



SUBMISSION

for the

**REPORT OF THE WORKING GROUP ON ENFORCED OR INVOLUNTARY
DISAPPEARANCES FOR THE SPECIAL INITIATIVE MARKING THE 30TH
ANNIVERSARY OF THE DECLARATION ON THE PROTECTION OF ALL
PERSONS FROM ENFORCED DISAPPEARANCE**

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TRIAL International

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A. Introduction

1. The United Nations Working Group on Enforced or Involuntary Disappearances (hereinafter “WGEID”) announced that, in December 2022, to mark 30 years of Declaration on the Protection of All Persons from Enforced Disappearance (hereinafter “Declaration”), it will launch a special initiative to mark the adoption of the Declaration, aiming at taking stock of the progress of international law on the subject, as well as identifying the obstacles encountered in the implementation of the Declaration.

2. To that end, the WGEID invited different stakeholders from all countries, including civil society actors, to send responses to a questionnaire. Based on their expertise, the Human Rights and Justice Centre (HRJC) and TRIAL International are submitting their answers to the questionnaire below with regard to the applicable legislation and relevant jurisprudence in Nepal. The information submitted refers to the context and laws relating to the internal armed conflict of Nepal. Notwithstanding, reference will be made to domestic legislation applicable to enforced disappearances in peacetime. The submission does not deal with some questions addressed towards the State parties, in particular question no. 4 and 6 of the questionnaire.

3. In January 2005, the WGEID released its report¹ on the visit of Nepal (conducted in December 2004) and followed up on it in February 2012. In its follow up report, the WGEID requested the government of Nepal to send further information and comments on the follow up measures taken with regard to implementation of the recommendations of the WGEID’s visit. However, it did not receive any response. The WGEID also recommended Nepal to harmonize national legislation and practices with Nepal’s international obligations.² Unfortunately, at the time of writing most of those recommendations have not been fully implemented. Additionally, the request of the WGEID to visit Nepal has been pending before the Nepal government for a long time now.

¹ Working Group on Enforced or Involuntary Disappearances (WGEID), *Report on the Mission to Nepal*, UN Doc. E/CN.4/2005/65/Add.1 of 28 January 2005, available at <https://undocs.org/E/CN.4/2005/65/Add.1>

² WGEID, UN Doc. A/HRC/19/58/Add.4, *Report on the Missions to Colombia and Nepal: follow-up to the recommendations*, 13 February 2012, para 17, available at <https://undocs.org/A/HRC/19/58/Add.4>

B. Background

4. Nepal suffered from internal armed conflict from 1996 to 2006. International human rights bodies reported widespread and systematic practice of gross human rights violations, conducted by all parties involved.³ In particular, the WGEID has repeatedly stressed the existence of widespread practice of enforced disappearances in Nepal during the conflict.⁴

5. In 2003 and 2004, Nepal was the country with the highest reported number of enforced disappearances in the world.⁵ The WGEID identified a clear pattern of enforced disappearances perpetrated by security forces, particularly the Royal Nepalese Army (hereinafter “RNA”).⁶ The Office of the High Commissioner for Human Rights (hereinafter “OHCHR”) found that enforced disappearances were among the most widespread human rights violations committed during the armed conflict in Nepal.⁷

6. Although the conflict ended in 2006,⁸ for several years Nepalese authorities have been unable or unwilling to deal with the gross human rights violations, including enforced disappearances that occurred during the conflict.⁹ Despite a provision on the establishment of a Truth and

³ Among others, see: Office of the High Commissioner for Human Rights (OHCHR), *Nepal Conflict Report*, 4 October 2012, p. 109, available at https://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf; Human Rights Watch (HRW), *Clear Culpability: "Disappearances" by Security Forces in Nepal*, 1 March 2005, available at: <https://www.refworld.org/docid/42c3bd1e0.html> ; Amnesty International, *Nepal: Widespread "disappearances" in the context of armed conflict*, 16 October 2003, p. 1, available at <https://reliefweb.int/report/nepal/nepal-widespread-disappearances-context-armed-conflict>.

⁴ WGEID, *Annual Report for 2005*, UN Doc. E/CN.4/2006/56, 27 December 2005, paras. 378 and 386; WGEID, *Mission to Nepal*, UN Doc. E/CN.4/2005/65/Add.1, 28 January 2005, para. 25; OHCHR, *Nepal Conflict Report*, op. cit., 4 October 2012, pp. 39-42., paras 109 and 110.

⁵ WGEID, *Annual Report*, UN Doc. E/CN.4/2004/58 of 21 January 2004, para. 227. From January to September 2004, the WGEID transmitted 117 cases as urgent appeals to the Nepali government – more than for any other country in the world during that period.

⁶ WGEID, *Report on the Mission to Nepal*, op. cit., para. 27.

⁷ OHCHR, *Nepal Conflict Report*, op. cit., p. 109.

⁸ The conflict ended formally on 21 November 2006 with the signing of a Comprehensive Peace Accord between the Communist Party of Nepal (CPN-M) and the political alliance of seven parties.

⁹ Before the enactment of the new National Penal Code in 2018, enforced disappearance was not codified as an autonomous offence under Nepali legislation. The lack of such provision in the Nepalese legal system has been highlighted as source of concern by the WGEID as well as by UN Treaty Bodies. See, among others: WGEID, *Report on the Mission to Nepal*, op. cit. para. 33; HRC, *Concluding Observations on Nepal*, UN Doc. CCPR/C/NPL/CO/2 of 26 March 2014, para. 5. This has also been reiterated by the HRC in its views on many individual complaints against Nepal. See, among others, HRC, *Case Tripathi v. Nepal*, views of 25 November 2014; *Case Tharu v. Nepal*, views of 3 July 2015; *Case Sabita Basnet v. Nepal*, views of 22 November 2016; *Case Nakarmi v. Nepal*, views of 8 May 2017; *Case Neupane v. Nepal*, views of 31 August 2017; and *Case Kandel v. Nepal*, views of 14 July 2019.

Reconciliation Commission in order to “investigate truth about people seriously violating human rights and involved in crimes against humanity” in the Comprehensive Peace Accord¹⁰ the constitutional provision¹¹ and the order of the Supreme Court in 2007 directing the government to form an independent commission to investigate on, and elucidate the fate and whereabouts of disappeared persons, and to prosecute those responsible,¹² Nepal failed to establish any dedicated mechanism until 2015. Even when it eventually did so, the mechanisms concerned proved ineffective and not up to international standards.¹³

7. On 21 April 2014, the parliament of Nepal adopted the Enforced Disappearances Inquiry, Truth and Reconciliation Commission Act, 2014 (hereinafter “TRC Act”) creating the Truth and Reconciliation Commission (hereinafter “TRC”) and the Commission of Investigation on Enforced Disappeared Persons (hereinafter “CIEDP”). The TRC and CIEDP were established on 10 February 2015. The Supreme Court of Nepal issued a ruling holding that several provisions of the TRC Act are unconstitutional and at odds with international standards and directed the government to amend such provisions and make them consistent with its international undertakings.¹⁴ The Supreme Court ordered the amendment of the TRC Act. However, the government of Nepal, through the Attorney General Office, filed a petition in the Supreme Court to review its decision.¹⁵ The petition was rejected by the Supreme Court on 27 April 2020. At the time of writing, the TRC Act has not yet been amended. Hence, it remains at odds with the

¹⁰ Comprehensive Peace Accord (CPA), 2006, clause 5.2.5.

¹¹ The Interim Constitution, enacted in 2007, provided legitimacy to the CPA in its Article 166(3) through its annexation and reaffirmed the State’s commitment to establish a truth and reconciliation commission and provide relief to conflict victims. See: Interim Constitution of Nepal, 15 January 2007, Part IV, para. 33 (q) and (s).

¹² See: Supreme Court of Nepal, Case *Rabindra Dhakal on behalf of Rajendra Dhakal and Others v. the Government of Nepal*, Writ No. 3575, verdict of 1 June 2007.

¹³ OHCHR, Nepal: OHCHR position on UN support to the Commission on Investigation of Disappeared Persons and the Truth and Reconciliation Commission: 16 February 2016, available at https://www.ohchr.org/Documents/Countries/NP/Nepal_UN%20osition_supportTRC_COIDP_Feb2016.pdf

¹⁴ Supreme Court of Nepal, Case *Madhav Kumar Basnet and others for JuRI-Nepal v. Government of Nepal*, Writ No. 0058, decision of 2 January 2015; Supreme Court of Nepal, Case *Suman Adhikari and others v. Government of Nepal*, Writ No 0057, decision of 26 February 2015.

¹⁵ The Kathmandu Post, *Supreme Court set to hear review petition on its landmark 2015 ruling*, 12 May 2019, available at <https://kathmandupost.com/valley/2019/05/12/supreme-court-set-to-hear-review-petition-on-its-landmark-2015-ruling>.

international standards and inadequate to address the gross human rights violations occurred during the conflict, including enforced disappearances.¹⁶

C. Questionnaire

1. Can you please share examples of how the Declaration on the Protection of All Persons from Enforced Disappearances (hereinafter, “the Declaration”) has contributed to the development of domestic legislation in your country (or countries in focus)? Can you kindly share examples of domestic provisions that were adopted in your country (or countries in focus) as a result of the implementation of the Declaration?

8. On 1 June 2007, the Supreme Court of Nepal gave a remarkable judgment in the case of *Rabindra Dhakal on behalf of Rajendra Prasad Dhakal vs Nepal Government* (hereinafter “Rajendra Dhakal case”) concerning several petitions for a writ of habeas corpus before the Supreme Court of Nepal on behalf of the persons who were allegedly arrested during the conflict (between 1999 and 2004) by Nepali security forces and were unaccounted since their arrest. In its decision, the Supreme Court also referred to the Declaration, among other international instruments and considered it as one of the guiding documents to frame new laws on enforced disappearances in the country.¹⁷ Similarly, in the case of *Madhav Kumar Basnet v Office of the Prime Minister* (hereinafter “Madhav Kumar case”), the Supreme Court quoted the preamble of the Declaration¹⁸ and cited first four articles of the Declaration (Article 1 to Article 4) and pronounced that Nepal must fulfil its inalienable obligation to eliminate enforced disappearances.¹⁹

9. The celebrated decision on Rajendra Dhakal’s case had also issued a directive order to form a Commission to deal with the cases of enforced disappearances that occurred during the conflict.²⁰

¹⁶ See, among others, TRIAL International, *Nepal: Draft Bill on Transitional Justice falls short of international law and standards*, 20 August 2018, available at <https://trialinternational.org/latest-post/nepal-draft-bill-on-transitional-justice-falls-short-of-international-law-and-standards/>.

¹⁷ Supreme Court of Nepal, Case *Rabindra Dhakal on behalf of Rajendra Dhakal and Others v. the Government of Nepal*, op. cit.

¹⁸ The decision quoted, “In many countries often in the persistent manner, enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials or different branches or level of government or by organized groups or private individuals acting on behalf of or with the support, direct or indirect consent or acquiescence of the government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty which places such persons outside the protection of law.”

¹⁹ Supreme Court of Nepal, Case *Madhav Kumar Basnet and others for JuRI-Nepal v. Government of Nepal*, op. cit.

²⁰ *Ibid.*

As mentioned in the background, the transitional justice commissions that were created are based on a faulty legislation, the ‘TRC Act’, that is not in line with the international standards.

10. On 17 August 2018, the new ‘National Penal Code’ (hereinafter the Code) entered into force. Chapter 16 in the Code was dedicated to deal with crimes of enforced disappearances and it is annexed (Annex I) to this questionnaire. For the first time, the Code recognized enforced disappearance as a distinct crime. However, the provisions contained therein are not fully consistent with international standards.²¹ More importantly, these provisions will not be applied retrospectively and therefore will not encompass the enforced disappearances committed during the conflict.²² This interpretation disregards the continuing nature of the offence of enforced disappearance, envisaged by Article 17 of the Declaration and is at odds with Nepal’s international obligations and the existing domestic and international jurisprudence.

11. The trajectory of the development of both laws (TRC Act and provisions of enforced disappearance in National Penal Code) can be tracked back to the judgment of Rajendra Dhakal’s case that called to use the Declaration as a guide. However, both laws do not meet the standards enshrined in the Declaration. (The comparison of domestic provisions with the Declaration are discussed in detail in number 7.2 below).

2. Can you please indicate the status of the Declaration in the domestic legal order in your country (or countries in focus), i.e. with respect to ordinary legislation?

12. The Nepali legislation provides that the treaties and agreements ratified by Nepal must be applied as Nepali law.²³ Referring to the same, the Supreme Court of Nepal concluded that, “there is no ground for the State to get itself absolved from the responsibility determined by these (signed or ratified) instruments.”²⁴ However, no Nepali legislation has provisions on the status of the Declaration. Remarkably, the Supreme Court of Nepal has cited the importance of Declarations²⁵

²¹ See TRIAL International, Human Rights and Justice Centre and Terai Human Rights Defenders’ Alliance, Third Cycle of UPR, March 2020, available at

<https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=8042&file=EnglishTranslation>.

²² *Ibid.*

²³ Nepal Treaty Act 1990, Sec 9

²⁴ Supreme Court of Nepal, Case *Rabindra Dhakal on behalf of Rajendra Dhakal and Others v. the Government of Nepal*, op. cit.

²⁵ *Ibid.*

and international Principles²⁶ in its decisions. The Court also referred to the Declaration on the Protection of all Persons from Enforced Disappearance as the international instrument that guided the formation of International Convention for the Protection of All Persons from Enforced Disappearance.

3. Can you please illustrate if the provisions of the Declaration can be invoked before domestic courts in your country (or countries in focus) and, if so, share examples of case law where domestic courts made reference to the Declaration in their verdicts (if possible, summarizing to which provisions of the Declaration reference was made and how they were interpreted)?

13. There is no provision in the Nepalese legislation to invoke the provisions of the Declaration before domestic courts. Nevertheless, in Rajendra Dhakal's case, the Supreme Court of Nepal referred to various international documents, such as the Declaration of basic principles of Justice for victims of crime and abuse of power; the standard minimum rules for the treatment of prisoners; the Universal Declaration of Human Rights, the United Nations Charter along with other Conventions.²⁷ Furthermore, the decision, cited the Declaration and considered the possibility of implication of the right to live with dignity, the right against torture, the right to personal freedom, the right of fair hearing and easy access to justice as well as the right of families in cases of enforced disappearance.²⁸

5. Has your State (or countries in focus) ratified or acceded to the International Convention on the Protection of All Persons from Enforced Disappearances? If your State (or countries in focus) has not yet ratified or acceded to the Convention, is there any pending project or initiative to do so?

14. Nepal has not ratified or acceded to the International Convention for the Protection of Enforced Disappearance. However, in the Rajendra Dhakal's case, the Supreme Court of Nepal noted definition of enforced disappearance as provided in Article 2 of the Convention and referred

²⁶ Supreme Court of Nepal, *Sunil Singh Ranjan et al vs Nepal Government*, Writ No. 067-WO-1043, para 21 & 22 cited the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

²⁷ Inter American Convention on Forced Disappearance of persons; European Convention for the Protection of Human Rights and Fundamental Freedoms 1950; International Convention for the Protection of All Persons from Enforced Disappearance, 2006).

²⁸ Supreme Court of Nepal, Case *Rabindra Dhakal on behalf of Rajendra Dhakal and Others v. the Government of Nepal*, op. cit.

breach of articles 6, 7 and 9 of the Convention due to enforced disappearance. Notably, the Court pointed that, “[a]lthough Nepal has not ratified the Convention for the Protection of All Persons from Enforced Disappearance and it has not yet come into force, the Convention has developed an important standard concerning the obligations of a State with respect to the security of disappeared persons” and that “[t]here seem to be no problem in internalizing the principles laid down in the Convention for the sake of respecting and promoting life, dignity and freedom of its citizens and Nepalese legal system must include this.”²⁹ “[I]t is not objectionable in both law and practice, rather essential. It is expected that state should, within its constitutional framework, proceed further as soon as possible to ratify such conventions.” The Court went on further to cite a judgment from the Inter-American Court of Human Rights which considered “the prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of jus cogens”.³⁰ The decision also directed the government to take action against officials found guilty of perpetrating enforced disappearances; and ensure that amnesties and pardons are not available to those suspected or found guilty of the crime.³¹

15. Despite the verdict in Rajendra Dhakal’s case, the government of Nepal has no plans of ratifying the Convention. During the third Universal Periodic Review cycle, responding to the recommendation to ratify the Convention, Nepal expressed that, “the Penal Code of Nepal explicitly criminalizes the act of enforced disappearance in compliance with the relevant international instruments. The Government of Nepal intends to build requisite legal and institutional foundation and capacity before joining additional instrument.”³² Nepal government has been citing transitional justice mechanisms like CIEDP to address the issues of enforced disappearance. However, the Human Rights Committee in its various decisions has pointed out that transitional justice mechanisms cannot serve to dispense with the criminal prosecution of serious violations of human rights.³³ The Committee also clarified that the fact-finding and truth-

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*; Also Supreme Court of Nepal, Case *Madhav Kumar Basnet and others for JuRI-Nepal v. Government of Nepal*, *op. cit.*

³² Report of the Working Group on the Universal Periodic Review 21 June-9 July 2021, UN Doc. A/HRC/47/10/Add.1, available at <https://undocs.org/A/HRC/47/10/Add.1>

³³ Case *Kandel v. Nepal*, *op. cit.*, para. 5.10

seeking objectives of the transitional justice mechanisms, though crucial for reconciliation purposes, cannot replace the criminal justice system in providing access to justice and redress to victims of gross human rights violations and their relatives.³⁴

7. Can you kindly indicate the main obstacles – practical and legal – encountered by you/your country (or countries in focus)/ institution/organization in the implementation of the Declaration (if possible, making reference to specific provisions and concrete examples)?

16. The challenges below, divided into practical and legal challenges are encountered the most by Nepal in the implementation of the Declaration.

7.1. Practical Challenges

I. Flawed transitional justice

17. As mentioned in the background, the TRC and CIEDP were formed in 2015 with a 2-year mandate. The mandate has been extended five times already, as the TRC and CIEDP could not complete their work within the assigned deadline. Despite this, during the past seven years, the Commissions have shown sheer ineffectiveness and lack of independence. Although there were repeated extensions of their respective mandate, TRC and CIEDP still operate on the basis of a flawed legislation, as flagged out since 2015 by the Supreme Court of Nepal.³⁵ Victims' groups and civil society organizations have been demanding the amendment of the law to bring it in line with international standards. The Government, despite its public commitment,³⁶ has taken no concrete steps to bring the TRC Act in line with international law. The Government claims to be working on the amendment of the TRC Act but the preparatory work on the amendment of the TRC Act is not transparent.

18. By September 2020, the CIEDP received 3,243 complaints, where it decided to look into 2496 complaints and considered the rest of the complaints not falling under its jurisdiction.³⁷ However, the CIEDP has failed to determine the fate and whereabouts of the victims, and nobody has been

³⁴ *Ibid.*

³⁵ Supreme Court of Nepal, *Suman Adhikari et al v. Government of Nepal*, op. cit., pp. 80-85.

³⁶ The Kathmandu Post, 'No blanket amnesty for serious rights violations, Gyawali says in Geneva', published 1 March 2019, available at <https://kathmandupost.com/national/2019/03/01/no-blanket-amnesty-for-serious-rights-violations-gyawali-says-in-geneva>.

³⁷ CIEDP, Press Release: Issued on the occasion of International Day of the Victims of Enforced Disappearances, 2 September 2021, available at <https://ciedp.gov.np/en/press-release-issued-on-the-occasion-of-international-day-of-the-victims-of-enforced-disappearances/>

held accountable. Hence the repeated extensions of the CIEDP without much progress is yet another blow, especially bearing in mind that most of the victims have already been waiting for more than 15 years to obtain justice and redress. While victims are still awaiting to know what happened to their loved ones; all these lulls are a form of revictimization.

19. During the investigation, the CIEDP gathered information related to these cases, recorded statements of witnesses and victims, filled ante-mortem forms and solicited the victims' opinion on the reparation policy.³⁸ However, victims who have filed a complaint to the CIEDP share the experience of the CIEDP calling them only once to reconfirm the facts reported in their initial complaint and not for other inquiries. In general, victims complained about the process of reporting the events to the CIEDP, which allegedly failed to carefully listen to the story.³⁹

20. As a matter of fact, the majority of victims lodged a complaint in 2016 or 2017, received a phone call once between 2018 and 2019, and has not received any further news since then. In the course of the investigation conducted by the CIEDP, it was also found that an official of the CIEDP scolded the victim when she forgot her husband's date of disappearance. Moreover, during the investigations, the CIEDP forwarded 414 files to the TRC after tallying their cases with the list of dead persons provided by the Ministry of Peace and Reconstruction, as well as the list by Informal Sector Service Centre.⁴⁰ Of these 414 complaints, 137 were sent back by the TRC to the CIEDP for further investigation."⁴¹ However, in none of these transfers, the victims were consulted, which has created further pain and hopelessness to establish the truth about their loved ones. Additionally, the registration of complaints was conducted by the CIEDP in the absence of an adequate witness protection programme and lacking technical knowledge and expertise.⁴² Notably, most victims

³⁸ The Record Nepal, Transitional justice body lets down families of the disappeared, available at <https://www.recordnepal.com/transitional-justice-body-lets-down-families-of-the-disappeared>.

³⁹ Pursuing Truth, Justice and Redress in Nepal: An Update on the transitional Justice Process, ICTJ briefing, February 2018, p. 2, available at <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Nepal-Justice-Truth-Reparations-Workshop-Feb-2018.pdf>.

⁴⁰ *Ibid.*

⁴¹ The Republica, CIEDP commissioners retire without accomplishing given tasks, Published on 12 April 2019, available at <https://myrepublica.nagariknetwork.com/news/ciedp-commissioners-retire-without-accomplishing-given-tasks/>.

⁴² International Commission of Jurists, Nepal's Transitional Justice Process: Challenges and Future Strategy A Discussion Paper, August 2017, pp. 9-10, available at <https://www.icj.org/wp-content/uploads/2017/08/Nepal-TJus-Proess-Advocacy-2017-ENG.pdf>.

have been struggling to establish the truth on their loved ones and to obtain justice and redress for two decades now and the lack of concrete responses from the CIEDP only adds to their anguish and suffering. Furthermore, the CIEDP has taken no steps in addressing the root causes of the conflict.⁴³

21. In 2007, the Government established the Interim Relief and Rehabilitation Program (IRP) for conflict-affected persons. Interim relief was offered to relatives of the disappeared, among others, and included economic compensation, academic scholarships and immediate medical care.⁴⁴ In 2009, the Cabinet decided to amend the IRP policy to provide the wives of the disappeared with the same amount provided to the wives of a deceased person. However, by then, around 400 wives of disappeared persons had declared their husband dead.⁴⁵ An additional lump-sum amount that was offered to wives of the deceased was not awarded to wives of the disappeared until 2011.⁴⁶ In addition to this, the wives of the disappeared reported various challenges in accessing the interim relief. Around 76% of the victims faced difficulties in providing evidence of the disappearance, 64% of the victims faced difficulties in bearing the cost of the transportation to receive the package, 45% faced lack of cooperation from public officials, and 22% from dysfunctional local committees.⁴⁷ Also, many families were unable to obtain a recommendation from a political party which, although not being a formal requirement to obtain interim relief, was reported to play significant role in speeding up and increasing the chances of successful application.⁴⁸

22. Because of the flaws within the working procedures of the CIEDP, the failure to duly consult victims in the early stages; the loopholes in the existent legal framework; the inadequate resources and little government support, the CIEDP is not even close to finishing its task.⁴⁹ No case has been

⁴³ Section 27 (f) of The Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2071 (2014) lists root causes of the conflict as one of the areas the Commissions must include in their reports after the investigation.

⁴⁴ Network of Families of the Disappeared, Nepal, Joint Submission to The Universal Periodic Review of Nepal, July 2020, available at <https://webcache.googleusercontent.com/search?q=cache:jBRJZZY8E4oJ:https://uprdoc.ohchr.org/uprweb/downloadfile.aspx%3Ffilename%3D8318%26file%3DEnglishTranslation+%&cd=1&hl=en&ct=clnk&gl=np>.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Judicial Body: Commission on Inquiry into Disappearances (Nepal), TRIAL International, available at <https://trialinternational.org/judicial-body/commission-on-inquiry-into-disappearances-nepal/>.

recommended for prosecution, no final report has been published and no reparative measures have been recommended. The non-consultative, uncoordinated and opaque approach to the CIEDP's work has created distrust among all major stakeholders, including conflict victims and members of civil society.⁵⁰

23. Finally, the current members of the CIEDP have been criticised for being highly politicized and thus their appointment has been rejected by the victims.⁵¹ The appointments were made based on hasty provincial consultations and lacked transparency.⁵² The conflict-victims and their representative associations have requested to meet the political leaders of the major political parties to illustrate their concerns and needs.⁵³ However, their request always go unanswered.

7.2. Legal challenges

24. Various provisions of the TRC Act and National Penal Code in relation to enforced disappearances are addressed in the points below:

7.2.1. Inadequate definition of Enforced Disappearance

25. Section 206(2)(a) in the National Penal Code defines enforced disappearances (Annex I). The definition unduly restricts the potential perpetrators to “persons of security personnel having authority by law to make arrest, investigation or enforcement of law”, thus leaving out several State agents that may formally have different attributions, as well as persons or groups of persons acting with the tolerance, support or acquiescence of State agents. The definition hence is not in line with the preamble of the Declaration. The flaw in the Code is not addressed by Sec. 206(2)(b) either, which contemplates the possibility for “any person, organisation or group, whether organised or not” to perpetrate an enforced disappearance. This wording departs from international law and uses an extremely vague formula that dilutes the State's responsibility.

⁵⁰ No law, No justice, No state for victims, The culture of impunity in post conflict Nepal, 20 November 2020, available at <https://www.hrw.org/report/2020/11/20/no-law-no-justice-no-state-victims/culture-impunity-post-conflict-nepal>.

⁵¹ Human Rights Watch, Nepal: Recent Steps Undermine Transitional Justice Victim Concerns Ignored Yet Again, 25 January 2020, available at <https://www.hrw.org/news/2020/01/25/nepal-recent-steps-undermine-transitional-justice>.

⁵² *Ibid.*

⁵³ The Kathmandu Post, *Political Instability an excuse to delay justice, conflict victims say*, 22 March 2021, available at <https://kathmandupost.com/national/2021/03/22/political-instability-an-excuse-to-delay-justice-conflict-victims-say-->.

Moreover, the constitutive element of denial that the deprivation of liberty took place or concealment of the fate and whereabouts of the disappeared is ambiguously phrased in Section 206 (2) (a) as being alternative instead of cumulative (“or a refusal to let the person deprived of liberty to meet a judicial authority”).

7.2.2. Insufficient penalties

26. While Article 4 of the Declaration require that the offence of enforced disappearance should be punishable by appropriate penalties which should take into account the “extreme seriousness” of the offence. Contrary to this, the sanction envisaged for enforced disappearance pursuant to Sec. 206(7) of the National Penal Code is deprivation of liberty for a maximum of 15 years and a fine up to 500’000 Nepalese Rupees (approximately 4’500 US\$). If the victim of the enforced disappearance is a child or a woman, the sentence could be increased to 17 years in jail. Besides failing to clearly establish a minimum sentence for perpetrators, these penalties are hardly proportionate to the gravity of the crime and do not meet international standards on the matter. Furthermore, the Criminal Procedure Code includes provisions for a plea bargain. It also lists circumstances contributing to the mitigation of sentences. For instance, if the accused pleads guilty of the offence before the investigating or prosecuting authority, remission of up to twenty-five percent of the sentence can be offered to the accused⁵⁴. Additionally, if the accused in the case of any organized offence or offence committed in a group, helps to locate the other persons involved in that offence or the place where criminal conspiracy of such offence was made, in seizing or forfeiting any vehicle, machine, equipment or other object or arms used for the commission of such offence, the prosecutor can also demand up to a fifty percent remission in punishment⁵⁵.

7.2.3. No Reparative mechanisms

27. The Rajendra Dhakal case cited Article 19 of the Declaration and noted the State’s obligation to provide reparation, including prompt, fair and adequate compensation to the victims of enforced disappearances. The decision also cited interpretation of Article 19 of the Declaration

⁵⁴ National Criminal Procedure Code 2017, section 33 (3)(a).

⁵⁵ National Criminal Procedure Code 2017, section 33 (3)(b).

by the Working Group on enforced or involuntary disappearances and recalled that, “monetary compensation shall be granted for any damage resulting from an enforced disappearance such as physical or mental harm, lost opportunities, material damages and loss of earnings, harm to reputation and costs required for legal or expert assistance.”

28. Sec. 208 of the Criminal Code unduly restricts the notion of reparation for victims of enforced disappearance, by providing that the disappeared person is entitled solely to pecuniary compensation from the perpetrator, and only if he or she surfaces alive. “Heirs” of the disappeared are entitled to pecuniary compensation if the disappeared person “is already dead”. This requirement implies that the fate and whereabouts of the disappeared are actually known, while enforced disappearance is characterised precisely by the lack of such knowledge. This provision departs from international law also because it disregards the fact that, pursuant to international law and jurisprudence, “victims of enforced disappearance” are not only the disappeared persons but also any other individual who suffers direct harm as a consequence of the disappearance. The failure to recognise relatives of the disappeared person as victims in their own right, may lead to their arbitrary exclusion from programmes of reparation or psycho-social support.

29. Furthermore, Sec. 208 of the Criminal Code does not clarify which criteria would be applied to calculate the compensation to be awarded, being the expression “reasonable compensation” extremely vague and indeterminate. This is problematic as it undermines legal certainty. Moreover, Nepal has a history of awarding very low amounts as compensation to victims of gross human rights violations that are not commensurate to the gravity of the crimes at stake. Moreover, reparation for gross human rights violations cannot be limited to pecuniary compensation (even less if made conditional upon the fact that the perpetrator is identified, sentenced, and able to pay such compensation), but must encompass restitution, rehabilitation, satisfaction and guarantees of non-repetition. Furthermore, for the reasons pointed out above, access to reparation cannot be made conditional upon the fact that the victim is actually dead.

7.2.4. Provisions allowing amnesty

30. Article 18 of the Declaration bars any amnesty to the perpetrators of the enforced disappearances. However, the TRC Act authorizes the CIEDP to recommend amnesty and mediate cases, even in situations involving grave crimes and gross violations of human rights, including

enforced disappearances.⁵⁶ Despite Supreme Court's order⁵⁷ to bring the TRC Act in line with international standards, indicating removal of provisions on amnesty, the laws have not been amended.

7.2.5. Statute of Limitations

31. Article 17 of the Declaration explicitly affirms the continuing nature of the violation in the cases of enforced disappearances. The Rajendra Dhakal case too noted, "it is also necessary to have provisions on continuous inquiry until the status of an allegedly disappeared person is determined."⁵⁸ Similarly, in the Madhav Kumar case, the Supreme Court observed that the statute of limitations on gross violations of international human rights law and serious violations of international humanitarian law are against the norms of criminal jurisprudence.⁵⁹ It also considered that the act of disappearance is a gross human rights violation and that the perpetrator involved in such crime needs to be prosecuted under criminal law. The Supreme Court also instructed Nepal Government to make necessary arrangements for the investigation of enforced disappearances, in line with the Constitution, laws, and the jurisprudence produced by the Supreme Court in the case of Rajendra Prasad Dhakal and in other legal precedents set by the Court.⁶⁰ However, Sec. 210 of the Criminal Code, concerning the statute of limitations for criminal proceedings on enforced disappearance, establishes that "no complaint shall be entertained after the expiry of 6 months from the date of having knowledge of commission of the offence or from the date of the disappeared person getting or being made public." In its current wording, this provision is at odds with the Declaration and conducive to impunity. The time line of 6 months is obviously not sufficient and furtherly the counting must not begin from the moment when the commission of the offence is known, but only after the fate and whereabouts of the disappeared persons are established with certainty.

⁵⁶ Section 16 (2), TRC Act, "(2) Notwithstanding anything contained in sub-section (1), if the concerned person or authority submits an apology to the satisfaction of the Commission, the Commission may either pardon him/her or remit or commute the sentence if so imposed on him/her or may suspend the punishment on the conditions set by the Commission or order not to execute the punishment if the conditions set by it are observed."

⁵⁷ Supreme Court of Nepal, *Suman Adhikari et al v. Government of Nepal*, op. cit.

⁵⁸ Supreme Court of Nepal, Case *Rabindra Dhakal on behalf of Rajendra Dhakal and Others v. the Government of Nepal*, op. cit.

⁵⁹ Supreme Court of Nepal, Case *Madhav Kumar Basnet and others for JuRI-Nepal v. Government of Nepal*, op. cit.

⁶⁰ *Ibid.*

32. Moreover, the Code would only concern the cases that were committed after the date of the enactment of the Code, clearly excluding the cases of enforced disappearances that occurred during the conflict. As enforced disappearance has long been established as a crime under international law, the international treaties obligate States Parties like Nepal to make laws fully in compliance with international standards. Adhering to its international obligation, Nepal should have previously criminalized the act of enforced disappearance. However, criminalizing the act at present does not exempt it from not investigating the act of enforced disappearance that took place before the criminalization. The UN Working Group on Enforced or Involuntary Disappearances has issued a General Comment stating that “where a statute or rule of procedure seems to negatively affect the continuous violation doctrine, the competent body ought to construe such a provision as narrowly as possible so that a remedy is provided or persons prosecuted for the perpetration of the disappearance.”⁶¹

33. In 2021, some of the family members of the persons disappeared during the conflict tried to lodge their cases before the concerned District Police Office in accordance with the provisions in the National Penal Code. However, not a single complaint was registered. The police denied registering the cases stating they did not fall under their jurisdiction.⁶² Nobody has been prosecuted under the law since its enactment in 2018.

8. Can you kindly illustrate whether your country (or countries in focus) has previous experiences with regard to technical cooperation and assistance from Special Procedures and whether you think this could be an effective mean to further disseminate and foster the implementation of the Declaration. What other kind of initiatives could be favoured?

34. Although representatives of TRIAL International and the HRJC have been reaching out to the Special Procedures through individual communications and meetings in the past, there is no experience of technical cooperation and assistance to Nepal so far. As organizations working in the field of enforced disappearances and transitional justice in Nepal, we humbly request the WGEID to consider coordinating with other relevant Special Procedures and conduct training

⁶¹ UNGA, Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/16/48, 26 January 2011, para. 39

⁶² The Kathmandu Post, Families of persons disappeared during insurgency start filing criminal cases with police, available at <https://kathmandupost.com/national/2021/09/02/families-of-persons-disappeared-during-insurgency-start-filing-criminal-cases-with-police>

sessions for civil society organizations, victims' groups and human rights defenders (HRD) of Nepal on issues as emerging international jurisprudence on enforced disappearance, evidence securing and forensic investigation on people who were enforcedly disappeared. The list is not exhaustive and the HRJC will gladly play a role in assisting with the identification of specific needs for technical cooperation and assistance from Special Procedures, in coordination with the victims' groups and HRDs in the future.

9. Can you kindly illustrate any activity undertaken in your country (or countries in focus) to raise awareness and further disseminate the content of the Declaration? To your knowledge, has the Declaration been translated in any local language other than the six UN language? If so, could you please share a copy?

35. The government of Nepal has translated some international documents in Nepali language. However, the Declaration has not been translated. The HRJC, with the support of TRIAL International, translated the Declaration in Nepali (Annex 2) for the purpose of training lawyers in Nepal on the laws related to enforced disappearances.

10. Can you kindly share information on existing training programs (directed both at authorities and at civil society organizations) in your country (or countries in focus) where the Declaration is analyzed and disseminated? Any information on the nature and frequency of such trainings is welcome.

36. TRIAL International has been conducting short-term trainings and long-term coaching programs on gross human rights violations, including enforced disappearances, directed at lawyers of Nepal since 2015. The trainings encompass sessions on international human rights law, including enforced disappearances, legal instruments as the Declaration and mechanisms like the WGEID (its mandate, working procedure and communications). HRJC joined TRIAL in the conduction of such trainings since 2017. The trainings have been extended to national Human Rights Defenders and to representatives of non-governmental organizations since 2018. In 2020 and 2021, HRJC and TRIAL conducted specific 3-days trainings focused exclusively on enforced disappearances targeting participants from 3 regions of Nepal and a six-month coaching directed to human rights defenders working in the field of gross human rights violations, including enforced disappearances.

37. The HRJC and TRIAL International are not aware about the trainings from Special Procedures to State agents but highly recommend conducting capacity building activities for judges, government attorneys and police personnel on issues and concerns regarding enforced disappearances.

11. Is there any other information that you deem relevant for the purposes of the study?

x

About the Subscribing Organisations

The Human Rights and Justice Centre is an NGO established in 2017, based in Kathmandu. It aims at improving access to justice for victims of human rights violations in Nepal such as torture, enforced disappearances, extrajudicial executions and sexual violence.

Contact person: KapilAryal

E-mail: aryalkapil@gmail.com, contact@hrjc.org.np

Address: Jwagal-10, Lalitpur, Nepal

Tel./Fax No.: +977 9818 018 924

Website: <http://hrjc.org.np/>

TRIAL International is a Geneva-based NGO established in 2002 and with consultative statute to the UN Economic and Social Council (ECOSOC). Its aim is fighting impunity for international crimes and supporting victims in their quest for justice. The organization provides legal assistance, litigates cases, develops local capacity and pushes the human rights agenda forward.

TRIAL International

Contact person: Philip Grant

E-mail: p.grant@trialinternational.org, info@trialinternational.org

Address: Rue de Lyon 95 | 1203 Geneva | Switzerland

Tel./Fax No.: +41 22 321 61 10

Website: <https://trialinternational.org/>

Annex I

Chapter-16 Offences Relating to Enforced Disappearance

206. Prohibition of enforced appearance:

(1) No person shall subject, or cause to be subjected, any one to enforced disappearance.

(2) For the purposes of sub-section (1), the term "enforced disappearance" means any of the following acts: (a) The arrest, detention or any other form of control of a person by a person or security personnel having authority by law to make arrest, investigation or enforcement of law, followed by a failure to produce such person before the case trying authority within twenty-four hours of the date of such arrest or deprivation of liberty, excluding the time required for journey, or a refusal to let the person deprived of liberty to be presented before the judicial authority, and/or by concealment of information as to where, how and in what condition such person has been so held, (b) The abduction, custody, control or any other form of deprivation of liberty of a person by any person, organization or group, whether organized or not, followed by concealment of information to the concerned person as to the reason for such deprivation and where, how and in what condition such person has been so held,

(3) A person who orders the commission of enforced disappearance of a person upon arrest, detention or control of such person and a person who implements such order shall be considered to be the principal offender of enforced disappearance.

(4) Where an act of enforced disappearance is committed in pursuance of order or direction given by a person holding public office or by the responsible person of an organization or group, whether organized or unorganized, the person giving such order or direction shall be liable as the principal offender of enforced disappearance.

(5) A superior who, despite knowing that his or her subordinate official, body or group was committing or about to commit an act of enforced disappearance, disregards such information or fails to take necessary measures to prevent the commission of such act shall also be considered to have committed the offence under this Section.

(6) Where a person has been subjected to enforced disappearance by two or more persons jointly, every person involved in such act shall be equally liable as the offender.

(7) A person who commits the offence referred to in subsection (1) shall be liable to the following sentence: (a) In the case of the principal offender of enforced disappearance, a sentence of imprisonment for a term not exceeding fifteen years and a fine not exceeding five hundred thousand rupees, having regard to the duration and circumstances of such enforced disappearance, (b) In the case of a person who is accomplice or conspires to the commission of enforced disappearance, the same sentence as is imposable on the principal offender, and in the case of a person who attempts to or facilitates the commission of enforced disappearance, half the sentence imposable on the principal offender.

(8) A person who does an act constituting the offence referred to in sub-section (1) against a woman or child shall be liable to an additional sentence of imprisonment for a term of two years, in addition to the sentence to be imposed pursuant to sub-section (7).

(9) Where a person has committed any other offence punishable by law against any one who has been subjected to enforced disappearance, during such disappearance, he or she shall be liable to the additional sentence under this Section, in addition to the sentence imposable by law for such offence.

(10) A person who subjects any one to enforced disappearance by using any government vehicle, building, arms and ammunition or goods shall be liable to an additional sentence of imprisonment for a term of one year, in addition to the sentence imposable under this Section.

207. Forfeiture of goods related to offence: Any building, land, vehicle, arms and other goods knowingly allowed by the owner thereof to be used in, or used with the consent of the concerned owner in, the commission of the offence punishable under this Chapter shall be forfeited. Provided that no governmental building, vehicle, arms and goods shall be forfeited.

208. Entitlement to compensation: Where a person who is subjected to enforced disappearance appears or is made public subsequently, he or she shall be entitled to get a reasonable compensation from the person who has so subjected him or her to enforced disappearance. (2) Where the person subjected to enforced disappearance is already dead, the immediate successor to him or her shall be entitled to get the compensation referred to in sub-section (1).

209. Property to be returned: Where any person, in subjecting another person to enforced disappearance under this Chapter, has also taken any property belonging to that other person, the

person who has so subjected to enforced disappearance shall return such property, if available, and pay a reasonable compensation for such property, if not available, to the disappeared person or his or her immediate relative.

210. Statute of limitation: No complaint shall be entertained after expiry of six months from the date of having knowledge of commission of the offence under this Chapter or from the date of the disappeared person getting or being made public. Provided that if a complaint is filed, accompanied by the evidence, with the leave of the court, setting out the reason for not being in a position to file the complaint, such complaint may lie at any time.

Annex II

Nepali translation of the Declaration

साधारण सभा

ए/प्रस्ताव/४७/१३३

१२ फेब्रुअरी १९९३

सत्वालीसौं सत्र

एजेण्डा सामग्री ९७ (ख)

साधारण सभाद्वारा ग्रहण गरिएको

(तेस्रो समितिको प्रतिवेदन उपर (ए/ ४७/६७८/थप २

४७/१३३ बलपूर्वक बेपत्ता पारिएका सम्पूर्ण व्यक्तिहरूको सुरक्षा सम्बन्धीको घोषणापत्र

साधारण सभा,

संयुक्तराष्ट्र संघको बडापत्रमा घोषणा गरिएका सिद्धान्तहरू र अन्य अन्तर्राष्ट्रिय सन्धिका प्रावधानहरू अनुरूप, मानव परिवार सम्पूर्णको अन्तर्निहित मानसम्मान तथा समान र अवच्छिन्न अधिकारहरू नै विश्वमा स्वतन्त्रता, न्याय र शान्तिको आधार हो भन्ने कुराको विचार गर्दै,

बडापत्र अन्तर्गत भएका, र खास गरी धारा ५५ अन्तर्गत मनावधिकारहरू र आधारभूत स्वतन्त्रताहरूको सम्मान र पालनाको गर्नुपर्ने राष्ट्रका दायित्वको मनन गर्दै,

थुप्रै राष्ट्रहरूमा, धेरैजसो लगातार रूपमा बेपत्ता पार्ने काम हुन्छ, यस अर्थमा विभिन्न निकाय वा तहका सरकारी कर्मचारीद्वारा, वा संगठित समूह वा सो का लागि काम गर्ने निजी व्यक्तिद्वारा, वा सरकारको सहयोग, प्रतक्ष्य वा अप्रत्यक्ष, सहमति वा स्वीकृतिका साथ, आफ्नो इच्छाविरुद्ध वा अन्य रूपमा कुनै व्यक्ति पक्राउ पर्छ, थुनामा पर्छ, वा अपरहणमा पर्छ जसपश्चात सम्बन्धित व्यक्तिको ठेगानाको खुलासाको इन्कारी गर्ने वा स्वतन्त्रताबाट वन्चित गरेको अस्वीकार गर्ने त्यस्ता व्यक्तिलाई कानूनको सुरक्षाको दयारा भन्दा बाहिर राख्ने गरेको घटनाहरूप्रति गहन चिन्तन गर्दै,

बलपूर्वक बेपत्ता पार्ने कार्यले कुनै पनि कानुनी शासन, मनावधिकार र आधारभूत हक अधिकारप्रति प्रतिबद्ध भएको समाजको गहिरो भन्दा गहिरो मान्यतालाई बेवास्ता गर्छ, र साथै यस्ता कार्यको व्यवस्थित अभ्यास गर्नु मानवता विरुद्धको अपराध हो भन्ने विचार गर्दै,

विश्वका विभिन्न क्षेत्रका रिपोर्ट अनुसार, जबरजस्ती वा अस्वेच्छिक रूपमा बलपूर्वक बेपत्ता पारिएका घटनाहरू र साथसाथै त्यस्ता कार्यले ल्याएको वेदना र दुःख सम्झिँदै र अधिकार प्राप्त अधिकारी र सुरक्षाकर्मीलाई कानुनी रूपमा जिम्मेवार बनाउन आवहान गरेको २० डिसेम्बर १९७८ को प्रस्ताव स्मरण गर्दै,

१२ अगष्ट १९४९ को जेनेभा सन्धिहरु र त्यस्का पूरक महासन्धिद्वारा सशस्त्र द्वन्द्वका पिडितहरुलाई प्रदान गरिएको सुरक्षालाई समेत सम्भ्रदै,

व्यक्तिको बाँच्न पाउने अधिकार, स्वतन्त्रता र सुरक्षाको अधिकार, यातना तथा क्रुर, अमानविय व्यवहार विरुद्धको अधिकार र कानून अघि व्यक्ति समानको अधिकार सुरक्षित गरेका नागरिक तथा राजनीतिक अधिकार सम्बन्धि अन्तर्राष्ट्रिय महासन्धि र मानवअधिकारको विश्वव्यापी घोषणापत्रलाई ध्यानमा राख्दै, यातना तथा क्रुर, अमानविय वा अपमानजनक व्यवहार विरुद्धको महासन्धिले राष्ट्रलाई यातना रोकथाम र सजायको लागि प्रभावकारी उपायहरु अवलम्बन गर्न लगाएको कुरा पनि ध्यानमा राख्दै,

कानून कार्यान्वयन गर्ने कर्मचारीका लागि आचरण संहिता, कानून कार्यान्वयन गर्ने कर्मचारीद्वारा बल तथा हतियार प्रयोगको आधारभूत सिद्धान्तहरु, अपराध र शक्तिको दुरुपयोगका पिडीतको लागी न्यायका आधारभूत सिद्धान्तहरुको घोषणापत्र र कैदीबन्दीका लागी स्तरीय व्यवहारका न्यूनतम नियमहरुको मनन गर्दै,

बलपूर्वक बेपत्ता पार्ने कार्यको रोकथामका लागि, ९ डिसेम्बर १९८८ को ४३/१७३ को प्रस्तावको अनुसूचीमा रहेको कुनै प्रकारको बन्दी वा कैदीमा रहेको व्यक्तिको सुरक्षाको लागि बनेका सिद्धान्तहरु र साथै १५ डिसेम्बर १९८९ को ४४/१६२ को प्रस्तावद्वारा महासभाले समर्थन गरेको २४ मे १९८९ को आर्थिक र सामाजिक परिषद्को अनुसूचीमा प्रस्तुत गरिएको १९८९/६५ प्रस्तावमा भएको गैरकानुनी, स्वेच्छाचारी हत्याको प्रभावकारी रोकथाम र अनुसन्धानका सिद्धान्तको पूर्ण अवलम्बन गर्नुपर्ने जरुरी रहने विश्वास गर्दै,

जहाँ बलपूर्वक बेपत्ता पार्ने कार्यसँग सम्बन्धित कार्यहरु माथि उल्लेखित अन्तर्राष्ट्रिय दस्तावेजका अनुसार रोक लगाइन्छ, त्यहाँ एउटा नयाँ दस्तावेज बनाउन उत्तिकै जरुरी छ जसले बलपूर्वक बेपत्ता पार्ने सम्पूर्ण कार्यलाई गहन अपराधको रूपमा लिन्छ, र त्यस्ता कार्यलाई रोक्न र सजाय दिन मापदण्डको निर्माण गर्दछ भन्ने मनन गर्दै,

१. यो बलपूर्वक बेपत्ता पारिएका सम्पूर्ण व्यक्तिहरुको सुरक्षा सम्बन्धीको घोषणापत्र सम्पूर्ण राष्ट्रका लागी सिद्धान्त अनुरूप हुने घोषणा गर्छु

२. घोषणापत्रको सर्वत्र जानकारी दिन र सम्मानका लागि सम्पूर्ण प्रयास गरियोस् भन्ने आग्रह गर्छु

धारा १

१. हरेक बलपूर्वक बेपत्ता बनाइने कार्य व्यक्तिको आत्मसम्मान विरुद्धको अपराध हो । यसलाई संयुक्त राष्ट्रसंघको अधिकारपत्रको उद्देश्य विरुद्धको कार्य र साथसाथै मानव अधिकारको विश्वव्यापी घोषणामा निहित मानव अधिकार र मौलिक स्वतन्त्रता विरुद्धको गम्भीर उल्लङ्घनको रूपमा आलोचना गरिन्छ, जसलाई यसै क्षेत्रका अन्य अन्तर्राष्ट्रिय दस्तावेजहरुमा प्रतिपादित र उल्लेखित गरिएका छन् ।

२. बलपूर्वक बेपत्ता बनाइने कार्यले बलपूर्वक बेपत्ता पारिएको व्यक्तिलाई कानूनको सुरक्षाबाट अलग गराउँछ, र त्यस्ता व्यक्ति र उनको परिवारप्रति कठोर दुःख दिन्छ । यसले हरेक व्यक्तिको कानून समक्ष व्यक्ति समान मान्यता पाउने अधिकार, स्वतन्त्रता र व्यक्तिगत सुरक्षाको अधिकार र यातना तथा क्रुर,

अमानविय वा अपमानजनक व्यवहार विरुद्धको अधिकार जस्ता अन्तर्राष्ट्रिय कानुन प्रदत्त नियमहरूको उल्लङ्घन गर्दछ। साथै यसले बाँच्न पाउने अधिकारमा गम्भीर खतरा पुराउँछ।

धारा २

१. कुनै राष्ट्रले बलपूर्वक बेपत्ता पार्ने कार्यको अभ्यास गर्ने, अनुमति दिने वा सहन गर्ने छैन।
२. राष्ट्रले संयुक्त राष्ट्रसंघसँग समन्वय गर्दै राष्ट्रिय तथा क्षेत्रिय तहबाट बलपूर्वक बेपत्ता पार्ने कार्यको रोकथाम तथा निर्मूलीकरणका लागि हरेक तवरबाट कार्य गर्नेछ।

धारा ३

हरेक राष्ट्रले, आफ्नो क्षेत्राधिकार भित्र पर्ने क्षेत्रहरूमा, बलपूर्वक बेपत्ता पार्ने कार्यको रोकथाम तथा निर्मूलीकरणका लागि प्रभावकारी व्यवस्थापकीय, प्रशासनिक वा अन्य उपाय अपनाउनु पर्नेछ।

धारा ४

१. हरेक बलपूर्वक बेपत्ता पार्ने कार्यलाई अपराधिक कानुनी अन्तर्गत अपराध बनाई सोलाई अत्यन्त गम्भीरताका साथ उपयुक्त सजाय र दण्डको व्यवस्था गर्नुपर्छ।
२. बलपूर्वक बेपत्ता पार्ने कार्यमा संलग्न भएका व्यक्तिले पिडितलाई जीवित बाहिर ल्याउन वा स्वेच्छाले सूचना प्रदान गरी बलपूर्वक बेपत्ता पारिएका मुद्दामा सहयोग गरेमा त्यस्ता व्यक्तिका लागि राष्ट्रिय कानुनमा सजाय कम गराउने परिस्थितिको निर्माण गर्न सकिन्छ।

धारा ५

त्यस्ता लागु हुने अपराधिक सजायका साथै, बलपूर्वक बेपत्ता पार्ने कार्यले अपराधी र यस्ता कार्य संगठित गर्ने, स्वीकार गर्ने वा सहने राष्ट्र वा राष्ट्रिय निकायलाई कुनै सम्बन्धित राष्ट्रको अन्तर्राष्ट्रिय कानुन अनुसारको अन्तर्राष्ट्रिय जिम्मेवारीका सिद्धान्तप्रति, कुनै पूर्वाग्रह नराखी देवानी कानुन अन्तर्गत उत्तरदायी बनाउँछ।

धारा ६

१. कुनै पनि सार्वजनिक पदमा रहेको व्यक्ति, जनता, सैनिक, वा अन्य कोहीले दिएको कुनै आदेश वा निर्देशनले, बलपूर्वक बेपत्ता पार्ने कार्यलाई न्यायोचित बनाउन मिल्दैन। त्यस्तो कुनै आदेश वा निर्देशन पाएको व्यक्तिसँग सो नमान्ने अधिकार र कर्तव्य हुन्छ।
२. हरेक राष्ट्रले बलपूर्वक बेपत्ता पार्न निर्देशन दिने, मान्यता दिने वा प्रोत्साहन गर्ने आदेश वा निर्देशनमाथि रोक लगाउने सुनिश्चित गर्नुपर्छ।
३. यस प्रावधानको अनुच्छेद १ र २ लाई कानुन कार्यन्वयन गर्ने अधिकारीको तालिमले जोड दिनेछ।

धारा ७

कुनै पनि परिस्थिति, चाहे युद्धको डर, युद्धको अवस्था, आन्तरिक राजनैतिक अस्थिरता वा अन्य कुनै सार्वजनिक आपतकालीन अवस्थालाई बलपूर्वक बेपत्ता पार्नका लागि न्यायोचित मानी लागु गर्न मिल्दैन ।

धारा ८

कुनै व्यक्तिलाई कुनै राष्ट्रमा बलपूर्वक बेपत्ता पारिने खतरा भएको पर्याप्त आधार भएमा, कुनैपनि राष्ट्रले त्यस्तो व्यक्तिलाई निकाल्ने, फर्काउने वा अन्य देशमा सुपुर्द गर्न पाउने छैन ।

२. त्यस्ता आधारहरु भए वा नभएको पत्ता लगाउनका निम्ति, सक्षम निकायद्वारा राष्ट्रमा भएको मानव अधिकारको लगातार र गम्भीर वा मानव अधिकारको थुप्रै उल्लङ्घनको अवस्था लगायत सम्पूर्ण अन्य सान्दर्भिक स्थितिलाई विचार गर्नुपर्छ ।

धारा ९

१. सम्पूर्ण परिस्थितिमा बलपूर्वक बेपत्ता रोकथामका निम्ति, स्वतन्त्रता गुमाएको व्यक्तिले आफू भएको ठाउँ वा आफ्नो स्वास्थ्य स्थितिको बारेमा पत्ता लगाउने मध्यमको रूपमा शिघ्र तथा प्रभावकारी न्यायिक उपचारको अधिकार र/वा व्यक्तिगत स्वतन्त्रताबाट बन्चित गर्ने आदेश वा निर्देशन दिने निकायको पहिचान गर्ने र साथै माथि धारा ७ मा उल्लेखित प्रावधान समेत समावेश गर्न आवश्यक पर्दछ ।

२. त्यस्ता कार्यविधिमा एक सक्षम राष्ट्रिय निकायलाई व्यक्तिको स्वतन्त्रता कुण्ठित गरी बन्दी बनाइएको ठाउँ, त्यस ठाउँको कुनै भाग वा सो व्यक्ति भएको विश्वास गर्न सकिने कुनै ठाउँको पहुँच हुन्छ ।

३. राष्ट्रिय कानून वा राष्ट्र पक्ष भएको अन्तर्राष्ट्रिय कानून अन्तर्गतका अन्य सक्षम निकायलाई समेत त्यस्तो ठाउँको पहुँच रहनेछ ।

धारा १०

१. कुनै पनि स्वतन्त्रता हनन भएको व्यक्तिलाई आधिकारिक मान्यताप्राप्त थुनामा राखी राष्ट्रिय कानून बमोजिम थुना पश्चात शिघ्र न्यायिक निकाय समक्ष पेश गर्नुपर्छ ।

२. थुनामा रहेको व्यक्ति र सो व्यक्ति रहेको ठाउँ र ठाउँहरू लगायत सरुवा गरिएको ठाउँबारे तुरुन्त परिवारका सदस्य, सम्बन्धित कानुनी व्यवसायी, वा विपरित इच्छा राख्ने व्यक्ति बाहेक व्यक्तिलाई सूचना दिनुपर्दछ ।

३. हरेक थुनामा राखिएका ठाउँमा, स्वतन्त्रता हनन गरिएका सम्पूर्ण व्यक्तिको औपचारिक र पछिल्लो जानकारी सहितको अभिलेखसङ्ग्रह कायम गरिनुपर्छ । साथै हरेक राष्ट्रले केन्द्रिकित अभिलेखसङ्ग्रह कायम गर्न आवश्यक पर्ने कदम चाल्नु पर्नेछ । यस्ता अभिलेखसङ्ग्रहमा भएका हरेक सूचना माथिल्लो अनुच्छेदमा उल्लेख गरिएका व्यक्तिहरूलाई, कुनै न्यायिक वा अन्य सक्षम र स्वतन्त्र राष्ट्रिय निकायलाई र सम्बन्धित राष्ट्रको कानून वा थुनामा रहेको व्यक्तिको ठेगाना पत्ता लगाउन खोजेको, राष्ट्र पक्ष भएको अन्तर्राष्ट्रिय कानूनद्वारा हक प्रदान गरिएका सक्षम निकायलाई प्रदान गरिनुपर्छ ।

धारा ११

हरेक स्वतन्त्रता खोसिएका व्यक्तिलाई थुनामुक्त गर्दा, वास्तविक रूपमा थुनामुक्त गरिएको हो भन्ने विश्वसनीय प्रमाणिकरणका साथ थुनामुक्त गरिनुपर्छ र, थप रूपमा थुनामुक्त गर्दाको अवस्थामा व्यक्तिको शारीरिक निष्ठा र प्रदान गरिएका अधिकारको सम्पूर्ण रूपमा उपभोग गर्ने क्षमता सुरक्षित गरिनुपर्छ ।

धारा १२

१. हरेक राष्ट्रले आफ्नो राष्ट्रिय कानून अन्तर्गत, स्वतन्त्रता हनन गर्ने आदेश दिने अधिकार प्राप्त अधिकारीहरूलाई इंगित गर्दै, त्यस्ता आदेश दिने अवस्था निर्माण गर्ने, र कुनै न्यायिक तर्कबिना थुना सम्बन्धी सूचना दिन इन्कार गर्ने अधिकार प्राप्त अधिकारीलाई दण्ड सजायको प्रावधान निर्माण गर्नुपर्छ ।

२. यसैगरी हरेक राष्ट्रले, पक्राउ गर्ने, थुनामा राख्ने, हिरासतमा लिने, सरुवा र कैदमा राख्न जिम्मेवार अधिकारी र साथै बल तथा हतियारको प्रयोग गर्न कानूनले अधिकार दिएको अधिकारीको कडा निगरानीका साथै आदेशको श्रृंखला (चेन अफ कमाण्ड) सुनिश्चितता गर्नुपर्छ ।

धारा १३

१. कुनै व्यक्तिलाई बलपूर्वक बेपत्ता पारिएको बारेका सम्बन्धित ज्ञान भएको व्यक्ति वा अन्य कुनै चासो भएको व्यक्तिको राष्ट्रका सक्षम र स्वतन्त्र निकायमा उजुरी दिने हक हरेक राष्ट्रले सुनिश्चित गर्नुपर्छ र साथै त्यस्ता उजुरी निकायले निष्पक्ष, शीघ्र र बिस्तारित रूपमा हेर्नुपर्ने व्यवस्था सुनिश्चित गर्नेछ ।

२. हरेक राष्ट्रले आफ्ना सक्षम निकायसँग प्रभावकारी अनुसन्धान गर्न आवश्यक पर्ने शक्ति र श्रोतको सुनिश्चितता गर्दै, साक्षीको उपस्थिति आवश्यक गराउन र सम्बन्धित दस्तावेज उपलब्ध गराउन र शीघ्र घटनास्थल भ्रमण जान समेत सुनिश्चित गर्नुपर्छ ।

३. हरेक राष्ट्रले, अनुसन्धानमा सम्मेलित उजुरीदर्ताकर्ता, वकिल, साक्षी र अन्य सहभागी समेतलाई दुर्व्यवहार, त्रास वा बदला विरुद्ध सुरक्षाको सुनिश्चितता लागि आवश्यक कदमहरू चाल्नुपर्छ ।

४. त्यस्तो अनुसन्धानबाट आएका निष्कर्ष, अपराधिक अनुसन्धानमा बाधा पर्न जाने स्थितिमा बाहेक, सम्पूर्ण सम्बन्धित पक्षसमक्ष अनुरोध गरेको खण्डमा, उपलब्ध गराउनुपर्छ ।

५. उजुरी गर्दाको बखतमा वा अनुसन्धान कार्यविधि चलिरहेको समयमा कुनै दुर्व्यवहार, त्रास वा बदला वा अन्य कुनै किसिमको हस्तक्षेपलाई उपयुक्त सजाय गर्न राष्ट्रले आवश्यक कदमहरू चाल्नुपर्छ ।

६. माथि उल्लेखित कार्यविधि अनुसार भएको अनुसन्धान तब सम्म गरिनुपर्छ जबसम्म बलपूर्वक बेपत्ता पारिएको पिडितको भाग्य निश्चित हुँदैन ।

धारा १४

कुनै राष्ट्रमा गठित औपचारिक अनुसन्धानबाट तथ्य खुल्न आएको खण्डमा, बलपूर्वक बेपत्ता पार्ने कार्यको आरोपित व्यक्तिलाई अन्तर्राष्ट्रिय कानून बमोजिम क्षेत्रधिकार प्रयोग गर्न इच्छुक अर्को राष्ट्रले सुपुर्दगी नगरेकोमा, राष्ट्रका सक्षम निकायले अभियोजन अधि बढाउन र मुद्दाको सुरुवात गर्नुपर्छ ।

धारा १५

राष्ट्रका सक्षम निकायले शरण प्रदान गर्ने वा नगर्ने निर्णय गर्दा, कुनै व्यक्तिले माथि धारा ४, अनुच्छेद १ मा उल्लेख गरिएका अत्यन्त गम्भीर प्रकृतिका कार्य गरेको वा त्यसमा सहभागी भएको तथ्यमाथि विश्वास गर्ने आधार रहेको खण्डमा, त्यस्ता व्यक्तिलाई शरण प्रदान गर्ने वा नगर्ने निर्णय गर्दा राष्ट्रका सक्षम निकायले मनसायलाई बेवास्ता गर्दैन, यस्ता कार्यलाई विचार गर्नुपर्छ ।

धारा १६

१. धारा ४, अनुच्छेद १ मा उल्लेख गरिएको प्रावधान उल्लङ्घन गरेको आरोपित व्यक्तिविरुद्ध, धारा १३ मा व्यवस्था गरिएको अनुसन्धान चल्दाको बखतमा त्यस्तो व्यक्तिलाई कार्यालयको कर्तव्यबाट निष्काशित गरिनुपर्छ ।

२. त्यस्ता व्यक्तिलाई हरेक राष्ट्रमा, सामान्य सक्षम अदालतद्वारा, र र खासगरी, सैन्य अदालत बाहेक अन्य कुनै विषेश न्यायाधिकरण कारवाही अघि बढाउनुपर्छ ।

३. भिएना कुटनीतिक सम्बन्ध सम्बन्धी महासन्धिको प्रावधानहरूमाथि कुनै पूर्वाग्रह नराखी त्यस्ता मुद्दाका कारवाहीमा कुनै विषेशाधिकार, प्रतिरक्षा वा विषेश छुट स्वीकार गरिने छैन ।

४. त्यस्ता कार्याका लागि जिम्मेवार ठानिएका व्यक्तिलाई, अनुसन्धानका सम्पूर्ण तह, अभियोजन र अन्तिम फैसलासम्म, मानवअधिकारको विश्वव्यापी घोषणापत्र लगायत अन्य सान्दर्भिक चालु अन्तर्राष्ट्रिय सन्धिद्वारा प्रदान गरिएका, निष्पक्ष व्यवहारलाई प्रत्याभूत गर्नुपर्छ ।

धारा १७

१. बलपूर्वक बेपत्ता पार्ने कार्यलाई तबसम्म चालु अपराध मानिने छ जब सम्म अपराधीले बलपूर्वकबेपत्ता पारिएको व्यक्ति रहेको ठाउँ र भएको घटनाबारे खुलासा गर्दैन र यस्ता सत्य अस्पष्ट हुन्छन् ।

२. नागरिक र राजनीतिक अधिकार सम्बन्धी अन्तर्राष्ट्रिय प्रतिज्ञापत्रको धारा २ प्रदत्त उपचार अहिले प्रभावकारी नभएको अवस्थामा, यी उपचारहरू पुनर्स्थापना नभएसम्म, बलपूर्वक बेपत्ता पार्ने कार्यको हदम्याद स्थगित गर्नुपर्छ ।

३. बलपूर्वक बेपत्ता पार्ने कार्य सम्बन्धी हदम्याद प्रावधान हुँदा यसलाई अत्यन्त गम्भीर अपराध अनुरूप पर्याप्त र आनुपातिक हुनुपर्छ ।

धारा १८

१. धारा ४, अनुच्छेद १ मा उल्लेख गरिएको अपराध गर्ने अपराधी वा आरोपितलाई अपराधको कार्यविधि वा सजायबाट, कुनै प्रकारको विषेश क्षमादानको कानून वा सोही प्रकारको छूटबाट लाभान्वित गर्न मिल्दैन ।

२. माफीको अधिकार को प्रयोग गर्दा, बलपूर्वक बेपत्ता पार्ने कार्याको चरम गम्भीरतालाई ध्यान दिनुपर्छ ।

धारा १९

बलपूर्वक बेपत्ता पारिएको कार्यका पिडित र उनका परिवारले उपचार पाउनेछन र उचित क्षतिपूर्ती लगायत सम्भव भएसम्मको, पूर्ण पुर्नस्थापनाका उपायहरु, पाउनेछन । बलपूर्वक बेपत्ता पारिएको कारणबाट पिडितको मृत्यु हुन गएकोमा, पिडितमा निर्भर हुनेले समेत क्षतिपूर्ती पाउनेछन ।

धारा २०

१. बलपूर्वक बेपत्ता पारिएका बाबुआमाको सन्तान र आमा बेपत्ता हुँदाको अवस्थामा जन्म भएको बालबालिकाको अपरहरणलाई रोक्ने र दबाउने काम राष्ट्रले गर्नेछ, र साथै त्यस्ता बालबालिकाको खोज र पहिचानका लागि प्रयासहरू समर्पित गर्नेछ, र बालबालिकाको मूल परिवारमा पुनर्स्थापना गर्नेछ ।

२. माथिल्लो अनच्छेदमा उल्लेख गरिए अनुसार, बालबालिकाको सर्वोत्तम हितको आवश्यकतालाई मनन गर्दै, धर्मपुत्र र धर्मपुत्रीको व्यवस्था भएका राष्ट्रहरूमा, त्यस्तो बालबालिका धर्मपुत्र र धर्मपुत्री बनाउने व्यवस्थाको र खासगरी बलपूर्वक बेपत्ता पार्नुको कारणबाट बनाइएका धर्मपुत्र र धर्मपुत्रीबारे समिक्षा गर्ने अवसर राष्ट्रहरूमा हुनेछ । तर यदी बच्चाका नजिकका आफन्तहरूले सहमती दिएको खण्डमा धर्मपुत्रधर्मपुत्री विद्यमान हुन्छ ।

३. बलपूर्वक बेपत्ता बनाईएका बाबुआमाका बालबालिकाको वा आमा बलपूर्वक बेपत्ता बनाइएको अवस्थामा जन्म भएको बालबालिकाको अपरहण र त्यस्ता बालबालिकाको सही पहिचान भएको दस्तावेज साट्टने वा लुकाउने कार्य गम्भीर अपराध हो जसको लागी गम्भीर सजाय निर्धारण गर्नुपर्छ ।

४. यिनै कारणहरूका लागि, राष्ट्रले, उपयुक्त अवस्थामा, द्विपक्षीय र बहुपक्षीय सन्धिहरू गर्नुपर्छ ।

धारा २१

यस घोषणापत्रका प्रावधानहरु, मानवअधिकारको विश्वव्यापी घोषणापत्र लगायत अन्य कुनै अन्तर्राष्ट्रिय सन्धिमा भएका प्रावधानसँग बाझिने छैन, र साथै त्यस्ता प्रावधानको विपरित वा प्रतिबन्धित रूपमा व्याख्या गरिनेछैन ।

१२ औं प्लेनरी बैठक

१८ डिसेम्बर १९९२