

Comments from the Perspective of Victims of Enforced Disappearances

DRAFT CRIMINAL CODE

Chapter 16 – Disappearance of Persons**s207 – Prohibition against Causing Disappearance of Persons**

We welcome the Government of Nepal (GoN)'s decision, in line with Article 4 of the ICAED, as well as the Supreme Court Judgment in *Rajendra Dhakal v Government of Nepal*,¹ of criminalizing enforced disappearances, whether committed by the State [S207(2)(a)] or by any other group [S207(2)(b)]. We make following recommendations to make the provisions in the chapters compatible with Nepal's international obligations.

Definition of Disappearance of Persons

In the current draft, the elements of the S207(2)(a) offence are not clearly defined and each element is drafted in the alternative, leading to the creation of several offences in each sub-section; with respect to the S207(2)(b), the definition is very broad and overlaps with the offences of kidnapping/abduction.

The ambiguity in each definition may lead to the acquittal of a perpetrator on the basis that the section fails to comply with the principle of legality.² To ensure that perpetrators of this crime are uniformly prosecuted and do not escape punishment, we suggest the adoption of a Nepal-specific definition, based on international human rights norms:³

The arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, or by non-State agents, acting as State agents, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, failing to provide accurate information as to the whereabouts and fate of the person deprived of their liberty, which place such a person outside the protection of the law.

Crime against Humanity

¹*Rajendra Dhakal and Others v. The Government of Nepal*, writ no.3575, registration date Jan 21, 1999, decision June 1, 2007, known as the "Disappearance case."

² The principle of legality is also known as the Latin maxim *nullum crimen sine lege*; it mandates that no one shall be tried for a crime that is vague or unclearly defined, nor shall a person be punished for a crime that did not exist at the time of commission of an alleged offence (non-retrospectivity).

³ This is an adaptation of the definition contained in Article 2 of the Enforced Disappearances Convention, which takes into account the specific post-conflict context of Nepal.

We further recommend that in the case that an act of disappearance is part of the widespread or systematic attack targeted against a civilian population, it shall be defined as a crime against humanity as per the Statute of International Criminal Court.⁴

In addition, we recommend a section explicitly setting out that the entirety of the provisions of this Chapter are non-derogable under any circumstances, including states of emergency, to assist in the event that any ambiguity as to its application arises in future.

Chain of Command Criminal Liability: Principal Offender

We commend the GoN for recognizing and acting on the experience of those affected by disappearance that it is often an act ordered down a chain of command where the persons who ordered or acquiesced to the occurrence of a disappearance are as culpable as the persons who carried it out.

The current drafting is somewhat confusing in identifying the principal offender, due to the repetition of the differing definitions of “principal offender” at Sections 207 (3-6).

We therefore recommend the adoption of our proposed drafting, below, to clearly establish criminal liability of all participants in a disappearance, from those directly involved, to those persons who are less obviously involved in inducing or ordering the disappearance, as well as persons in authority who choose to ‘look the other way’ or indirectly sanction the actions of subordinates who are involved in disappearances.

(1) A principal offender is defined as follows:

(a) Any person who commits, orders, solicits or induces the commission of, attempts to commit or participates in a disappearance of persons; or

(b) A superior who:

(i) Knew, or consciously disregarded information which clearly indicated that subordinates under his or her effective authority and control were committing or about to commit a crime of disappearance of persons;

(ii) Exercised effective responsibility for and control over activities which were concerned with the crime of disappearance of persons; and

(iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of a disappearance of persons or to submit the matter to the competent authorities for investigation and prosecution;

(c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander.

(2) No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of disappearance of persons.

⁴ Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.

By phrasing command liability in this way, we can ensure that all levels of authority are equally responsible and liable for ensuring that disappearances do not occur.

We further recommend that chain of command criminal liability is extended to all offences of unlawful detention (Chapter 15), as per our recommendation below.

Punishment- S207(7)

AF and REDRESS commend the taskforce on providing a significant penalty (up to 15years and 5 lakh rupees) for offenders under this section; however, despite the detailed provisions in the Sentencing Bill, we would recommend the introduction of a minimum penalty for consistency with the punishment provisions for kidnapping/abduction and other serious offences.

When disappearances are carried out as a widespread or systematic policy, it should be defined as a crime against humanity as per our recommendation above. We submit that, proportionate to the gravity of the offence, life imprisonment should be the maximum penalty.

s209 – Compensation

We welcome the establishment of a Victim Relief Compensation Fund. We recommend a clear, consistent system whereby the Fund compensates the victims, and recovers the money from the offender at a later date. This would ensure that victims are not suffering further by having to wait for the offender to have sufficient means to pay compensation. It is also consistent with the terms of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation.⁵In the interim, we support the direct system of compensation as provided for in this section.

s211 - Limitation

International jurisprudence⁶ has clearly established that the act of disappearance of a person is a continuous crime and therefore the limiting of a period in which to make complaints is not appropriate whilst a person remains disappeared. We further recommend that in circumstances in which a person is released, to recognize seriousness of this crime (constituting a crime against humanity when widespread or systematic), that the limitation period be extended to 1 year and begin from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature, consistent with Article 8 of the Disappearance Convention.

We acknowledge the provision in this Chapter, which provides the court with discretion to allow a complaint to be lodged outside the limitation period. Nonetheless, the reported difficulty that victims

⁵Principle IX, para 15, 16, at: <http://www2.ohchr.org/english/law/remedy.htm>.

⁶“Enforced disappearances are prototypical continuous acts. The act begins at the time of the abduction and extends for the whole period of time that the crime is not complete, that is to say until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual.” Working Group on Enforced or Involuntary Disappearances General Comment on Enforced Disappearance as a Continuous Crime, <<http://www2.ohchr.org/english/issues/disappear/docs/GC-EDCC.pdf>> accessed 3 January 2011.

face when trying to register complaints about disappeared persons⁷ will not be eased by the insertion of this provision as there are no guiding criteria as to when a complaint may be accepted by the court. We recommend the insertion of such criteria in an inclusive (not limiting) manner.

Provisions relating to Chapter 15 - Unlawful Detention

We welcome the inclusion of this chapter. Unlawful detention is relevant to disappearances, as it represents a “gateway” for disappearances to occur. Non-compliance with procedural law, such as failing to present accused persons to court within 24 hours⁸ or detention of persons in unauthorized places (secret detention) encourages a perceived “bending” of the law, increases the vulnerability of an accused person to torture and supports a culture of impunity in law enforcement.⁹

Proposed Additional Provision: Chain of Command Criminal Liability

To ensure that a systematic prohibition on unlawful detention is developed, the support and acquiescence of persons in authority must be addressed. We submit that providing for chain of command criminal liability would assist to reduce overall levels of impunity currently pervading the law-enforcement system, referred to above.

s195 – Prohibition to detain anybody in any manner except as provided by law

Criminal sanctions against persons who detain anybody in an illegal manner are a welcome addition to the Code and address the concerns raised in the above paragraph. In our experience there will often be cases where the criminal investigation and sanctions will involve a conflict of interest, i.e. investigation and possible laying of charges against members of the Nepal Police or other government representatives *by* the Nepal Police.

As per our recommendation regarding S11 of the Criminal Procedure Code below, we would encourage the establishment of an independent commission/special investigative team to recommend disciplinary action and charges, directly to the Government Attorney, in cases where a conflict of interest exists.

s196 - Prohibition of Detention without Minimum Humane Facilities

AF and REDRESS are pleased to see this addition to the Criminal Code; however, the term “minimum humane conditions” would preferably be defined so as to provide a comprehensive guide for judges as well as for detention centre staff and prisoners. AF suggests that “minimum humane conditions” be

⁷ December 2010 ‘Indifference to Duty: Impunity for Crimes Committed in Nepal,’ Human Rights Watch/Advocacy Forum Report available at <<http://www.hrw.org/node/94902>> accessed 3 January 2011.

⁸The State Cases Act 2042 BS (1992 AD) s 15(2).

⁹ See, *inter alia*, December 2010 ‘Indifference to Duty: Impunity for Crimes Committed in Nepal Human Rights Watch/Advocacy Forum Report available at <<http://www.hrw.org/node/94902>> accessed 3 January 2011; Advocacy Forum and others ‘Review of the implementation of recommendations made by the Special Rapporteur on Torture, Manfred Nowak, after his mission to Nepal in 2005’ (Kathmandu 2009) available at <<http://www.advocacyforum.org/publications/index.php>> accessed 3 January 2011.

interpreted by reference to the “Standard Minimum Rules for the Treatment of Prisoners.”¹⁰ We further recommend that sanctions apply for a failure to comply with this section.

s198 –Prohibition against Secret Detention

This provision is positive to the extent that it recognizes the uncertainty and danger secret detention involves for a person detained in an unauthorized and/or unofficial place. However, it would be useful to clarify that secret detention is prohibited even when it occurs in official places of detention (e.g. unofficial holding cells in recognized detention facilities). The Committee against Torture (“CAT”) has declared that secret detention, in itself, may amount to torture.¹¹ AF and REDRESS welcome the inclusion of criminal sanctions against perpetrators; however, considering the international definition of secret detention as a form of torture we recommend an increase in the maximum penalty¹² to reflect the seriousness of the crime.

s199 –Limitation

We are concerned by the brief limitation period provided for in this section for the additional reasons that: firstly, a person who has been unlawfully detained could be in fear of further repercussions from the perpetrator should they make a complaint, and secondly, if a person’s detention subsequently becomes lawful, i.e. an accused person is brought before the court and remanded, they may not see a lawyer in custody to be able to make a complaint, or become aware of their rights, within the 3 month limitation period. To prevent this occurring, we recommend that the limitation date for each offence be extended to at least one year, that the limitation date begin from the date of release from *any* form of detention, and further, that the court should have the discretion to allow a complaint at any time.¹³

Miscellaneous Provisions

S2 - Extra-territorial Jurisdiction

As a step against impunity we are encouraged to see that the taskforce has included legal responsibility for any criminal misconduct by government officials acting outside Nepal’s borders by providing for universal jurisdiction of Nepali courts in such cases [S2(1)(e)]. The following recommended wording aims to strengthen this provision and avoid technical legal argument as to whether a Government official is ‘acting in his/her official capacity’, or in fact, ‘in an organization’ at all:

S2(1)(e) *“Any offence committed by a person representing the Nepal Government in any capacity whatsoever.”*

¹⁰ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Available at <<http://www2.ohchr.org/english/law/treatmentprisoners.htm>>

¹¹ UN General Assembly, UN Doc. A/RES/60/148, 16 December 2005, Article 11; UN Commission on Human Rights, UN Doc. E/CN.4/RES/2005/39, 19 April 2005, article 9.

¹²S198(2): less than 4 years imprisonment and a fine.

¹³As provided for under Chapter 16.

We further recommend adding war crimes, genocide and crimes against humanity, as well as any individual act of enforced disappearance or torture as crimes for which Nepali courts have universal jurisdiction; the nature of the crime of enforced disappearance is so heinous that all states have an interest and indeed an obligation to ensure that suspects do not escape justice, even when they are located outside of the countries in which the crimes were committed.

Parole, Suspension and Reduction of Sentence: Enforced Disappearance

Considering the gravity of the crime of enforced disappearance, as emphasized throughout this comment, and in order to better protect potential victims and to deter perpetrators, we recommend including 'enforced disappearance' as an offence for which neither parole nor reduction of sentence is available.

For clarity and consistency in penalty with the offences of 'kidnapping and abduction' and enforced disappearance, we recommend the addition of the crime of 'enforced disappearance' be explicitly provided for as an offence for which suspension of imprisonment is not available.

s4 – Duty to Give Information or Application Relating to Commission of an Offence-

We recommend the imposition of a positive onus on Police/CDOs to register and investigate any complaint submitted to police and that the Government Attorney (GA) should hold the decision-making power and political responsibility in relation to non-investigation of complaints. We make this recommendation in light of the number of mandamus petitions lodged to the Supreme Court by AF and others seeking a writ to have the Police register complaints and begin investigations, and the consequent misuse of judicial time and resources.

Further, the Criminal Procedure Code provides a mechanism whereby erroneous, false or fictitious complaints need not be investigated on the advice of the GA: S10(1); S8(8). The draft Criminal Code further provides a prohibition on creating false evidence at S88, with a penalty providing for up to 5 years imprisonment. The deterrent against presenting false evidence, combined with the mechanism by which the GA can decline to investigate a complaint, efficiently provides protection against the police potentially wasting time and resources in investigating baseless complaints. We recommend the following insertion after sub-section (5) of section 4:

Police are to Register All FIRs and Conduct a Preliminary Investigation

(6)An authorized government official, including a Chief District Officer, must register any complaint made under this section. If an authorized government official refuses to register a complaint, he/she must provide reasons for the refusal to file the complainant in writing; any person who fails to comply with this section shall be subject to departmental action on the recommendation of the Attorney General to the concerned office.

We also recommend the removal of proviso in S4(3), which permits a delay in investigating postal complaints, or complaints 'by proxy' until they can be verified in person. The S4(3) proviso is unduly restrictive and discriminatory towards persons residing in remote communities and those without

means of transport. Persons in the deepest poverty are often those with the least access to justice; we therefore recommend removing this provision in order to achieve equality before the law.

s5 - Complaint Procedure in case of refusal to record FIR

We are pleased that there is provision made for complaints in case of a refusal to register an FIR. In order to further address the issues of accountability to victims in terms of registering complaints above, we recommend the following strengthening measures:

- empowering only the GA with the decision of whether to investigate and prosecute;
- requiring that the GA be accountable in writing to the complainant;
- providing more significant penalties for government representatives who fail to comply with procedural law, to enable the legislation to lead the way for cultural change in the law enforcement area.

In a case where the GA recommends further action pursuant to S5(2), the police office must be legally obliged to follow the directive pursuant to S5(3). We recommend the addition of the following:

S5(2): "...and an investigating official from the concerned police station shall be bound to follow the lawful direction of the Government Attorney issued pursuant to sub-section (2)."

S5(3): "In cases in which the Government Attorney recommends no further action, the Government Attorney is to provide written reasons for declining to investigate to the FIR, including a list of evidence provided by the investigating officer; departmental action shall be imposed on any person failing to comply with the above procedure."

Complaints to the Chief District Officer

In relation to the procedure for complaints of Schedule 2 offences to the administrative offices or the Chief District Officer ("CDO"), the CDO retains a discretion to decline to register complaints: S5(5). In accordance with our comments above, we submit that all complaints should be registered by the relevant office; and in the event that any refusal is made, recourse to the GA (not the CDO or Home Ministry), should be available. We make this recommendation to create a more independent procedure and to cross check the decision-making of the CDO by a legal practitioner in the GA.

Refusal to Investigate on Grounds of Alternative Justice Mechanism Available

During the course of AF's work we have received information from a variety of sources that the debates relating to the establishment of the Truth and Reconciliation Commission and Disappearances Commission has been invoked by Police as a reason not to accept an FIR, even though these bodies have not been formally established nor will they have the same prosecutorial competence once established.

This rationale for refusal to investigate has been rejected by the Supreme Court of Nepal on several occasions. In addition, the aforementioned Commissions are not currently operational; further, they do not set out any requirement for the competence, independence, impartiality of the members of the commissions, nor do they include any provision for the protection of victims and witnesses. In addition, they will not have prosecutorial powers. We therefore seek the insertion of a specific section excluding this as a ground to refuse to investigate.

s10 – Sending of Preliminary Report

We are encouraged to see that a 3-day time limit for an investigating officer to send the preliminary report to the GA has been considered and implemented.

We are further encouraged to see that what constitutes “preliminary investigation” is defined; the set criteria on the measures that the police should reasonably take in terms of investigation is welcomed from the perspective of victims. AF has been compelled to file mandamus petitions due to a failure by police to investigate; therefore we recommend the adoption of a provision requiring the investigating official to carry out the preliminary investigation *in good faith and with due diligence*; with departmental action as a penalty to ensure that investigations are thoroughly carried out in a timely manner.

Onus on Police to Keep Victim’s Informed

To place Nepal at the forefront of victim’s right legislation, and to supersede current international practice in investigations,¹⁴ we submit that placing a legal onus on the investigating officer to keep complainant(s) informed of progress of the case should be added.

s12 – Special Investigative Teams

Currently the draft legislation gives discretion to the head of Police/Superior Authority to choose whether to investigate a complaint against one of their own staff or not. Granting the Head of Police the discretion to maintain control of an investigation that may be a conflict of interest is not appropriate as it leads to a strong perception of bias and is insufficient to protect victims of offences that are carried out by Police or other government authorities.

We submit that a special investigative team should be established and utilized wherever there is a conflict of interest, i.e. where there is a private or professional relationship between the individual(s) under investigation and those carrying out the investigation, to ensure independent and thorough investigations are carried out and public confidence in the justice system is maintained.

To practically ensure that the teams can function effectively, we recommend a sub-section be added mandating the co-operation of government officials with special investigating authorities.

S53(4) – Government Officials’ Immunity to Prosecution

Qualified immunity for government officials acting *in good faith* in the course of their official duties is generally accepted. However, this provision as currently drafted provides an impermissible degree of immunity for government official and essentially provides a “loophole” for officials to mask any illegal behaviour. Government officials are not above the law and should not be able to hide behind the

¹⁴ Articles 7.2 and 7.3 of the Code of Practice for Victims of Crime (Crown Prosecution Service Operational Guidance) (UK) provide that victims must be directly informed of important decisions during an investigation and prosecution; however, it is a guide only and not legally enforceable. In Australia, the *Victims’ Charter Act 2006* is an Act governing the treatment of victims by the police, the Office of Public Prosecutions and victim support services; the provisions of which are legally enforceable and include the right to be kept informed.

required permission of GoN to avoid prosecution for illegal acts. We suggest that the phrase “without written sanction of Nepal Government” be replaced by an objective standard:

“No government employee to be tried for any act done by him in the course of discharging his official duty insofar as his/her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

This makes the conduct of the government official, even whilst in the course of his/her duty, subject to the laws of Nepal, as well as the constitutional rights of other citizens. The jurisdictional question turns on whether a hypothetical reasonable person, in the government official’s position, would have known that his/her actions violated clearly established law. The phrasing of the immunity in this way ensures that the rights of citizens are protected, while still allowing officials to perform public duties.

We note that there can be no circumstance in which a government official’s involvement in disappearance of persons can be considered a lawful exercise of authority.

We further recommend that an explicit section be inserted stating that no written sanction of GoN is necessary to investigate or prosecute a complaint made against a government employee under this Code.

s114 – Witness Protection Measures

AF and REDRESS are pleased that the GoN has taken measures to ensure witness attendance through providing means of protection. AF has anecdotal evidence that often intimidation of witnesses occurs after the making of the complaint, but before giving evidence. Witness protection measures need to take this into account and applications for specific forms of protection should be able to be made at the earliest stage of proceedings.

We acknowledge the insight and initiative of the legislature for the inclusion of in-camera proceedings and prohibition of publishing the names of vulnerable witnesses, including the complainant [S178 CPC]; and the ability to give evidence via audio-visual recording [S179 CPC]. We further suggest listing protective measures to ensure that law enforcement officials and judges are aware of the range of protections available, such as: the provision of safe houses for victims and their families; the introduction of restraining (protection) orders preventing the suspect contacting the victim or their family (if suspect on bail); prosecute persons who threaten or intimidate complainants¹⁵; accompaniment by a friend or victim-support person at the time of giving evidence; the option to give evidence without facing the defendant, i.e. in a witness protection box (physically separated from defendant); and providing separate waiting areas for complainants and police escorts for complainants, if required.

Complainant’s Right to Information

¹⁵S170 draft Criminal Code: ‘Prevention to Commit Inhumane Treatment.’

The right to information is important to victims. We therefore recommend placing an onus on investigating officials to make the range of protections known to victims, so that they can make any necessary or desirable requests.

s116 - Not Withdrawal of the Case:

Chapter 16 (Disappearance of Persons) offences are able to be withdrawn pursuant to the exceptions provided for in sub-section(2)(a); in light of the seriousness of enforced disappearances signified by their definition as a crime against humanity, as well as the necessary element of State agents as perpetrators of this crime, it is inappropriate to give the discretion to other State agents (GA) to decline to prosecute such a case. We therefore recommend removing Chapter 16 (Disappearance of Persons) from sub-section(2)(a).

Suggested Further Provision - Duty to Ensure Accurate Information is Kept

We strongly urge adding the following provision, which clearly outlines what information should be kept and disseminated in terms of detained persons, and provides for sanctions, including fines, against individuals/police units who fail to do so. This provision is particularly pertinent to protecting victims of unlawful detention, enforced disappearances and torture and provides a clear standard of information to be kept in relation to detainees. We submit that such a provision would be a strong protective and preventative measure against any future crimes of disappearances.

Proposed to be inserted after S13 – Power to Apprehend and Take into Custody:

s13A – Provision to ensure accurate information kept and disseminated

(1) The officer in charge of any State agency entrusted with arrest and detention of any person shall ensure:

- a) the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose; and*
- b) guarantee to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel, access to at least the following information:*
 - i) The authority that ordered the deprivation of liberty;*
 - ii) The date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty;*
 - iii) The authority responsible for supervising the deprivation of liberty;*
 - iv) The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer;*
 - v) The date, time and place of release;*
 - vi) Elements relating to the state of health of the person deprived of liberty;*
 - vii) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.*

(2) A failure to comply with sub section (1) shall be an offence, punishable by up to 5 years imprisonment and a fine. Any government agent or employee shall also be liable to departmental action for a failure to comply with sub section (1).

(3) Failure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official register knew or should have known to be inaccurate shall be an offence.

(4) Refusal to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal requirements for providing such information have been met shall be an offence.

(5) Any person committing an offence pursuant to sub sections (3) or (4) above, shall be punished by up to 5 years imprisonment and a fine, and shall also be liable to departmental action.