

Serious Crimes in Nepal's Criminal Code Bill, 2014

A Briefing Paper

March 2017

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Table of Contents

Introduction	1
Shortcomings in the Criminalization of Enforced Disappearance in the Draft Criminal Code Bill	4
<i>Applicable International and National Law on Enforced Disappearance.....</i>	<i>4</i>
<i>Nepal's Draft Criminal Code Bill on Enforced Disappearance</i>	<i>6</i>
<i>The Definition of Enforced Disappearance in the Draft Criminal Code Bill Falls Short of International Standards</i>	<i>6</i>
<i>The Draft Criminal Code Bill Inadequately Addresses Superior Command Responsibility for Enforced Disappearances.....</i>	<i>9</i>
<i>The Draft Criminal Code Bill Does Not Expressly Make the Prohibition Against Enforced Disappearance Absolute.....</i>	<i>11</i>
<i>Penalty Provisions are Inconsistent with International Standards</i>	<i>11</i>
<i>Reparations Provided Under the Draft Criminal Code Bill are Inadequate.....</i>	<i>13</i>
<i>The Limitations Period Under the Draft Criminal Code Bill is Inconsistent with International Standards</i>	<i>15</i>
<i>The Draft Criminal Code Bill Fails to Establish Enforced Disappearances as a Crime against Humanity.....</i>	<i>17</i>
Shortcomings with Criminalization of Rape and Sexual Violence and Gender Based Violence in the Criminal Code Bill	18
<i>Applicable International and National Law on Sexual and Gender-Based Violence.....</i>	<i>18</i>
<i>Nepal's Draft Criminal Code Bill on Sexual and Gender-Based Violence</i>	<i>19</i>
<i>Definition of Rape is Inconsistent with International Standards.....</i>	<i>19</i>
<i>The Draft Criminal Code Bill Does Not Adequately Incorporate the Element of Consent.....</i>	<i>22</i>
<i>Marital Rape is Inadequately Criminalized.....</i>	<i>23</i>
<i>Aggravating Circumstances Are Not Consistent with International Standards</i>	<i>25</i>
<i>Provisions Criminalizing Sexual Offences against Children are Inadequate...25</i>	<i>25</i>
<i>Compensation Under the Draft Criminal Code Bill is Inadequate</i>	<i>26</i>
<i>Limitations Period is Inconsistent with International Standards.....</i>	<i>28</i>
<i>Criminalization of "Unnatural Sex" is Contrary to International Law.....</i>	<i>29</i>
Other Serious Crimes	30
<i>Genocide is Not Criminalized in the Draft Criminal Code Bill</i>	<i>30</i>
<i>Crimes Against Humanity and War Crimes Are Not Criminalized in the Draft Criminal Code Bill.....</i>	<i>31</i>
Conclusions and Recommendations.....	32
<i>Enforced Disappearances</i>	<i>32</i>
<i>Rape and Sexual Violence</i>	<i>34</i>
<i>Other Serious Crimes</i>	<i>35</i>

Introduction

Nepal's armed conflict, from 1996-2006, was marked by widespread violations of international human rights and humanitarian law. The need to address accountability and provide for reparation for victims of violations a major component of the peace accords that ended the conflict and established a new republic in the country. One of the reforms demanded by Nepali civil society and also recommended by the country's international supporters was revising Nepal's laws to criminalize acts that constitute gross violations of human rights and are established as crimes under international law.

On 2 November 2014, Nepal's Ministry of Law, Justice, Constituent Assembly and Parliamentary Affairs tabled five bills, including a bill on the Criminal Code, to the Legislative-Parliament. The bill on the Criminal Code sets out numerous reforms to the laws contained in the National Code 1963 (*Muluki Ain 2020*). Amongst the key reforms, the Criminal Code Bill criminalizes enforced disappearance, rape and other forms of sexual violence.

The 2014 draft Criminal Code Bill is the latest in a series of several drafts tabled by the Nepal government. In a 2011 joint submission, Nepali advocacy groups along with the ICRC and UN agencies reviewed an earlier draft Bill in 2011 and called upon the Government to incorporate serious crimes into the Criminal Code.¹ The joint submission urged the Government to criminalize genocide, crimes against humanity and war crimes, and recommended possible penalties.² The joint submission also stressed that there be no limitation periods for the prosecution of these crimes.³

The Government of Nepal's latest initiative to update its criminal laws and codify new crimes signals renewed political will to address this problem and is an improvement on previous draft bills. However, the current draft still falls short of meeting Nepal's international human rights obligation to the criminalize human rights violations and abuses that amount to crimes under international law.

The acts that are crimes under international law are well established under international human rights law.⁴ International standards, including the UN

¹ DHRC, INSEC, ICRC, UNICEF, Advocacy Forum, Access to Justice and Advocacy of Rights (AJAR) Nepal and OHCHR Nepal made a joint submission analysing the Draft Criminal Code, Criminal Procedure Code and Sentencing Bill in 2011, titled "Civic Appraisal, Constructive Improvement Options, Criminal Justice System of Nepal (Draft Criminal Code, Criminal Procedural Code, Sentencing Bill, Children Bill and Prison Act)", Access to Justice and Advocacy of Rights (AJAR) Nepal 2011, available in English at <http://www.ajarnepal.org.np/uploads/images/CIVIC%20APPRAISAL%20About%20%20Draft%20Criminal%20Code,%20Criminal%20Procedural%20Code,%20Sentencing%20Bill,%20Children%20Bill%20and%20Prison%20Act.pdf>.

² Civic Appraisal, Constructive Improvement Options, Criminal Justice System of Nepal (Draft Criminal Code, Criminal Procedural Code, Sentencing Bill, Children Bill and Prison Act), Access to Justice and Advocacy of Rights (AJAR) Nepal 2011, available in English at <http://www.ajarnepal.org.np/uploads/images/CIVIC%20APPRAISAL%20About%20%20Draft%20Criminal%20Code,%20Criminal%20Procedural%20Code,%20Sentencing%20Bill,%20Children%20Bill%20and%20Prison%20Act.pdf>.

³ Ibid. at 15-16, 59-63.

⁴ See International Commission of Jurists (ICJ), International Law and the Fight Against Impunity, Practitioners Guide No. 7, available at <https://www.icj.org/international-law-and-the-fight-against-impunity-icj-practitioners-guide-no-7-now-available-in-english/>; ICJ, Enforced Disappearance and

Updated Set of Principles for the Promotion and Protection of Human Rights through Action to Combat Impunity, identify "serious crimes under international law as "grave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol I thereto of 1977 and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution, and slavery."⁵

There is a clear duty under international human rights law, including treaties to which Nepal is a party, to criminalize torture and other ill-treatment, enforced disappearance, and arbitrary and otherwise unlawful killings.⁶

States are also required to criminalize war crimes, crimes against humanity and other breaches of international humanitarian law. Nepal has acceded to the Geneva Conventions of 12 August 1949,⁷ and is obliged "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed any of the grave breaches of the [Conventions]."⁸ In the case of *Rajaram Dhakal v. Government of Nepal*,⁹ the Supreme Court of Nepal stated, "legislation that covers all aspects of the spirit of the Geneva Convention has yet to be formulated and the process of formulating such legislation is underway. It is appropriate and essential to enact effective legislation at the national level addressing the implementation of the Geneva Conventions including provisions as prescribed in the Conventions such as those establishing tribunals, procedure and punishment for violation of the provisions of Conventions."¹⁰ The Supreme Court directed the government of Nepal to take necessary action, including formulating appropriate legislation with applicable procedures and punishment where offences are committed, to implement its obligations under the Geneva Conventions.¹¹

The internationally recognized definitions of genocide, war crimes and crimes against humanity, are set out and defined in the Rome Statute for the International Criminal Court.¹² The Preamble of the Rome Statute recognizes that these crimes threaten the "peace, security and well being of the world", and reaffirms that it is the "duty of every State to exercise its criminal jurisdiction

Extrajudicial Execution: Investigation and Sanction, Practitioners Guide No. 9, available at <http://www.icj.org/wp-content/uploads/2015/12/Universal-Enforced-Disappearance-and-Extrajudicial-Execution-PGNo9-Publications-Practitioners-guide-series-2015-ENG.pdf>.

⁵ UN Doc. E/CN.4/2005/102/Add.1.

⁶ Art. 2(1), Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Art. 2(2), International Covenant on Civil and Political Rights (ICCPR); Art. 4, International Convention for the Protection of All Persons from Enforced Disappearance (ICESCR).

⁷ International Committee of the Red Cross (ICRC), available at <https://www.icrc.org>.

⁸ The Geneva Conventions of August 12 1949 (date of publication unattributed), Geneva: International Committee of the Red Cross, at 42, 68, 130, 154.

⁹ *Rajaram Dhakal v. Government of Nepal*, Nepal Kanoon Patrika, 2060(BS), Issue 12, Decision No. 7274.

¹⁰ See *Rajaram Dhakal*, at 787-788.

¹¹ *Ibid.* at 787-788.

¹² Art. 5, Rome Statute of the International Criminal Court (Rome Statute), 17 Jul 1998 (last amended 2010), available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf. These specific crimes are further defined in subsequent sections.

over those responsible for international crimes". Nepal has not yet become party to the Rome Statute. However, on 24 July 2006, the Nepal Parliament unanimously issued a resolution directing the Government to accede to the Rome Statute.¹³

The draft Criminal Code Bill aims to criminalize acts of enforced disappearance, rape and other sexual violence. Rape and other sexual violence are, in many contexts, crimes under international law. Under certain aggravated circumstances, they may constitute war crimes or crimes against humanity. Rape, particularly when conducted by or with the participation or complicity of State agents, is a form of torture. The State also has obligations to prosecute rape by private actors, including in situations of domestic violence, under international human rights law.

However, the draft Bill still fails to criminalize other serious crimes, including the full range of war crimes, crimes against humanity and genocide.

Similarly, the Government of Nepal has registered a separate *Torture Bill in the Parliament in 2014, which also fall shorts of international standards and meeting Nepal's International legal obligations in several key respects.*¹⁴

This briefing paper analyses the provisions of the draft Criminal Code Bill and their compliance with international law, particularly Nepal's international human rights obligations. The briefing paper also considers, where appropriate, comparative practice in implementing these laws in certain other jurisdictions. The briefing paper specifically addresses three areas of the draft Bill: the criminalization of enforced disappearances, the criminalization of rape and other sexual violence, and the criminalization of other serious crimes under international law.

The briefing paper concludes with recommendations for revision of several provisions of the draft Criminal Code Bill in order to ensure full compliance with Nepal's international legal obligations. Among the comprehensive list of recommendations available at the conclusion of this briefing paper, the following key recommendations are directed towards the Government of Nepal:

- Amend the definition of enforced disappearances to make it consistent with Nepal's international obligations and the Convention on the Protection of All Persons from Enforced Disappearance (CED);
- Revise the prescribed penalties and mitigating and aggravating factors in the Criminal Code Bill to comply with relevant provisions of the CED and other international standards, keeping in mind the extreme seriousness of the offences;
- Clarify that there must be no statute of limitations for complaints in respect of and prosecution for enforced disappearance;

¹³ Coalition for the International Criminal Court, available at <http://www.iccnw.org>.

¹⁴ See ICJ, The Torture and Cruel, Inhuman or Degrading Treatment (Control) Bill, 2014, A Briefing Paper, June 2016, available at <https://www.icj.org/wp-content/uploads/2016/06/Nepal-Torture-Bill-Advocacy-Analysis-Brief-2016-ENG.pdf>.

- Amend provisions on rape and sexual violence to ensure that they are gender neutral, and that both perpetrators and victims can be male, female, or “third-gender”, as defined by the Nepal Supreme Court;
- Maintain consistent penalties for both marital rape and non-marital rape;
- Revise the penalty for rape to reflect the seriousness of the crime and the long-lasting damage suffered by the victim, in line with international standards; and,
- Include provisions criminalizing genocide, crimes against humanity and war crimes, in line with international law and standards.

Shortcomings in the Criminalization of Enforced Disappearance in the Draft Criminal Code Bill

Applicable International and National Law on Enforced Disappearance

Enforced disappearances are absolutely prohibited under the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the International Convention for the Protection of all Persons from Enforced Disappearances (CED). Nepal is a party to the ICCPR and the CAT.¹⁵ While Nepal has not yet become a party to the CED, the Nepal Supreme Court has indicated that the State is obliged to implement the main provisions of that instrument. In its landmark decision of *Rabindra Prasad Dhakal v. the Government of Nepal* in June 2007, the Court stated that “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

¹⁵ The ICCPR protects a number of rights that are constitutive of enforced disappearances and imposes duties on States to investigate, prosecute and provide for an effective remedy and reparation for such violations. Acts of enforced disappearance necessarily entail a violation of the prohibition against torture and ill-treatment protected under article 7 of the ICCPR, the prohibition against arbitrary detention (article 9, ICCPR) and the right to recognition as a person under the law (article 16, ICCPR). In instances where the fate of the disappeared person turns out to be an unlawful killing (extrajudicial, summary or arbitrary execution), it also constitutes a denial of the right to life under article 6 of the ICCPR. Accordingly, the UN Human Rights Committee has made clear in its General Comment on the General Legal Obligations under the ICCPR, as well as in numerous cases and jurisprudence, that States Parties must investigate and bring to justice perpetrators of enforced disappearance. See Human Rights Committee, General Comment 31, Nature of the general legal obligation imposed on State parties to the Covenant, 2004, UN Doc. CCPR/C/21/Rev.17/Add.13, 26 May 2004, para. 18, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/419/56/PDF/G0441956.pdf?OpenElement>. See also Human Rights Committee, Decision of 27 October 1995, Case of Nydia Erika Bautista (Colombia), Communication 563/1993, UN Doc. CCPR/C/55/D/563/1993, and Decision of 29 July 1997, Case of José Vicente and Amado Villadfene, Luis Napoeon and Angel Maria Torres Crespo and Antonio Hugues Chaparro (Colombia), Communication 612/1994, UN Doc. CCPR/C/60/D/612/1995.612/1995. Nepal also must provide victims of enforced disappearance with an effective remedy, including a prompt, thorough and effective investigation, adequate information resulting from its investigation and immediate release of the victim if under detention. The UN Human Rights Committee has expressly affirmed these ICCPR obligations with respect to enforced disappearances in Nepal. See Human Rights Committee, Sharma v. Nepal, UN Doc. CCPR/C/94/D/1469/2006, para 9.

barriers to using the provisions of the Convention as guiding principles.”¹⁶ To that end, the Supreme Court of Nepal also ordered the Government to enact legislation to criminalize enforced disappearance.¹⁷ The Court noted that it was necessary to enact legislation that provides a “[definition] of the act of disappearance consistent with the definition stated in the *International Convention for the Protection of All Persons from Enforced Disappearance* 2006.”¹⁸ A subsequent decision by the Supreme Court in 2014 directed the Government to implement the Court’s 2007 decision.¹⁹ The Supreme Court makes it clear that the standard to be used for this legislation is the CED.

The CED itself, adopted by consensus by the UN General Assembly in 2006, sets out extensively the contemporary and internationally accepted standards with respect to enforced disappearance. Article 2 of the CED defines enforced disappearance as:

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.

Pursuant to article 4 of the CED, “[e]ach State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law”. Article 24 of the CED lists the rights of victims of enforced disappearances, including: reparation; prompt, fair and adequate compensation; and knowledge of the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Article 24 of the CED also defines victims as not only the individual who has been subjected to the enforced disappearance, but also “any individual who has suffered harm as the direct result of an enforced disappearance”, which includes relatives of the disappeared person.

The right to an effective remedy and reparation, including compensation, guarantees of non-repetition, rehabilitation, restitution and satisfaction, is affirmed in the UN Basic Principles on the Right to a Remedy and Reparation for Victims of Gross violations of International Human Rights Law and Serious

¹⁶ See *Rajendra Prasad Dhakal and Others v. the Government of Nepal and Others*, Nepal Kanoon Patrika, 2064(BS), Issue 2 decision no 7817.

¹⁷ The Supreme Court specifically stated, “From among these instruments, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention against Torture, Cruel, Inhumane or Degrading Treatment or Punishment are related to the present matter and hence are particularly relevant.” See *Rabindra Prasad Dhakal and Others v. the Government of Nepal and Others* (Nepal Kanoon Patrika, 2064(BS) Issue 2 decision no 7817).

¹⁸ The Supreme 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.” See *Rajendra Prasad Dhakal and Others v. the Government of Nepal and Others* (Nepal Kanoon Patrika, 2064(BS), Issue 2, decision no 7817).

¹⁹ See *Madhav Kumar Basnet v. the Government of Nepal*, Nepal Kanoon Patrika, 2070 (BS) Issue 9, Decision No. 9051, citing *Rajendra Prasad Dhakal and Others v. the Government of Nepal and Others*, Nepal Kanoon Patrika, 2070(BS), Issue 9, decision no. 7817.

Violations of International Humanitarian Law, which was adopted by consensus resolution of the General Assembly in 2005.²⁰ The right to remedy is guaranteed in article 2(3) of the ICCPR and article 14 of the CAT.²¹

Nepal's Draft Criminal Code Bill on Enforced Disappearance

The proposed Criminal Code Bill is aimed at criminalizing and sanctioning enforced disappearances in Nepal. Chapter 16 of the Bill contains provisions criminalizing enforced disappearances, prescribing penalties and outlining terms of compensation for victims. Chapter 16 falls well of short of what is necessary for Nepal to meet its international legal obligations and comply with the orders of the Supreme Court. Without amendment of the provisions to comply with these legal obligations, the draft Bill will not succeed in delivering justice to the victims of enforced disappearances, including the families of the disappeared.

As further elaborated below, the following sections of Chapter 16 should be revised in order to comply with international standards and Nepal Supreme Court jurisprudence: the definition of enforced disappearances; command responsibility; universal application of these provisions; penalties, reparations and compensation; and limitation periods.

The Definition of Enforced Disappearance in the Draft Criminal Code Bill Falls Short of International Standards

Subsection 203(1) of the draft Criminal Code Bill states that "[n]o one shall commit or cause to commit an act of disappearance of another person". The definition of "act of disappearance of a person" is set out in subsection 203(2) of the Bill. Provisions on penalties are set forth in subsections 203(7)(a)-(b).

For the purpose of subsection (1), Subsection 203(2) defines an "act of disappearance of a person" as follows:

- a) If a person or security personnel, having authority to arrest, investigate or enforce law in accordance with law, does not produce a person detained or held under control in any other forms before the judicial authority within the period to be presented according to law or does not allow concerned person to visit him/her or not provides information on where, how and in which condition s/he is held;

²⁰ Adopted by the UN General Assembly, Resolution A/RES/60/147, 16 Dec 2005, paras. 3, 15-23.

²¹ UN Human Rights Committee, General Comment 31, the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 16 (Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.); UN Committee against Torture, General Comment No. 3, Implementation of Article 14 by States Parties, UN Doc. CAT/C/GC/3, 19 Nov 2012, paras. 8-18.

- b) If any person is deprived of his/her liberty having been kidnapped, captured, taken into control or by any other means in the name of any organization or organized or unorganized group and not provided information to concerned person the reason/cause of such depriving and where, how and in which condition s/he is held.

The definition of an enforced disappearance under the CED consists of four elements: (1) deprivation of liberty of any form; (2) involvement of agents of the State, at either directly or through support, authorization of or acquiescence in conduct of others; (3) refusal to acknowledge the deprivation of liberty, or concealment of the fate or whereabouts of the disappeared person; and (4) placement of the disappeared person outside the protection of the law.

The definition of an "act of disappearance" as set out in the draft Criminal Code Bill is inconsistent with the definition of enforced disappearances in Article 2 of the CED in several important ways such that, if enacted without amendment, many instances of enforced disappearance will fall outside the ambit of this definition, resulting in continued impunity and denial of justice for victims of enforced disappearances.

First, the manner in which the definition in section 203(2)(a) of the Bill is drafted potentially restricts the scope of individuals who can be held responsible for an enforced disappearance to persons "having authority to arrest, investigate or enforce law in accordance with law", instead of "any agent of the state" (as in the CED). Similarly, the offence in this sub-section is framed in terms of presenting the disappeared person "before the case hearing officer within the period to be presented according to law". However, the CED requirement is much broader, requiring only a "refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person", irrespective of whether a case hearing officer has mandated the "disappeared" person's presence. Sections 203(2)(a) and 203(2)(b) also both do not specifically and clearly include other elements of the CED definition. For example, neither reflects the element of the refusal to acknowledge the deprivation of liberty.

Second, section 203(2)(b) conflates the crime of enforced disappearance by a non-state actor who is acting with the consent or acquiescence of an official, with the offences of kidnapping and abduction in which there is no support, authorization or acquiescence of a State official. Nepal's international obligations require enforced disappearances to be a stand-alone, independent offence with its distinct elements.

In addition, by omitting the situation where there are persons or groups of persons acting with the support, consent, or acquiescence of the State, there is no possibility to hold State agents who supported, consented or acquiesced accountable as required under article 6 of the CED.

Third, defining separate and different elements of the crime of disappearance for State actors, on the one hand, and non-state actors, on the other hand, is not consistent with the CED. Under the CED, the same elements of the crime apply to both "agents of the state", and "persons or groups of persons" acting with the authorization, support or acquiescence of the State. Defining different

elements for different groups results in certain elements of the offence applying to one group and not the other. For example, not providing information to the concerned person about why his/her liberty has been deprived is an element of the crime under subsection 203(2)(b), applicable to organizations or groups, but not under subsection 203(2)(a), applicable to those “who have the authority in the law to arrest”.

Fourth, the title and definition of the prohibition also notably omits the word “enforced”. This is not in line with the CED, which uses the terminology “enforced disappearance”. Other international treaties have specifically incorporated the term “enforced disappearance” or “forced disappearance”, including, for example, the Rome Statute to the International Criminal Court,²² the Kampala Convention²³ and the Inter-American Convention on the Forced Disappearance of Persons.²⁴ A number of other instruments also incorporate the terminology of “enforced” or “forced” disappearance, including the UN Declaration on Enforced Disappearance²⁵, the International Law Commission (ILC) Draft Code of Crimes against Peace and Security of Mankind (1996),²⁶ and the United Nations Transitional Administration in East Timor (UNTAET) Regulation No. 2000/15.²⁷ Legislation in various jurisdictions also refers to “enforced” or “forced” disappearance.²⁸ Furthermore, the Supreme Court of Nepal in its 2007 ruling²⁹ has explicitly used the term “enforced disappearance” (*Balpurbak Beppta Parne Karya*).

The Criminal Code Bill should be amended to use the term “enforced disappearance” instead of “disappearance”, and include the following definition, consistent with Nepal’s international obligations: 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

²² For a definition of enforced disappearances, see Rome Statute of the International Criminal Court, A/CONF.183/9, art. 7(2)(i), 17 Jul 1998, available at <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

²³ Article 9(1)(c) of the Kampala Convention states: “State Parties shall protect the rights of internally displaced persons regardless of the cause of displacement by refraining from, and preventing, the following acts, amongst others... enforced disappearance.” African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (“Kampala Convention”), 22 Oct. 2009. See also International Committee of the Red Cross, Customary IHL, Practice Relating to Rule 98: Enforced Disappearance, available at https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter32_rule98#top.

²⁴ See Inter-American Convention on the Forced Disappearance of Persons, 9 Jun 1994, available at <http://www.oas.org/juridico/english/treaties/a-60.html>.

²⁵ See Declaration on the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/47/133, 18 Dec 1992, available at <http://www.un.org/documents/ga/res/47/a47r133.htm>.

²⁶ “Forced disappearance[s]” of persons is a crime against humanity. International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, art. 18(i) (1996), available at http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf.

²⁷ Section 5(1)(i) of the UNTAET states, “Enforced disappearance of persons” constitutes a crime against humanity. Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, section 5(1)(i), 6 Jun 2000, available at <http://www.un.org/en/peacekeeping/missions/past/etimor/untaetR/Reg0015E.pdf>.

²⁸ See, e.g., Australia (Schedule 1, s268.21, International Criminal Court (Consequential Amendments) Act 2002), Congo (Article 6, Genocide, War Crimes and Crimes against Humanity Act, 1998), Netherlands (Article 4(1)(i), International Crimes Act, 2003), South Africa (Schedule 1, Part 2, s.1(i), ICC Act, 2002).

²⁹ See *Rajendra Prasad Dhakal and Others v. the Government of Nepal and Others*, Nepal Kanoon Patrika, 2064(BS), Issue 2, decision no 7817.

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.³⁰

The Draft Criminal Code Bill Inadequately Addresses Superior Command Responsibility for Enforced Disappearances

Sections 203(3) – (6) of the Draft Criminal Code Bill state, in pertinent part:

203(3) The person, who orders to arrest, detain or take into control to someone that caused an act of disappearance and who executes the order, both shall be considered as principal offender.

203(4) If an act of disappearance occurred as an order or instruction made by any persons holding public office or responsible person of any organization or organized or unorganized group, the person who orders or instructs, shall be considered as a principal offender.

203(5) If a superior who knew or consciously disregarded information which clearly indicated that his/ her subordinate, agency or group are committing an act of disappearance and/ or failed to take necessary measures to prevent the commission of such act, s/he shall be considered as an offender of such crime.

203(6) If someone is made disappeared by more than one person, each person involved shall be considered as an offender equally.

It is a positive step that sub-sections 203(3)-(6) of the Draft Bill recognize that persons who ordered, or acquiesced in, the commission of an enforced disappearance are as culpable as the persons who actually carried out the act. However, the current draft lends itself to inconsistent enforcement and application due to the varying definitions of “principal offender” under subsections 203(3)-(6).

These subsections should be redrafted to clearly establish liability for all those involved, including those who were directly involved in committing the act, attempting to commit the act, ordering or soliciting the act, those who were accomplice to an enforced disappearance (or attempt), and those who bore superior or command responsibility.

This more expansive formulation would also be in line with Article 6 of the CED, which outlines those who, at a minimum, a State must take measures to hold criminally responsible.³¹ Article 6 of the CED states in pertinent part:

(1) A principal offender is defined as follows:

³⁰ See also Advocacy Forum and Redress Trust, Comment on Nepali Draft Criminal Code, Draft Criminal Procedure Code and Draft Sentencing Bill: Provisions relevant to a Fair Trial, Enforced Disappearance and Sexual Violence (April 2011), available at: http://www.redress.org/downloads/publications/AFRedress_Report_on_Draft_Legislation.pdf.

³¹ See Art. 6, International Convention for the Protection of All Persons from Enforced Disappearance (CED), General Assembly Resolution 61/177, UN Doc. A/RES/61/177, adopted 20 Dec 2006, available at <http://www.ohchr.org/en/hrbodies/ced/pages/conventionced.aspx>.

- (a) A person who commits, orders, solicits the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance;
 - (b) A superior who: i) knew, or consciously disregarded information which clearly indicated that subordinates under his or her effective authority and control were committing, or about to commit, a crime of enforced disappearance; (ii) exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and (iii) failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;
 - (c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander.
- (2) No order or instruction from any public authority, civilian, military or other may be invoked to justify an offence of enforced disappearance.

This formulation would also conform with Nepal's obligations under the CAT with respect to superior orders. The CAT Committee has elaborated on the obligation to implement article 2 of the CAT stating that "the responsibility of any superior officials, whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein, be fully investigated through competent, independent and impartial prosecutorial and judicial authorities."³²

Paragraphs 3-6 of Section 203 should be amended to define principal offenders and assign criminal responsibility for superior officers in line with the definition prescribed by Article 6 of the CED, stating in pertinent part:

- (1) A principal offender is defined as follows: (a) A person who commits, orders, solicits the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance; (b) A superior who: i) knew, or consciously disregarded information which clearly indicated that subordinates under his or her effective authority and control were committing, or about to commit, a crime of enforced disappearance; (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution; (c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander.
- (2) No order or instruction from any public authority, civilian, military or other may be invoked to justify an offence of enforced disappearance.

³² UN Committee against Torture, General Comment No. 2, Implementation of article 2 by States parties, UN Doc. CAT/C/GC/2, 24 Jan 2008, para 26.

The Draft Criminal Code Bill Does Not Expressly Make the Prohibition Against Enforced Disappearance Absolute

Article 1(2) of the CED states that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance”.³³ Article 6(2) of the CED states that “[n]o order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance.” This language is crucial to emphasize the absolute and non-derogable nature of the prohibition against enforced disappearances, even in states of emergency, times of armed conflict or other national crisis.

There is, however, no equivalent provision in the draft Criminal Code Bill to expressly reaffirm the absolute nature of the prohibition against enforced disappearances.

A provision should be included in the Criminal Code Bill to reaffirm the universal applicability of the prohibition against enforced disappearances, as per article 1(2) of the CED, clarifying that: i) No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance; ii) An order from any public authority, civilian, military or other may not be invoked as a justification for enforced disappearance.

Penalty Provisions are Inconsistent with International Standards

Section 203(7) of the draft Criminal Code Bill, which specifies penalties for enforced disappearances, states:

Person committing the offence under sub-section (1) shall have the following punishment:

- (a) Considering the duration and circumstances of the person disappeared, the person responsible for committing an act of disappearance considered as the principal offender shall receive imprisonment of up to 15 years and fine up to five hundred thousand rupees;
- (b) Person committing the act of disappearance or conspiring with the person considered as the principal offender in the act of disappearance, or person attempting or creating the circumstances of disappearance, shall receive half punishment to the principal offender.

Sub-sections 8, 9 and 10 of the same section provide for certain aggravating and mitigating factors, stating in pertinent part:

- (8) Anyone who commits an offence against women and children pursuant to subsection (1), shall be liable to additional two years of imprisonment in addition to the punishment referred to sub section (7);

³³ Ibid., art. 1(2).

(9) Anyone who was involved in the act of enforced disappearance, if he or she commits any other offence which was punishable under Nepali law, against the person who was made disappeared, he or she shall be liable to additional punishment as prescribed in Nepali law, in addition to the punishment referred to this section;

(10) Anyone who uses the government's vehicle, building, weapons or equipment in order to make any person disappeared, he or she shall be liable to additional one year imprisonment in addition to the punishment referred to this section.

Article 7 of the CED requires States to sanction enforced disappearances with "appropriate penalties, which take into account [their] extreme seriousness".³⁴ Article 7(2) lists certain permissible aggravating and mitigating factors.³⁵ While there are no exact penalties specified in international standards, the UN Working Group on Enforced or Involuntary Disappearances has said that a penalty of twenty-five to forty years of imprisonment would be consistent with the "appropriateness" requirement of the UN Declaration.³⁶

The maximum penalty of 15 years and a monetary fine in the draft Bill is inadequate for the seriousness of the offence and inconsistent with international guidelines on penalty provisions for the crime of enforced or involuntary disappearance. Additionally, the provisions in the draft Bill relating to aggravating and mitigating circumstances raise two principal concerns.

First, under section 203(7)(b), persons attempting an enforced disappearance, or creating circumstances for an enforced disappearance, are subject only to one-half of the sentence as someone who directly commits the act. Under article 6(1)(a) of the CED, "Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance" must be held responsible.³⁷ Article 7(2) of the CED does not recognize attempted enforced disappearance or acting merely as an accomplice as mitigating factors in imposing penalties on perpetrators.³⁸

Second, sections 203(7)-(10) in the draft Bill do not reflect all the aggravating and mitigating factors in the CED, such as the aggravating factors of the death of the disappeared person or the commission of an enforced disappearance with respect to pregnant women, minors, persons with disabilities or other particularly vulnerable persons.

The UN Working Group on Enforced or Involuntary Disappearances lists additional aggravating factors, based on a survey of best practices from other jurisdictions, including where the deprivation of liberty is prolonged, such as for more than two days;³⁹ the act is committed against one's family members;⁴⁰ the

³⁴ Ibid., art. 7.

³⁵ Ibid., art. 7(2).

³⁶ Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC16/48/Add.3, paras. 39, 40, available at

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-48-Add3.pdf>.

³⁷ Art. 6(1)(a), CED.

³⁸ Art. 7(2), CED.

³⁹ Código Penal Bolivia, art. 292°(3).

⁴⁰ Código Penal Bolivia, art. 292°(2).

victim is targeted for his or her (or a family member's) beliefs or political opinions, or other discriminatory reason;⁴¹ and the body is altered after death to prevent identification or cause damage to third parties.⁴²

The penalties and mitigating and aggravating factors in the Criminal Code Bill should be revised so that they are consistent with article 7 of the CED.

Reparations Provided Under the Draft Criminal Code Bill are Inadequate

Section 205 of the Criminal Code Bill states:

If the person disappeared is appeared or made public such person can claim and receive reasonable compensation from the person who committed an act of disappearance. Nevertheless if the person disappeared is dead the compensation mentioned in subsection (1) can be claimed or received by the close relative of such person.

Nepal has an obligation under international law to ensure victims' right to effective remedy and reparations for human rights violations.⁴³ This obligation cannot be extinguished solely through an *ex gratia* payment to victims prior to investigation into allegations of human rights violations or abuses.⁴⁴ Nor can individuals excuse the Government of Nepal from its duty to carry out effective investigations and provide effective remedy, since the duty is to society as a whole and not just the individual.⁴⁵

The draft Criminal Code Bill's focus solely on monetary compensation to the victims of enforced disappearance and their family thus fails to recognize the duty to provide full and effective reparation to the victims, beyond mere financial compensation, as reflected in international law.

The scope and content of this reparations provision is not consistent with the right of victims of enforced disappearance to receive reparation under international human rights law and standards in a few important respects.

⁴¹ Colombia Ley N° 599 de 2000 (24 de julio) – Por la cual se expide el Código Penal, art. 166, available at http://www.wipo.int/wipolex/en/text.jsp?file_id=190482.

⁴² Colombia Ley N° 599 de 2000 (24 de julio) – Por la cual se expide el Código Penal, art. 166, available at http://www.wipo.int/wipolex/en/text.jsp?file_id=190482.

⁴³ Art. 2, ICCPR, Art. 6, International Convention on the Elimination of All forms of Racial Discrimination (CERD), Art. 14, CAT.

⁴⁴ Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, 7 Dec 1993, UN Doc. E/CN.4/1994/7, paras. 688, 711.

⁴⁵ Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, 7 December 1993, UN Doc. E/CN.4/1994/7, paras. 688, 711; Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. E/CN.4/1990/13, 20 Jan 1990, para. 339. Final report by the Special Rapporteur on the right to restitution, compensation and rehabilitation, UN Doc. E/CN.4/Sub.2/1993/8, 2 Jul 1993, para. 14. Similarly, the UN Basic Principles on Rights to Remedy reaffirms that the duty entails the adequate, effective and prompt reparation for harm suffered. 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 violation of International Humanitarian Law, Resolution 60/147, 16 Dec 2005, UN Doc. A/RES/60/147, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>. The right to reparation includes restitution, rehabilitation, satisfaction, and guarantees of non-recurrence, in addition to compensation.

First, in the draft Criminal Code Bill, compensation for an enforced disappearance is only recoverable from the person who has committed the act. Under international human rights law, the obligation to provide effective remedy, including reparation, to victims falls first and foremost on the State. Article 24(4) of the CED states: "Each state party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation."

Individuals must be held criminally accountable, and States may seek to recover damages from responsible individuals, but this does not absolve the State from its primary responsibility to victims. Aside from this core legal principle, there are practical reasons why this provision is unsatisfactory. In some cases, despite evidence that an enforced disappearance has taken place, a trial may not convict any single individual. Even if a trial does result in a conviction, this can take very long, and will frustrate the right to prompt reparation. Moreover, most individual perpetrators are unlikely to have the personal resources to make adequate reparation to victims of a crime as grave as enforced disappearance. Under international standards it is the State - not the perpetrators alone - that is responsible for ensuring victims receive adequate and appropriate reparation.

In the Philippines, for example, the Human Rights Victims' Compensation Board was created in 2013 to provide reparations to victims of human rights abuses during the Marcos regime, specifically including victims of enforced or involuntary disappearances.⁴⁶ The government allotted ten billion pesos (roughly \$220 million) for the fund.⁴⁷

A clear, consistent system is recommended whereby the fund compensates the victims and, when possible, recovers money from fines imposed on individuals found responsible. This would ensure that the ability of the victim to obtain remedy is not dependent upon those responsible for the crime being identified, brought to justice and having sufficient means to pay compensation.

Section 47 of the draft Criminal Code Bill states, in pertinent part:

Section 47(i): The Court can order the offender to provide interim relief to the victim for any medical treatment or monetary compensation. Such amounts should be provided immediately to the victim, or to dependents of the victims.

...

Section 47(iii): If the offender is acquitted, the victim or their dependents must return the amount of compensation to the accused within 35 days of being acquitted. If the amount is not returned within 35 days, the Court shall order payment of that amount through any property of the victim within 60 days.

While the principle of immediate interim relief to victims of crimes such as enforced disappearance is welcome, the requirement that it be paid by an

⁴⁶ Philippines Republic Act No. 10368, An Act Providing for Reparation and Recognition of Victims of Human Rights Violations During the Marcos Regime, Documentation of Said Violations, Appropriating Funds Therefor and for Other Purposes (23 Jul 2012), available at <http://www.gov.ph/2013/02/25/republic-act-no-10368/>.

⁴⁷ Ibid.

individual who has not been finally convicted is a clear violation of the presumption of innocence. In any event the principal obligation must be borne by the State. Furthermore, the requirement that the victim repay the compensation if the individual is acquitted would serve to “re-victimize” the victim and nullify the victim’s right to reparation.

Section 205 should be amended to ensure that the principal duty to provide compensation and other appropriate forms of reparation is borne by the State, and not individuals.

Furthermore, Section 47 should be amended to ensure that interim relief be provided by the State; where appropriate, those convicted of crimes can be asked to pay fines to the State.

Second, article 24(1) of the CED provides that, “[f]or the purposes of this Convention, ‘victim’ means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance”.⁴⁸ However, the draft Criminal Code Bill restricts the definition of ‘victim’ to the disappeared person alone, unless the person in question is dead, in which case a ‘close relative’ can claim compensation. This understanding is not consistent with international standards, under which families, relatives and other loved ones also are victimized as a result of the enforced disappearance.

Third, section 205 of the draft Criminal Code Bill restricts the available means of reparation to “compensation”. This is only one form of reparation, and numerous international law instruments make clear that other forms of reparation must be made available for enforced disappearance and other gross human rights violations. These include, in addition to fair and adequate compensation, restitution, rehabilitation, satisfaction (including the restoration of dignity and reputation) and guarantees of non-repetition. This requirement is contained not only in the CED and the UN Basic Principles on Remedy and Reparation, but is also enshrined under the article 2(3) ICCPR and article 14 of the CAT.⁴⁹

Section 205 of the Criminal Code Bill should be amended to include a broader understanding of victims of enforced disappearance, to include families, relatives and loved ones, and provide for the full range of reparations required under international law and standards.

The Limitations Period Under the Draft Criminal Code Bill is Inconsistent with International Standards

Section 207 of the Criminal Code Bill states:

No complaint can be filed after six months from the date of knowing of having committed the offence under this Chapter or the person being or made public.

⁴⁸ Article 24(1), CED.

⁴⁹ See supra notes 20, 21 and 45.

Nevertheless complaint can be filed at any time with the evidence if the circumstances provided were not favorable and in the permission of the court.

This provision is unacceptable, even with the discretion given to a court to make exceptions. Statutes of limitations on enforced disappearances are impermissible under international law. As the UN Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity makes clear: "Prescription shall not apply to crimes under international law that are by their nature imprescriptible."⁵⁰ International standards and jurisprudence have clarified that statutes of limitation should not generally be applied to crimes under international law, including enforced disappearance, torture and extrajudicial executions.⁵¹

Under international standards, as interpreted by numerous authorities, the act of disappearance of a person is a continuous crime. The Working Group on Enforced or Involuntary Disappearances states, "[E]nforced disappearances are prototypical continuous acts. The act begins at the time of the abduction and extends for the whole period of time that the crime is not complete, that is to say, until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual."⁵²

Keeping this in mind, article 8(1) of the CED states that a State which applies a statute of limitations for enforced disappearance "must ensure that the term of limitation for criminal proceedings: (a) [i]s of long duration and is proportionate to the extreme seriousness of this offence; [and] (b) [c]ommences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature...."⁵³

In the Philippines, an enforced disappearance is considered a continuing offense so long as the whereabouts of the disappeared person are unknown.⁵⁴ There is no statute of limitations unless the victim resurfaces alive, after which a twenty-five year limitation period begins.⁵⁵ Similarly, while enforced disappearances are not specifically criminalized in Thailand, offenses relating to the deprivation of liberty are subject to a statute of limitations. However, offenses relating to detaining, confining or depriving of a person's liberty are considered continuous offenses, and thus the statute of limitations is not triggered until the crime is "completed" and person found.⁵⁶

⁵⁰ Principle 23, UN Updated set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1, 8 Feb 2005.

⁵¹ Art. 8, IACFD; Principle 4, UN 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; Case of Barrios Altos (Chumbipuma Aguirre and others v Peru), Inter-Am Ct.H.R., 14 Mar 2001, para 4.

⁵² See Working Group on Enforced or Involuntary Disappearances General Comment on Enforced Disappearance as a Continuous Crime, available at <http://www.ohchr.org/Documents/Issues/Disappearances/GC-EDCC.pdf>.

⁵³ Art. 8(1), CED.

⁵⁴ Philippines Republic Act No. 10353, Sec. 21 (2012).

⁵⁵ Ibid., Sec. 22.

⁵⁶ Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC16/48/Add.3, at 17, n.67.

Consistent with international law and standards, the Supreme Court of Nepal, on 2 January 2014, reaffirmed that a statute of limitations should not be applied to gross violations of human rights or international humanitarian law.⁵⁷ The Supreme Court has similarly recognized the continuous nature of enforced disappearances, saying it is "necessary to have provisions on continuous inquiry until the status of an allegedly disappeared person is determined."⁵⁸ The limitations period in section 207 of the draft Criminal Code Bill, in which the limitation period begins when the offence is still ongoing, is therefore unacceptable.

Section 207 should be deleted in its entirety, and the bill should be amended to clarify that there should be no statute of limitations for complaints and prosecution for enforced disappearance.

The Draft Criminal Code Bill Fails to Establish Enforced Disappearances as a Crime against Humanity

A significant omission from the draft Bill is that it does not establish, criminalize or punish the systematic or widespread practice of enforced disappearance as a crime against humanity under international law. Article 5 of the CED states that "the widespread or systematic practice of enforced disappearance constitutes a crime against humanity, as defined in applicable international law", and "shall attract the attendant consequences provided for in international law".⁵⁹

The Rome Statute of the ICC has set forth what is the generally accepted as the minimal definition of a crime against humanity under international law. Under Article 7(1)(i) of the Rome Statute of the International Criminal Court, enforced disappearances of persons constitute a crime against humanity over which the International Criminal Court has jurisdiction "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."⁶⁰ Article 7(1) has been incorporated in the statutes of other international and hybrid tribunals, including the Sierra Leone Special Court, the Special Panels for Serious Crimes in Timor-Leste and the Extraordinary Chambers in the Courts of Cambodia.

In order to ensure that the new Criminal Code in Nepal criminalizes and the authorities can prosecute widespread or systematic practice of enforced disappearance as a crime against humanity, the Bill must incorporate a provision following subsection 203(2) expressly elevating an enforced disappearance as a crime against humanity when it is part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, consistent with the generally accepted definition under international law as reflected in the Rome Statute.

⁵⁷ See Madhav Kumar Basnet v. the Government of Nepal, Nepal Kanoon Patrika, 2070(BS), Issue 9, decision no. 9051.

⁵⁸ See Rajendra Prasad Dhakal and Others v. the Government of Nepal and Others, Nepal Kanoon Patrika 2064(BS), Issue 2 decision no 7817.

⁵⁹ See Art. 5, CED.

⁶⁰ See Art. 7(1), Rome Statute.

Shortcomings with Criminalization of Rape and Sexual Violence and Gender Based Violence in the Criminal Code Bill

Applicable International and National Law on Sexual and Gender-Based Violence

With respect to violence against women, the obligation to protect human rights under the ICCPR requires the State to protect women against violations and abuses not only by State authorities, but also private actors, including in the home or workplace. The State must “take appropriate measures or ... exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”⁶¹

Nepal ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 22 April 1991.⁶² CEDAW requires States to refrain from engaging in any act or practice of discrimination against women;⁶³ to eliminate discrimination against women by any person, organization or enterprise;⁶⁴ and to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women.⁶⁵

The CEDAW Committee has clarified that “gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men”,⁶⁶ and recommended that State parties “take appropriate and effective measures to overcome all forms of gender-based violence”.⁶⁷ This includes ensuring that “laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity”⁶⁸ and that “[e]ffective complaints procedures and remedies, including compensation” are provided.⁶⁹

Other treaties to which Nepal is a party impose obligations on the State to ensure non-discrimination, prevent and prosecute all forms of gender-based violence, and ensure that all victims and survivors can access their right to remedy. These include the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC). Nepal has also voted in favour of normative declarations and agreements which reflect and commit to these obligations, including the Declaration on the Elimination of Violence against Women (1993), the Programme of Action of the International Conference on Population and Development (1994) and the Beijing Declaration and Platform for Action (1995).

⁶¹ UN Human Rights Committee, General Comment 31, para. 8.

⁶² Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), UN Doc. A/34/46, 1249 U.N.T.S. 13, 18 Dec 1979.

⁶³ Ibid., art. 2(d).

⁶⁴ Ibid., art. 2(e).

⁶⁵ Ibid., art. 2(f).

⁶⁶ UN Committee on the Elimination of Discrimination Against Women, CEDAW General Recommendation No. 19: Violence against Women, UN Doc. A/47/38 (1992), para.1.

⁶⁷ Ibid., para. 24(a).

⁶⁸ Ibid., para. 24(b).

⁶⁹ Ibid., para. 24(i).

Equivalent obligations are also contained in the Constitution of Nepal, 2015. Article 18 of the Nepal Constitution guarantees the right to equality and non-discrimination, including on the grounds of gender. Article 38(3) of the Constitution states that “there shall not be any physical, mental, sexual or psychological or any other kind of violence against women, or any kind of oppression based on religious, social and cultural tradition, and other practices. Such an act shall be punishable by law and the victim shall have the right to compensation as provided for in law.”

There have been several significant Supreme Court of Nepal judgments that clarify the responsibilities of the Government in order to meet their obligations to prevent and punish rape and sexual violence, including on the definition of rape,⁷⁰ sexual harassment in the workplace,⁷¹ compensation for rape⁷² and limitation periods for rape.⁷³

Nepal’s Draft Criminal Code Bill on Sexual and Gender-Based Violence

Chapter 18 of the draft Criminal Code Bill addresses “offences relating to sexual intercourse”. It contains provisions criminalizing rape, and provides for penalties for the perpetrator and compensation for the survivor. These draft provisions do not meet Nepal’s international and domestic legal obligations to address rape and other forms of sexual violence.

International law and standards recognize rape and other forms of sexual violence as a form of gender-based violence against women.⁷⁴ It is also established under international law that if the perpetrator of the rape is a State agent or a person acting pursuant to State authority, the conduct constitutes torture and must be prosecuted specifically as the crime of torture.⁷⁵

Definition of Rape is Inconsistent with International Standards

Sections 216 through 223 of the draft Criminal Code Bill defines and prohibits various sexual acts as forms of sexual violence. Section 216 of the draft Bill sets forth the definition and prohibition against rape. Section 217 of the draft Bill defines and prohibits act of incest. Section 218 defines and prohibits sexual

⁷⁰ Government of Nepal v. Tek Bahadur Chhetri, Nepal Kanoon Patrika 2066(BS) Part 51, Issue 5, decision no. 8142.

⁷¹ Sharmila Parajuli v. His Majesty's Government, Nepal Kanoon Patrika 2061(BS). Issue 10, decision no. 7449.

⁷² Triratna Chitrakar v. Government of Nepal, Nepal Kanoon Patrika 2066 (BS) Issue 5, decision no. 8148.

⁷³ Sapana Pradhan Malla v. Government of Nepal, Nepal Kanoon Patrika, Issue 11, decision no. 8038.

⁷⁴ For international law and standards relating to rape and other forms of sexual violence, see ICJ, Women’s Access to Justice for Gender Based Violence, Practitioners Guide No. 12, at 203, available at <http://www.icj.org/wp-content/uploads/2016/03/Universal-Womens-accesss-to-justice-Publications-Practitioners-Guide-Series-2016-ENG.pdf>. As noted, rape is a form of sexual violence, distinguished by the fact that the violence results in sexual penetration, whereas sexual violence generally is any form of sexual abuse or assault, even if it does not involve physical contact. Moreover, rape and other forms of sexual violence occur against men and boys as well. Where domestic law restrictively defines rape as only occurring where there is penetration of the vagina by the penis, the law omits a number of forms of abuse as amounting to rape, as well as the possibility of men and boys as victims.

⁷⁵ Ibid. at 204.

intercourse with a person in detention, section 219 defines and prohibits sexual intercourse with a person in protection or security, section 220 defines and prohibits sexual harassment in the workplace, section 221 criminalizes acts of sexual abuse and harassment that are committed with sexual intention, section 222 prohibits and defines child sexual abuse and section 223 prohibits “unnatural sex” but leaves it undefined.

Section 216 of the draft Bill defines rape as follows:

Prohibition to cause an act of rape: (1) No one shall commit an act of rape. (2) If someone commits sexual intercourse to any woman against her consent or cause an act of sexual intercourse with a girl child below the age of 18 years even taking consent of her, that shall be considered as enforced sexual intercourse (rape) against such woman or a girl child.

Explanation: For the purpose of this Chapter:

- (a) Consent taken with coercion, undue influence, intimidation, threat, falsification or kidnapping or taking hostage shall not be considered as consent,
- (b) Consent taken in an unconscious condition shall not be considered as consent,
- (c) For the purpose of this section, it shall be considered as sexual intercourse if the penis is even partly penetrated into the vagina or case is of oral or anal sex.

Section 216 only criminalizes the rape of a woman or of a girl child and does not address rape or sexual violence against a male child, man or transgender person. Similarly, in the definition of incest, sexual intercourse by a male member of the family or within kinship is penalized, while sexual intercourse committed by a woman or transgender person is not.

Nepal’s Constitution and international law guarantee the right to equality before the law and freedom from sexual and gender-based discrimination for all persons, including LGBTI persons.⁷⁶ This right extends to men, boys and transgender persons who may also be subjected to rape and other sexual violence. Therefore, all victims of sexual violence, regardless of gender or sexual identity, have the right to remedy, and the perpetrators of crimes against them must be held to account.

In the case of *Sunilbabu Pant v. Government of Nepal*,⁷⁷ the Supreme Court of Nepal prohibited discrimination against transgender persons. It held that the State shall recognize the existence of the third gender or transgender citizens and may not deprive them of the fundamental entitlements granted by Part 3 of the Constitution, which include equality and non-discrimination. Similarly, in *Prem Kumari Nepali v. National Women Commission*, the Court held that all

⁷⁶ Art. 2(1), ICCPR; Art. 2(2), ICESCR; Art. 1, CEDAW; Art. 2(1), CRC; Art. 18, Nepal Constitution (2015).

⁷⁷ *Sunilbabu Pant v. Government of Nepal, Prime Minister and Council of Ministers and Others*, Nepal Kanoon Patrika 2065 (BS), Issue 4, decision no. 7958.

constitutional and legal rights provided to citizens should be enjoyed by all citizens whether they are men, women, homosexual/lesbian or “third gender”.⁷⁸

The Draft Bill should be redrafted to ensure that the provisions are gender neutral, and that both perpetrators and victims can be male, female, or “third gender”, as defined by the Nepal Supreme Court.

Explanation (c) to section 216 defines “sexual intercourse” as limited to penile-vaginal penetration, oral sex or anal sex. This provision only criminalizes rape if there has been some penile penetration, meaning that sexual violence involving penetration of objects other than the penis, including other organs or other objects, are not covered by this provision.

Definitions of rape in international law are broader, recognizing rape as a crime against sexual autonomy and the physical and mental integrity of an individual. For example, the ICC Elements of Crime define the act of rape as:

The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.⁷⁹

The International Criminal Tribunal for the Former Yugoslavia noted that the crime of rape in international law includes sexual penetration with any object without consent.⁸⁰

In Nepal, Supreme Court jurisprudence has broadened the definition of rape beyond the statutory requirement of penetration in certain cases, finding the statutory definition inadequate. In *Government of Nepal v. Tek Bahadur Chhetri*, the Supreme Court held that if the “intention or desire of intercourse” was “materially completed” it amounted to the crime of rape. Specifically, the Court said that “if all attempts of rape were completed” and only the penetration was absent “due to very early age of the victim girl”, the act of rape could not be considered; rather, according to the Court, an attempt to rape could be considered for the sole reason of non-penetration.⁸¹ Similarly, in *Government of Nepal v. Mubarak Mir Musalman*,⁸² the Supreme Court held that the objective of criminalizing rape was to protect the victim and to redress the injury or loss she/he has suffered. In this case, the Court had said that the alleged rape had been established by the fact that the perpetrator had taken all efforts to commit the act, even though they ultimately failed in the act of penetration. The physical, social and psychological losses borne by the victim were more

⁷⁸ Prem Kumari Nepali v. National Women Commission and Others, Nepal Kanoon Patrika 2070 (BS), Issue 1, decision no. 8945. The term “third gender” is a term adopted by the Nepal Supreme Court but is not a universally accepted term among SOGI activists and the LGBTQI community for transgender persons. While some transgender persons might identify themselves as “third gender”, others consider themselves merely as “transgender male” or “transgender female”.

⁷⁹ Art. 7(1)(g), Rome Statute.

⁸⁰ The International Criminal Tribunal for the Former Yugoslavia (ICTY), *The Prosecutor v. Kunarac, IT-96-23-T and IT-96-23/1-T*, 22 Feb 2001, at 460.

⁸¹ *Government of Nepal v. Tek Bahadur Chhetri*, Nepal Kanoon Patrika 2066 (BS), Issue 5, decision no. 8142.

⁸² *Government of Nepal v. Mubarak Mir Musalman*, Nepal Kanoon Patrika 2067 (BS), Issue 9, decision no. 8466.

important in assessing whether rape was committed, the Court said, rather than the instance of penetration itself. Therefore, penetration should not be an essential element of the crime.⁸³

Clause (c) of the draft Bill should be amended to define "sexual intercourse" in line with the ICC definition of rape, to include any act of penetrating the body of any person, however slightly, with a sexual organ, or of the mouth, anal or genital opening of any person with any object or any other part of the body.

The Draft Criminal Code Bill Does Not Adequately Incorporate the Element of Consent

The understanding of consent in the context of rape or sexual violence reflected in the draft Bill is inadequate; the draft Bill is inconsistent with international standards, and does not encompass certain circumstances where consent is often presumed to be absent in criminal laws on sexual assault and rape.

The Bill defines consent in the negative, specifying circumstances where consent does not exist. However, criminal laws in a number of other countries require proof of unequivocal and voluntary affirmative agreement to participate in the sexual act. In the Indian Criminal Law (Amendment) Act of 2013, consent is defined as "an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act". The Act stipulates that an absence of physical resistance is not to be considered consent.⁸⁴ Canada has similarly adopted a voluntary standard for sexual assault, requiring "the voluntary agreement of the complainant to engage in the sexual activity in question."⁸⁵ South Africa defines consent as a "voluntary or uncoerced agreement."⁸⁶

Furthermore, many national laws and international law also provide that no genuine consent can be given in certain circumstances. For example, according to the ICC Elements of Crime, there is no consent where acts are "committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."⁸⁷

Some countries also include more specific circumstances considered to be coercive or aggravating factors under which consent cannot be deemed to exist. These can include where there is an abuse of trust or authority⁸⁸ and where specific power dynamics exist, such as if the perpetrator is a police officer, a

⁸³ Government of Nepal v. Mubarak Mir Musalman, Nepal Kanoon Patrika 2067 (BS), Issue 9, decision no. 8466.

⁸⁴ India Criminal Law (Amendment) Act, Sec. 375 (2013).

⁸⁵ Criminal Code of Canada, Sec. 273.1 (1992).

⁸⁶ South Africa Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, Sec. 1(1)(2) (2007).

⁸⁷ International Criminal Court, Elements of Crimes (2011).

⁸⁸ Papua New Guinea Criminal Code Act, Sec. 347(a)(2)(i).

public servant, a member of the armed forces, staff at a jail, remand home, place of custody, or hospital, or a relative, guardian or teacher.⁸⁹

Other coercive or aggravating circumstances may fall under the broad circumstances listed in the Nepali provision, but remain ambiguous or obscured if not expressly stated in the statute. These include situations where the person is incapable of giving consent, with specific instances being where the person has a physical or mental disability⁹⁰, where the person is unconscious, sleeping, or affected by alcohol or drugs,⁹¹ where the person was mistaken about the sexual nature of the act or the identity of the person,⁹² where the person mistakenly believed the act was for medical or hygienic purposes,⁹³ where the person was a minor under a certain age,⁹⁴ where the perpetrator committed the rape repeatedly or during communal or sectarian violence,⁹⁵ or where the perpetrator caused grievous bodily harm or threatened the person's life.⁹⁶

The understanding of consent employed in the Criminal Code Bill should be revised to comply with international standards and international and national best practices, which should include proof of unequivocal and voluntary agreement to participate in the sexual act and a broader recognition of coercive circumstances where consent cannot be deemed to exist.

Marital Rape is Inadequately Criminalized

The UN Declaration on the Elimination of Violence Against Women describes violence against women as encompassing physical, sexual and psychological violence occurring in the family, including among others, marital rape.⁹⁷ Marital rape may amount to a violation of international human rights law where the State fails to prevent, investigate, punish and/or provide effective remedies and reparations, including when it is committed by non-state actors.⁹⁸

Section 216(4) provides for a differential punishment for marital rape, stating that:

Whatsoever is mentioned in subsection (3), if a husband rapes his wife during the marital relationship, he may be imprisoned up to five years.

⁸⁹ India Criminal Law (Amendment) Act, Sec. 376(2) (a)-(f) (2013).

⁹⁰ Papua New Guinea Criminal Code Act, Sec. 347(a)(2)(f); India Criminal Law (Amendment) Act, Sec. 376(2)(l) (2013); Namibia Combating of Rape Act, No. 8 of 2000, Sec. 2(f)(i).

⁹¹ Papua New Guinea Criminal Code Act, Sec. 347(a)(2)(e); Namibia Combating of Rape Act, No. 8 of 2000, Sec. 2(f)(i)-(iii).

⁹² Papua New Guinea Criminal Code Act, Sec. 347(a)(2)(g); Namibia Combating of Rape Act, No. 8 of 2000, Sec. 2(g)-(h).

⁹³ Papua New Guinea Criminal Code Act, Sec. 347(a)(2)(h).

⁹⁴ India Criminal Law (Amendment) Act, Sec. 376(2)(h)-(i) (2013); Namibia Combating of Rape Act, No. 8 of 2000, Sec. 2(d).

⁹⁵ India Criminal Law (Amendment) Act, Sec. 376(2)(g),(n) (2013).

⁹⁶ India Criminal Law (Amendment) Act, Sec. 376(2)(m) (2013).

⁹⁷ Art. 2, UN Declaration on the Elimination of Violence Against Women, GA Res. 48/104 (1993); for a detailed overview of international law and standards relating to marital rape, see ICJ, Women's Access to Justice for Gender Based Violence, Practitioners Guide No. 12, at 22, 40 and 215, available at <http://www.icj.org/wp-content/uploads/2016/03/Universal-Womens-access-to-justice-Publications-Practitioners-Guide-Series-2016-ENG.pdf>.

⁹⁸ Art. 2, UN Declaration on the Elimination of Violence Against Women.

A Nepali Supreme Court decision has found that the failure to criminalize marital rape in the *Muluki Ain* was unconstitutional and contrary to the ICCPR.⁹⁹ The Court stated that there was “no rationality in differentiating between marital and non-marital rape”.¹⁰⁰ Due to this ruling, the *Muluki Ain* was amended in 2006 to criminalize marital rape, but the penalty was much lower (3 to 6 months as provided in the *Gender Equality Act*) compared to the penalty for non-marital rape.¹⁰¹ This differential punishment for marital and other forms of rape was also successfully challenged before the Supreme Court in a later decision, when the Court held that “discrimination on punishment between marital and non-marital rape cannot be made and there is no justifiable reason in providing lesser punishment on the basis of relationship with regards to marital rape.... Therefore, pursuant to the principle of equality, the court hereby issues a directive order in the name of the Ministry of Law, Justice and Parliamentary Affairs to make provisions so as to bring coordination between the discriminatory sentencing policies between marital and non-marital rape.”¹⁰²

The sentence for marital rape should not be lesser than that of other forms of rape. In fact, rape or other forms of sexual violence that have been committed by a spouse or partner could be considered an aggravating circumstance when considering sentencing.¹⁰³

While the draft Bill is an improvement, as it brings the penalty for marital rape closer to the existing penalty for rape, it still maintains a differential punishment. The decisions of the Supreme Court, provisions in the Constitution, and Nepal’s international law obligations require that marital rape be treated on par with any other form of rape, and that marriage is not seen as a defence or limiting factor in any way. This is also consistent with recommendations in the UN Report on Good Practices in Legislation on Violence against Women,¹⁰⁴ and with the approach taken by other countries. According to UN Women, as of April 2011, 52 countries have amended their legislation to explicitly make marital rape a criminal offence.¹⁰⁵

⁹⁹ Forum for Women, Law and Development v His Majesty’s Government/Nepal (Writ No. 064-WS-001).

¹⁰⁰ See Jit Kumari Pageni (Neupane) and Others v. Prime Ministers and Council of Ministers and Others, Writ No. 064-0035 of the Year 2063 (Nepali Calendar). The court observed that, “where a spouse is raped by the closest person, then such a person... cannot be entitled to a rebate in punishment merely because of his relationship with his spouse and there is no jurisprudential basis with regards to such a rebate in punishment”.

¹⁰¹ See Gender Equality Act, 2063 (2006).

¹⁰² See Jit Kumari Pageni (Neupane) and Others v. Prime Ministers and Council of Ministers and Others, Writ No. 064-0035 of the Year 2063 (Nepali).

¹⁰³ Updated Model Strategies and Practical Measures, para. 17(b); Istanbul Convention, art. 46(a).

¹⁰⁴ See Report on Good Practices in Legislation on Violence against Women, Expert Group meeting organized by the United Nations Division for the Advancement of Women, United Nations Office on Drugs and Crime, United Nations Office at Vienna, Austria, 26-28 May 2008, available at [http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/Report%20EGMGPLVAW%20\(fin al%2011.11.08\).pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/Report%20EGMGPLVAW%20(fin al%2011.11.08).pdf).

¹⁰⁵ Annex 4, UN Women, Progress of the World’s Women: In Pursuit of Justice, 2011 – 2012, available at <http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2011/progressoftheworldswomen-2011-en.pdf>.

Article 2(a) of the Declaration on the Elimination of Violence against Women describes marital rape as a specific form of violence against women.¹⁰⁶ Furthermore, providing different punishments for rape and marital rape violates the right to equality and perpetuates discrimination on the basis of marital status.

Section 216(4) should be deleted.

Aggravating Circumstances Are Not Consistent with International Standards

Subsection 216(6) provides for some aggravating factors for the purpose of rape sentencing, stating:

In case of gang rape or rape of a pregnant woman of above six months, helpless or disabled woman, or woman with physical and mental illness, or rape while demonstrating weapons, shall receive three years imprisonment in addition to the sentence mentioned in subsection (3).

While aggravating factors are in general recognized to be necessary to account for the differential impact of rape, depending on certain circumstances, this provision requires some changes. Firstly, the language must be amended to make it gender neutral and account for the possibility of rape of men or transgender persons. Secondly, the rape of a pregnant woman at any stage of pregnancy must attract the same aggravated penalty, and the aggravated penalty must not be restricted to a woman who is more than six months pregnant, at least where it is established that the perpetrator knew or would have reasonably been expected to know that the woman was pregnant.

Finally, the government must also consider other possible aggravating factors, including the use or threat of violence, the age of the victim, and the relationship between the victim and convict (e.g., whether the convicted person held a position of power or authority over the victim).

Subsection 216(6) should be amended to be gender neutral, and that that the knowledge of a woman's pregnancy be a potential aggravating factor in increased sentencing, at any stage of her pregnancy.

Provisions Criminalizing Sexual Offences against Children are Inadequate

The draft Criminal Code Bill criminalizes sexual offences not amounting to rape generally under section 221, which states in pertinent part:

If a person, except husband and wife, without the consent of any persons or children, holds with the intention of rape or touches attempts to touch his/her sensitive organs or puts off or attempts to put off inner clothes (under garments) or create any obstacles to wear or put off his/her inner clothes (under garments) or takes him/her to unusually lonely place or makes him/her touch or catch his/her sexual organ or uses vulgar or other similar words verbally, in written or through electronic means or

¹⁰⁶ See Declaration on the Elimination of Violence against Women, UN Doc. A/RES/48/104, 20 Dec 1993, available at <http://www.un-documents.net/a48r104.htm>.

teases or harasses her for the purpose of sexual intercourse or treats him/her with any unusual behavior, shall be deemed to have done sexual harassment.

The draft Bill also specifically addresses child sexual abuse not amounting to rape, but falls short of international standards in several respects.

Section 222 defines and sanctions child sexual abuse. This section states:

- (1) No one shall sexually abuse children.
- (2) If any one, with the intention of sexual intercourse, takes a child below the age of 10 years in a lonely place and unusually touches or catches his/her sexual organs, causes him/her to touch or to catch his/her own sexual organ or treats him/her with sexually unusual behaviour of any other kind, it shall be deemed as child sex abuse.
- (3) Person committing offence under Subsection (1) shall be imprisoned for up to two years.

As party to the Convention on the Rights of the Child (CRC), Nepal has an international legal obligation to take all appropriate legislative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other persons who has the care of the child.¹⁰⁷

Under the CRC, children are defined as any person under the age of 18 years, and the protections under the CRC apply equally to all, with certain exceptions that are not applicable here.

The definition of child sexual abuse in 222(2) is vague and overly limited. For example, it is unclear what acts would amount to "sexually unusual behavior". Furthermore, according to the definition, these acts are only punishable if performed "with the intention of sexual intercourse", which means that if someone touches a child in a sexual manner without the intention of subsequent intercourse, they cannot be punished. Subsection (2) also excludes children between the ages of 10 and 18, leaving them unprotected by the law.

Section 222 should be revised to include a more comprehensive definition of child sexual abuse in accordance with international standards, including expanding the age restriction to include any person under age 18, and listing an illustrative, non-exhaustive list of acts that would amount to sexual abuse.

Compensation Under the Draft Criminal Code Bill is Inadequate

Section 224 of the draft Criminal Code Bill, regarding the order to pay compensation, states:

¹⁰⁷ Art. 19, CRC; Committee on the Rights of the Child, General Comment 13, The right of the child to freedom from all forms of violence, UN Doc. CRC/C/GC/13, 18 Apr 2011, at 8, *et seq.*

Except in the offences mentioned in section 217 (Incest) and 223(4) (bestiality and other unnatural sexual intercourse), in other offences compensation shall be ordered to the victim by the offender.

This provision fails to adequately ensure the right to reparation for victims, and the primary duty upon the State. Where, for instance, rape or sexual violence is committed by a State agent or where responsibility can otherwise be ascribed to the State, it is the State that is primarily responsible for full reparation.¹⁰⁸ Similarly, where the perpetrator is a private individual and the State has not adequately discharged its obligation to protect through due diligence, the State is also responsible for reparation, alongside the perpetrator.

The draft provision also fails to adequately ensure reparation in a timely manner. It is possible that the criminal case will take very long to conclude, or that a flawed investigation may prevent convictions even where proof of rape exists. In such cases, the victim will not receive compensation promptly if he or she is required to wait until the offender is found, prosecuted and convicted.

The importance of prompt compensation for rape survivors has been recognised by the Supreme Court of Nepal. In *Triratna Chitrakar v. Government of Nepal*,¹⁰⁹ the Supreme Court considered the quantum of compensation to be provided to a child survivor of sexual assault and rape, holding that the compensation must consider “the effects and consequences in the different aspects of life, including family, humane, psychological, physical, character, professional, intellectual, economic and social, caused by the act of rape.” The Court also held that compensation should be provided without any additional procedural requirements and delay.¹¹⁰

This ruling is in line with the practices recommended by the UN Report on Good Practices in Legislation on Violence against Women.¹¹¹ It is also consistent with the terms of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, which provide that States should endeavour to provide assistance in the event that parties liable for harm are unable or unwilling to meet their obligations.¹¹²

As noted above, international law has recognised different forms of reparation beyond merely compensation, and guarantees all forms of reparation to

¹⁰⁸ See *supra* at p.13, *et seq.*

¹⁰⁹ *Triratna Chitrakar v. Government of Nepal*, Nepal Kanoon Patrika 2066 (BS), Issue 5, decision no. 8148.

¹¹⁰ *Triratna Chitrakar v. Government of Nepal*, Nepal Kanoon Patrika 2066 (BS), Issue 5, decision no. 8148.

¹¹¹ See Report on Good Practices in Legislation on Violence against Women, Expert Group meeting organized by the United Nations Division for the Advancement of Women, United Nations Office on Drugs and Crime, United Nations Office at Vienna, Austria (26 to 28 May 2008), available at: [http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/Report%20EGMGPLVAW%20\(fin al%2011.11.08\).pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/Report%20EGMGPLVAW%20(fin al%2011.11.08).pdf).

¹¹² Paragraph 16 of the UN Basic Principles on the Right to Remedy states, “States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations”. Principle 9, UN Basic Principles and Guidelines on the Right to a Remedy and Restitution, paras. 15-16, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

victims.¹¹³ The draft Criminal Code Bill only covers one form of reparation, namely compensation, and is silent on other forms of reparation.

Section 224 should be revised to place the primary obligation to provide reparation, including restitution, rehabilitation, satisfaction and non-recurrence, in addition to compensation, on the State.

Limitations Period is Inconsistent with International Standards

Section 225 provides a limitation period within which complaints of rape must be filed: It states:

(1) The complaint can be filed at any time in the offence mentioned in section 217 (Incest) (2) In the offences mentioned in 216 (prohibition to cause an act of rape)... complaint must be filed within a year of such incident and in other offences mentioned in this Chapter no complaint (FIR) shall be filed after completing three months from the date on knowing of such an offence.

This one-year limitation period improves over current provisions in the *Muluki Ain*,¹¹⁴ which prescribe a 35-day limitation period for filing complaints of rape. However, it is still insufficient in the context of Nepal, where survivors of rape and sexual violence may be unwilling or unable to file complaints immediately. Furthermore, most women in Nepal are unaware of their legal rights, and may primarily seek support in other forms, for example psychological support and medical assistance. Even if they are aware of their rights, factors such as fear of re-victimization, shame, and social stigma may impact the ability of the victim to make a complaint, which then limits their ability to access justice.¹¹⁵

The Supreme Court of Nepal has also recognized the problems with the limitation provision for rape. In *Sapana Malla Pradhan v. Government of Nepal*, the Court had directed the government to extend the previous limitation period for rape complaints, finding it one of the significant hindrances in accessing justice for the victims and survivors. In that particular case, the Court had instructed the government to provide for a timeframe sufficient to effectively investigate and prosecute the case.¹¹⁶ Similarly, on 17 April 2015, the Supreme Court issued another stricture asking the government to extend the limitation period in the National Code, saying that the narrow timeframe had prevented victims from lodging a complaint.¹¹⁷

¹¹³ Art. 14, CAT; Art. 6, CERD. The UN Basic Principle on Right to Remedy states that victims of gross violation of international human rights law and serious violations of international humanitarian law should be provided with full and effective reparation which includes, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Principle 18, 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 violation of International Humanitarian Law, GA Res 60/147, UN Doc. A/RES/60/147, 16 Dec 2005.

¹¹⁴ See Chapter 14, National Code (*Muluki Ain*) 2020 (Nepali) (1963).

¹¹⁵ See, e.g., Raju Prasad Chapagai, *Thirty Five Day Limitation Clause: Statutory Barrier to Access Justice by Victim of Rape*, NJA Law Journal, Special Focus on Access to Justice for Poor and Marginalized Groups in Nepal, Special Issue 2012, at 113.

¹¹⁶ *Sapana Malla Pradhan v. Government of Nepal*, Nepal Kanoon Patrika 2065 (BS), Issue 11, decision no. 8038.

¹¹⁷ See www.ekantipur.com/np/2072/1/7/full.../407598.html; www.nagariknews.com.

The Model Criminal Code states that the range of statutory limitations must be “20 years in the case of a criminal offence for which a maximum penalty of 15 years is prescribed”, and “10 years in the case of a criminal offence for which a maximum penalty of five years is prescribed”.¹¹⁸

Where rape constitutes torture, a war crime, or a crime against humanity, the limitation period must be abolished entirely. This is in line with international standards such as the United Nations Basic Principles on the Right to Remedy and Reparation, which provides that a “statute of limitations shall not apply to gross violations of human rights.”¹¹⁹ On 2 January 2014, the Supreme Court affirmed this principle, stating that a statute of limitations on gross violations of human rights is a violation of international standards.¹²⁰

The Draft Bill should be amended to remove any limitation periods for filing allegations of rape, in line with international standards.

Criminalization of “Unnatural Sex” is Contrary to International Law

Section 223 prohibits non-consensual “unnatural sex”. The reference to “non-consensual” is welcome, and clarifies that consensual sexual conduct, whether between different genders or people of the same gender, is not criminalized. The Supreme Court of Nepal has also recognized this, saying no one has the authority to question how consenting adults “enter into sexual intercourse” or to decide whether such intercourse is natural or unnatural. The Court reaffirmed the right to privacy in this context, stating that the right to sexual identity and orientation of gay, lesbian and “third gender” persons may not be denied by calling such sexual activities unnatural. In this case, the Court also directed the government “to formulate law or amend current laws to provide rights without discrimination equally as to the others to the persons with different sexual identity and orientations by performing necessary study.”¹²¹

However, the reference to “unnatural sex” in the draft Bill is still vague, and therefore contrary to the general principle of legality. There is no definition of what amounts to “unnatural sex”. Also, terming certain types of sexual conduct as “unnatural” reinforces the notion that there are some forms of sex that are not acceptable. These notions were the foundation of the previous prohibition against same-sex sexual conduct, which has now been abolished. Finally, *all* non-consensual sex should be prohibited, whether “unnatural” or otherwise, under the provision governing rape in section 216. If the Government is concerned that section 216 alone is inadequate, and that there are some forms of non-consensual sex not covered by the definition in 216, it would be preferable to amend that provision and include that which is missing.

¹¹⁸ See art. 9, Model Codes for Post-Conflict Criminal Justice, available at <http://www.usip.org/sites/default/files/MC1/MC1-Part1Section5.pdf>; see also Raju Prasad Chapagai, *Thirty Five Day Limitation Clause: Statutory Barrier to Access Justice by Victim of Rape*, NJA Law Journal, Special Focus on Access to Justice for Poor and Marginalized Groups in Nepal, Special Issue 2012, at 114-115.

¹¹⁹ Principle 4, UN Basic Principles and Guidelines on the Right to a Remedy and Restitution, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

¹²⁰ Basnet and Pokharel v. Government of Nepal & Others, 2 January 2014 (069-WS-0057).

¹²¹ Sunilbabu Pant v. Government of Nepal, Nepal Kanoon Patrika 2065 (BS), Issue 4, decision no. 7958.

Section 223 should be deleted, and section 216 should be revised to clarify that all forms of non-consensual sex amount to rape.

Other Serious Crimes

This section addresses Nepal's obligation to ensure that genocide, war crimes and crimes against humanity are made criminal under Nepali domestic law. These crimes should be reflected in the draft Criminal Code Bill.¹²²

Historically, many of these acts have not been specifically or adequately criminalized in Nepal. While both sides to Nepal's armed conflict committed these crimes, individual perpetrators were not held responsible because of the lack of legal provisions enabling this, resulting in a climate of impunity and lack of accountability.

It is essential that these acts are specifically criminalized and, in respect of crimes under international law, that this is done with retroactive effect. While article 15(1) of the ICCPR states that no one shall be held guilty of any criminal offence on account of any act that did not constitute a criminal offence at the time when it was committed, Article 15 (2) clarifies that this should not "prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." Therefore, the Government of Nepal has an obligation to ensure that perpetrators of crimes under international law are held criminally accountable.

Genocide is Not Criminalized in the Draft Criminal Code Bill

The Nepal acceded to the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") in 1969,¹²³ but 47 years later it has still not implemented its provisions.

Article II of the Genocide Convention defines genocide as follows:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.¹²⁴

¹²² The Government of Nepal registered a separate bill to address torture and other ill treatment, titled "Torture and Cruel, Inhuman or Degrading Treatment (Control) Bill 2014" (Torture Bill), which also falls short of international standards and Nepal's international legal obligations in several key respects. The ICJ has published a briefing paper in 2016 analysing the Torture Bill, available at <https://www.icj.org/wp-content/uploads/2016/06/Nepal-Torture-Bill-Advocacy-Analysis-Brief-2016-ENG.pdf>.

¹²³ UN Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), 9 Dec 1948, UN Doc. A/RES/260, 78 U.N.T.S. 277, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=e.

¹²⁴ Genocide Convention.

This definition is also reflected in international criminal law treaties, including the Rome Statute of the International Criminal Court, the Statute of the International Criminal Tribunal for Rwanda, and the Statute of the International Criminal Tribunal for the former Yugoslavia.

Article I of the Genocide Convention provides that “[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”.¹²⁵ Nepal acceded to the Genocide Convention on 17 January 1969.

Therefore, Nepal has an obligation to expressly criminalize the international crime of genocide, and prosecute and punish all perpetrators.

The Draft Criminal Code Bill should be amended to include a provision criminalizing genocide in line with international law and standards.

Crimes Against Humanity and War Crimes Are Not Criminalized in the Draft Criminal Code Bill

Crimes against humanity and war crimes are not criminalized under the draft Criminal Code Bill or elsewhere under Nepali law. As party to the Geneva Conventions, Nepal has an obligation to criminalize violations under those Conventions as war crimes.¹²⁶ The Rome Statute for the ICC sets forth the internationally accepted definitions of both war crimes (in international and non-international armed conflicts), and crimes against humanity.

Article 7(1) of the Rome Statute defines crimes against humanity as follows:

For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Article 8 of the Rome Statute defines war crimes as “[g]rave breaches of the Geneva Conventions of 12 August 1949” and “[o]ther serious violations of the laws and customs applicable in international armed conflict, within the

¹²⁵ Ibid., art. II.

¹²⁶ Nepal ratified the four Geneva Conventions in 1964.

established framework of international law”, and enumerates the specific acts that constitute war crimes.¹²⁷

While Nepal has not yet ratified the ICC Statute, on 24 July 2006 the Nepal Parliament unanimously adopted a resolution directing the Government to accede to the Rome Statute.¹²⁸ Furthermore, in the case of *Rajaram Dhakal v. Government of Nepal*,¹²⁹ the Supreme Court of Nepal stated that the Government was obliged to enact legislations in order to implement the Geneva Convention in the Nepali context. The Supreme Court directed the Government of Nepal to take necessary action to formulate appropriate legislation and other mechanisms for implementing the Geneva Conventions.¹³⁰

The Draft Criminal Code Bill should be amended to include provisions criminalizing war crimes and crimes against humanity in line with international law and standards.

Conclusions and Recommendations

The draft Criminal Code Bill is an important opportunity to ensure that Nepal’s law is in line with its international human rights law obligations, its political commitments and the directives of the Nepal Supreme Court.

This paper has analysed provisions in the draft Bill dealing with enforced disappearances, sexual violence and rape, and other serious crimes as against applicable international law and standards and Supreme Court judgments. Based on this analysis, the Government of Nepal must implement the following recommendations for amendment of the draft Bill in order to bring it in compliance with Nepal’s legal obligations:

Enforced Disappearances

While the criminalization of enforced disappearances in the Criminal Code Bill is a welcome step, it is necessary that these provisions comply with Nepal’s international obligations and the directives of the Nepali Supreme Court. Therefore, the Government of Nepal must make the following revisions to the draft Criminal Code Bill:

¹²⁷ Article 8 of the Rome Statute enumerates the full list of acts constituting war crimes, to include: grave breaches of the Geneva Conventions; serious violations of international laws and customs applicable in international armed conflicts; serious violations of common article 3 of the four Geneva Conventions of 12 August 1949, applicable in armed conflicts not of an international character, namely, acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause; and other serious violations of laws and customs applicable to conflicts not of an international character within the framework of international law. For the exhaustive list of war crimes, see Article 8 of the Rome Statute, available at https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

¹²⁸ Coalition for the International Criminal Court, available at <http://www.iccnw.org>.

¹²⁹ *Rajaram Dhakal and Others v. Government of Nepal and Others*; Nepal Kanoon Patrika. 2060(BS), Issue 12, decision no. 7274.

¹³⁰ *Ibid.* at 787-788.

- The Criminal Code Bill should be amended to use the term “enforced disappearance” instead of “disappearance”, and include the following definition, consistent with Nepal’s international obligations: 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;
- Paragraphs 3-6 of Section 203 should be amended to define principal offenders and assign criminal responsibility for superior officers in line with the definition prescribed by Article 6 of the CED, stating in pertinent part:
 - (1) A principal offender is defined as follows: (a) A person who commits, orders, solicits the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance; (b) A superior who: i) knew, or consciously disregarded information which clearly indicated that subordinates under his or her effective authority and control were committing, or about to commit, a crime of enforced disappearance; (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution; (c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander;
 - (2) No order or instruction from any public authority, civilian, military or other may be invoked to justify an offence of enforced disappearance;
- A provision should be included in the Criminal Code Bill to reaffirm the universal applicability of the prohibition against enforced disappearances, as per article 1(2) of the CED, clarifying that: i) No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance; ii) An order from any public authority, civilian, military or other may not be invoked as a justification for enforced disappearance;
- The penalties and mitigating and aggravating factors in the Criminal Code Bill should be revised so that they are consistent with article 7 of the CED;
- Section 205 should be amended to ensure that the principal duty to provide compensation and other appropriate forms of reparation is borne by the State, and not individuals;

- Section 47 should be amended to ensure that interim relief be provided by the State; where appropriate, those convicted of crimes can be asked to pay fines to the State;
- Section 205 of the Criminal Code Bill should be amended to include a broader understanding of victims of enforced disappearance, to include families, relatives and loved ones, and provide for the full range of reparations required under international law and standards;
- Section 207 should be deleted in its entirety, and the bill should be amended to clarify that there should be no statute of limitations for complaints and prosecution for enforced disappearance; and
- In order to ensure that the new Criminal Code in Nepal criminalizes and the authorities can prosecute widespread or systematic practice of enforced disappearance as a crime against humanity, the Bill must incorporate a provision following subsection 203(2) expressly elevating an enforced disappearance as a crime against humanity when it is part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, consistent with the generally accepted definition under international law as reflected in the Rome Statute.

In addition to these amendments to the provisions of the Criminal Code Bill pertaining to the domestic criminalization of enforced disappearances, Nepal must also, without further delay, become party to the International Convention for the Protection of All Persons from Enforced Disappearance (CED).

Rape and Sexual Violence

The Government of Nepal must make the following revisions to the draft Criminal Code Bill with respect to the crimes of rape and other sexual violence, to ensure that Nepal complies with its human rights obligations:

- The draft Bill should be redrafted to ensure that the provisions are gender neutral, and that both perpetrators and victims can be male, female, or “third gender”, as defined by the Nepal Supreme Court;
- Clause (c) of the draft Bill should be amended to define “sexual intercourse” in line with the ICC definition of rape, to include any act of penetrating the body of any person, however slightly, with a sexual organ, or of the mouth, anal or genital opening of any person with any object or any other part of the body;
- The understanding of consent employed in the Criminal Code Bill should be revised to comply with international standards and international and national best practices, which should include proof of unequivocal and voluntary agreement to participate in the sexual act and a broader recognition of coercive circumstances where consent cannot be deemed to exist;
- Section 216(4), which prescribes differential penalties for marital rape, should be deleted;

- Subsection 216(6) should be amended to be gender neutral, and that that the knowledge of a woman's pregnancy be a potential aggravating factor in increased sentencing, at any stage of her pregnancy;
- Section 222 should be revised to include a more comprehensive definition of child sexual abuse in accordance with international standards, including expanding the age restriction to include any person under age 18, and listing an illustrative, non-exhaustive list of acts that would amount to sexual abuse;
- Section 224 should be revised to place the primary obligation to provide reparation, including restitution, rehabilitation, satisfaction and non-recurrence, in addition to compensation, on the State;
- The Draft Bill should be amended to remove any limitation periods for filing allegations of rape, in line with international standards; and
- Section 223 should be deleted, and section 216 should be revised to clarify that all forms of non-consensual sex amount to rape.

Other Serious Crimes

- The Draft Criminal Code Bill should be amended to include a provision criminalizing genocide in line with international law and standards; and
- The Draft Criminal Code Bill should be amended to include provisions criminalizing war crimes and crimes against humanity in line with international law and standards.

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