

## **Preliminary Analysis of the TJ Bill, 2079**

**(Update: March 2023)**

The government registered a Bill to amend the Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Commission 2071 (2014) (hereafter, TRC Act) in the parliament on 9 March 2023. The Bill is very similar to the one that was being discussed in the Parliamentary Human Rights Committee at the time the Parliament was dissolved last year. The changes that we have noted are the followings:

- The new bill includes the provision of appeal, allowing to appeal against the decision of the Special Court to the Special bench of the Supreme court within 35 days,
- The time for the public prosecutor to make a decision on whether or not to prosecute the case is within a year. The previous bill had the provision of six months,
- It has a provision for TJ fund and the committee to advise on the use of TJ fund,
- It removes the provision of suspension of public officers from office once the prosecutor indicts him/ her.

### ***Major provisions in the bill***

Major mandates of the Truth and Reconciliation Commission (TRC) under this Bill are to uncover the truth, analyze root causes of conflict, analyze the pattern, and severity of the violations committed, make legal, structural and policy recommendations to prevent future violations, recommend vetting for those responsible for serious violations of human rights, conduct reconciliation/mediation between victims and perpetrators, recommend for interim relief and reparation, investigate and collect evidence and recommend for prosecution among other. The Commission will work for 2 years. A fund will be created and a committee will be established, composed of a maximum of 7 members under the Minister for Law, Justice and Parliamentary Affairs to advise on the use of the TJ fund.

The Bill classifies human rights violations that come under the jurisdiction of the Act into two categories: “violation of human rights” and “serious human rights violations”. “Violations of human rights” **include killings, sexual violence, physical or psychosocial torture, abduction or hostage taking, illegal detention, beating and mutilation, looting, vandalism and arson of private or public property, forced displacement, or other inhumane acts against human**

**rights and humanitarian law committed against unarmed civilians or the communities in a widespread and targeted manner.**<sup>1</sup> “Serious violations of human rights” include **murder with cruelty or torture, rape, torture (cruel and inhumane) and enforced disappearance committed against unarmed civilians or the communities in a widespread and targeted manner.**<sup>2</sup>

The bill allows amnesty to those involved in violations of human rights but prevents serious violations of human rights. Those involved in serious violations will be prosecuted by the public prosecutors of the Attorney General's office on the recommendation of the TRC,<sup>3</sup> and tried in the Special Court.<sup>4</sup> Three members Special Court will be established in ‘consultation’ with the judicial council ‘by the government’.<sup>5</sup> A three members special bench will be established in the Supreme Court to hear an appeal against the special court's decision.<sup>6</sup> Punishment will be ‘as per the existing law’.

### ***Major concerns on the bill***

Victims and CSOs have been raising several concerns in the new Bill. International human rights organizations have also raised that some of the sections in the Bill may undermine international law, and Nepal's Constitution and also provide *de facto* amnesty for those involved in gross violations of human rights and international crimes. The main ones are as follows.

- A. Classification of violations excludes many violations from the jurisdiction of the Special Court. It limits the jurisdiction of the Special Court only to 4 categories of violations. The state's obligation to investigation and prosecute under international law is not limited only to those four categories of violations.

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<sup>1</sup> Bill Prepared for the Amendment of the Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act 2014 (unofficial translation), Number 2 (4).

<sup>2</sup> Bill Prepared for the Amendment of the Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act 2014 (unofficial translation), Number 2 (5).

<sup>3</sup> Bill Prepared for the Amendment of the Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act 2014 (unofficial translation), Number 18.

<sup>4</sup> Bill Prepared for the Amendment of the Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act 2014 (unofficial translation), Number 19 (1).

<sup>5</sup> Bill Prepared for the Amendment of the Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act 2014 (unofficial translation), Number 19 (1).

<sup>6</sup> Bill Prepared for the Amendment of the Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act 2014 (unofficial translation), Number 19

- B. Many violations listed in violations of human rights are of the nature of serious violations of human rights and may amount to crimes against humanity and war crimes if they were committed widespread or systematic manner. However, the bill does not include crimes against humanity and war crimes under the jurisdiction of the TJ mechanisms, neither the TRC nor the Special Court. Thus, the possibility exist for amnesty even for those involved in war crimes and crimes against humanity.
- C. The bill does not provide any provision for those not qualified for amnesty to be accountable in any manner, thus everyone would enjoy de facto amnesty.
- D. Special court's provision may also render the court seen as biased and not independent. The selection of the judges in the Special Court should be like that of the high court and follow the constitutional provision. Constitution says that the judges in the high court will be appointed on the recommendation of the judicial council by the chief justice.
- E. The bill provides that the court will impose sanctions on those found guilty as per existing law. However, the possibility does not exist unless the existing laws are amended or some provisions are included in the TJ Bill.
- F. There is no provision for the prosecutor's office and special court to do further investigation if required in any of the cases recommended by the TRC.

### **Discussion in detail**

The current definition of a “serious violation” in the Bill excludes many acts that may amount to gross violations of human rights, war crimes and crimes against humanity requiring investigation and prosecution under international law. For example, the Bill classifies human rights violations that come under the jurisdiction of the Act into two categories: “violation of human rights” and “serious human rights violations”. “Violations of human rights” include **killings, sexual violence, physical or psychosocial torture, abduction or hostage taking, illegal detention, beating and mutilation, looting vandalism and arson of private or public property, forced displacement, or other inhumane acts against human rights and humanitarian law committed against unarmed civilians or the communities in a widespread and targeted manner.**<sup>7</sup> “Serious violations of human rights” include **murder with cruelty or torture, rape, torture (cruel and inhuman), and enforced disappearance**

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<sup>7</sup> Bill Prepared for the Amendment of the Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act 2014 (unofficial translation), Number 2 (4).

committed **against unarmed civilians or the communities in a widespread and targeted manner.**<sup>8</sup>

Furthermore, these violations come into the jurisdiction of the TRC and the Special Court if they are committed against “unarmed people or the group” or in a “targeted” manner. These qualifiers may leave many violations requiring investigation under international law outside the ambit of the special court. Additional qualifiers in the Bill such as “murder with cruelty” and “cruel or inhumane” torture also remain problematic as it is not in line with international standards. Rape committed only against an “unarmed person” would mean accepting rape committed against Maoist combatants, who had taken up arms as amnestiable offenses. As the legal definition of rape is narrow in Nepal, excluding other forms of sexual violence from the list of serious violations would make many other brutal forms of sexual violence amnestiable, which is also problematic.

#### ***War crimes and crimes against humanity are not included in the Bill***

Amnesty is prevented for “serious violations of human rights” but possible for crimes categorized as “violations of human rights”. Some of the violations listed as “violations of human rights” if committed in a widespread or systematic manner could amount to war crimes and crimes against humanity. Thus, the possibility exists under the new Bill to provide (de facto) amnesty for those involved in war crimes and crimes against humanity. Restriction on amnesty imposed by international law is not limited to only those four categories of cases that the new Bill considers a “serious violation of human rights”. Violations such as abduction and mutilation, if committed as part of a policy and plan could amount to crimes against humanity or war crimes, where amnesty is prohibited.

The current definition of a “serious violation” in the Bill excludes many acts that may amount to gross violations of human rights, war crimes and crimes against humanity requiring investigation and prosecution. The “gross violations of human rights” or “serious violations of human rights” under international law, requiring prosecution, include extrajudicial, summary or arbitrary executions; torture and other cruel, inhuman or degrading treatment or punishment; slavery; enforced disappearance, rape and other forms of sexual violence of comparable

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<sup>8</sup> Bill Prepared for the Amendment of the Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act 2014 (unofficial translation), Number 2 (5).

gravity.<sup>9</sup> In addition, States are also under an obligation to investigate and prosecute international crimes such as war crimes, and crimes against humanity.<sup>10</sup> Thus, the definitions that undermine these international standards would not sustain a legal challenge and needs amendment.

***Providing de facto amnesty for those involved in serious violations and international crimes***

The Bill also states those involved in serious violations will be prosecuted on the recommendation of the TRC,<sup>11</sup> and tried in the Special Court.<sup>12</sup> Human rights violations other than the 4 “serious” ones above are considered as “human rights violations”. They include abduction and hostage-taking, illegal detention, beating, maiming and causing physical disability, looting, capture, destruction or arson of private and public property, forced eviction from one's residence or displacement by any other means, or any inhuman act that is against international human rights and humanitarian law are to be provided with amnesty considering the fulfillment of certain conditions and victim's free consent.

However, the way the Bill classifies violations and limits the jurisdiction of the Special Court only to the four categories of violations makes amnesty possible even for gross violations. For example, for the four acts (murder with cruelty and torture, rape, enforced disappearance, and cruel or inhuman torture) to be non-amnestiable they have to have been committed “against unarmed persons” in a “widespread” or “systematic manner”. This would result, for example, in the crimes of rape, torture or disappearance against an alleged combatant being eligible for amnesty. International law does not allow amnesty for gross violations such as rape, torture or enforced disappearances, irrespective of whether they were committed against an armed or unarmed person and whether one can establish that the crimes were part of a pattern being committed in a widespread and systematic manner.

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<sup>9</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR), “Rule-of-Law Tools for Post-Conflict States. Amnesties” (2009) 21; Rape and other forms of sexual violence can constitute a war crime, crime against humanity or a constituent act with respect to genocide. It stresses the need for the exclusion of sexual violence crimes – not only rape – from amnesty provisions in the context of conflict resolution processes. United Nations Security Council (UNSC), “Resolution 1820 (2008) adopted by the Security Council at its 5916<sup>th</sup> meeting, on 19 June 2008” (19 June 2008), UN Doc S/RES/1820.

<sup>10</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (ICC Statute), article 5, article 12 (1).

<sup>11</sup> Bill Prepared for the Amendment of the Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act 2014 (unofficial translation), Number 18.

<sup>12</sup> Bill Prepared for the Amendment of the Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act 2014 (unofficial translation), Number 19 (1).

Furthermore, the restriction on amnesty imposed by international law is not limited only to those four categories of cases that the Bill considers “serious violations”. The Bill does not include war crimes and crimes against humanity under the jurisdiction of the Commission. This would mean there is no possibility of these violations being investigated or prosecuted nor of them being prevented from enjoying amnesty. Violations such as abduction and mutilation, if committed as part of a policy and plan could amount to crimes against humanity or war crimes, where amnesty is prohibited.<sup>13</sup>

Furthermore, both the TRC Act and the Bill require those receiving amnesty to fulfill certain conditions such as disclosure of truth, requiring perpetrators to apologize to victims, making perpetrators pay compensation to victims, etc.<sup>14</sup> The Bill has made victims’ informed consent also mandatory to recommend amnesty by stating that: “the Commission ...shall make a recommendation for amnesty on victim's free consent and also considering the harm suffered by the victim as well as the statement made by the perpetrator in the Commission”.<sup>15</sup> However, in the absence of any legal provisions to prosecute those cases where victims do not give consent for amnesty or those where perpetrators fail to fulfill those conditions, this provision paves the way for all the perpetrators of those violations, including abduction, mutilations, beatings, etc, to enjoy de-facto amnesty. If amnesty and leniency of sentencing do not serve the purpose of TJ, they may not be seen to be legitimate. Any illegitimate amnesty and amnesty for crimes considered as serious violations of human rights under international law “would not prevent prosecution before foreign or international Courts” nor provide security for alleged perpetrators despite the work of the Truth Commission.<sup>16</sup>

## **Recommendation**

- To make amnesty work effectively and to promote alleged perpetrators’ engagement with the TJ bodies, those willfully not fulfilling these conditions have to be held

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<sup>13</sup> Mandira Sharma, “The Complexities of Delivering Justice and Truth Simultaneously in Transitional Justice Processes with a Special Focus on Nepal” (DPhil thesis, University of Essex 2020).

<sup>14</sup> TRC Act, s 26 (3) (4) (5) (6) (7); Bill Prepared for the Amendment of the Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act 2014 (unofficial translation), Number 15 (4) (5) (7), 29 ( c).

<sup>15</sup> Bill Prepared for the Amendment of the Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act 2014(unofficial translation), Number 15(5).

<sup>16</sup> OHCHR, “Technical Note. Nepal Bill for amending 2014 Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act” (July 2018) para 44; OHCHR, “Rule-of-Law Tools for Post-Conflict States. Amnesties” (2009) 29f.

accountable by making it possible to have prosecution even in the categories of violations not considered to be “serious human rights violations”. For this to happen, the jurisdiction of the Special Court should not be limited only to those four categories of violations.

- The Bill should make provisions allowing the Special Court to determine if an incident is a violation of human rights or a serious violation, instead of leaving it to the Commission.
- The Bill needs to clarify that the statutory limitation and retroactive effect of laws will not be a barrier in prosecuting and punishing those recommended by the TRC.

### ***Prosecution***

The new Bill states that prosecution of serious violations will be done based on the investigation of the Commission. The Commission, after its investigation, can recommend prosecution to the prosecutor. The prosecutor could decide whether to prosecute or not within a year (up from 6 months in the 2022 Bill). This gives a year-long duration to make such a decision which is also problematic when the mandate of the TRC itself is only for 2 years. It is not clear what will happen to those cases that the TRC could not investigate within those 2 years.

Whether the Commission can do an investigation and collect evidence that could lead to prosecution is questionable. An investigation or inquiry done for establishing the truth or recommending reparation is different from doing an investigation for the purpose of prosecution. In addition, investigating serious human rights violations also requires a different approach than the investigation of traditional crimes. However, no special investigation unit in the Commission and/or Prosecutor’s office is envisioned in the Bill.

- This Bill needs to incorporate the provision of having an investigation unit in the Commission, consisting of specialized investigators i.e. specially trained personnel with expertise in conducting investigations and gathering evidence that can lead to prosecution.

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| <ul style="list-style-type: none"><li>▪ The Bill should incorporate the provision allowing the public prosecutors or the Special Court to conduct further investigations if it finds necessary.</li></ul> |
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### ***Possible tension in compromising fair trial rights***

The new Bill lacks clarity as to how it balances truth-seeking and evidence collection for its prosecutorial purpose-related mandate, without compromising the fair trial rights of the accused. The TRC has several mandates that require self-incriminatory evidence and statements from alleged perpetrators. For example:

- The TRC facilitates mediation/reconciliation between the victims and perpetrators.<sup>17</sup> Before it reconciles the victim and perpetrator, among other things, the alleged perpetrator has to admit the violations he/she committed and apologize before the victim(s).<sup>18</sup>
- The TRC also has the mandate to recommend amnesty.<sup>19</sup> The process for recommending amnesty requires the alleged perpetrator to file an application disclosing all the facts to his/her knowledge, and the role that he/she played in committing such violation.<sup>20</sup>
- During an investigation, the TRC can issue a subpoena to bring anyone before the Commission to give a statement or to provide documents related to the matter under its investigation<sup>21</sup> and can take action for contempt which could also lead to self-incriminatory evidence.<sup>22</sup>

Thus, the alleged perpetrators could provide a confession, which could contain self-incriminatory information hoping to qualify for mediation/reconciliation, amnesty or a reduced sentence. As it is possible that after analyzing the evidence from the alleged perpetrator, the Commission may not be able to proceed with reconciliation or recommend amnesty, the alleged

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<sup>17</sup> TRC Act, s 22 (1) states that “if the perpetrator or victim makes an application to the Commission for reconciliation, the Commission may bring about mutual reconciliation between the perpetrator and victims”.

<sup>18</sup> TRC Act, s 22(2).

<sup>19</sup> TRC Act, s 26; Bill Prepared for the Amendment of the Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act 2014 (unofficial translation), s 15 (5a).

<sup>20</sup> TRC Act, s 26.

<sup>21</sup> For example, Section 15. 5 provides that if any person obstructs the Commission its act, the Commission may impose a fine of up to fifteen thousand rupees on such a person on the case to case basis.

<sup>22</sup> TRC Act, s 15.



perpetrator may have to face trial. This makes an alleged perpetrator vulnerable as the information he/she discloses for mediation and amnesty could potentially be used in criminal proceedings against him/her and could raise serious legal tensions undermining fair trial standards.

The Constitution of Nepal offers the right to a fair trial to the accused,<sup>23</sup> including the right against self-incrimination,<sup>24</sup> the right to legal representation,<sup>25</sup> and the presumption of innocence until proven guilty.<sup>26</sup> In addition to this, Nepal has ratified several human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), and is obliged to ensure such rights of the accused as derived from those treaties.<sup>27</sup> Under international human rights law, it is the right of the accused not to be compelled to provide self-incriminatory evidence. This compulsion does not require the presence of physical or psychological pressure. The threats of contempt and criminal sanctions resulting in self-incriminatory information have also been held to be an improper compulsion and their subsequent use in criminal cases constitutes a violation.

Thus, if the TRC uses its mandates and powers to require self-incriminatory information, without considering the rights of the accused, it could either contribute to violations of the fair trial rights of the accused, rendering the trial a sham or letting perpetrators escape justice on these grounds.

## **Recommendation**

- The Bill should include sufficient measures to prevent the risk of compromising the rights of the accused and essentially render the trial a sham and let perpetrators escape justice.

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<sup>23</sup> Constitution of Nepal 2015, Article 20 (9)

<sup>24</sup> Constitution of Nepal 2015, Article 20(7)

<sup>25</sup> Constitution of Nepal 2015, Article 20(2)

<sup>26</sup> Constitution of Nepal 2015, Article 20(5)

<sup>27</sup> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 14 (1); Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law. ICCPR, art 2; Not to be compelled to testify against himself or to confess guilt. ICCPR, art 3 (g); To implement international treaties, and agreements to which Nepal is a party. Constitution of Nepal 2015, art 51 (b) (3).

- The Bill should include a provision where the TRC must strike a balance between obtaining the necessary evidence to hold perpetrators accountable for serious human rights violations, while also respecting the legal rights of the accused to ensure fair trials.

### *Special Court*

The Bill states that a Special Court will be established to try those recommended by the Commission. There will be 3 judges, appointed by the Government in “consultation” with the Judicial Council. This violates constitutional provisions and the guidelines set out by the Supreme Court in 2017. The Constitution requires high court judges (the proposed Special Court has the status of a High Court) to be appointed by the **Chief Justice** on the **recommendation** of the Judicial Council.

### **Recommendation**

- The Bill needs to include a provision for the appointment of judges to the Special Court that is consistent with the constitution.

### *Leniency of sentencing*

If the prosecutor decides to prosecute, depending on whether the accused has disclosed the truth, agreed to pay compensation, etc. the prosecutor could indict the person demanding leniency in punishment. The Special Court should also consider the context of violations, the context of TJ, and those other conditions (such as disclosure of truth) and **should** mitigate sentences. The language used in the Bill does not provide discretion to the Court but obliges the Special Court to mitigate the sentences.

### **Recommendation**

- Remove the language “should” to “may” respecting the independence of the judiciary.

### ***Existing law***

The Bill states that the sentencing will be done as per “existing law”. This is problematic as without amendments to the Penal Code it is not possible to prosecute many of those serious violations as the Penal Code prevents non-retroactive application of the Penal Code (it came into force only in 2018).<sup>28</sup> The Penal Code also has a provision of limitations in reporting cases. For example, reporting rape is now 2 years from the time of its occurrence.<sup>29</sup> The Code does not criminalize and penalize crimes against humanity and war crimes, making it impossible to impose any penalty for these international crimes.<sup>30</sup>

Victims and CSOs had raised all these provisions being problematic at the time the previous version of the Bill was tabled and called for their amendments. Victims and civil society organizations in Nepal have also expressed their serious concerns over these issues. Unfortunately, none of those concerns have been addressed in the new Bill. On the contrary, one of the positive provisions of the previous Bill that required the suspension of public officials once a charge sheet is filed in the Special Court is now removed from the Bill.

### **Recommendation**

- Either include a provision in the Bill stating that the non-retroactive effect of law, and statutory limitation in existing laws will not apply to the cases under the jurisdiction of this Act or amend the Penal Code to say that these provisions will not apply to the crimes committed during the armed conflict.

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<sup>28</sup> It shall commence on 17 August 2018 (the first day of the month of Bhadra of the year 2075). National Penal Code 2017, s 1(2); “Law” means law for the time being in force. National Criminal Procedure Code 2017, s 2 (f).

<sup>29</sup> No complaint shall lie after the expiry of one year from the date of commission of any of the offenses under Section 219. National Penal Code 2017, s 229 (2). However, the House of Representatives has endorsed a proposal to increase the statute of limitations for rape. Onlinekhabar, “Statute of limitations for rape increases as lawmakers endorse the proposal” ( 11 July 2022) < <https://english.onlinekhabar.com/statute-of-limitations-rape-increase.html> > accessed 25 July 2022.

<sup>30</sup> Human Rights Watch and Advocacy Forum, “Waiting for Justice. Unpunished Crimes from Nepal’s Armed Conflict” (September 2008); Amnesty International, “Nepal. Make Torture a Crime” (2001) ASA 31/002/2001, 4f; Advocacy Forum-Nepal and REDRESS, “Held to Account. Making the Law Work to Fight Impunity in Nepal” (December 2011) 48-56; Advocacy Forum-Nepal and REDRESS, “UN Human Rights Committee: Nepal Responsible for Disappearance and Torture of Teacher, Urges Government to Prosecute Perpetrators & Change Laws” (Press Release, 23 August 2012) < [https://nepalconflictreport.ohchr.org/files/docs/2012-08-23\\_press-release\\_af\\_eng.pdf](https://nepalconflictreport.ohchr.org/files/docs/2012-08-23_press-release_af_eng.pdf) > accessed 19 September 2020; “Criminalize conflict-era torture and enforced disappearances: NHRC” *my República* (Kathmandu, 5 February 2018) <<https://myrepublica.nagariknetwork.com/news/criminalize-conflict-era-torture-and-enforced-disappearances-nhrc/>> accessed 19 September 2020.

### ***Reparation is a right without any enforcement mechanisms***

It is noted that recognizing reparation as a victim's right by the Bill. It states: “victims shall have the right to obtain reparation following this Act and makes it non-contingent to the non-identification of the perpetrator, whether or not victim and perpetrator have reconciled, and whether or not the recommendation is made to pardon the perpetrator or to prosecute him/her.”<sup>31</sup> However, there are no provisions providing opportunities for victims to go and make their claim for reparation if they are not provided with this right or if they are not satisfied with the reparation provided. In the context where many empty promises are made, a right without enforcement mechanisms does not ensure victims' right to reparation in practice.

### **Recommendation**

- Include a provision where victims can go for enforce reparation if they are denied their right to reparation.

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<sup>31</sup> Bill Prepared for the Amendment of the Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act 2014 (unofficial translation), number 10 (1) (2).