

Assessment Of Psychological Harm Suffered During the Maoist Insurgency and the Judicial Approach towards it in Nepal

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Abstract: The International Criminal Court has not been able to construe harm embracing the aspects of mental harm on civilians during warfare. Even after the articulation of prohibition on violence to 'mental well-being' in Article 4 of Additional Protocol II, the lack of concrete definition of 'mental well-being' or 'mental harm' has left adversely affected civilians with no access to justice. It has also created a gap for the victims who suffered mental harm before death to trigger international criminal liability. More than three decades after the Maoist insurgency, traces of terror have still been floating around. While there have been efforts, albeit minimal, to indemnify the loss of life and other forms of human rights violations during the protracted ten years long armed conflict, the psychological harm, suffered by the aggrieved has been profoundly disregarded in Nepal. This paper explores the effect on the civilian victims of the Maoist Insurgency and depicts how narrowly the issue of psychological harm is construed by the Nepalese cohort and the approach taken by the Supreme Court of Nepal. On that account, the paper further studies the barriers to assessing mental harm, and the unfeasibility of relying completely on the expert's opinion. The traditional standard adopted by the Nepalese Supreme Court has not been able to address the issue, therefore, demanding alternative international dispute resolution mechanisms. In that context, the assessment of the psychological harm suffered by the civilians during the Maoist Insurgency must be carried out through a quasi-judicial body. In the end, the paper examines the possibility of a regional legal framework for the proper assessment of mental harm to victims of Maoist Insurgency taking into consideration the complex political situation of Nepal.

Keywords: Psychological, Insurgency, Judicial Approach, humanity, biological experiments

1. Introduction

Mental health has the same status as physical health (Gisel, 2016, p. 35). Several acts, under international criminal law, that involve the infliction of "mental pain or suffering," or the forms of "psychological oppression," are specifically criminalized. War crimes of torture, inhuman treatments, biological experiments, wilfully causing great suffering, mutilations, and crimes against humanity of torture, inhumane acts, rape, enforced prostitution, and sexual violence can be deemed as mental pain or suffering (Rome Statute, art. 8(2)(a)(ii)).

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Additional Protocol II of the Geneva Convention considers, that the intentional terrorization of civilians constitutes laws of war violation. The need for serious mental harm to be delineated pervades criminal and international criminal law according to which the elements of criminal conduct must be expressly defined in advance (Cassese et al., 2013, pp. 27-28). In Nepal, having gone through the decade-long armed conflict, marks of psychological harm, along with physical harm, are irreparable. While the physical harm sustained by the victims is always in the spotlight the severe psychological harm sustained by the victims is unscrutinised. It is therefore a matter of utmost necessity to start this discussion and alarm dispute settlement bodies to set standards for assessing mental harm.

2. Maoist Insurgency and The Psychological Impact on Civilians

The ten-year-long Maoist insurgency recorded the horrendous loss of lives, unlawful killings of civilians, cases of enforced disappearance, torture, and infliction of conflict-related sexual violence. When an armed conflict is not between two or more opposing states, but between government forces and non-governmental armed groups, it is considered “non-international” in character. Therefore, the armed conflict in Nepal was non-international and is based on the provisions of International Humanitarian Law (IHL) applicable to a non-international armed conflict. Between the launch of the “People’s War” and the formal end of the armed conflict, the government recorded a total of 12,686 individuals including both combatants/fighters and civilians killed in the conflict (Ministry of Peace and Reconstruction, n.d.). There are 63,718 records of complaints in the Truth and Reconciliation Commission (hereinafter 'TRC') while the Disappearance Commission has 3,223 complaints in its database (Ghimire, 2023). The report of the Disappearance Commission showed that only 1,227 such families were compensated and a report from International Committee of Red Cross (ICRC) stated that 1,333 people were still missing since 2006.

The conflict also recorded instances of psychological torture wherein certain victims were threatened with execution (United Nations Office of the High Commissioner for Human Rights, 2012). The beating was found to be the most common method of torture that gave rise to psychological harm. Though it is evident that the victims and their families suffered immense psychological harm the execution authority has disregarded the topic and measures have not been taken effectively. Neither civilians nor the Supreme Court of Nepal has set a forum to bring these issues to light. The terrors of the Maoist insurgency last long with the never-ending trauma it has left among the victims. It is recognized that all victims of armed conflict are prone to experience serious suffering and enduring mental and physical harm underlined by associated stigma (Prosecutor v. Dragoljub, 2002).

The exact number of sexual violence cases during the Maoist insurgency is still unclear. Advocacy Forum stated that it collected evidence from over 200 victims while TRC recorded 316 complaints which is the lowest of all categories. Even though the recorded number is low, Thematic Report by TRIAL International, 2020 claims the number to be much higher because such cases remain much under-reported. The trauma suffered by women who were sexually assaulted is much higher because some of them were raped in front of their children, husband, and other members of family or friends. This led to denial from their families where in some instances they were even told ‘no longer suitable’ to be their wives. One heinous instance has been recorded where one victim also reported that Nepal Army used dogs to rape them (Rayamajhi & Shrestha, 2023a). Geeta Rasaili, former Maoist fighter, and sister of insurgency victim Reena Rasaili stated that victims of sexual violence have separate medical and psychological needs from that of other victims, so reparations ought to serve such needs (Rayamajhi & Shrestha, 2023b).

3. Experiences of Victims of Maoist Insurgency

Sita Raut, wife of a government postman recalled how she lost her senses hearing the death news of her husband and still has had a headache. Similarly, a mother of a 14-year-old was so scarred by the death of her son that her family took out a loan for care. This demonstrates the dark side of the economic situation of Nepal where a normal-class family is compelled to take a loan for treatment.

In Kavreplanchowk district, Reena Rasaili, a 17-year-old girl was raped and killed by security forces on February 13, four days before the brutal killing of Maina Sunwar, her 15-year-old cousin. Devi Sunuwar, mother of Maina witnessed Reena's killing, which is connected to the fact that the Royal Nepalese Army reached Devi's home searching for her and arrested Maina when told that Devi was not home. Maina's case was that of enforced disappearance and torture who was later brutally killed by the officials of Royal Nepal Army (RNA). Devi after witnessing her niece's killing lost her daughter and fought for justice but it remains elusive for Maina, Reena, and many other victims (Diez-Bacalso, 2023).

It has been widely argued that domestic courts are reluctant to make assessments of mental harm. However, recent jurisprudence of the international criminal tribunals has adopted an approach to incorporate the issues of psychological harm. In the *Furundzija case*, the ICTY Trial Chamber held that the rapes of the victim in front of the soldiers who were watching and laughing caused "severe physical and mental pain, in addition to the public humiliation" and, correspondingly amounted to enrages upon her dignity (Prosecutor v. Furundzija, 1998). Therefore, this serious issue of psychological harm, demands subjective as well as objective assessment. However, it must be noted that the assessment standard for psychological harm is complex and has different barriers that must be examined.

4. Barriers To Assessing Mental Harm

Due to its nature as well as due to the high evidentiary standards governing the criminal procedure in relation to other procedures governed by tort law, mental harm is exposed to complex assessment standards. In assessing the mental harm, the court must be sure beyond a reasonable doubt, and not an assumption that the mental harm has been inflicted (Weinstein & Dewsbury, 2006, p. 172). Mental harm cannot be appraised and constitutes a certain evidentiary burden that must be met (Lieblich, 2013). The assessment criteria for mental harm are more abstract than physical harm. This is true, especially in cases of prolonged exposure to hostilities it is difficult to prove that a particular attack caused the mental harm the civilian is found to have sustained (Lubell & Cohen, 2020, p. 174). In the case of *Aashakumari Chaudhary v. Nepal Government* (Aashma Chaudhary v. Nepal Government, n.d.), the victim stated that she could not register a complaint against cruel, inhumane behavior and rape due to the physical and mental harm caused by the behavior. The Supreme Court of Nepal remained silent and did not take any stand regarding the 'mental harm' element claimed by the victim. This reflects one instance of the null approach of the apex court towards mental harm.

Practice shows that English courts have required such harm to stem from a "recognized psychiatric illness" that is shock-induced (Law Commission, 1995, pp. 10-13; Law Commission, 1997, pp. 9-10). In that regard, ephemeral shock or emotions of fear and grief are not enough to induce any compensatory claims (Law Commission Report, 1997, pp. 10-12; Law Commission, 1995, p. 10). One thing that the court has emphasized is the reasonable person standard test. The incurred mental harm must be foreseeable according to the standards of a reasonable person (Law Commission Report, 1997, pp. 20, 27). The

question of whether a reasonable person would have suffered the mental harm that the plaintiff did as a result of exposure to the particular event must be determined. In tort, the damage sustained by the plaintiff must be linked to the time and place of the contested event to help establish causation. Another complex interpretation is that the law does not award damages to mere bystanders who have witnessed a traumatic event.

In Nepal, the concept of tort is completely raw as it was provisioned for the first time in the Muluki Civil Code, 2074 in 2017 having enforceability from 2018. A tort is still not the first option for the civilian victims of Maoist Insurgency in Nepal because, firstly, neither citizens nor judges or lawyers are aware of its proper concept and secondly there is a lack of culture in Nepal to approach the courts through torts even when all other circumstances allow. Therefore, the only alternative left with victims for legal proceedings is the criminal approach. They do not realize that they have a burden of proof and how difficult it is to establish their claim beyond a reasonable doubt if a criminal approach is chosen. Even though there could have been some other complexities, the burden of proof in tort is 'preponderance of the evidence' which apparently could have made it a lot easier for victims to establish their claim. For instance, mental harm could qualify as an independent ground for the award of such damages, even in the absence of any physical harm as established, by the Canadian Supreme Court, in the case *Saadati v. Moorhead* (*Saadati v. Moorhead*, 2017). This approach is less likely to be entertained in the Nepalese courts, especially regarding the psychological harm suffered by the victims of the armed conflict. The spectrum of mental harm is vague so its whole concept cannot be understood only as psychiatric illness. It will under-include the cases where civilians have suffered trauma but not specifically psychiatric illness (Solomon, 2017). As a matter of fact, the expert's opinion during the assessment has always remained unparalleled.

5. Non-Coherency of Expert's Opinion Regarding the Assessment of Psychological Harm

The need for a medical expert is considered in establishing mental insanity in criminal law as well as it is deemed to be required during mental harm assessment. The US courts have reiterated on numerous occasions that there is a substantial dispute within the mental health professions about diagnoses, that psychiatry is not an exact science, and that the law is unbound by extra-legal professional criteria (Kooijmans & Meynen, 2017). The International Criminal Court (ICC) needs procedural coherence because the standards for defining mental injury have not yet been established in its jurisprudence. The ICC mentioned the severe trauma that child soldiers experienced as a result of their recruitment in the case of *Lubanga* (*Prosecutor v. Lubanga Dyilo*, 2012, p. 1358). The Trial Chamber reached the judgment based on the expert's testimony (*Prosecutor v. Lubanga Dyilo*, 2012, p. 605), but the judges made no further explanations of which aspects of the expert's testimony indicated that the trauma constituted the threshold of gravity. In Nepal, even though the records are not clear, there is an estimation that at least 3,500 - 4,500 Nepali children were a part of the Maoist fighting force. In addition to that, thousands of Nepali children were forced at that time to flee their homes only to avoid recruitment by Maoists. Whether recruitment in Maoists' front or fleeing home to avoid it, the children suffered trauma in both cases (Human Rights Watch, 2007). The mental health consequences of conflict on children are apparent, with high rates of post-traumatic stress, depression, and anxiety in conflict-affected children (Slone & Mann, 2016). These effects are valid due to direct exposure to traumatic events and increased levels of daily stressors (Miller & Rasmusen, 2014).

Likewise, *the Katanga* case displayed a lack of specific standards for the measurement of mental harm (Prosecutor v. Katanga, 2014). In this case, where a woman had been repeatedly raped and assaulted, the judges' held that the victim had suffered serious mental harm and did not derive from any opinions or reports provided by mental health experts. Courts have limited the reliability of treatment experts considering they are not necessarily specialists in mental health. Courts are of account that it is impossible for an individual having a prior relationship with a party to be an objective witness. In addition, courts seem hesitant to allow treatment experts to provide opinions on post-traumatic stress disorder issues. In light of these scenarios, there is less viability to relying on an expert's opinion in measuring psychological harm. The discussion so far has illustrated the inability of the regular courts to address the issues coupled with uncertainties and ambiguities, and pushing for exploring other dispute settlement options.

6. Need For Alternative Dispute Settlement Mechanism to Assess Psychological Harm

Twenty years after the end of the armed conflict, the Commission on the Investigation of Enforced Disappearance of the Persons, Truth and Reconciliation Act, 2071 (2014) (hereinafter 'TRC Act') was brought into effect standing as a transitional justice mechanism. The Commission serves to find out and publish the incident of the grave violation of human rights committed in the course of the armed conflict from 13 February 1996 to 21 November 2006, between the Maoists and the government (The Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act, 2014). Though it recommends legal action to penalize offenders involved in the commission of grave crimes the commission does not qualify to be a quasi-judicial body. Moreover, the TRC Act is problematic for replicating the Ordinance on the Truth and Reconciliation Commission (2013 TRC Ordinance), which disregards basic principles of transitional justice (International Commission of Jurists, 2014). The Supreme Court of Nepal 2014 deemed the ordinance unconstitutional as it contravened international law (Madhav Kumar Basnet et al. v. Government of Nepal, 2004). Therefore, this has two far-reaching implications, first, the Supreme Court has not been able to gauge the psychological harm suffered by the victim for the standard nor has the victims' voice been heard. Second, the commission's intended transitional justice mechanism has not yielded anything and thus lacks an approach to settle disputes.

The Supreme Court of Nepal, arguing ineffective in setting standards to measure psychological harm, is not a quasi-judicial body. The Court has not been able to address the issue wherein the commission also owes for not cashing in its responsibility, therefore necessitating a separate dispute settlement mechanism. In their judgment, the Supreme Court of Nepal omitted to provide reparation for the aggrieved suffering psychological harm, significantly failing to give the meaning to the term 'mental harm'. The European Court of Human Rights has awarded reparations to the families of victims of enforced disappearance due to the "anguish and distress" they have suffered (Cakici v. Turkey, 1999). In the Nepalese context, the Supreme Court has barely entertained 'distress and anguish', in relation to the victims of the armed conflict nor has it recognized that cases of mental harm should target psychological remedy, as applied in international law. The custom has been set to incorporate costs required for psychological and social services as compensation, and medical and psychological care (G.A. Res. 60/147, 2005) as rehabilitation. Owing to the court's inability, the assessment of the psychological harm suffered by the civilians during the Maoist Insurgency must be carried out through a quasi-judicial body.

7. Maoist Insurgency and the need for a Quasi-judicial Body

A quasi-judicial entity is partially judicial and has the authority to undertake investigations into disputed claims, hold hearings on such claims, and make decisions in a manner proximate to courts (*Schoen v. Bd. of Fire & Police Comm'rs*, 2015). The TRC Act has envisioned two separate commissions, the Truth and Justice Reconciliation Commission, and the Commission on the Investigation of Enforced Disappearance of the Persons, however, has neither conducted an investigation (Rai, 2023) nor been functioning keeping the issue at limbo. The record mainly emphasizes physical harm and talks less about psychological harm suffered by the victims and their families during the armed conflict. Likewise, international judicial and quasi-judicial bodies do not discuss incidental mental harm (Lieblich, 2013), therefore, making the situation more complex.

The establishment of a quasi-judicial body to deal with the psychological aspect harm in the issues of Maoist insurgency has now been a pressing necessity. This is sufficiently valid even more when the tort Jurisprudence in Nepal is still immature and evolving. As it happens, even civil damages in the form of psychological harm have not been aptly addressed by the Nepalese court. First, both commissions have lost their credibility as they have been built on a poor foundation. Its roots are in the TRC Act which blatantly disregarded the Supreme Court's verdict. The Supreme Court of Nepal directed the Government to criminalize to ensure that amnesties and pardons would not be available to those suspected or found guilty of the crime (United Nations, 1992; United Nations, 2006). Further, the Supreme Court went on to direct the government to criminalize enforced disappearance consistent with the UN International Convention for the Protection of All Persons from Enforced Disappearance. To crystalize the essence of the commission and the justice for the victims, the Court in the case of *Raja Ram Dhakal v. Office of the Prime Minister, et al* directed the Government to formulate national legislation for the implementation of the four Geneva Conventions (*Raja Ram Dhakal v. Office of the Prime Minister*, 2059). Section 25.2(a) of the TRC Act, bars any case from being recommended for prosecution if that has been mediated (Truth and Justice Reconciliation Act, sec. 22(5)). It is a rule under international law that the victim's right to an effective remedy and reparations as well as a state's obligation to hold perpetrators accountable for their crimes cannot be suppressed by informal processes such as reconciliation (International Commission of Jurists, 2014, p. 6).

Thus, these commissions' setbacks hold enough evidence that the existing dispute settlement mechanism (transitional justice mechanism) is a lame duck that needs immediate restructurings. The demand can only be fulfilled with a new commission designed to initiate action that incorporates the imminent subject of the psychological harm suffered during the armed conflict. Alongside this, the existing TRC Act needs to be amended as per the direction of the Supreme Court of Nepal, and the government's non-adherence to the Supreme Court's verdict shows the adamancy of the state actors. Thus, the dispute settlement regarding the issues of Maoist Insurgency is as complex as it has remained unsolved for more than twenty years. As argued in the above paragraphs, the assessment of psychological harm is technical, and mere procedural examination lacks accuracy. The courts also recognized that psychological suffering could be intensified by social and cultural conditions that can be particularly acute and long-lasting (UNHCR, 2012, p. 160). Considering that the effect of psychological harm can be protracted, this issue should be catered to in a different way than what the traditional courts have been doing. A separate commission must be established and it should start acting as a quasi-judicial body that rightly addresses the pre-and post-psychological harm induced by the ten-year-long armed conflict, which more or less, serves the essence of the alternative dispute settlement mechanism.

8. Development of Regional Mechanisms to Address Psychological Harm Suffered By The Victims

The aforementioned two responsible commissions deviated from linear path rings for a regional mechanism for the assessment of mental harm. However, the proposed regional mechanism ought to enable the contemporary approach to, first admit the issues of psychological harm, and second, set the assessment standard distinct and more appropriate than the traditional approach taken by the domestic courts. The patterns of stigmatization, ostracization, and overall psychological harm follow a similar pattern as for the shared culture and belief among the South Asian nations. A domestic dispute settlement mechanism stems from a politically influenced bubble rather than a regional mechanism.

One of the families of the disappeared person said that ‘the political party has been defining the process, of establishing the Commission of Investigation on Enforced Disappeared Persons, to their advantage and the commission will not proceed independently (International Center for Transitional Justice, 2016).’ It seems that there is absolutely no political will (Schultz, 2017). Though this does not resonate with the assessment of psychological harm, it portrays how biased the political parties are toward this issue. During his prime ministership, Baburam Bhattarai, an ex-Maoist leader, recommended the President’s office to grant pardon to the offenders of the armed conflict (Neupane, 2016). This has been the approach of Nepalese political strata and the whole dispute settlement mechanism is diluted by such propositions. In a situation where the two established commissions to look over the matter are dysfunctional and shrouded with political interest, the establishment of a regional dispute settlement mechanism to assess psychological harm suffered by the victims can be the highest possibility. The regional mechanism of Africa for Human Rights embraces African values and includes innovative elements linked to the history of African civilization (FIDH, n.d.). Along with this, it broadly continues the modernity and universality of human rights of international human rights instruments. This shows that at the regional level, the mechanism can be structured with a balance of traditional values and legal aspects (FIDH, n.d.). Therefore, the special provisions that seem to be required for the traditional courts of South Asia to take a bold stand in the matter concerning the assessment of mental harm can be articulated through regional legislation.

9. Conclusion

In an existing scenario, there is only a minimum possibility of setting standards for the measurement of psychological harm, let alone justice for the victims of the Maoist insurgency. The state-orchestrated mechanism that is in place shows non-functional attribution that left victims of the armed conflict unsecured. When the alternative dispute settlement is established in place of traditional courts to set criteria that fairly compensate the psychological harm incurred by the victim, it must show a tendency to incorporate psychological service and care for the aggrieved. It then carries the approach to reform and rehabilitate the victim owing to the situation that mere compensation may not minimize the harm suffered by the victims. Therefore, the paper emphasizes more on an immediate requirement to establish a separate dispute settlement body in the form of a Quasi-Judicial body as the prevailing mechanisms are at a vulnerable stage. In exception to that, based on shared culture, beliefs, and legal arrangements, a regional mechanism should be framed to deal with the issues of psychological harm setting the balance standard to determine it. Imposition of such a mechanism to a considerable extent solves the issues surrounding Maoist insurgency bestowing impartial justice to the psychologically impacted victims of the armed conflict.

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