

Establishing **VICTIMS' RIGHT** to Truth,
Justice and Reparation in Cases Involving
ENFORCED DISAPPEARANCES in Nepal

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Kathmandu, Nepal



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Advocacy Forum-Nepal

1. INTRODUCTION

In 2017, the Nepali Parliament passed the long-awaited 'National Penal Code 2017' (known as Penal Code).¹ Amongst other provisions, the Penal Code criminalises enforced disappearances. Despite having more than three thousand outstanding cases of enforced disappearances from the past conflict, no cases thus far have been investigated under the Penal Code. Investigating authorities have argued that cases of enforced disappearances from the conflict will have to be dealt with by the 'transitional justice (TJ) mechanisms' such as the Truth and Reconciliation Commission (TRC) and the Commission of Investigation on Enforced Disappeared Persons (CIEDP). It is further argued that the Penal Code does not have a retroactive effect and it has a statutory limitation of six months, which prevents investigation and prosecution of past crimes under this Code.

The 'Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act' (2014) (hereinafter 'TRC Act') was passed by the Parliament in 2014. The TRC Act provides a legal framework for two Commissions; the Commission of Investigation on Enforced Disappeared Persons and the Truth and Reconciliation Commission. Both Commissions were established in early 2015. The

¹ The Code came into force in August 2018.

TRC has registered 63,718 complaints (as of 19 July 2020)² and the CIEDP has registered 3,223 complaints.³

Despite registering thousands of cases, neither the TRC nor the CIEDP has been able to clarify the fate of a single case of enforced disappearances, let alone hold those responsible to account. 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.⁴ Further, police authorities are refusing to initiate criminal investigations on these cases on the pretext that they will be dealt with by the CIEDP and the TRC.

This paper will highlight the State's obligation to investigate, prosecute and punish crimes of enforced disappearances

² The information was collected from the Truth and Reconciliation Commission's office at Kathmandu.

³ "The CIEDP has registered 3,223 complaints with a total number of 3,250 missing persons. The Commission has claimed, of the total complaints, 713 complaints were delisted after preliminary investigation and at present 2,522 complaints of enforced disappeared are under thorough investigation." (unofficial English translation) <https://ciedp.gov.np/आयोगको-उजुरी-सम्बन्धी-जा/> (Accessed 27 January 2021)

⁴ 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), *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).

and duty to provide truth and justice under international law. It will analyse the mandates and powers of CIEDP and assess whether the investigation conducted by the CIEDP fulfils the State's obligations under international law. Furthermore, it will analyse provisions related to the retroactive effect of criminal law, the statutory limitation, and what international standards exist and how they can be applied to cases involving enforced disappearances. The question of amnesty will also be analysed as this remains one of the contested mandates of the CIEDP.

The primary objective of this paper is to support victims, human rights defenders and the legal community in Nepal working to promote truth, justice, reparation by countering impunity in cases involving enforced disappearances. It provides a legal analysis of the investigation, prosecution and adjudication of crimes of enforced disappearances in Nepal under the Penal Code and the Commission of Inquiry on Enforced Disappearances Truth and Reconciliation Commission Act. It discusses the international legal standards and assesses the compatibility of key provisions in the national legal framework with international standards. It highlights the critical areas of law that need reform to ensure effective remedies that are in line with international standards.

2. INTERNATIONAL OBLIGATION OF STATES IN RELATION TO INVESTIGATION AND PROSECUTION OF ENFORCED DISAPPEARANCES

International law protects every person from enforced disappearances. The International Convention for the Protection of All Persons from Enforced Disappearance (hereinafter "ICPPED") defines enforced disappearance as:

*"[t]he arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."*⁵

The definition provided by the ICPPED identifies the three elements which characterise enforced disappearance.

⁵ United Nations General Assembly (UNGA), *International Convention for the Protection of All Persons from Enforced Disappearance*, UN Doc. A/RES/61/177, 20 December 2006, <https://www.ohchr.org/en/hrbodies/ced/pages/conventionced.aspx> (Accessed 24 August 2020)

First, there needs to be deprivation of liberty against the will of the person concerned. Second, there needs to be involvement of State's officials, directly, indirectly or by acquiescence. Third, there needs to be refusal to disclose the fate and whereabouts of the person concerned.⁶

It is important to note that understanding of human rights treaties is narrower to the extent that they define enforced disappearance only to cover certain acts perpetrated by State actors. It includes the acts of private actors only if they were committed on behalf of, or with the support, direct or indirect, consent or acquiescence of the government.⁷ Although States are required to take appropriate measures to investigate acts, comparable to enforced disappearances, committed by persons or groups of persons acting without the authorisation, support or acquiescence of the State and to bring those responsible to justice,⁸ human rights treaties do not include a broad

⁶ UN Economic and Social Council (UNESCO), Commission on Human Rights, Report of the Working Group on Enforced or Involuntary Disappearances, General comment on article 4 of the Declaration, UN Doc. E/CN. 4/1996/38, para.55.

⁷ UNGA, Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances*, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, UN Doc. A/HRC/7/2, 10 January 2008, para. 26, p. 10.

⁸ UNGA, Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances*, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, UN Doc. A/HRC/7/2, 10 January 2008, para. 26, p. 10.

definition as seen for example with the definition in the Rome Statute of the International Criminal Court(ICC).

International criminal law provides a wider definition of enforced disappearances as it recognises both State and political organisations capable of committing enforced disappearances. For example, Article 7(2) (i) of the Rome Statute articulated enforced disappearance as:

"[t]he arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time."

The definition in the Penal Code of Nepal is closer to the one provided by the ICC. Section 206 (1) of the Penal Code prohibits enforced disappearance and defines the crime of enforced disappearance as the following:

"..(a) the arrest, detention or any other form of control of a person by a person or security personnel having authority by law to make arrest, investigation or enforcement of law, followed by a failure to produce such person before the case trying authority within twenty four hours of the date of such arrest or deprivation of liberty, excluding the time required for

journey, or a refusal to allow the concerned person to meet such person, and/or by concealment of information as to where, how and in what condition such person has been so held,

(b)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.”

It 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 capable of committing the crimes of enforced disappearances.

The definition in the Penal Code provides wider protection on some aspects. For example, non-state actors are included as perpetrators committing enforced disappearances. However, it falls short in others. The Penal Code narrowly criminalises the act of enforced disappearance by completely ruling out the possibility of arrest, detention, abduction or any other form of deprivation of liberty committed by persons or groups acting with the authorisation, support or acquiescence of the State (as defined by ICPPED in art 2).

It is important to note that international standards provide that where domestic criminal legislation does not include acts committed by individuals acting on behalf of the government or with its direct or indirect support. Without necessarily having received orders or instructions from government agents to commit the offence, such definition was partial and, as such, needed to be amended.⁹

Enforced disappearance is a complex crime which involves multiple violations of rights guaranteed in international treaties. If it is used in a systematic or widespread manner enforced disappearance could amount to a crime against humanity. It could also amount to a war crime if used in the context of armed conflict.

A. ENFORCED DISAPPEARANCES AS CRIMES AGAINST HUMANITY

The Rome Statute of the ICC provides that enforced disappearances is a crime against humanity "when committed as a part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."¹⁰ This is reinforced by the ICPPED. Article

⁹ UNGA, Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances- Addendum: Best practices on enforced disappearances in domestic criminal legislation, UN Doc. A/HRC/16/48/Add.3, 28 December 2010, para. 25.

¹⁰ *Rome Statute of the International Criminal Court* (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (ICC Statute), art.7(1).

5 of ICPPED reaffirms that “the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.”

Although the definition of enforced disappearance contained in the Rome Statute is binding only to the member States to the ICC, the notion of “the widespread or systematic practice of enforced disappearance” as a crime against humanity has evolved under international customary law also recognised by international courts and tribunals.¹¹ The UN Working Group on Enforced Disappearances (WGEID) has articulated that the definition given by article 7 (1) of the Statute of the ICC reflects customary international law.¹² Similarly, the

¹¹ “..in its constant case law on cases of forced disappearance of persons, the Court has reiterated that this constitutes an illegal act that gives rise to a multiple and continuing violation of several rights protected by the American Convention...the inter-American regional system had frequently used this term to refer to this series of acts and violations as a crime against humanity. It is even described as such by Article 7(1)(i) of the 1998 Statute of the International Criminal Court, when committed as part of a widespread or systematic attack directed against any civilian population.” in Judgment of 22 September 2006, Inter-American Court of Human Rights (IACtHR), Goiburú et al. v. Paraguay, Series C No. 153, para. 82.

¹² UNGA, Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances*, General comments on enforced disappearances as a crime against humanity, UN Doc. A/HRC/13/31, 21 December 2009, para. 39 (14) https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/13/31 (Accessed 28 August 2020).

Human Rights Committee has also confirmed that “when committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity”.¹³

Enforced disappearances are prohibited in all contexts including in states of emergency as well as in times of international armed conflict or internal armed conflict.¹⁴ This has been interpreted in case law with the IACtHR stating that the “prohibition to commit crimes against humanity is a *jus cogens* rule, and the punishment of such crimes is obligatory pursuant to the general principles of international law.”¹⁵

In the context of Nepal, the WGEID has indicated that the practice of enforced disappearances was widespread.¹⁶

¹³ UN Committee on International Covenant on Civil and Political Rights (UNICCPR), 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. 18.

¹⁴ International Commission of Jurists, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction*, Practitioner’s Guide No. 9 (2015), p. 99.

¹⁵ International Commission of Jurists, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction*, Practitioner’s Guide No. 9 (2015), p. 98.

¹⁶ UNESCO, 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).

Thus, it can be argued that enforced disappearances in Nepal may amount to crimes against humanity. However, neither the Penal Code nor the TRC Act prohibits crimes against humanity. They do not recognise the systematic practice of enforced disappearances as crimes against humanity. Neither the TRC nor the CIEDP have mandates to investigate crimes against humanity, meaning this crime falls completely outside the jurisdiction of criminal justice and TJ processes. This may provide immunity to perpetrators and constitute a violation of international law.

B. ENFORCED DISAPPEARANCES AS WAR CRIMES

Article 8 of the Rome Statute identifies acts committed during international and non-international armed conflicts as war crimes. It gives ICC jurisdiction over acts amounting to grave breaches of the 1949 Geneva Conventions and their 1977 Additional Protocols, including wilful killing or torture of protected persons or extensive destruction of protected property; serious violations of common article 3 of the 1949 Geneva Conventions, including intentional attacks on or violence against civilians and other serious violations of the laws and customs applicable in armed conflicts of an international and non-international character.¹⁷

Although Nepal is not a party to the ICC, it is a party to all four Geneva conventions. Although international humanitarian law

¹⁷ *Rome Statute of the International Criminal Court* (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (ICC Statute), art.8.

treaties do not specifically enlist “enforced disappearance” as a war crime, enforced disappearance violates or threatens to violate, a range of customary rules of international humanitarian law, most notably the prohibition of arbitrary deprivation of liberty (GC IV, Art 147; Rule 99), the prohibition of torture and other cruel or inhuman treatment (The four Geneva Conventions of 1949 (GC I, Art. 12; GC II, Art. 12; GC III, Arts 13, 17 and 87; GC IV, Arts 27 and 32; GC I-IV common article 3; Rule 90) and the prohibition of murder (GC I-IV common article 3; Rule 89).¹⁸

In non-international armed conflicts, parties are also required to take steps to prevent disappearances, including through the registration of persons deprived of their liberty (Rule 123).¹⁹ This prohibition should also be viewed in the light of the rule requiring respect for family life (Rule 105) and the rule that each party to the conflict

¹⁸ Geneva Convention for the Amelioration of the Condition of the Wounded And Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GC I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick And Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (GC II); Geneva Convention Relative to the Treatment of Prisoners of War of (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GC III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War of (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC IV); See Also, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, Volume 1: Rules, 2009.

¹⁹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, Volume 1: Rules, 2009, p. 340.

must take all feasible measures to account for persons reported missing as a result of armed conflict and to provide their family members with information it has on their fate (Rule 117). The cumulative effect of these rules is that the phenomenon of “enforced disappearance” is prohibited by international humanitarian law.²⁰

However, the definition within the Penal Code also excludes enforced disappearances committed as part of war crimes. The TRC Act also excludes mandates of these mechanisms to investigate war crimes, denying the TRC the competency to investigate the systematic nature of crimes and assess the magnitude and gravity of the offense in line with international law.²¹

C. ENFORCED DISAPPEARANCES VIOLATING MULTIPLE RIGHTS

International law recognises that enforced disappearance violates several rights protected under international human rights law. Jurisprudence from human rights bodies have established that enforced disappearances violate the right to life (Article 3 of UDHR; Article 6

²⁰ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, Volume 1: Rules, 2009, p. 340-341.

²¹ Office of the United Nations High Commissioner for Human Right (OHCHR), Nepal: OHCHR position on UN support to the Commission on Investigation of Disappeared Persons and the Truth and Reconciliation Commission: 16 February 2016.

of ICCPR), the prohibition against torture and cruel, inhuman and degrading treatment (Article 5 of UDHR; Article 7 of ICCPR; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)1984), right to liberty and security of person (Article 3 of UDHR; Article 9 of ICCPR), the prohibition against arbitrary arrest, detention (Article 9 of UDHR; Article 9 of ICCPR), the right of detainees to be treated with humanity and dignity (Article 10 of ICCPR), right to recognition as a person before the law (Article 6 of UDHR; Article 16 of ICCPR) and right to an effective remedy (Article 8 of UDHR; Article 3 of ICCPR) to name a few. It can also constitute the denial of the right to recognition as a person under the law, which is non-derogable under Article 16 of the ICCPR.

Nepal's Penal Code also recognises that enforced disappearances could violate and intricately relate with other violations by including additional punishment for those other rights violated while the crime of enforced disappearances is committed. For example, Section 206 (9) of the Penal Code provides that if there are any other offences under the Code, committed against while committing the crime of enforced disappearance, punishment for such crimes will also be added into the punishment awarded for enforced disappearances.²² However, how that will be executed in practice is yet to be seen.

²² National Penal Code 2017, section 206 (9).

D. ENFORCED DISAPPEARANCE AS A CONTINUOUS CRIME

Various international treaties, and international, regional, and domestic tribunals, have recognised the continuous nature of the crime of enforced disappearance.²³ The continuous nature operates on the premise that the crime does not cease unless the uncertainty of fate and whereabouts of the “disappeared” is discovered. It has been clarified that the act begins at the time of the abduction, arrest, and extends for the whole period. This means the crime is not complete until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual.”²⁴ Enforced disappearance “involves a typical situation of a certain duration in accordance with the will of the perpetrator during which the crime continues to be consummated until the illegal situation ceases”.²⁵ As long as the victims are under the power and custody of the state agents and armed groups, the crime is reproduced constantly in every instant.²⁶

²³ International Commission of Jurists, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction*, Practitioner’s Guide No. 9 (2015), p. 41.

²⁴ 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.

²⁵ International Commission of Jurists, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction*, Practitioner’s Guide No. 9 (2015), p. 41.

²⁶ International Commission of Jurists, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction*, Practitioner’s Guide No. 9 (2015), p. 41.

The principle has been explicitly affirmed in Article 8 of the ICPPED which stipulates that term of limitation for criminal proceeding “commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature”²⁷ and Article 17 of the 1992 Declaration that instructs:

“ [A]cts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared, and these facts remain unclarified.”

This understanding has facilitated domestic tribunals in convicting those accused of enforced disappearance in cases where the commission of the act had begun before the offence was codified under domestic law and also to expand understanding on statutory limitations,²⁸ and the non-applicability of retroactive effect of law.

Nepal’s Penal Code fails to explicitly recognise this, which creates not only confusion but also space for investigating

²⁷ *International Convention for the Protection of All Persons from Enforced Disappearance* (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICPPED), art.8 (b) <https://www.ohchr.org/en/hrbodies/ced/pages/conventionced.aspx> (Accessed 24 August 2020).

²⁸ UNGA, Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances- Addendum: Best practices on enforced disappearances in domestic criminal legislation, UN Doc. A/HRC/16/48/Add.3, 28 December 2010, para. 34.

authorities to deny investigation on the pretext that the Penal Code provides for the non-applicability of retroactive effect of the Code and statutory limitation in filing cases.

I. NON-APPLICABILITY OF RETROACTIVE EFFECT OF CRIMINAL LAW

Given the continuing character of enforced disappearance, it is possible to prosecute alleged perpetrators based on a legal instrument that was enacted after the enforced disappearance began, notwithstanding the general principle of non-retroactive effect in criminal law.

International law recognises the principle of protection against the retroactive effect of law, known as *nullum crimen sine lege* or no crime without pre-established law, that aims to protect people from prosecution for any acts, which was not defined as crimes at the time it was committed. For example, Article 15 of the ICCPR states that “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.”

The Constitution and the Penal Code of Nepal, both have provisions protecting individuals against the retroactive effect of criminal law. For example, Article 20 (4) of the Constitution stipulates that “no person shall be liable for punishment for an act which was not punishable by the law

in force when the act was committed, nor shall any person be subjected to a punishment greater than that prescribed by the law in force at the time of the commission of the offence.” Similarly, Section 7 of the Penal Code provides that “no person shall be liable to punishment for doing an act not punished by law.”

However, these provisions are not applied in the crimes of gross violations including 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.²⁹ The Human Rights Committee (HRC) clarifies the crimes where this principle constitutes no bar would include gross human rights violations such as slavery, torture, enforced disappearance and extrajudicial execution. The Inter-American and the European systems have developed similar jurisprudence.³⁰

As enforced disappearance has long been established as a crime under international law, the international treaties

²⁹ *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).

³⁰ *Streletz, Kessler and Krenz v. Germany*, European Court of Human Rights (ECtHR), Application Nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001; *Kolk and Kislyiy v. Estonia*, ECtHR, Application Nos. 23052/04 and 24018/04, Judgment of 17 January 2006; *Judgment of 26 September 2006*, IACtHR, *Almonacid-Arellano et al. v. Chile*, Series C No. 154, para. 90.

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. Furthermore, the continuous nature of crimes means the crime is still happening. Therefore, the Penal Code has jurisdiction over the crimes of enforced disappearances committed during the conflict, which means they can be investigated and prosecuted as per its provisions.

II. NON-APPLICABILITY OF STATUTES OF LIMITATION IN ENFORCED DISAPPEARANCES

International law also recognises the principle of statutory limitation in criminal law. It is to prevent unjust delays between the commission of the crimes and prosecution or punishment.³¹ It prevents prosecution of crimes after a lapse of a certain amount of time. The rationale behind the statutory limitations is the realisation that when there is a large time gap between the commission of the offence and the investigation, it is difficult to conduct the investigation and find reliable evidence. Due to the length of time that had passed, the act may have lost its harmful effect

³¹ Robert Cryer, Darryl Robinson, Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2010, p. 77.

and that punishment would not have the same deterrent effects.³² This is also based on the principle of certainty as it aims to provide certainty and finality to potential defendants.³³

Unlike other general criminal offences, crimes of human rights violations are primarily committed by those in power and evidence often can only be found once they have left power. For example, when alleged perpetrators are still in power, they can obstruct proper investigation and prosecution. It may take time for witnesses and victims to speak out because of fear of reprisal. In some contexts, a country may not have the capacity to deal with the cases committed for various reasons such lack of resources, training and infrastructure. Furthermore, cases of human rights violations committed as part of States' policies, often in a clandestine manner, may take time to be investigated. If a statutory limitation is imposed on these categories of crimes, these cases could not be prosecuted. Unlike other general offences, the deterrent effects of international criminal law will have a positive effect to create an environment of deterrence and the threat of sanction among the perpetrators throughout their life.

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.³⁴ Ensuring an effective remedy through criminal

³² Ibid.

³³ Ibid.

³⁴ *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*

proceedings enforced disappearances should not be subject to statutes of limitation.³⁵ The HRC has urged several States not to apply any statute of limitations to serious human rights violations.³⁶ Lately, the HRC has recommended abolishing statutes of limitation on offences involving serious human rights violations altogether.³⁷

For example, in *Purna Maya v. Nepal* the Committee found 35 days limitations in reporting cases of rape in detention preventing victim effective remedy and recommended to the State to abolish the 35-day limitation period for filing complaints of rape. The committee has also recommended removing obstacles that frustrate the filing of complaints and effective access to justice for victims.³⁸

The Penal Code prescribes six months statutory limitation in filing complaints in enforced disappearances. Firstly, it can be argued that this should not be applicable in cases involving

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.

³⁵ *Abdulsamet Yaman v. Turkey*, ECtHR, Application No. 32446/96, Judgment of 2 November 2004, para. 55.

³⁶ Human Rights Committee (HRC), Concluding observations: Argentina, UN Doc. CCPR/CO/70/ARG of 15 November 2000; HRC, Concluding observations: El Salvador, UN Doc. CCPR/C/SLV/CO/6 of 18 November 2010, para. 6 ; HRC, Concluding observations: Uruguay*, UN Doc. CCPR/C/URY/CO/5 of 2 December 2013, para. 19; HRC, Concluding observations: Panama, UN Doc. CCPR/C/PAN/CO/3 of 17 April 2008, para. 7.

³⁷ *Maya v. Nepal*, Human Rights Committee Communication No. 2245/2013, Views of 17 March 2017, UN Doc. CCPR/C/119/D/2245/2013 (2017).

³⁸ *Ibid.*

enforced disappearances. As discussed above, 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*³⁹ 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.⁴⁰

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

³⁹ *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.

⁴⁰ *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.

right to life, freedom, and justice.⁴¹ 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. Issuing a directive order for the Nepal Government, the SC directed to internalise the principles laid down in various international instruments and urgently enact a law that includes provisions criminalising the act of disappearance. The law would define the “act of disappearance” pursuant to the definition stated in the ICPPED 2006. Provisions would include the right to remedy, a flexible statute of limitations, interim relief to the families of the victims as well as no pardon to persons prosecuted and convicted for their involvement in the act of disappearance.⁴²

⁴¹ *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.

⁴² *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, pp. 169-250; See also ICJ, *Disappearances In Nepal: Addressing the Past, Securing the Future*, 2009, p. 3-5 <https://reliefweb.int/report/nepal/disappearances-nepal-addressing-past-securing-future> (Accessed 28 August 2020).

3. STATES' OBLIGATION TO PROVIDE AN EFFECTIVE REMEDY

The ICCPR, and many other treaties that Nepal has ratified, obliges States to provide an effective remedy to victims whose rights have been violated. This requires the State to take legislative or other measures necessary to give effect to the rights enshrined in the treaty and to provide effective remedy enforceable by competent judicial, administrative or legislative authorities in violation of such rights.⁴³ In cases of enforced disappearances duty to provide effective remedy includes criminal justice measures, such as investigation, prosecution and punishment. It also includes the obligation to establish the truth and to provide reparation to victims.⁴⁴

⁴³ Article 2.3 of the ICCPR states "(a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity, (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy, (c) to ensure that the competent authorities shall enforce such remedies when granted".

⁴⁴ *The Right to the Truth in the Americas*, IACHR, OEA/Ser.L/V/II.152, Doc. 2 (13 August 2014), para. 14.

For example, in *Dev Maharjan v. Nepal*,⁴⁵ where the author was disappeared for some time and subjected to torture in a military barrack in July 2004 during the conflict, the HRC viewed that Nepal is under an obligation to provide Maharjan and his family with an effective remedy, by ensuring a thorough and diligent investigation into the torture and ill-treatment suffered, providing Maharjan and his family with adequate compensation for all the violations suffered and to ensure prosecution and punishment for those that were responsible.⁴⁶ It further stated to amend national legislation to bring it into conformity with the Covenant, including the amendment and extension of the thirty-five-day statutory limitation; and repealing of all laws granting impunity to alleged perpetrators of acts of torture and enforced disappearance.⁴⁷

The human rights bodies have developed jurisprudence that States have the obligation to provide effective remedies including investigation, prosecution and punishment. It also includes the duty to provide reparation and to establish the truth. Administrative measures such as a commission of inquiry for conducting investigation or providing compensation alone would not be considered sufficient responses in ensuring effective remedies as required by the ICCPR.⁴⁸ The following sections discuss

⁴⁵ *Maharjan v. Nepal*, Human Rights Committee Communication No. 1863/2009, Views of 19 July 2012, UN Doc. CCPR/C/105/D/1863/2009 (2012).

⁴⁶ *Ibid.* *Maharjan v. Nepal*, para. 9.

⁴⁷ *Ibid.* *Maharjan v. Nepal*, para. 9.

⁴⁸ *Bautista de Arellana v. Colombia*, Human Rights Committee Communication No. 563/1993, Views of 27 October 1995, UN Doc. CCPR/C/55/D/563/1993(1995); *Coronel v. Colombia*, Human Rights

those obligations and constituent elements of those obligations so one could assess whether the investigation done by the CIEDP fulfils international obligations.

A. DUTY TO INVESTIGATE

Investigation is the first step towards fulfilling the duty to provide effective remedies. It is also a procedural right of the victim. As discussed in previous sections, enforced disappearances could lead to the violations of many substantive rights enshrined in the ICCPR. The HRC has found several violations, including but not limited to Article 2 (duty to provide effective remedy), Article 6 (right to life, Article 7 (right against torture) and rights to individual liberty.⁴⁹ When crimes of enforced disappearances

Committee Communication No. 778/1997, Views of 24 October 2002, UN Doc. CCPR/C/76/D/778/1997 (2002); *Aksoy v. Turkey*, ECtHR, Application No 21987/93, Judgment of 18 December 1996, para. 98; *Öneryildiz v. Turkey*, ECtHR, Application No. 48939/99, Judgment of 30 November 2004, para. 91; *Kaya v. Turkey*, ECtHR, Application No. 158/1996/777/978, Judgment of 19 February 1998, para. 107; *Judgment of 26 November 2013*, IACtHR, *Osorio Rivera And Family Members v. Peru*, Series C No. 274, para. 178; *Judgment of 16 November 2009*, IACtHR, *González et al. ('Cotton Field') v. Mexico*, Series C No. 205, para. 246.

⁴⁹ *Maharjan v. Nepal*, Human Rights Committee Communication No. 1863/2009, Views of 19 July 2012, UN Doc. CCPR/C/105/D/1863/2009 (2012); *Giri v. Nepal*, Human Rights Committee Communication No. 1761/2008, Views of 24 March 2011, UN Doc. CCPR/C/101/D/1761/2008 (2011); *Sharma v. Nepal*, Human Rights Committee Communication No.1469/2006, Views of 28 October

are concerned, States are required to have a judicial investigation that entails different constituent elements. For example, the investigation must be *prompt*.⁵⁰ Prompt investigation is found to be important not only to protect life, prevent torture and enforced disappearances but also to maintain public confidence in the authorities and adherence to the rule of law.⁵¹ It is also important to prevent any collusion in, or tolerance of, unlawful acts.⁵²

Investigation must be “*thorough*” and “*exhaustive*” as well. Thorough investigation also entails an analysis of facts, evidence and scrutiny of all material circumstances to establish the crime.⁵³ The HRC also suggests in cases

2008, UN Doc. CCPR/C/94/D/1469/2006 (2008); *Herrera Rubio v. Colombia*, Human Rights Committee Communication No. 161/1983, Views of 2 November 1987, UN Doc. Supp. No. 40 (A/43/40) at 190 (1988), para 11-12.

⁵⁰ *Judgment of 31 August 2011*, IACtHR, Contreras et al. v. El Salvador, Series C No. 232, para. 128; *Report No. 1/99 of 27 January 1999*, Inter-American Commission on Human Rights (IACHR), Case No. 10.480, *Lucio Para.da Cea* (El Salvador), para. 148; *Oğur v. Turkey*, ECtHR, Application No. 21594/93, Judgment of 20 May 1999, paras. 91-92; *Opuz v. Turkey*, ECtHR, Application No. 33401/02, Judgment of 9 June 2009; 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.

⁵¹ *Ramsahai and Others v. The Netherlands*, ECtHR, Application No. 52391/99, Judgment of 15 May 2007, para. 326.

⁵² *Ibid.*

⁵³ *Nachova and Others v. Bulgaria*, ECtHR, Application No. 43577/98 and 43579/98, Judgment of 6 July 2005, para. 114; *Zelilof v. Greece*, ECtHR, Application No. 17060/03, Judgment of 24 August 2007, para. 56.

of serious human rights violations such as enforced disappearances a “thorough and exhaustive investigation” needs to be done by the competent judicial authorities.⁵⁴ The thorough and exhaustive investigation also includes States making efforts to investigate and clarify patterns of violations, the operational structures that allowed violations, reasons for them, causes, consequences and beneficiaries so the applicable punishment can be imposed.⁵⁵

Furthermore, 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.⁵⁶ The HRC states that in gross violations such as a death in custody, enforced disappearances, murder, rape and

⁵⁴ HRC, Concluding observations:Algeria, UN Doc. CCPR/C/DZA/CO/3 of 12 December 2007, para. 7.

⁵⁵ *Judgment of 26 May 2010*, IACtHR, Manuel Cepeda Vargas v. Colombia, Series C No. 213 paras 118-19; *Judgment of 16 November*, IACtHR, González et al. (‘Cotton Field’) v. Mexico, Series C No. 205, para.454.

⁵⁶ 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.

torture, the investigation has to be started *ex-officio* and without delay.⁵⁷

Duty to investigate under international law also includes conducting independent and impartial investigations.⁵⁸ An impartial and independent investigation includes several components such as the assurance that there is no influence of any alleged perpetrators in the investigation;⁵⁹ investigators have no records of being involved in violations etc.⁶⁰ The impartiality and independence of an investigation cannot be achieved only thorough having a legal provision ensuring it (*de jure*) but translating that into practice (*de facto*),⁶¹ 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.⁶²

⁵⁷ *Judgment of 23 September 2009*, IACtHR, Garibaldi v. Brazil, Series C No. 203, para. 114.

⁵⁸ 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.

⁵⁹ 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.

⁶⁰ *Güleç v. Turkey*, ECtHR, Application No. 54/1997/838/1044, Judgment of 27 July 1998, paras 81-82.

⁶¹ *Judgment of 6 April 2006*, IACtHR, Baldeón García v. Peru, Series C No. 147, para. 95.

⁶² *Abdulsamet Yaman v. Turkey*, ECtHR, Application No. 32446/96, Judgment of 2 November 2004, para. 85.

Furthermore, the State's duty to investigate is not limited to violations of human rights committed by state agents.⁶³ Although States are not held directly responsible for violating substantive rights when crimes are committed by private non-state actors, States need to apply due diligence to have crimes investigated.⁶⁴ States are held responsible for their failure to investigate and to provide effective remedies even if the crimes are committed by non-state actors.⁶⁵ In some situations, a State's refusal to intervene could be characterised as acquiescence.⁶⁶

⁶³ *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; UNICCPR, 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.

⁶⁴ UNICCPR, 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; *Judgment of 25 November 2000*, IACtHR, Bámaca Velásquez v. Guatemala, Series C No. 70, para. 172; Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, Oxford University Press, 2009, p. 23.

⁶⁵ UNICCPR, 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.

⁶⁶ Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, Oxford University Press, 2009, p. 23.

More importantly, the effective investigation requires States to respect a victim's right to participate in the investigation process.⁶⁷ Although, this obligation does not obligate a state authority to satisfy every request of the victims⁶⁸ as an ongoing investigation may contain sensitive issues and could rightfully restrict full access of victims the investigating authority however has to inform the victims of the progress in the investigation.⁶⁹ Several international treaties that Nepal has ratified such as the Convention Against Torture (ACT), Convention on Elimination of All Forms of Discrimination against Women (CEDAW) have provisions articulating State's obligation to investigate.

⁶⁷ *Angelova v. Bulgaria*, ECtHR, Application No. 38361/97, Judgment of 13 June 2002, paras 140, 324; *Rantsev v. Cyprus and Russia*, ECtHR, Application No. 25965/04, Judgment of 7 January 2010, para. 239, *Judgment of 4 July 2006*, IACtHR, *Ximenes-Lopes v. Brazil*, Series C No. 149, para. 193; *Judgment of 1 July 2006*, IACtHR, *Ituango Massacres v. Colombia*, Series C No. 148, para. 296; *Judgment of 7 June 2003*, IACtHR, *Sánchez v. Honduras*, Series C No. 99, para. 186; *Judgment of 29 August 2002*, IACtHR, *Caracazo v. Venezuela*, Series C No. 95.

⁶⁸ *Ramsahai and Others v. The Netherlands*, ECtHR, Application No. 52391/99, Judgment of 15 May 2007, para. 347.

⁶⁹ *Ibid*; *Charalambous and Others v Turkey*, ECtHR, Application No. 46744/07, Judgment of 3 April 2012, para. 65; *Judgment of 27 November 2008*, IACtHR, *Valle Jaramillo and others v. Colombia*, Series C No. 192, para. 233.

B. DUTY TO PROSECUTE AND PUNISH

The human rights bodies have also used obligation to provide an effective remedy to require States to prosecute gross violations such as enforced disappearances. The HRC argues that States are required to launch a criminal investigation and to prosecute those found responsible for enforced disappearances. For example, the HRC is of the opinion that "States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life."⁷⁰

In *Yasoda Sharma v. Nepal*, the HRC stated that "...the State Party is 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....and to take measures to prevent similar violations in the future."⁷¹ It further elucidated

⁷⁰ OHCHR, Human Rights Committee, General Comment No 6. Article 6 (Right to Life), para. 4.

⁷¹ *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, ICJ, International Commission Of Jurists (ICJ), *Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity*, 2009 <https://www.>

that “the State Party is under an obligation to provide the author with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author’s husband, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the author and her family for the violations suffered by the author’s husband and by themselves.”⁷²

This duty of State could be materialised only after ensuring different elements such as the criminalisation of violations, removing prosecutorial hurdles such as amnesty, statutory limitation, making punishment proportionate to the gravity of crimes committed, ensuring trial in a competent civilian court among others.

Noting the lack of criminal law defining torture and enforced disappearances in Nepal that left victims of torture and enforced disappearances with no effective remedies, the HRC argued that this is not only denied victims’ access to effective remedies but also promoted impunity.⁷³ In

icj.org/wp-content/uploads/2012/04/Nepal-Briefing-paper-on-Enforced-Disappearances-Analysis-briefs-2009.pdf (Accessed 15 December 2020).

⁷² Ibid. *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.

⁷³ *Maharjan v. Nepal*, Human Rights Committee Communication No. 1863/2009, Views of 19 July 2012, UN Doc. CCPR/C/105/D/1863/2009 (2012); *Giri v. Nepal*, Human Rights Committee Communication No. 1761/2008, Views of 24 March 2011, UN Doc. CCPR/C/101/D/1761/2008 (2011); *Sharma v. Nepal*, Human Rights Committee Communication No.1469/2006, Views of 28 October 2008, UN Doc. CCPR/C/94/D/1469/2006 (2008).

Maharjan v. Nepal the victim was subjected to torture and enforced disappearances, although temporarily, but had no legal remedies as the police would not even register a complaint and start the investigation, not knowing under which law they would register and investigate this conduct and what punishment these crimes would claim. The HRC finding a violation stated that States' obligation under the treaty requires them to have criminal law in place criminalising all acts amounting to torture and enforced disappearances.⁷⁴ The human rights bodies, both at the global and regional level, have found a lack of criminal law criminalising gross violations constituting a violation of the treaty obligation to provide an effective remedy.⁷⁵ The Supreme Court of Nepal has also ordered

⁷⁴ *Maharjan v. Nepal*, Human Rights Committee Communication No. 1863/2009, Views of 19 July 2012, UN Doc. CCPR/C/105/D/1863/2009 (2012).

⁷⁵ *Judgment of 22 November 2005*, IACtHR, Gómez Palomino v. Peru, Series C No. 136, para. 102; *Judgment of 26 November 2013*, Osorio Rivera and family members v. Peru, IACtHR, Series C No. 274, para. 206; *X and Y v. The Netherlands*, ECtHR, Application No. 8978/80, Judgment of 26 March 1985, para. 27; *Mahmut Kaya v. Turkey*, ECtHR, Application No. 22535/93, Judgment of 28 March 2000; *Necati Zontul v. Greece*, ECtHR, Application No. 12294/07, Judgment of 17 January 2012; *Maharjan v. Nepal*, Human Rights Committee Communication No. 1863/2009, Views of 19 July 2012, UN Doc. CCPR/C/105/D/1863/2009 (2012); *Maharjan v. Nepal*, Human Rights Committee Communication No. 1863/2009, Views of 19 July 2012, UN Doc. CCPR/C/105/D/1863/2009 (2012).

the Nepal Government to criminalise gross violations such as enforced disappearances⁷⁶ torture⁷⁷ among others.

⁷⁶ Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance 2012, section 2(j) (3); *Madhav Kumar Basnet et al. v. Office of the Prime Minister and Others*, NKP 2070, Issue No 9, Decision No. 9051, para. 54; *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, 245-246

⁷⁷ *Rajendra Ghimire and Others v. Office of the Prime Minister and Council of Ministers et. al.*, Writ No. 3219 of Year 2005, Judgment of 17 December 2007.

4. INVESTIGATION UNDER THE PENAL CODE

Under international law, enforced disappearance is a continuous crime and extends over the entire period until the fate and whereabouts of the disappeared is made public by the State. Given that the offence of enforced disappearance is a continuous crime, it can therefore be investigated and prosecuted under the Penal Code, which came into force in August 2018. However, the irony is that the Penal Code must: 1) impose a statutory limitation of six months on the offence of enforced disappearance, which is contrary to the international standards, and 2) the Code proceeds to state that the statute of limitation will be applicable from the date of the disappeared person getting or being made public. This section highlights the process of filing complaints and investigation under the Penal Code.

A. INVESTIGATION

As there is no separate law governing the crime of enforced disappearance, the Penal Code is the applicable law. Being a Schedule-1 crime,⁷⁸ the Criminal Procedure

⁷⁸ The list of offences under various chapters of the Penal Code is included in Schedule-1 of the Criminal Procedure Code. The Crimes

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.⁷⁹

Although no one has attempted to file the FIR demanding investigation on enforced disappearances in any of the police districts yet, there are complaints of police not registering the FIR in conflict-related cases in the past. 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.⁸⁰ If the police

enlisted under Schedule-1 require the Government of Nepal to be the plaintiff in the cases stipulated.

⁷⁹ 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.”

⁸⁰ 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.”

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*. 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 as of the writing of this paper.

The obligation under international law also entails initiating ex-officio investigation if the authorities are aware of crimes such as enforced disappearances. 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.

Once the FIR is registered or the police are informed about the incident, the concerned police office, must designate an investigating officer to investigate the incident and collect evidence as soon as possible.⁸¹ The investigating officer is endowed with the power to arrest the perpetrator with permission from the judicial authority.⁸²

After the initial investigation, the investigating officer has to forward a preliminary investigation report to the District

⁸¹ National Criminal Procedure Code 2017, section 8.

⁸² National Criminal Procedure Code 2017, section 9.

Government Attorney Office no later than three days seeking further guidance on the investigation.⁸³ Once the evidence is collected, within at least fifteen days before the expiry of the statute of limitation under the relevant law in relation to a case not involving a detainee, and normally three days in advance of the day for filing a case, and taking into consideration whether to institute the case and the time required for preparing a charge sheet and filing it in the court, in relation to a case involving a detainee,⁸⁴ the investigation report has to be submitted to the prosecutor for the prosecution.⁸⁵

B. PROSECUTION

After completion of the investigation, the investigating officer must submit the file to the prosecutor for prosecution. If the investigating officer finds that the incident did happen, but it is unclear who committed the crime, then an investigation report stating the same has to be sent to the concerned Government Attorney Office,⁸⁶

⁸³ National Criminal Procedure Code 2017, section 10(2), The explanation clause states that this report varies depending on the type of crime so with regard to the crime of enforced disappearance one challenge might be to find out what happened to the person and what type of investigation to be done for the report.

⁸⁴ National Criminal Procedure Code 2017, section 31 (2).

⁸⁵ National Criminal Procedure Code 2017, section 31 (1).

⁸⁶ National Criminal Procedure Code 2017, section 31(1).

which then decides whether or not to prosecute and sends the report to the Office of the Attorney General.⁸⁷

As the investigation of crimes of enforced disappearance could pose challenges in the identification of perpetrators and the whereabouts of the body due to the nature of secrecy of the crime, all available resources need to be there to investigate and prosecute the crimes. HRDs and victims in Nepal have raised their concerns that without the efforts of investigators and prosecutors it may be difficult to collect required evidence to enable prosecution. The Penal Code envisions more active roles of the District Attorney Offices compared to the past. The role of prosecutors and the degree of their involvement during the investigation also remain important for making prosecution possible in cases involving enforced disappearances.

For example, within 3 days of the start of the investigation, the investigating authority needs to submit the file of preliminary investigation to the district attorney.⁸⁸ Upon receiving the file, the district attorney must guide and advise the investigating authority, if there are areas for further investigations. Although not tested in the cases involving gross violations, in other criminal cases, there are concerns that these procedures are considered, both by the police and prosecutors, as a formality, rather than the obligation to properly analyse and scrutinise investigation.⁸⁹ Prosecutors are found to have taken a back

⁸⁷ National Criminal Procedure Code 2017, section 31(3).

⁸⁸ National Criminal Procedure Code 2017, section 10 (2).

⁸⁹ "When FIRs are registered, police and prosecutors procrastinate in carrying out investigations, even in the face of orders and legal

seat throughout the investigation stage whilst entirely relying on information or evidence collected by police.⁹⁰

Furthermore, in some instances, considering both the constitutional and legal prohibition of the non-retroactive effect of criminal law, prosecutors and human rights defenders have found as to whether or not the crime of enforced disappearances committed during the conflict could be prosecuted under the penal code.⁹¹ However, as discussed earlier, under international law, offences having a continuous nature falls outside the scope of this provision. The UN Working Group on Enforced or Involuntary Disappearances has issued a General Comment 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 the

rulings by district courts, courts of appeal, or the Supreme Court.”in Human Rights Watch and Advocacy Forum, *No Law, No Justice, No State for Victims The Culture of Impunity in Post-Conflict Nepal*, 2020, p. 18. http://advocacyforum.org/_downloads/no-law-no-justice-no-state-for-victims-20-november-2020-english.pdf (Accessed 15 December 2020).

⁹⁰ ICJ, *Authority without accountability: The struggle for justice in Nepal*, 2013,p. 18. <https://www.icj.org/wp-content/uploads/2013/10/ICJ-AUTHORITY-WITHOUT-ACCOUNTABILITY-final-1.pdf> (Accessed 5 September 2020).

⁹¹ Advocacy Forum-Nepal And Coalition's Joint Submission to the Universal Periodic Review of Nepal, 2020 <http://advocacyforum.org/downloads/pdf/publications/upr-submission-tj-and-impunity-in-nepal-af-and-coalition-9-luly-2020.pdf> (Accessed 15 December 2020).

disappearance.”⁹² It can be safely argued that the crimes of enforced disappearances in Nepal can be investigated and prosecuted under the Penal Code.

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.⁹³ 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.”⁹⁴

The Constitution of Nepal also requires attorneys to scrutinise the legality of the detention of alleged perpetrators and also act on any allegation of torture and ill-treatment of detainees. For example, Article 158 (3) (c) of the Constitution provides that “if a complaint

⁹² 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.

⁹³ *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.”

⁹⁴ *United Nations Guidelines on the Role of Prosecutors 1990*, UN Doc. A/CONF.144/28/Rev.1, 7 September 1990, Guideline 11.

is made alleging that any person held in custody has not been treated humanely subject to this Constitution or such person has not been allowed to meet his or her relative or through his or her legal practitioner or if the information of such matter is received.”⁹⁵ The Attorney General has also issued guidelines requiring government attorneys to conduct regular custody monitoring and give necessary directives to protect and uphold the human rights of the detainees.⁹⁶ However, prosecutors are also found to be unassertive/, failing to discharge their duties proactively⁹⁷

⁹⁵ Constitution of Nepal 2015, art. 158 (6) (c).

⁹⁶ Functions, duties and powers of the Attorney General delegated to the subordinate government attorneys. Official Gazette, 20 September 2015, p. 4. <https://ag.gov.np/files/महान्यायाधिवक्ताको%20कार्यालय/ऐनहरू/महान्यायाधिवक्ताको%20अधिकार%20मातहतका%20सरकारी%20वकिललाई%20सुम्पेको.pdf> (Accessed 15 January 2021).

⁹⁷ Despite the directive, in the year 2020 only, several instances of custodial death (as a consequence of torture and ill-treatment) were reported from all across Nepal. One such case is of Bijay Ram Mahara, 19-year-old, resident of Garuda Municipality, Rautahat, arrested on 17 August 2020 and held at Area Police Office (APO) Garuda in the alleged murder of Niranjana Ram. On 27 August 2020, Bijay Ram Mahara was declared dead under police custody while undergoing treatment at the National Medical College, Birgunj. Members of civil society organizations issued a joint statement requesting authorities for an independent and impartial investigation of the incident. For more, see Accountability Watch Committee, Advocacy Forum-Nepal, and Terai Human Rights Defenders Alliance, *Demanding an impartial and independent investigation against the suspicious death of Bijay Ram Mahara, and action against the perpetrator and justice for the family*. Joint Press Statement of 27 August 2020, <http://advocacyforum.org/downloads/pdf/press-statement/2020/joint-press-statement-on-suspicious-death-of-bijay-mahara-in-rautahat-nepali-version.pdf> (Accessed 15 January 2021); Similarly Shambhu Sada, a 23-year-old Nepali truck driver

as ill-treatment and torture in detention facilities continues to be perpetrated but rarely scrutinised and prosecuted by the prosecutors.

C. PUNISHMENT

If the public prosecutor decides to prosecute, a charge sheet is filed⁹⁸ 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, a remission of a maximum of twenty five percent of the sentence can be offered to the accused.⁹⁹ Furthermore, if the accused pleads guilty of the offence in which he or she was also involved and assists in revealing

from Sabaila Municipality, died in police custody in Dhanusha District on the morning of June 10, 2020. The police reported Sada's death as a suicide, saying he hanged himself in the jail's bathroom. It was reported that no officers were suspended or charged, despite accusations that they were blackmailing Sada in custody. For more, see Peter Gill and Abha Lal, "Deaths in custody", in *The Record*, 22 June 2020. <https://www.recordnepal.com/wire/features/deaths-in-custody/> (Accessed 15 January 2021).

⁹⁸ National Criminal Procedure Code 2017, section 32.

⁹⁹ National Criminal Procedure Code 2017, section 33 (3)(a).

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.¹⁰⁰

Under the Penal Code, perpetrators are also entitled to have the possibility of parole and probation. As per section 12 of the Criminal Offences (Sentencing and Execution) Act 2017, before passing the sentencing order, the Court can order the probation or parole officer to prepare a report on the perpetrator describing his/her personality traits before commission of the crime and circumstances surrounding the crime etc.¹⁰¹ As there is no exception clause concerning the non-applicability of this provision to particular categories of crimes, there is a possibility that this could be offered to those involved in serious violations including enforced disappearances.

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

¹⁰⁰ National Criminal Procedure Code 2017, section 33 (3)(b).

¹⁰¹ Criminal Offences (Sentencing and Execution) Act 2017, section 12.

to the seriousness of that offence. Article 7(1) of ICPPED requires “each State Party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.” This provision lays down the obligation on the State parties to take the necessary steps for ensuring that the domestic law recognises the seriousness of the offence of enforced disappearance, the nature of its commission and set out the provisions on penalties accordingly i.e., commensurate with the gravity of the offence in question.

Furthermore, in crimes involving enforced disappearances, perpetrators’ cooperation in truth-seeking is grounds for mitigating sentences. Article 4 of the Declaration on the Protection of All Persons from Enforced Disappearance 1992 and Article 7(2)(a) of the ICPPED recognises the following grounds for mitigating circumstances: 1) for persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive; 2) make it possible to clarify cases of enforced disappearance; and 3) to identify the perpetrators of an enforced disappearance.¹⁰² However, it should be noted that Principle 28 of the Updated Set of Principles to Combat Impunity provides that the mitigating circumstances do not exempt the perpetrator from criminal responsibility i.e. “the fact that a perpetrator discloses the violations that he, she or others have committed in order to benefit from the favourable provisions of the legislation

¹⁰² ICJ, *Disappearances In Nepal: Addressing the Past, Securing the Future*, 2009, p. 12 <https://reliefweb.int/report/nepal/disappearances-nepal-addressing-past-securing-future> (Accessed 28 August 2020).

on disclosure or repentance cannot exempt him or her from criminal or other responsibility. The disclosure may only provide grounds for a reduction of sentence in order to encourage revelation of the truth.”¹⁰³

The Penal Code uses the term “up to 15 years” providing a wide range of discretionary power to the Court as the punishment can range from a few months to 15 years. As the Penal Code does not have a separate provision explaining circumstances, the accused or the convicted of enforced disappearance can request for reduced sentencing. It is important to assess how it uses its discretion when sentencing the perpetrators involved in enforced disappearances to ensure proportionality is respected and the grave nature of the crime of enforced disappearances is considered.

In general, the Penal Code has also enlisted a range of aggravating factors to be considered. These include: 1) taking benefit of or abusing a public office;¹⁰⁴ 2) the offence is committed by five or more persons affiliated in a group;¹⁰⁵ 3) the offence is committed by subjecting anyone to torture, cruel, inhumane or degrading treatment;¹⁰⁶ 4) the additional offence of abducting or taking hostage of

¹⁰³ UNESC, Human Rights Commission, Promotion And Protection of Human Rights. Impunity. Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher*-Addendum : Updated Set of principles for the protection and promotion of human rights through action to combat impunity , UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005 <https://undocs.org/E/CN.4/2005/102/Add.1> (Accessed 18 December 2020).

¹⁰⁴ National Penal Code 2017, section 38 (d).

¹⁰⁵ National Penal Code 2017, section 38 (g).

¹⁰⁶ National Penal Code 2017, section 38 (m).

anyone;¹⁰⁷ 5) the offence is committed against a person under detention, custody, imprisonment or control;¹⁰⁸ 6) the offence is committed by a person who has a duty to provide security to any person against that person;¹⁰⁹ 7) the offence is committed a crime against humanity;¹¹⁰ 8) the offence committed in a planned or organised manner¹¹¹ and so forth. Thus, it is recommended that the Court takes these factors into consideration and not allow extremely lenient sentences for those involved in enforced disappearances.

¹⁰⁷ National Penal Code 2017, section 38 (p).

¹⁰⁸ National Penal Code 2017, section 38 (q).

¹⁰⁹ National Penal Code 2017, section 38 (r).

¹¹⁰ National Penal Code 2017, section 38 (u).

¹¹¹ National Penal Code 2017, section 38 (v).

5. AMNESTY IS NOT PERMISSIBLE IN GROSS VIOLATIONS INCLUDING THE CRIMES OF ENFORCED DISAPPEARANCES

Although amnesty, as a legal tool, has been in use for a long time in many transition societies, human rights bodies have started to find that it prevents victims from accessing effective remedies. By preventing investigation, prosecution and punishment, amnesty measures remove the most effective measures to protect human rights, undermines the rule of law and encourages violations of human rights.¹¹²

Both international and regional human rights bodies have found amnesty being incompatible with the international obligations of States. The HRC has consistently held that 'amnesties, pardons or other analogous measures contribute to creating an atmosphere of impunity for the perpetrators of human rights violations, undermine efforts to re-establish respect for human rights and the rule of law, situations that run contrary to the obligations of the States under the ICCPR.'¹¹³

¹¹² Second Report on the Situation of Human Rights in Peru, IACHR, OEA/Ser.L/VII.106, Doc.59/Rev (2 June 2000), para. 230.

¹¹³ HRC, Preliminary Observations: Peru, UN Doc. CCPR/C/79/Add.67 of 25 July 1996, paras 9-10, 20.

The IACtHR argues that amnesty or any other measures that prevent investigation, prosecution and punishment of those involved in serious violations are not compatible with the American Convention.¹¹⁴ In the *Barrios Altos* case the IACtHR states that all amnesty provisions that prevent criminal responsibility in cases involving serious human rights violations are inadmissible under the Inter-American Convention.¹¹⁵

These developments in international law have been recognised by the Supreme Court of Nepal. For example, the Supreme Court rejected the Nepalese Government's arguments that amnesty is necessary in concluding the peace process.¹¹⁶ The Supreme Court concluded that amnesty for gross violations violates victims' rights to effective remedies guaranteed by the Constitution of Nepal and the international treaties that Nepal is a party to. The Supreme Court has further argued that "it is a serious challenge against humanity and justice if one is to look for principles to not initiate prosecution or for sufficient grounds for granting amnesty in cases of gross violation of human rights."¹¹⁷

Although the Penal Code does not contain the language

¹¹⁴ *Judgment of 27 November 1998*, IACtHR, Castillo Páez v. Peru, Series C No. 43.

¹¹⁵ *Judgment of 14 March 2001*, IACtHR, Barrios Altos v. Peru, Series C No. 75, paras. 41-42.

¹¹⁶ *On behalf of council cabinet of Minister, Chief Secretary Lilamani Poudyal v. Suman Adhikari et al.*, Supreme Court Writ No.070- WS-0050.

¹¹⁷ *Suman Adhikari et al. v. Office of the Prime Minister and Council of Ministers and Others*, NKP 2071, Issue 12, Decision No. 9303, para. 70.

of amnesty, the TRC Act empowers Commissions to recommend amnesty to those involved in gross violations including enforced disappearances.¹¹⁸ These provisions were challenged in the Supreme Court and the Court has ordered the amendment to the Act by striking down the use of amnesty in gross violations. The Act is, however, yet to be amended, in line with the Supreme Court's decision.

¹¹⁸ TRC Act 2014, section 26.

6. TRANSITIONAL JUSTICE MECHANISM AND INVESTIGATION OF ENFORCED DISAPPEARANCES AND THE RIGHT TO TRUTH

The Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2014 (TRC Act) provides the legal framework for the establishment of two commissions: a TRC with a mandate to investigate cases of serious human rights violations including unlawful killings, sexual violence, torture and a range of other serious crimes committed during the conflict; and CIEDP, with a mandate specific to enforced disappearances.

In addition to investigations for recommending prosecution,¹¹⁹ the mandates of the two Commissions also included establishing truth, bringing about reconciliation between perpetrators and victims,¹²⁰ recommending legal action/prosecution to be taken against perpetrators¹²¹ and recommending reparation for victims.¹²² Further, upon completion of the investigation, the Commissions are required

¹¹⁹ TRC Act 2014, section 3, section 13 (a).

¹²⁰ TRC Act 2014, section 3, section 13 (c), section 22.

¹²¹ TRC Act 2014, section 3, section 13 (e), section 25, section 29.

¹²² TRC Act 2014, section 13 (d), section 23 ; See also, Sarah Fulton and Mandira Sharma , "Raahat ki n Aahat: Reparation in Post-Conflict Nepal" in Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, Brill-Nijhoff, Second Revised Edition, 2020, pp.710-745.

to submit a report to the Government of Nepal¹²³ including details on the complaints investigated and proceedings suspended by the Commissions,¹²⁴ details on the truth and facts discovered from the investigation,¹²⁵ details of recommendation made for action,¹²⁶ root causes of the armed conflict and matters on policy, legal, institutional, administrative and practical reforms required for non-recurrence of such incidents in the future.¹²⁷ Further, the report must highlight the immediate and long term matters to be addressed by the Government of Nepal to ensure the future promotion of human rights, strengthening of the justice system and creation of a societal environment for reconciliation.¹²⁸

A. TRC'S INVESTIGATION FOR PROSECUTION

The TRC Act provides that the crimes under its jurisdiction will be investigated by these two Commissions. It also states that the Commissions will make recommendations for prosecution against those perpetrators to the Nepal Government. Both the Commission have investigative mandates and powers. In exercising its power, if the CIEDP believes that a disappeared person is killed and that their dead body was buried in a place, it may excavate that place

¹²³ TRC Act 2014, section 27 (1).

¹²⁴ TRC Act 2014, section 27 (a).

¹²⁵ TRC Act 2014, section 27 (b).

¹²⁶ TRC Act 2014, section 27 (e).

¹²⁷ TRC Act 2014, section 27 (g).

¹²⁸ TRC Act 2014, section 27 (h).

as part of the investigation.¹²⁹ The Act also instructs the CIEDP to conduct excavation systematically, and if a dead body or human remains of a deceased is discovered, the Commission must undertake a deoxyribonucleic acid (DNA) examination or autopsy examination of that dead body and hand over the dead body or human remains to the family member.¹³⁰

The Commission of Enquiry on Enforced Disappearances Regulations 2016 elaborates further on the investigatory procedures. It stipulates that the Commission can issue a public notice clearly stating the duration, procedures, and place to collect complaints of enforced disappearance.¹³¹ Complainants, on behalf of victims or victims, can register complaints/information through postal services, e-mail service, or via other electronic means.¹³² Commission can constitute a sub-committee or task force to conduct a preliminary investigation on the complaints received.¹³³ Based on the preliminary investigation report or the seriousness of the complaint or information, the Commission has the right to appoint an investigation officer for a thorough investigation.¹³⁴ The rules mandate the Commission to give

¹²⁹ TRC Act 2014, section 14 (6).

¹³⁰ TRC Act 2014, section 14 (7).

¹³¹ The Commission of Enquiry on Enforced Disappearances Regulations 2016, rule 3.

¹³² The Commission of Enquiry on Enforced Disappearances Regulations 2016, rule 4.

¹³³ The Commission of Enquiry on Enforced Disappearances Regulations 2016, rule 10.

¹³⁴ The Commission of Enquiry on Enforced Disappearances Regulations 2016, rule 11.

special preference to complaints involving children, senior citizens, differently-abled and victims of sexual violence.¹³⁵

Similarly, Commission can inquire/or record statements of the accused or informants;¹³⁶ can issue summons during its proceedings;¹³⁷ issue an order to produce any deed or document;¹³⁸ carry out a search;¹³⁹ seek information from the victim.¹⁴⁰ The Chairperson or members or employees of the Commission have the right to monitor or cause to monitor the investigative works carried out by the investigating officer and may provide necessary instructions, in accordance to which the investigating officer has the obligation to abide by it.¹⁴¹ Likewise, the Commission can conduct exhumation;¹⁴² recommend action against the perpetrator.¹⁴³ The Commission is under the mandate to protect the witness, victims, informants, complainants who need to

¹³⁵ The Commission of Enquiry on Enforced Disappearances Regulations 2016, rule 14.

¹³⁶ The Commission of Enquiry on Enforced Disappearances Regulations 2016, rule 15.

¹³⁷ The Commission of Enquiry on Enforced Disappearances Regulations 2016, rule 16.

¹³⁸ The Commission of Enquiry on Enforced Disappearances Regulations 2016, rule 18.

¹³⁹ The Commission of Enquiry on Enforced Disappearances Regulations 2016, rule 19.

¹⁴⁰ The Commission of Enquiry on Enforced Disappearances Regulations 2016, rule 20.

¹⁴¹ The Commission of Enquiry on Enforced Disappearances Regulations 2016, rule 22 (1) (2).

¹⁴² The Commission of Enquiry on Enforced Disappearances Regulations 2016, rule 26

¹⁴³ The Commission of Enquiry on Enforced Disappearances Regulations 2016, rule 27.

keep their identity confidential;¹⁴⁴ rescue;¹⁴⁵ recommend compensation, treatment, and rehabilitation (including psycho-social counselling);¹⁴⁶ recommend for concession and facilities.¹⁴⁷ If deemed appropriate then the Commission may publish its findings.¹⁴⁸ The Commission can conduct a public hearing on issues relating truth-seeking, reparation and compensation;¹⁴⁹ has the right to issue identity cards to victims;¹⁵⁰ and, if necessary, the Commission may frame directives and procedures for the smooth and systematic operation.¹⁵¹

Despite having such a wider power and mandate, neither the TRC nor the CIEDP are functional and are contributing to the truth, justice and reparation. The effectiveness of these Commissions is seriously hampered by their legitimacy, competency, and independence. As discussed earlier, there are also legal challenges in the investigation of enforced disappearance. Investigation of cases of gross violations

¹⁴⁴ The Commission of Enquiry on Enforced Disappearances Regulations 2016, rule 28.

¹⁴⁵ The Commission of Enquiry on Enforced Disappearances Regulations 2016, rule 29.

¹⁴⁶ The Commission of Enquiry on Enforced Disappearances Regulations 2016, rule 30 (1) (2) (3).

¹⁴⁷ The Commission of Enquiry on Enforced Disappearances Regulations 2016, rule 31.

¹⁴⁸ The Commission of Enquiry on Enforced Disappearances Regulations 2016, rule 33.

¹⁴⁹ The Commission of Enquiry on Enforced Disappearances Regulations 2016, rule 37.

¹⁵⁰ The Commission of Enquiry on Enforced Disappearances Regulations 2016, rule 38.

¹⁵¹ The Commission of Enquiry on Enforced Disappearances Regulations 2016, rule 42.

may require specific knowledge, techniques and expertise. Evidence in enforced disappearances needs to be properly collected and secured without jeopardising the right of the accused. As discussed earlier, it must be exhaustive and thorough. However, the process of investigation of these mechanisms so far does not meet the standards required by international law.

The legitimacy of these Commissions is seriously hampered because of the process. The way the TRC Act was passed undermines the consultative process, ignores the call of victims and civil society and the order of the Supreme Court. The mandates also allow for amnesty even to those responsible for gross violations including the enforced disappearances. Many of the sections of the Act were successfully challenged by victims where the Supreme Court has ordered amendments, which are yet to be enacted.

B. COMPLEMENTARY ROLE OF TRC TO PROSECUTE

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.¹⁵² Administrative bodies like

¹⁵² "...the Committee nevertheless considers the State party duty-bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances

TRC or CIEDP cannot fulfil these obligations. The HRC has adopted the view that TJ mechanisms cannot substitute the criminal justice mechanism. For example, in *Chaulagain v. Nepal*, the Committee considered “..the future transitional justice mechanisms, such as the Truth and Reconciliation Commission, would not be able to provide an adequate remedy in respect of the violations alleged in the present communication.. that in cases of serious violations a judicial remedy was required.”¹⁵³ In this respect, 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

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.

¹⁵³ *Chaulagain v. Nepal*, Human Rights Committee Communication No. 2018/2010, 28 October 2014, UN Doc. CCPR/C/112/D/2018/2010 (2014) para. 6.3.

organs capable of affording a judicial remedy,¹⁵⁴ and the remedies identified by the State party had been ineffective.¹⁵⁵ These views highlight Nepal's obligation to start criminal investigation and prosecution of alleged perpetrators to give effect to the right to an effective remedy, as guaranteed under international human rights treaties. It also requires the State to stop shifting the obligation of criminal investigation and prosecution on non-functioning TJ mechanisms. "Derailing from its obligation" would mean that the State has violated its treaty obligations, and the commitments embodied in the Constitution.¹⁵⁶

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

¹⁵⁴ *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.

¹⁵⁵ *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.

¹⁵⁶ Constitution of Nepal 2015, art. 51 (b) (3) the State has the policy "to implement international treaties, agreements to which Nepal is a party."

transitional justice.¹⁵⁷ If one is to comprehend that a victim cannot file an FIR; that means there will not be a prosecution. This will create a situation where victims will never experience justice, thus raising questions on the functionality of the criminal justice system.¹⁵⁸ The court further stated that the regular criminal justice system shall never cease to be active to probe, prosecute, and take judicial action against serious human rights violations.¹⁵⁹

Therefore, until the TRC Act is amended to be able to undertake investigations which can lead to prosecution and the mechanisms demonstrate the capacity fulfilling the obligation to conduct an effective investigation, investigation on conflict era cases of enforced disappearances should be investigated and prosecuted by the regular criminal justice system, using the Penal Code.

C. OBLIGATION TO PROVIDE TRUTH

International Law acknowledges that the transitional justice Commissions are instrumental in ensuring victims' right to truth. Initially, Additional Protocol I to the Geneva Conventions established the right of relatives of the missing

¹⁵⁷ *Keshav Rai v. Nepal Government, Ministry of Home Affairs et al.*, SC Writ No.067-WO-0532, Judgment of 15 March 2016, p. 19.

¹⁵⁸ *Keshav Rai v. Nepal Government, Ministry of Home Affairs et al.*, SC Writ No.067-WO-0532, Judgment of 15 March 2016, p. 19.

¹⁵⁹ *Keshav Rai v. Nepal Government, Ministry of Home Affairs et al.*, SC Writ No.067-WO-0532, Judgment of 15 March 2016, p. 19.

to know the fate and whereabouts of their loved one.¹⁶⁰ However, human rights bodies have further expanded this by developing jurisprudence that the uncertainty about the fate of a loved one, created by not knowing the truth can amount to the violation of the right not to be subjected to torture and cruel or inhuman treatment under the composite human rights treaties.¹⁶¹

For example, in *Quintero v. Uruguay*, the HRC established that not knowing the fate and whereabouts of the loved one amounts to a violation of the Covenant rights (Article 7 of the ICCPR in particular) of the family members. HRC found that the enforced disappearance of the daughter

¹⁶⁰ For example, Additional Protocol I to the Geneva Conventions establishes the right of the relatives of the missing to know the fate and whereabouts of their loved one. Article. 32 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of Victim of International Armed Conflicts (Protocol I) 1125 UNTS 3, 8 June 1977; Resolution XIII on obtaining and transmitting personal data as a means of protection and of preventing disappearances, adopted by 25th International Conference of the Red Cross and Red Crescent, Geneva 1986.

¹⁶¹ *Katombe L Tshishimbi v. Zaire*, Human Rights Committee Communication No. 542/1993, Views of 25 March 1996, UN Doc. CCPR/C/53/D/542/1993 (1996) para. 5.5; *Ana Rosario Celis Laureano v. Peru*, Human Rights Committee Communication No. 540/1993, Views of 25 March 1996, UN Doc. 540/1993 CCPR/C/56/D/540/1993 (1996) para. 8.5; *Sarma v. Sri Lanka*, Human Rights Committee Communication No. 950/2000, Views of 16 July 2003, UN Doc. CCPR/C/78/D/950/2000 (2003), para. 9.5; *Kurt v. Turkey*, ECtHR, Application No. 24276/94, Judgment of 25 May 1998, para. 174; *Judgment of 19 November 1999*, IACtHR, *Street Children (Villagrán-Morales et al.) v. Guatemala*, Series C No. 63, paras 177, 253.4.

compounded with the denial of truth by the State caused anguish and stress to the mother. It viewed that the mother too was a victim of the violation of her right against torture or to cruel, inhuman or degrading treatment or punishment.¹⁶² Similar findings have been made by the IACtHR¹⁶³ and the ECtHR.¹⁶⁴

Jurisprudence shows growing tendencies to expand the right to truth not only to victims of enforced disappearances but also to cover victims of other gross violations of human rights.¹⁶⁵ The UN study on the right to truth also finds that this right includes cases involving gross violations such

¹⁶² *Maria del Carmen Almeida de Quintero et al. v. Uruguay*, Human Rights Committee Communication No. 107/1981, Views of 21 July 1983, UN Doc. CCPR/C/19/D/107/1981 (1983), para. 14.

¹⁶³ *Judgment of 19 November 1999*, IACtHR, *Street Children (Villagrán-Morales et al.) v. Guatemala*, Series C No. 63; *Judgment of 25 November 2000*, IACtHR, *Bámaca Velásquez v. Guatemala*, Series C No. 70, para. 159-66,230; *Judgment of 15 September 2005*, IACtHR, *Mapiripán Massacre v. Colombia*, Series C No. 134, paras 140-46, 335.1; *Judgment of 31 January 2006*, IACtHR, *Pueblo Bello Massacre v. Columbia*, Series C No. 140, paras. 163, 296.3; *Judgment of 6 April 2006*, IACtHR, *Baldeón García v. Peru*, Series C No. 147, paras 127-30, 218.4; *Judgment of 4 July 2006*, IACtHR, *Ximenes-Lopes v. Brazil*, Series C No. 149, paras. 155-63, 262.3; *Judgment of 5 July 2006*, IACtHR, *Montero-Aranguren et al. (Detention Centre of Catia) v. Venezuela*, Series C No. 150, paras 53, 160.2.

¹⁶⁴ *Kurt v. Turkey*, ECtHR, Application No. 24276/94, Judgment of 25 May 1998, para. 174.

¹⁶⁵ *Sankara et al. v. Burkina Faso*, Human Rights Committee Communication No. 1159/2003, Views of 28 March 2006, UN Doc. CCPR/C/86/D/1159/2003(2006); *Staselovich v. Belarus* Human Rights Committee Communication No. 887/1999, Views of 3 April 2003, UN Doc. CCPR/C/77/D/887/1999 (2003); *Khalilova v.*

as enforced disappearances, torture and extra-judicial execution and serious breaches of humanitarian law.¹⁶⁶ The Inter-American human rights system has articulated that the right to truth is not limited to cases of enforced disappearances, stating that it also applies to other human rights violations.¹⁶⁷

Furthermore, jurisprudence has also started to emerge that right to the truth also has a social dimension by articulating that the right to truth does not belong only to the victims and their families but also to societies suffering from gross violations.¹⁶⁸ It is important to

Tajikistan Human Rights Committee Communication No. 973/2001, Views of 30 March 2005, UN Doc. CCPR/C/83/D/973/2001 (2005).

¹⁶⁶ UNESCO, Commission on Human Rights, Promotion And Protection of Human Rights. Study on the right to the truth. Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. E/CN.4/2006/91, 8 February 2006, para. 34.

¹⁶⁷ HRC, Concluding observations: Guatemala, UN Doc. CCPR/C/79/Add.63 of 3 April 1996 , para. 25; *Rodríguez v. Uruguay*, Human Rights Committee Communication No. 322/1988, Views of 19 July 1994, UN Doc. CCPR/C/51/D/322/1988 (1994), paras 12(3), 14; *Judgment of 24 January 1998*, IACtHR, *Blake v. Guatemala*, Series C No. 36, para. 97; *Judgment of 15 September 2005*, IACtHR, *Mapiripán Massacre v. Colombia*, Series C No. 134, paras. 140-46; *Judgment of 29 November 2006*, IACtHR, *La Cantuta v. Perú*, Series C No. 162, paras 81-98.

¹⁶⁸ *Judgment of 25 November 2003*, IACtHR, *Myrna Mack Chang v. Guatemala*, Series C No. 101, paras. 274-275; *Judgment of 8 December 1995*, IACtHR, *Caballero Delgado and Santana v. Colombia*, Series C No. 22, para. 58; *Judgment of 27 February 2002*, IACtHR, *Trujillo Oroza v. Bolivia*, Series C No. 92, paras. 99-111; *Judgment of 8 July 2004*, IACtHR, *Gómez Paquiyauri Brothers v. Peru*, Series C No. 110; *Judgment of 25 October 2012*, IACtHR, *Massacres of El Mozote and Nearby Places v. El Salvador*, Series C

combat impunity, prevent future violations and promote reconciliation.¹⁶⁹ The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law states that "States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimisation and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations."¹⁷⁰ It is now

No. 252, para. 198 ; HRC, Concluding observations: Guatemala, UN Doc. CCPR/C/79/Add.63 of 3 April 1996, para. 25.

¹⁶⁹ *Judgment of 25 November 2003*, IACtHR, Myrna Mack Chang v. Guatemala, Series C No. 101; *Judgment of 22 February 2002*, IACtHR, Bámaca Velásquez v. Guatemala, Series C No. 91; *Judgment of 25 October 2012*, IACtHR, Massacres of El Mozote and Nearby Places v. El Salvador, Series C No. 252, para. 298.

¹⁷⁰ UNGA, Resolution adopted by the General Assembly on 16 December 2005, 60/147. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, 21 March 2006, (hereafter UN Principles on Remedy and Reparation), principle X., para. 24.

increasingly argued that in a democratic society the truth about grave human rights violations must be known, which the State must satisfy, on the one hand, through the obligation to investigate human rights violations, and on the other hand, through the public disclosure of the results of criminal and investigation processes.¹⁷¹

D. REPARATION

Reparation under the Penal Code is narrow and limited to the victims' right to compensation.¹⁷² 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 are entitled to get compensation.¹⁷³ 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. However, the provision of social rehabilitation for victims of crimes

¹⁷¹ *Judgment of 25 November 2000*, IACtHR, *Bámaca Velásquez v. Guatemala*, Series C No. 70; *Judgment of 25 October 2012*, IACtHR, *Massacres of El Mozote and Nearby Places v. El Salvador*, Series C No. 252; *Judgment of 20 November 2012*, IACtHR, *Gudiel Álvarez et al. ('Diario Militar') v. Guatemala*, Series C No. 253.

¹⁷² National Penal Code 2017, section 32.

¹⁷³ National Penal Code 2017, section 32.

provides some room for interpretations, where the Courts could expand it through its jurisprudence.

Furthermore, the Constitution of Nepal also provides the right to social rehabilitation for victims suffering from crimes. Article 21 states “a victim of a crime shall have the right to get information about the investigation and proceedings of a case in which he or she is the victim as well as have the right to justice including social rehabilitation and compensation in accordance with the law.” Besides, it also stipulates grounds of compensation to victims of torture,¹⁷⁴ victims of unlawful or detained with bad intention,¹⁷⁵ victims of physical, mental, sexual, psychological, or any other forms of violence or exploitation.¹⁷⁶ The Crime Victim Protection Act, 2018 enacted to implement fundamental rights envisions victims’ right to fair treatment,¹⁷⁷ as well as compensation and social rehabilitation.¹⁷⁸ This could be considered as an opportunity to expand understanding of reparation for victims suffering gross violations of human rights.

However, the notion of receiving compensation from the offender, as the Penal Code provides, makes justice dependent on the offender’s financial status which is not how justice should be delivered. It creates hurdles in ensuring victims’ right to compensation, let alone reparation. Although provisions exist to suggest that if the offender is unable to pay the financial compensation to the victim within a stipulated time, the Courts can order to recover the compensation

¹⁷⁴ Constitution of Nepal 2015, art. 22 (2).

¹⁷⁵ Constitution of Nepal 2015, art. 23 (3).

¹⁷⁶ Constitution of Nepal 2015, art. 38 (3).

¹⁷⁷ The Crime Victim Protection Act 2018, section 4.

¹⁷⁸ The Crime Victim Protection Act 2018, section 19 (1) (2).

amount from the property of the offender,¹⁷⁹ the victim's right to compensation could be jeopardised.

The understanding of reparation under international law is wider and includes several elements. Article 24(4) of ICPPED recognises various forms of reparation. For example, Article 24(4) and (5) of ICPPED provides a broad definition of reparation that incorporates the right to obtain reparation and prompt, fair, and adequate compensation as well as the right to obtain reparation including material and moral damages and, where appropriate, other forms of reparation such as: (a) restitution; (b) rehabilitation; (c) satisfaction, including restoration of dignity and reputation; and (d) guarantees of non-repetition.

The Supreme Court has also started to articulate States' obligation to provide reparation as can be seen in *Liladhar v. Government of Nepal*. Although the case was related to forceful eviction and confiscation of land by the armed groups, the Supreme Court highlighted that it is the obligation of the State to provide compensation. It cannot shift the responsibility to other non-state actors. The Supreme Court has emphasised that the State has a primary obligation to protect citizen's right to life and property. Even if the seizure of claimants' property happened during the conflict-era by the then rebel group, the State cannot shift the blame on the other party for the act of unlawful seizure of the property.¹⁸⁰ The State is believed to be detached from its obligations if it could not act effectively to prevent incidents that undermine

¹⁷⁹ Criminal Offences (Sentencing and Execution) Act 2017, section 45(1).

¹⁸⁰ *Liladhar Bhandari v. Office of the Prime Minister and Council of Ministers et al.*, NKP 2065, Issue No 9 Decision No. 8012, para. 13.

and violate the rights of its citizens.¹⁸¹ The Court deemed that the incident deprived and continues to deprive the claimants of their rights to obtain benefit from their property.¹⁸² Hence, SC issued an order to return the property of the owner captured unlawfully and provide compensation for the loss by assessing the damage caused by the seizure of said property.¹⁸³ 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.

The TJ mechanisms such as the TRC and the CIEDP need to fulfil their mandates to ensure truth, contribute to justice, reparation and guarantee of non-repetition. However, both of these Commissions have largely failed to fulfil their mandates. Even after almost six years of operation, they were neither able to investigate any case and recommended prosecution nor uncovered the truth and recommended reparation for victims.

¹⁸¹ *Liladhar Bhandari v. Office of the Prime Minister and Council of Ministers et al.*, NKP 2065, Issue No 9 Decision No. 8012, para. 14.

¹⁸² *Liladhar Bhandari v. Office of the Prime Minister and Council of Ministers et al.*, NKP 2065, Issue No 9 Decision No. 8012, para. 16.

¹⁸³ *Liladhar Bhandari v. Office of the Prime Minister and Council of Ministers et al.*, NKP 2065, Issue No 9 Decision No. 8012, para. 18.

7. LEGITIMACY AND THE NEED FOR THE AMENDMENT TO THE TJ PROCESS

The existing transitional justice Commissions' legitimacy is seriously hampered because of the way the TRC Act was passed. Undermining the consultative process, ignoring the call of victims and civil society and the order of the Supreme Court the TRC Act was passed midnight in April 2014, with parliamentarians unable to comment. The mandates also include amnesty, even to those responsible for gross violations including the enforced disappearances. Many of the sections of the Act were challenged by victims. Further, the Supreme Court has also found many of those sections, including the one on amnesty, violates the previous decision of the Supreme Court, Nepal's constitution, and Nepal's international obligation. The Court ordered amendments to be made, but to date, there have been no amendments.

The legitimacy of Truth Commissions is important for the success of a TJ process.¹⁸⁴ A Commission should be perceived as an objective body capable of delivering its mandates.¹⁸⁵ Its Commissioners need to be appointed following an open

¹⁸⁴ James L Gibson, "On legitimacy Theory and the Effectiveness of Truth Commissions", in *Law and Contemporary Problems*, Volume 72, 2009, p. 123.

¹⁸⁵ Jeremy Sarkin, "The Interrelationship and Interconnectedness of Transitional Justice and the Rule of Law in Uganda: Pursuing Justice, Truth, Guarantees of Non-Repetition, Reconciliation and

and transparent process,¹⁸⁶ to ensure an inclusive and well-balanced Commission consisting of highly respected people.¹⁸⁷

The Updated Set of Principles to Combat Impunity contains some minimum standards for Truth Commissions.¹⁸⁸ It requires Commissions to be established after broad public consultations¹⁸⁹ and to follow a process to ensure the independence of the Commission.¹⁹⁰ The State should guarantee the independence, impartiality, and competence of the Commission.¹⁹¹

Until the TRC Act is amended through a consultative process to respect the SC's order, its legitimacy will continue to

Reparations for Past Crimes and Human Rights Violations" in *Hague Journal on the Rule of Law*, Volume 7 (1), 2015, p.111, 126.

¹⁸⁶ Mark C Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' in *The Academy of Management Review*, Volume 20(3),1995, p. 571.

¹⁸⁷ Jeremy Sarkin, "The Interrelationship and Interconnectedness of Transitional Justice and the Rule of Law in Uganda: Pursuing Justice, Truth, Guarantees of Non-Repetition, Reconciliation and Reparations for Past Crimes and Human Rights Violations" in *Hague Journal on the Rule of Law*, Volume 7 (1),2015, p.111, 126.

¹⁸⁸ UNESCO, Human Rights Commission, Promotion And Protection of Human Rights. Impunity. Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher*-Addendum : Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005 (hereafter Principle against impunity).

¹⁸⁹ Principle against impunity, principle 6.

¹⁹⁰ OHCHR, *Rule-of-Law Tools for Post-Conflict States. Truth Commissions*, Geneva, 2006.

¹⁹¹ Principle against impunity, principle 7.

be questioned, thus hindering its work. Even if these commissions enjoy legitimacy and function effectively, their role is to contribute to truth, justice, reparation, and non-recurrence. This cannot be done by substituting the criminal justice system but by complementing it.

Advocacy Forum (AF) is a leading non-profit, non-governmental organization working to promote the rule of law and uphold international human rights standards in Nepal. Since its establishment in 2001, AF has been at the forefront of human rights advocacy and actively confronting the deeply entrenched culture of impunity in Nepal.

AF's contribution in the human rights advocacy in Nepal has been recognized by Human Rights Watch (HRW) in terms of "One of Asia's most respected and effective human Rights Organization". AF is a recipient of a number of awards including "Women In Leadership Award" (conferred by Swiss Agency for Development and Cooperation)

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