

Exhumations of bodies of the disappeared – in need of a policy framework



Advocacy Forum

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Executive Summary

The disappearance, killing and subsequent exhumation of the bodies of five students in Nepal's southern Dhanusha district is emblematic of the impunity that continues to protect perpetrators of serious crimes under international law. A summary of key historical points in the case gives a sense of the agony that institutionalized impunity causes families of the victims:

- five students were rounded up and killed in Dhanusha on 8 October 2003;
- almost three years later, on 23 January 2006, after years of denials and obfuscation, the Royal Nepal Army (RNA, now Nepal Army) in a letter to the National Human Rights Commission (NHRC) acknowledges the killing of these five students on the date of their arrest, but points the finger to the Nepal Police;
- six months later, on 9 July 2006, under constant national and international pressure led by family members, the Nepal Police tell families that they have registered a First Information Report,

the essential first step in a prosecution, and they fence off the area of the clandestine burial;

- after three years of inaction and neglect of the burial site, the Nepal Police acknowledge under Supreme Court questioning that an FIR was never filed and is ordered on 3 February 2009 to correct this and to initiate an investigation;
- seven years after the disappearance, in September 2010, after the leading advocate and father of one of the victims has died of heart failure, the exhumation of the bodies takes place, but in an *ad hoc* manner that falls below international standards of criminal procedure and respect for families of victims;
- in June 2011, one of the people identified as involved in the disappearances is promoted to a senior Nepal Police Department role. In an interim ruling, the Supreme Court holds that a recommendation by the National Human Rights Commission for him to be prosecuted is not sufficient basis to order the suspension of his promotion pending the outcome of the investigations.

This report focuses on the exhumation, and points to weaknesses in law and in practice. Advocacy Forum-Nepal (AF) believes that the *ad hoc* nature in which exhumations to date have been processed, with a lack of clarity on the responsibilities of individual authorities, the slowness of the process, the lack of attention to safeguarding evidence and ensuring it is admissible in legal proceedings, the lack of focus on the needs of the relatives during the exhumation processes in Dhanusha and elsewhere – all draw attention to the urgent need for a comprehensible policy framework to regulate exhumations undertaken as part of the gathering of evidence in

criminal investigation procedures and/or as part of any future transitional justice mechanisms.

As Nepal is still in the early stages of dealing with the legacy of the armed conflict, there is an opportunity to put in place a clear legal and policy framework to ensure exhumations are conducted in line with international standards and best practices. Such a framework should be grounded in international law and best practices and include:

1. A strengthening of the existing legal framework including by amending the State Cases Act to ensure the compulsory involvement of forensic doctors and the prohibition for police to dispose of bodies.
2. A detailed victim and witness protection law should be put in place to ensure the necessary protection measures are available for victims of crime and human rights violations and key witnesses.
3. An unambiguous allocation of responsibilities among all the relevant agencies at the pre-, during and post-exhumation stages.
4. The creation of special investigation units in the Nepal Police and Attorney General's Office and the review of the Attorney General's role to ensure there is no conflict of interest at any stage of the investigations.
5. Ensure the right to truth of the relatives, their consensual participation in the process and include measures to ensure they are not re-traumatised.
6. Ensure better criminal procedures and practice that have the safeguarding of evidence as one of its central concerns and

improve the chances of obtaining truth, justice and reparations. These three rights from a victim's perspective are integrated and interconnected, and must be seen together in any analysis or set of recommendations.

7. The provision of psychological support for the families should be ensured, including through prior consultations with families of victims on any needs, expectations, and questions that they may have and, while, ensuring that re-victimization does not occur, permitting access of victims, as rights holders, to scientific and technical information, and favoring integral processes in search of truth, justice and reparations.
8. The standardized collection of *ante mortem* data should be incorporated into the policy framework, including a clear public awareness and communications strategy and the use of standard collection forms. Those collecting the information should be properly trained, including through sensitization on the psychosocial needs of the families. Sufficient financial resources should be allocated for this purpose.
9. A proper victim and witness protection scheme should be put in place and any alleged perpetrators in positions that may influence investigations should be suspended pending the outcome of investigations.

A comprehensive list of recommendations can be found at the end of this report.

The example of the five Dhanusha students

Introduction

On 15 February 2011, national and international forensic experts exhumed what is believed to be the last of the human remains of five students from a site near the Kamala River, at Godar, Dhanusha district. This concluded an exhumation process initiated by the National Human Rights Commission (NHRC) in September 2010 to recover the remains thought to be of five students who disappeared after they were arrested by the security forces on 8 October 2003.

This briefing documents the *ad hoc* way in which exhumations have been carried out in Nepal to date and links these to the wider systemic failures in the criminal justice system that so far has failed to hold to account those responsible for disappearances. It will describe the problematic issues identified during the exhumations in Dhanusha and in other previous exhumations. Then, it will examine international standards and best practices and finally set out recommendations taking into account the Nepali context.

Disappearances were a prominent feature of the armed conflict between the security forces and the Communist Party of Nepal-

Maoist (CPN-M) between 1996 and 2006. The NHRC received 1,619 complaints of enforced disappearances: 1,234 were attributed to the security forces, 331 to the Communist Party of Nepal-Maoist and 54 were not attributed to either party to the conflict. In August 2010, the International Committee of the Red Cross (ICRC) reported that 1,378 persons reported missing during the conflict remained unaccounted for.¹

According to the Government, 1,302 persons have been reported as disappeared.²

So far, very few bodies of the people who disappeared at the hands of the security forces or the Maoists during the conflict have been exhumed. It is likely that once the High-level Commission on Disappearances and the Truth and Reconciliation Commission are established, that many more relatives and witnesses will step forward and identify sites where the remains of victims of enforced disappearances have been illegally buried.³ In the meantime, there have been some reports of illegal exhumations of bodies by unauthorized persons. For example, in Rolpa District on 24 March 2011, members of the Maoist-affiliated All Nepal People's Artist Federation exhumed the bodies of 11 members of the federation

¹ International Committee of the Red Cross, 'List of Names of People Being Sought by Their Relatives: Update 30.08.10', available at http://www.familylinks.icrc.org/wfl/mis_npl.nsf/Bottin!OpenView&lang=eng. This figure includes people who went missing at the hands of both the security forces and the CPN-M.

² This figure dates from December 2010 and is the official number of relatives of the disappeared who have received "interim relief" provided by the Ministry of Peace and Reconstruction.

³ Bills for the establishment of both commissions have been before the Legislative Committee of the Parliament since April 2010. For more details, see Advocacy Forum and Human Rights Watch, "Indifference to Duty", December 2010, page 10-11, available at <http://www.advocacyforum.org/publications/impunity-reports.php>.

who were said to have been killed by the then Royal Nepal Army (RNA, now Nepal Army) in June 1999. It is unclear why these bodies were exhumed this year (commemoration events have been held yearly since 2000) and what has happened to the remains since they were exhumed.⁴

Advocacy Forum-Nepal (AF) believes that the *ad hoc* nature in which exhumations to date have been processed, with a lack of clarity on the responsibilities of individual authorities, the slowness of the process, the lack of attention to safeguarding evidence and ensuring it is admissible in legal proceedings, the lack of focus on the needs of the relatives during the exhumation processes in Dhanusha and elsewhere – all draw attention to the urgent need for a comprehensible policy framework to regulate exhumations undertaken as part of the gathering of evidence in criminal investigation procedures and/or as part of any future transitional justice mechanisms. This policy framework should have an unambiguous allocation of responsibilities among all the relevant agencies at the pre-, during and post-exhumation stages, have the safeguarding of evidence as its central concern, ensure the right to truth of the relatives, their consensual participation in the process and include measures to ensure they are not re-traumatised. It should be grounded in international law and best practices.

The case of the Dhanusha students

Sanjeev Kumar Karna and Durgesh Labh from Janakpur Municipality-10, Jitendra Jha from Janakpur Municipality-4, Pramod

⁴ INSEC, 'Bodies of 11 Maoist Cadres Exhumed', 24 March 2011, <http://www.insec.org/index.php?type=news&id=7866&lang=en>. There have been other reports of illegal exhumations at Lamjung and Palpa.

Narayan Mandal from Kurtha VDC-1 and Shailendra Yadav from Duhabi VDC-7 were arrested with six other persons (whose identities are not known) on 8 October 2003 by security personnel under the unified command of the then Royal Nepal Army (RNA). All those arrested were young men in their mid-twenties.

According to witnesses who do not want to be identified, a group of around 20-25 joint security forces comprising of RNA, Armed Police Force and Nepal Police arrived in four vans at a place called Khataiyachauri VDC Ward No-4. Some were in uniform, while the majority was in plainclothes. They reportedly arrested 11 persons from a house in the area. Each of them was blindfolded, beaten with sticks and rifle butts and then taken to the then Regional Police Office (now Zonal Police Office) in Janakpur. Six of the eleven arrested students were reportedly released the next day, while five have remained disappeared since then.

Jay Kishor Lav, the father of Sanjeev Kumar Karna, one of the arrested students, has testified that he witnessed a group of young men including his son being lined up in the compound of the Regional Police Office in Janakpur on 8 October 2003. However, police denied and continue to deny their involvement in the detention of these individuals, including the son of Jay Kishor. On 9 October 2003, the families complained to the NHRC and requested an investigation.

The initial NHRC investigations consisted of writing letters to the security forces requesting confirmation of the whereabouts of the disappeared students. As the armed conflict between the government and the CPN-M intensified and the number of reported disappearances escalated, the NHRC did not have the capacity to thoroughly investigate all individual cases. After the King took power in February 2005 and appointed new members of the Commission, its effectiveness declined further.

Jai Kishor Lav reportedly visited all army barracks and police stations in Dhanusha and neighbouring districts more than a dozen times. On all visits, he was told that the students had not been and were not being held by the army or the police. He also wrote thousands of letters to different national and international human rights organizations, made more than 100 phone calls to the NHRC, and wrote numerous letters to political parties and national bodies, such as the Nepal Bar Association. In response, he received thousands of letters from different national and international organizations. He also personally wrote to the then King, Prime Minister and Home Ministry. Over a period of seven years, he devoted his life in search of his son. (Jay Kishor Lav died of a heart attack in April 2010, five months before the exhumations started.)

On 23 January 2006, more than three years after their initial inquiries, the NHRC received a letter from the Human Rights Cell of the RNA, stating that the five students had been killed in a police operation in Janakpur area on 8 October 2003. The letter did not state how they were killed, where their remains were or if their bodies had been disposed of. Following the correspondence from the RNA, the NHRC wrote to the Inspector General of Police. In a response dated 24 February 2006, Nepal Police Headquarters stated that a police task force, coordinated by a Deputy Inspector General, was investigating the case.

After the end of the armed conflict in April 2006, the relatives felt some level of security and some hope for justice and attempted to file a First Information Report (FIR, a formal complaint) with the local police. According to the State Cases Act, such complaints have to be filed “as soon as possible” at the “nearest police office”.⁵ In this

⁵ State Cases Act, 1955, Section 3(1).

case, this meant that they had to complain at the Janakpur District Police Office, the subordinate police office of the regional police where Jai Kishor last saw his son and the other students being lined up. The families therefore feared that the police personnel were likely to be sympathetic to some of the people involved in the arrest and disappearances. Nevertheless, they went to the police station on 9 July 2006 in the company of AF lawyers and representatives of the United Nations Office of the High Commissioner for Human Rights in Nepal (OHCHR). The police first refused to file the FIR. After hours of discussion, they finally accepted the FIRs. The families of Sanjeev, Jitendra, Durgesh, and Shailendra jointly filed a FIR about their arrest and enforced disappearance and the family of Pramod Narayan filed a separate one. On the same day, the families (accompanied by AF lawyers and officers of OHCHR) showed the police the alleged site where, according to villagers, the bodies of the five students had been buried and where villagers had reportedly seen some clothes and slippers in the days immediately after they were buried. The police demarcated the site with barbed wire, but did not take any action to start the process of exhumation of the bodies. The police also did not carry out any investigations despite repeated formal and informal inquiries from Jai Kishor, AF and others to be informed of the progress.

On 28 January 2007, Jay Kishor filed a writ petition in the Supreme Court with the assistance of AF seeking an order for the Dhanusha police to inform the court of the progress in the investigations. At a preliminary hearing on 4 February 2007 Justice Sarada Prasad Pandit issued a 15-day “Show Cause Notice” against the Dhanusha District Police Office (DPO) and the Regional Police Office. On 21 August 2007, the court ordered the Nepal Police Headquarters to provide a copy of the report of the police task force set up to investigate the

case. The police informed the Supreme Court on 6 October 2007 that the task force was defunct and that it was forming a new committee. In a further hearing, on 3 March 2008, the Supreme Court ordered the NHRC to submit all the documents in the case.

In its final hearing on 3 February 2009, the Supreme Court, after receiving a reply from the Dhanusha DPO arguing that it had not registered the FIRs in Diary No. 10⁶ as per the law, and thus did not take any action regarding the FIR, issued an order to the DPO to immediately register the FIR and to promptly proceed with investigations. Finally, the FIR was registered in February 2009. In its judgment, the Supreme Court also noted the conflicting versions of events provided by the army and the police: on the one hand, an internal police investigation report states that the students were handed over to the Bhiman Barracks; on the other, the army informed the court that the police were responsible for the disappearances and killings. It is to be noted that neither the Nepal Police nor the Nepal Army has submitted the reports of their internal investigations resulting in these conclusions to the court.

In the absence of much progress in the criminal investigation and a lack of transparency about any internal disciplinary investigations within the Nepal Police and Nepal Army, human rights defenders approached the Supreme Court in July 2011 when Kuber Singh Rana, named as one of the suspects in the FIRs filed by the relatives, was promoted to Assistant Inspector General of Police (AIG). They sought a court order to suspend his promotion to avoid him

⁶ Several police forces in the country have used this argument to suggest that somehow this would absolve the police of its responsibilities to conduct criminal investigations under the State Cases Act. AF maintains that the use of specific registers is an administrative police matter, and does not in any way negate obligations set out in law.

being able to interfere with the investigations. The court refused to give the order, but did direct the police and Attorney General's Office to report back on a monthly basis to the court and the NHRC on progress in the case.

Where those accused of serious human rights violations (including enforced disappearances, summary execution, and torture) are in an official position within the State, international human rights law requires that they should be suspended from office pending the investigation into the allegation. This has been recognized as necessary both to protect the investigation from interference from influence by the alleged perpetrator,⁷ and to uphold or restore public confidence in the country's institutions.⁸

Protection of the site

As stated above, in July 2006, at the same time that police appeared to have filed an FIR (later denied by police), relatives had pointed out the probable site of the clandestine burial to the Dhanusha police based on reliable witness testimony. Though the police had initially demarcated it with barbed wire, this was later removed, though it is unclear by whom and when. Amid fears that the police were not adequately securing the site, AF felt compelled to hire a villager to act as a watchman over the site. Between July

⁷ See, e.g. Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, Principle 15; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Recommended by General Assembly resolution 55/89 of 4 December 2000, Principle 3(b).

⁸ UN Human Rights Council, Report of the independent expert on the situation of human rights in the Democratic Republic of the Congo, Mr. Titinga Frédéric Pacéré, A/HRC/4/7, 21 February 2007, para. 67.

2006 and September 2010, the police failed to proceed with the exhumations. This is despite the Supreme Court ruling of February 2009 and directions from the public prosecutor in November 2009 (see below).

Exhumation of the Victims' Bodies: the NHRC takes the initiative

The NHRC completed its own investigations on 29 January 2008. It wrote to the Prime Minister and Council of Ministers recommending that the government should provide NRs 300,000 compensation to the families and initiate further investigations with a view to bring those responsible to justice. However, as of early 2011, the families have not received this compensation recommended by the NHRC though they have received NRs 100,000 as “interim relief”.⁹

The NHRC decided to initiate an exhumation due to the persistent inaction of the Dhanusha police even in the face of the Supreme Court order of February 2009 and continuous pressure by Jai Kishor, AF, and other HR organizations. This refusal to obey the highest court was not only a case of impunity, but a rejection of the rule of law itself by the institutions bound to uphold it. In this context, the NHRC sought the assistance of Finnish forensic experts with whom it had cooperated earlier during the exploration of a possible exhumation site at Shivapuri National Park (see below). Also participating were staffs of the National Forensic Science Laboratory (NAFOL), Forensics Medicine Department of the Institute of Medicine (FMD, IOM), the Department of Archaeology (DOA) and the forensic

⁹ For more information on the “interim relief” scheme, see Advocacy Forum, ‘Discrimination and Irregularities. A Painful Tale of Interim Relief in Nepal’, 2010, <http://www.advocacyforum.org/publications/transitional-justice.php>

laboratory of the Nepal Police.¹⁰ Eventually, the Nepal Police also agreed to participate in the exhumation process.¹¹

On 6 September 2010, the process of exhumation began under the formal authority of the police with the technical assistance of the NHRC. By the evening of 14 September 2010, four skeletal remains had been recovered along with 21 other pieces of evidence, including cartridge cases, bullets, worn clothes and footwear, necklaces, etc. The Dhanusha Police secured all the evidence and documented the scene of the crime. Observing the skeletal remains, it reportedly appeared that the victims had been murdered: the head of one of the bodies appeared to have been severed and there were what appeared to be bullet holes observed in another body. All the bodies were reportedly lying face down and two of them were said to have been blindfolded. Then, on 19 September 2010, the NHRC stopped the exhumation. According to some reports, the exhumations were stopped because of sickness suffered by the experts involved in the process. According to others, they were stopped because the fifth body they were trying to locate could not be found. Finally, on 14 February, 2011, the team led by the NHRC resumed the exhumation and found the remaining fifth body.¹²

Relatives kept in the dark

From early on in the exhumation process, there was concern that the presumed relatives of those exhumed, as well as their legal

¹⁰ Sumina Karki, 'Of disappearances, and forensic science', MyRepublica, 24 December 2010, http://theweek.myrepublica.com/details.php?news_id =26449.

¹¹ Ibidem

¹² Kathmandu Post, 'Dhanusha burial site: NHRC starts over Godar exhumation', 14 February 2011, <http://202.166.193.40/2011/02/14/headlines/Dhanusha-burial-site-NHRC-starts-over-Godar-exhumation/329573/>

representatives and concerned human rights organizations, were not provided sufficient information about the process of exhumation before it actually started. This is denied by the NHRC. However, interviews by AF and other human rights organizations with some of the relatives indicate that many, if not all, of the relatives were not fully informed in advance of the start of the exhumation process.

Approximately one week before the exhumations started, the local NHRC office called a meeting for local NGOs, but did not invite the relatives. In the meeting, the focus of discussions was on the possible location of the graves. There was no mention of the relatives. On 2 September 2010, the relatives themselves were requested to come to the local NHRC office in Janakpur, Dhanusha and were asked to fill in an *ante-mortem data* form, without being clearly informed of the specific plans ahead. Then, on 4 September 2010, just before the team set off for Dhanusha, the NHRC on short notice called a meeting in Kathmandu to provide a briefing to national NGOs on how the exhumation process was being initiated. By that time, it was evident that NHRC plan was final, and there was limited scope to influence the way in which relatives were going to be participating and kept informed. At this meeting, NGO representatives raised concern about the legality of the exhumation, and sought clarification about the authority in charge, i.e. whether the Dhanusha police or the NHRC were leading the investigations. It appears that the decision to conduct the exhumations under the formal authority of the police was taken very late in the process, and that the relatives were never informed about this. Given their concern that senior police officers were involved in the arrests and disappearances of their loved ones, it would have been particularly important to explain this to them and set out the measures taken to ensure the process could not be interfered with and the evidence collected would be secured. The

NHRC also appointed a former member of the NHRC, Sushil Pyakurel as an observer for civil society during the exhumations though this was not discussed during the NGO briefing in the morning of 4 September 2010

Most of the relatives stated that they learned about the actual start of the exhumation from radio broadcasts on the day that the exhumation began. They were not formally informed, let alone consulted and no counseling was offered to them in the period leading up to the start of the exhumation. After the NGOs raised concern about the lack of counseling, the ICRC highlighted and stressed that psychosocial needs of the families should be given due consideration. Subsequently, during the later part of the exhumations, the families were provided a one-off counseling session by an organization based in Sindhuli district and supported by the ICRC. The ICRC also organised a briefing session on the psychosocial needs of the families of the missing, including sensitization for the organisers and support staff taking part in the exhumation.

In addition to members and staff of the NHRC, national and international forensic experts and the Dhanusha police, a person from OHCHR was present providing technical support during the exhumation. On the first day, two human rights defenders from AF managed to get access to near the actual site of the exhumations. But, on the following days, they and other human rights defenders were told by the police to remain at a distance of approximately 50 meters. During breaks in the work, or at the culmination of work, some human rights defenders managed to move closer to the site and meet informally with either NHRC staff or police officials. However, this was an *ad hoc* form of access that formally violated the boundaries set by the NHRC.

OHCHR's formal role was as an observer to the process. The organization subsequently submitted a number of recommendations to the NHRC to improve future exhumations. In May 2011, OHCHR provided AF with a list of these recommendations:

- Put in place a plan for all weather conditions; prepare all equipment and materials needed in an organized manner; clear sharing of organized responsibilities; arrangements of better equipments; coordination with stakeholders, information management and clear communication.
- Holding separate briefing meetings with media and human rights defenders beforehand, where the process, methods, responsibilities and objectives are explained clearly. It must also be clearly explained why access and photographing is not allowed at all times.
- Clarify the legal framework regarding the competence of NHRC to undertake exhumations when there is a pending criminal investigation.¹³

Contrary to best practice, the exhumation team did not properly collect *ante-mortem* data from the relatives, nor did they put arrangements in place to provide psychosocial counseling to the victims' families.¹⁴ The team did not ask the families what they expected from the process in terms of their presence, nor did they provide information on the steps to be taken, etc. The collection of *ante mortem* data by the NHRC was done in isolation, without

¹³ Email exchange with staff member of OHCHR, 11 May 2011.

¹⁴ For a summary of best practices involved in the collection of ante-mortem data, see "ICRC: The Missing. Action to resolve the problem of people unaccounted for as a result of armed or internal violence and to assist their families. Final report and outcomes", 2002, http://www.icrc.org/eng/assets/files/other/icrc_themissing_102002_en_3.pdf, page 23-24.

explanation to the relatives of the wider process ahead. The relatives were reportedly also asked to fill out the forms without being provided much guidance.

Throughout the period from 6 to 19 September 2010, while the exhumations proceeded, the families were not provided daily progress reports about the findings of the process of exhumation. Some relatives were allowed temporary access to the site on three occasions (including on 8 September 2010). Each time, this only happened after they explicitly requested access from the NHRC.¹⁵

Similarly, as stated above, when the team stopped the exhumation on 19 September 2010, the relatives were not formally informed and the reason for the cessation was not made clear. According to some reports, the NHRC called a halt to the exhumations as it had been unable to locate the fifth body, after digging “58 trenches, nine extensions and two blocks”.¹⁶ Other reports said the suspension was due to illness. The relatives were particularly upset that the team did not inform them about when they would resume the exhumation of the remains of the fifth body.

During the first of two subsequent de-briefings conducted by the NHRC in Kathmandu on 30 September 2010, concerns were raised about the lack of clear legal authority and guidelines to ensure a smooth and effective investigation and prosecution. One human rights defender also expressed concern about the lack of involvement

¹⁵ The NHRC maintains that relatives had indicated that they did not want to be involved in the whole exhumation process, but only wanted to visit the site if there was “progress”. However, others report that at least some of the families had indicated they wanted to be present but had been told that it was not possible as there was no transport available.

¹⁶ Kathmandu Post, ‘Dhanusha burial site: NHRC starts over Godar exhumation’, 14 February 2011, <http://202.166.193.40/2011/02/14/headlines/Dhanusha-burial-site-NHRC-starts-over-Godar-exhumation/329573/>

of the families with the exhumation process, and regarding the appearance of arbitrariness in keeping human rights defenders at a distance of 50 meters most of the time. The criticism was not well received by the NHRC. There were also complaints that the team did not provide counseling or support for the victims' families. The donors, OHCHR or INGOs observers present did not pick up on this issue. In response, the NHRC said that they were prepared to provide counseling to the victims' families if that was requested. This resulted in the relatives being permitted to be present during the exhumation of the fifth body in February 2011.

The process of identifying the five exhumed bodies is reportedly underway at the Teaching Hospital while advance forensic tests are being carried out at University of Helsinki.

At the end of the process in September 2010, the relatives were not formally asked to identify any of the items recovered during the exhumation. Nor have the police requested them to come to the DPO to identify them since. As of early August 2011, the families are not clear when the remains are likely to be returned to them to allow them to perform the last rituals or what the process and plans for that are.

Experiences of relatives during other exhumations

The NHRC in the past has undertaken a small number of other exhumations. AF is aware of six cases where forensic doctors have exhumed bodies under the authority of the NHRC. It appears that the NHRC took on this responsibility for humanitarian purposes, such as for the body to be returned to the family rather than as a process of collecting evidence of a crime, safeguarding the chain of custody of the evidence to be presented before police and public prosecutors as part of a larger body of evidence and recommendations for further investigations and prosecutions of those responsible as per the normal criminal procedure.

The Disappearance of Sarala Sapkota

On 11 January 2006, a forensic pathologist from Teaching Hospital in Kathmandu was engaged by the NHRC to recover the remains of 15-year-old Sarala Sapkota from the forest near her village, Chhapagaun, Jeevanpur VDC, Dhading District. Sarala Sapkota had disappeared after she was arrested from her grandfather's house on 15 July 2004. When her relatives went to Baireni Barracks and the

Dhading DPO, the officers denied that the arrest had taken place. For 16 months, the family received no information on Sarala's whereabouts. The father filed complaints with the NHRC and the ICRC. He later informed them of a stench of what could be a body coming from nearby fields. The NHRC sent a delegation to examine the site on 22 December 2005 and then returned to perform the exhumation on 11 January 2006.

This was the first exhumation undertaken at the initiative of the NHRC. The forensic report and post-mortem report was submitted to the NHRC. The NHRC provided a copy to the DPO but to AF's knowledge, the DPO has not taken any action to investigate the case, despite a FIR filed by the father. On 14 July 2008, the NHRC concluded its investigations. It submitted its recommendations to the Government on 19 August 2008, recommending that the family be provided NRs 300,000 compensation and that the police initiate prompt investigations into the FIR. As of early August 2011, the family has not received the compensation recommended by the NHRC, though it has received NRs 100,000 "interim relief". Sarala's remains continue to be held at the Forensic Department of the Teaching Hospital, Kathmandu as the father is refusing to perform funeral rites unless justice has been done. Despite a Supreme Court order of 31 May 2010 ordering the Dhading police to promptly proceed with investigations, there is no sign of progress.

The Disappearance of Hari Prasad Bolakhe

Similarly, after the NHRC, during its investigations into the disappearance of Hari Prasad Bolakhe obtained information from witnesses that Hari had been killed and that his body was buried in a forest at Ganesthan, Kavre District, it proceeded with organizing an exhumation without involving the police. On 6 July 2006, the NHRC

exhumed Hari's body together with the clothes and shoes he was wearing at the time of his arrest. The father and brother of Hari Prasad were present. Forensic examinations concluded that Hari had died due to a "gunfire injury to the pelvis." The forensic department sent copies of the forensic report to the Kavre police and the NHRC though the criminal investigations has seen little progress since.

The Shivapuri National Park Case

In mid-December 2007, the NHRC organized a visit to identify a possible burial site at an area in Shivapuri National Park, north of Kathmandu city, where it is alleged that the body of one of many people detained at the Maharajgunj army barracks in 2003 who subsequently disappeared had been taken and cremated by the RNA. The individual was thought to be one of 49 people named in a May 2006 report by OHCHR which documented torture and disappearances from the barracks.¹ In this instance, in addition to national forensic experts, two forensic experts from Finland were engaged.

The experts reportedly tested 15 different objects — coal-like black objects, black soil, plastic and rubber-like materials and all other collected objects, including pieces of woods and clothes — in a laboratory in Finland. In November 2008, the NHRC received the results which stated that the remains were human. The NHRC then announced that it would invite the Finnish experts — Professor Helena Ratna of the University of Helsinki and Professor Rekka Saukko of the University of Turku — to continue with the investigation. "We decided to invite them because, after studying the report, we

¹ OHCHR-Nepal, "Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu, in 2003–2004", May 2006, <http://nepal.ohchr.org/en/index.html>

concluded that we should continue with the investigation,” NHRC commissioner and spokesperson Gauri Pradhan told the Himalayan Times on 26 November 2008.²

The NHRC has also sought assistance from the ICRC. In late 2008, two experts from Geneva, Ute Hofmeister and Oran Finegan, trained NHRC staff as well as Nepal Police, local forensic experts, medical students and human rights activists in exhumation procedures, the collection of ante-mortem data and other skills relating to the identification of human remains.³ Further training sessions were organized in 2009 and 2010. In December 2010, 15 forensic experts from NAFOL, FMD, IOM, DOA and the forensic laboratory of the Nepal Police, and NHRC participated in a joint training conducted by ICRC and the Ministry of Peace and Reconstruction with the technical support from an Argentine forensics anthropology team.⁴

Despite this, there have been no further developments in the Shivapuri National Park case.

The exhumation of Dekendra Raj Thapa

On 25 June 2008, the NHRC organized the exhumation of the body of Dekendra Raj Thapa, from a jungle area in Dailekh district. Dekendra Raj Thapa had been abducted by members of the CPN-M in the district on 11 August 2004 on suspicion of spying against the party. He was affiliated to Radio Nepal, Nepal Red Cross Society, Dailekh, Amnesty International, and was the President of the Drinking Water Users' Committee. He was politically close to the CPN-UML.

² Himalayan News Service, “SHIVAPURI CASE: A growing pointer to human remains”, 26 November 2008. (The article is no longer available on the internet.)

³ Nepali Times, ‘Unearthing the Truth’, 19 December 2008, available at <http://www.nepalitimes.com/issue/2008/12/19/Nation/15496>

⁴ Sumina Karki, “Of disappearances, and forensics”, MyRepublica, op cit note 8.

He was allegedly tortured before he was killed. The names of the alleged perpetrators are Lachi Ram Gharti, Bam Bahadur Khadka, Chabi Lal Shahi (Ranjeet), who is a Secretary of the Maoists Party for the district.

The exhumation was conducted on request of the family and the Federation of Nepal Journalists. His family filed a FIR naming the alleged perpetrators with the Dailekh police. However, there has been little progress in the investigations and none of the alleged perpetrators have been questioned let alone arrested. DNA tests have since confirmed that the remains recovered were Dekendra Raj Thapa's. Forensic tests have reportedly also confirmed that he was killed after severe torture.

The exhumation of the body of Maina Sunuwar

Contrary to the exhumations described above, the NHRC did not lead the exhumation of the body of Maina Sunuwar, a 15-year-old girl who died in army custody after torture in February 2004.⁵ National forensic experts with the assistance of an international expert exhumed her remains from a shallow grave near the Panchkhal army barracks in Kavre District in March 2007.

The Kavre police were in charge of the criminal investigation into Maina's death, and the exhumation was clearly considered as part of that investigation. It was organized with the technical assistance of OHCHR in close consultation with AF (representing Devi Sunuwar, Maina's mother). OHCHR and the NHRC were present as observers, as were Devi Sunuwar and her husband. OHCHR asked Devi Sunuwar to provide ante-mortem data in advance of the

⁵ AF, "Maina Sunuwar. Separating fact from fiction", February 2010, available at <http://www.advocacyforum.org/downloads/pdf/publications/maina-english.pdf>

exhumation, and was assisted by her legal counsel during the interview. However, there was no psychological counselling provided before, during or after the exhumation.

The remains were taken to the Teaching Hospital Forensic Department. A DNA sample was taken from Devi Sunuwar. The police sent this sample together with a sample from the remains for analysis to a laboratory in India in late November 2007. In July 2008, the results of tests on the samples confirmed the remains were indeed Maina's. These were communicated to the Kavre police. The DPO informed the public prosecutor and court accordingly. Earlier, in January 2008, on the direction of the Supreme Court, the Kavre Public Prosecutor had filed murder charges in the Kavre District Court against the four army officers suspected of being responsible for her death. The court also issued summons for the arrest of the four accused. However, none of them have been questioned nor arrested by police.

Key shortcomings in the current legal and policy framework

Police Investigations

There is no specific legal and policy framework in Nepal addressing the process of gathering evidence through exhumations. Instead, the State Cases Act is applied, providing a more general framework for criminal investigations and the handling of cases involving the recovery of bodies in the State Cases Act applies. Section 11 of the Act states:

- (1) If a police Office receives information on homicidal, accidental or suicidal death, death in suspicious circumstances caused by criminal activities committed in its territory, the Police Personnel not below the rank of Assistant Police Inspector, as soon as possible, shall go to the place where the dead body is located and shall examine the body and prepare a body examination report consisting in, inter alia, the essentials as follows, shall as far as possible, take photos of the dead body and the scene:
 - a) Particulars regarding the identification of the body;

- b) The place where the dead body is located;
 - c) Wounds, injuries, blue or red marks, if seen on the body, particulars, inter alia, of place, number, length, breadth, depth of every wound, injuries, blue or red marks;
 - d) The possible cause of death and symptoms related to it as appears on the body;
 - e) Any symptoms which may be helpful determining the cause of death;
 - f) Any remarkable things.
- (2) Notwithstanding anything provided by sub Section (1) the examination of the body by the person as authorized under no 2 of the Chapter on Homicide of the Country Code shall not be prejudiced.¹
- (3) If it appears by the examination of the body that the death is caused by criminal activities or is in suspicious circumstances, the relevant Police shall refer the same body to the Government doctor for a post-mortem the expenses being borne from government funds.
- (4) If the body is not in a condition to be examined or is found in a state of decomposition, the relevant Police personnel shall prepare an examination report mentioning the same; the proceeding as mentioned under Sub Section (3) are not required.
- (5) After the body is examined or examination report is prepared under sub Section (4), the relevant Police Personnel shall hand

¹ The Country Code provision referenced here requires the VDC or Police to get the nearest most medically qualified person to do a 'dead body examination report' as soon as possible, and to protect the body.

over the body to its family members and have them sign a receipt. In case the family member refuses to receive the body or no family member is present, the relevant Police Personnel shall carry out cremation in accordance with the Police Act having the expenses borne from government Funds.²

It is apparent on the face of these provisions that they do not specifically contemplate the complexities associated with clandestine burials exhumed years after death, except to the extent that a “state of decomposition” is to be noted (subsection (4)). However, a number of these general provisions regarding criminal investigations are particularly relevant to exhumations. For instance, according to Section 4(1) of the Act, police officers must “as soon as possible, make arrangements to prevent the commission of the crime, extinction or loss of evidence relevant to the crime and to prevent the criminal (suspect) from escaping”. Section 7 of the Act further requires that a police officer “not below the rank of Assistant Police Inspector” “shall, as soon as possible, carry out an investigation of such crime and collect evidence.” The police officer who is conducting the investigation has to “prepare a report containing in, as far as possible, particulars as follows:

- a) Particulars of the scene;
- b) Location of such scene and its linkage with the crime or criminals;
- c) Any remarkable items that were seen or found at or around the scene.

The investigating officer, in addition to preparing the on the scene report, may, inter alia, as far as possible, take photographs of the

² This refers to Section 22A of the Police Act which sets out procedures for the police to handle ‘unclaimed’ dead bodies.

scene, of fingerprints or footprints as seen or found at the scene or of any important items.

The investigating officer shall, in case the documents or goods relevant to the crime are found, take possession over them.”

The obstacles faced by the police in performing these duties are manifold. First of all, there is a lack of cooperation from the Nepal Army. Furthermore, as in the Dhanusha case, senior officers of both the Nepal Army and Nepal Police are regularly named as suspects in the FIRs. As the officers in charge are normally of a lower rank (assistant police inspectors or police inspector as it was in Dhanusha), it is hard for them to enforce cooperation from more senior officers.

The Supreme Court in its interim ruling of 13 July 2011 (see above), ordered the state to appoint an officer with powers equivalent to that of a Deputy Superintendent of Police (DSP) to take forward the investigations in pursuant to Rule 4(1) of State Cases Rules, 1998. Moreover, the court directed that the government should see to it that Kuber Singh Rana does not intervene and influence the investigation. The court also ordered the Prime Minister’s Office, Home Minister and Police Headquarters to send a monthly progress report to the court and the NHRC.³ It remains to be seen whether this will result in tangible progress in the investigations, and how Kuber Singh Rana, as Assistant Inspector General of Police will cooperate with the investigation led by a junior officer of DSP rank.

In addition, the longstanding climate of impunity in the country has contributed to a lack of commitment of the police to conduct effective investigations into complaints filed against the security forces. This is evident from the lack of action to protect the crime scene at Dhanusha and the lack of genuine attempts to interview

³ See <http://www.advocacyforum.org/downloads/sc-decision-in-kuber-rana-case.pdf>

suspects or collect evidence about the alleged crime. Instead, the police tend to procrastinate and write letters seeking information. In a Supreme Court ruling of December 2009 on a mandamus petition relating to the killing of Reena Rasaili, the court commented on the tendency of police to report letter-writing (“correspondence”) as evidence of investigative action:

“Correspondence does not comprise investigative procedures in cases of homicide. Correspondence cannot be called investigation....

An act declared a crime by the law is a crime ... no matter who the perpetrator is or what the circumstances are. The law does not prevent anyone from investigating an FIR stating that a woman sleeping at night in her home was forcefully arrested ... and shot dead by the army or security personnel. It would be a mockery of the law and of the natural rights of civilians.”⁴

Still, the Nepal Police repeatedly has argued that the cases from the armed conflict period should be treated differently. Some officers have argued that the transitional justice mechanisms will “deal with” these crimes. However, the draft laws for the establishment of the TRC and the Disappearances Commission have not set out any powers for the commissions to initiate prosecutions. Instead, it is expected that they will refer cases where there is *prima facie* evidence of a crime having been committed to the police and Attorney General’s Office for further investigations with a view to prosecutions.⁵

⁴ Supreme Court of Nepal, order of December 14, 2009 in Writ no. 0339/2064 (2007), p. 4.

⁵ For a legal briefing on the relationship between transitional justice mechanisms and the criminal justice system, see OHCHR-Nepal, “The relationship between transitional justice mechanisms and the criminal justice system. Can conflict-related human rights and humanitarian law violations and abuses be deferred or suspended on the basis of commitments to establish a Truth and Reconciliation Commission?”, March 2011, available at http://nepal.ohchr.org/en/resources/Documents/English/other/2011/2011_03_29_Legal_Opinion_E.pdf

National Human Rights Commission

The powers of the NHRC are set out in the 1997 NHRC Act.⁶ Under Sections 131-133 of the 2007 Interim Constitution the NHRC was elevated to a constitutional body. The powers of the Commission under Section 132 include conducting inquiries, forwarding recommendations to the concerned authorities, lodging petitions in court, reviewing existing laws relating to human rights, monitoring the implementation of international instruments concerning human rights to which Nepal is party, and publicising the names of officials, bodies and individuals violating human rights. The NHRC does not have judicial powers; but has powers similar to a court to obtain evidence, issue summons, and seek cooperation from relevant institutions and to “order the provision of compensation”. Though these powers are set out in the Interim Constitution, the 1997 statute has not been amended accordingly, so some confusion currently prevails about the NHRC’s powers.

The NHRC does not have a protocol setting out procedures to be followed in investigations of cases involving possible exhumations. It remains unclear whether or not the NHRC can collect evidence through exhumations and whether it can directly refer all the evidence it has collected to the Attorney General’s Office for further investigation with a view to prosecution. So far, though the Interim Constitution and the 1997 Act is silent on this question, the NHRC has not referred any cases directly to the Attorney General’s Office for prosecutions.⁷ Instead, it is submitting the reports of its investigations to the Office of the Prime Minister and Council of Ministers. The recommendations made by the NHRC have not been uniformly

⁶ See <http://www.nhrcnepal.org/legislation1.php?legisNo=3>.

⁷ AF understands that a working group has been set up consisting of representatives of the Attorney General’s Office and the NHRC to study this question.

implemented. “Out of the total of nearly 500 recommendations made by the NHRC, only 35 have been fully implemented over the period of the last 14 years, according to progress reports received by the Office of the Prime Minister and Council of Ministers (PMO).”⁸

Medical Professionals

In addition to the lack of clarity about the role of the Nepal Police and the NHRC, there is also confusion about the role of forensic doctors. The State Cases Act (which dates from 1955, when there were no forensic experts in Nepal) does not explicitly provide for forensic experts to be involved in police investigations.⁹ Section 13 generally states that if the investigating police officer thinks it is necessary, s/he may seek expert opinions. When read with Section 11, which gives the police wide-ranging powers to examine bodies and dispose of them (see above), it is clear that the legal framework of the State Cases Act is not guaranteeing effective exhumations of the highest standard and needs to be amended.

The Public Prosecutor

The role of public prosecutors in investigations of human rights violations has been problematic. Though the State Cases Act provides that a public prosecutor can advise the Nepal Police, Section 7(5) states that it can only do so upon request. This has resulted in a very passive approach among public prosecutors, with occasional exceptions (such as in the Dhanusha case). During the Dhanusha

⁸ Bimal Gautam “Only 35 NHRC Recommendations Implemented” MyRepublica 12 January 2010 http://www.myrepublica.com/portal/index.php?action=news_details&news_id=27064.

⁹ The first forensic doctor started practising in Nepal in 1985.

investigations, in November 2009, the district public prosecutor proactively provided detailed directions on conducting the exhumations to the local police. Despite this, the police had delayed the exhumations till September 2010.¹⁰

Further lack of clarity and potential conflict of interest surrounding the role of the Attorney General became apparent when the Attorney General appeared on the side of AIG Kuber Singh Rana in a case filed by human rights defenders challenging his promotion before the Supreme Court (see above). Under the 2007 Interim Constitution, the Attorney General's Office is the institution responsible for prosecuting all "state cases", i.e. criminal cases listed in the State Cases Act, 1955 (which includes murder). So, it is clear from this, that there is a potential conflict of interest involved in this dual role for the Attorney General (who, if the police do a proper investigation, will be the institution bringing criminal charges against the people on whose behalf the same Attorney General is currently appearing in writ petitions referring to those same criminal activities which may have to be prosecuted later). This potential conflict is further highlighted after the Supreme Court in an interim ruling directed the police and Attorney General to report monthly to the court and the NHRC about the progress in the criminal investigations.

A similar potential conflict of interest has emerged in the case of Arjun Lama, resident of Chhatrebas VDC -5, Dapcha, Kavre district who was abducted by a group of Maoist cadres on 19 April 2005 Those who abducted him have been identified as Maoist cadres Yadav Paudel, alias "Rakki" of Puranagaun VDC-8, Bhola Aryal of Mathurapati

¹⁰ OHCHR, Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation, in Nepal, 16 February 2011, UN doc: A/HRC/16/23, paragraph 36.

VDC-3, Phulbari, and Karnakhar Gautam alias “Shyam”, of Pokharichauri VDC-8, Phulbari in Kavre district. After the arrest, he disappeared.

According to Arjun’s wife Purni Maya and several witnesses, he was produced before Agni Sapkota, a Central Committee Member of the CPN-M by a local Maoist activist Norbu Moktan at a Maoist training centre at Budakhani VDC. Then on the direct command of Sapkota, Maoist cadres killed him in the fourth week of June 2005 and buried his body.

In this case, like many others, the police first refused to register the FIR arguing that accountability for crimes committed during the conflict will be dealt with by the proposed TRC. The Supreme Court on 10 March 2008 issued an order against the DPO stating that it is the primary duty of the police to do the investigation on the alleged crimes of murder. Investigation on such cases cannot be deferred to a commission which has not even been established and whose mandate and jurisdiction are not made clear yet. Unless there is law and the law ensures that all these crimes fall under the jurisdiction of TRC, all the crimes listed in the State Cases Act has to be registered and investigated by the police under the existing criminal justice system. Eventually, the FIR was registered at the DPO Kavre on 11 August, 2008. There are six accused in the case, namely Agni Sapkota, Yadav Poudyal, Bhola Aryal, Karnakhar Gautam, Suryaman Dong and Norbu Moktan.

On 4 May, 2011, Agni Sapkota, was appointed as a Minister in the government. Challenging this decision, a writ was filed in the Supreme Court on 27 May, 2011 by a group of human rights defenders. Once again, the Attorney General appeared on behalf of the Minister. Responding to the writ petition, the Supreme Court refrained from issuing interim order as sought by the writ. However, it directed the

Kavre District police to initiate prompt investigation into the Arjun Lama case and to report every 15 days to the court via the Attorney General's Office.

Since then, Advocacy Forum has been regularly following up with the DPO Kavre regarding the progress made upon into the case, and to secure the possible burial site where Arjun Lama is thought to have been buried. The DPO Kavre has corresponded to the Foksingtar Area Police Office to protect the site. Advocacy Forum is not aware of any other action by the police. As of mid-August 2011, the Attorney General's Office had not provided any updates to the Supreme Court.

Amid all of this ambiguity in law and policy, the families of the victims are forgotten. There is no protocol in place that sets out how to ensure the dignity of the mortal remains is preserved throughout the exhumation process and to ensure the rights of the families to truth, justice and reparation are upheld, including through genuine consultation, adequate information, psychosocial and social support being provided throughout the process.

International standards and best practices

International Instruments

It has widely been recognised that for the rights of families to be respected, they must be kept informed of developments in the investigations that could lead to clarification of the fate of their loved ones. Article 24 of the Convention for the Protection of All Persons from Enforced Disappearances states that “each victim has the right to know the truth regarding the circumstances of [an] enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.” The state has an obligation to keep the victim’s family informed of the progress of the investigation.¹ This has been further emphasised by the UN Working Group on Enforced or Involuntary Disappearances in its General Comment on the Right to Truth, which states that,

¹ Article 24 International Convention on the Protection of all Persons from Enforced Disappearances 2006, available at <http://www2.ohchr.org/english/law/disappearance-convention.htm>. The Convention entered into force in December 2010. Nepal has not ratified the Convention to date.

“The right to the truth in relation to enforced disappearances means the right to know about the progress and results of an investigation, the fate or the whereabouts of the disappeared persons, and the circumstances of the disappearances, and the identity of the perpetrator(s).”

“Indeed, the relatives of the victims should be closely associated with an investigation into a case of enforced disappearance.”²

In April 2010, the ICRC organized a conference in Bogota, Colombia, a continuation of ongoing efforts to establish standards for providing psychosocial support to affected families and communities. At this *World Congress on Psychosocial Work in Exhumation Processes, Forced Disappearance, Justice and Truth*, experts from governments, NGOs and international organizations from 27 countries agreed on minimum norms placing a responsibility upon states and governments to provide family members with guarantees of protection, participation, as well as prior and regular information on the status of legal and humanitarian proceedings, including exhumation processes.³ They also urged relevant governmental bodies to permit families of the disappeared “free access to information, transparency in procedures, and a guarantee of protection and security”, instructing public functionaries to respect the suffering of families, and to process claims before judicial authorities when human rights violations are committed.

² UN Working Group on Enforced and Involuntary Disappearances, General Comment on the Right to the Truth, available at http://www2.ohchr.org/english/issues/disappear/docs/GC-right_to_the_truth.pdf.

³ http://www.congresoexhumaciones.com/index.php?option=com_content&view=article&id=72&Itemid=94. At the time of writing, the report of the conference was not available in English. AF was able to obtain a copy in Spanish. Any errors in translation are the responsibility of AF.

Earlier, on 21 February 2003, at an International Conference of Governmental and Non-Governmental experts also organized by the ICRC, the Observations and Recommendations adopted by consensus confirmed the need to ensure “that families of the missing are at the core of efforts to prevent and resolve this tragedy and should have the right to psychological and social support as part of our global response to disappearances resulting from armed conflict and internal violence.”⁴ Nepal was represented at the conference by the NHRC.

While these Observations and Recommendations and the Minimum Norms adopted in Bogota in 2010 are not a legally binding documents, they are promoted as an “operational tool containing practical measures” and would be applicable to Nepal.⁵

The Observations and Recommendations developed at the 2003 conference provide a best practice framework relating to the rights of families to know the truth, to be kept informed and to be involved in the exhumations of their loved ones. The following are particularly relevant in the Nepal context:

State responsibility:

“5.2 The State authorities and armed groups bear primary responsibility for providing information on missing persons. They should be obliged to investigate cases. Criminal procedures should include penalties for non-compliance with court orders pertaining to the disclosure of evidence. The

⁴ Summaries and outcomes of the International Conference of Governmental and Non-Governmental Experts and the 28th International Conference of the Red Cross and Red Crescent, February 2003, available at <http://www.icrc.org/eng/resources/documents/publication/p0857.htm>.

⁵ Report by the Chairman to the Plenary, Mr Nicolas Michel, Director, Directorate of Public International Law, Federal Department of Foreign Affairs, Switzerland, *ibidem*.

knowing and wilful destruction of evidence should be subject to criminal sanction.

Families' right to know:

5.6.D Information that has been uncovered during a criminal investigation and that can shed light on the fate of a missing person should be provided to the family, in a manner and as soon as compatible with judicial guarantees and effective prosecution.

Role of Forensics experts:

6.10 The involvement of forensic specialists requires an adequate working framework and agreed protocols. Identification for the purposes of informing the family and returning remains is just as important as providing evidence for criminal investigations and constitutes due recognition of the rights of the families. The work of forensic specialists is necessary to ensure both objectives.

Right of families during forensic work:

6.13 All those involved must recognize the role of forensic specialists and the need for a framework, standard guidelines and protocols relating to exhumation, autopsies and identification. This includes the understanding that exhumation and identification comprise the dual objectives of identification and establishing the cause of death; it also includes a commitment to give simultaneous consideration to the family in all matters pertaining to human remains and to ensure that everything possible is done so that the families are informed and supported. These aspects should be reflected in contracts between the forensic specialists and those employing them.

6.20 The communities and the families must be involved in any process to exhume and/or identify human remains. Their involvement should be adapted to the context, and the process must therefore include a communication strategy agreed and implemented by all those involved.

6.21 The same holds true for the collection from relatives of ante mortem data and/or samples for DNA analysis.

Need for prior agreement before carrying out an exhumation:

6.22 The collection of human remains and the processes of exhumation and identification should only start once a framework for doing so has been agreed by all those involved. This framework must include the relevant protocols, psychological support for the families and organization of the process of ante mortem data collection. As a general principle, families should only have to undergo one interview, which may nevertheless be conducted in several stages. Whenever possible, the entire process should be organized for groups of people who went missing under the same circumstances or during the same event and/or whose remains may be expected to be found in the same location, so as to facilitate planning and speed up the process of identification.

Responsibility for support to families:

7.2 The families' specific material, financial, psychological and legal needs must be addressed by the directly concerned State authorities, who bear primary responsibility, with the support of the community of States, of international, regional and national governmental and non-governmental organizations and of the ICRC.

7.7 Programmes providing psychological support and, when necessary, psychiatric treatment for the families of missing persons should be set up with a view to helping the families adapt to their altered situation and come to terms with the events. Such programmes should be built on the local mental health, primary health care and healing systems, in order to be adapted to the cultural context and habits. Those systems must therefore be supported and reinforced.

7.8 The State authorities should incorporate into their domestic legislation provisions regarding the legal situation of missing persons and the rights of

family members while the person is missing. Matters of concern include the civil status of spouse and children, guardianship and parental authority and the administration of the missing person's estate.

Informing families about fate of disappeared:

8.5 The process of informing the families about the death of a relative and of returning personal effects or human remains must be well prepared.

9. Clarification of the fate of persons unaccounted for: It is crucial that families receive information on the individual fate of their unaccounted for family members. The families and communities also need both acknowledgement of the events leading to persons becoming unaccounted for and perpetrators held accountable. Measures that can be taken include:

9.1 ...government authorities and armed groups enabling independent investigations to be carried out to clarify the fate of persons unaccounted for and to provide information; [...]

9.5 ...providing the family, in accordance to judicial guarantees and procedures and privacy rights, information collected during criminal investigations that shed light on the fate of a person unaccounted for.

11. Management of human remains and of information on the dead: The principle responsibility in the proper handling of all the dead without adverse distinction and in providing information to the families with a view to preventing anxiety and uncertainty lies with government authorities and armed groups. Measures that can be taken include: [...]

11.7 ...beginning the process of exhumation and identification only once a framework has been agreed upon by all those concerned and ensuring that the framework includes: ...appropriate means of associating the communities and the families in the exhumation, autopsy and identification procedures;⁶

⁶ International Conference of Governmental and Non-governmental experts - Outcome Observations and Recommendations-Adopted by Consensus, 21 February 2003, available at <http://www.icrc.org/eng/resources/documents/publication/p0857.htm>.

International Jurisprudence

The importance of the inclusion of the family in investigations was also emphasized by the European Court of Human Rights in several cases. In one case, the court stated:

*"The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."*⁷

*"Besides being independent, accessible to the victim's family, carried out with reasonable promptness and expedition and affording a sufficient element of public scrutiny of the investigation or its results, the investigation must also be effective in the sense that it is capable of leading to a determination of whether the death was caused unlawfully and if so, to the identification and punishment of those responsible."*⁸

Guatemala: An Attempt to Standardize Approaches

In Latin-America, after many years of experiences in investigating disappearances, several countries have drawn up policy frameworks. In Guatemala a manual was first proposed by organisations working on exhumations in 1997. It was put together with the help of doctors, anthropologists, judges and prosecutors, and covered the procedures to be followed during a forensic anthropology investigation. While it was never approved or signed by the Chief Prosecutor, it was used by several public prosecutors around the country.

⁷*Tahsin Acar v. Turkey*, Application No. 26307/95, European Court of Human Rights (2004) (Emphasis added).

⁸ *Varnava and other, v. Turkey*, Applications No. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 the European Court of Human Rights (2009) (Emphasis added).

In February 2003, the ICRC held an international conference on “The Missing”, during which the protocol of the Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions was recognized as the key protocol, and the use of testimony obtained by forensic anthropologists as a basis for laboratory analysis was validated.⁹ This confirmed the methodology used by anthropologists in Guatemala since the first forensic anthropology investigations in 1992.

South African Approach

In South Africa, a policy framework was agreed for the exhumations to be conducted as part of the work of the Truth and Reconciliation Commission. The policy put strong emphasis on the need for clear allocation of responsibility and coordination between the various agencies involved. These included: the police, prosecutor’s office, and Ministry of Justice, Ministry of Health, Ministry of Finance, the army and intelligence agencies.¹⁰

⁹ ICRC, “The missing and their families. Documents of reference”, http://www.icrc.org/eng/assets/files/other/icrc_002_0857.pdf. For more details on the manual and its development, see <http://www1.umn.edu/humanrts/instree/executioninvestigation-91.html#II>

¹⁰ Department of Justice and Constitutional Development, “Exhumation police. Cases of missing persons reported to the Truth and Reconciliation Commission. Invitation to submit comments”, *Staatskoerant*, 12 December 2008, available at http://us-cdn.creamermedia.co.za/assets/articles/attachments/18647_not1539.pdf

Conclusions and recommendations

Exhumations, whether conducted as part of criminal investigations or as part of investigations conducted by a transitional justice mechanism (such as the TRC or Disappearances Commission in Nepal), are in essence an exercise in collecting evidence of a possible serious violation of the right to life and crimes of murder and enforced disappearances with a view to identify the perpetrators and bring them to justice. They cannot be regarded as a purely humanitarian process however important issues such as the return of the remains are to the relatives.

AF encourages the families of the disappeared to step up their campaigning for truth, justice and reparation and to insist on being consulted about their needs and expectations and any questions they may have, including at the time of any exhumations.

There are serious concerns that some of the early exhumations carried out in Nepal under the authority the NHRC (such as the exhumations of Sarala Sapkota and Hari Prasad Bolakhe) are likely to have destroyed evidence, rather than assisted in the investigations and possible prosecution of those responsible. Similarly, the illegal

exhumations carried out by private actors (such as the Maoist members in Rolpa) have destroyed evidence.

As Nepal is still in the early stages of dealing with the legacy of the armed conflict, there is an opportunity to put in place a clear legal and policy framework to ensure exhumations are conducted in line with international standards and best practices. Such a framework should include:

Legislative Reform

1. There should be a clear duty for the authorities to secure the reported site of any illegal burial pending any exhumation and any tampering with the site or unauthorized exhumations should be made a criminal offence.
2. The existing legal framework has to be strengthened, including by amending the State Cases Act to ensure the compulsory involvement of forensic doctors and the prohibition for police to dispose of bodies. Similarly, the Police Act and the Muluki Ain, Chapter on Homicide and/or the proposed criminal procedure legislation need to be reviewed and amended in line with the best practices outlined above.
3. Non-compliance with court orders should be made a serious offence.
4. A detailed victim and witness protection law should be put in place to ensure the necessary protection measures are available for victims of crime and human rights violations and key witnesses.

Policy Framework and Practical Measures

5. As exhumations are a critical phase of gathering evidence relating to complex crimes, they must be conducted under the authority of senior officials and experts. The government should consider appointing a special investigation unit of senior police officers with relevant experience, together with members of the NHRC, and appoint OHCHR as an observer.
6. In parallel with the special investigation unit in the Nepal Police, the Attorney General's Office should also consider establishing a special unit and its officers should be empowered to direct police investigations.
7. The role of the Attorney General's Office in appearing on behalf of state officials in public interest litigation cases should be reviewed to ensure there is no conflict of interest.
8. A policy framework, standard guidelines and protocols should be developed in consultation with families of the disappeared, victims' organisations, human rights defenders, medical profession NHRC and other stakeholders to clearly define the specific roles of individual agencies in all the phases of exhumations, i.e. pre, during and post exhumation.
9. The legal and policy framework should ensure the special investigation team have the requisite powers to compel members of the public, state institutions (including the Nepal Army) and suspected perpetrators to fully cooperate with the investigations.
10. All suspected perpetrators should be suspended from duty, pending outcome of criminal investigations.

11. All officers involved should be trained in complex serious crime investigations, including crime scene investigations, the securing of physical evidence and obtaining of statements from potential witnesses, including members of the security forces, and how to check and obtain details of used firearms and ensure successful ballistic tests.
12. The policy framework should allocate responsibility for and ensure effective implementation of a sustained dialogue with the relatives of the disappeared, victims' organisations and those supporting them to mitigate the emotional impact of the process.
13. The provision of psychological support for the families should be ensured, including through prior consultations with families of victims on any needs, expectations, and questions that they may have and, while, ensuring that re-victimization does not occur, permitting access of victims, as rights holders, to scientific and technical information, and favoring integral processes in search of truth, justice and reparations.
14. The standardized collection of *ante mortem* data should be incorporated into the policy framework, including a clear public awareness and communications strategy and the use of standard collection forms. Those collecting the information should be properly trained, including through sensitization on the psychosocial needs of the families. Sufficient financial resources should be allocated for this purpose.
15. The list of missing persons in the country should be consolidated and centralized to ensure the most effective tracing efforts and the agency responsible for the management of the register should be clearly allocated in the policy.

16. All other forms of reparation, including restitution (whenever possible), rehabilitation, compensation, satisfaction and guarantees of non-repetition should be provided in line with the *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law*.¹

¹ Adopted by the United Nations General Assembly, Resolution 60/147.

