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OF JURISTS

**BRIEFING PAPER**  
***DISAPPEARANCES IN NEPAL: ADDRESSING  
THE PAST, SECURING THE FUTURE***

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# *Disappearances in Nepal: Addressing the Past, Securing the Future*

## TABLE OF CONTENTS

<b>I.</b>	<b>Introduction</b> .....	2
<b>II.</b>	<b>Applicable International Law</b> .....	5
<b>III.</b>	<b>The Crime of Enforced Disappearance</b> .....	8
	1. <i>Definition of “Enforced Disappearance”</i> .....	8
	2. <i>Crimes against Humanity</i> .....	8
	3. <i>Continuous crime and limitation period</i> .....	9
	4. <i>Criminal responsibility</i> .....	10
	<i>Responsibility of superior</i>	
	<i>Responsibility of subordinates</i>	
	<i>Responsibility of accomplices</i>	
	5. <i>Proportional penalty</i> .....	11
	6. <i>Mitigating factor</i> .....	11
	7. <i>Definition and rights of victims</i> .....	12
<b>IV.</b>	<b>National Commission on Enforced Disappearances</b> .....	14
	1. <i>The mandate of the Commission</i> .....	14
	2. <i>Relationship with other bodies</i> .....	14
	<i>The Truth and Reconciliation Commission</i>	
	<i>Office of the Attorney General and the Courts</i>	
	<i>The National Human Rights Institutions</i>	
	3. <i>Preventive measures</i> .....	16
	4. <i>Appointment and removal of Commissioners</i> .....	16
	<i>Eligibility criteria</i>	
	<i>Selection process</i>	
	<i>Removal of Commissioners</i>	
	5. <i>Public release of report</i> .....	18
	6. <i>Witness protection</i> .....	18
	7. <i>Exhumations</i> .....	19
	8. <i>Role of NGOs and international actors</i> .....	20
<b>V.</b>	<b>Conclusion</b> .....	20

## I. INTRODUCTION

The practice of enforced disappearances in Nepal during the ten years of conflict (1996 – 2006) was amongst the worst in the world. Both sides of the conflict, the Nepali security forces and members of Communist Party of Nepal (Maoists) (CPN-M), were responsible for numerous acts of enforced disappearance. These egregious crimes were aided and abetted by a climate of political and legal impunity for perpetrators. It is generally estimated that over 3,000 people were victims of enforced disappearances. The UN Working Group on Enforced or Involuntary Disappearances (WGEID) has noted that 532 cases were transmitted to the Government of Nepal.<sup>1</sup>

This briefing paper provides an overview of recent political and judicial developments in Nepal related to enforced disappearances and presents applicable international law, including Nepal's legal obligations. It also provides comments on the Ordinance recently adopted by the cabinet and promulgated by the president, and recommends a set of amendments to specific provisions regarding the criminalization of enforced disappearances and the establishment of a Commission on Disappearances.

Since the end of conflict, many human rights organisations in Nepal have documented cases/complaints involving enforced disappearances:

- The National Human Rights Commission (NHRC) registered about 2800 cases, of which 900 cases remain unresolved (600 disappearances and 300 abductions).
- The ICJ recorded 209 cases (195 disappearances and 14 abductions).
- The Advocacy Forum documented 417 cases.
- Informal Sector Service Centre (INSEC) documented 933 cases (828 disappearances and 105 abductions).
- The Society of Families of the Disappeared recorded 1162 unresolved cases.
- The ICRC reported more than 3000 disappearances, of which 1127 cases remain unresolved.

### *Political and judicial developments*

Since the end of the armed conflict, the Government of Nepal has publicly expressed its commitment to address the issue of enforced disappearance. Under the Comprehensive Peace Agreement (CPA) of 12 November 2006 that ended the conflict between the Government of Nepal and the CPN-M, the parties undertook to disclose the status of detainees and to release all of them within 15 days; to release, within 60 days, details of people subjected to enforced disappearance or killed during the conflict, and to inform the family members.<sup>2</sup>

The interim Constitution of 15 January 2007 also obliges the Government "to provide relief to the families of the victims, on the basis of the report of the Investigation Commission constituted to investigate the cases of disappearances made during the course of the conflict."<sup>3</sup> In furtherance to this, in May 2007 the then interim Legislature-Parliament proposed a Bill to amend the Civil Code to criminalize the practice of "enforced disappearances" and "abduction or hostage taking." While the

<sup>1</sup> Report of the Working Group on Enforced or Involuntary Disappearances, Human Rights Council, A/HRC/7/2, 10 January 2008, para 251, p. 59.

<sup>2</sup> CPA Articles 5.2.2, 5.2.3, 12 November 2006, available at: <http://nepembseoul.gov.np/doc/nov21.doc>. Point 8 of the 23-Point Agreement of 23 December 2007 between the Government and CPN-M provided that, "as per the Comprehensive Peace Accord, ... with regard to the disappeared, relief shall be provided based on the report of the Investigation Commission. The preliminary report shall be submitted within a month after the Investigation Commission begins work." Available at: [www.unmin.org.np/downloads/keydocs/2007-12-24-23.Point.Agreement.SPA.ENG.pdf](http://www.unmin.org.np/downloads/keydocs/2007-12-24-23.Point.Agreement.SPA.ENG.pdf)

<sup>3</sup> Article 33(q) of the interim Constitution, 15 January 2007, available at: [www.unmin.org.np/downloads/keydocs/Interim.Constitution.Bilingual.UNDP.pdf](http://www.unmin.org.np/downloads/keydocs/Interim.Constitution.Bilingual.UNDP.pdf).

Bill was a positive initiative, a number of elements failed to accord with applicable international human rights law and standards. It was heavily criticized by human rights groups and eventually withdrawn.<sup>4</sup>

On 1 June 2007, the Supreme Court of Nepal issued a landmark ruling on a large number of enforced disappearance cases, including 80 *habeas corpus* writs.<sup>5</sup> The ruling issued directive orders, *inter alia*, for the Government to enact legislation consistent with international law that would criminalise enforced disappearance, and establish a high level 'Investigation Commission for Disappeared People' for inquiry into past enforced disappearances. The judgment also ordered the provision of interim relief to the families of the victims without prejudice to the final outcome of these cases.

The Court observed that,

"it is necessary to urgently enact a law which includes provisions that the act of disappearance is a criminal offence, defining the act of disappearance pursuant to the definition stated in the International Convention for the Protection of All Persons from Enforced Disappearance, 2006."<sup>6</sup>

The Court order stated that these measures should conform to the international standards as provided in "the Charter of the United Nations, the Universal Declaration of Human Rights, the Declaration on the Protection of All Persons from Enforced Disappearance, 1992, and the International Convention for the Protection of All Persons from Enforced Disappearance, 2006."<sup>7</sup>

The Court further laid down that the law must incorporate provisions on the rights of detainees;<sup>8</sup> judicial remedies available to both detainees and family members; the right to compensation; a flexible statute of limitations; an appropriate complaint filing system regarding cases related to arbitrary detention and enforced disappearance; the requirement of formal detention centers<sup>9</sup> with adequate record keeping; the right of families to know all conditions of the detainee; and the implementation of a process to ensure that detainees who were said to have been released were, in fact, released. The Court also stated that,

"It is also equally important to enact a provision that uphold the international standard that pardon cannot be granted to persons who should be prosecuted for their alleged involvement in the act of disappearance, as well as to persons who are convicted for their direct responsibility or complicity in the act of disappearance."<sup>10</sup>

With regard to establishing a Commission of Inquiry on disappearances, the Court laid out in detail the criteria needed for compliance with international law, including requirements,

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<sup>4</sup> ICJ letter to the Speaker of the Interim Legislature-Parliament, 30 May 2007, available at: [http://www.icj.org/news.php?id\\_article=4164&lang=en](http://www.icj.org/news.php?id_article=4164&lang=en). Also see, OHCHR *Comments and Recommendations on Disappearance and Abduction Bill*, May 2007.

<sup>5</sup> *Rajendra Dhakal and Others v. The Government of Nepal*, writ no.3575, registration date Jan 21, 1999, decision June 1, 2007, known as "Disappearance case." Also see, *the Criteria for Commissions of Inquiry developed by the OHCHR*.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, the Supreme Court stated that, "The law must incorporate provisions on the rights of detainees, the obligations of detaining authorities, the determination of the place of detention, the relationship and access to the lawyer and families of the detainee, and the right of the detainee to be informed of the reasons of his detention..."

<sup>9</sup> *Ibid.*, the Supreme Court stated that, "the law must incorporate provisions on... the creation of formal detention centers with the stipulation that such centers are the only places where individuals may be detained; humanitarian treatment while in detention; adequate documentation of detention conditions including the time of the detention, the name, title, address and other relevant details of the person who ordered detention; the obligation to uphold such provisions when transferring the detainee."

<sup>10</sup> *Ibid.*

“that the jurisdiction of the commission is clear; that the commission’s inquiry does not replace the jurisdiction of the Court; that persons nominated for such a commission are appropriate and competent for such work; that the terms of office and conditions of service and facilities are provided for; that representation of women and other castes or communities are guaranteed; that the powers, duties and functions of the commission are prescribed in the Act itself; and that, in considering the nature of the problem, investigations could be initiated on the basis of information received from any source. It is also necessary to have provisions on continuous inquiry until the status of an allegedly disappeared person is determined; the availability of protection and security for victims, witnesses, plaintiffs, advocates and investigator, so as to solicit their continuous assistance in the probes; the right and opportunities for the victims to record their statements and raise their concerns, and if desired, to keep their statements confidential if so called for, and the power of the commission to conduct searches and to question all persons who it deems necessary. It is also necessary to ensure the means and resources necessary for such commission to accomplish its goals.”<sup>11</sup>

Further it held that,

“[b]y the very nature of the act of disappearance, it is necessary that the families and relatives of disappeared person are provided with the findings of the investigations that the report is made public.”<sup>12</sup>

Following the judgement, on 21 June 2007 the Government of Nepal formed a three-member “High Level Investigation Commission on Disappeared Persons,” headed by ex-Justice Narendra Bahadur Neupane. However, the Commission was not able to start its work. From its inception, it was criticized by human rights groups as flawed, inadequate and contrary to the Supreme Court judgement and international standards.<sup>13</sup>

On 28 November 2007 the Parliamentary Committee on Law, Justice and Legislative Relations withdrew the much criticised draft Bill of May 2007, retaining only amendments to the Civil Code relating to abduction and hostage taking. The Parliamentary Committee ordered the Government to draft a new law on enforced disappearance in accordance with international law and the Supreme Court judgement. Almost one year later, on 15 November 2008, the Government made public a new draft Bill on Enforced Disappearance (Crime and Punishment) Act 2008, criminalizing the act of enforced disappearance and establishing a Commission of Inquiry to address past violations.<sup>14</sup> While the Bill was a considerable improvement over the previous version, it did not fully comply with Nepal’s obligations under international law and the Supreme Court guidelines.<sup>15</sup>

On 5 February 2009, while the Constituent Assembly was in recess after the longest session in Nepal’s history, the cabinet decided to introduce the Bill by executive ordinance rather than submit it to parliamentary discussion and debate. Despite the opposition of the coalition partner CPN (UML), the main opposition party Nepali Congress and most national and international human rights organizations, the President promulgated the Ordinance on 12 February 2009.<sup>16</sup> In this way, the Government of Nepal undermined the Constituent Assembly and bypassed a public debate on the question.

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> The ICJ press release on 16 July 2007, *Nepal: ICJ urges Government to ensure “High level Commission of Inquiry on Disappeared Citizens” meets international standards and complies with Supreme Court order*, available at: [http://www.icj.org/news.php?id\\_article=4194&lang=en](http://www.icj.org/news.php?id_article=4194&lang=en).

<sup>14</sup> See: <http://www.kantipuronline.com/kolnews.php?&nid=166902>.

<sup>15</sup> The ICJ letter to the Chairperson of the Constituent Assembly and press release on 25 November 2008, *New Bill on Enforced Disappearances proposed by Government of Nepal fails to meet human rights obligations*, available at: [http://www.icj.org/news.php?id\\_article=4419&lang=en](http://www.icj.org/news.php?id_article=4419&lang=en).

<sup>16</sup> ICJ press release on 30 January 2009, *Nepal: Government should allow Parliament to debate*, available at [http://www.icj.org/news.php?id\\_article=4443&lang=en](http://www.icj.org/news.php?id_article=4443&lang=en).

The Ordinance is a major achievement and a step forward. It criminalizes the acts of enforced disappearance, establishes a commission to investigate past cases from 1996 to 2006, and provides for prosecution of perpetrators and reparations for victims. However, these welcome steps could be undermined in practice by weakness of certain provisions that are not in line with international standards.

## II. APPLICABLE INTERNATIONAL LAW

According to Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance (Convention on Enforced Disappearance):

“enforced disappearance” is considered to be the 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.<sup>17</sup>

Enforced disappearance violates multiple human rights. The International Convention on Civil and Political Rights (ICCPR), 1966 does not contain a specific right to be protected against enforced disappearance. However, a number of rights, such as right to an effective domestic remedy (Article 2(3)), right to life (Article 6), prohibition against torture and cruel, inhuman and degrading treatment (Article 7), right to liberty and security of person (Article 9), the right of detainees to be treated with humanity and dignity (Article 10), and right to recognition as a person before the law (Article 16) are relevant to situations of enforced disappearance. Some or all these rights may be implicated in an enforced disappearance.<sup>18</sup>

The Human Rights Committee in its General Comment on the nature of the general legal obligation on state parties to the Covenant, noted that,

“15. Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights...A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy...”

18. Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity (see Rome Statute of the International Criminal Court, article 7).”<sup>19</sup>

The Declaration on the Protection of All Persons from Enforced Disappearance (Declaration on Enforced Disappearance) was adopted by the UN General Assembly

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<sup>17</sup> International Convention for the Protection of All Persons from Enforced Disappearance 2006, General Assembly Resolution 61/177, U.N. Doc. A/RES/61/177 (2006), adopted on 20 December 2006, .

<sup>18</sup> Article 1(2) of the Declaration on Enforced Disappearance, OHCHR Fact Sheet No. 6 (Rev. 12), Enforced or Involuntary Disappearances. The Supreme Court of Nepal in the “Disappearance case”, *op. cit.* n. 5.

<sup>19</sup> General Comment No. 31: Nature of the General Legal Obligation of State Parties to the Covenant, adopted by the Committee on 29 March 2004, UN doc. CCPR/C/21/Rev.1/Add.13 (2004), paras.15 and 18.

in 1992.<sup>20</sup> The Declaration represents a broad consensus of international community recognising that all States are under an obligation to take effective legislative, administrative, judicial or other measures to prevent and terminate acts of disappearances.<sup>21</sup> In order to further strengthen the protection against enforced disappearance, in 2006, the General Assembly adopted the Convention on Enforced Disappearance.<sup>22</sup>

The Convention, which is yet to enter into force, is principally based on the Declaration on Enforced Disappearance and contains substantive provisions aimed at increasing the level of protection with respect to enforced disappearance. The Supreme Court of Nepal also noted in the *Disappearance case*, “[a]lthough the Disappearances Convention has not yet come into force and Nepal has not yet ratified it, this Convention has developed an important standard concerning the obligations of a state with respect to the security of disappeared persons” and that “there should be no barriers to use the provisions of the Convention as guiding principles.”<sup>23</sup> Referring to the UN Convention on Disappearance, the Inter-American Court of Human Rights has considered that “the prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*.”<sup>24</sup> *Jus cogens* (peremptory norms of international law) are binding norms accepted by the international community which allow for no derogation.

Other relevant instruments include – *the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (Updated Principles on Impunity), endorsed by the Human Rights Commission in 2005; and *the Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and International Humanitarian Law* (Basic Principles on Reparations), adopted by the General Assembly in 1992.

### ***Obligations of the Government of Nepal under international law***

Under international law Nepal is obligated to take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance.<sup>25</sup> In particular, Nepal is required to<sup>26</sup> –

<sup>20</sup> See General Assembly resolution 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992), adopted on 18 December 1992.

<sup>21</sup> Article 3 of the Declaration on Enforced Disappearance.

<sup>22</sup> *Op. cit.* n.17.

<sup>23</sup> The “Disappearance case”, *op. cit.* n. 5.

<sup>24</sup> *Case of Goiburú et al. v. Paraguay*, Judgment of September 22, 2006 (*Merits, Reparations and Costs*), Series C No. 153, para. 84.

<sup>25</sup> Article 2(3) of the ICCPR, Article 3 of the Declaration on Enforced Disappearance, and Article 3 of the Convention on Enforced Disappearance. See also, *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*, March 21, 2006, adopted by the 60th session of the United Nations General Assembly, A/RES/60/147, Principle II.3.(d), “The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: (d) Provide effective remedies to victims, including reparation, as described below.”

<sup>26</sup> Articles 4, 9, 10, 11, 12, 13, 14 and 19 of Declaration on Enforced Disappearance; and Articles 3, 4, 12, and 17-24 of Convention on Enforced Disappearance. Also see, T. Van Boven, (Special Rapporteur of the UN), *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final Report*, UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993, p. 36-37. Report of Secretary General: *Question of enforced or involuntary disappearances*, 53<sup>rd</sup> Session, A/53/304, 26<sup>th</sup> August 1998, para.10. See also, Human Rights Committee, General Comment N° 31, para. 18, and Reports of the UN Working Group on Enforced or Involuntary Disappearances (WGEID): General comment on Article 3 of the Declaration on the Protection of All Persons from Enforced Disappearance, WGEID report 1995 (E/CN.4/1996/38); General commentary on Article 4 of the Declaration on the Protection of All Persons from Enforced Disappearance (UN.Doc E/CN.4/1996/38, pars 54 to 58); General comments on Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance (UN.Doc E/CN.4/1998/43) paras. 78 to 75, and General Comment on the definition of

- criminalise the act of enforced disappearance,
- investigate and establish the whereabouts/fate of those disappeared,
- prosecute those responsible for the cases of enforced disappearance,
- provide adequate remedy and reparation to the victim and/or his(her) family, and
- take adequate measures of prevention.

The UN Human Rights Committee in a recent communication against the Government of Nepal relating to a case of enforced disappearance, *Yasoda Sharma v. Nepal*<sup>27</sup> found the Government of Nepal to be in breach of these obligations, and noted that,

“under article 2(3) of the Covenant, 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... the Committee considers 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.” (para 9)

Further, the Committee found the Government of Nepal to be in violation of Articles 2(3), 7, 9 and 10 of the ICCPR and specifically held that,

- keeping the author’s husband in captivity and preventing him from communicating with his family and the outside world (*incommunicado detention*) constituted a violation of article 7 of the Covenant. (para 7.2)
- arrest of author’s husband without a warrant and being held *incommunicado* without being informed of the reasons of his arrest or charges against him; as well as never being brought before a judge and granted opportunity to challenge the legality of his detention, amounted to a violation of article 9. (para 7.3)
- the burden of proof cannot rest on the author alone, as the author and the State do not always have equal access to the evidence. In cases where the allegations are corroborated by credible evidence submitted by the author, and further clarification depends on information exclusively in control of the State, the Committee may consider an author’s allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State. (para 7.5)
- all persons deprived of their liberty have the right to be treated with humanity and with respect for the inherent dignity of the human person. In the present case, the author’s husband disappeared and possibly died while in the custody of the State, and the Committee considered that this disappearance constituted a violation of article 10. (para 7.7)
- the anguish and stress that the disappearance of the author’s husband caused to the author, amounted to a violation of article 7 of the Covenant with regard to the author herself. (para 7.9)
- Under article 2(3) of the Covenant, the States are required to ensure that individuals have accessible, effective and enforceable remedies, particularly establishing appropriate judicial and administrative mechanisms, for addressing violations of rights guaranteed in the Covenant at domestic level.

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enforced disappearance, at: [http://www2.ohchr.org/english/issues/disappear/docs/disappearance\\_gc.doc](http://www2.ohchr.org/english/issues/disappear/docs/disappearance_gc.doc).

<sup>27</sup> Communication No. 1469/2006, CCPR/C/94/D/1469/2006, Human Rights Committee, Ninety-fourth session, 6 November 2008.



In the present case, lack of access to such effective remedies amounted to violation of article 2(3). (para 7.10)

### III. THE CRIME OF ENFORCED DISAPPEARANCE

This section assesses provisions in the Ordinance relating to the crime of enforced disappearance in light of the international law and standards.

#### 1. Definition of “Enforced Disappearance”

The definition of enforced disappearance contained in Article 2 of the Convention on Enforced Disappearance provides following elements:<sup>28</sup>

- (i) detention/ deprivation of liberty in whatever form,
- (ii) refusal to acknowledge the deprivation of liberty, or the fate or whereabouts of the disappeared person, and
- (iii) placing the disappeared person outside the protection of the law and all recognised rights.

According to the Convention on Enforced Disappearance, enforced disappearance must be caused by agents of the State or private individuals or organised groups (e.g. paramilitary groups) acting on behalf of or with the support, direct or indirect, consent or acquiescence of the State.<sup>29</sup> While any or all of these elements may be subject to national legislative provisions, all requirements must be met cumulatively in order for an enforced disappearance to be committed.

The definition of ‘Disappearance’ in Section 2 (a)(1) of the Ordinance does not comply with the definition of enforced disappearance in Article 2 of the Convention on Enforced Disappearance. The definition in the Ordinance, for example, only covers an enforced disappearance carried out by a person ‘having the legal authority’ to arrest or investigate or implement laws, whereas the Convention on Enforced Disappearance includes not only *all* agents of the State but also all “persons or groups of persons acting with the authorization, support or acquiescence of the State.” Furthermore, the Ordinance does not specifically mention ‘the refusal to acknowledge the deprivation of liberty’ as an element of the crime. Lastly, the definition does not provide placement of disappeared person outside the protection of law as an essential element of enforced disappearance.

*The ICJ recommends that the definition of the crime of enforced disappearance in national law reflect the internationally recognised definition, as that contained in Article 2 of the Convention on Enforced Disappearance.*

#### 2. Crimes against humanity

The widespread or systematic practice of enforced disappearances constitutes a ‘crime against humanity’ under international law. The ICC Rome Statute, Article 7(1) provides that enforced disappearances of persons constitute a crime against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Article 5 of the Convention on Enforced Disappearance reaffirms this standard and provides that an

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<sup>28</sup> WGEID, General Comment on the definition of enforced disappearance, *op. cit.* n.26; Inter-American Court of Human Rights, *Case of Palamara-Iribarne v. Chile*. Merits, Reparations and Costs, judgment of November 22, 2005. Series C No. 135 paras. 94 & ff.

<sup>29</sup> WGEID, General Comment on the definition of enforced disappearance, *ibid.*

act of enforced disappearance, when it constitutes a crime against humanity, shall attract the attendant consequences provided for in international law.

This is also reaffirmed in other international legal instruments, such as Declaration on Enforced Disappearance (preambular paragraph 4, “systematic practice of such acts is of the nature of a crime against humanity”); Draft code of offences against the peace and security of mankind, International Law Commission, Supplement N° 10 (A/51/10), Vol. II (2); Human Rights Committee, General Comment No. 31, para. 18; Inter-American Convention on Forced Disappearance of Persons, (preambular paragraph 6, “Reaffirming that the systematic practice of the forced disappearance of persons constitutes a crime against humanity”). The International Criminal Tribunal on the Former Yugoslavia, has considered that widespread and systematic practice of this crime is a crime against humanity given the fact that the enforced disappearance amounts to an inhuman act.<sup>30</sup>

The omission from the Ordinance of provisions covering crimes against humanity is troubling given the magnitude of the problem of enforced disappearances in Nepal during the armed conflict.

*The ICJ recommends that national legislation should make the systematic practice of enforced disappearances a crime against humanity in Nepal's criminal law, together with provisions for the investigation, prosecution and appropriate penalties for such a crime.*

### 3. Continuous crime and limitation period

An inherent characteristic of enforced disappearance is that the crime continues as long as the fate and whereabouts of the victim has not been established and the case remains unresolved.<sup>31</sup> The continuing nature of the violation is explicitly affirmed in Article 8 of the Convention on Enforced Disappearance and Article 17 of the Declaration on Enforced Disappearance. As the Supreme Court noted in its ruling, “it is also necessary to have provisions on continuous inquiry until the status of an allegedly disappeared person is determined.”<sup>32</sup>

Article 8(1) of the Convention on Enforced Disappearance provides that any statute of limitations, therefore, should be of a ‘long duration’ and commence ‘from the moment when the offence of disappearance ceases, taking into account its continuous nature.’ The trigger for time limits should commence when the case is resolved, which will normally be when the whereabouts or fate of the disappeared person has been clarified. Further, even in cases where the fate of the disappeared person is known, Article 8(1)(a) of the Convention provides that any limitation must be “of long duration and proportionate to the extreme seriousness of this offence.”

Section 26(2) of the Ordinance is especially problematic in that it fails to recognize the continuing nature of the violation and provides a six-month period of limitation from the date when a disappearance became known or fate of disappeared made public. This period is far too short given the climate of fear under which enforced disappearances were committed and the consequent reluctance of people to report these grave violations to law enforcement authorities due to fear of reprisals. To this

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<sup>30</sup> *Prosecutor vs. Zoran Kpreskic et al*, Judgment of 14 January 2000, IT-95-16-A, para. 566. Also see, Inter-American Court of Human Rights, *Goiburú et al. v. Paraguay*, Judgment of September 22, 2006 (*Merits, Reparations and Costs*), Series C No. 153.

<sup>31</sup> In *Cyprus v. Turkey* the European Court found that “there was a continuing violation of article 2 of the Convention (right to life) on account of the failure of authorities of the respondent State to conduct an effective investigation into the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life threatening circumstances”... It also established a continuing violation of Article 5 (right to liberty and security), Application No. 25781/94, Judgement of 10 May 2001.

<sup>32</sup> The “Disappearance case”, *op. cit.* n. 5.

effect, the WGEID report has noted that “the phenomenon of disappearances is under-acknowledged....that a culture of silence has sprung-up, with villagers too fearful to report disappearances for fear of reprisal from the security forces or the Maoist insurgents.”<sup>33</sup>

*The ICJ recommends that the Ordinance recognize the continuing nature of enforced disappearance and that Section 26(2) be amended to increase the limitation period in proportion to the seriousness of the crime.*

#### **4. Criminal responsibility**

##### **- Responsibility of superior**

In the context of enforced disappearance, the circumstances in which a superior will be held responsible are broad in scope and well established in international law.<sup>34</sup> Article 6(1)(b) of the Convention on Enforced Disappearance provides that a superior should be held criminally responsible for an offence where he/she:

- (a) knew or consciously disregarded information indicating that subordinates were committing or about to commit the crime,
- (b) exercised effective responsibility, control or discipline over those committing the crime,
- (c) should have known about the conduct of subordinates, given the position of authority, or,
- (d) failed to take all necessary and reasonable measures to prevent the crime or to submit the matter for investigation and prosecution.

Section 4(3) of the Ordinance provides an excessively narrow construction of superior responsibility, holding accountable only those who direct or order enforced disappearance.

*The ICJ recommends that section 4(3) of the Ordinance be amended to ensure that superiors have criminal responsibility for enforced disappearance where such persons knew or ought to have known that a subordinate was committing or about to commit the crime, but failed to take all necessary and reasonable measures to prevent the crime, or to submit the matter for investigation and prosecution.*

##### **- Responsibility of subordinates**

Experience shows that in most cases a responsible person will be a subordinate, usually acting under superior orders. Section 4(2) of the Ordinance provides that the person under whose order a person has been arrested, kept in detention or taken under control and disappeared, shall be considered to be the ‘principal offender.’ There is a concern that this provision could be invoked effectively to shield subordinates from responsibility on grounds of obeying superior orders. It is important therefore that legislation makes clear to subordinates that no superior order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance, as provided under Articles 6

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<sup>33</sup> Report of the UN Working Group on Enforced or Involuntary Disappearances, *Mission to Nepal* (6-14 December 2004), E/CN.4/2005/65/Add.1, 28 January 2005, p.2.

<sup>34</sup> Principle 27 of the *Updated Principles on Impunity*, Article 28 of the Rome Statute 1998. See also, the Protocol Additional to the Geneva Conventions of 12 August 1949, and the Geneva Convention relating to the Protection of Victims of International Armed Conflicts (Article 86, para. 2); the Statute of the International Criminal Tribunal for the Former Yugoslavia (Article 7, 3); the Statute of the International Criminal Tribunal for Rwanda (Article 6,3); the Rome Statute of the International Criminal Court (Article 28); the *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* (Principle 19); and the *Code of Conduct for Law Enforcement Officials* (Article 5).

(1) and 7 of the Declaration on Enforced Disappearance, Articles 1, 6 (2) and 23 (2) of the Convention on Enforced Disappearance.

*The ICJ recommends that Section 4(2) of the Ordinance be amended to ensure that subordinates who commit the offence of enforced disappearance cannot use the defence that they were obeying orders or instructions.*

Often, subordinates will feel under pressure to obey superior orders. For this reason, it is a general principle of international law that subordinates who receive orders to commit enforced disappearances have the right and duty not to obey them. This principle is expressly contained in international instruments, such as Article 6 (1) of the Declaration on Enforced Disappearance, Article 23 (2) of the Convention on Enforced Disappearance, Article VIII of the Inter-American Convention on Forced Disappearance of Persons and Article 5 of the *United Nations Code of Conduct for Law Enforcement Officials*. The Ordinance does not contain such a provision.

*The ICJ recommends that national legislation expressly provide that subordinates who receive orders to commit enforced disappearances have the right and duty not to obey those orders.*

#### **- Responsibility of accomplices**

Under international law, any person who orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance, and held criminally responsible, (Article 6 of the Convention on Enforced Disappearance).

Sections 4 and 5 of the Ordinance limits the criminal responsibility to persons directly involved in or who orders or directs the commission of enforced disappearance. More generally it holds responsible any person who carries out or causes to be carried out the act of enforced disappearance.

*The ICJ recommends that national legislation should also hold a person criminally responsible if (s)he solicits, induces, is an accomplice to, or participates in, an enforced disappearance.*

#### **5. Proportional penalty**

An essential ingredient of any system of justice founded on the rule of law is that penalties be proportionate to the offence. Enforced disappearance is a heinous crime. Article 4 of the Declaration on Enforced Disappearance and Article 7(1) of the Convention on Enforced Disappearance require that the offence of enforced disappearance should be punishable by appropriate penalties which should take into account the "extreme seriousness" of the offence. National legislators will, therefore, have to decide what is an appropriate penalty in light of existing penalties for other serious crimes, such as homicide. Section 6 of the Ordinance provides an imprisonment of up to five years. A maximum imprisonment of five years does not reflect the seriousness of the offence.

*The ICJ recommends that the sentence for enforced disappearance should be increased to commensurate with the seriousness of the offence, in line with offences of similar gravity under Nepali law, such as homicide.*

#### **6. Mitigating factors**

Under international law, the application or recognition of mitigating circumstances

in relation to international crimes is very restricted.<sup>35</sup> Article 4 of the Declaration on Enforced Disappearance and Article 7(2)(a) of the Convention on Enforced Disappearance recognize that mitigating circumstances may be taken into account during sentencing, particularly for offenders who “effectively contribute to bringing the disappeared person forward alive, or make it possible to clarify cases of enforced disappearance, or to identify the perpetrators of an enforced disappearance.”

However, the standard for mitigation recognized in the Ordinance is broader and subject to abuse of discretion, potentially resulting in a form of a “back door” pardon or amnesty. According to Section 6(4) “notwithstanding anything contained elsewhere in this Act, if any other offender, except the main guilty involved in the act of a disappearance of a person, helps the commission, investigation officer, prosecutor or court to find out the true facts during the investigation of the commission or the hearing of the case, the authority which hears the case, shall consider, per the circumstances, mitigating the punishment to be imposed pursuant to this Act or waive the whole punishment.” Under this provision, an offender who brings out certain facts, regardless of their probative value or effective contribution to resolving the case, may be absolved of responsibility and punishment.

*The ICJ recommends that mitigating factors should be limited to conform to Article 4 of the Declaration and Article 7(2) of the Convention on Enforced Disappearance.*

## **7. Definition and rights of victims**

The complex and continuing nature of enforced disappearance, whether as a crime or a violation of human rights, is also reflected in its particular ability to create many other victims in addition to the person who has been subject to a deprivation of liberty. The close relatives and friends of a detained individual, by the fact of enforced disappearance, are subjected to a situation of extreme anguish and stress which may last for many years, and are therefore also recognised as victims.<sup>36</sup> This principle was upheld by the Human Rights Committee in 1983 in the landmark case of *Quinteros Almeida v. Uruguay*, that “the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts” rendered her a victim of violations of the Covenant (ICCPR) suffered by her daughter too, in particular Article 7.<sup>37</sup>

The Convention on Enforced Disappearance under Article 24 takes a very broad view of who is a ‘victim’, including in its definition the disappeared person and “any individual who has suffered harm as a direct result of an enforced disappearance.”

Section 2(b) of the Ordinance defines the victim to include family members of the disappeared person. This is a welcome expansion of the definition but should not be considered an exhaustive list. International law recognizes that victims include not only close relatives of the victim, but any person damaged as a direct consequence of the criminal offence.

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<sup>35</sup> International Law Commission, Report 1996, *Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996*, Official Records of the General Assembly, Fifty-first session, UN Doc. Supplement No. 10 (A/51/10), and *Report of the International Law Commission on the work of its forty-sixth session, 2 May - 22 July 1994*, Official Records of the General Assembly, Forty-ninth session, Supplement No. 10 (A/49/10); Rome Statute, Article 110, para. 4.

<sup>36</sup> Report of the Independent Expert examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, E/CN.4/2002/71, 8 January 2002, p.33.

<sup>37</sup> Communication No. 107/1981, final views of 29 March 1982. The Inter-American Court of Human Rights in *Blake v. Guatemala*, recognised that “the circumstances of such disappearance generate suffering and anguish, in addition to a sense of insecurity, frustration and impotence in the face of the public authorities’ failure to investigate,” which justified considering the family members as victims of inhuman treatment, Petition No. 11.219/1993, Judgement of 24 January 1998.

*The ICJ recommends that the national legislation should take a view of who is a 'victim' that is in accordance with international standards provided under Article 24 of the Convention on Enforced Disappearance.*

As a legal consequence of the status of 'victim', certain rights accrue to the disappeared person, as well as his/her family members or dependants. Article 24(2) of the Convention on Enforced Disappearance establishes a right for victims 'to know the truth regarding the circumstances of an enforced disappearance,' including the progress and results of any investigation and the fate of the disappeared person.<sup>38</sup> Article 24(3) obliges States to take measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect, and return their remains. It is to be noted that this requirement emanates from the provision relating to victims and their rights, rather than the separate obligation contained in Article 12 with regard to investigation of alleged cases of enforced disappearance.

Additionally, Article 24(4) includes the right to obtain prompt, fair and adequate compensation for physical or mental injury, and material damage, such as loss of income or opportunities, defamation and legal aid costs. Further, Article 24(5) provides for a right to reparation,<sup>39</sup> which includes **restitution, rehabilitation** (medical, including psychological treatment, and social care), **satisfaction** (restoration of dignity and reputation, public acknowledgement of the harm suffered), as well as **guarantees of non-repetition** (repealing laws which facilitate enforced disappearance, such as emergency provisions allowing prolonged incommunicado detention, removing from office the officials implicated in serious violations).<sup>40</sup>

Also, the Convention on Enforced Disappearance requires that 'each State Party shall take appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights', although this list is not exhaustive.<sup>41</sup>

The Ordinance in Section 22 states that the Commission "if deems appropriate" shall recommend reparation. However, this is contrary to the international standards, as reparation is not included as a right of the victim, but merely as a discretion of the Commission, based on the notion of victim's condition. Further, the ICJ welcomes the enumeration of specific reparation and rehabilitation measures in the Ordinance, however strongly recommends that this list should not be treated as exhaustive. As envisaged under the international law and standards, reparation provisions should be comprehensive, ranging from the financial or material reparations to symbolic, or other measures and benefits. One of the disturbing omissions is lack of a provision relating to prevention and non-repetition of the crime.<sup>42</sup>

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<sup>38</sup> The Human Rights Committee, mindful of the peculiarly mystifying nature of 'disappearances,' stressed in *the Quintero's* case that 'the author has the right to know what happened to her daughter,' *ibid.* The Inter-American Court of Human Rights also reaffirmed the victim's right to truth in the case of *Efrain Bamaca Velasquez v. Guatemala* where it ruled that "the right to truth is subsumed in the right of the victim or his next of kin to obtain clarification of facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigations and prosecutions ...", Petition No. 11.129/1993, Judgement of 25 Nov. 2000. This was reaffirmed by the Court in *Durant and Ugarte v. Peru*, Petition Nos. 10.009 and 10.078/1987, Judgement of 16 Aug. 2000.

<sup>39</sup> Report of the Independent Expert, *op. cit.* n.36, paras. 84-91.

<sup>40</sup> Also see, *the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violation of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the General Assembly on 16 December 2005, A/RES/60/147.

<sup>41</sup> Article 24 (6) of Convention on Enforced Disappearance.

<sup>42</sup> See, for example, legislative changes adopted by Bolivia and submitted as a guarantee of non-repetition to the Inter-American Court of Human Rights in the case of *Trujillo Oroza v. Bolivia*, Judgement of 26 January 2000.

*The ICJ recommends that the national legislation should recognise the victim's right to reparation and adopt a comprehensive reparation programme in accordance with international standards provided under Article 24 of the Convention, as well as the UN Basic Principles on Remedy and Reparations.*

## **IV. NATIONAL COMMISSION ON ENFORCED DISAPPEARANCES**

This section assesses provisions in the Ordinance relating to the Commission on Enforced Disappearances (Disappearances Commission) in light of the international standards and best practices.

### **1. The mandate of the Commission**

A Commission of Inquiry should have a broad mandate, to look not only into individual responsibility, but also to address the extent and patterns of past violations, as well as their causes and consequences.

Under the present Ordinance the Disappearances Commission is given a limited mandate restricted to investigating the facts related to the disappeared person, ascertaining the persons guilty of disappearances, and making recommendations regarding reparations. Issues regarding examination of enforced disappearance as a part of pattern of a widespread and systematic attack amounting to 'crime against humanity;' causes and contributory factors of enforced disappearance; and other forms of accountability, like vetting, are excluded from the purview of the mandate of Commission. A broader mandate will also enable the Commission to make effective recommendations regarding legal and institutional reforms and/or other measures required for preventing commission of these gross human rights violations in the future.

*The ICJ recommends that the national legislation should broadly define the mandate of the Disappearances Commission to include a) examination of enforced disappearance as a part of pattern of a widespread and systematic attack amounting to 'crime against humanity'; b) causes and contributory factors of enforced disappearance; and c) other forms of accountability.*

### **2. Relationship with the other bodies**

#### **- *The Truth and Reconciliation Commission***

Parallel transitional justice mechanisms often struggle to strike an appropriate balance regarding their respective roles. A key aspect therefore is to define clearly the nature and *modus operandi* of respective mechanisms so as to ensure a complementary functioning of different mechanisms and avoid competing mandates and potential rivalries. A truth and reconciliation commission (TRC) is established in post-transition periods to address the legacy of human rights violations, establish the truth regarding crimes committed during the conflict, pave the way for prosecutions, consider broad causes of the conflict and thereby establish long-term justice and peace. A truth commission could have competence to deal with all issues including disappearances, but may only supervise investigations in the case of disappearances. On the other hand the Disappearances Commission can focus on full investigation of cases of enforced disappearance, establish status and whereabouts of the disappeared, and recommend criminal proceedings against those responsible.

The inter-relationship between the proposed Disappearances Commission and the TRC in Nepal requires careful consideration to ensure a complementary functioning of the two mechanisms.

*The ICJ recommends that the Government of Nepal clearly define the inter-relationship between the Disappearances Commission and other bodies addressing the issue of enforced disappearance and clarify their respective functions and responsibilities.*

- *Office of the Attorney General and the Courts*

The role of a Disappearances Commission is to investigate the facts regarding enforced disappearance, receive information, gather evidence and identify perpetrators. Such Commissions are not intended to act as substitutes for the civil, administrative or criminal courts.<sup>43</sup> Criminal courts alone have jurisdiction to establish individual criminal responsibility, with a view as appropriate to passing judgement and imposing a sentence. Therefore, the relationship between the Disappearances Commission, prosecuting agencies and the Courts need to be clearly defined.

The Disappearances Commission's investigation can provide crucial information to those conducting criminal investigation and prosecutions against the perpetrators. However, a major issue in countries where similar Commissions have been established is whether the information given to the Commission *must* be made available to the bodies responsible for prosecutions, or whether it *should* be privileged. The international best practice shows that only the Office of the Prosecutors should have the power to compel the Commission to disclose confidential information.<sup>44</sup> For instance, in East Timor the regulation specifically provided that the Commission shall not be compelled to release information, except on request of the Office of General Prosecutor.<sup>45</sup> Therefore, systems of communication should be set up from the start between the Office of the Attorney General and the Disappearances Commission to coordinate these matters.

Where the Commission forwards possibly incriminating information and evidence to the relevant authorities, the issues like standards of proof, the right to be presumed innocent, the right of the defence to examine and challenge evidence and/or witness (under Article 14 of the ICCPR), need to be considered. Standards of fair trial must at all times be respected. Therefore, systems of communication should be set up at the outset between the Office of the Attorney General and the Disappearances Commission to adopt a clear policy consistent with international law, relating to these issues. The legislation establishing the Disappearances Commission should contain clear provisions with respect to the nature and extent of information sharing, as well as handling of evidence and witnesses between the Commission, Office of the Prosecutor and the Courts.

*The ICJ recommends that the Government of Nepal should carefully describe the nature and extent of information sharing, as well as handling of evidence and witnesses between the Commission, office of the prosecutor and the courts.*

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<sup>43</sup> Principle 8 of the *Updated Principles on Impunity*.

<sup>44</sup> William B. Schabas and Shane Darcy, *Truth Commissions and Courts: the Tension between Criminal Justice and the Search for Truth*, Kluwer Academic Publishers, 2004, pp.144-146.

<sup>45</sup> Section. 44(2), United Nations Transitional Administration in East Timor, Regulation No. 2001/10 on the establishment of a Commission for Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10, 13 July 2001.



### - *The National Human Rights Institutions*

National Human Rights Institutions (NHRIs) can play an important role in transitional justice measures such as Truth or Disappearances Commissions. NHRIs can contribute to transitional justice processes through information gathering, documenting and archiving human rights abuses, conducting investigations, monitoring and reporting, cooperating with national, regional, or international judicial mechanisms, providing assistance to victims, facilitating national consultations on transitional justice, ensuring the participation of victims, women and vulnerable groups, ensuring respect for international standards, advising on legislative and institutional reforms, and conducting education and training on human rights and national reform efforts.<sup>46</sup>

In Nepal, the National Human Rights Commission (NHRC) is the only official structure that has received and documented cases of enforced disappearance. The NHRC has also supervised exhumations that have been conducted in Nepal over the last few years.<sup>47</sup> However, the present Ordinance falls short of clarifying the role of the NHRC with respect to the Commission. Once the Commission has been set up and starts functioning, the NHRC should cooperate with the workings of the Commission.

*The ICJ recommends that the Government of Nepal should define the inter-relationship between the Disappearances Commission, the NHRC and other bodies addressing the issue of enforced disappearance.*

### **3. Preventive measures**

Preventive measures should be taken by all States in order to ensure that acts of enforced disappearance do not occur. Articles 17-23 of the Convention on Enforced Disappearance provide for a number of measures seeking to prevent enforced disappearance. Such measures include: official and centralised registries of persons deprived of liberty, guarantees against illegal deprivation of liberty and its control by a judicial body or other competent authority; the right to challenge the legality of detention in courts (*habeas corpus*), protection from secret detention, release procedure of person deprived of liberty, and establishing an offence of obstruction to administration of justice.

The present Ordinance does not include provisions for the Commission to recommend preventive measures. This deficiency limits the purview and scope of Commission's work. The Commission should therefore have the mandate to make recommendations regarding reforms and measures designed to prevent enforced disappearance.

*The ICJ recommends that the national legislation should include within the mandate of the Disappearances Commission to make recommendations regarding reforms and measures designed to prevent enforced disappearance in the future.*

### **4. Appointment and removal of the Commissioners**

#### - *Eligibility criteria*

The composition of the Commission is particularly important, as the quality and competence of Commissioners generally determine the effective functioning of the

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<sup>46</sup> OHCHR, Guidance note on NHRIs and Truth Commissions

[http://www.nhri.net/2008/NHRIs\\_Guidance%20Note%20TJ\\_Oct%2008%20\(ind.\).doc](http://www.nhri.net/2008/NHRIs_Guidance%20Note%20TJ_Oct%2008%20(ind.).doc)

<sup>47</sup> ICTJ report, *Disappearances in Nepal*, by Madeleine Fullard, June 2008, pp. 21-22.

Commission. The criteria of selection of members of the Commission must be based on proven expertise and experience in human rights and other relevant fields. The Commissioners should be of high moral character, impartiality and integrity and demonstrated commitment to human rights. Further, in order to ensure functional independence and impartiality of the Commission, it is vital that the Commissioners should not have an affiliation with political parties or other institutions or groups accused under the law.<sup>48</sup>

However, the present section 10(4) of the Ordinance only provides that the members of the Commission should be on recommendation from “among human rights activists, psychologists, law experts, laws science experts, conflict experts and sociologists to even include the representation of women from among persons who have achieved fame with at least ten years of work experience in the related field.” The eligibility criteria intended to ensure independence, competence and effectiveness of the Commissioners, do not include the requirements of integrity, impartiality, high moral character, and lack of political affiliations.

*The ICJ recommends that the national legislation should set out in detail the eligibility criteria to ensure that the Commissioners are selected on the basis of their competence in human rights and other relevant fields, proven independence and recognised impartiality.*

#### - Selection process

The appointment of Commissioners should be a transparent and consultative process. *The Updated Principles on Impunity* provides that the Commissions of Inquiry “must be established through procedures that ensure their independence, impartiality and competence.”<sup>49</sup> If a Disappearances Commission is to be accepted as a credible mechanism, its members should be selected by visible and transparent processes, involving public consultation, or public nomination and scrutiny by selection panel and other interested parties.<sup>50</sup> Civil society organisations, victims groups, human rights defenders, the NHRC and members from marginalised and vulnerable groups should actively participate in the process of selection and appointment of the Commissioners. Further, the Selection Panel for Commissioners should include representatives from government, civil society organisations and victim groups.

The present Ordinance does not set out in detail the selection procedure, and fails to provide a transparent and consultative appointment process, which in turn will have bearing on the effective functioning of and public confidence in the Commission.

*The ICJ recommends that the national legislation should ensure that the selection process is based on a broad consultative process which includes members from difference stakeholder groups such as government, human rights organisations and victim groups.*

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<sup>48</sup> OHCHR, *Rule of Law Tools for Post-Conflict States, Truth Commissions*, 2006, at: [www.ohchr.org/Documents/Publications/RuleofLawVettingen.pdf](http://www.ohchr.org/Documents/Publications/RuleofLawVettingen.pdf).

<sup>49</sup> Principle 7 of *the Updated Principles on Impunity*.

<sup>50</sup> For instance, at the Commission for Reception, Truth and Reconciliation in East Timor, seven national commissioners were selected after a month long public nomination and selection process, see <http://www.easttimor-reconciliation.org>. Also, in the South African truth commission the commissioners were selected through a highly visible process, which included enabling the public at large to nominate potential commissioners who were then screened by a panel of judges. Out of this, a shortlist was developed, the members of which were then exposed to public interview and scrutiny by the judges and other interested parties. A second shortlist of 20-plus names was then presented to the President, who then formally appointed the commissioners. See, John Daniel and Marisha Ramdeen, *Dealing with Africa's post-independence past: truth commissions, special courts, war-crimes trials and other methods*, at [www.hsrcpress.ac.za](http://www.hsrcpress.ac.za).

## - *Removal of Commissioners*

The present Ordinance does not contain any provisions in relation to removal of the Commissioners. In order to ensure institutional and functional independence, the legislation should set out clearly the grounds and process of removal. *The Updated Principles on Impunity* provides that members of a Commission may be removed from their position for reasons such as misbehaviour, incapacity and incompetence, and pursuant to legal procedures “ensuring fair, independent and impartial determinations procedures.”<sup>51</sup> In addition, the members of a Commission should enjoy “privileges and immunities especially in relation to any defamation proceedings or other civil or criminal action brought against them on the basis of facts or opinions contained in the commission’s report.”<sup>52</sup>

*The ICJ recommends that the national legislation should contain a clearly defined process and grounds for removal of the Commissioners.*

## 5. Public release of report

A Disappearances Commission’s final report is critical not only because it highlights the investigative work of the Commission, but also because it determines future action required from the Government and other actors.<sup>53</sup> The final report of the Commission should be publicly released, and widely disseminated without any undue delay. The Supreme Court of Nepal in the *Disappearances Case* recognised the need of public release of the Commission’s report and stated that “[b]y the very nature of the act of disappearance, it is necessary that the families and relatives of disappeared person are provided with the findings of the investigations and that the report is made public.”<sup>54</sup>

The present Ordinance under Section 24(1) requires the Commission to submit its final report to the Government of Nepal, which then will present the report before the Constituent Assembly under Section 24(3). The Ordinance does not include any provision requiring the final report to be publicly released. This may prevent the public from knowing the findings of the Commission, and monitoring the implementation of its recommendations.

*The ICJ recommends that Section 24 of the Ordinance should guarantee that the final report of the Commission should be published and made public without undue delay.*

## 6. Witness protection

Witnesses are often at risk, as those implicated may try to prevent the cooperation of witnesses or take action against those who do cooperate. For instance, in context of public hearings, those who testify often receive threats after the hearing.<sup>55</sup> The Disappearances Commission should provide for witness protection and inform the deponents about it before they testify.

The Ordinance should ensure the protection of witnesses who may be at risk as a result of their participation in the process. A comprehensive, long-term and effective witness protection programme should be devised prior to the initiation of any investigation and then implemented as soon as the investigation begins.

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<sup>51</sup> Principle 7(a).

<sup>52</sup> Principle 7(b).

<sup>53</sup> ICTJ, *Truth Commissions and NGOs: The Essential Relationship*, p.35, at <http://www.ictj.org/images/content/1/0/106.pdf>.

<sup>54</sup> The “Disappearance case”, *op. cit.* n. 5.

<sup>55</sup> OHCHR, *Rule of Law Tools for Post-Conflict States*, *op. cit.* n.48, sub section 8.

Protection measures should be available for all witnesses, staff and others associated with the investigation. While designing the witness protection programme, the Commission should take into account the views of the witnesses on which measures they require and whether the protection measures are proportionate to the seriousness of the risk.<sup>56</sup>

ICJ welcomes the recognition of the need for witness protection measures in the present Ordinance under Section 19, however it is concerned that the present Ordinance does not set out the modalities of the witness protection programme.

The Commission should consider establishing a special unit to oversee the implementation of the witness protection programme. The Unit should also include staff with mental health expertise and counsellors able to respond to the needs of traumatised witnesses.

*The ICJ recommends that the Government of Nepal should consider establishing a witness protection unit within the Disappearances Commission to oversee the protection of witnesses.*

## 7. Exhumations

The task of excavation, exhumation and identification of mortal remains needs to be conducted by professional teams of forensic experts. Before exhumations can start, one needs, however, to establish an ante-mortem database with reliable health and other data (e.g. dental records) to facilitate the identification of mortal remains. This should be a joint exercise of the ICRC, professional teams of forensic experts, the Government, the NHRC and the NGOs who would carry out the interviews with relatives of the missing persons.<sup>57</sup> Furthermore, gravesites would need to be located and guarded before excavations can start; and during exhumations work the personal security of the experts need to be guaranteed.

In Bosnia and Herzegovina in order to coordinate the activities of the various authorities concerned with excavating mass graves, a so-called Expert Group on Exhumations and Missing Persons was created in early 1996. It was composed of the UN expert on missing persons, the UN Special Rapporteur on the situation of human rights in the territory of the former Yugoslavia, as well as representatives of the ICRC, of ICTY, and from Physicians for Human Rights.<sup>58</sup>

The ICTJ has recommended a three pronged process which starts with preliminary investigation and site identification (investigation stage), followed by excavation of site and exhumation of remains (archaeological stage) and lastly the forensic examination of the recovered remains (anthropological stage).<sup>59</sup> All these three stages require expertise of professionals from different backgrounds and it is essential that the team responsible for excavation and exhumations consist of members with expertise in forensic anthropology and forensic archaeology.<sup>60</sup>

The Ordinance under Section 17(5) grants powers of exhumation to the Commission. However, the provision still does not address the complexities related to the excavation and exhumation process and does not make provision for involving forensic and other experts. Furthermore, the excavation of mass graves and

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<sup>56</sup> Amnesty International, *Truth, justice and reparation: Establishing an effective truth commission*, 11 June 2007, AI Index: POL 30/009/2007.

<sup>57</sup> Manfred Nowak, "Monitoring disappearances – the difficult path from clarifying past cases to effectively preventing future ones," *European Human Rights Law Review*, Issue no.4, 1996, pp. 348-361.

<sup>58</sup> *Ibid.*, at p.359

<sup>59</sup> ICTJ report, *Disappearances in Nepal*, *op. cit.* n. 47, at p.22.

<sup>60</sup> *Ibid.*, at p. 25.

identification of mortal remains is a highly expensive undertaking.<sup>61</sup> Therefore, appropriate financial support for this task should be secured and appeal to international community should be made to make available the necessary means and facilities so that the remains of the dead can be exhumed, forensically examined, identified and reburied in an orderly and respectful manner.

*The ICJ recommends that the Government of Nepal should create an Expert Group on Exhumations and Missing Persons consisting of ICRC, professional teams of forensic experts, government representatives, the NHRC and NGOs.*

*The ICJ further recommends that international community should provide appropriate financial support to the Government of Nepal to undertake the excavation of mass graves and identification of mortal remains.*

## **8. Role of NGOs and international actors**

National and international NGOs can play a variety of important roles in all phases of the work of transitional justice mechanisms such as Disappearances Commissions, by lobbying Government officials, training members of the Commission, sharing information and resources with the Commission, counseling victims, implementing a national outreach and advocacy strategy to advance public understanding of the commission, and monitoring the implementation of recommendations made by the Commission.<sup>62</sup> Depending on how the NGOs position themselves, they may act as watchdogs, offering criticism and recommendations, or as advisers offering technical assistance.<sup>63</sup>

International actors also have an important role to play in the work of the Commission. They can provide the Commission specific areas of expertise, through training and access to material on international human rights and humanitarian law that may be relevant to the investigations.<sup>64</sup> Donors may also provide crucial financial support needed to conduct important investigative operations such as excavations and exhumations.

The present Ordinance does not clarify the nature and scope of involvement of NGOs and international actors in the workings of the Disappearances Commission. Involvement of international actors can strengthen the knowledge base of the Commission and help the Commission gain from experiences of Commissions elsewhere.

*The ICJ recommends that the Government of Nepal should encourage the active participation of NGOs, INGOs and other international actors in all phases of the Commission's work.*

## **V. CONCLUSION**

The phenomenon of enforced disappearances is one of the most serious human rights violations. It infringes upon a range of human rights embodied in the UDHR and set out in both International Covenants on Human Rights and other major human rights instruments. The crime of enforced disappearance is not directed only

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<sup>61</sup> ICRC report, *The Missing: Action to resolve the problem of people unaccounted for as a result of armed conflict or internal violence and to assist their families*, Human Remains Management, 2002, at: [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5CALR3/\\$File/ICRC\\_TheMissing\\_102002\\_EN\\_3.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5CALR3/$File/ICRC_TheMissing_102002_EN_3.pdf).

<sup>62</sup> OHCHR, *Rule of Law Tools for Post-Conflict States*, *op. cit.* n.48, pp. 33-34.

<sup>63</sup> ICTJ, *Truth Commissions and NGOs*, *op. cit.* n. 53.

<sup>64</sup> OHCHR, *Rule of Law Tools for Post-Conflict States*, *op. cit.* n.48.

against the disappeared person but also against their families, friends and the society they live in.

The ICJ welcomes the decision of the Government of Nepal to legislate on the issue of enforced disappearance, establish a Disappearances Commission and investigate cases of alleged enforced disappearance and abduction. Ensuring accountability for past human rights violations can assist in the process of healing and contribute to national reconciliation.

Every effort must be made by the Government of Nepal to investigate and prosecute cases of enforced disappearance and abduction. The Government must also ensure that these processes are in accordance with international best practices and international human rights norms.

At this critical juncture in Nepal's political transition to a peaceful, democratic republic, the Constituent Assembly has the historic responsibility of ensuring that the Disappearances Ordinance fulfils the promise of ending impunity for gross human rights violations and strengthening respect for the rule of law. As the Supreme Court cautioned in its judgment, *"at a time when the nation is making a leap forward with great hope and confidence in the direction of democratization, if the present State does not become serious on matters relating to disappeared persons, the objective underlining the People's Movement will not be realized."*<sup>65</sup>

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<sup>65</sup>The "Disappearance case", *op. cit.* n. 5.