies form the actions in resulting impunity. The objective of the conference was to provide a platform for National Human Rights Institutions (NHRIs) to come together as an attempt to identify challenges and share good practices in combating impunity and promoting and protecting human rights in South Asia.

This report is prepared to archive the events of the conference, which has strengthen collaborative efforts, set out measurable and action-oriented objectives. This report of the conference vividly reflects our shared priorities; the issues of transitional justice, rights of women and indigenous communities, fundamental rights and human rights, migration and livelihood and truth and reconciliation, as stated by the Hon. Chairperson of NHRC-Nepal in his Keynote address.

This December, we also celebrated the 70th anniversary of the Universal Declaration of Human Rights which is celebrated worldwide. Today’s need is to reclaim the fundamental idea of equality and dignity of all people, to cherish the core values of human rights and stand for the demand that they ascertained as a foundation for policymaking and practice. The underpinning values of human rights are far too integral to human life as to discard; and, efforts to protect them is far too sensitive to take for granted.
We are grateful in having had excellent cooperation from many respected organizations engaged in monitoring and campaigning for the protection and promotion of human rights. We also have been privileged to welcome the participation of NHRIs and global and national experts. We are hopeful to present this report as an endeavor to contribute in political study aspect, which observes the international political scenario in context of human rights status.

In addition, the high level of attendance of governmental bodies, as well as international and non-governmental organizations, reflected the level of commitment of a wide variety of actors upholding different mandates and perspectives. We Hind/rance whether from countries of origin, transit, or destination, to work more closely together to combat trafficking and to assist its victims.

I hope you will enjoy reading this report, which aims to capture the main activities, achievements and outputs of the conference. By compiling this overview of the main issues discussed by the conference participants, we shed light on how we can accomplish global goals by taking local actions.

Mohna Ansari
Member
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I. Introduction

With this conference, the National Human Rights Commission of Nepal (NHRC) brought together the first regional gathering of national human rights institutions (NHRIs) to specifically identify challenges and share good practices in combating impunity and promoting and protecting human rights in South Asia. The meeting was an effort to pinpoint effective ways to challenge the violations of fundamental human rights across SAARC member states, building on the achievements of previous gatherings. The Nepal NHRC brought regional and international experts into the conversations, to allow participating delegations and delegates to assess their current position and progress with respect to international human rights norms in the context of transition from conflict.

The conference organizers sought to provide a forum for identifying local, regional, and international challenges in human rights protection and promotion and in so naming these challenges, hoped to take the first step in combating impunity around human rights abuses. It was expected that participants would ensure that gender and issues of gender-based violence were integrated into all discussions – and this was met through the commentary of participants and panelists over many of the sessions.

Organizers and participants alike sought to reflect on the changed context of human rights in South Asia over the past 15 years. A clear goal was to share effective practices for responding to fundamental rights violations including, where relevant, in times of conflict and in post-conflict settings. Furthermore, conference participants sought to identify effective collaborations between NHRIs and other human rights defenders in overcoming challenges through “best practices” particularly in terms of government advocacy. While this was an objective of the conference, and some common points were highlighted by participants, there is work yet to be done on this front.

Participants also met with a goal of issuing a joint statement regarding next steps for addressing common institutional challenges around impunity. A strong “Kathmandu Declaration” was adopted at the conference. Next steps would include the establishment of a regional mechanism or designate a focal point within each NHRI with the mandate to exchange information and coordinate activities; undertake a study to explore the possibility of establishing a SAARC regional human rights mechanism, joint lobbying of SAARC governments on key concerns in the region,
such as the protection of refugees and economic migrants and victims of trafficking. Furthermore, to achieve the goals set out in the Kathmandu Declaration, the conference encouraged GANHRI and APF to support these initiatives.

II. Methodology/Format

Given the nature of the issues at hand, and challenges in the region, the conference organizers aimed to provide an environment conducive to meaningful dialogue and opportunities for learning. To create such a setting, the conference was designed around space for discussion, drawing from the experiences of all participants.

This report first summarizes the speeches during the opening ceremony, including by Hon President, Bidya Bhandari.

Chairs from each NHRI, as well as from different delegations, moderated sessions and shared their own expertise and experiences throughout the conference. For instance, NHRI representatives each briefly outlined some of the key challenges and successes they encountered in their work.

The focus during the conference was on thematic presentations and discussions on key aspects of impunity facing South Asia today. The selection of topics within the frame of Human Rights and Impunity allowed participants to have productive discussions, reflection, and develop meaningful next steps. They were:

- Fundamental rights, national security and human rights
- Migration
- Transitional justice
- The rights of women and other marginalized communities
- NHRI at the regional and domestic level

The discussions on all these topics have been summarized in Section IV below. Under each section, there is a short introduction to the theme, followed by a summary of the presentations and discussions at the key session as well as a summary of references to the same theme in other sessions.

The following points served as guidelines or ‘take-away’ points for even the thematic sessions:

- Best practices in collaboration for impact with the government
- Best practices in collaboration for public impact
- Successful methods of regional networking for combating impunity and promoting and protecting human rights, and the outcomes of that networking

The last chapters include the concluding remarks and suggestions for ways going forward (Chapter V) and the text of the Kathmandu Declaration (Chapter VI). All speeches made available by the speakers have been added into the Annexes.

III. Opening Session

The opening session of “Identifying Challenges, Assessing Progress, Moving Forward: Addressing Impunity and Realizing Human Rights in South Asia,” saw six speakers from Nepal, Afghanistan, Bangladesh, Pakistan, India and Sri Lanka. All speakers welcomed participants to a conference with ambitious, but feasible, goals.

Hon Prakash Osti, Member of the NHRC Nepal stressed the importance of a dialogue between NHRIIs, government and civil society. He stressed how their challenges are different, but a great deal in common. Transition justice, migration, truth and reconciliation, women rights, indigenous rights are common issues that need to be addressed. Combatting ill-treatment and impunity is a pre-requisite to promote human rights. We are all aware of the role NHRIIs have been playing, despite the many challenges. The Conference addresses common issues across the regions, and how to move ahead, helping each other. Cross-border cooperation is needed to advance human rights. Mr Osti expressed his confidence that the conference will also contribute to peace-building, saying human rights can prevent conflict and bring justice. Without justice, there is no peace. Our mission is noble and essential.

Kedar Nath Upadhaya, former Chairperson of the NHRC Nepal addressed the conference, expressing the following view: – We cannot overlook the growth of the human rights jurisprudence over the past decades. It has redefined the shape of democracy in the modern rights. In modern times, we cannot only look at rights as civil and democratic rights, we have to consider the rights of minorities and underprivileged groups. The Constitution of Nepal recently adopted incorporated most universal human rights concepts. They are to be implemented with the relevant laws. Includes the need to establish national sectoral human rights commissions, besides the NHRC. There should be provincial human rights commissions as well. The 10 years of civil war have subjected people to grave violations of human rights and crime against humanity. The Comprehensive Peace Agreement has led to power
sharing. The transitional justice process has been slow and patchy, and the perpetrators on both sides have been left unaccountable. The government of Nepal only partially acted upon the NHRC recommendations: the government only pays compensation, without prosecution. Both commissions on transitional justice did not manage to perform their tasks within the dedicated timeframe. **The culture of impunity prevails in the field of human rights and is due to lack of respect for the rule of law.** The situation is not dissimilar in other Southern Asian countries. Civil society and human rights defenders should work with NHRIs.

Dr Sima Samar, Chair of the Asia Pacific Forum of NHRIs (APF) and Afghanistan IHRC spoke of the growing risks and sacrifices facing human rights defenders. In the aftermath of the fall of the Taliban, Afghanistan faces two issues: stability and justice. The UN and international community were mainly focusing on stability. This has overlooked justice. Impunity continues until today.

In 2005, a joint delegation of IHCR, EU Delegation, Government was established to draft a 3-year action plan on peace, reconciliation and justice. Victims groups have been established. IHRC has been compiling conflict mapping report (1978-2001). We experienced 40 years of conflict, war crimes and crimes against humanity. Warlords have posed a great threat to the rule of law. A law was enforced reinforcing the impunity and put forward amnesties. The OHCHR had prepared a report but was unable to launch it, because of our government. Various research call for comprehensive approaches for justice and against impunity, by the government and the international community. Efforts for justice and efforts for security can go hand in hand. Justice is not a luxury. It cannot be traded off against security. Afghanistan is a good example. Joint voices to raise for justice is crucial. More resources should be spent on social protection, equality and justice. The ICC and the Afghan government have signed a cooperation agreement, which is a step forward. Injustice in Afghanistan feels the culture of impunity everywhere. We NHRIs and HRDs should heal victims of human rights. Respect for human rights does not know borders.

Katharina Rose, Representative of GANHRI the Global Alliance of NHRIs explained the wider context of the conference. GANHRI was established 25 years ago. NHRIs recognized that they can better succeed nationally by working in unison regionally and internationally. They formed a platform to exchange and ensure respect for the Paris Principles, through our accreditation process. Over the last two decades, events around the world have served as reminders as to how the absence of justice can lead
to the absence of human rights. We need to make human rights a reality in our laws, in our policies and decision-making, in our homes, our businesses, our communities. NHRIs play a range of different roles. Several NHRIs across the region have been established as part of truth and reconciliation mechanisms. NHRIs can serve a unique role, which was recognized by States 25 years ago in the adoption of the Paris Principles. The Paris Principles constitute the pathway according to which NHRIs should work. They are referred to as the essential bridge between the international and the domestic levels. They can make treaties a reality. The SDGs have also stressed the importance of establishing NHRIs as per SDG Goal 16. Underlines the interconnectedness between the three UN pillars: development, security and human rights. NHRIs can only play their role if there is the right level of responsiveness from the government. Preconditions include autonomous and sufficient resources, wide-ranging mandates and independence. The State has the prime responsibility to ensure a safe and enabling environment for the work of human rights defenders, including NHRIs. In cooperation with the OHCHR and UNDP, the GANHRI developed tools to ensure the security of NHRIs under attack, notably in post-conflict situations. The UN should safeguard a meaningful space for NHRIs to operate. As NHRIs have a unique role and responsibility in conflicts and post-conflict, we need to ensure that the support, resources and capacity for NHRIs to carry their mandate, for constructive engagement of the UN with NHRIs, to maximize the use of information from the ground.

Anup Raj Sharma, Chair, NHRC Nepal – Since the CPA and the Interim Constitution, we need to make it effective in practice. Nepal is a highly diverse country. We are leaving in a post-Peace Agreement period. It is now 12 years since the CPA, but the perpetrators of crime are still not held accountable. The government shall provide the right legal framework and resources for the two transitional commissions to work and be compliant with the Supreme Court decision. Nepal, as a newly elected member of the UN Human Rights Council, must be upholding the highest standards of human rights. NHRIs must build partnerships with victims and marginalized groups. The independence of the judiciary and rule of law are important. Without those, no country has been to develop economically neither. We need to find the words that any man, woman and children can understand, to carry the message of human rights.
Hon. President of Nepal Bidya Devi Bhandari formally opened the conference. She welcomed all participants. In her speech, the President stressed that human rights are a global standard. The NHRC has brought together the NHRIs from the region. It has done a laudable job. The Constitution of Nepal promulgated in 2015 provided for human rights guarantees. Also included provision for inclusion. It is the most progressive constitution of our times. In South Asia, exchanges of experience and ideas can bring more meaning to our Conference. Nepal has achieved a peaceful transformation from conflict times. The Supreme Court has delivered key judgements. Our human rights protection mechanisms under the conflict and post-conflict periods can serve as example for the region. The government is duty-bound to solve the problems that have emerged in the transitional justice. I would like to reiterate the principles of human rights, democracy and social welfare enshrined in our Constitution. We can take promotion of human rights in South Asia to new highs. ESC rights are as important as civil and political rights. Without the implementation of human rights, democracy cannot be people-oriented. Human dignity encompasses the right to food, to clean environment, to drinking water, etc.

The President expressed her hope that the conference will further institutionalize the protection of human rights in the region.

The texts of the speeches by Hon. President Bidya Bhandari and Hon. Chairperson Anup Raj Sharma can be found in Annex II and III respectively.

IV. Thematic Sessions

THEME I: Fundamental Rights, National Security and Human Rights

There is often a false and dangerous dichotomy drawn between national security and human rights. Rather, the discussion should be about national security and human rights.¹

A reliance on science will not overcome issues of violence and impunity. Science never was and never will be gender-neutral: if we simply expect the solution to exist there, we’re failing to account for biases inherent in science, and in the use of technology.²

¹ William O’Neill, Conflict Prevention and Peace Forum, New York, USA
² Vrinda Grover, human rights advocate and attorney, India
THEME I: Fundamental Rights, National Security and Human Rights

Introduction

Human rights activists have often heavily criticized the practices of national security institutions for violating fundamental human rights norms, most frequently for acting without due process and without heed to individual rights, including the right to life. At the same time, the promotion of human rights has sometimes been viewed as competing with, or even compromising, issues at the core of national security. It is inevitable that stances will have to balance both -- the state’s interests in security, with the interest of the individual in the preservation of his or her human rights. However, states often try to justify the gross violation of human rights on the grounds of national security – a stance that has seen particularly strong resonance around the world since September 11, 2001, although it was certainly articulated prior to these events as well.

Fundamental rights refer to those rights that are inherent to all individuals, and available to all peoples for the development of themselves and their communities. These include the belief that every individual in a given jurisdiction has the right to certain protections, including legal protection, as a consequence of being human. These exist irrespective of race, caste, gender, color, place of birth, religion, political affiliation or any other opinion or status. Fundamental rights are the basis of civil rights and civil liberties, include the right to freedom of thought, of religion, of freedom of expression, and the right to self-determination, as well as the right to liberty, to the due process of law, freedom of movement, and the right to peaceful assembly. The different thematic sessions chosen for this conference all link back to this basic, fundamental rights protected by international and regional documents, as well as the domestic commitments of SAARC states.

At the same time, states will often invoke national security as a justification, to legitimize the state’s exercise of power in constraining fundamental rights, particularly freedoms of association, expression and liberty. In the name of national
security, state security apparatuses have unfortunately routinely practiced torture, arbitrary detention, indefinite detention, and extrajudicial killings. Furthermore, even under international human rights law, states are allowed derogations of rights on grounds of national security – and they regularly do so, to suppress dissenting and marginalized voices, to increase powers for police and security apparatuses, and to introduce new powers of surveillance that limit and control people’s movement and activities. All of this raises serious questions about the commitment of the state to human rights, civil liberties, inclusion, peace, security, and democratic development.

According to the statement by the UN High Commissioner for Human Rights to the Security Council’s open debate on Maintenance of International Peace and Security, short-term geopolitical considerations and narrowly defined national interests, have repeatedly taken precedence over what should be intolerable human suffering, and grave violations of human rights. These violations, and the short-termism of many states, present long-term threats to international peace and security.5

United Nations Resolution 1373 asks governments to take such action as is necessary to prevent and prosecute terrorism -- but international law requires that such action conform with international human rights, humanitarian and refugee law.6 International human rights law provides a carefully calibrated set of scales that can enable governments to balance national security and human rights. This balance is achieved by recognizing that sometimes it is necessary to limit individual rights to protect national security or respond to situations of public emergency. However, this balancing exercise cannot be used to excuse any derogation of rights: freedom of thought, the right to life and the right to be free from torture or other cruel, inhuman or degrading treatment, cannot be suspended in any circumstances.7

In this context, speakers and participants raised issues of how National Human Rights Institutions can make clear that the preservation and protection of fundamental human rights are non-negotiable and keep these rights at the forefront of state responses. They also raised questions about how National Human Rights Institutions (NHRIs) have understood – or failed to adequately analyze - national security through a human rights framework, with responses that ensure accountability from the armed forces and the police. Speakers urged NHRIs, as central organizations in a network of

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human rights advocacy, to work closer together with civil society actors to make sure that legal safeguards are in place to regulate the state’s powers, and to ensure that local governments adequately ensure human rights protections.

The use of torture, arbitrary detention (as defined in national law and under international treaties and norms), and indefinite detention are unacceptable, and yet they take place across our region. Speakers across the board reiterated that national security cannot be an excuse to suppress political voices, and to undermine democratic principles. As Vrinda Grover and William O’Neill both remarked, issues of surveillance and freedom of expression are both salient here, and national security-based justifications must not become a basis for silencing the voices of marginalized genders, or ethnic and religious minorities who attempt to claim or exercise their rights. NHRIs must cast a keen eye on the police power of the state and bring together human rights advocates and national security actors for security sector reform.

Key session: Fundamental Rights

Prof. Dr. Sev Ozdowski, former Australian Commissioner of Human Rights

Professor Ozdowski’s talk provided an overview of his longer paper, “Human Rights As An Instrument of Social Cohesion in Southeast Asia.” He began by discussing human rights standards and implementation mechanisms, and then discussed what it means to conduct human rights practice in society, as well as the role of NHRIs in this. His central thesis was that human rights and social cohesion drive each other; they are synergistic. While the Universal Declaration of Human Rights (UDHR) was not a binding document, it established a set of universally applicable standards that empowered varied communities and individuals with a set of rights and protections. The 1993 Vienna Conference and Declaration recognized these rights as indivisible, interdependent, and interrelated—while acknowledging the importance of national and regional particularities.

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Professor Ozdowski then compared the concept of ‘social cohesion’ in Europe and Asia and related it to the work of institutions involved in human rights practice in these two regions. In Europe, social cohesion is understood as contending with issues of marginalization, namely linguistic differences and cultural diversity. By comparison, in South and Southeast Asia, social cohesion includes the practice of democracy, policy priorities, and a range of other elements that were pre-determined features of the liberal state in Europe. This separate demarcation of social cohesion means that the language of human rights enters the public discourse at a different political and institutional level in South and Southeast Asia, compared to Western Europe. Professor Ozdowski noted that the delegitimization of democratic processes and the deterioration of religious and civil liberties pose threats to human rights around the world, including in South Asia. The challenge faced by human rights commissions is thus to “focus on winning hearts and minds” to legitimize human rights practice, and to work on human rights education in order to change social values and give substantive meaning to the notion of rights.

Prof. Dr. Surya Dhungel, Senior Advocate, Supreme Court of Nepal; Dean, Kathmandu School of Law

Professor Dhungel focussed his remarks on fundamental rights and the constitutional status of human rights in Nepal, assessing progress in human rights, and flagging potential areas of work for NHRI s in the days ahead. Enumerating some statistics around the tremendous demographic and cultural diversity that exists in Nepal and across the region, he noted that this presents opportunities for deeper understanding of diversity through shared lessons, as well as challenges in reaching consensus. He also commented on the need to reflect on the post-conflict constitution in Nepal, which he said presented opportunities for greater realization of human rights and social justice – but which still needed to have a more clear articulation of competencies at different levels of government and judiciary in a federal system.

Professor Dhungel also expressed concerns about the full implementation of human rights, including economic and social rights, across the federal system, which would create three levels of government, with 753 municipal governments, 7 provincial governments, and 1 federal government, compared to the previous state structure in
which only the central government could enact legislation. He remarked that the realization of these rights would require “special lead-frame enactments,” that would need to be completed through the Nepali legislature by September. Although optimistic, he questioned the feasibility of this time-frame. Professor Dhungel flagged the power of the judiciary, and the ways in which civil society actors have successfully used the courts, winning verdicts for greater inclusivity and the realization of human rights. He posited that civil society organizations have pushed cases that led the judiciary to produce meaningful decisions, and encouraged NHRIs to work more closely with community organizations for better monitoring and enforcement of human rights norms across all three new levels of government. He marked enforcement at the level of the municipal government as a specific area of concern.
**Key Session: The Role of Security Forces in Challenging Impunity**

A. Speakers

**Vrinda Grover, Lawyer/Activist, India**

Ms. Grover spoke about the vital importance of critically examining the role of security forces in India, and their part in impunity. In doing so we see both institutional gaps, and biases. Institutional gaps include legislation that continues to ban full investigations of government activities, and of security forces. Initially developed in the British colonial era, these measures continue through to the present day. One of the consequences of these gaps can be seen in the limited investigatory capacity of the Indian National Human Rights Commission, and the current statute of limitations on offenses that leads to impunity.

Enforced disappearances in militarized zones continue to be a serious problem in India. In these same places, we see women at the forefront of campaigns against enforced disappearances through long-term, non-violent, action -- including sit-in protests. Despite the seriousness of the problem, and recognition in international law, enforced disappearances are still not a crime, codified in the Indian Penal Code. The only possible legal claim that can be brought forth is under that of “missing persons,” which does not sufficiently capture the crime and the role of the state in this activity. Furthermore, no law prohibits torture in all circumstances – but the NHRC has taken a strong stance against this. Institutional biases also exist: these constrain an exercise of rights, and promote impunity.

**Prof. Dr. Yubaraj Sangroula, Nepal**

Dr. Sangroula began his talk with a somewhat controversial proposition: that the high ratio of civilians to law enforcement officers contributes to a sense of vulnerability among the police, and exacerbates the possibility of human rights violations during times of high tension. The majority of his talk focused on the relationship between political actors and security forces, to conclude that often, violations attributed to the police are actually the responsibility of political leadership, who orders such actions. He encouraged the use of more evidence-based methods of data collection and
forensic analysis to properly attribute responsibility, to both individual and institutional actors.

At the same time, Dr. Sangroula was adamant that training police personnel to respond better to crisis is both possible, and not the biggest challenge. “But as long as the police are maintained as instruments of political rule, and there is no action taken to change the structures of authority with respect to political leaders, there cannot be changes in the actions that we see from police and security forces,” he said. He insisted that promoting accountability among the security forces was meaningless without engaging the government and political parties, who both treat justice as an “unproductive” sector. Thus, reforms that are ostensibly focused on security forces must be aimed at the level of political actors. Without deep political will, torture, police violence, and other violations of human rights will continue.

William O’Neill, Conflict Prevention and Peace Forum (CPFF), New York

Human rights and national security should not be seen as oppositional, but as issues that are necessarily discussed together. The best way of ensuring national security is by respecting and realizing human rights. Unfortunately, at this time, there is a stronger attack on human rights than at any point since 1945. First, since September 11, 2001, there has been an increased use of national security as a justification for the derogation of core human rights principles. The use of torture, prolonged detentions, and unfair trials are all examples of this -- and also become ways for terrorist organizations to recruit. Similarly, the use of drone warfare, such as in this region, has increased enmity against user-states, instead of successfully contributing to any fight against terrorism. The use of mass data surveillance erodes the right to privacy and, undermines freedom of association and speech. A third attack comes from an increasing weaponisation of migrants by right-wing governments around the world, in order to gain political capital. Migration is not a crime, but a right. There is a right to seek asylum, and non-refoulement. A growing, new, emphasis on walls has become part of an effort to weaponise migrants in political battles for power, and to exclude vulnerable groups in need of protection. By militarizing borders, escalating
xenophobic rhetoric, and excluding groups, governments cause further harm to vulnerable individuals.

Mr. O’Neill also emphasized the need for deeper collaboration between national security practitioners and human rights activists, to avoid polarity between the two groups, and to enable security sector reform that ensures both the punishment of violators of human rights, and the prevention of future violations. On this, he remarked:

“Unfortunately, a harmful dynamic has emerged whereby human rights defenders and national security activists are often in direct conflict, and at times even see the other as part of a zero-sum game, with mutually exclusive goals. Each side would be served by gaining a deeper appreciation of both the real threats posed by terrorism – as well as how the use of security as a justification to erode human rights only reinforces the very factors that often lead to terrorism and violent extremism. Rights may have limits, but limitations on rights are not absolute or open-ended, and must be proportionate – and truly necessary, as determined by an independent judiciary.”

In this regard, the UN Rule of Law indicators provide a helpful guide, and potential ways to measure change. An independent judiciary plays a crucial role in determining when there can be a legitimate derogation of fundamental rights. NHRIs can help to gather data, and to advocate for the rights of victims in receiving remedies -- a right without a remedy is an empty right. Working domestically, and regionally, as well as with the UN Special Rapporteur on Truth, Justice, Reparation, and Guarantees of Non-Recurrence, can help establish independent oversight of the security sector, and help restore confidence in the state.

B. Chairs

Hon. Anup Raj Sharma, Chairperson, National Human Rights Commission, Nepal

Nepali Commissioner Anup Raj Sharma ceded the floor to Dr. Udagama.
Hon. Dr. Deepika Udagama, Chairperson, Human Rights Commission of Sri Lanka

Dr. Udagama noted that in Sri Lanka, the HRC is able to function relatively efficiently under a powerful and broad mandate that allows it to advise the government, run a robust complaints mechanism, and also monitor the human rights situation in the country. The Commission’s most important success has been its ability to gain the confidence of the public regarding its independence. This success complements general improvements in the human rights context of Sri Lanka, such as the growth in democratic space and the eradication of enforced disappearances and extrajudicial killings following the 2015 governmental transition from authoritarianism.

Despite these improvements, she noted, there are serious challenges to the issue of fundamental rights, and the relationship between national security apparatuses and human rights protection both domestically and regionally. For example, the delay in implementing legislation that incorporates human rights treaties, and decreased independence and capacity in the institutions necessary for implementing the rule of law indicates a precarious situation for the rule of in Sri Lanka. Moving forward, she said, governments must focus on deepening democracy, as opposed to upholding “prop-democracies.” This should take place through measures that meaningfully strengthen the citizenry, such as actions to improve the literacy of women, to foster deeper political engagement and economic participation.

C. DISCUSSION

The discussion that followed the joint session on Fundamental Rights and National Security and Human Rights, raised some very sharp, important, questions and also introduced commentary from participants about the overall responsibility of the international community vis-a-vis constraints on security forces.

Questions and comments

Nepali civil society member and activist Rakesh Mishra questioned Dr. Sangroula’s methodology and analysis:
“You selected a soft target – politicians. Three years ago when the constitution was promulgated, dozens were shot dead, with bullets to their chest and head. Do you think politicians were the ones who ordered this? Secondly, you said there have been no extrajudicial disappearances or killings. What about Tharu protesters, like Resham Chaudhary – who has been in judicial custody for years since the protests in Tikapur? Third, what makes you say there are few security forces – what about the huge size of the army? Is this not part of the security forces, and thus a matter at issue?”

Regarding the presentations by panelists from Nepal and India about the relationship between politicians and police, Hon. Dr. Sima Samar noted that she saw close connections between the issues:

“Yes, politicians should have political will to promote good governance, but if the police are not enforcing that, then who will? Furthermore, even if the police are professional, if prosecutors are not, then the whole system is eroded.

If politicians are bad, and police are bad, that is also a problem! In our case for example, we are discussing the reform of police. You cannot imagine what reduction of torture we have achieved. The practice was extremely widespread. Now it still exists, but is mostly related to so-called homeland security. With respect to police violence, we are the ones who raised our voices and shouted to the president. The government sent a very corrupt officer to our programs, which brings us to the matter that even if the chief of police is good, if the governor is bad, then you can’t get very far. These questions of action by the security forces, and human rights and accountability from political leaders are very closely connected. And it brings in of course, the citizens, who should be responsible for choosing their leaders.”

Hon. Dr. Samar also spoke to a practice taken on by the Independent Afghan Human Rights Commission, that has supported their review and monitoring of police mechanisms while also creating more gender-inclusive policing practices:

“We signed an MoU with the police for two reasons. One, to monitor violations, within their structure. Two, to train them. But we also wanted to create a safer structure for women, within that structure. … We cannot deny that we live in a part of the world where society is entirely dominated by men
- even the color of a woman’s scarf taking precedence over her dignity as a human being.”

Responding to Dr. Sanguola, participant Nirajan Thapaliya remarked that in the context of Nepal it was crucial to not only notice and talk about institutional gaps, but institutional resistance to accountability for abuses. One notable example of this would be in the context of transitional justice, and the case of Maina Sunuwar. Here, we see how the army is continually resisting court verdicts holding them responsible for Maina’s torture and death -- and they continue to file appeals in the courts. This is tantamount to an institution refusing to be under civilian control or judicial oversight.

Indigenous rights activist Devasish Roy of Bangladesh posed a question about international human rights law and asked how civil society/human rights activists could better leverage treaty law for domestic change, when states like Bangladesh – despite ratification of the major treaties – fail to submit reports or remark on their progress.

The commissioner from the NHRC of Jordan, Hon. Mr. Mousa Suleiman Thany Burayzat, posed a question about the relationship between police, protestors and politicians from another angle, drawing from experiences in Jordan. He noted that during large-scale protests in 2014, the police of Jordan had accommodated a wide variety of protest actions against government policies, corruption cases, and abuses. At one point, more than 40 police were injured through direct shots – and the government apparently took no action against the protestors. Since then, he noted, Jordan has continued to see a lack of action against such protestors. He suggested that the UN should move to act or speak in such instances, because protests like these pose potentially grave national security concerns, as took place in Syria, where the civil war began after protests. He asked participants and panelists to provide their thoughts on why the UN is not acting, when internal protests too can have serious repercussions for humanitarian issues.

D. Responses

Vrinda Grover

Across the region, there is a rise of an ultra-right nationalist rhetoric, with very real reprisals against those who question an officer in uniform. These are reprisals with
physical consequences as well. Ms. Grover noted that her focus would be on accountability, and not to say that either/or should be addressed, with respect to the holding security personnel or protestors responsible for violence. She also provided an interesting response to those who would insist that ‘scientific methods’ will automatically create better policing, or accountability:

“I would also like to address the reliance on science. Science never was and never will be gender-neutral. We’ve already seen what it has done to information. I’m not saying it won’t allow for fingerprint collection. But rather, if we say that the solution is there, we’re failing to account for biases inherent in science. We must be mindful, or we’ll see truth serums, brain mapping, and the use of other technologies that amount to violations of due process and torture.”

William O’Neill

Mr. O’Neill gently noted to some who posed questions about the role of the UN that he was not a UN representative, but that his organization works together with the UN in helping them understand conflict. He said:

“The one theme that comes up is that the UN is not truly exploiting its moral authority as the one truly universal authority, especially in terms of human rights. Two of the biggest failures of that are in this region, in Myanmar and Sri Lanka, where the UN didn’t push hard on human rights, and consistently. And in your region [responding to the question from Jordan], it’s true – what about Israel? We were hoping that with a new Secretary General, this would happen – but this requires standing up to Russia, to China, to Trump and more. After the atrocities in Sri Lanka in 2009, the UN recognized that there needed to be a higher emphasis placed on human rights. Hence the Rights Up Front Initiative, even within the office of the Secretary General. But this role has recently been eliminated. Why? Because Russia refused to accede to budgetary funding for it. The UN will often defer to say – it is the composite of the member states. And this is true. Even more importantly -- the states are the people. So it’s us, we the people, who need to keep pushing.”
Dr. Yubaraj Sangroula

Dr. Sangroula emphasized that policing is a function of the government, and that along with others, he has conducted research into the factors that propel massive human rights violations during demonstrations. While his answer invited a heated response from the floor, he remarked:

“Empirical evidence shows that those who are given responsibility are untrained and inadequately educated. Officers are not present at these times. The police personnel who are sent out cannot have dialogue with the people – they cannot answer them, but rather, immediately indulge in violence, striking protesters. We need police who can engage in dialogue. This is very important. Having more police means that they will be under less stress, and will be less likely to resort to violence. An additional concern is what weapons the government gives to the police. Furthermore, it’s not just about that, but who gives the orders: these aren’t the heads of police, but politicians, who are responsible for these orders.”

Fundamental rights and national security in other sessions

The session on fundamental rights provided a foundation for the conference as a whole. For example, as Hon. Commissioner Justice Murugesan of the NHRC of India acknowledged in his plenary remarks, fundamental rights belong to all individuals – citizens and non-citizens alike, and thus become an important source of rights-based advocacy for migrants/refugees as well. In their talks, the chairman of the Nepal Human Rights Commission and the President of Nepal both highlighted the prominent role of fundamental rights in the Nepali Constitution and the role of the legislature in ensuring that these rights have legs.

In William O’Neil’s discussion of national security and migration, he offered a recurring theme of the need for states to consider the fundamental rights of asylum seekers and migrant individuals – and pushed states to use these rights as a way to make decisions that would serve humanitarian ends, and not just win votes. In the discussion of freedom of expression, both speakers emphasized that freedom of expression is a fundamental rights, without with the practice of democracy and the articulation of all other rights simply could not occur.
THEME II: Migration and Human Rights

Migration needs to be seen from a migrant rights-approach, not a migration-management approach.9

As countries where people are moving, it is important for us to fight for the rights of irregular migrants. The realities of how workers are leaving – from the very moment where they approach a recruiter – means that they enter a spiral of exploitation, that alters migration from being within a regular status, to an irregular one. And as soon as you are identified as an irregular migrant, you fall outside the protections of the law – and this poses problems in terms of access to justice.10

Introduction

Migration is recognized as an enabler of human development, as having the capacity to empower migrants and their families, as well as the societies migrants leave and those that receive them. These enabling features highlight the need for effective and cohesive governance of migration, to better harness the social and economic opportunities presented by human movement while maintaining a sharp eye to the human rights of migrants.11

Today, around 244 million people currently live outside their country of origin, with some 36.97 persons involved in either inter or intraregional migration in and from South Asia.12 While for some migration is a positive and empowering experience, it is increasingly clear that the absence of a human rights-based systems of migration governance at the global, regional and national level is creating a human rights crisis for migrants at borders and in the territory of countries of transit and destination.13

On 19th September 2016, the United Nations General Assembly hosted a high-level Summit for Refugees and Migrants that aimed at improving the way in which the international community responds to large movements of refugees and migrants. All 193 Member States of the United Nations unanimously adopted the New York Declaration for Refugees and Migrants (Resolution 71/1), and agreed to a set of

9 Renu Adhikari, women’s rights/human rights advocate, Women’s Rehabilitation Centre (WOREC), Nepal
10 William Gois, migrant rights advocate, Migrant Forum Asia
13 http://www.ohchr.org/EN/Issues/Migration/Pages/MigrationAndHumanRightsIndex.aspx
commitments, among them an acknowledgement of their shared responsibility to manage large movements of refugees and migrants in a humane, sensitive, compassionate and people-centred manner. This commitment was embedded with recognition of the need for international cooperation, while recognizing the varying national capacities and resources in responding to those movements.

Today, record-breaking numbers of refugees and migrants are moving across international borders, fleeing conflict, persecution, poverty and other life-threatening situations. They are also responding to labour and skill shortages and demographic changes and seeking better opportunities elsewhere. This can only be described as a human rights and humanitarian crisis and it demands urgent attention.

Most of the states of South Asia are not signatories to the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”), and the 1967 Protocol to the Convention – only Afghanistan has acceded. The region is arguably the least represented among signatories. At the same time, South Asian states host some of the world’s biggest refugee populations. Almost every country in the region has produced, or hosted, refugees – or both. Of approximately 21.3 million refugees worldwide, more than 3.5 million refugees are in South Asia. Pakistan alone has hosted up to 1.6 million, and is among the top five hosting countries worldwide, with 1.4 million refugees, despite limited resources and other domestic challenges. While South Asian states have arguably been among the most generous in the admission of forcibly displaced peoples, the security, livelihood prospects, and quality of life of refugees in the region remains a matter of deep concern. Forced migration and refugee status – particularly when legal status is precarious – leads to further vulnerability to labour exploitation, trafficking, and abuse. Around the world, refugees and migrants are demonized and their movements are criminalized. Particularly in the western hemisphere, states have designed policies based on deterrence, militarization and extraterritoriality, which may implicitly or explicitly tolerate the risk of migrant deaths as part of an effective control of entry. Punitive deterrence policies range from military securitization of the most accessible border

17 See e.g. UNHCR, Global Trends Forced Displacement in 2016, available at http://www.unhcr.org/5943e8a34.pdf
18 Id., at 3.
entry points — thereby purposefully funnelling migration flows into more hazardous terrain — to the imposition of strict detention and return policies.

At the same time, the right not to be arbitrarily deprived of life is a foundational and universally recognized right. It is applicable at all times and in all circumstances, including during armed conflict, or refugee flows or other public emergency. The right to life — a *jus cogens* norm — is protected by international and regional treaties, customary international law and domestic legal systems.19

States and non-state actors continue to perpetuate a myriad of human rights violations against migrants. These violations include denial of access to fundamental rights such as the right to education or the right to health, and are often closely linked to discriminatory laws and practice, as well as deep-seated attitudes of prejudice and xenophobia against migrants.20 A human rights-based approach to migration is timely – indeed, past due. Such an approach places the needs and interests of migrants at the centre of migration policies and governance. It also pays particular attention to the situation of marginalized and disadvantaged groups of migrants. Such an approach will also ensure that migrants are included in relevant national action plans and strategies, such as plans on the provision of public housing or national strategies to combat racism and xenophobia.21

This session was thus conceptualized with two prongs in mind, both of crucial importance for the region: forced migration, as it affects refugee and asylum seekers, and “voluntary” migration for primarily labour or livelihood purposes. Given the current largely “post-conflict” context of the region, the session was primarily an opportunity to discuss on-going conditions of vulnerability leading to migration. Speakers on this panel addressed a central “push” factor for all types of migration: the issue of economic compulsion, and the desire for changed material conditions. Speakers discussed and challenged the roles and liability that governments should assume in the matter of labour migration, as well as the role local human rights defenders and NHRIs have taken to advocate for the rights of migrant workers, before, during, and after migration. Each speaker pointed to links between recruitment agencies (so-called “manpower agencies”) and the government, and the need to understand this connection in order to hold all of those parties accountable for the exploitation of migrants. During the talks and subsequent discussion, there was

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20 [http://www.ohchr.org/EN/Issues/Migration/Pages/MigrationAndHumanRightsIndex.aspx](http://www.ohchr.org/EN/Issues/Migration/Pages/MigrationAndHumanRightsIndex.aspx)
21 Ibid.
both a tacit and explicit recognition that while migration outside the region receives a great deal of attention in both national and international media, there are also tremendous migration flows for work within South Asia, particularly to India. There was also a frank discussion of the emergent crisis in the region presented by the persecution and flow of Rohingya refugees from Myanmar.

The presenters’ talks dovetailed to provide a strong foundation for understanding some of the most pressing, and core, challenges of migration in the region, as well as points of intervention by governments and NHRIs – particularly those that seek to affirmatively address issues of social and economic rights. William Gois talks about exploitation and ways to address it: access to justice and the (re)instatement of firewalls between law enforcement and immigration authorities; more transparency around agreements between recruiting states and sending countries; the establishment of a regional mechanism; advocacy by migrant workers. Brabim Kumar and Renu Adhikari’s talks, in turn, addressed some of the core push factors of migration: the failure of governments to invest in the creation of livelihood and their youth, as well as significant structural barriers to economic and political enfranchisement that render women vulnerable to exploitation both in countries of origin and destination, while undermining their agency and access to fair migration. Participants from Malaysia (a major labour-receiving country), Maldives, and the SAARC region pointed to the need for the judiciary to accept, and rule on, issues of workers’ rights and access to justice across the migration journey. While the panel was primarily about labour migration, and not the rights of asylum seekers and refugees, it provided a timely point of entry into the roles that NHRIs can play in advocating for migrant populations.
Key Session: Migration and Livelihood

A. Speakers

William Gois, Migrant Forum Asia

Mr. Gois noted a positive development in the human rights field, an understanding of migration as a human rights issue. He went on to recognize the ways in which the field of migrant rights has historically been uneven. Migrant rights advocates saw a glimmer of hope when the issue came before the UN during the development of the Global Compact for Migration. Mr. Gois highlighted the importance of the initial discussions, in which participants sought to develop a single compact that encompassed all migrants – asylum seekers and authorized and unauthorized migrants alike. He emphasized the ease with which the categories slipped into each other, and ways in which precarious working conditions and exploitative agencies made it easy for someone to go from ‘authorized’ to ‘unauthorized’. However, the negotiation phase of this Global Compact has been gradually stifled by populist and xenophobic practices introduced by some Member States. This has been unfortunate, especially in light of mounting abuses faced by migrant populations, many of whom are immediately thrust into a spiral of exploitation the moment they approach recruiters or enter their country of destination.

To overcome the impunity that currently exists around the physical and economic harms faced by migrants, Mr. Gois suggested a few tactics. First, the need for firewalls – such as those between law enforcement authorities (namely the police) and immigration authorities. Firewalls allow migrant workers to have the confidence to reach out to authorities, including service providers, without the fear that doing so will mark them as irregular. Without firewalls, migrants are excluded from the protections of human rights law. Both irregular and regular migrants need to have their rights protected. The reality of worker mobility and the exploitative practices of recruiters means that it is very easy for a worker to slip from a regular position to an irregular one. Second, he emphasized political enfranchisement, drawing attention to the Philippines as a positive example, for allowing overseas (migrant) citizens to vote. Both sending and receiving countries are dependent on migrant workers, and the failure to recognize their rights fully is an abrogation of their responsibility.

Mr. Gois also addressed an important issue when addressing the role of governments as advocates of their overseas citizens: corruption. Governments are often taking
advantage of migrant worker populations, by underbidding other states so that their citizens are recruited and transmit remittances. In doing so, states have decreased incentives to actively monitor recruitment agencies, or punish them for excesses. He recommended that NHRIs play an advocacy role for migrants, to push governments to be accountable. He suggested this could be done through collaborative work between NHRIs, and through research into bilateral and multilateral agreements between sending and receiving countries, to make them public (instead of the ‘state-secret’ position they have in many SAARC countries). Mr. Gois spoke frankly about the ineffectual consular services available to migrants (comparing this to the support and advocacy often provided by Philippines consular offices). He encouraged governments to provide more to their citizens abroad, and for NHRIs to encourage this action. Finally, Mr. Gois addressed the importance of NHRIs to work in collaboration with, and not to merely duplicate, the work of civil society actors.

Dr. Renu Adhikari; WOREC (Founder), United Nations Voluntary Fund on Contemporary Forms of Slavery (Member of the Board of Trustees)

Dr. Adhikari’s remarks provided strong and coherent links between structural issues of gender, inequality, and migration. She noted the impossibility of talking about the rights of migrant workers without discussing the politics of caste, class, gender, and race. Dr. Adhikari emphasized the long history of migration and noted that a historical analysis of political economy uncovers how bodies – including and especially women’s bodies – have long been taken as tools for economic development.

Drawing on her years of experience as an activist for women, she began her talk by remarking on the importance of recognizing that while the exploitation of women migrants requires a discussion of such issues as mental health concerns and susceptibility to violence, it is also equally important to challenge patriarchal discourse and legislation surrounding the so-called protection of women migrants. As she noted, women who are migrating are actually challenging patriarchal attitudes by exercising their autonomy. Laws protecting these women often stem from concerns about the “honour” of women and the nation, when they should rather be based on their rights, distinctly separate from any discriminatory values. Furthermore, laws
that restrict women’s work to the private, unregulated realm (such as domestic labour) fuel patriarchal reasoning that informs the specific contours of legislation around women’s migration.

While high-profile cases, like that of Sita Rai in Nepal, have compelled a greater understanding of the risks created, by Nepali institutions and government actors. But even Sita Rai’s case has not resulted in real justice for the victimized. Instead of promoting access to justice, laws have continued to seek to constrain the mobility of women from lower economic strata such that they are rendered even more vulnerable to violence from the state and individual actors. Other steps by the government have also been questionable in the sense of their conception of women migrants as change agents: for example, Nepal is active in the Global Compact on Migration, but has aligned itself closely with the Holy See: what threats could this pose, in terms of the regulation of women’s bodies and sexuality in the context of migration, which are already hot-rods for legislation by governments that seek to curtail women’s economic, and geographic, mobility?

Dr. Adhikari also pointed to a need to recognize the economic, political, and social rights of women “left behind” by migration – particularly those with migrating husbands, who have statistically been rendered even more vulnerable to domestic and sexual violence. She posited the role of NHRIs in advocating for the rights of women migrant workers and in combating prevailing patriarchal norms around the notion of protection. In order to do this, she insisted, NHRIs must act proactively to initiate discussion, and not just react to crises.

**Brabim Kumar, Youth Leader and Advocate, Former President of Association of Youth Organizations, Nepal**

Mr. Kumar’s talk used demographic figures to emphasize the need for a changed approach to migration policy, that would prioritize investment in industry, jobs, and training domestically in countries like Nepal. As he discussed, Nepal is currently experiencing a hugely significant demographic phenomenon: a “youth bulge”, with an under-35 population that constitutes 70 per cent of the nation’s overall population. While about 21 per cent of the population is age 16 to 25, about 41 per cent are in the 16 to 40 bracket. At the same time, by some estimates, up to 92 per cent of youth entering the labour force seek work abroad. In a context like Nepal, where the large
youth population and dearth of “good” jobs would otherwise create a great deal of social and political pressure, foreign labour migration creates a safety valve. However, this is unlikely to be a good solution for Nepal’s long-term economic growth.

Indeed, a vast majority of workers who remain in the country are also in precarious positions and remain in the informal sector: 80 per cent of male and 90 per cent of female workers are in this position. Mr. Kumar then discussed the need for an economic and job policy that would create opportunities targeting both of the two main groups seeking to migrate: low-income, primarily rural, youth, and urban youth educated in private schools. He remarked that this policy would also need to pay attention to the social challenges created by migration and split family units, and pointed to the absence of political and social rights in the discussion around migrant work. Like Mr. Gois, he pointed to the need for political enfranchisement of young (and old) voters abroad, as this would acknowledge migrants as a political constituency, thus putting pressure on political parties to create platforms that actively address youth and economic issues. Additionally, and a second “way forward”, would be education, campaigns, and outreach to promote greater awareness of legal rights and options while migrating.

B. Chairs

Chair, Hon. Justice D. Murugesan, Member, NHRC India

Migration is a legal term that should be distinguished by its different forms, namely legal and illegal migration. The latter form poses numerous problems for migrants caught in a “no man’s land” which renders them susceptible to criminalization. It also places women and children at a distinct risk of being trafficked. Thus, there should be a common standard operating procedure to deal with these migrants who need access to human rights protections under the law. Meanwhile, countries that are experiencing mass exoduses should uncover why their citizens are moving. Failing to do so could itself be deliberate abuse.
Chair, Hon. Sudip Pathak, Member, NHRC Nepal

The problem starts from the point at which a migrant worker arrives in a foreign airport, and continues through to when they return home. It’s true that there are problems with the recruitment process – there is still a need to have a fair recruitment process. There are also many lapses in the law. The NHRC is currently conducting research with the relevant Ministries, and with the families of migrant workers. NHRIs in the region should work together in this regard. And if a regional mechanism is established, we should, collaborate within a South Asian mechanism to ensure that the rights of migrant workers are upheld, within and beyond this region.

C. DISCUSSION

The question and answer involved both technical and more general discussion points from audience members, some of whom asked Mr. Gois to clarify why it would be helpful to have one compact instead of two that separated asylum seekers from other types of migrants, and others of whom proposed a role for NHRIs that would include oversight of data collection of migrants both entering and leaving a given state.

Questions/Comments

A researcher at the Centre for the Study of Labour and Migration (CESLAM) responded to Mr. Gois’s recommendation that the Global Compact on Migration address both refugees and other migrants, suggesting that there should be a distinction drawn between the two groups because failing to do so would be “contentious”, and asking Mr. Gois to elaborate on his comment.

Sona Khan asked how minimum wages for migrant workers figure into the discussion. She asked if worker insurance could protect migrants, so that migrant workers would not be stuck at the mercy of their consulates.

Hon. Commissioner Gwendolyn Pimentel-Gana, from the Commission on Human Rights, Philippines took the opportunity to bring the floor’s attention to a new global alliance of NHRIs that has created a migration task force. She highlighted the alliance’s advocacy for the presence of NHRIs in the Global Compact on Migration. Committed to the possibility of NHRI advocacy as a positive force, she said: “NHRIs should push for an active role in the protection of, and prevention of violations against, the rights of migrant workers. We are going to keep pushing for the participation of civil society!”  Hon. Comm’r Gwendolyn Pimentel-Gana also asked
if the NHRC Nepal was interested in holding a national inquiry regarding the rights of migrants, encouraging the Commission to do so.

**Sona Khan** asked if women are not migrating for work, could they be adequately absorbed into the existing workforce? “It seems like the current economic scenario cannot allow for this! In Punjab, for example, we see the auction of migrant labour – in *mandis*, where migrant labour is auctioned off.”

**Vrinda Glover** asked about a particular double-standard she had observed, in states that are both sources and hosts for migrants and migrant labour. “As you noted, India holds a position as both a source and destination country. And we know that when the rights of Indian migrant workers are violated abroad, the government responds at the highest level. But when the rights of those who are marginal in India as migrants are challenged, there doesn’t seem to be a mechanism for redress. Any suggestions?”

**Hon. Mohd. Zahid**, VP of the Human Rights Commission of the Maldives remarked that Maldives is not a sending country, it is a receiving country. Maldives have over 150k migrant workers living in the country, including from members of all the countries present here today. Mr. Zahid highlighted the contributions of migrants and migrant labour to the Maldives, and remarked how he and others see it:

> “The problem starts in the origin countries. We see that when workers come, they don’t know where they’re coming to. And their embassies and ambassadors are not, I am sad to say, providing adequate cooperation – or support, to them. I’m not putting forward a request. I’m just putting forward a proposal that human rights institutions in our countries – as what Mr. William [Gois] was saying – help make sure that workers know what they are coming to do, and that they have passed all the procedures in their own countries. Because we really appreciate the work and contributions of all migrants to our country. And we are interested in seeing that they do not become, as in Mr Gois’ words, irregular migrant workers. Because when workers do not know who their agent is, or where their papers are, it becomes a very challenging issue to address.”

Australian academic and former commissioner of the Human Rights Commission there, **Sev Ozdowski**, was adamant about the need to keep three categories distinct – migrants, refugees, and irregular migrants.

Participant **Biyaja Dahal** expressed some regret that the needs of refugees had not featured significantly in the discussion, despite the multiple global conflicts that push
asylum seekers out of their home countries and through transit states including those of South Asia. She spoke to the possibility of NHRIs advocating for the needs of such individuals,

D. Responses

William Gois

The Global Compact on Migration (GCM) is a negotiation, which means that you have to be willing to take the mic several times. Too many countries come forward, make a statement, and then sit back. This is a shortcoming in terms of competence and capacity. Nepal has been quite active in the sessions. Rather, the [challenging] country within South Asia has, from my perspective, been India – which has been very reluctant to take a rights perspective, which is quite ironic given the volume of Indian migrant workers in both regular and irregular status.

There is currently a race to the bottom of the barrel. And South Asian migrant labour is at the bottom of that barrel. Governments, in order to have market access, are willing to take significant cuts to the earnings of citizens. When Philippines set a min wage of $400/month, India decided to take $275, Sri Lanka $200, Nepal around $150 – and so forth. This presents the challenge we are facing with our source countries, of how they are willing to take ever-diminishing wages.

With respect to insurance, many migrant workers do pay some kind of insurance when they are leaving a country for purposes of work. Whether it is comprehensive enough, and whether migrant workers are informed of how to use this insurance, remains a question. There is a whole “building block” process in formalizing and having access to enforcement of one’s rights, that is yet to be done. And this is also the problem that arises in the context of Memoranda of Understanding: as countries go into negotiations, these same concerns around migrants’ knowledge of rights, of pressure by the government, and of consistency, remains an issue. MoUs have become a new mantra – with civil society pressure leading to increasing number of governments signing MoUs. But the value of MoUs must extend beyond their initial signing. For example, how often are these agreements reviewed? What are the implementation or enforcement mechanisms. And how are they reviewed? Ultimately, the country of destination is what accounts for how these MoUs play out. And what you need is accountability in the enforcement process.
The Philippines offers one example of a good practice, as all MoUs are put on the website of the Philippines Overseas Employment Administration as soon as they are signed.22 There are also, in many cases, tripartite consultations before they are signed. This is unlike many of our countries, where these MoUs are treated like secret state documents, even after they are signed. NHRIs also need to determine: what is the niche they can fulfill, so they are not just duplicating the role of civil society?

Renu Adhikari noted the discrepancy in attitudes towards migration depending on the identities and positions of those who seek mobility. “Nobody questions the mobility of our children [upper-middle class children] who go to Australia or the US to work. But the moment poor women want to move abroad to work, their honour and their motives are questioned.”

When posed questions about trafficking, she also emphasized the need to avoid focusing on trafficking when discussing migrant rights, while still recognising the dangers of exploitation and forced labour. She said:

“As someone who started her work in trafficking/anti-trafficking efforts, I’m very hesitant about bringing that discussion into this one. Because the government wants to do this, to curb the mobility of women, and of poor people more generally. It’s important for us to talk about this as a matter of workers’ rights, so people do not fall into trafficking-like situations. … As soon as women migrate and are involved in sex work, we think of that as trafficking – but that is not necessarily the case. Sometimes women are intentionally migrating for involvement in the entertainment sector. … The concept of ‘safe migration’ has been co-opted by the government, which is trying to curb and control women’s, especially poor women’s, bodies and labour.”

E. Key lessons and paths forward

Overall, the suggestions made by the speakers proposed that NHRIs can play a valuable role in advocating for the rights of migrants by working alongside civil society organizations, while also building bridges with their counterparts in other states to conduct research around the detention and imprisonment of migrants, and to push sending-country governments toward greater transparency in presenting their

negotiations with host countries and publishing MoUs. Speakers recommended that NHRIs remain attentive to the universe of human rights that are relevant to migrants, and ensure that these rights receive attention in an intersectional manner – that the rights of women migrants facing violence, for example, do not become cause for restriction of mobility and punitive legislation. A youth bulge in South Asian states like Nepal is a significant propeller of migration, as well as potential political conflict: this large, and growing, demographic change should be understood as an opportunity, but one that can only fully be realized if NHRIs contribute to ensuring that the development of economic opportunities creates affirmative conditions for peace and the realization of human rights.

**Migration and human rights, in other sessions**

The session discussed methods of protecting the rights of migrant and refugee populations and finding ways forward within the region. While freedom of movement is one relevant area, the right to liberty and security of the person, the right to family life, the right to expression and protest, to education, and to service provisions, were all recognized as topical.

In the National Security and Human Rights session, William O’Neill discussed how both xenophobia and other practices of exclusion, including the militarization of borders, serve as recruitment tools for terrorist organizations. The criminalization of migrants, and constraints on their freedom of expression, drives insecurity and a sense of otherness, which can propel social isolation and greater vulnerability.

Similarly, in this session, William Gois spoke about a slip in the language of national security and national sovereignty when discussing migrant workers, whereby states will criminalize migrants, both their own citizens and foreign migrants - for failing to complete registration procedures, and posit this as a national security threat, when in fact is an administrative matter.

During the comment period surrounding the Kathmandu Declaration, participants expressed an interest in making sure that the rights of refugees and other migrants were protected by National Human Rights Institutions, and that there was international attention to the crisis faced by Rohingya refugees. Multiple participants called for accountability from those who had propelled the crisis, while others praised Bangladesh in particular for its role in taking in and trying to provide humanitarian support to the refugee community.
THEME III: TRANSITIONAL JUSTICE AND TRUTH COMMISSIONS

Introduction

When you seek the truth you do not get richer, but you feel free.\textsuperscript{23}

Truth Commissions are the constitutional bodies set up to investigate past violations of human rights—which can include violations by the military and/or other government forces or by armed opposition forces.\textsuperscript{24} Truth Commissions have become a popular policy option for societies emerging from a conflict or authoritarian rule.\textsuperscript{25}

As a means of nation-building and achieving some measures of justice, Truth Commissions focus on the broad patterns of violence and their causes and, in the process, establish a more comprehensive record of past injustices.\textsuperscript{26} In 2009, the United Nations Human Rights Council (UNHRC) adopted a resolution calling on states to better facilitate fact-finding related to gross human rights violations.\textsuperscript{27}

Treaty bodies, regional courts, and international and domestic tribunals have also affirmed the right for individuals to know the truth about the fate of disappeared persons or information about other past abuses.\textsuperscript{28} International conventions have affirmed the right to truth, such as Article 32 of the First Additional Protocol to the Geneva Convention which establishes principles governing a state party’s obligations related to the missing and the dead. Article 32 states that the parties “shall be prompted mainly by the right of families to know the fate of their relatives.”\textsuperscript{29} Additionally, the Preamble of the International Convention for the Protection of All Persons from Enforced Disappearance adopted by the UN General Assembly has affirmed “the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person.”\textsuperscript{30} States that have

\begin{itemize}
\item \textsuperscript{23} Hon. Justice Ali Nawaz Chowhan from the Pakistan NHRC, quoting Aristotle
\item \textsuperscript{24} Avruch Kevin, Transcultural Psychiatry. Sage, February 2010, page 34
\item \textsuperscript{26} Carsten Stahn, Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor, 95 AM. J. INT’L L. 952, 954 (2001)
\item \textsuperscript{27} Human Rights Council Res. 12/12, Right to the Truth, 12th Sess., 12th October 2009, U.N. GOAR, A/HRC/RES/12/12, at 3 (Oct. 12, 2000)
\item \textsuperscript{28} E/CN.4/2005/102 and Add.1
\item \textsuperscript{29} Article 32 of Protocol I
\end{itemize}
ratified this Convention are obliged to domesticate its provisions in their national legislation.

Rather than merely establishing guilt or innocence of individual perpetrators, Truth Commissions help to establish an official truth about the past which can give victims a voice, help to restore public trust in the new government, and provide a diagnosis and roadmap for reform of institutions to ensure that violations do not happen again.31

Reconciliation is both a goal and a process. There are four key elements to a successful reconciliation: (i) an inclusive national dialogue; (ii) political will; (iii) security and freedom to speak and move; and (iv) a national vision of the nation’s end state as defined by its citizens.32 Still, Truth and Reconciliation Commissions are only a part of the comprehensive transitional justice strategy, and should be considered together with possible initiatives towards prosecutions, reparations, vetting and other accountability or reform programs.33

The Conference hosted a robust discussion on impunity in post-conflict situations in South Asia and participants gave an overview of the purposes and practices behind an effective Truth and Reconciliation Commission. During the “Truth and Reconciliation Commissions and Impunity” session, speakers emphasized the importance of prioritizing truth in all circumstances in order for there to be the greatest public impact. The speakers also uniformly insisted that for Truth and Reconciliation Commissions to lead to peace, they must take a holistic approach which places victims at the center of their processes. This means that the creation of a commission must be a consultative process and its practices must be inclusive of all the victims it is intended to serve. Most of the speakers in this session focused on the flaws of the Truth and Reconciliation Commission (TRC) and Commission of Investigation of Enforced Disappeared Persons (CIEDP) in Nepal which were given limited mandates that fail to respond to the needs of victims and were created without their consultation. However, most of these speakers also agreed that, with an increase in political will and self-reflection, and beginning with the amendment of the Transitional Justice Act, these commissions can be reformed to efficiently combat impunity and address the needs of victims – healing society and laying the groundwork for lasting peace.

Key Session: Truth and Reconciliation Commissions and Impunity

A. Speakers

Hon. Agni Prasad Kharel, Attorney General, Nepal

The Speaker commended the work being done to reform the Truth Commissions in Nepal. He emphasized that the Attorney General’s Office understands that prosecution is integral to truth and reconciliation efforts and will actively address the most serious human rights violations, which include extrajudicial killings, enforced disappearances, torture, rape and other offenses. In an effort to ensure these prosecutions come to fruition, the office has engaged in discussions with the government about obtaining necessary resources and personnel for the commissions and will continue working with the NHRC to implement its recommendations. Nonetheless, holistic reforms are still needed for the commissions and the Attorney General’s Office to fully support the transitional justice process, and international support and collaboration in this regard is welcome. In the meantime, the Attorney General’s Office is open for those who have concerns about the progress of transitional justice in Nepal.

Mr. Surya Kiran Gurung, Chairperson, TRC, Nepal

The Truth and Reconciliation Commission in Nepal has faced numerous challenges since its creation under a controversial governmental law which fueled distrust and hostility in the country. Nonetheless, the speaker noted that the commission has had some achievements. For example, it has been able to enter most districts and speak with victims, has decided to establish field offices in all districts of Nepal to carry out investigation work, and offers victims who are called to the national office both travel and staying allowances. These highlights of the Commission’s work are tempered by the fact that it currently faces the challenging task of investigating 63,000 cases. These cases cannot be forgotten, meaning there must be a holistic approach taken to reform the transitional justice system in Nepal.
Mr. Lokendra Mallick, Chairperson, CIEDP, Nepal

The speaker lamented that the CIEDP of Nepal faces many challenges. For example, there is no law criminalizing the act of enforced disappearances during armed conflict, the current provision for reparation requires amendment to be effective, and a special court has yet to be established. In regards to resources, the Commission is woefully underfunded, contributing to its lack of personnel and expert equipment. The government has begun to address these problems, but there still needs to be a significant increase in political will if the Commission is to fulfil its mandate. If given the requisite governmental support, the CIEDP understands that women’s rights are paramount to the truth a reconciliation process, and that victims, political parties, NGOs and civil society must also support the Commission if it is to successfully combat impunity – a necessary condition for lasting peace.

Mr. Suman Adhikari, CVCP, Nepal

The speaker whose father was the victim of an unlawful killing by the Maoist opposition in 2002 exclaimed that victims have been waiting twenty years for justice and reparation and want to move ahead in this process so that they can realize peace. In order to move ahead, the commissions must be able to answer to victims as to why they have failed to deliver under their mandates and investigate violations. In light of these failures, victims demand that they are consulted in the work of the commissions and that they are given real ownership in the transitional justice process. For example, the presence of political party representatives in the commissions contributes to distrust in the victim community and should be remedied to accommodate their needs. In sum, the current working modality of the commissions is clearly not working. If they continue in the same way, they will continue to be dysfunctional, denying victims their right to truth.

Mr. Ram Bhandari, CVCP, Nepal

The speaker, whose father was the victim of an enforced disappearance in 2001, has been raising same question for 17 years: Why has no one given an answer to his
disappearance? Individual and collective victims are not at peace as the government continues to fail in addressing the root causes of the conflicts where people’s rights were systematically violated. This is partly the fault of deep flaws within the two commissions established to bring about truth and reconciliation. These commissions were created without the consultation of victims and suffer from a weak mandate, as well as a lack of accountability due to political interference. Moving forward, the transitional justice process should be localized and take a victim-centered approach. For this to be possible, the root causes of the exclusion and isolation of victims need to be identified and addressed so that victims can take their rightful place in the center of transitional justice process.

Mr. Govinda “Bandi” Sharma, Advocate/ Activist, Nepal

In reforming the transitional justice process in Nepal, the creation and design of the commissions needs to be critically evaluated, namely the establishment of two commissions, their limited mandates, and their misallocation of resources should be questioned. The lessons from these failed commissions can help Nepal move forward. The speaker suggested that truth commissions fully understand their mandates and that they embody a process rather than an outcome. Finally, it is clear that empowering law is necessary for a truth commission to complete its work. In the Nepal context, this includes amending the Transitional Justice Act to limit amnesty powers. However, fixing the law will not solve all the problems of transitional justice, there needs to be a massive shift in political will.

Ms. Mandira Sharma, Human Rights Activist, Nepal (Founder, Advocacy Forum)

The creation of the two truth commissions in Nepal was a deeply problematic process in which political actors undermined the voices of civil society by passing a flawed act at midnight. This act had several troublesome provisions, including one that allows the commission to recommend amnesty, even for those involved in gross violations of human rights. The government went ahead with the creation of the commissions despite opposition by the international community, victims, and civil
society, leading to a deep sense of betrayal. The Act is finally being reviewed and this will hopefully remedy the mistakes of the past. In this review, there are two major concerns that deserve close attention: the protection of victims and the assurance of fair trial standards. The latter may be at risk arising from the truth commission’s the prosecution mandate which in turn could hinder its truth-seeking. Most importantly, reforms must take a holistic approach to transitional justice, including holistic thinking and planning.

Ms. Priscilla Hayner, UN Standby Team of Mediation Advisors

The speaker offered a global view of the role of truth commissions, stating that they generally have three primary purposes: To tackle the very difficult questions of why the conflict and atrocities occurred, to evaluate a country’s past in order to ensure non-repetition and institutional reform in the future, and to respond to the needs and interests of those most affected by past violence. In fulfilling their mandates, it is important that truth commissions are guided by the principles of independence and consultation, both of which strengthen the legitimacy of the transitional justice process. Truth commissions may also consider adopting the following best practices: taking in-depth statements from victims in a respectful manner, engaging in public hearings, undertaking thematic research about the root causes of conflict, and including recommendations about next steps in their final reports. It is important for truth commissions to look beyond individual cases, and instead focus on key representative cases to help create global view conclusions. Finally, when these commissions struggle in balancing truth and reconciliation, they should remember that it is always pertinent to emphasize the truth and not to undermine it. While practices and recommendations can be supportive of reconciliation, upholding the truth in all cases is ultimately better for the victims and society at large.

B. Chairs

Hon. Dr. Deepika Udagama, Chairperson, HRC Sri Lanka

In summarizing the comments from civil society members, the chair noted an emphasis on inclusivity, whereby people feel ownership of the truth and
reconciliation process through constant reporting, consultation, and the ability to monitor the process. Truth Commissions need to move beyond just working independently, to working independently and in collaboration with the affected communities. In this regard, governments should not pass legislation on truth and reconciliation in a secret manner, but rather, pass sound legislation through a highly consultative process, establishing constitutional bodies with a clear and transparent mandate. This challenge is especially acute in a context like Sri Lanka, where there was no distinct transitional process, but rather a single victor. Sri Lanka has faced over forty years of conflict and its communities need to heal through justice, but this path to justice needs to be clearer. For example, it is confusing and misleading to translate “transitional justice” into local languages, meaning these types of terms need to be unpacked and explained so that they can resonate with the communities they address. Thorough explanations and detailed legislation are necessary for victims to feel confident that these processes will address the harms committed to them. While there is no single process, nor recipe, for setting up a commission, or for achieving reconciliation, governments should strive for a political process that ensures a better and more inclusive future, where everyone has access to human rights protections.

**Chair, Hon. Justice Ali Nawaz Chowhan, Chairperson, NHRC Pakistan**

The Chair summarized the proceedings by stating that there have been serious questions of credibility raised about Truth Commissions which must be addressed if these commissions are to have their intended effects. For example, it is clear that their mandates need redirection and to be well-stated, ensuring that the suffering of victims is at the heart of their practices. Also, the commissions do not need to focus on solving all of its individual cases, but instead, should focus on general trends and issues in order to uncover the root causes of the conflict and to ensure these atrocities do not happen again. In Nepal, there are currently 60,000 petitions pending with the Truth and Reconciliation Commission of Nepal and the state must cooperate, earnestly, if this surmountable challenge is to be overcome. However, in reality, it is extremely difficult to promote truth among security and government officials when they risk culpability. The new Constitution of Nepal is a step in the right direction. While amendments are needed, it is a “living document” which will hopefully lead to
more effective Truth Commissions in the country. Moving forward, a shared goal of avoiding future repetitions of conflict should empower everyone to come forward with the truth, facilitated by processes and resources from the state.

C. Discussion

Questions

Abdullah Rahmani, Afghanistan

Mr. Rahmani offered a comment on the constitution and transitional justice in Afghanistan, noting that it has faced not only challenges, but also achievements. In Afghanistan, the Independent Human Rights Commission (IHRC) worked with the human rights community and civil society to bring about a meaningful TJ process, but unfortunately there was no tangible result. Considering the scope of the challenge in Afghanistan, advocacy must continue in a collaborative way. The IHRC made a report advocating for a TJ process, but it was not published during the previous regime. Other challenges to transitional justice in the country include political will, the power of war lords, and the 2007 amnesty law. However, there are achievements worth noting. For example, ardent advocacy has made transitional justice into an issue that everyone knows about. Also, there has been great support from the International Criminal Court (ICC), leading to hundreds of applications being submitted to it. The main challenge moving forward is that Afghanistan does not have a rule for reconciliation. Considering this issue, Mr. Rahmani asks for more information about the structure of reconciliation in other countries.

Audience participant

This speaker addressed the plight of child soldiers used in the conflict in Nepal. During the peace process started in 1973, the UN Mission in Nepal (UNMIN) “disqualified” child soldiers from its rehabilitation and re-integration agreement, leading to some of these individuals to commit suicide. Thus, a major challenge for the TRC is the fact that there is no law regarding child soldiers. The state has done nothing to address this challenge, as it is overwhelmingly concerned with money. In
inquiring about the future of former child soldiers in the country, the speaker asks: Is the use of child soldiers not a war crime?

**Raju Chapagai, Nepal**

Truth Commissions must embody a consultative process. In Nepal, there is an opportunity for the government to allow all relevant stakeholders to work together and share the burden to renovate and revisit the transitional justice process. In this renovation, they should address the re-appointment of commissioners, insisting that there is a discussion among all relevant stakeholders in relation to their re-election. They should also identify what the scope for amnesty should entail. The speaker requests that the Attorney General convey this message regarding consultation to the government.

**Dr. Sona Khan, Advocate Supreme Court of India**

As a lawyer, Dr. Sona Khan is concerned about whether or not there will be a separate law for the cases concerning transitional justice or will they be inbuilt into the already existing laws? In her opinion, if a state wishes to live up to the expectations of its people, it will need to create a separate legal framework.

**D. Responses**

**Hon. Agni Prasad Kharel, Attorney General, Nepal**

The Attorney General expressed his similar concern with the term “disqualified” with regard to child soldiers in Nepal. He announced that he intends to discuss the replacement of the word with concerned stakeholders and that he will remain sensitive to the issue. He then continued to discuss amendments to the Transitional Justice Act in Nepal, noting that the process should be credible and that there is enough political determination to ensure this credibility. In order to ensure credibility, several different stakeholders should be engaged in the amendment of the Act. This is why the Attorney General has consulted with victims in his office, met with civil
society actors, and engaged with the opposition leaders and government officials. Everyone he has spoken to is positive about the changes to come. Finally, in response to Dr. Sona Khan, the Attorney General stated that a separate legal framework is not achievable.

Mr. Surya Kiran Gurung, TRC, Nepal

Regarding what kind of structure the TRC should have, the Chair announced that the five departments of the Commission have been set: administration, reconciliation, prosecution, investigation and publishing. Additionally, the Commission is expanding its offices into all districts in Nepal and continues to allocate a lot of time to hearing victims. Moving forward, a special court will be established and recommendations of the TRC for prosecutions will be handled through the Attorney General’s Office.

Mr. Govinda “Bandi” Sharma, Advocate/ Activist, Nepal

In response to Mr. Rahmani’s call for advice about building a structure of reconciliation in Afghanistan, the speaker warned that it is important to think twice before designing a transitional justice experience and to refrain from jumping into the process. Do not rush transitional justice, especially when there are already national institutions in place. Also, remember that adopting legislation will not solve the problem.

Transitional justice and truth commissions in other sessions

In the Opening plenary, Chairperson of the Afghan IHRC Hon. Dr. Sima Samar discussed the importance of prioritizing justice, not just stability. In this regard, she pointed to notable achievements in Afghanistan, such as the Afghanistan IHRC’s 2004 survey of 6,000 people affected by the decades-long conflict, a 2009 Joint declaration for 3-year action plan for truth and reconciliation, and a conflict mapping report which documented mass atrocities spanning from 1978-2001. However, she also elaborated on major challenges to the recognition of justice in Afghanistan, namely the continued presence of warlords, the 2007 amnesty law passed by Parliament, government opposition to the release of reports by the international community, general lack of political will to deal with issues of transitional justice,
and rampant corruption within a war economy. For justice to be realized in Afghanistan after 48 years of conflict, it must be understood as a basic right for everyone and the unconditional responsibility of the government and the State.

During the “Voices of Human Rights: Freedom of Expression and its Meaning in South Asia,” Speaker, William O’Neill, mentioned that the UN Special Rapporteur for Truth, Justice, Reparation, and Guarantees of Non-Recurrence could be a resource in establishing independent oversight of the security sector and in helping restore public confidence in the state.

In the question and answer section of the Fundamental Rights and Human Rights session, a participant noted that, in the context of Nepal, impunity is the result of more than just institutional gaps – it is also attributable to institutional resistance to being held accountable for abuses. One notable example would be the case of Maina Sunuwar. The army’s continued resistance to court verdicts holding them responsible for Maina’s torture and death is a failure in transitional justice and is tantamount to an institution refusing to be under civilian and judicial oversight.
THEME IV: NHRIS AT THE REGIONAL AND DOMESTIC LEVEL

Introduction

National Human Rights Institutions (NHRIs) are key stakeholders in national, regional, and international human rights frameworks. NHRIs contribute to upholding international human rights standards and help make human rights a reality on the ground through monitoring, investigations, reporting, complaints handling, and advisory mandates.\(^{34}\)

Since States are responsible for the protection and promotion of human rights, the prevention of human rights violations, and building mechanisms and procedures to functionalize the international human rights framework, NHRIs have a broad human rights mandate and a wide range of specific responsibilities stipulated by the UN Paris Principles.\(^{35}\) One of the key roles of NHRIs, as outlined by the Paris Principles, is interacting with international human rights mechanisms and promoting the ratification of human rights treaties.\(^{36}\) NHRIs have a duty to contribute to the reports which States submit to UN bodies and treaty monitoring committees, and to regional institutions, pursuant to the country’s treaty obligations and, where necessary, to express an opinion on the subject, with due respect to their independence.\(^{37}\) NHRIs are not only central elements of a strong national system to promote and protect human rights: they can also serve as an effective bridge between rights holders and duty bearers (the State).\(^{38}\)

The World Conference on Human Rights held in Vienna in 1993 reaffirmed the important and constructive role played by national institutions for the promotion and protection of human rights, particularly through their advisory capacity to the competent authorities and by remedying human rights violations through the dissemination of human rights information and education in human rights. The conference encouraged the establishment and strengthening of national institutions,

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\(^{36}\) GA Resolution 48/134, paragraph 3(d)

\(^{37}\) GA Resolution 48/134, item 3(d)

\(^{38}\) UNDP-OHCHR Toolkit for collaboration with National Human Rights Institutions. OHCHR. UNDP. December 2010
having regard to the ‘principles relating to the status of national institutions’ and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level.\textsuperscript{39}

NHRI\textsuperscript{s} face numerous challenges and they require substantial support, not only from their national governments and civil society, but also from the international community and regional associations.\textsuperscript{40} The Paris Principles have mandated that each NHRI should enjoy independence from its government for a favorable working environment and have a broad human rights mandate for upholding international human rights standards. The Paris Principles also dictate that NHRI\textsuperscript{s} be given sufficient resources to carry out their functions effectively.

The Conference largely centered around the shared experiences and challenges of NHRI\textsuperscript{s}, as many of the participants were members of these institutions across the region. There was a general consensus that NHRI\textsuperscript{s} should be fully independent, able to evaluate the past in post-conflict situations, and ensure the inclusion of vulnerable groups in its work. However, much of their success relies on the cooperation of their respective governments. In addition to unresponsive governments, speakers in the plenary session, “Experiences and Challenges of Human Rights Organizations in Advocacy and Work Against Impunity, and Best Practices, Including Cooperation with NHRI\textsuperscript{3},” noted that the work of NHRI\textsuperscript{s} is hindered by rampant corruption, a lack of resources, and the use of a rigid human rights framework that fails to encapsulate a full understanding of human rights.

In light of shared purposes and challenges, speakers in this session, and participants throughout the course of the conference, identified areas for international and regional cooperation. The Asia Pacific Forum (APF) and the Asian NGO Network on NHRI\textsuperscript{s} (ANNI) were noted useful resources for NHRI\textsuperscript{s} in the region. All six of the APF’s South Asia members were present at the conference and the APF Deputy Director expressed hope that the Pakistani NHRI will also soon become a member. It was also suggested the NHRI\textsuperscript{s} across the region join hands to form their own South Asian Human Rights Commission to ensure greater cooperation. This suggestion had strong traction among participants. Some suggested a regional body should be used to combat impunity and promote human rights. Others suggested that NHRI\textsuperscript{s} collaborate within the South Asian mechanism to ensure that the rights of migrant workers are

\textsuperscript{39} Vienna Declaration and Programme of Action; Part 1; para. 36

\textsuperscript{40} Petersen Carole J., Bridging the Gap?: The Role of Regional and National Human Rights Institutions in the Asia Pacific, April 15-16, 2011
realized, even suggesting the creation of a regional mechanism on migration alone. Internationally, the Global Alliance of National Human Rights Institutions (GANHRI), the 2015 Kiev Declaration on the role of NHRIs in conflict and post-conflict situation, and presentations and peer exchanges from the OHCHR and other UN agencies were all noted as useful resources for NHRIs to draw on. However, it is also noted that the UN has been largely ineffective in supporting the implementation of human rights standards. Therefore, NHRIs may consider following the example of several small nations around the world in adopting national mechanisms of implementation, reporting and follow-up (NMIRFs). The Simore website in Paraguay is well-respected for its tracking of records of what the government is doing or not doing to implement recommendations and can serve as a good example for NHRIs who choose to follow this prudent path. In sum, participating NHRIs valued regional and cross-border cooperation in addressing their shared challenges and in promoting human rights and transitional justice.

Plenary Session: Experiences and challenges of human rights organizations in advocacy and work against impunity, and best practices, including collaboration with NHRIs

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41 https://www.universal-rights.org/programmes/focus-domestic-implementation-universal-norms/project-1/ accessed on April 23, 2018
42 http://www.mre.gov.py/mdhpy/Buscador/Home accessed on April 23, 2018
A. Speakers

Ms Pip Dargan, Deputy Director, APF

The APF is a membership organization consisting of 24 NHRIs in the Asia-Pacific region that provides advice and expertise to members and prospective members while promoting effective leadership and governance among NHRIs. All six of its South Asia members were present and the APF hopes the Pakistani NHRI will also soon become a member.

The speaker noted that NHRIs, guided by the Paris Principles, are well placed to understand the sources of conflict, identify the needs of vulnerable groups and to advise the government on SDG 16 on peace and access to justice for all. When looking into post-conflict situations, NHRIs can set up referral mechanisms, present evidence, and apply legal powers of inquiry. However, in order to be most effective, NHRIs should be fully independent and have the ability to evaluate the past in post-conflict situations. This independence is particularly important in times of conflict because by advocating for the universality of human rights, NHRIs can promote a consensual platform for building peace. NHRIs should also work to employ better data and ensure the inclusion of women, internally displaced peoples, children, and other vulnerable groups. During times of conflict, they must be creative and flexible, and the safety of those involved in NHRIs' work should be paid close attention to.

In light of their heavy responsibilities, NHRIs face several challenges, such as over-stretched resources, especially in the wake of post-conflict situations, and unresponsive governments. Additionally, a report released last year by the APF points out other foreseeable trends that deserve attention: violence affects all Asia Pacific countries, development and urbanization will likely increase violence in the upcoming decade, and gender-based violence is widely present.

The APF supports NHRIs in the Asia-Pacific region in addressing its challenges and promoting their effective work. However, the speaker also noted other regional and international efforts to support NHRIs. The 2015 Kiev Declaration on the role of NHRIs in conflict and post-conflict situation included useful guidelines for NHRIs. Also, the APF and UN offer support for peer exchanges. The APF meetings in Qatar and Bangkok also focused on conflict situations. Finally, presentations by other NHRIs, the OHCHR, and ANNI can be useful resources.
Bipin Adhikari, Dean, Kathmandu University School of Law

The speaker began by describing the two major challenges facing NHRIs: corruption, which has negatively affected every institution in Nepal, and the issue of impunity. Impunity is a particularly difficult issue because it is an issue of authority. No matter how strong civil society organizations or NHRIs are, it is impossible to get rid of impunity without the exercise of political power. Thus, impunity is primarily a state responsibility, so the speaker argued that when we rely too much on civil society organizations and NHRIs, we are misplacing our emphasis. At the constitutional level, everything is there to ensure states are active in the fight against impunity, including the creation of six independent institutions. Unfortunately, political issues undermine efforts to combat impunity and, by extension, the work of NHRIs. As a result, the issue of lack of prosecution remains and victims are denied remedy.

Dr. Bhaskar Gautam, Senior Researcher

The speaker called on NHRIs and human rights advocates to engage in self-reflection and move beyond the rigid framework of existing human rights infrastructures. In the Nepal context, rampant unaccountability and patronage politics plague NHRC work. Additionally, limits to the understanding of human rights are exacerbated by the domination of exclusive and majoritarian politics. This is exemplified by the Comprehensive Peace Agreement (CPA) which, despite its positive attributes, failed to address a number of issues such as access to land, economic, social and cultural rights, and monitoring mechanisms. To remedy this, the speaker suggested that civil society organizations be encouraged to monitor state activity and that NHRIs and human rights advocates increase their use of media and technology. The toothless character of the transitional justice commissions in Nepal are noted for exacerbating the country’s limited understanding of human rights. In response, the speaker called on the NHRC to play a higher role in the transitional justice process and for the creation of six additional powerful commissions which are not limited to MoUs and so forth. Another cause of the persisting rigid human rights framework is attributed to the failure of the NHRC to understand the complex classifications of violence, meaning it must begin producing knowledge on the issue. Finally, the speaker stated that in order to challenge the existing human rights framework in Nepal, there needs
to be disentanglement of existing social power relations so to move beyond the middle-class imaginary. In sum, the NHRC has the potential to own the peace process and exercise its mandates if it takes the lead in working with various marginalized communities and it challenges the rigid boundaries of existing human rights infrastructures in the country.

Marc Limon, Universal Rights Group, What is Impunity?

The key domestic stakeholders that should hold their governments accountable, referred to as the “implementation triangle,” are NHRIs, civil society, and parliaments. However, on the international level, the speaker stated that efforts to enforce implementation are notably weak. The Human Rights Council (HRC) was established in 2006, in replacement of the norm-creating Commission on Human Rights, in the hopes of shifting attention to implementation. The HRC was intended to provide capacity-building, encourage exchanges, and it added the new Universal Periodic review (UPR) mechanism. Nonetheless, there seems to be a continuing gap when it comes to implementation. Instead of focusing on implementation, UN mechanisms are unduly occupied with panel debates, an expansion of human rights mechanisms, especially in the Special Procedures Branch, and an increasingly politicized Human Rights Council, all the while facing gross underfunding within the UN budget. However, the speaker attributed the lack of implementation to primarily a capacity problem rather than an issue of political will.

There is a huge potential for NHRIs to engage in the “implementation agenda.” Many small nations have adopted national mechanisms of implementation, reporting and follow-up (NMIRFs). For example, the Simore website in Paraguay is well-respected for its tracking of records of what the government is doing or not doing to implement recommendations. NHRIs have a role to play in adopting these mechanisms and the software associated with it and developed by OHCHR. NHRIs can advocate for their governments to adopt these mechanisms or do it instead of the government. The online systems associated with the NMIRFs are free and could help increase accountability and reduce impunity. Hopefully, the work of NHRIs will push states to translate the wealth of NHRI recommendations into concrete policies, helping solve the gap between human rights standards and implementation.
B. Chairs

Hon. Chair Nurun Naher Osmani, Bangladesh NHRC

The chair addressed the Rohingya crisis, stating that the NHRC had visited the camps and met with international bodies.

Hon. Chair Sima Samar, Afghanistan IHRC

The chair lamented that forty-eight years of conflict in Afghanistan are set to continue due to a lack of accountability and also because of persisting poverty and low levels of education. She reiterated that the provision of justice is the unconditional responsibility of the government and the State. Justice is not a luxury and states should take care to avoid double standards in the provision of justice.

Discussion regarding NHRIs at the regional and international levels in other sessions

In his welcoming speech during the inaugural session, Hon’ Prakash Osti stated that NHRIs should realize the value of regional and cross-border cooperation by working together to address challenges such as, transitional justice, migration and livelihood, and women’s rights.

Representative of the GANHRI, Ms. Katharina Rose, gave informative opening remarks about the role of NHRIs during the inaugural session. She explained that GANHRI is a global network of NHRIs that strives to increase unity among NHRIs globally by providing a platform for sharing information and best practices, and by ensuring the growth of strong independent NHRIs through a respected accreditation process. Events threatening human rights around world over the past two decades render NHRIs more important than ever as they have an essential role in monitoring developments in human rights, investigating violations, challenging authorities, protecting victims, offering constructive advice and guidance to those holding power, in some cases, handling truth and reconciliation. Guided by the UDHR, core international and regional human rights treaties, the Paris Principles, and more recently, the SDGs, NHRIs serve as an essential bridge between the international and national protection of human rights. Despite their importance, NHRIs can only be
effective if they have the support of their national government. Unfortunately, this requisite support is challenged by difficult situations in post-conflict countries and by threats to the security of NHRI staff. Thus, GANHRI, along with partners at the OHCHR, support NRHIs in these challenges, and have even created guidelines for dealing with issues of security and reprisals. Moving forward, it is important that UN safeguards are recognized and that NHRI independence continues to be strengthened in all regions and contexts.

During the first plenary session, Hon. Dr. Sima Samar noted that the achievements and establishment of NRHIs mark progress in the region. In that same session, keynote speaker, Hon. Aminath Eenas from the Maldives NHRC stated that in the wake of weak and dysfunctional institutions of governance which lack knowledge of human rights, the role of NRHRCs in monitoring and evaluating state actions is extremely important both domestically and regionally. One interesting proposal came from keynote speaker, Hon. Nurun Naher Osmani from the Bangladesh NHRC. She suggested that, in order to ensure greater regional cooperation among NRHIs, a South Asian Human Rights Commission be established which consists of ten nominated members. Another keynote speaker during this same session, Hon. Justice Ali Nawaz Chowhan, proposed that NRHIs around the region join hands to bring an end to impunity and promote human rights. Regarding the regional mechanism suggested by Hon. Nurun Naher Osmani, the justice stated that he believes that NHRC Pakistan would support such an initiative and that he hopes that other NRHIs will follow suit.

During the session on the “Role of Security Forces in Promoting or Challenging Immunity,” Mr. William O’Neill stated that NRHIs could play an important role in the independent oversight of the security sector.

In the “Voices of Human Rights: Freedom of Expression and its Meaning in South Asia” session, Mr. Yusuph Al-Amin from UNESCO emphasized that NRHIs should strengthen their internal capacity, ensure cyber safety, engage in raising awareness, work to improve the capacity of media workers and press, promote inclusion within educational institutions relevant to journalism, remain sensitive to gender issues, and make pragmatic use of the UNESCO Director-General Report on the Safety of Journalists and the Danger of Impunity.

Mr. Shankar Limbu called on NRHIs to support the rights enumerated in ILO Convention 169 and UNDRIP during the session on the “Rights of Women and Marginalized Communities and Challenges of Combatting Impunity.”
In the “Migration and Livelihood” session, recalling the proposal of a regional mechanism for NHRIs, **Hon. Sudip Pathak** stated that NHRIs in the region, should work together in conducting research with the relevant Ministries, and with the families of migrant workers. He also noted that if regional mechanism is established, the NHRC should collaborate within a South Asian mechanism to ensure that the rights of migrant workers, within and beyond this region, are upheld. In this same session, **Dr. Renu Adhikari** explained that NHRIs have a role in protecting women migrant workers and in combating the prevailing patriarchal norms in this protection. However, in order to do this, NHRIs must act proactively, not just reactively, in order to initiate discussion **Mr. William Gois** also affirmed that NHRIs have a role in ensuring that migrant workers receive human rights protections. Namely, NHRIs should research collaboratively on issues of human rights and migrants, address issues of corruption, explore bilateral agreements in countries of origin, and work to raise the levels of consular services. He also stated that regional mechanism for migrant workers should be considered.

During the discussion part of the “Migration and Livelihood” session, **Hon. Gwendolyn Pimentel-Gana** followed up with William Gois’ recommendation for a regional mechanism on migration, stating that GANHRI has created a migration task force, and that it is pushing for the presence of NHRIs in the Global Compact on Migration.
THEME V: THE RIGHTS OF WOMEN AND OTHER MARGINALIZED COMMUNITIES

Introduction

The key treaty in relation to women’s rights is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The CEDAW, which entered into force in 1981,⁴³ is often described as an international bill of rights for women. Despite the legal obligation for states to recognize the rights of women, their discrimination continues to be a major concern all over the world.

The UN Charter affirms that fundamental human rights are universal in nature, applying to all individuals.⁴⁴ However, violations of women’s rights and marginalized communities has been a major concern across the globe, and more particularly, in the South Asia region. UN Security Council resolution 1325 on women, peace and security (2000) recognized that the war impacts women differently and reaffirmed the need to increase women’s role in decision-making with regard to conflict prevention and resolution.⁴⁵ Nonetheless, conflict-era crimes, mainly in relation to violence against women, remain unaddressed while the issue of gender inequality persists in the region.

Conflict prevention and resolution are handled at the state level where the participation of women is minimal, resulting in the issues of women being systemically ignored. Several UN organizations and resolutions are mandated to address the gap in the protection of the rights women. For example, the Beijing Declaration and Platform for Action lays out guiding principles for governments striving for gender equality which contribute to the gender-responsive implementation of the 2030 Agenda for Sustainable Development.⁴⁶ Additionally, UN Women exists to support efforts to achieve gender equality and empower all women and girls.⁴⁷

Any individual who is denied or does not have access to human rights protection is a marginalized person. Marginalized communities comprise of those who are not the

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⁴⁴ The Core International Human Rights Treaties (pg73)
majority holders of power, whether political, economic or social in nature.\textsuperscript{48} Therefore, the term marginalized often refers to national or ethnic, religions and linguistic minorities, but is not limited to those groups. For example, in some circumstances it can also refer to individuals from majority groups, dissenters, minority groups, and women.\textsuperscript{49} Under Article 27 of the International Covenant on Civil and Political Rights, “states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right and to enjoy their own culture, to profess and practice their own religion, or use their own language.”\textsuperscript{50} In post-conflict countries, wherein the process of democratization is ongoing, the marginalized communities and their role in the political transition and economic development are often overlooked. When ensuring minority rights, an inclusive development process and the equal treatment of marginalized communities is expected to deepen democracy and help establish an inclusive state structure.

The challenges of impunity remain a prominent issue in the South Asia region with regards to the rights of women and other marginalized groups. Caste-based and religion-based discrimination persists, making impunity an especially difficult phenomenon to combat in post-conflict states. Consequently, it is important for NHRI\textips and human rights defenders to understand the particulars risks and discrimination facing women and other marginalized groups, namely minority and indigenous communities. These marginalized groups face substantial and systemic challenges in accessing justice mechanisms to express and remedy for violations of their human rights. In addition to the lack of access to courts and to a fair trial, the burden of prosecution remains on the shoulders of the victim, meaning crimes against marginalized groups remain largely unpunished. Therefore, it is of the utmost importance that the issues of women and other marginalized groups reach the ears of the state and echo in areas of policy and practice.

The conference focused heavily on the rights of women and other marginalized groups. However, several speakers insisted that the definition of marginal groups should be expanded to include individuals from majority groups who face situations of marginalization, such as extreme poverty. In the session on this topic, several practices were flagged as integral to the protection of these groups. For example, democracies should incorporate the rights of minorities and historically marginalized groups

\begin{itemize}
\item \textsuperscript{48} http://archive.ipu.org/dem-e/minorities/faq.pdf
\item \textsuperscript{49} See Dr. Sona Khan’s speech in the session on “The Rights of Women and Marginalized Communities and Challenges of Combatting Impunity”
\item \textsuperscript{50} The Core International Human Rights Treaties, page 34
\end{itemize}
groups, and implement measures which strengthen its entire citizenry, including women. Governments were also called upon to intervene to legalize protections for women and marginalized groups, such as implementing measures which protect the freedom from rape and molestation, ensure usufructuary rights, and combat trafficking. These protections should also domesticate international law regarding Indigenous Peoples’ rights, including meaningful consultation and free, prior, and informed consent should be recognized as enumerated by ILO Convention 169 and UNDRIP. One proposal suggested the establishment of trafficking and general compensation commissions to tackle trafficking and to help compensate women who were sexually violated. The importance of an intersectional approach which challenges and dismantles patriarchal structures was also flagged. This approach requires a deep understanding of what women need to have addressed and why.

Throughout the conference, several countries were commended for their efforts to include women and other marginalized groups. Nepal was congratulated for the creation of its new constitution which paves the way for an inclusive democratic system, and for its more inclusive media, which, after 2006, began to include the voices of marginalized groups. Meanwhile, in Bangladesh the number of women in the political sphere has drastically increased, and in India, the NHRC experienced notable success in combatting discrimination against women, children, elders, those with disabilities, and transgender individuals. IHRC Afghanistan was also signaled out for signing an MoU with police, training them in order to create a safer structure for women. However, these successes need to be tempered with persisting challenges. For example, the Nepal constitution was criticized for failing to address the needs of Indigenous Peoples. Also, any success of this document in protecting minority groups, such as the Dalits, relies on enabling legislation which has yet to be passed. In several countries, rape and violence against women persists, and impunity remains rampant in practice. Thus, the rights of women and other marginalized groups remains of paramount concern and deserves the sustained attention of the regional community.
Key session: Rights of women and marginalized communities and challenges of combating impunity

Chair, Mr. Charan Prasai, Representative of Civil Society/Human Rights Activist

It is important to note that, according to the speaker, the definition of marginalized groups can include the dominant caste. For example, it is inclusive of all those who live in abject poverty, even those in majority groups. Further, the Nepali law dictating that a child born from a foreign husband does not receive equal citizenship rights is also discriminatory, even though it is directed against men. The speaker concedes that many minority groups are also marginalized, drawing attention to women, Dalits and persons with disabilities.

The protection of all marginalized groups in Nepal grew following the creation of the new constitution which paves the way for a more inclusive democratic system. Despite the promise of the new constitution, the speaker lamented that the challenges of impunity remain. The recommendations of the NHRC must be followed, the Rome Statute and other related international instruments need ratification, and there must be a significant increase in political will to combat impunity and fully protect marginalized groups.

Dr. Sona Khan, Advocate Supreme Court of India

First, the speaker reiterated that anyone who does not have access to human rights protection should be understood as a marginalized person. This can include individuals from majority groups, dissenters, minority groups, and women. She then focused her attention on the plight of women, noting that women have proved their ability to contribute to society and that states should support them in these contributions. Thus, states have a duty to protect women’s dignity which encapsulates the following: promoting freedom from rape and molestation, ensuring usufructuary rights by ending the state practice of seizing communal property, and combating
trafficking through ardent efforts, including the use of available science. In addition to regional cooperation and coordination in progressing human rights, the speaker suggested the establishment of two commissions to aid in the protection of marginalized women: a trafficking commission to address the massive trafficking problems in Nepal and Bangladesh and a general compensation commission to compensate any woman who has been sexually violated.

Ms. Khushi Kabir, Women's Rights Activist, Bangladesh

The speaker emphasized that as citizens of the world, we all have equal rights. Drawing from the Vienna Convention, she reminded the participants that women’s rights are human rights. However, even though rights are universal, the fact that women face a different form of violence and subjugation means there is a need for some distinction and recognition. In this regard, she commended the conference for the inclusion of this session.

According to the speaker, when addressing any human rights topic, it is insufficient to simply bring a treaty into force unless there are mechanisms in place to enforce it. On its own, a treaty only provides a background – a set of aspirational standards. Therefore, we need to evaluate the issues in depth, both separately or in their totality. In the case of women, we need to understand what women need to have addressed specifically and why. For example, women are intentionally targeted in situations of conflict, of war, and in local situations when there is an interest in controlling a power base, whether economic, political, or within one's own family. Control and using women’s bodies as a weapon against them, is a way of trying to put forward one’s own supremacy, and has therefore becomes a common tactic. The system that promotes this tactic is called patriarchy – a pervasive system that is prevalent in our laws and ideologies, our religions, and in the institutions and constitutions that are supposed to protect us. The institutions that are supposed to protect rights are patriarchal in nature. This is not only perpetuated by men, women imbibe and embody these roles when they accede to positions of power. To instigate any actual change, we must examine these patriarchal systems and challenge the disconnect between the power of those who are governing, and those who are governed.
In addressing different examples of success, the speaker noted that success is a relative term. There are some things that are successes for now, such as passing laws or addressing impunity in some discrete cases. However, these successes need to be sustained, meaning we must evaluate the underlying causes of conflict and change the existing structure. In this regard, is is important to bring in the concept of intersectionality. Women often hear that when other human rights are acknowledged, the situation of women will follow, but why does it need to follow this sequence?

One thing that all women face, irrespective of group or class, is sexual violence. It may be at home, or it may be in the streets. It can affect a seven-month child or an eighty year old woman. The perpetrator could be a family member, or it may occur in the context of war, to denounce the existence of an entire community. Unless one recognizes how sexuality is being misused, and how it becomes an impediment to human rights, we cannot talk about changing the situation for everyone. This is not just a women’s issue or a women’s concern, but a substantial problem for all those who believe in the rights of all people to have access to the same inalienable rights, irrespective of caste, class, gender, religion, identity.

Mr. Raja Devasish Roy, Chief Chakma Administrative Circle, Bangladesh (Issue of Indigenous/Marginalized Communities)

Marginalized women include women from Indigenous, Dalit, minority, and other marginalized groups. Their human rights include civil and political rights, economic social and cultural rights, and collective rights. The speaker explained that the recognition of these rights requires an intersectional approach which does not have to occur in reverse order from security and stability. Focusing on South Asia, the status and progress of these rights varies from country to country. For example, legal and institutional reform is more progressive in India and Nepal, but positive legislation does not tend to transfer into practice. For example, the Nepali constitution guarantees extensive rights to the Dalit population, but enabling legislation still needs to be passed to bring effect to these provisions. Further, issues of impunity for violence against women are of the most serious concern in Afghanistan, Bangladesh, and Pakistan. Looking at Bangladesh specifically, the speaker challenged the notion that an increase in women in high political places can be equated with increase in gender equality throughout the country. In Bangladesh Indigenous women are over-
represented in rape and in violence against women; impunity remains rampant in practice, and there is no anti-discrimination law in force.

Moving forward, the speaker called on governments to intervene to legalize protections for marginalized women and to combat government impunity. NHRI s also have a role in monitoring governments and holding them accountable. Most importantly, women and Indigenous Peoples should continue voicing their views and fighting for their rights with the support of NGOs and CSOs, the press and media, and UN organs and agencies. In response, UN organs should be less focused on avoiding offending a government, and more willing to take risks in protecting marginalized groups.

Mr. Shankar Limbu, Advocate, Nepal

The speaker focused his speech on Indigenous Peoples in Nepal, noting that participants can judge whether or not it is prudent to replicate his suggestions in other countries and contexts. He then argued that much of the discrimination in the country today stems from the existence of a single national identity prior to 1991. The power of this dominant culture and the resulting discrimination against Indigenous Peoples has not been remedied by the new constitution, but rather exacerbated by it. He contended that seventy per cent of people in Nepal are upset with the constitution because of its provisions which exclude or marginalize Indigenous Peoples.

His first criticism of the new constitution is its failure to recognize collective rights. He distinguished individual and collective rights, arguing that failure to recognize them both can lead to conflict. He then criticized the constitution for offering no interpretation of Indigenous Peoples. He clarified that he has no objection to its caste interpretation, but that he thinks Indigenous Peoples should be included. He added that for the rights of Dalits to be exercised anyway, enabling legislation must be passed. Finally, he lamented that the constitution does not fully recognize Indigenous Peoples access to justice. He drew attention to a past demonstration against forced eviction and denied compensation in which the government announced that no complaints could be lodged, and alleged that the Supreme Court put lawyers who challenged this decision on a blacklist. The Constitution, however, failed to address this practice.
Despite these issues, the speaker commended NHRC Nepal for doing a commendable job at responding to the issues of Indigenous Peoples. However, he noted that there is more work to be done in order to remedy these complex problems. Moving forward, there should be meaningful consultation with Indigenous Peoples and free, prior and informed consent should be recognized as enumerated by ILO Convention 169 and UNDRIP. Also, Indigenous Peoples’ claims to land must be recognized as a collective right, stemming from the peoples’ distinct connection to the land and its use as a natural resource.

I. Discussion regarding rights of women and marginalized groups in other sessions

In her opening remarks during the inaugural session, Hon. Dr. Sima Samar announced that the recognition of women in all political and institutional aspects is an immediate objective for the region. In the opening plenary session, she stressed that in order to provide a better future, attention must be given to women and children. This means that access to quality education and health care, including women’s access to contraception, must be improved. Also, any peace process must be inclusive to women. In sum, Dr. Samar argued that human rights do not recognize geographical boundaries, gender, or race, and that we need to recognize this universal character of human rights in order to recognize our own dignity.

In the opening plenary session, Hon. Nurun Naher Osmani noted that there has been some considerable progress in women’s rights in Bangladesh over the last thirty years. Most notably, the number of women in the political sphere has drastically increased, with the Prime Minister, leader of ruling party, and Speaker of Parliament all being women. Bangladesh has also created a number of human rights commissions in its efforts to promote sector-based human rights, including a Committee on Women’s Rights and a Committee on Dalits, Hijra and other exploited communities. In the same session, Hon. Justice Kedar Nath Upadhyay stated that democracies must must incorporate the rights of minorities and historically marginalized groups. Hon. Justice D. Murugesan commended the successes of the NHRC India in combatting discrimination against women, children, elders, those with disabilities, and transgender individuals. Speaking about NHRC Nepal, Hon. Chairperson Anup Raj Sharma stated the Commission needs to discover ways to reach the lower levels of government to ensure marginalized groups have access to rights and justice. Hon. Dr. Deepika Udagama then called on governments to focus on deepening democracy
by implementing measures which strengthen its citizenry, such as measures which improve the literacy of women.

During the session on “Fundamental Rights and Human Rights,” Hon. Dr. Sima Samar explained that the Afghani IHRC signed an MoU with the police to both monitor their violations and to train them. In regards to the latter point, the goal was to create a safer structure for women, within that structure. Dr. Samar stated that she cannot deny that she lives in a part of the world where society is entirely dominated by men – where even the color of a woman’s scarf takes precedence over her dignity as a human being.

In the “Voices of Human Rights: Freedom of Expression and its Meaning in South Asia” session, Mr. CK Lal lamented that freedom of expression is hindered by the intolerance of dominant religions and cultures. Their majoritarian doctrine considers marginalized groups as enemies. Mr. Akhilesh Upadhyay offered a different view, suggesting that in post-2006 Nepal, after the Maoists joined mainstream politics, the media began to include the voices of the marginalized and the Madheshis, adding to a robust national discourse. In the same session, Mr. Yusuph Al-Amin emphasized that women journalists have played a crucial role in pushing for human rights and that it is important to promote inclusion within educational institutions relevant to journalism.

In the “Migration and Livelihood” session, Hon. Justice D. Murugesan noted that women and infants are vulnerable for trafficking after migration – not only for sex work, but for the harvesting of organs, and labor. In this session, Dr. Renu Adhikari offered a detailed overview of the situation of women and migration, emphasizing the need to challenge the patriarchal discourse and legislation surrounding their protection. Laws and practices protecting these women should not fall under the guise of “honor”, but should be based on their rights, distinctly separate from any discriminatory values. Her speech triggered a robust discussion on challenging patriarchal discourse and recognizing that status of women who are choosing to migrate for economic empowerment or to exercise their own autonomy. (For more information on this speech, please refer to Chapter II.)
V. Concluding remarks and suggestions for ways forward

As part of the Kathmandu Declaration adopted at the end of the conference, NHRI of the South Asia region committed themselves to active cooperation in order to:

1. Support each other through exchange of information on a regular basis to share challenges, lessons learned, and best practices, as well as technical assistance and capacity building;

2. Establish a mechanism or designate a focal point within each NHRI with the mandate of information exchange and coordination of activity;

3. Undertake a study to explore the possibility of establishing a regional human rights mechanism in the SAARC region;

4. Lobby SAARC governments on issues of key concern to NHRI in the region in a coordinated manner including on issues that cross borders such as protection of refugees and economic migrants and victims of trafficking and cooperation on responses to abuses against South Asian workers abroad;

5. Address human rights violations linked to the environment and climate change;

6. Promote efforts to protect civil and political (ICCPR) and economic, social and cultural rights (ICESCR);

7. Ensure that all investments in economies in the region, including by international financial institutions, are human rights-friendly and compliant with the UN Guiding Principles on Business and Human Rights (Ruggie Principles);

8. Welcome and encourage further efforts by GANHRI and APF to support capacity-building, sharing of experiences and good practices, as well as knowledge management with and among NHRI, and by all governments in the region to mobilize resources to that effect.

The Chairperson of the Nepal NHRC, Hon. Anup Raj Sharma in his closing remarks thanked the participants for their efforts to deliver a successful conference and closing declaration. He stressed that having resolved to address impunity, one of the key human rights problems in the region jointly is an important step, and he looked forward to working together through a coordinated joint human rights mechanism very soon.
VI. The Kathmandu Declaration

During the last session of the conference, participants discussed a draft Declaration, which aimed to summarise the recommendations made during previous sessions, towards a joint commitment from all NHRIIs present to tackle impunity in South Asia. With constructive input from the floor, including from members of NHRIIs and civil society, the conference reached a strong final text, including specific action points to put the “Kathmandu Declaration” into reality. Below is the full text as adopted.
Kathmandu Declaration on Addressing Impunity and Realizing Human Rights in South Asia
11 April 2018

The International Conference on Identifying Challenges, Assessing Progress, Moving Forward: Addressing Impunity and Realizing Human Rights in South Asia was held from 9 to 11 April 2018 in Kathmandu, Nepal. The representatives of National Human Rights Institutions (NHRIs) of Afghanistan, Bangladesh, India, Maldives, Nepal, Pakistan and Sri Lanka, as well as the National Women’s Commission of Bhutan, participated in the conference hosted by the NHRC of Nepal. NHRIs from Jordan, Malaysia, Myanmar, Mongolia and Philippines also participated along with a broad range of human rights organisations (HROs) and journalists from the South Asia region. The United Nations Office of the High Commissioner for Human Rights, the United Nations Development Program (UNDP)-Kathmandu and a number of international human rights organisations also participated.

The President of Nepal, Mrs. Bidya Devi Bhandari inaugurated the Conference in a special ceremony.

The NHRC of Nepal expressed its sincere thanks to the Governance Facility, UNDP-Kathmandu and the Asia Pacific Forum of NHRIs (APF) for the support they extended to organize the Conference. Participants of the Conference expressed their appreciation to the NHRC of Nepal for the excellent manner in which the Conference was organized and for the hospitality extended to all delegates.

The conference unanimously adopted the following Kathmandu Declaration as follows:

Recalling the international instruments agreed upon by States to promote and protect human rights and fundamental freedoms, including the Charter of the United Nations; the Universal Declaration of Human Rights (UDHR); the International Covenant on Economic, Social, and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights (ICCPR); and the Rome Statute of the International Criminal Court; as well as the Agenda 2030 and the Sustainable Development Goals, alongside the Charter of the South Asian Association for Regional Cooperation (SAARC) and its Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution; Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia and the Regional Convention on Suppression of Terrorism;

Noting that the year 2018 marks the 70th anniversary of the UDHR, which is celebrated worldwide;
Reaffirming that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing, and that all human rights must be treated fairly, equally and with the same level of attention;

Recognizing that core international human rights instruments make provisions for and require States to undertake measures to protect their populations, including from threats of an exceptional nature, but this must be within the framework of respect for human rights, fundamental freedoms and the rule of law;

Recalling that human rights, development, and peace and security are interrelated and mutually reinforcing;

Recognizing the Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights adopted by General Assembly resolution 48/134 on 20 December 1993 (Paris Principles) as international standards guiding the work of NHRIs and noting that the year 2018 marks the 25th anniversary of the endorsement of the Paris Principles by the UN General Assembly. In particular, we draw attention to the need for states to ensure that National Human Rights Institutions (NHRIs) are given adequate resources and capacity to function independently and effectively, in full conformity with the Paris Principles;

Recalling the 2004 Seoul Declaration, 2015 Mérida Declaration, and 2015 Kiev Declaration as well as the outcome Statement issued by the GANHRI 2017 Annual Meeting on the roles of NHRIs in early warning, during conflict and transition to peaceful societies;

Recognizing that NHRIs play a major role in encouraging ratification and integration of international human rights norms and standards in national legislation and practices, monitoring national human rights situations, investigating and documenting human rights violations, promoting human rights education and awareness, providing protection to individuals, providing constructive advice and guidance to authorities, and calling on states to respect human rights at all times, especially in conflict and post-conflict contexts;

Recognizing also the importance of the collaboration between NHRIs, as well as their collaboration with civil society, in addressing issues related to conflict and its consequences;

Bearing in mind the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (Updated Principles to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1) including norms and standards regarding the duty to prosecute, the right to the truth and the right to remedy and reparation;
**Alarmed** by the regular recurrence of crises and conflict in the region, including armed conflict, the crackdowns on the right to freedom of expression and assembly and other fundamental freedoms, the rhetoric of divisive politics leading to hate speech, targeting of religious and ethnic minorities resulting from the lack of accountability, and existence of impunity, which represent threats against peace;

**Recalling** that the absence of the rule of law may give rise to violations of civil, political, economic, social and cultural rights, as well as to authoritarian rule and conflict;

**Recognizing** the need for comprehensive approaches to deal with gross human rights violations and abuses of the past, to fully realise the rights to truth, justice, reparation and guarantees of non-recurrence, including through investigations and prosecutions, truth-seeking, reparation programs, and vetting; and that any such combination of processes must be in conformity with international norms and standards, while taking into account national context;

**Recognising further** the unique and critical contributions being made by NHRIs, especially those in line with the Paris Principles, in post-conflict and transitional justice processes, in order to ensure accountability, serve justice and achieve reconciliation, and in advancing broader institutional reform necessary to address the root causes of conflict, including by realising economic, cultural and social rights; and considering that this role could be further strengthened;

**Underlining** the need to promote political and economic good governance as the basis of a peaceful democratic society;

**Being aware** of the foregoing, the South Asian NHRIs resolve to:

**General**

1. **Recall** the General Assembly and Human Rights Council resolutions on NHRIs and urge all member states to implement these resolutions; in particular we encourage member states to give due consideration to recommendations and advice from NHRIs; to respect the Paris Principles to ensure strong and effective NHRIs; and to refrain from unduly interfering with the independence and autonomy of NHRIs.

2. **Strongly reaffirm** the need for full adherence to the Paris Principles and to actively work towards this, including through seeking legislative reform ensuring the integrity of the NHRIs through effective nominations and selection processes and financial independence.

3. **Call** on all states to sign, ratify and implement all international human rights instruments as well as the Rome Statute for the International Criminal Court, and ensure their implementation at the national level, and reaffirm our commitment...
as NHRIs to supporting, advising and monitoring our respective states in this endeavor.

4. **Call** on all states to meet their periodic treaty-body reporting requirements, in accordance with their international human rights treaty obligations.

5. **Reaffirm** that in the combat against impunity, as in other human rights endeavors, NHRIs must reach out and collaborate and cooperate with civil society in a clearly inclusive manner.

6. **Urge** states to bring an end to violence and hate crimes based on caste, religion, ethnicity, political affiliation, regional origin, and gender.

**Impunity and Transitional Justice**

7. **Restate** that the rule of law signifies that all individuals (including women, children and minority groups and marginalized communities) are protected by the justice system equally and without discrimination.

8. **Reaffirm** that the state’s failure to fulfill its duty to investigate and, where necessary, prosecute gross human rights violations perpetuates a culture of impunity, which is in turn a major obstacle to the political stability required for full enjoyment of human rights and economic prosperity.

9. **Ensure** that truth, criminal justice, reparations and measures to prevent non-recurrence (including institutional reforms) are intimately linked as pillars of transitional justice and are mutually supportive.

10. **Ensure** the full participation of victims’ groups, civil society and NHRIs in any transitional justice process through a consultative and transparent engagement from the start.

11. **Reaffirm** that prosecution is one of the central elements of an integrated transitional justice strategy, aiming at moving a society beyond impunity and a legacy of human rights abuse, in compliance with the requirements of due process of law and the principles of non-discrimination.

12. **Reaffirm also** that security personnels that were complicit in violations need to be transformed into institutions of integrity that sustain peace and uphold and promote human rights and the rule of law. Public officials and employees who are personally responsible for gross violations of human rights or serious crimes under international law should not continue to serve in State institutions, in line with Principle 36 of the Updated Principles.

13. **Reaffirm** that NHRIs should play a key role in ensuring the establishment of effective vetting processes that exclude persons with serious integrity deficits
from the administration of justice, law enforcement and security forces, in order
to re-establish civic trust and re-legitimize these institutions. Any removal of
persons should comply with the requirements of due process of law and the
principle of non-discrimination.

14. *Understand* the role that transitional justice plays in helping countries emerging
from conflict restore the rule of law and ensure a sustainable peace, through the
pursuit of truth-seeking, justice and reparations processes and institutional
reforms to prevent the return to situations of conflict.

**National Security and Security Sector Reform**

15. *Urge* all states in the South Asia region to review national security and counter-
terrorism laws and policies to ensure that they do not infringe on
fundamental rights, including mass surveillance measures are
proportional and strictly necessary to address legitimate national security
threats.

16. *Hold* non-state actors accountable for gross human rights abuses, even if they
are approved and backed by civilian stakeholder communities, keeping in mind
that the state response must always be proportionate and respect human rights.

17. *Recognizing* the right of states to call a state of emergency when national
security is genuinely in peril, call on states to ensure that any derogation of
rights is legitimate, proportional and strictly necessary, in conformity with
Article 4 of the ICCPR, and that under no circumstances will the use of torture
or derogations of the right to life be justified.

18. *Underline* the centrality of security sector reform, with a focus to ending
extrajudicial executions, disappearances and torture.

19. *Urge* states to ratify the Convention Against Torture and Other Cruel, Inhuman
or Degrading Treatment or Punishment along with its Optional Protocol, and
the Convention for the Protection of All Persons from Enforced Disappearance.

20. *Stress* the need to have effective accountability mechanisms to vet security
forces for internal promotions and for deployment to UN peacekeeping
missions.

**Migration and Livelihood; Refugees and Asylum Seekers**

21. *Stress* the right of freedom of movement, including migration in search of
employment. Recognising the economic benefits of migrant labour to
destination and origin countries alike, encourage cooperation between origin
and destination countries to ensure that the rights of migrants, particularly
women, are realized, to avoid serious abuses such as those that occur under the *kafala* system.

22. *Call* on governments to cooperate to bring about necessary legal and administrative measures to protect rights of migrants, in both countries of origin and countries of destination, according to International Labour Organisation standards, including the monitoring and regulation of recruiters, and assuring access to justice.

23. *Call upon* all states in the region to ratify the Convention on Refugees.

24. *Deeply concerned* by continuing gross violations of human rights in the region, such as the mass expulsion of Rohingyas from Myanmar, calling for an end to the violations, and to holding the perpetrators of the most serious violations accountable.

**Experiences and Challenges of Human Rights Organisations in Advocacy and Work against Impunity, and Best Practices, including Collaboration with NHRIs**

25. *Express* concern that global trends indicate a threatening environment for human rights defenders in all regions, including staff of NHRIs, and media personnel, with human rights defenders increasingly subjected to harassment, restrictions and reprisals amid an overall shrinking democratic space.

26. *Stress* that the work of human rights defenders and independent media is essential to promote and protect human rights and the rule of law, including in preventing conflicts and violence. Remind states that they have an unconditional responsibility to protect all human rights defenders and the media, without whom there is no democracy.

27. *Call on* states to ensure, that human rights defenders and independent media can operate in a safe and enabling environment, and implement effective measures for their protection, in line with the recommendations from the UN Special Rapporteur on the Situation of Human Rights Defenders.

28. *Reaffirm* the UN Declaration on Human Rights Defenders and resolve to promote its implementation in our respective countries.

**Commitments to future cooperation**

29. *Promote* active cooperation between NHRIs of the South Asia region in order to:

   1. *Support* each other through exchange of information on a regular basis to share challenges, lessons learned, and best practices, as well as technical assistance and capacity building;
2. *Establish* a mechanism or designate a focal point within each NHRI with the mandate of information exchange and coordination of activity;

3. *Undertake* a study to explore the possibility of establishing a regional human rights mechanism in the SAARC region;

4. *Lobby* SAARC governments on issues of key concern to NHRI in the region in a coordinated manner including on issues that cross borders such as protection of refugees and economic migrants and victims of trafficking and cooperation on responses to abuses against South Asian workers abroad;

5. *Address* human rights violations linked to the environment and climate change;

6. *Promote* efforts to protect civil and political (ICCPR) and economic, social and cultural rights (ICESCR);

7. *Ensure* that all investments in economies in the region, including by international financial institutions, are human rights-friendly and compliant with the UN Guiding Principles on Business and Human Rights (Ruggie Principles);

8. Welcome and encourage further efforts by GANHRI and APF to support capacity-building, sharing of experiences and good practices, as well as knowledge management with and among NHRI, and by all governments in the region to mobilize resources to that effect.
## Annex I: Conference Schedule

<table>
<thead>
<tr>
<th>Time</th>
<th>Theme</th>
<th>Speakers</th>
<th>Description</th>
<th>Format</th>
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<tr>
<td>8:00 am – 9:00 am</td>
<td>Breakfast</td>
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<tr>
<td>9:00 am – 12:00 pm</td>
<td>Sightseeing</td>
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<td>3:00 pm onwards</td>
<td>Arrival of the dignitaries/participants and guests, to be seated in the Hall of Yak and Yeti Hotel, Kathmandu</td>
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<td>Facilitated by MC</td>
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<tr>
<td>3:30 pm – 5:00 pm</td>
<td>Conference Inauguration Session</td>
<td>Inauguration of the Conference by Chief Guest Rt. Hon. President of Nepal Bidya Devi Bhandari Welcome speech by Hon. Prakash Osti, Commissioner of National Human Rights Commission of Nepal Opening Remarks by Justice Kedar Nath Upadhyay, Former Chairperson of National Human Rights Commission of Nepal Opening Remarks by Hon. Dr. Sima Samar, Chairperson Afghanistan IHRC Opening Remarks by Ms. Katharine Rose, Representative of GANHRI Keynote Speech by Hon. Anup Raj</td>
<td>Facilitated by MC</td>
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<td>Time</td>
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<tr>
<td>5:00 pm-5:30 pm</td>
<td>Closing Announcement of Inauguration Session by MC</td>
<td>Facilitated by MC</td>
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<tr>
<td>5:30 pm-5:45 pm</td>
<td>Photo Session</td>
<td>Facilitated by MC</td>
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<td>6:00 pm onwards</td>
<td>Cultural Program and Networking</td>
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<td>6:45 pm onwards</td>
<td>Dinner</td>
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Sharma, Chairperson of National Human Rights Commission of Nepal
Inaugural Address by Chief Guest Rt. Hon. President of Nepal
Bidy Devi Bhandari
Annex II: Opening speech of Hon. President Bidya Bhandari

Chairperson of the National Human Rights Commission of Nepal,

Chairpersons and representatives of Human Rights Commissions of the South Asian region,

Representatives of the Human Rights Institutions who have gathered here from different countries,

Human Rights activists,

Ladies and Gentlemen:

I am delighted to welcome the representatives of Human Rights Commissions of South Asia and the Asia Pacific, who have gathered here today to discuss the progress and possible reforms in the condition of human rights in our region. I am pleased to inaugurate such an important conference.

It is a matter of great satisfaction to be able to attend and share my understanding with the high level representatives from the human rights commissions of the neighboring countries and in the presence of international experts on human rights.

At a time when human rights norms have been universalized, it is a matter of satisfaction that the National Human Rights Commission of Nepal has organized this international conference. This is a laudable attempt to create a common platform for national human rights commissions of the Asia Pacific region where they will be able to share their experiences.

The Constitution of Nepal, which was drafted by people's representatives elected to the Constituent Assembly and was promulgated in 2015, has given top priority to human rights. The Preamble of the Constitution itself accommodates the fundamental human rights norms, along with the determination to attain them through the democratic process. Our Constitution has also incorporated the provisions of inclusion and proportional representation as fundamental rights, along with the human rights norms as guaranteed by the United Nations.

This is undoubtedly an extremely progressive Constitution, and it is now the responsibility of the Government of Nepal to draft the required laws necessary for the implementation of the guaranteed fundamental rights.
I believe that the discussion and sharing of experiences in the area of protecting and promoting human rights in the South Asian region will be extremely important for the sake of quality of life and livelihood in this region.

In the context of sharing experiences, let me state with some satisfaction that Nepal has achieved peaceful transformation from conflict and has successfully addressed major issues including those of inclusion, electoral systems and human rights. The Supreme Court of Nepal has delivered important judgements that stand as precedents in the protection of conflict victims. I believe that the protection of human rights during the time of conflict and the experience gained by our human rights mechanisms at the time of transition can be useful for other countries as well.

The Comprehensive Peace Accord of 2006 has provided a framework for transitional justice. We should leave no stone unturned to fundamentally internalize and embrace the mechanisms established to provide justice to the victims of conflict. In my view, the Government is duly-bound to resolve the problems that have emerged in attainment of transitional justice. Our experience has shown that the judicial system of Nepal, including the courts, is fully capable of dispensing justice in any kind of situation.

As we all know, human rights, democracy and rule of law are interdependent. Protection of human rights can be achieved only through internalizing democratic values and the guarantee of due process. Therefore, I would like to reiterate the ideals of democracy, human rights and social welfare state as enshrined in our new Constitution. I believe that this conference will be successful in identifying the challenges and opportunities faced by human rights in our region, and help take the implementation of human rights ideals in South Asia to new heights.

Ladies and Gentlemen,

The understanding of human rights should certainly not be confined to speeches and writings, but permeate our everyday lives. In the context of ensuring human rights, as important as civil and political rights are the economic, social and cultural rights. Without the implementation of human rights broadly understood, democracy cannot be people-oriented, and without guaranteeing human rights, democracy cannot be institutionalized.

Over the decades, the political parties of Nepal have been engaged in a series of untiring struggles for democracy and human rights. In today's context, with leaders who have contributed to democracy and human rights established at the helm of state
leadership, I believe, strong attempts will be made to end impunity. In this context, the National Human Rights Commission has played an important role to combat impunity. Relevant laws should be reformed as required to strengthen the role of the Commission to combat impunity.

I believe that the conference will be productive because its agenda includes discussions on the different types of discriminations in South Asia, including the rights of marginalized groups, collective rights, as well as violence against women. The matter of rule of law, due process as well as combating impunity, I hope, will received due importance.

I thank the office bearers at National Human Rights Commission of Nepal, the Government of Nepal as well as all the supporting organizations for organizing such an important conference. I would also like to thank all the chairpersons and members of national human rights institutions representing different countries, human rights experts and all distinguished guests for accepting the invitation of the National Human Rights Commission and taking part in this conference.

I wish this conference all success, and firmly believe that your presence in this important event will help further institutionalize human rights in our region, through coordination among the human rights mechanisms of the region.

9th April, 2018, Monday
Annex II: Keynote Speech by Hon. Anup Raj Sharma, Chairperson, NHRC, Nepal at the Inaugural Session

Rt. Hon. President of Nepal Ms. Bidya Devi Bhandari
Hon. Chairpersons and members of NHRI present here,
Chairperson of the Asia Pacific Forum of National Human Rights Institutions,
Representative from Global Alliance of National Human Rights Institutions,
Former Chairperson of National Human Rights Commission, of Nepal
Government officials,
Heads of security bodies,
Excellences and Representatives of diplomatic missions,
Human rights activists, civil society members,
Distinguished guests, Media persons,
Ladies and Gentlemen,

I am delighted to welcome you all here in Kathmandu today. As the Chair of the National Human Rights Commission of Nepal, it is my privilege to welcome you to this conference on vital issues of human rights. I hope, among other human rights issues, this event will contribute to our on-going efforts at the national level to complete the historic peace process of Nepal. Your presence here in this conference encourages us to continue our works and demonstrate that there is no boarder on human rights issues our solidarity against impunity can enhance peace and social justice.

Ladies and Gentlemen,

This is a regional conference but as the host NHRI to the event, let me indulge and allow briefly to talk about the human rights situation in Nepal as we have been observing and monitoring for more than one and half decade.

Since the signing of the comprehensive peace agreement in November 2006, an interim and then a new constitution have been promulgated and now we have to make it work in practice. We must find the optimum ways to put the aspirations in the constitution into practice and make sure that it is a document that truly captures the aspirations of all people, irrespective of gender, region, ethnicity, caste and religion. Nepal is a highly diverse nation in terms of geography, linguistic and ethnicity which have made us stronger in nationality and identity.
Such type of diversity can be found in all South Asian Nations. None of us has forgotten the reality of the decade-long conflict of Nepal from mid-nineties that we all suffered in different ways and degrees. Many People say that we are living in the post-conflict period, but in my view, it would be more accurate to say that we are living in a post-peace accord period and that much still has to be done to deliver the accord, including by addressing impunity.

Addressing impunity is integrally linked to promoting rule of law and development. It is clear that no Sustainable Development Goals of the United Nations can be achieved without addressing impunity in this region. Freedom of expression and the voice of the voiceless and marginalized people should be heard properly to respect human rights. As we look back, we can clearly see that the roots of the conflict lie in the denial of the enjoyment of human rights. Your presence here today inspires us to follow that path to create a Respectful Society in South Asia.

It is now almost 12 years since the Comprehensive Peace Agreement put an end to the decade long armed conflict, but the victims of the conflict still yearn for justice. The next step will be for our new government to implement the Supreme Court’s ruling on the twin Truth Commissions. It is a priority for us to modernize our legislation and bring it fully in line with the many human rights treaties ratified, for example, by criminalizing both torture and enforced disappearance. I am personally confident that the newly elected government of Nepal will provide the necessary legal instruments and resources for both Truth and Reconciliation and Commission on Disappeared People. Distinguished Guests, Nepal, as a newly elected member of the Human Rights Council must be seen to be a responsible member state of the United Nations to which we contribute much for the Common People. We must take advantage of our hardearned peace to root out and eliminate discrimination wherever we find. As you know, the NHRC alone cannot perform this, but we are constantly seeking ways in which we can be a true partner to our people as they strive for this vision of a better society for all. We have a duty by the constitution, to provide leadership as we accompany our people. We have to learn how to be a loyal duty bearer to our people and we look forward to benefitting from the experiences of our Colleagues and experts whose presence here encourages me very much. This conference may provide a place for NHRI to come together to identify challenges for the respect and protection of human rights.

The purpose of the conference is to create a foundation for strengthening the work of all the NHRI in our South Asian region. The conference conveners will provide a space for the commissioners from NHRI as well as activists and Human Rights
practitioners to discuss shared challenges. Commissioners and other human rights stakeholders will learn about best practices in the protection and promotion of human rights at the national, regional and global levels. We also anticipate that Commissioners and other stakeholders across the region will develop a more robust relationship among us and our own civil society groups. To do this we must build a partnership with the marginalized groups and victims of human rights violations and abuses: many issues of Economic, Social and Cultural Rights are similar in this region. We can collaborate to combat with such fundamental issues of human rights. In this context, National Human Rights Commission of Nepal is honored to host the international human rights conference, with the support of the United Nations, Asia Pacific Forum, Government of Nepal and Governance Facility. We sincerely hope that the conference will make a contribution to increasing regional cooperation in the protection and promotion of the basic human rights in this region.

Ladies and Gentlemen,

Absence and denial of rule of law is the major obstacle to combating impunity. The independence of the judiciary, the justice and administrative system and other instituting are very important as a whole. History has shown us that without rule of law, no country has been able to prosper and develop its economy to the optimum. Central to this aspiration is an end to the scourge of caste and gender-based violence in an integrated approach.

Ladies and Gentlemen, as you know, we are living in complex times. Our challenge is to find the way in which we can best contribute to the well-being of our people. We have a historic opportunity but history will judge us harshly if we fail to grasp that opportunity with sincerity and intelligence. For me, to open a conference like this is a fulfillment of many of my own personal goals. It fills me with pride to see you all gathered here in my country to find ways together of carrying out our honorable duty. In order to do that, we have to find the ways to explain to our people the true meaning of human rights, to find the words that every man; woman and child can understand our purpose, our calling. We are proud of our peace process, but we are not too arrogant to realize that more still needs to be done to complete that process. As an NHRI we bear a heavy responsibility, but it is a task which honors us all. Finally, I would like to take this opportunity to extend our gratitude to the Government of Nepal for providing necessary technical assistance to the commission for promotion and protection of human rights including monitoring and investigation works. I would also like to thank all the working organizations for supporting the commission to perform more actively and responsibly.

Thank You!
Annex III: Keynote speech by William O’Neill

National Security or Human Rights: a false and dangerous choice

Introduction

The tension between national security and human rights is rooted in the UN Charter and has undermined the struggle to enhance liberty, freedom and respect ever since the founding of the United Nations in 1945. The UN Charter, in its Preamble, notes that one of the purposes in creating the United Nations is to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and in Article 1.3 proclaims (UN Charter, Preamble 1945). Yet in Article 1.3 reiterates the promotion and respect for human rights and fundamental freedoms as a primary purpose of the organization.

Yet a few lines later, in Article 2.7, the Charter states that: “Nothing contained in the present Charter shall authorize the United Nations to intervene matters which are essentially within the domestic jurisdiction of any state…” This provision, coupled with Article 51 in Chapter VII of the Charter which provides that Member-States have an inherent right to “individual or collective self-defense” if an armed attack occurs against a Member-State, created ambiguity and tension between the state’s obligation to protect human rights and its rights to conduct its own affairs without outside interference and to act in case of threats from outside. Where is the line between promoting and protecting universal human rights and protecting national sovereignty?

Three years after the founding of the UN, a Committee led by Eleanor Roosevelt and containing experts from every region of the world drafted the Universal Declaration of Human Rights. Glendon 2001, p. 164. For the first time in human history, the fundamental rights and freedoms mentioned in the UN Charter were described and identified. Eighty years ago, the UDHR was unanimously approved by the General Assembly with only a handful of states abstaining. Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights, 2001, p. 169. While not a binding treaty, the UDHR specifies civil and political along with economic, social and cultural rights. Interestingly, the UDHR never mentions the term “national security.” In its article 29 the UDHR notes the in exercising rights everyone “shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”
When diplomats convened to create a binding human rights treaty from the basis of the UDHR, the limitations on rights were a major concern. After all these were state officials who all shared a priority to limit state responsibility for breaches of human rights which in turn meant seeking broad and flexible powers on when and how to limit the exercise of human rights. First however, they could not agree on including all the rights enumerated in the UDHR in one treaty since the Soviet bloc objected to civil and political rights while favoring economic, social and cultural rights and the Western states largely favored civil and political rights and the US in particular objected to economic social and cultural rights. After a long impasse the negotiations split and two treaties resulted, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).

I will focus on the ICCPR since it was the introduction of the concept of “national security” as a possible limitation on the exercise of rights although regional human rights treaties covering Africa, the Americas and Europe contain similar provisions. The most significant limitation in the ICCPR appears in Article 4, the so-called “derogation provision.” This allows states, unilaterally, in a time of “public emergency which threatens the life of the nation” to derogate or suspend their obligations under the Covenant. The state must publicly declare this emergency officially. The derogation must be strictly limited consistent with the exact exigencies of the situation. Even in such a state of emergency, certain rights however, like the prohibition on torture and slavery or the right to life and freedom of conscience/belief/religion, can never be suspended.

Less sweeping but in fact more dangerous to human rights than the derogation provision, are general limitations to the enjoyment of rights found in several articles in the ICCPR. For example, in article 21 of the Covenant which guarantees the right to peaceful assembly, this right is subject to restrictions which are “necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.” Who decides whether “national security” should trump enjoyment of the right to peaceful assembly: the state of course. Examples are legion over the roughly 42 years since the ICCPR came into effect where states have used the alleged threat to national security to subvert human rights. Recourse for such abuse is limited since the Human Rights Committee, which oversees adherence to the treaty by States-Parties, has no enforcement powers and little leverage. The situation,
with certain minor modifications, is also true for the various regional human rights treaties.

There is a gaping hole in human rights law and practice that states are not hesitant about using: claim a threat to national security, no matter how baseless or ludicrous, and cut back on rights, especially those of perceived political opponents, despised minorities or anyone else the state wants to suppress and control. For most of the past decades “national security” was used as a pretext to crack down on political opponents, on speech that was critical of those in power and to weaken anyone viewed as a threat to a party’s hold on power.

For example, the UN Human Rights Committee has expressed concerns over many derogations using Article 4 over the years, particularly over the issue of states derogating rights that are non-derogable under Article 4. (See, for example Concluding Observations of the HRC for the Dominican Republic (1993), Jordan (1994), Nepal (1994), Russian Federation (1995), Zambia (1996), Colombia (1997), Israel (1998), Mongolia (2000) and Kyrgyzstan (2000), cited in note 3 to General Comment No. 29 of UN Doc. CPPR/C/21/Rev. 1/Add.11). Of course certain situations genuinely endanger national security and public order. For example, the government in Sri Lanka recently declared a national emergency after attacks by Sinhalese Buddhist extremists on Muslim shops, homes and mosques which put people’s lives and property in real danger. New York Times, 6 March 2018.

The Committee’s comment on Nepal in 1994 is particularly telling. It noted that “The Committee deplores the lack of clarity of the legal provisions governing the introduction and administration of a state of emergency, particularly article 115 of the Constitution, which would permit derogations contravening the State party’s obligations under article 4, paragraph 2, of the Covenant.” This is not at all unique to Nepal but is interesting historically given what happened a few years later after the outbreak of the Maoist hostilities. The Committee also expressed concern “with the excessive restrictions on the right to freedom of expression and information and the restrictions which apply to the manifestation of religion and to change of religion.” (UN Doc. CCPR/C/79/Add.42, 10 November 1994).

Counter-Terrorism and Human Rights

The tension between national security claims and human rights reached an apogee following the terrorist attacks on New York, Washington DC and Pennsylvania on September 11, 2001. The United States, whose record on this precise issue was not that bad, suddenly seemed to become unmoored and used the attack to justify an all-out assault on human rights. Not only was this devastating to human rights in the
USA but also provided a pretext for many leaders around the world to launch a similar offensive against human rights, all the while claiming it was “necessary” due to concern for national security.

I will not go into great detail concerning the massive violations of human rights committed in the name of national security in the US and elsewhere since 2001. This has already been documented at length by many. See any annual report by Human Rights Watch or Amnesty International from 2001 to the present. They each offer a wealth of depressing detail on how many states, all in the name of national security, have engaged in arbitrary arrests, prolonged pre-trial detention, suspending numerous freedoms including expression, assembly, association and movement. Even torture, prohibited by every major international treaty and also by the principle of *jus cogens* was used by the United States and several other states engaged in “renditions” where people were knowingly transferred to jurisdictions where torture was likely to occur. Twisted legal rationales were created by Bush administration lawyers to define away “torture” and recast practices prohibited by international and even domestic law in the US as “enhanced interrogation techniques.” See Rumsfeld Memorandum on Enhanced Interrogation Techniques, 2003, Rizzo CIA Memoranda, 2005 and Bybee Memorandum, 2002.

In another insult to international law and especially the ICCPR and the Convention Against Torture (CAT), the US government at the time argued that its human rights obligations extended only as far as US territory, thus creating the legal black hole of Guantanamo Bay Prison. Finally, in perhaps the most breathtaking renunciation of its obligations under binding international law, a March 2003 memorandum from the Department of Defense declared that President Bush was not bound by either the CAT, which the US has ratified, or by a federal anti-torture law because he had authority as Commander-in-Chief to approve any technique needed to protect the nation’s security. *New York Times*, Guide to the Torture Memos 2012.

The discourse and actions taken by many states soon created a very unhealthy dynamic: national security and human rights were mutually exclusive. They could not co-exist in this new post-9/11 world and security concerns had to prevail over human rights. Many dictators, needling little excuse to restrict human rights, jumped on this bandwagon and gleefully noted that if the US, Britain and France were cutting back on human rights, then who is to say that Zimbabwe, Egypt, Syria, Sri Lanka, Burma, Russia, Iran and other states hostile to human rights could not adopt similar methods. States that already tortured, killed and arbitrarily arrested and detained people now felt they had an unfettered license to continue these abuses, all in the name of fighting terrorism and to insure national security.
The election of Donald Trump to the US Presidency has only worsened these trends. Candidate Trump stated throughout the 2016 campaign that torture “works” and that he would allow and even order the US military to use methods like waterboarding and worse. Vice-President Mike Pence, has refused to rule out waterboarding and both he and Trump favor maintaining the prison at Guantanamo Bay. Pence has said when asked about torture and waterboarding, “We’re going to have a president again who will never say what we’ll never do.” Huffington Post 2016.

Trump has also said he would intentionally order the killing of the relatives of suspected ISIS members. “We’re fighting a very politically correct war,” Trump answered in response to a question about avoiding civilian casualties. “And the other thing is with the terrorists, you have to take out their families. They, they care about their lives. Don’t kid yourself. But they say they don’t care about their lives. You have to take out their families.” So much for the principles of distinction and humanity under the laws of armed conflict, let alone the prohibition in human rights law on summary or arbitrary executions.

Of course, we don’t know if Trump will actually order US military and/or the CIA to commit war crimes and crimes against humanity, which systematic torture and the intentional targeting of civilians would be, but once again for now we are left with what Trump has said many times. Moreover, his first head of the CIA, Mike Pompeo, often argued for using harsh interrogation measures and criticized the Obama administration for outlawing torture techniques like waterboarding. The person just named to replace Pompeo at the CIA, Gina Haspel, actually ran a secret torture center in Thailand shortly after the 9/11 attacks. New York Times, “Gina Haspel, Trump’s Choice for C.I.A., Played Role in Torture Program, March 13, 2018.

Authoritarian leaders around the world took all these statements as a license to torture and commit other violations of human rights and the laws of war. Many reacted positively to Trump's victory. The Philippine President's response was revealing. Rodrigo Duterte, following his congratulatory phone call to Trump, said: “We don't have any quarrels. I can always be a friend to anybody, especially to a president, a chief executive of another country. He has not meddled in the human rights.” That last sentence is key: do business with us but don't raise pesky questions about our human rights record. None other than Zimbabwe's ex-president Robert Mugabe, said that he was looking forward to re-establishing diplomatic relations with the US. Fortunately, that will now happen under his successor. Brutal dictators like Putin of Russia, Sissi of Egypt and Erdogan of Turkey all welcomed Trump’s victory. The Washington Post, “Trump’s Election threatens human rights around the world,” Nov. 10, 2016.
Terrorism and the Laws of Armed Conflict

Terrorism itself poses a great danger to human rights. By definition terrorism constitutes a serious human rights violation. While the UN cannot agree on a definition of terrorism, relying on the shibboleth of “one person’s terrorist is another person’s freedom fighter,” that does not stop us from concluding that attacking civilians with the express intent of creating terror violates human rights and cannot be justified by any alleged political goal. The ICRC’s approach is eminently sensible, noting that while International Humanitarian Law does not provide a definition of “terrorism”, the law does prohibit acts that “would commonly be considered ‘terrorist’.” IHL does expressly prohibit “acts of terrorism” in Article 33 of the Fourth Geneva Convention and in Article 4 of Additional Protocol II. This Protocol and Additional Protocol I both prohibit “acts or threats of violence the primary purpose of which is to spread terror among the civilian population.” Article 51 in Protocol I and Article 13 of Protocol II.

Of course IHL applies to armed conflict situations and emphasizes a core principle of distinction/discrimination between combatants and non-combatants. The latter can never be intentionally targeted which is precisely what terrorists do. In situations not involving armed conflict, IHL does not apply but international human rights law and domestic criminal laws govern behavior. Regardless of the motives of terrorists, international human rights law prohibits the unlawful use of force by state actors or those acting on behalf of or with the acquiescence of the state and non-state actors; criminal law prohibits individuals or groups from engaging in acts involving the illegal use of force or violence against other individuals or against the state. So regardless of the applicable legal regime, torture is illegal and a serious crime, war crime and/or human rights violation. ICRC January 2015.

The problem has been however, that in countering terrorism some states have only made matters worse. They have committed terrorist acts themselves (yes there is such a thing as state terrorism: See Myanmar’s treatment of Rohingya and South Sudan’s genocidal campaign against certain minorities as two recent out of many examples). And as shown above, under the pretext of countering terrorism they have unlawfully restricted human rights. The so-called “war on terrorism” is more than a misleading misnomer since terrorism is a tactic and you cannot have a war against a tactic. It also creates and sustains a political environment that seeks to justify using illegal means such a as torture and extrajudicial killings to protect national security.

Unfortunately, a very harmful dynamic has developed often pitting human rights defenders against national security activists. In the most extreme cases each sees a “zero sum” game where the two goals are mutually exclusive. More human rights
mean less national security and vice-versa. It behooves human rights advocates to
gain a deeper appreciation of the real threats that terrorism poses while national
security advocates need to grasp how using fears about security as a justification to
erode human rights only reinforces many of the factors that can lead to terrorism and
violent extremism. Rights have limits as described above, yet limitations on rights are
also not absolute or open-ended and must be proportionate and truly necessary.

Three current worrying trends

As was noted in a major conference in 2006 on “National Security and Human
Rights” at the Woodrow Wilson Center in Washington, DC, “suppressing democratic
freedoms as an expedient to national security will only weaken security further by
radicalizing and isolating certain populations, which in turn will contribute to these
populations’ perceived grievances and thereby increase the impetus to violence.”
Woodrow Wilson Center, National Security and Human Rights, 2006, p. 7. In fact,
respect for human rights and insuring the rule of law and combatting corruption can
be crucial tools in enhancing national security. It is a false dichotomy to postulate
that security concerns require limiting certain freedoms.

Yet despite these insights made by many over the past 17 years since the attacks in
the United States, the two worlds have not often come together and the dynamic
remains one of opposition rather than complementarity. Several recent trends are
particularly worrying and I turn to them now.

1. The Use of Drones and remotely piloted aircraft

A vast literature now exists analyzing the impact of the use of armed pilotless aircraft
(drones). See O’Connell, “Unlawful Killing with Combat Drones, July 2010, Koh,
‘Interview with Harold Koh,” April 2012 and Anderson, “Predators over Pakistan,”
March 2010. I will focus on the issues of the legal regime that should govern their
use and then on the impact of drones on the dynamic between human rights and
national security.

Drones offer the possibility of increasing the precision of targeting enemy
combatants. Instead of just bombing or sending rockets, however refined, into areas
where civilians are also known to be, drones can often identify the exact location of
the persons targeted along with the presence of civilians. The person then watching
the live feed has to decide literally whether to pull the trigger or not.

There is nothing inherently illegal in using drones. The key question is: is there an
armed conflict? If there is not an armed conflict then the use of armed drones to kill
people without first attempting to arrest, disarm or use less than deadly force to
control the situation, is highly suspect and quite possibly illegal. And using drones in
the name of enhancing national security can have exactly the opposite effect. It is
vitaly important to avoid confusion between the legal regime governing armed
conflict and the norms governing counter-terrorism.

First, the laws of war by definition only apply in armed conflicts which can be
international (between two or more states) or non-international (between states and
non-state actors or between non-state actors). If an armed conflict exists combatants
can lawfully kill other combatants. This is what war is all about. Any weapon that
increases the accuracy of the combatants thereby lowering the risk of civilian deaths
or injury can be a good thing. A drone offers this technological advance. Its high-
resolution real-time picture of the battlefield offers combatants an accurate
assessment of just who is there: combatants, civilians or a mix. Of course the
principles of the laws of war apply always: distinction, proportionality, necessity and
humanity.

Drones can greatly improve the chances of distinguishing between combatants and
civilians thus lowering the risk of disproportionate civilian casualties. Whether they
actually have done so in the armed conflicts in Afghanistan and Yemen is a subject of
great debate. Tregan, The Guardian Weekly 2013. The legal issues will grow
increasingly complex as non-state armed groups actors start to use drones. And the
CIA already uses drones. CIA officers sitting in air-conditioned offices in the US, not
wearing uniforms and not part of a military chain of command are “combatants”
under the laws of armed conflict and do not enjoy the combatant privilege to kill

If there is no armed conflict then the use of drones at all is much more problematic,
regardless of their accuracy. Human rights law takes precedence in situations where
there is no armed conflict. Here the state may only use deadly force as a last resort, in
self-defense or to protect the life of a third party which is in imminent danger. UN
Basic Principles on Force and Firearms, 1990, art. 9. The state must only use force
carefully calibrated to control the situation and deadly force is always the last resort.
If a warning can be given, an arrest made or a perpetrator brought under control by
non-lethal means, none of which a drone can do, then such means must be used.

In all cases the use of drones, legal or illegal, has a huge psychological effect on
everyone in the region. Their use can also have a negative impact on the population’s
ability to enjoy economic, social and cultural rights. UN Special Rapporteur on
Promoting Human Rights while countering terrorism, 2017, p. 9. Children can be
traumatized and unable to go to school. Farmers may fear going to their fields so
crops go UN harvested and hunger grows.
States always claim they need to use drones to protect national security. In the case of an armed conflict this is probably true and the question becomes have drones been used in accordance with the laws of armed conflict? Even if the answer is yes, the impact of the drones may have such a negative impact on society, including their ability to enjoy their human rights, that it is at least arguable whether the drones are having a net positive effect on national security.

If there is no armed conflict, then in addition to the legal issues raised above, whether using drones enhance national security is debatable. States claim that they must act in self-defense because an armed group is posing an imminent threat and the state has “no other option to defend the country from attack and no other means to detain, disrupt or otherwise prevent those plotting acts of terror.” UK House of Lords 2016. While states under the UN Charter as noted previously have the right to self-defense, many have challenged its applicability regarding non-state actors operating outside theatres of war who may someday pose a threat. Where is the “imminence”? As the former UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Philip Alston noted in discussing the US claim that has the right based on self-defense to target anytime anywhere al Qaeda, the Taliban and “associated groups” years after the September 11, 2001 attacks: “This interpretation of the right to self-defense is so malleable and expansive that it threatens to destroy the prohibition on the use of armed force contained in the United Nations Charter.” Alston, Harpers Archive, 2010. Alston further noted that if other nations used the same rationale as the US in their fight against terrorism “the result would be chaos.”

The ICRC has clearly stated on numerous occasions that it rejects the notion often put forward by the US that it is fighting a “forever war” against al Qaeda and the Taliban and any ‘associated forces’ wherever they may be. “With respect to the phenomenon of armed groups that are perceived as having a global reach, such as al-Qaeda or the Islamic State group, the ICRC does not share the view that an armed conflict of global dimensions is, or has been, taking place. This would require, in the first place, the existence of a ‘unitary’ non-State party opposing one or more states.” ICRC, “The Applicability of IHL to terrorism and counter-terrorism”, October 2015, p. 5. The ICRC correctly notes that based on the available evidence, this is simply not true for al Qaeda or ISIS. The ICRC also rejects the claim that the laws of armed conflict apply wherever anyone associated with armed groups may be found, e.g. al Qaeda in the Maghreb. Unless there is the requisite level of intensity of conflict and organization of armed groups, IHL does not apply.

Regardless of the legal issues, using drones may undermine national security by creating such enmity towards the state using drones that many more enemies are
created than are killed. This practical policy question is often overlooked or dismissed. But reliable accounts from Pakistan and Yemen claim that drones, in addition to traumatizing the population has also motivated some of its member to resist the party using the drones.

In the town of Obeiraq in Dhamar province in southwestern Yemen, after a series of US drone attacks in 2013, a local leader declared: “I assure you, the young of men of Obeiraq may soon be joining AQAP [al Qaeda in the Arabian Peninsula].” The Guardian Weekly, “Yemenis are living in fear of drones, July 26, 2013, p. 30. And after an earlier series of deadly drone strikes also in Yemen, a young Yemeni writer noted: “Drone strikes are causing more and more Yemenis to hate America and join radical militants; they are not driven by ideology but rather by a sense of revenge and despair.” Mothana, New York Times, “How Drones help al Qaeda, June 13, 2012. And regarding the use of drones in Pakistan, a country with which the US has never been at war and is nominally an ally, two experts on counter-terrorism have written that “while violent extremists may be unpopular, for a frightened population they seem less ominous than a faceless enemy that wages war from afar and often kills more civilians than militants.” Kilcullen and Exum, “Death from Above, Outrage down Below,” New York Times May 16, 2009.

2. Mass Digital Surveillance

Another relatively new issue in the ongoing dichotomy between rights and national security is state mass surveillance of digital information in the name of national security. The UN General Assembly has made this a priority concern. UN GA Resolution, year. Numerous human rights bodies within the UN system have taken up the issue noting that the right to privacy plays a “pivotal role in relation to other rights.” UN Special Rapporteur on the promotion of protection of human rights while countering terrorism, 2017, p. 10. The Human Rights Council has even named a Special Rapporteur on the Right to Privacy and issues of digital privacy have been considered by the Human Rights Committee of the ICCPR and in various commentary in the Universal Periodic Review conducted by the Human Rights Council. UPR A/HRC/29/15.

The state’s activities regarding sweeping online surveillance of virtually anyone with no prior notice or any basis or finding of “probable cause” to suspect criminal activity has also been the subject of numerous court cases in national and regional courts. For example, the European Court of Justice has held that generalized access to electronic communications, in essence electronic eavesdropping with no prior judicial review of the propriety of such actions, undermines the essence of the fundamental right to privacy and respect for a private life. Grand Chamber Case, Schrems v. Data
Protection Commissioner, 2015. The European Court of Human Rights has confirmed this result in a case involving a surveillance law from Hungary, noting that the law contravenes the right to privacy found in the European Convention on Human Rights and that human rights principles must be “enhanced” to take into account the increasing appetite of states for ‘massive monitoring of communications.” Szabo v. Hungary, 2016.

The retention of so-called “meta-data” without a reasonable suspicion that of illegal activity is not allowed since it would be impossible then to balance whether the need for such data outweighs the intrusion into the private lives of individuals. This proportionality principle should govern every assessment of whether the needs for national security trump concerns about privacy but if massive and indiscriminate surveillance exists such a test is impossible to apply.

Perhaps no other issue illustrates just how dangerous the fight against terrorism can be for human rights. A case from the Constitutional Court in Germany perfectly captures the challenges in this era. The Court ruled that a general screening of data across public and private data bases hunting for possible terrorist “sleepers” is illegal; only a concrete and imminent danger to the lives or safety of persons or to the state, not a general threat level or heightened tensions, could justify such a screening. The methods and technology now available or likely to be in the future, make it imperative that human rights advocates constantly be on guard for new and creative infringement of rights, all “justified” in the name of national security. Special Rapporteur on promotion of human rights while countering terrorism, 2017, p.11.

3. Migration and Refugees

The exploitation by political leaders of the phenomenon of migration and refugees poses a grave threat to human rights. The rhetoric is chilling and becoming all too commonplace. From Hungary to Slovakia, Italy, France, Germany, and most tellingly, in the United Kingdom with the drive to leave the European Union, the intentional fear-mongering of the “other has led to disastrous policies for migrants and asylum-seekers in Europe. The rise of nationalist verging on fascist parties like the Alternatif fur Deutchland (AFD) in Germany, the League in Italy (formerly the Northern League but the name was changed to attract southern Italians to a party that had previously insulted southerners and foreigners) and the long-standing racist and anti-Semitic Front National in France (who also just changed its name to try to hide its insidious roots and extend its appeal) has been disastrous for human rights. Hate speech abounds, attacks on minorities/refugees/migrants, restricting freedom of movement, all in the name of protecting people from a non-existent threat, have become a terrifying norm in Europe.
The United States, under Trump’s administration, takes a back seat to no country in spewing anti-immigrant rhetoric and attempts to enact policies that violate fundamental human rights. The infamous wall that Trump wants to build is only the most physical example. Trump’s attempts to restrict migration from countries based on their alleged threat to the US, which was in fact based solely on an anti-Muslim prejudice, has so far been largely held in check by the US federal courts, but the battle is far from over.

And of course, dictators and authoritarians from around the world have looked to these precedents to justify their own harsh actions against migrants and asylum-seekers. The most egregious case is in Myanmar where the government has stoked anti-Muslim sentiment to justify its policy of the forced expulsion of over 700,000 Rohingyas on the pretext that they are really Bangladeshi interlopers and not really Burmese at all, even though the Rohingyas have been in Burma for centuries. The UN Special Representative on the Prevention of Genocide recently stated regarding the Rohingya that “All the information that I have received indicates that the intent of the perpetrators was to cleanse northern Rakhine State of their existence… possibly even to destroy the Rohingya as such, which, if proven, would constitute the crime of genocide. New York Times, “Myanmar rejects UN Findings,” March 14, 2018.

Complicating all this is the fact that many modern migrants are fleeing war zones where terrorist groups operate. Thus the fear that among those fleeing are terrorists who will do harm even though virtually every study worthy of repute has shown that refugees and migrants are no more likely to commit crimes than the host population and are even less likely to engage in terrorism or to become radicalized. Newland, October 2015. Instead of posing risks, migrants and refugees are at great risk fleeing conflicts. Over 16 million refugees in 2014 alone fled five countries with the highest amount of terrorist activities. Institute for Economics and Peace, Global Index 2015.

What is true is that the numbers of refugees, internally displaced and migrants have reached all-time records. In 2015, for example, the number of displaced reached more than 65.3 million globally. UNHCR, Global Trends 2015. Many states instead of protecting and welcoming these desperate people stigmatize, stop and even arrest, detain or expel them. While states have every right to protect their borders and every effort should be made to disable terrorists and their networks. These concerns about national security cannot infringe on the rights of migrants and refugees not only because they violate international law but ultimately are counterproductive. As the Special Rapporteur noted: “A worrying trend has been that ‘institutional and policy structures, migration and border controls have been increasingly integrated into security frameworks that emphasize policing, defence and criminality over a rights-

Yet the militarization of border patrols and crackdowns on migrants and refugees instead of increasing security have only created chaotic and deadly migration by handing power to traffickers who do not hesitate to abandon or even murder migrants. This can in fact assist those intent on committing terrorism by intensifying xenophobia and vilification of certain groups. This is a gift to terrorists seeking to recruit new members. UNHCR Dec. 2015.

Borders are not “human rights-free zones” and states have obligations under the UDHR, ICCPR, refugee law and customary international law to seek and enjoy asylum and to not be forced to return to the place where they fear persecution (the principle of non-refoulement”). 1951 Convention on Refugees, art. 33. The Office of the High Commissioner for Human Rights has issued an excellent paper on how to address security concerns while fulfilling human rights obligations. See OHCHR, Recommended Principles and Guidelines on human rights at international borders, 2014. For example, while screening and registering all those who arrive at borders is perfectly acceptable, profiling based on ethnic, religious, ethnic, national or other grounds is strictly prohibited since it violates the core human rights principle of non-discrimination. Any differential treatment of migrants at international borders must be necessary and proportionate.

The issue of mass data collection analyzed above is relevant to migration. Border agents now routinely collect data allegedly to identify terrorist among those seeking entry. Again, collecting data is permissible as long as it respects core human rights principles. As noted above, data collection must respect the right to privacy which migrants do not abandon as they move. The Office of the High Commissioner for Human Rights underscores that collecting biometric data at borders must be accurate and up to date, proportionate to a legitimate aim, obtained lawfully, stored for a limited time and disposed of safely and securely.

The mass and prolonged incarceration of migrants and asylum-seekers is also an affront to human rights and refugee laws. USA Today, “Asylum Seekers sue Trump over prolonged detention”, March 15, 2018. In the United States, even women and children are incarcerated and in some recent cases young children have been separated from their parents. The Washington Post, “A mother and child fled Congo fearing death, ICE has held them separately for months,” Feb. 27, 2018.

Words and language are important. The UN Special Rapporteur on the human rights of migrants has emphasized that migration is not a crime and that the term “illegal
“migrants” should not be used to refer to migrants in an irregular situation. Special Rapporteur on the human rights of migrants, October 2, 2013. States should never criminalize irregular entry or residence in a country.

Those who seek, however, to criminalize migration and castigate vast numbers of people by tarring them with the terrorist label, also sow confusion by asserting that refugee law undermines national security by providing a haven for those who “hate us.” Nothing could be further from the truth. Refugee law explicitly prohibits awarding refugee status when there are “serious reasons to consider” that anyone who has committed war crimes, crimes against humanity, crimes against peace or other acts contrary to the purposes and principles of the UN. 1951 Refugee Convention art. 1(F). Clearly terrorism falls within all of these categories and the level of proof required is not very high to exclude from refugee someone on these grounds.

Conclusions

Ever since Cicero executed Cataline in 63 BC without a trial under emergency powers granted to Roman Consuls, the debate between national security and human rights has continued. Two thousand years ago, just as now there was real doubt about just how much a threat to the state Cataline and his followers presented. Was Cicero using an “emergency” to enhance his powers while getting rid of a pesky rival? Mary Beard, Confronting the Classics, 2013, p. 83.

What I have tried to show in the preceding analysis is that even when there might be a real threat to national security, a state’s powers to suspend or limit human rights is itself constrained by international law, both treaty and customary law. Any derogations or limitations must be proportional to the threat and not discriminate based on ethnic, national, religious or other prohibited grounds in their application. And certain suspensions, such as the obligation never to torture or to execute arbitrarily or summarily, are on their face illegal, whether or not there is a real threat or an armed conflict.

Finally, suspending or restricting the enjoyment of human rights can have the exact opposite effect from the claimed rationale for the limitations. Abusing human rights can only fuel resentments and become an effective recruiting tool for the very terrorists or violent extremists that the state is seeking to combat. A much more effective response would be to extend human rights, including key rights like education, access to health care, housing, food and clean water, to as many people as possible without regard to race, nationality, social class or ethnicity. This would dampen the appeal to violence, reduce resentments that inevitably arise from exclusion and have the added benefit of improving the lives of billions of people.
Annex IV: Closing Remarks by Hon Chairperson of NHRC, Nepal, Anup Raj Sharma

Hon. Chairpersons and members of NHRIs present here,
Chairperson of the Asia Pacific Forum of National Human Rights Institutions,
Representative from Global Alliance of National Human Rights Institutions,
Former Chairperson of National Human Rights Commission, of Nepal
Government officials,
Heads of security bodies,
Excellences and Representatives of diplomatic missions,
Human rights activists, civil society members,
Distinguished guests, Media persons,
Ladies and Gentleman,

I am honoured to speak at the closing of this successful conference. I have always resist the use of the word "closing" in such deliberation. Rather I would like the word "beginning". It is beginning of sitting together discussing the Human Rights issues and finding the ways forward.

I want to start by thanking Commissioners and entire team for having the vision of organising this conference and putting faith on my chairmanship. The Nepalese commission had given me absolute authority to prepare the concept as well as design of the conference. I was little frightened. I appointed Mohna Ansari as chairperson of preparation committee along with officers of NHRC. I am proud that Commissioner Mohna Ansari did commendable work for the success of this conference. Please give a big hand for commissioner Mohna Ansari .I also give my sincere thanks to my fellow commissioner Prakash Osti, Sudip Pathak and Govinda Sharma Poudyal, secretary Bed Prasad Bhattarai and Staffs of NHRC for their restless support and very positive role they have done.

Of course, we could not have reached this point without all the participants giving their dedicated energy and focus of mind on the issue of impunity in the South Asian region.
My thanks goes also to the fellow commissioners from NHRIs across the region, members of civil society in Nepal and elsewhere in the region, the media, the staff of the Nepal NHRC who have worked tirelessly to make this a success.

Special thanks also to the Governance Facility for believing in this initiative and even risking being criticized for doing so. And, of course, thanks to our longstanding partners, the UNDP, for their support. How can I forget the support given by APF.

I am delighted that we have been reached a strong Declaration, which will help all the NHRIs in the region to work more closely together and address critical issues such as impunity, migration and potential Human Rights Issues.

The time has come for impunity to be shown its place in history – the dustbin or dirt heap. We have by adopting the Kathmandu Declaration shown our commitment to ending this scorn that has marked South Asia and many other parts of the world for a long time.

We are not naïve to consider that we can do this overnight. It will be a long and slow process, but as is made clear in the Declaration, we are committed to address impunity and we have identified key stepping stones, whether it is in respect of civil and political rights and the legacy of conflict or in respect of economic, social and cultural rights and the engrained, century-old forms of discrimination against women and other traditionally marginalised groups or groups such as LGBTI, whose specific human rights concerns we are finally starting to recognise in this region.

It has been a very rewarding three days for me personally and I am sure we have learned so much from each other.

I can only end by expressing my deep-felt desire that we will all go away from here, feeling we have more clarity and resolve to address one of the key human rights issues in this region, hopefully very soon through a coordinated joint human rights mechanism.

Thank you again, and I hope to welcome you again in Kathmandu on our next joint steps on the realization of human rights in the South Asian region.

Thank you
Photo Gallery

At opening ceremony with Rt. Hon’ble President and Representatives of NHRC Nepal

International Conference on Addressing Impunity and Realizing Human Rights in South Asia
Opening Remarks by Mr. Kedarnath Upadhayay, Former Chairperson of NHRC Nepal

Welcome speech by Hon. Member Prakash Osti, NHRC Nepal at opening ceremony
Opening Remarks by Hon. Chairperson Dr. Sima Samar, APF and Afghanistan IHRC

International Conference on Addressing Impunity and Realizing Human Rights in South Asia
Inaugural Address by Chief Guest Rt. Hon. President of Nepal, Bidya Devi Bhandari

Opening of the plenary session by Mr. Bed Bhattarai Secretary of NHRC Nepal
Hon. Chairperson Anup Raj Sharma, NHRC Nepal on the Plenary session aims to reflect the changes to the context of human rights in South Asia over the past decade and a half.

Hon. Chairperson Dr. Deepika Udagama, HRC Sri Lanka on the Plenary session aims to reflect the changes to the context of human rights in South Asia over the past decade and a half.

Mr. William O’ Neil, Director, CPPF on the session Role of security forces in promoting or challenging impunity.
Ms. Vrinda Gover, Lawyer and Human Rights Activist, India on the session Role of security forces in promoting or challenging impunity

Prof. Dr. Yubaraj Sangroula, Executive Director, Kathmandu School of Law on the session Role of security forces in promoting or challenging impunity

Prof. Dr. Sev Ozdowski, Former Commissioner, Australian Human Rights Commission on the session Fundamental Rights and Human Rights.
Mr. Yusuph Al-Amin, UNESCO-South Asia Representative on the session The voices of human rights Freedom of expression and its meaning in South Asia.

Mr. Raja Devasish Roy, Chief Chakma Administrative Circle, Bangladesh on the session Rights of Women and Marginalized Communities and Challenges of Combating Impunity

Ms. Khushi Kabir, Women's Rights Activists, Bangladesh on the session Rights of Women and Marginalized Communities and Challenges of Combating Impunity
Hon. Member Sudip Pathak, NHRC Nepal on the session Migration and livelihood

Mr. Marc Limon, Executive Director, URG on the session Experiences and challenges of Human Rights organizations in advocacy and work against impunity and best practices, including collaboration with NHRIs.

Q & A Discussions
Ms. Sona Khan, Advocate Supreme Court of India, on the session Rights of Women and Marginalized Communities and Challenges of Combating Impunity

Mr. William Gois, Regional Coordinator, Migrant Forum in Asia on the session Migration and Livelihood

Dr. Renu Adhikari, Human Rights Defender, on the session Migration and Livelihood
Mr. Akhilesh Upadhyay, Chief Editor at the Kathmandu Post, on the session Freedom of Expression and its Meaning in South Asia

Mr. Brabim Kumar, Youth Activist and Researcher, on the session Migration and Livelihood

Mr. CK Lal, Writer and Columnist, on the session Freedom of Expression and its Meaning in South Asia
Mr. Shankar Limbu, Advocate, on the session Rights of Women and Marginalized Communities and Challenges of Combating Impunity

Ms. Mandira Sharma, Human Rights Activist, on the session Truth and Reconciliation: commissions, lessons learnt, and what not to do to promote impunity

Mr. Suman Adhiari, Chairperson of Conflict Victims Common Forum, on the session Truth and Reconciliation: commissions, lessons learnt, and what not to do to promote impunity
Mr. Ram Kumar Bhandari, Human Rights Activist, on the session Truth and Reconciliation: commissions, lessons learnt, and what not to do to promote impunity

Mr. Charan Prasain, Human Rights Activist, on the session Rights of Women and Marginalized Communities and Challenges of Combating Impunity

Dr Renu Adhikari, Human Rights Activist, on the session Migration and livelihood
Dr Sona Khan, Advocate, Supreme Court of India, on the session Rights of Women and Marginalized Communities and Challenges of Combating Impunity

Dr Surya Dhungel, Senior Advocate, Supreme Court of Nepal, on the session Fundamental Rights and Human Rights

Hon. Commissioner General Mousa Suleiman Thany Burayzat, Jordan National Center for Human Rights on the session Regional Networking and Kathmandu Declaration
Hon. Minister for Law, Justice and Parliamentary Affairs Sher Bahadur Tamang on Closing Ceremony

Closing Remarks by Hon. Anup Raj Sharma, Chairperson of NHRC Nepal

Group Photo of Conference Preparatory Committee with Hon’ble Chairperson of NHRC Nepal
Hon. Member Mohna Ansari, NHRC Nepal on the Press Meet Session

Closing Remarks by Ms. Valerie Julliand, UN Resident Coordinator

Closing Remarks by Ms. Caroline Vandenabeele, Governance Facility –Head
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