

Questions and Answers on Enforced Disappearances

जबर्जस्ती बेपत्ता सम्बन्धमा केही प्रश्न-उत्तर

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## 1. Where to go for registering FIR?

As there is no separate law governing the crime of enforced disappearance, the Penal Code is the applicable law. Being a Schedule-1 crime,<sup>1</sup> the Criminal Procedure Code requires that a First Information Report (FIR), written, oral, or through electronic means, need to be filed at the nearest police station. In the FIR, the complainant should provide evidence (to the extent possible) that the alleged incident happened.<sup>2</sup> These provisions of the new Penal Code are yet to be tested in practice as no one has attempted to file a complaint demanding an investigation of enforced disappearances committed in the past under the Penal Code.

### १. जाहेरी दर्ताको लागि कहाँ जाने?

जबर्जस्ती बेपत्ता पार्ने अपराधलाई नियन्त्रण गर्ने कुनै छुट्टै कानून नभएकाले यसमा मुलुकी अपराध संहिता लागू हुन्छ। जबर्जस्ती बेपत्ता मुलुकी फौजदारी कार्यविधि संहिता, २०७४ को अनुसूची १ अन्तर्गत पर्ने अपराध भएको हुनाले लिखित, मौखिक, वा विद्युतीय माध्यमबाट नजिकैको प्रहरी कार्यालयमा जाहेरी दर्ता गर्न सकिन्छ। जाहेरीमा उजुरीकर्ताले घटनासम्बन्धी सम्भव भएसम्मको सूचना तथा प्रमाण उल्लेख/संलग्न गर्नुपर्छ। अपराध संहिताअन्तर्गत विगतमा जबर्जस्ती बेपत्ता पारिएका घटनाहरूको छानबिनको माग गर्दै उजुरी दर्ता गर्ने प्रयास कसैबाट नभएको हुँदा नयाँ अपराध संहिताका यी प्रावधानहरू अझै व्यवहारमा परीक्षण हुन बाँकी रहेका छन्।

## 2. What process do we follow if FIR is not registered?

The Penal Code provides that if the police officer refuses to register the FIR, a complaint can be lodged at the District Government Attorney Office (DGAO) or the police office higher in level than the police office (nearby police office) required to register such FIR or information.<sup>3</sup>

If the police office still refuses to register the complaint even after the decision of the Office of the District Government Attorney or higher police office, then the complainant can resort to the extraordinary jurisdiction of the Court through the writ of *certiorari* and/or *mandamus*.

<sup>1</sup> The list of offences under various chapters of the Penal Code is included in Schedule-1 of the Criminal Procedure Code. The Crimes enlisted under Schedule-1 require the Government of Nepal to be the plaintiff in the cases stipulated.

<sup>2</sup> National Criminal Procedure Code 2017, section 4 (1) states “..(1) A person who knows that any offence set forth in Schedule-1 has been committed or is being committed or is likely to be committed shall, as soon as possible, make a first information report in writing or give information verbally or through electronic means, on such offence, along with whatever proof or evidence which is in his or her possession or which he or she has seen or known, to the nearby police office in the form set forth in Schedule-5.”

<sup>3</sup> National Criminal Procedure Code 2017, section 5 (1) states “..If the concerned police office refuses to register a first information report made or information given pursuant to subsection (1) of Section 4, the person making or giving such first information report or information may make a complaint setting out such matter, accompanied by the first information report or information, to the concerned district government attorney office or the police office higher in level than the police office required to register such first information report or information.”

## २. जाहेरी दर्ता नभएमा हामी के प्रक्रिया अपनाउँछौं ?

फौजदारी अपराध संहिताको दफा ५ को व्यवस्था अनुसार प्रहरी अधिकृतले उजुरी दर्ता गर्न अस्वीकार गरेमा जिल्ला सरकारी वकिल कार्यालय वा माथिल्लो तहको प्रहरी कार्यालयमा त्यस्तो उजुरी दर्ता गर्न सकिन्छ ।

प्रहरी कार्यालयले जिल्ला सरकारी वकिलको कार्यालय वा माथिल्लो प्रहरी कार्यालयले दिएको निर्णय तथा निर्देशनपश्चात् पनि त्यस्तो जाहेरी वा उजुरी दर्ता गर्न अस्वीकार गरेको खण्डमा उजुरीकर्ताले परमादेश र/वा उत्प्रेषणको रिटमार्फत अदालतको असाधारण अधिकारक्षेत्रको सहारा लिन सक्दछन् ।

## 3. Can we register FIR for the disappearance committed by the Maoists?

Section 206 (1) of the Penal Code prohibits enforced disappearance and entails different elements of crimes, such as detention or any other form of control of a person causing deprivation of liberty, failure to produce such person before the law enforcement authority within twenty-four hours, and concealment of information about the condition of such person. It includes both State and non-state actors (such as any person, organization or group, whether organized or not)<sup>4</sup> capable of committing the crimes of enforced disappearances. Thus, if the Maoist has abducted the person without giving information about his/ her whereabouts, FIR can be filed under the same section of the Penal Code.

Although the definition of enforced disappearances under the international human rights treaties is narrower as under international law only the disappearances committed by the State apparatus is considered as enforced disappearance. However, under international law duty to investigate is not limited to violations of human rights committed by state agents.<sup>5</sup> States are held responsible for their failure to investigate and to provide effective remedies even if the crimes are committed by non-state actors.<sup>6</sup> In some situations, a State's refusal to intervene could be characterised as acquiescence.<sup>7</sup>

<sup>4</sup> National Criminal Code 2017, section 206 (1) (b) states that "enforced disappearance" means "the abduction, custody, control or any other form of deprivation of liberty of a person **by any person, organization or group, whether organized or not**, followed by concealment of information to the concerned person as to the reason for such deprivation and where, how and in what condition such person has been so held."

<sup>5</sup> *Judgment of 16 November 2009*, IACtHR, González et al. ('Cotton Field') v. Mexico, Series C No. 205, para. 246; *Judgment of 16 November 2009*, IACtHR, Narciso González Medina and family v. Dominican Republic, Series C No. 240, para. 206; *Judgment of 3 April 2009*, IACtHR, Kawas Fernandez v. Honduras, Series C No. 196, para. 78; HRC, Preliminary Observations: Yemen, UN Doc. CCPR/C/79/Add 51 of 7 April 1995, para. 11; UNICCP, Human Rights Committee, General Comment No. 31 [80]. The Nature of the General Legal Obligation Imposed on States Parties to the Covenant. Adopted on 29 March 2004 (2187th meeting) UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 8

<sup>6</sup> UNICCP, Human Rights Committee, General Comment No. 31 [80]. The Nature of the General Legal Obligation Imposed on States Parties to the Covenant. Adopted on 29 March 2004 (2187th meeting) UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 8.

<sup>7</sup> Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, Oxford University Press, 2009, p. 23.

Maoists, nonetheless, as non-state actors were involved in abducting and disappearing people during the armed conflict, an FIR for the disappearance committed by the group can be registered, followed by State's obligation to investigate and held the perpetrator accountable.

### ३. के हामी माओवादीले बेपत्ता पारेको घटनामा समेत जहेरी दर्ता गर्न सक्छौं ?

मुलुकी अपराध संहिताको दफा २०६(१)ले जबर्जस्ती बेपत्ता गर्न निषेध गर्दै हिरासत वा अन्य कुनै स्वरूपमा व्यक्तिको नियन्त्रणबाट हुने स्वतन्त्रताको हनन, त्यस्ता नियन्त्रणमा लिइएका व्यक्तिलाई चौबीस घण्टाभित्र कानूनबमोजिमको अधिकारप्राप्त अधिकारीसमक्ष प्रस्तुत गर्न असफल, र यस्तो व्यक्तिको अवस्थाबारे जानकारी लुकाउने जस्ता कुराहरू अपराधका विभिन्न तत्वहरूभित्र पर्दछन् भनेको छ। यसमा जबर्जस्ती बेपत्ता पार्ने अपराध गर्न सक्षम राज्य र गैर-राज्यपक्ष (जस्तै कुनै व्यक्ति, संगठन वा समूह, चाहे त्यो संगठित होस् वा नहोस्) दुवै पर्दछन्। तसर्थ, माओवादीले कसैलाई उसको इच्छाविरुद्ध अपहरण गरेको छ र त्यस्तो अपहरित व्यक्तिको अवस्था/उसलाई राखेको ठाँउको बारेमा परिवारलाई जानकारी दिन इन्कार गरेको छ भने त्यस्तो घटनामा अपराध संहिताको माथि उल्लेखित यही दफाअन्तर्गत जाहेरी दर्ता गर्न सकिन्छ।

अन्तर्राष्ट्रिय कानूनभन्दा अन्तर्राष्ट्रिय मानवअधिकार कानूनमा जबर्जस्ती बेपत्ताको परिभाषा केही साँघुरो छ किनकि यसअन्तर्गत राज्यका निकायहरूद्वारा गरिएको बेपत्तालाई मात्र जबर्जस्ती बेपत्ता भनी परिभाषित गरिएको छ। जे भएतापनि, अन्तर्राष्ट्रिय कानूनअन्तर्गत छानबिन गर्ने दायित्व राज्यका निकायहरूबाट भए गरिएका मानव अधिकारको उल्लंघनमा सीमित छैन। गैर-राज्य पक्षसम्बद्ध व्यक्तिहरूद्वारा भए गरिएका मानवअधिकार ज्यादतीहरूमा पनि प्रभावकारी अनुसन्धान र उपचार प्रदान गर्न असफल हुँदा पनि राज्यका निकायहरूलाई जिम्मेवार बनाइन्छ। कुनै परिस्थितिमा गैरराज्य पक्षबाट भएका मानवअधिकार ज्यादतीहरूविरुद्ध राज्यले हस्तक्षेप गर्न अस्वीकार गरेमा यस्तो अस्वीकारलाई त्यस्ता ज्यादतीहरूमा राज्यको स्वीकृतिको रूपमा लिइन्छ।

सशस्त्र द्वन्द्वको क्रममा गैर-राज्य पक्षको रूपमा रहेको माओवादी समूह मानिसहरूलाई अपहरण गर्न र बेपत्ता पार्ने कार्यमा संलग्न थियो। यस समूहद्वारा गरिएको बेपत्ताको लागि जाहेरी दर्ता गर्न सकिन्छ र यस्तो जाहेरी छानबिन गर्ने र अपराधीलाई जवाफदेही बनाउने राज्यको दायित्व हुन्छ।

### 4. What do we do when the disappearance is registered as death because of the Government's discriminatory relief programme?

The Government has enacted different legal and policy measures discriminating against families of those killed and disappearances. This has resulted in many families of disappeared registering their case killing for the purpose of legal and administrative work although they do not think their loved ones are dead and continue to wait for the truth about their loved one.

Evidence Act 1974, section 32 provides that a disappeared person will be presumed to be dead after 12 years of the disappearance unless the person claiming the disappeared person is alive furnishes the proof. This provision of the law seemed to come to help victims families and facilitate their other rights such as the transfer of property, pensions and others. However, the presumption that the forcibly disappeared person is dead is contrary to the continuous nature of

the crime of enforced disappearances and the obligations arising thereof. Under international law, enforced disappearance is a continuous crime and extends over the entire period until the fate and whereabouts of the disappeared are established or made public by the State. There should not be any hurdle in access relief, recognition, transfer of property, pensions and bank transactions simply because a person is disappeared, not dead.

While adopting legislation concerning the legal situation of disappeared persons whose fate has not been clarified, the Committee on Enforced Disappearances has recommended the State party to the issuance of declarations of absence by reason of enforced disappearance, without the need to declare that the disappeared person is presumed dead.<sup>8</sup>

#### ४. सरकारको भेदभावपूर्ण राहत कार्यक्रमको कारणबाट बेपत्तालाई मृतकको रूपमा दर्ता गरियो भने हामी के गर्छौं ?

सरकारले मृतक र बेपत्ता पारिएकाहरूको परिवारलाई भेदभाव गर्ने विभिन्न कानून र नीति बनाएको छ । यसले गर्दा बेपत्ता पारिएका व्यक्तिका धेरै परिवारहरूले कानूनी र प्रशासनिक प्रयोजनका लागि बेपत्ता पारिएका आफन्तको मृत्यु भएको भनी मृत्युदर्ता गराएका छन् । यद्यपि बेपत्ता पारिएका प्रियजनहरू मरेका छैनन् भन्ने उनीहरूलाई लाग्छ र आफ्नो प्रियजनको बारेमा सत्य थाहा पाउनका लागि उनीहरू प्रतीक्षारत छन् ।

प्रमाण ऐन २०३१ को दफा ३२ ले बेपत्ता पारिएको व्यक्ति जीवितै रहेको दाबी गर्ने व्यक्तिले प्रमाण पेश गर्न नसकेमा बेपत्ता भएको १२ वर्षपछि मरेको मानिने प्रावधान राखेको छ । यो प्रावधान पीडित परिवारलाई मद्दत गर्न र उनीहरूको सम्पत्ति, पेन्सन र अन्य सम्पत्तिको हस्तान्तरण जस्ता अन्य अधिकारको सुविधाको लागि ल्याइएको हो । तैपनि, यो कानूनी प्रावधान जबर्जस्ती बेपत्ता पारिएको व्यक्ति जीवितै छ भन्ने मान्यता, जबर्जस्ती बेपत्ता अपराधको निरन्तर प्रकृति र त्यसबाट उत्पन्न हुने दायित्व विपरीत छ । अन्तर्राष्ट्रिय कानूनअन्तर्गत जबर्जस्ती बेपत्ता एक निरन्तर अपराध हो र बेपत्ताहरूको अवस्था तथा उनीहरूलाई बेपत्ता पारी राखिएको स्थानबारे राज्यद्वारा सत्य स्थापित वा सार्वजनिक नभएसम्मको पूरै अवधिभर लागू हुन्छ । यसमा बेपत्ता पीडित परिवारलाई राहत, पहिचान, सम्पत्तिको हस्तान्तरण, पेन्सन र बैंक ब्यालेन्ससम्म पहुँचमा कुनै बाधा हुनुहुँदैन किनकि कानूनी रूपमा बेपत्ता पारिएको व्यक्ति हराएको मानिन्छ, मरेको मानिँदैन ।

अवस्था स्पष्ट भइनसकेका बेपत्ता पारिएका व्यक्तिहरूको कानूनी अवस्था सम्बन्धी कानून जारी गर्ने क्रममा बेपत्ता पारिएका व्यक्ति मरेको अनुमान नगरी बेपत्ता पारिएकाले अनुपस्थित रहेको घोषणा गर्नुपर्छ भनी जबर्जस्ती बेपत्ता पारिएका व्यक्तिहरू सम्बन्धी समितिले पक्षराष्ट्रलाई सिफारिस गरेको छ ।

<sup>8</sup> Committee on Enforced Disappearances (CED) ,Concluding observations:Peru, UN Doc. CED/C/PER/CO/1 of 8 May 2019, para 31 <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsh9uw1pXxaYAoAoSynAhvKGyg7KDpXME815RvP52YWgNmLN1132c41pSCeGUdW0rFSofPj0CYfvOqbKN4I9c3qkyc%2FKKVhvc8lnRqzQ9z1s4> (Accessed 30 December 2020) ; CED ,Concluding observations:Chile, UN Doc. CED/C/CHL/CO/1 of 8 May 2019, para 29 <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsh%2BtmDOu2a8f4aG6g1KfZycfMdkcNtViKXbOq6YRc%2BHN02ZxOEv%2Bs1Ha3WmqxRsOjQJjyJsO8B7UPkk1hqf%2FfyBrouJ51xs8EEf29sI2ZemH> ( Accessed 30 December 2020).

## 5. The crime was committed long ago: what about statutory limitation?

Human rights bodies have developed jurisprudence that statutes of limitations and any other measures that prevent investigation and prosecution of those responsible for serious human rights violations such as enforced disappearances are inadmissible.<sup>9</sup> Ensuring an effective remedy through criminal proceedings enforced disappearances should not be subject to statutes of limitation.<sup>10</sup> Enforced disappearances are continuous crimes and the statutory limitation in reporting cases does not apply as long as the person is disappeared. International law does not allow statutory limitations for gross violations including enforced disappearances, which is also upheld by Nepal's Supreme Court of Nepal.

For example, in *Madhav Kumar Basnet v. Office of the Prime Minister*<sup>11</sup> the SC observed that the statutes of limitations on crimes amounting to gross violations of international human rights law and serious violations of international humanitarian law were against the basic norms of criminal jurisprudence and that the act of disappearance is a gross human rights violation and the alleged perpetrator involved in such crime needs to be prosecuted under criminal law. While issuing a writ of *mandamus*, the SC has instructed the Nepal Government to make necessary arrangements for the investigation of enforced disappearances, in line with the Constitution, laws, and the jurisprudence produced by the Supreme Court in the case of Rajendra Prasad Dhakal and other legal precedents set by the Court.<sup>12</sup>

In Rajendra Prasad Dhakal's case, the SC has further observed that the incident of disappearance should be taken as a violation of fundamental rights of persons such as the right to life, freedom, and justice.<sup>13</sup> Whether in wartime or peace, the State cannot escape its responsibility to identify and publicise the condition of the disappeared persons and initiate legal action against the responsible person.

## ५. अपराध धेरै पहिले भएको थियो : हदम्याद लाग्छ कि लाग्दैन ?

बलपूर्वक बेपत्ता पार्नेजस्ता गम्भीर मानवअधिकार उल्लङ्घनका घटनाहरूमा हदम्यादको व्यवस्था वा यस्ता घटनाहरूको छानबिन तथा अभियोजन रोक्ने अन्य कुनै पनि संयन्त्रहरू अस्वीकार्य हुन्छन् भनी मानवअधिकार संयन्त्रहरूले विधिशास्त्रको विकास गरेका छन् । फौजदारी प्रक्रियामार्फत प्रभावकारी

<sup>9</sup> *Judgment of 14 March 2001*, IACtHR, *Barrios Altos v. Peru*, Series C No. 75, para. 41; *Judgment of 29 August 2002*, IACtHR, *Caracazo v. Venezuela*, Series C No. 95, para. 119; *Judgment of 29 November 2006*, IACtHR, *La Cantuta v. Perú*, Series C No. 162, para. 152; *Judgment of 22 September 2009*, IACtHR, *Anzualdo Castro v. Peru*, Series C 202, para. 182.

<sup>10</sup> *Abdülsamet Yaman v. Turkey*, ECtHR, Application No. 32446/96, Judgment of 2 November 2004, para. 55.

<sup>11</sup> *Madhav Kumar Basnet et al. v. Office of the Prime Minister and Others*, Nepal Kanoon Patrika (NKP) 2070, Issue No 9, Decision No. 9051, pp. 1101-1155.

<sup>12</sup> *Madhav Kumar Basnet et al. v. Office of the Prime Minister and Others*, Nepal Kanoon Patrika (NKP) 2070, Issue No 9, Decision No. 9051, para. 55.

<sup>13</sup> *Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal v. Government of Nepal, Ministry of Home Affairs and Others*, NKP 2064, Issue No. 2, Decision No. 7817, p. 226

कानूनी उपचार सुनिश्चित गरी बलपूर्वक बेपत्ता पार्ने जस्ता प्रकृतिको अपराधमा हदम्यादको व्यवस्था लागू हुनुहुँदैन । जबर्जस्ती बेपत्ता पारिने कार्य निरन्तर अपराध हो र व्यक्ति बेपत्ता रहनुजेल मुद्दा उजुरी गर्न हदम्याद कायम हुँदैन । अन्तर्राष्ट्रिय कानूनले जबर्जस्ती बेपत्ता पार्ने सहित जघन्य मानवअधिकार उल्लंघनका घटनामा हदम्यादको अनुमति दिँदैन, जुन कुरालाई नेपालको सर्वोच्च अदालतले पनि मान्यता दिएको छ ।

उदाहरणका लागि, माधवकुमार बस्नेतविरुद्ध प्रधानमन्त्रीको कार्यालयको मुद्दामा सर्वोच्च अदालतले अन्तर्राष्ट्रिय मानवअधिकार कानूनको जघन्य प्रकृतिको उल्लङ्घन र अन्तर्राष्ट्रिय मानवीय कानूनको गम्भीर उल्लङ्घनका घटनामा हदम्याद लागू गर्नु फौजदारी विधिशास्त्रको आधारभूत मापदण्ड विपरीत हो र बेपत्ता पार्ने कार्य जघन्य मानवअधिकारको उल्लङ्घन भएकाले त्यस्तो अपराधमा संलग्न आरोपितहरूलाई फौजदारी कानूनअन्तर्गत मुद्दा चलाउनुपर्ने उल्लेख गरेको थियो । परमादेश जारी गर्दै सर्वोच्च अदालतले बलपूर्वक बेपत्ता पारिएका घटनाहरूको अनुसन्धान गर्न संविधान, कानून र राजेन्द्रप्रसाद ढकालको मुद्दामा सर्वोच्च अदालतले स्थापित गरेको विधिशास्त्र र सर्वोच्च अदालतले कायम गरेका अन्य नजिरहरूबमोजिम आवश्यक प्रबन्ध मिलाउन नेपाल सरकारलाई निर्देशन दिएको छ ।

राजेन्द्रप्रसाद ढकालको मुद्दामा सर्वोच्च अदालतले बेपत्ता पारिएको घटनालाई जीवन, स्वतन्त्रता र न्यायको हकजस्ता व्यक्तिको मौलिक हकको उल्लङ्घनको रूपमा लिनुपर्ने कुरा थप उल्लेख गरेको छ । युद्ध वा शान्तिको समयमा होस्, राज्य बेपत्ता व्यक्तिहरूको अवस्था पत्ता लगाउने र सार्वजनिक गर्ने र जिम्मेवार व्यक्तिविरुद्ध कानूनी कारवाही शुरू गर्ने आफ्नो जिम्मेवारीबाट उम्कन सक्दैन ।

## **6. Penal code does not have retroactive effects: how can we use the penal code for the past cases of enforced disappearances?**

The human rights bodies have developed jurisprudence clarifying that States can and should enact legislation having a retroactive effect when such conducts are already crimes according to the laws recognised by the community of nations when they were committed.<sup>14</sup>As enforced disappearance has long been established as a crime under international law, the international treaties obligate States Parties like Nepal to make laws fully in compliance with international standards. Adhering to its international obligation, Nepal should have previously criminalised the act of enforced disappearance. However, criminalising the act at present does not exempt it from not investigating the act of enforced disappearance that took place before the criminalisation.

The UN Working Group on Enforced or Involuntary Disappearances has issued a General Comment stating that “where a statute or rule of procedure seems to negatively affect the continuous violation doctrine, the competent body ought to construe such a provision as narrowly as possible so that a remedy is provided or persons prosecuted for the perpetration of

<sup>14</sup> *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art. 15(1); *American Convention on Human Rights* (entered into force 18 July 1978)(American Convention), art. 9; *Baumgarten v. Germany*, Human Rights Committee Communication No. 960/2000, Views of 31 July 2003, UN Doc. CCPR/C/78/D/960/2000 (2003).



the disappearance.”<sup>15</sup> Given that the offence of enforced disappearance is a continuous crime, it can be safely argued that the crimes of enforced disappearances in Nepal can be investigated and prosecuted under the Penal Code, which came into force in August 2018.

As discussed earlier, enforced disappearance is a Schedule-1 crime requiring the Government of Nepal to be the plaintiff in the case, therefore, the role of public prosecutors is of utmost importance to bring and try the case before the Court of law despite both the constitutional and legal prohibition of retroactivity in criminal law. International standards also exist concerning the roles of prosecutors in the protection of human rights and ensuring due process and smooth functioning of the criminal justice system.<sup>16</sup> The United Nations Guidelines on Roles of Prosecutor provides that “prosecutors shall perform an active role in criminal proceedings, including the institution of prosecution and, where authorised by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.”<sup>17</sup>

#### ६. फौजदारी संहिताको भूतप्रभावी असर छैन : हामी कसरी विगतमा भएका जबर्जस्ती बेपत्ताको घटनाहरूको लागि फौजदारी संहिताको उपयोग गर्न सक्छौं ?

घटना हुँदाको समयमा राष्ट्रहरूको समुदायले मान्यता दिएका कानूनबमोजिम अपराधको रूपमा पारिभाषित गरिसकेको घटना भएमा राष्ट्रहरूले त्यस सम्बन्धमा भूतप्रभावी कानून बनाएर लागू गर्न सक्छन् र गर्नु पनि पर्छ भन्ने कुरा स्पष्ट पाउँ मानवअधिकार संयन्त्रहरूले विधिशास्त्रको विकास गरेका छन् ।

अन्तर्राष्ट्रिय कानूनले जबर्जस्ती बेपत्ता पार्ने कार्यलाई धेरै अगाडिदेखि अपराधको रूपमा स्थापित गरिसकेकाले अन्तर्राष्ट्रिय सन्धिहरूले नेपाल जस्ता पक्षराष्ट्रहरूलाई अन्तर्राष्ट्रिय मापदण्ड अनुरूपको कानून बनाउन बाध्य गरेका छन् । आफ्नो अन्तर्राष्ट्रिय दायित्वको पालना गर्दै नेपालले पहिले नै जबर्जस्ती बेपत्ता पार्ने कार्यलाई आपराधिक कार्यको रूपमा स्थापित गर्नुपर्ने थियो । तर भर्खरै कानून बनाएर फौजदारी अपराध बनाएको भन्दै पहिले गरिएका जबर्जस्ती बेपत्ता सम्बन्धी घटनाहरूको अनुसन्धान नगर्ने उन्मुक्ति लिन मिल्दैन ।

बलपूर्वक वा अस्वैच्छिक बेपत्तासम्बन्धी संयुक्त राष्ट्रसंघको कार्यसमूहले एउटा सामान्य टिप्पणी जारी गरेको छ जसअनुसार “जहाँ कुनै कानून वा प्रक्रियाको नियमले निरन्तर उल्लङ्घनको सिद्धान्तमा

<sup>15</sup> UNGA, Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances\*, UN Doc. A/HRC/16/48, 26 January 2011, para. 39

<sup>16</sup> *United Nations Guidelines on the Role of Prosecutors 1990*, UN Doc. A/CONF.144/28/Rev.1, 7 September 1990, Guideline 12 provides that, “Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.”

<sup>17</sup> *United Nations Guidelines on the Role of Prosecutors 1990*, UN Doc. A/CONF.144/28/Rev.1, 7 September 1990, Guideline 11



नकारात्मक असर पार्दछ भने त्यस अवस्थामा सक्षम निकायले त्यस्तो कानून वा नियमलाई मिहिन ढङ्गले व्याख्या गर्नुपर्दछ ताकि कानूनी उपचारको व्यवस्था गर्न सकियोस् वा बलपूर्वक बेपत्ता पार्ने कार्यको लागि जिम्मेवार व्यक्तिहरूलाई अभियोजन गर्न सकियोस्” । जबर्जस्ती बेपत्ताको अपराध एक निरन्तर अपराध हो तसर्थ नेपालमा जबर्जस्ती बेपत्ता सम्बन्धी अपराधमा भदौ २०७५ देखि लागू भएको फौजदारी संहिता अन्तर्गत अनुसन्धान र अभियोजन गर्न सकिन्छ भनी तर्क गर्न सकिन्छ ।

पहिले चर्चा गरिएजस्तै, जबर्जस्ती बेपत्ता अनुसूची १ अन्तर्गतको सरकारवादी फौजदारी अपराध भएकाले यसमा नेपाल सरकार वादी हुन आवश्यक छ । यसैले फौजदारी कानूनको भूतप्रभावी असरलाई संवैधानिक र कानूनी रूपमा निषेध गरिएको भए पनि अदालतमा मुद्दा चलाउन सरकारी वकिलको भूमिका अत्यन्तै महत्वपूर्ण छ । मानवअधिकारको संरक्षण र फौजदारी न्याय प्रणालीको उचित प्रक्रिया तथा कार्यसम्पादन सुनिश्चित गर्न अभियोजनकर्ताले खेल्नुपर्ने भूमिकाका सम्बन्धमा पनि अन्तर्राष्ट्रिय मापदण्डहरू रहेका छन् । अभियोजनकर्ताको भूमिकासम्बन्धी संयुक्त राष्ट्रसंघको निर्देशिकाले “अभियोजनकर्ताहरूले अभियोजन कानूनबमोजिम वा स्थानीय अभ्यासअनुरूप अपराधको अनुसन्धान, यी छानबिनहरूको वैधतामाथि सुपरीवेक्षण, अदालतको निर्णयहरूको कार्यान्वयनको सुपरीवेक्षण र जनहित गर्ने प्रतिनिधिको रूपमा अन्य कार्यहरूको प्रयोगलगायत फौजदारी कारवाहीमा सक्रिय भूमिका निर्वाह गर्नेछन्” भन्ने व्यवस्था गरेको छ ।

## 7. What obligation does the state have under international law to investigate?

States cannot excuse themselves from conducting a thorough, prompt and effective investigation on the ground that no one filed a complaint about the crimes. In cases of violations like enforced disappearances, States are under obligation to initiate investigation *ex-officio*, meaning on their own as soon as the State authorities are aware of the act of enforced disappearances. This obligation is independent of the filing of a complaint.<sup>18</sup>

This has been recognised by the Penal Code. Section 4(4) and 4(5) empower the police to prepare their own report if they find out about the incident from any other source apart from the complaint. Therefore, police have the obligation to initiate an investigation if they have information about the crime of enforced disappearances. They cannot relieve themselves from this obligation using the excuse that no one has filed the FIRs.

Moreover, the Human Rights Committee (UN HRC) states that in gross violations such as a death in custody, enforced disappearances, murder, rape and torture, the investigation has to be started *ex-officio* and without delay.<sup>19</sup>

<sup>18</sup> HRC, Concluding observations: Dominican Republic, UN Doc. CCPR/C/DOM/CO/5 of 19 April 2012, para. 14; *Judgment of 22 September 2009*, IACtHR, Anzualdo Castro v. Peru, Series C No. 202, para.65; *Judgment of 28 August 2013*, IACtHR, García Lucero et al. v. Chile, Series C No. 267, para.122; *ilhan v. Turkey*, ECtHR, Application No. 22277/93, Judgment of 27 June 2000, para. 63.

<sup>19</sup> *Judgment of 23 September 2009*, IACtHR, Garibaldi v. Brazil, Series C No. 203, para. 114.

Duty to investigate under international law also includes conducting independent and impartial investigations.<sup>20</sup> An impartial and independent investigation includes several components such as the assurance that there is no influence of any alleged perpetrators in the investigation;<sup>21</sup> investigators have no records of being involved in violations etc.<sup>22</sup> The impartiality and independence of an investigation cannot be achieved only through having a legal provision ensuring it (*de jure*) but translating that into practice (*de facto*),<sup>23</sup> which may in some cases require taking temporary measures such as suspension of a public official pending the investigation involving gross violations including enforced disappearance.<sup>24</sup>

### ७. अन्तर्राष्ट्रिय कानूनबमोजिम राज्यको अनुसन्धानको दायित्व के हो ?

कसैले पनि अपराधको उजुरी गरेको छैन भन्ने आधारमा राज्यहरूले विस्तृत, तत्काल र प्रभावकारी छानबिन नगर्ने बहाना लिन सक्दैनन् । बलपूर्वक बेपत्ता पार्नेजस्ता उल्लङ्घनहरूमा राज्यहरूले स्वतः दायित्व वहन गर्ने सिद्धान्तानुरूप त्यस्ता घटना थाहा पाउनेबित्तिकै आफैले छानबिन शुरू गर्ने दायित्व हुन्छ । उजुरी दर्ता गरिएको वा नगरिएकोसँग यस दायित्वको सरोकार हुँदैन ।

अपराध संहिताको दफा ४ को उपदफा (४) र (५) ले घटनाबारे उजुरीबाहेक अन्य स्रोतबाट प्राप्त जानकारीलाई पनि समावेश गरी आफ्नो प्रतिवेदन तयार गर्न सक्ने अधिकार प्रहरीलाई दिएको छ । त्यसकारण बलपूर्वक बेपत्तासम्बन्धी अपराधबारे जानकारी भएमा अनुसन्धान शुरू गर्नुपर्ने प्रहरीको बाध्यता हुन्छ । कसैले पनि जाहेरी दर्ता गरेको छैन भन्ने बहानामा उनीहरू यो दायित्वबाट पन्छिन मिल्दैन ।

यसबाहेक हिरासतमा मृत्यु, बलपूर्वक बेपत्ता, हत्या, बलात्कार र यातनाजस्ता जघन्य उल्लङ्घनहरूमा छानबिन ढिलासुस्ती नगरी शुरू गर्नुपर्ने मानवअधिकार समितिको भनाइ छ ।

अन्तर्राष्ट्रिय कानूनबमोजिम अनुसन्धान गर्ने दायित्वमा स्वतन्त्र र निष्पक्ष अनुसन्धान पनि समावेश छ । निष्पक्ष र स्वतन्त्र अनुसन्धानमा कुनै पनि आरोपित अपराधीको अनुसन्धानमा कुनै प्रभाव छैन भन्ने कुराको प्रत्याभूति लगायत अनुसन्धानकर्ताहरू कुनै उल्लङ्घनहरूमा संलग्न भएको रेकर्ड छैन भन्ने जस्ता थुप्रै अवयवहरू हुन्छन् । अनुसन्धानको निष्पक्षता र स्वतन्त्रता कानूनी प्रावधान राखेर मात्र सुनिश्चित गर्न सकिँदैन तर त्यसलाई व्यवहारमा पनि लागू गर्न आवश्यक हुन्छ । केही अवस्थामा बलपूर्वक बेपत्ता

<sup>20</sup> OHCHR, Compilation of General Comments And General Recommendations Adopted By Human Rights Treaty Bodies. General Comment No. 20. Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment) UN Doc. HRI/GEN/1/Rev.9 (Vol.I), para. 14.

<sup>21</sup> Carla M. Buckley, Alice Donald, and Philip Leach (eds), Towards Convergence in International Human Rights Law Approaches of Regional and International Systems. Approaches of Regional and International Systems, Brill-Nijhoff, 2017, p. 38.

<sup>22</sup> *Güleç v. Turkey*, ECtHR, Application No. 54/1997/838/1044, Judgment of 27 July 1998, paras 81-82.

<sup>23</sup> *Judgment of 6 April 2006*, IACtHR, Baldeón García v. Peru, Series C No. 147, para. 95.

<sup>24</sup> *Abdülsamet Yaman v. Turkey*, ECtHR, Application No. 32446/96, Judgment of 2 November 2004, para. 85.

पार्नेजस्ता जघन्य उल्लङ्घनमा संलग्न रहेको भनिएका सरकारी अधिकारीलाई निलम्बन गर्ने जस्ता अस्थायी उपायहरू अपनाउनुपर्ने हुनसक्छ ।

## 8. What punishment exists for the perpetrator?

If the public prosecutor decides to prosecute, a charge sheet is filed<sup>25</sup> in the District Court. In cases involving enforced disappearances, the punishment could be up to fifteen years of imprisonment and fines up to 500,000 (five hundred thousand rupees) depending on the gravity of the crimes.

The Penal Code has the provision of a plea bargain and has several circumstances contributing to the mitigation of sentences. For example, if the accused pleads guilty of the offence in whole, before the investigating authority or prosecuting authority, remission of a maximum of twenty-five percent of the sentence can be offered to the accused.<sup>26</sup>

Furthermore, if the accused pleads guilty of the offence in which he or she was also involved and assists in revealing detailed facts as to the offence and the other offenders or gang involved in the offence or the principal giving direction to commits the offence or in helping to arrest the persons involved in the offence, the prosecutor can demand a fifty percent remission in punishment. Similarly, if the accused in the case of any organised offence or offence committed in a group, helps to locate the other persons involved in that offence or the place where criminal conspiracy of such offence was made, in seizing or forfeiting any vehicle, machine, equipment or other object or arms used for the commission of such offence, the prosecutor can also demand up to a fifty percent remission in punishment.<sup>27</sup>

Although some grounds for mitigation of sentences are provided under international law, punishment for those involved in enforced disappearances needs to be proportional to the seriousness of that offence.

## ८. अपराधीलाई कस्तो सजाय हुन्छ ?

सरकारी वकिलले मुद्दा दायर गर्ने निर्णय गरेमा सम्बन्धित जिल्ला अदालतमा अभियोगपत्र दायर गरिन्छ । बलपूर्वक बेपत्ता पारिएका घटनामा अपराधको गम्भीरता हेरी पन्ध्र वर्षसम्म कैद र ५,००,००० (पाँच लाख रुपैयाँ) सम्म जरिवाना हुनसक्छ ।

अपराध संहितामा सजाय कम गर्ने सम्झौता (प्ली बार्गेन) को व्यवस्था छ र अन्य विभिन्न परिस्थितिले सजाय कम गर्नमा योगदान पुऱ्याएको हुन्छ । उदाहरणका लागि, अनुसन्धान अधिकारी वा अभियोजनकर्तासमक्ष अभियुक्तले पूर्णरूपमा अपराध स्वीकारेमा अभियुक्तलाई सजायको अधिकतम २५ प्रतिशत सजाय कम गर्न सकिन्छ ।

<sup>25</sup> National Criminal Procedure Code 2017, section 32

<sup>26</sup> National Criminal Procedure Code 2017, section 33 (3)(a)

<sup>27</sup> National Criminal Procedure Code 2017, section 33 (3)(b)

यसबाहेक, अभियुक्तले आफू संलग्न अपराधमा दोषी भएको स्वीकार गरेमा र अपराधमा संलग्न अन्य अपराधी वा गिरोहबारे विस्तृत तथ्यहरूको जानकारी दिएमा वा अपराधमा संलग्न व्यक्तिहरूलाई गिरफ्तार गर्न मद्दत गरेमा, अभियोजनकर्ताले सजायमा ५० प्रतिशत छुटको प्रस्ताव गर्न सक्छ। त्यस्तै, कुनै सङ्गठित अपराध वा कुनै समूहमा गरेको अपराधमा संलग्न अभियुक्तले उक्त अपराधमा संलग्न अन्य व्यक्ति वा त्यस्तो अपराधको आपराधिक षड्यन्त्र गरिएको ठाउँ पत्ता लगाउन, त्यस्तो अपराधको लागि प्रयोग गरिएका कुनै सवारीसाधन, यन्त्र, उपकरण वा अन्य वस्तु वा हातहतियार जफत गर्ने कार्यमा सहयोग गरेमा अभियोजनकर्ताले सजायमा ५० प्रतिशतसम्म छुटको प्रस्ताव गर्न सक्छ।

यद्यपि अन्तर्राष्ट्रिय कानून अन्तर्गत सजायहरू न्यूनीकरणको लागि केही आधारहरू प्रदान गरिएको छ तर जबर्जस्ती बेपत्तामा संलग्नहरूलाई दिइने सजाय त्यस अपराधको गम्भीरताको अनुपातमा हुनु आवश्यक छ।

### 9. Can victims claim reparation under the current legal provision?

Reparation under the Penal Code is narrow and limited to the victims' right to compensation.<sup>28</sup> For the crime of enforced disappearance, the victim has the right to receive compensation from the offender after the victim is released. In the case, where the disappeared has died, the nearest kin of the deceased victim is entitled to get compensation.<sup>29</sup> Furthermore, section 32 (2) of the Penal Code provides that victims of crimes have the right to justice including compensation and social rehabilitation without spelling out what social rehabilitation entails. However, the Penal Code does not have any specific provision of reparation for those victims suffering crimes of enforced disappearances except the right to receive compensation from the offender.

It is important to note that the Crime Victim Protection Act, 2018 enacted to implement fundamental rights envisions victims' right to fair treatment,<sup>30</sup> as well as compensation and social rehabilitation.<sup>31</sup> This could be considered as an opportunity to expand understanding of reparation for victims suffering gross violations of human rights.

In *Liladhar v. Government of Nepal*, the Supreme Court has highlighted the States' obligation to provide reparation. Although the case was related to forceful eviction and confiscation of land by the armed groups, the Supreme Court underlined the obligation of the State to provide compensation. The Court has emphasised that the State has a primary obligation to protect citizen's right to life and property. The Court deemed that the incident deprived and continues to deprive the claimants of their rights to obtain benefit from their property.<sup>32</sup> Hence, SC issued an order to return the property of the owner captured unlawfully and provide compensation for the

<sup>28</sup> National Penal Code 2017, section 32

<sup>29</sup> National Penal Code 2017, section 32

<sup>30</sup> The Crime Victim Protection Act 2018, section 4

<sup>31</sup> The Crime Victim Protection Act 2018, section 19 (1) (2)

<sup>32</sup> *Liladhar Bhandari v. Office of the Prime Minister and Council of Ministers et al.*, NKP 2065, Issue No 9 Decision No. 8012, para. 16.

loss by assessing the damage caused by the seizure of said property.<sup>33</sup> Therefore, there is space building on the SC jurisprudence and to expand the understanding of reparation under the Penal Code through legal interpretation, which can be done once the cases reach the Courts.

## ९. के पीडितहरूले वर्तमान कानूनी प्रावधान अन्तर्गत परिपूरण दाबी गर्न सक्छन् ?

दण्ड संहितामा परिपूरणको साँघुरो व्यवस्था छ, यो केवल पीडितहरूको क्षतिपूर्तिको अधिकारमा सीमित छ । जबर्जस्ती बेपत्ताको अपराधमा पीडित छुटेपछि अपराधीबाट क्षतिपूर्ति प्राप्त गर्ने अधिकार छ । बेपत्ता भएको अवस्थामा मृत्यु भएको छ भने मृतकको निकटतम आफन्त क्षतिपूर्ति पाउने हकदार हुन्छन् । यसबाहेक, दण्ड संहिताको धारा ३२ (२) ले अपराध पीडितहरूलाई कस्तो सामाजिक क्षतिपूर्ति दिने भन्ने उल्लेख नगरी सामाजिक क्षतिपूर्ति र सामाजिक पुनःस्थापना सहित न्यायको अधिकार हुनेछ भन्ने व्यवस्था गरेको छ । तर फौजदारी संहिताले अपराधीबाट क्षतिपूर्ति पाउने अधिकारबाहेक जबर्जस्ती बेपत्ता पारिएका पीडितहरूलाई अतिरिक्त क्षतिपूर्ति दिने कुनै विशेष व्यवस्था गरेको छैन ।

पीडितहरूको उचित उपचारको अधिकार, साथै क्षतिपूर्ति र सामाजिक पुनःस्थापना जस्ता मौलिक अधिकारहरूको संरक्षणका लागि अपराध पीडित संरक्षण ऐन, २०७५ लागू गरिएको कुरा टिपोट गर्न महत्वपूर्ण हुन्छ । यसलाई मानवअधिकारको गम्भीर उल्लंघनका पीडितहरूको लागि क्षतिपूर्तिसम्बन्धी बुझाइलाई विस्तार गर्ने अवसरको रूपमा लिन सकिन्छ ।

लिलाधर विरुद्ध नेपाल सरकारको मुद्दामा सर्वोच्च अदालतले पनि परिपूरण प्रदान गर्ने राज्यको दायित्वलाई उल्लेख गरेको छ । यो मुद्दा सशस्त्र समूहहरूले बलपूर्वक व्यक्तिलाई उसको घरबाट हटाउने र जमिन कब्जा गर्ने कार्यसँग सम्बन्धित भए पनि सर्वोच्च अदालतले क्षतिपूर्ति प्रदान गर्नु राज्यको दायित्व हो भन्ने ठहर गरेको छ । सर्वोच्च अदालतले नागरिकको जीवन र सम्पत्तिको हक संरक्षण गर्नु राज्यको प्रमुख दायित्व भएकोमा जोड दिएको छ । अदालतले उक्त घटनाबाट उजुरीकर्ताहरू आफ्नो सम्पत्तिको उपभोग गर्ने र लाभ प्राप्त गर्ने अधिकारबाट वञ्चित गरिरहेको ठहर गरेको छ । तसर्थ, तिनीहरूले गैरकानूनी तवरले कब्जा गरेको सम्पत्ति फिर्ता गर्न र उक्त सम्पत्ति जफत गर्दा भएको क्षतिको मूल्याङ्कन गरेर क्षतिपूर्ति प्रदान गर्न आदेश जारी गरेको छ । त्यसैले, सर्वोच्च अदालतको विधिशास्त्रलाई स्थापित गर्न अपराध संहिताअन्तर्गत परिपूरणको बुझाइलाई विस्तार गर्ने अवसर छ । त्यसका लागि मुद्दाहरू अदालतसमक्ष पुग्नु जरुरी छ ।

## 10. Can the existence of CIEDP prevent an investigation by the police?

No, the investigation of CIEDP can not prevent the criminal investigation. There are growing concerns that these mechanisms are being used to deny remedies to victims as victims are being prevented from accessing the regular justice system.<sup>34</sup> Further, police authorities are refusing to

<sup>33</sup> *Liladhar Bhandari v. Office of the Prime Minister and Council of Ministers et al.*, NKP 2065, Issue No 9 Decision No. 8012, para. 18.

<sup>34</sup> Human Rights Watch and Advocacy Forum, *No Law, No Justice, No State for Victims The Culture of Impunity in Post-Conflict Nepal*, 2020, p. 5. <http://advocacyforum.org/downloads/no-law-no-justice-no-state-for-victims-20-november-2020-english.pdf> (Accessed 15 December 2020) ; International Commission Of Jurists (ICJ),

initiate criminal investigations on these cases on the pretext that they will be dealt with by the CIEDP and the TRC. In this respect, it is important to note that the duty to investigate gross violations of human rights violations requires criminal investigation and prosecution. These Commissions do not substitute the criminal justice process but exist to be complementary. In several cases, the HRC has stated that States' obligation to provide effective remedy entails criminal investigation, prosecution and punishment of perpetrators.<sup>35</sup> Administrative bodies like TRC or CIEDP cannot fulfil these obligations. The Committee viewed that the transitional justice bodies established by the Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation of 2014 were not judicial organs capable of affording a judicial remedy,<sup>36</sup> and the remedies identified by the State party had been ineffective.<sup>37</sup>

Furthermore, Nepal's Supreme Court has also rejected the argument that the regular criminal justice system should not investigate cases involving abduction and disappearances that took place during the Conflict. In *Keshav Rai's case*, the Supreme Court has stated that the argument that conflict era cases need to be dealt with exclusively by TJ mechanisms, not by the regular justice system is not just against the jurisprudence, but also humanitarian law and principles of transitional justice.<sup>38</sup>

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*Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity*, 2012 <http://www.icj.org/wp-content/uploads/2012/06/Nepal-Commissions-of-Inquiry-thematic-report-2012.pdf> (Accessed 15 December 2020)

<sup>35</sup> “..the Committee nevertheless considers the State party duty-bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and acts of torture, but also to prosecute, try and punish those held responsible for such violations” in *Sharma v. Nepal*, Human Rights Committee Communication No.1469/2006, Views of 28 October 2008, UN Doc. CCPR/C/94/D/1469/2006 (2008), para. 9; See also, *Giri v. Nepal*, Human Rights Committee Communication No. 1761/2008, Views of 24 March 2011, UN Doc. CCPR/C/101/D/1761/2008 (2011), para. 9; *Sedhai v. Nepal*, Human Rights Committee Communication No. 1865/2009, 19 July 2013, UN Doc. CCPR/C/108/D/1865/2009, para. 10; *Chaulagain v. Nepal*, Human Rights Committee Communication No. 2018/2010, 28 October 2014, UN Doc. CCPR/C/112/D/2018/2010 (2014), para. 13; *Maharjan v. Nepal*, Human Rights Committee Communication No. 1863/2009, Views of 19 July 2012, UN Doc. CCPR/C/105/D/1863/2009 (2012), para. 9; *Bolakhe v. Nepal*, Human Rights Committee Communication No. 2658/2015, Views of 19 July 2018 UN Doc. CCPR/C/123/D/2658/2015 (2018), para. 9; *Maya v. Nepal*, Human Rights Committee Communication No. 2245/2013, Views of 17 March 2017, UN Doc. CCPR/C/119/D/2245/2013 (2017), para. 14.

<sup>36</sup> *Neupane v. Nepal*, Human Rights Committee Communication No. 2170/2012, Views of 21 July 2017, UN Doc. CCPR C/120/D/2170/2012 (2017), para. 9.3; See also, *Tharu et al. v. Nepal*, Human Rights Committee Communication No. 2038/2011, Views of 3 July 2015, UN Doc. CCPR/C/114/D/2038/2011(2015), para 9.3; *Giri v. Nepal*, Human Rights Committee Communication No. 1761/2008, Views of 24 March 2011, UN Doc. CCPR/C/101/D/1761/2008 (2011), para. 6.3.

<sup>37</sup> *Neupane v. Nepal*, Human Rights Committee Communication No. 2170/2012, Views of 21 July 2017, UN Doc. CCPR C/120/D/2170/2012 (2017), para. 9.3.

<sup>38</sup> *Keshav Rai v. Nepal Government, Ministry of Home Affairs et al.*, SC Writ No.067-WO-0532, Judgment of 15 March 2016, p. 19.



Furthermore, in the context of Nepal, the WGEID has indicated that the practice of enforced disappearances was widespread.<sup>39</sup> Thus, it can be argued that enforced disappearances in Nepal may amount to crimes against humanity. Neither the Truth and Reconciliation Commission (TRC) nor the CIEDP have mandates to investigate crimes against humanity, meaning this crime falls completely outside the jurisdiction of criminal justice and Transitional Justice (TJ) processes.

## १०. बेपत्ता पारिएका व्यक्तिको छानबिन आयोगको गठनले प्रहरी अनुसन्धान रोक्न सक्छ ?

हैन, बेपत्ता पारिएका व्यक्तिको छानबिन आयोगको गठनले फौजदारी अनुसन्धान रोक्न सक्दैन । पीडितहरूलाई नियमित न्याय प्रणालीको उपयोग गर्नबाट रोकी संक्रमणकालीन न्याय प्रणालीका यी संयन्त्रहरू पीडितहरूलाई उपचारबाट वञ्चित गर्न प्रयोग गरिएको हुनाले गम्भीर चासो बढाएको छ । यसबाहेक, संक्रमणकालीन मुद्दाहरू संयन्त्रहरूले हेर्ने भन्दै प्रहरी अधिकारीहरूले यी मुद्दाहरूमा फौजदारी अनुसन्धान शुरू गर्न अस्वीकार गर्दैछन् । यस सन्दर्भमा, जघन्य मानवअधिकार उल्लङ्घनका घटनाको अनुसन्धानको दायित्व अन्तर्गत अपराध अनुसन्धान र अभियोजन अपरिहार्य छ । यी आयोगहरू नियमित फौजदारी न्याय प्रक्रियाको विकल्प नभई पूरक हुन् । मानवअधिकार समितिले धेरै मुद्दामा फौजदारी अनुसन्धान, अभियोजन र अपराधीहरूको सजाय राज्यहरूको प्रभावकारी उपचार प्रदान गर्ने दायित्वमा पर्दछ भनेको छ । सत्यनिरूपण तथा मेलमिलाप आयोग वा बेपत्ता पारिएका व्यक्तिको छानबिन आयोग जस्ता प्रशासनिक निकायहरूले यी दायित्वहरू पूरा गर्न सक्दैनन् । समितिले बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य र मेलमिलाप सम्बन्धी ऐन, २०७१ ले स्थापित गरेको संक्रमणकालीन संयन्त्रहरू न्यायिक उपचार प्रदान गर्न सक्ने न्यायिक निकायहरू होइनन् र राज्यपक्षले पहिचान गरेको उपचार प्रभावहीन रहेको बताएको छ ।

यसका साथै, नेपालको सर्वोच्च अदालतले नियमित फौजदारी न्याय प्रणालीमार्फत द्वन्द्वकालमा भएका अपहरण र बेपत्ता जस्ता मुद्दाहरूको छानबिन गर्नुहुँदैन भन्ने तर्कलाई पनि अस्वीकार गरेको छ । त्यस्तै केशव राईको मुद्दामा, सर्वोच्च अदालतले द्वन्द्वकालीन मुद्दाहरू नियमित फौजदारी न्याय प्रणालीबाट नभई संक्रमणकालीन न्यायका संयन्त्रहरूले मात्र सम्बोधन गर्नुपर्छ भन्ने तर्क विधिशास्त्रको मात्र नभई मानवीय कानून र संक्रमणकालीन न्यायको सिद्धान्त विपरीत छ भन्ने उल्लेख गरेको छ ।

यसबाहेक, जबर्जस्ती वा अस्वैच्छिक बेपत्ता सम्बन्धी कार्यसमूह (WGEID) ले नेपालको सन्दर्भमा जबर्जस्ती बेपत्ता पार्ने कार्य व्यापक रूपमा गरिएको थियो भनी उल्लेख गरेको छ । यसरी नेपालमा भएका जबर्जस्ती बेपत्ताका घटनाहरू मानवताविरुद्धका अपराध हुन् भनी तर्क गर्न सकिन्छ । सत्यनिरूपण तथा मेलमिलाप आयोग र बेपत्ता पारिएका व्यक्तिको छानबिन आयोग दुवैलाई मानवताविरुद्धको अपराधको छानबिन गर्ने अधिकार छैन । यसर्थ यो अपराध फौजदारी न्याय र संक्रमणकालीन न्याय प्रक्रियाको क्षेत्राधिकारभन्दा बाहिर छ ।

<sup>39</sup> UNESC, Commission on Human Rights, Report of the Working Group on Enforced or Involuntary Disappearances-Addendum: Mission To Nepal\*\*\* 6-14 December 2004, Civil And Political Rights, Including The Questions Of: Disappearances And Summary Executions. Question of enforced or involuntary disappearances. UN Doc. E/CN.4/2005/65/Add.1, 28 January 2005, para. 25 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/105/23/PDF/G0510523.pdf?OpenElement> (Accessed 6 September 2020).