Flygtningenævnets baggrundsmateriale

Bilagsnr.:	**369**
Land:	Pakistan
Kilde:	The International Commission of Jurists
Titel:	No More “Missing Persons”: The Criminalization of Enforced Disappearance in South Asia
Udgivet:	august 2017
Optaget på baggrundsmaterialet:	30. januar 2018

No More "Missing Persons": The Criminalization of Enforced Disappearance in South Asia

August 2017

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists (ICJ) promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

Published in August 2017

International Commission of Jurists
P.O. Box 91
Rue des Bains 33
Geneva
Switzerland

No More “Missing Persons”: The Criminalization of Enforced Disappearance in South Asia

August 2017

TABLE OF CONTENTS

Acknowledgements

This report has been written by Reema Omer, ICJ's International Legal Adviser for South Asia, Thyagi Ruwanpathirana, ICJ's National Legal Adviser for Sri Lanka, and Sanhita Ambast, ICJ's former International Legal Adviser for India. Frederick Rawski, Ian Siederman, Matt Pollard and Govinda Bandi Sharma provided editorial and legal review.

Introduction and Executive Summary

This report analyzes States' obligations under international law to ensure acts of enforced disappearance constitute a distinct, autonomous offence under national law. It also provides an overview of the practice of enforced disappearance, focusing specifically on the status of the criminalization of the practice, in five South Asian countries: India, Pakistan, Bangladesh, Sri Lanka and Nepal.

After setting the international standards pertaining to enforced disappearance, the report will briefly examine: (a) the national political and human rights context; (b) the existing legal framework; (c) national jurisprudence and the role of the courts; and (d) the status of each government's commitment to uphold its international obligations and its responses to relevant recommendations from UN bodies.

Enforced disappearances in the name of counter-insurgency

In most countries in the region, the practice of enforced disappearance has been used against nationalist or separatist groups or in the name of countering terrorism or insurgency.

In *Sri Lanka*, although a number of cases of enforced disappearances were recorded during the two armed insurrections against the State in the early 1970s and the late 1980s, most cases of enforced disappearances were reported during the end of the civil war in 2009, when mostly Tamils involved in fighting for the Liberation Tigers of Tamil Eelam (LTTE) and those suspected of supporting the LTTE were "disappeared" by the Sri Lankan security forces. In *Nepal*, conflict-related enforced disappearances were reported as early as 1997, and escalated significantly following the declaration of a state of emergency and mobilization of the Royal Nepalese Army against the Maoist insurgency in November 2001.

In *Pakistan*, enforced disappearances are largely reported in the North-Western region, where people accused of belonging to militant organizations or of involvement in terrorism-related activities have been "disappeared" and kept in secret detention centers by the security and intelligence agencies. The practice is also reported in large numbers in Balochistan, where there are ongoing movements for self-determination and greater provincial autonomy, as well as in Sindh, against people belonging to or perceived to be sympathetic with nationalist groups. With the "disappearance"[1] of a number secular bloggers and journalists earlier this year, the practice of enforced disappearance appears to be expanding — both in terms of geographical reach and also the categories of people being targeted. The practice can now be called a national phenomenon, spreading outside of conflict zones to suppress dissenting voices wherever they may exist.

In *India* enforced disappearances have predominantly been reported in

[1] In this report, enforced disappearance and "disappearance" have been used interchangeably.

regions where there is conflict. In Manipur and other states in the North East, the majority of cases of enforced disappearances were recorded during insurgencies in the 1980s and 1990s. In Punjab, dozens of cases of enforced disappearance were reported during counter-insurgency operations from 1983 to 1997. In Kashmir, enforced disappearances have been reported at least since 1989, when the Indian security agencies started a crackdown against nationalist and separatist groups and their perceived supporters and sympathizers.

In this respect, *Bangladesh* is an exception in the region as enforced disappearances are primarily used to suppress political opposition and dissent more generally, i.e. in contexts other than conflict or "security" concerns. Since 2009, when the Awami League Government led by Sheikh Hasina Wazed came into power, there has been a surge in enforced disappearances, with reports of hundreds of opposition political activists and human rights defenders going "missing".

Entrenched impunity

It has become a cliché to speak of a "climate of impunity", but the phrase is entirely apt in describing the situation in the region, where impunity for human rights violations has become institutionalised and systemised.

In *India*, *Pakistan*, and *Bangladesh*, not a single perpetrator has been held criminally accountable for enforced disappearance despite attempts by victims, including families of the "missing", to lodge criminal complaints and pursue other legal remedies. In most cases, the police refuse to register First Information Reports (FIRs) against members of law enforcement, security or intelligence agencies, and even when they do lodge criminal complaints, investigations into the allegations fall far short of international standards.

In *Nepal*, after more than a decade since the end of the armed conflict in 2006, the fate and whereabouts of more than a thousand possible victims of enforced disappearance remain unknown and perpetrators have still not been brought to justice, despite commitments to hold perpetrators of human rights violations and abuses accountable and to provide access to effective remedies and reparation to victims. And while there have been some successful prosecutions in *Sri Lanka* under the existing legal framework, reversing entrenched impunity for the tens of thousands of enforced disappearances reported during the civil war is a struggle and families are still seeking truth and justice.

Gaps and weaknesses in national legal frameworks

One of the primary obstacles to ensuring accountability for past human rights violations, and deterring future ones, has been the lack of an adequate national legal framework. This report focuses primarily on the fact that, at the time of writing, enforced disappearance is still not specifically criminalized in any country in the region. The widespread or systematic practice of enforced disappearance is also not yet recognized

as a crime against humanity in the domestic legislation of any of the five countries studied in this report.

In *Nepal* and *Sri Lanka*, draft legislation to criminalize enforced disappearance is under consideration. Though welcome, the draft bills in both countries are flawed and do not meet international standards.

In addition, other legal barriers to bring perpetrators to account and ensure victims' right to remedy and redress are similar in most, if not all, South Asian countries: members of the armed forces enjoy broad immunities for actions undertaken the course of their duties in the name of "national security"; there is lack of political will to hold perpetrators of human rights violations to account, especially when the alleged perpetrators belong to the military or intelligence agencies; the existence of "sanction" provisions in their laws require consent of the Government to file a criminal complaint against a state actor; and military personnel can be tried by a military court instead of a civilian court for all offences, including gross human rights violations.

These hurdles have made prosecuting suspected perpetrators and bringing those responsible to account close to impossible.

The role of courts

Despite the absence of a proper legal framework and the political will to criminalize enforced disappearance through the passage of new legislation or the amendment of existing laws, human rights defenders and victims' families have sought a remedy in the judicial system. In the absence of legal provisions specifically criminalizing enforced disappearance, victims and their families have utilized other means, such as the writ of *habeas corpus*, bringing complaints of abduction or kidnapping, and filing human rights petitions in the Supreme Court to trace the whereabouts of their loved ones. In a number of instances, the courts have stepped up to this challenge and issued strong decisions ordering governments to disclose information about the disappeared, prosecute perpetrators, and bring laws and practices into compliance with their international obligations – including the criminalization of enforced disappearance.

In *Nepal*, the Supreme Court has directed the Government to criminalize enforced disappearance on several occasions. The Supreme Court of *Pakistan* has issued several strong opinions, including calling for the establishment of a commission of inquiry to investigate cases of enforced disappearance, and has held that the principles enshrined in the ICPPED are applicable notwithstanding the fact that the Government has not ratified the treaty. In *Sri Lanka*, there have been a limited number of convictions in court, but more generally, there has been a heavy reliance on the use of *ad hoc* commissions of inquiry that have rarely resulted in accountability. While the Supreme Courts in *India* and *Bangladesh* have not taken up the question of enforced disappearance directly, they have emphasized that law enforcement agencies have to operate within the law and "national security" cannot be used as an excuse to violate human rights.

While these judgments are important, in many cases national jurisprudence has failed to fulfill, or has even contradicted, the international obligations of the State. The *Indian* Supreme Court, for example, has upheld the constitutionality of laws that shield security forces from accountability. The Supreme Court of *Pakistan* too has recently upheld the validity of constitutional amendments empowering military courts to try civilians, including those kept in secret detention, for terrorism-related offences and is delaying hearings on petitions challenging laws that facilitate secret detention in some parts of the country. And courts in *Bangladesh* often accept the Government's denial that "missing" people are in their custody, even when there are credible allegations of the involvement of law enforcement agencies in their alleged enforced disappearance.

Also, in most cases, authorities have failed to comply with court orders and courts have been reluctant to use available powers, such as powers of contempt of court, to ensure their orders are implemented.

Despite major obstacles to the implementation of judicial decisions, the courts have proven to be an important avenue for pursuing accountability. For this reason, it is essential that their impartiality and independence be protected from threats of political interference.

Commissions of Inquiry

In response to reports of enforced disappearances, *Pakistan, Sri Lanka and Nepal* have also constituted commissions of inquiry to document cases of alleged "disappearance", trace the whereabouts of the "missing", carry out investigations, and bring perpetrators to justice.

However, the COIs have failed to deliver in all three countries for a number of reasons: there are concerns about the independence and impartiality of the commissioners; the commissions have inadequate resources; the commissions have flawed mandates or insufficient powers to get their orders implemented or are hesitant in using the full range of powers available to them; and there are serious concerns about the security of witnesses and the confidentiality of evidence submitted to the commissions, which makes victims too fearful to approach the COIs with their complaints.

These concerns are not new. South Asian countries have a long history of establishing Commissions of Inquiry to investigate matters of public importance, including allegations of gross human rights violations. Though ostensibly formed to provide a measure of public accountability, COIs have promoted impunity by diverting investigations of human rights violations and crime from the criminal justice process into a parallel *ad hoc* mechanism vulnerable to political interference and manipulation.

International commitments and recommendations

All five countries have been taken to task by UN human rights

mechanisms and in international forums for their failure to hold perpetrators accountable for past violations and for not addressing weaknesses in national legal frameworks, including the lack of criminalization of enforced disappearance. UN human rights mechanisms such as the UN Working Group on Enforced or Involuntary Disappearances, the UN Human Rights Committee and the UN Committee against Torture have expressed concern at the impunity for perpetrators of enforced disappearance and have recommended laws specifically recognizing the practice as a serious crime. Most countries have also committed to criminalizing enforced disappearance as part of the Universal Periodic Review process.

However, none of the five countries studied have criminalized enforced disappearance at the time of writing, and, with the exception of Sri Lanka, none are party to the International Convention for the Protection of All Persons from Enforced Disappearance (though India has signed the ICPPED but has not yet ratified it).

To ensure greater compliance with recommendations of UN human rights mechanisms and other international forums, strong national advocacy for legal reform and the independence of the judiciary are vital. Indeed, a comprehensive set of reforms, both in law and policy, is required to end the entrenched impunity for enforced disappearances in the region. Criminalizing the practice would be a significant first step in this direction.

The ICJ hopes that this brief comparative study will generate discussion and facilitate greater collaboration amongst activists and lawyers working on enforced disappearances in the region to improve victims' access to justice and right to effective remedy and reparations.

Criminalizing Enforced Disappearances: Overview

What is an enforced disappearance?

The International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) defines enforced disappearance as the "arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law." The UN General Assembly has repeatedly described enforced disappearance as "an offence to human dignity" and a grave violation of international human rights law.

The practice of enforced disappearance occurs in all regions of the world. Since its inception in 1980, the UN Working Group on Enforced and Involuntary Disappearances has transmitted a total of 55,273 cases to 107 States from all regions in the world, and as of July 2016, the WGEID was actively considering 44,159 from 91 States.[2]

Once considered a practice used mainly by military regimes, enforced disappearances are now perpetrated in a variety of political systems and contexts for many different purposes. These include, but are not limited to, as a means of political repression of opponents and human rights defenders; as a preventive or intelligence gathering part of counter-terrorism strategies; as method of war; and in response to organized crime.

Enforced disappearance: a crime under international law

The practice of enforced disappearance is not only a human rights violation - like certain other violations of human rights such as torture, extrajudicial executions, war crimes and crimes against humanity, enforced disappearance is also a crime under international law.[3]

Accordingly, States are obligated to criminalize acts of enforced disappearance; promptly, thoroughly, impartially and effectively investigate allegations and bring those responsible to justice; either submit for prosecution or extradite for prosecution anyone in the State's territory who is accused of enforced disappearance; and refrain from transferring a person to another country where that person would be at real risk of enforced disappearance.

Enforced disappearance is also typically a composite of other serious

[2] Report of the Working Group on Enforced or Involuntary Disappearances, July 2016, UN Doc. A/HRC/33/51.
[3] For a detailed discussion, see *International Commission of Jurists*, Practitioners Guide no. 9, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction*, 2015.

human rights violations. These include extrajudicial or arbitrary execution in violation of the right to life, where a "disappeared" person is ultimately unlawfully killed. It will include cruel, inhuman or degrading treatment, and in many cases, torture. It typically involves arbitrary detention. And it can also constitute the denial of the right to recognition as a person under the law, which is non-derogable under Article 16 of International Covenant on Civil and Political Rights. Some of these violations can themselves constitute crimes under international law.

To provide a proper foundation for authorities to implement the duty to promptly, thoroughly, impartially and effectively investigate allegations of enforced disappearance and to prosecute or extradite alleged perpetrators, States should ensure that all acts of enforced disappearance as defined by international law constitute a distinct criminal offence under domestic criminal law.

International instruments

The leading global instrument setting out international standards on enforced disappearance is the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), which was adopted by consensus at the UN General Assembly in 2006, and now has 57 States Parties with a further 49 States having signed but not yet ratified, with the numbers increasing each year. The Convention builds on earlier standards, including the UN Declaration on the Protection of All Persons from Enforced Disappearance (DED) adopted by the UN General Assembly in 1992. The Declaration is not in itself legally binding but it applies to all States.

Enforced disappearances are also effectively prohibited by the obligations contained in other treaties, particularly the International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Although enforced disappearance is not expressly mentioned in either treaty, any perpetration of an enforced disappearance inherently involves one or more acts that are prohibited by the relevant treaty. The international bodies mandated to supervise State compliance with these treaties (i.e. the Human Rights Committee and the Committee against Torture) have consequently developed extensive jurisprudence and guidance on the application of the more general treaty provisions to acts of enforced disappearance, including with regards to the right to life, the right to be free from torture and other cruel, inhuman or degrading treatment, the right to liberty and security, and recognition as a person before the law.

The obligation to define certain human rights violations as crimes also arises from States' more general obligation to ensure the effective enjoyment and protection of human rights.[4]

[4] See for instance, Human Rights Committee, General Comment no 31 on "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" UN Doc CCPR/C/21/Rev.1/Add. 13 (2004), paragraphs 15 and 18; and the UN Basic Principles and

Establishing enforced disappearance as an autonomous offence

The Committee on Enforced Disappearance, the UN Working Group on Enforced or Involuntary Disappearances (WGEID) and the Human Rights Committee have clarified the content and scope of the obligation to recognize enforced disappearance as an autonomous offence, based on the ICPPED, the DED and the ICCPR, which converge upon a definition of the crime of enforced disappearance and the identification of its constituent components.

They all concur that enforced disappearance, considered both a criminal offense as well as a serious violation of human rights, involves the cumulative presence of two behaviors: the deprivation of liberty by state agents or individuals acting with the authorization, support or acquiescence of the state; and the refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of the disappeared person.

The Committee on Enforced Disappearance has repeatedly stated that the crime of enforced disappearance should be punishable under domestic criminal law as an autonomous offense in line with the definitions set out in Article 2 of the ICPPED. The Committee has said that, as a rule, "reference to a range of existing offences is not necessarily enough" to satisfy the obligation to ensure that all acts of enforced disappearance are punishable by national law. It has furthermore said that "a definition of enforced disappearance as a separate offence that was in accordance with the definition in Article 2 and distinguished it from other offences, would enable the State party to comply with a variety of obligations in relation to enforced disappearances," and that "such a definition also makes it possible to correctly encompass the many legal rights affected by enforced disappearances."[5]

The Working Group on Enforced or Involuntary Disappearances (WGEID) has stated that pursuant to Article 4 of the DED, enforced disappearance is to be defined as a separate and independent offence:[6]

> *…a number of States admit that they have not yet incorporated the crime of enforced disappearance into their domestic legislation, but argue that their legislation provides for safeguards from various offences that are linked with enforced disappearance or are closely*

Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by General Assembly resolution 60/147 of 16 December 2005.

[5] *Committee on Enforced Disappearances*, Concluding observations on the report submitted by Spain under Article 29, paragraph 1, of the Convention, 12 December 2013, UN Doc. CED/C/ESP/CO/1, para 9.

[6] Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Best practices on enforced disappearances in domestic criminal legislation, A/HRC/16/48/Add.3, 28 December 2010, para 9. See, likewise, Report of the WGEID: E/CN.4/1996/38, para. 54; and the Report of the Working Group, UN Doc A/HRC/7/2 (January 2008), para. 26 (Para. 3 of the "General Comment on the definition of enforced disappearance").

> *related to it, such as abduction, kidnapping, unlawful detention, illegal deprivation of liberty, trafficking, illegal constraint and abuse of power. However, a plurality of fragmented offences does not mirror the complexity and the particularly serious nature of enforced disappearance. While the mentioned offences may form part of a type of enforced disappearance, none of them are sufficient to cover all the elements of enforced disappearance, and often they do not provide for sanctions that would take into account the particular gravity of the crime, therefore falling short for guaranteeing a comprehensive protection.*[7]

The WGEID has concluded that for the crime of enforced disappearance the following three cumulative minimum elements should be contained in any definition:[8]

- Deprivation of liberty (whether otherwise legal or illegal) against the will of the person concerned;
- Involvement of government officials, at least indirectly by acquiescence; and
- Refusal to disclose the fate and whereabouts of the person concerned.

With regard to the scope of application of the crime of enforced disappearance, the WGEID has affirmed that national criminal definitions must apply wherever the perpetrators are "State actors or…private individuals or organized groups (e.g. paramilitary groups) acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government".[9] While the WGEID and ICPPED provide for "appropriate measures to investigate acts comparable to enforced disappearances committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice", the particular role of the State in relation to enforced disappearances calls for "comparable" non-State acts to be treated separately under national law and not simply combined by an extended definition of "enforced disappearance".

Guarantee against Impunity

As part of the duty to prosecute and punish crimes of enforced disappearance, States must remove all obstacles, both factual and legal, that hinder the effective investigation into the facts and the development of the corresponding legal proceedings.

Amnesties and similar measures that prevent perpetrators of enforced disappearance from being investigated, prosecuted and punished by the courts are inconsistent with States' obligation to punish such crimes under international law. Likewise, since such measures undermine the absolute

[7] WGEID "Best practices on enforced disappearances in domestic criminal legislation" *Ibid*, para 11.
[8] *Ibid*., para 21.
[9] *Ibid*., para 25.

prohibition against committing these crimes, they are incompatible with the obligation to guarantee the rights of the families of victims to an effective remedy and to be heard by an independent and impartial tribunal for the determination of their rights and to the truth.

The UN Human Rights Committee has concluded that amnesties and other measures that allow impunity for the perpetrators of enforced disappearances and other serious violations of human rights and prevent the investigation of the facts and the prosecution and punishment of the perpetrators, and/or that the victims and their families have an effective remedy and obtain redress are incompatible with the obligations of the ICCPR.[10]

The UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity expressly prohibit the granting of amnesties and similar measures to perpetrators of serious crimes under international law (which includes enforced disappearance) without such persons having been brought to justice and subject to other restrictions.[11]

Article 18 of the DED specifically provides that persons who have or are alleged to have committed offences related to enforced disappearances "shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction" and that "In the exercise of the right of pardon, the extreme seriousness of acts of enforced disappearance shall be taken into account."

Statutes of limitation

The use of limitation periods should not be permitted to allow for impunity in relation to other gross human rights violations. The ICPPED requires that if in a particular State a statute of limitations is applied in respect of enforced disappearances, the term of limitation for criminal proceedings must be "of long duration" and "proportionate to the extreme seriousness of this offence" and only commence when the enforced disappearance ceases, taking into account its continuous nature (i.e. if and when the fate

[10] See, inter alia, Concluding Observations: Peru (CCPR/C/79/Add.67, 1996, paras. 9 and 10; and CCPR/CO/70/PER, 15 November 2000, para. 9); Argentina, (CCPR/C/79/Add.46 - A/50/40, 5 April 1995, para. 144 and CCPR/CO/70/ARG, 3 November 2000, para. 9); Chile (CCPR/C/79/Add.104, 30 March 1999, para. 7); Croatia (CCPR/C/HRV/CO/2, 4 November 2009, para. 10; and CCPR/CO/71/HRV, 4 April 2001, para. 11); El Salvador, (CCPR/C/SLV/CO/6, 18 November 2010, para. 5; CCPR/CO/78/SLV, 22 August 2003; and CCPR/C/79/Add.34, 18 April 1994, para. 7); Spain, (CCPR/C/ESP/CO/5, 5 January 2009, para. 9); Former Yugoslav Republic of Macedonia (CCPR/C/MKD/CO/2, 3 April 2008, para. 12); France (CCPR/C/79/Add.80, para. 13); Haiti (A/50/40, paras. 224–241); Lebanon (CCPR/C/79/Add78, para. 12); Níger (CCPR/C/79/Add.17, 29 April 1993, para. 7); Republic of Congo (CCPR/C/79/Add.118, 27 March 2000, para. 12); Senegal (CCPR/C/79/Add.10, 28 December 1992, para. 5); Surinam (CCPR/CO/80/SUR, 4 May 2004, para. 7); and Uruguay (CCPR/C/URY/CO/5, 2 December 2013, para. 19; and CCPR/C/79/Add.19, paras. 7 and 11; and CCPR/C/79/Add.90, Part C. "Principal areas of concern and recommendations").

[11] Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1 (8 Feb 2005), principle 24.

and whereabouts of the person are established).[12] The ICPPED also provides that "Each State Party shall guarantee the right of victims of enforced disappearance to an effective remedy during the term of limitation."[13] This should be interpreted as reflecting article 17 of the UN Declaration on the Protection of all Persons from Enforced Disappearance, by which any limitation period should also be suspended during any time at which effective remedies, such as those contemplated under article 2 of the ICCPR, are not available. The Human Rights Committee has also affirmed that unreasonably short periods of statutory limitation can act as an impediment to the establishment of legal responsibility and should be removed.[14]

Superior responsibility

Under international law, individual criminal liability for gross human rights violations is not limited to the direct perpetrator of the crimes but can extend to superiors where they either order or induce the commission of an offence or fail to take sufficient measures to prevent or report the violations.

Under the ICPPED, criminal liability for enforced disappearances extends to any person who "commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance".[15] In addition, criminal liability of superiors extends at least to those who:[16]

- Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;
- Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and
- Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution.

The Human Rights Committee has stated in relation to Article 7 of the ICCPR (prohibition of torture and cruel, inhuman or degrading treatment), that "those who violate Article 7, whether by encouraging, ordering,

[12] ICPPED, Article 8(1).
[13] ICPPED, Article 8(2).
[14] Human Rights Committee, General Comment No. 31, para.18. See also the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by General Assembly resolution 60/147 of 16 December 2005, paras 6 and 7.
[15] ICPPED, Article 6(1)(a).
[16] ICPPED, Article 6(1)(b). Article 6(1)(c) specifies that this 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."

tolerating or perpetrating prohibited acts, must be held responsible."[17] The Updated Impunity Principles state that the fact that "violations have been committed by a subordinate does not exempt that subordinate's superiors from responsibility, in particular criminal responsibility, if they knew or had at the time reason to know that the subordinate was committing or about to commit such a crime and they did not take all the necessary measures within their power to prevent or punish the crime."[18]

Superior orders

In addition to the responsibility of superiors for the acts of those under their effective control, international law is also clear that subordinates are not absolved of criminal responsibility for gross human rights violations simply because they acted pursuant to orders from a superior.

Both the CAT and the ICPPED make clear that an order of a superior or public authority can never be invoked as justification in the criminal proceedings contemplated by those treaties. [19] The Human Rights Committee and the Committee against Torture have endorsed and recommended the incorporation of this principle in domestic law.[20]

Military courts

The inherent lack of independence from the executive of military tribunals make the use of tribunals unsuitable in cases against civilians or which concern violations of the human rights of civilians. Indeed, such courts have frequently acted in countries around the world to shield those responsible for human rights violations from criminal responsibility for their acts. Trials of persons accused of enforced disappearances as well as other serious violations of human rights should be excluded from the jurisdiction of military criminal courts, even where they are committed by military personnel.[21] With regard to enforced disappearance, this exclusion is expressly enshrined in Article 16(2) of the DED. Even though the ICPPED does not make express provision concerning military courts, the Committee on Enforced Disappearance has stated that jurisdiction over

[17] HRC, General Comment No.20: Article 7, A/44/40 (1992), para 13.
[18] Updated Impunity Principles, Principle 27(b).
[19] CAT, Article 2(3); ICPED, Article 6(2). See also Committee against Torture, General Comment No.2, para.26; Concluding Observations of the Committee against Torture: Egypt, CAT, A/49/44 (1994) 14 at para.89; Concluding Observations of Committee against Torture: Panama, CAT, A/48/44 (1993) 52 at para.339; Senegal, CAT, A/51/44 (1996) 19 at para.114; Uruguay, CAT, A/52/44 (1997) 16 at paras.91 and 93; Mauritius, CAT, A/54/44 (1999) 15 at para.123; and Poland, CAT, A/55/44 (2000) 21 at paras.88 and 93.
[20] HRC, General Comment No.31, para.18. See also HRC, General Comment No.20, Article 7, A/44/40 (1992), para.3; Concluding Observations of Committee against Torture: Armenia, Committee against Torture, UN Doc. A/51/44 (1996) 17 at para.97; Concluding Observations of the HRC: Ecuador, ICCPR, A/53/40 vol. I (1998) 43 at para.280; and Concluding Observations of Committee against Torture: El Salvador, Committee against Torture, UN Doc. A/55/44 (2000) 28 at para.158.
[21] See e.g. Principle 29 of the Updated Impunity Principles; and the Draft Principles governing the administration of justice through military tribunals, UN Doc E/CN.4/2006/58.

the offence of forced disappearance should lie with ordinary courts, in terms both of the investigation of the crime and the trial.[22]

Right to truth and reparation through criminal proceedings

The right of victims to reparation for human rights violations is an integral part of international human rights law.[23] The state must provide effective reparation for any violation that has been established, including through criminal proceedings. The right to the truth of family members of persons subjected to enforced disappearance is specifically recognized by the ICPPED (Preamble and Article 24(2)). Given the nature of criminal acts of enforced disappearance, the criminal justice system plays an important role for the realization of the right to an effective remedy and the truth, which includes knowing the identity and responsibility of the perpetrators, as only a criminal court may definitively determine the guilt of individuals. It is, therefore, an essential element for the satisfaction of these rights for relatives of victims of enforced disappearance to have access to criminal justice.

[22] Concluding observations on: France, CED/C/FRA/CO/1, 8 May 2013, paras 24 and 25; Spain, CED/C/ESP/CO/1, 12 December 2013, paras. 15-16; and the Netherlands, CED/C/NLD/CO/1, 10 April 2014, paras. 18-19.

[23] See for instance, Human Rights Committee, General Comment No.31, para.16; Updated Impunity Principles, Principles 2 to 5; UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by General Assembly resolution 60/147 of 16 December 2005, paras 22 and 24; General Assembly, resolution 68/165 "right to the truth" (18 December 2013). See also, *International Commission of Jurists*, "Illusory Justice, Prevailing Impunity: Lack of Effective Remedies and Reparation for Victims of Human Rights Violations in Tunisia", May 2016, Ch. 3.

India

Context

In India, enforced disappearances have occurred most often in regions facing insurgency or armed conflict. For example, according to a report released by the International Peoples Tribunal on Human Rights and Justice in Indian-Administered Kashmir and the Association of Parents of Disappeared Persons in 2012, there had been around 8000 enforced disappearances in Kashmir during the period of 1989 to 2012. The report provided details in 65 cases of such enforced disappearances.[24] A second report by the same organizations in 2015 provided details of another 172 enforced disappearances in Kashmir from the same period. Enforced disappearances were also common in Manipur and other states in the North East of India in the 1980s and 1990s. Several people have still not been found to date, and petitions regarding their fate or whereabouts are still pending in various courts.[25] A submission by REDRESS, Ensaaf and Center of Human Rights and Global Justice (CHRGJ) documented 32 enforced disappearances in Punjab from 1984 to 1995, in the course of counter-insurgency operations.[26]

It is difficult to assess the numbers and scope of enforced disappearances across India. A possible source of information – though far from comprehensive – is the complaints filed with the WGEID, and the official State responses to them, which confirm the patterns above. For example, 50 cases of enforced disappearances were submitted to the WGEID in 1992, mostly occurring in Punjab, Assam and Kashmir.[27] In 2000, 27 cases were reported, of which 21 occurred in Kashmir.[28] The Working Group stated the "fate of hundreds of victims of enforced or involuntary disappearance in other parts of India, such as Assam and Manipur, remained unknown".[29] As of 2016, there were 354 cases of enforced disappearances in India before the WGEID that remained unresolved.[30]

[24] See *International Peoples' Tribunal on Human Rights and Justice in Indian-Administered Kashmir and the Association of Parents of Disappeared Persons,* "Alleged Perpetrators - Stories of Impunity in Jammu and Kashmir" December 2012, available at: https://jkccs.files.wordpress.com/2017/05/alleged-perpetrators.pdf

[25] See for example, *Human Rights Watch*, "'These Fellows Must Be Eliminated': Relentless Violence and Impunity in Manipur", 29 September 2008, available at: https://www.hrw.org/report/2008/09/29/these-fellows-must-be-eliminated/relentless-violence-and-impunity-manipur

[26] *Redress, Insaaf and CHR]&GJ*, letter to the WGEID, October 2007, accessed at: http://www.redress.org/downloads/country-reports/Ensaaf%20cover%20letter%20to%20WGEID%2011.07.pdf

[27] Report of the Working Group on Enforced or Involuntary Disappearances, 7 January 1993, UN Doc. E/CN.4/1993/25.

[28] Report of the Working Group on Enforced or Involuntary Disappearances, 18 December 2000, UN Doc. E/CN.4/2001/68.

[29] *Ibid*., para 59.

[30] Report of the Working Group on Enforced or Involuntary Disappearances, 28 July 2016, UN Doc. A/HRC/33/51.

National legal framework

India has not made enforced disappearances a specific criminal offence in its penal code. As a result, families of the "disappeared" file complaints under more general provisions of the Code of Criminal Procedure and Penal Code. For example, families often lodge "missing persons" complaints with the police regarding family members who might have been subjected to enforced disappearance. Other commonly used provisions include "abduction", "kidnapping" or "wrongful confinement".[31]

In some instances, families have approached High Courts or the Supreme Court, and used the writ of *habeas corpus* to find the whereabouts of "disappeared" persons.

Where such cases have been filed against members of the security forces, investigations and prosecutions are hindered by the prevalence of sanction provisions in Indian law. These provisions require permission from the Government before prosecutions can be initiated against public servants and members of security forces.[32] Such permission is rarely, if ever, granted in cases of human rights violations. Furthermore, military courts have jurisdiction over criminal cases concerning personnel in the armed forces, meaning such cases may not be tried in civilian courts if military courts choose to exercise their jurisdiction.[33]

A large number of enforced disappearances are reported from areas considered "disturbed" under the Armed Forces Special Powers Act (AFSPA), such as Kashmir and Manipur. Once an area is declared "disturbed" under AFSPA, armed forces are given a range of "special powers", which include the power to arrest without warrant, to enter and search any premises, and in certain circumstances, to use lethal force even where not strictly necessary to protect life. Furthermore, under AFSPA, governmental permission, or sanction, is required before any member of the armed forces can be prosecuted for crimes in a civilian

[31] Under section 362 of the Indian Penal Code, "abduction" is defined as "Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person". Under section 361 of the Indian Penal Code, "kidnapping" is defined as "Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. Explanation.— The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person".

[32] Such sanction provisions can be found in several Indian laws. Illustrative examples include Section 197, Code of Criminal Procedure, 1973; Section 6, Armed Forces (Special Powers) Act 1958; Section 6, Jammu and Kashmir Disturbed Areas Act 1992; and Section 45, Unlawful Activities Prevention Act 1967.

[33] See section 125 of the Army Act, which allows the Army to choose to try army personnel before a court-martial instead of a civilian court for almost every offence.

court, thus effectively shielding armed forces from accountability for human rights violations.[34]

Jurisprudence

In the case of *Sebastian M. Hongray v. Union Of India*, security forces in Manipur allegedly abducted and unlawfully detained two people: C Paul and C Daniel.[35] The Supreme Court issued a writ of *habeas corpus* asking for both persons to be produced before the Court. However, the security forces failed to comply with the SC's orders.

In some cases, courts have dismissed the writ petitions without offering any relief;[36] in others, they have ordered inquiries –including judicial inquiries - into the incident after the writ was filed. Depending on the results of the enquiry, the courts have sometimes confirmed that there is a *prima facie* case of "abduction" and ordered the filing of an FIR.[37] In a number of such cases, either the police fail to comply with orders of the court, or if they do, the Government refuses to grant sanction for prosecution.

In July 2016, responding to a petition alleging over 1,528 cases of alleged extrajudicial killings in Manipur, the Supreme Court held "the law…is very clear that if an offence is committed even by Army personnel, there is no concept of absolute immunity from trial by the criminal court".[38] The Supreme Court followed up on that judgment in July 2017, where it ordered the Director of the Central Bureau of Investigations (CBI) to constitute a Special Investigation Team (SIT) within two weeks to go through the records of at least 85 cases of alleged extrajudicial killings that took place in Manipur between 1979 and 2012, lodge First Information Reports (FIRs), and complete investigations where required.[39] How this case proceeds would also have relevance for other cases of human rights violations where the law enforcement agencies or security forces are allegedly responsible, including in cases of enforced disappearance.

However, the Supreme Court has not expressly commented on the practice of enforced disappearance as a distinct, autonomous offence or highlighted the importance for perpetrators of the enforced disappearance to be held criminally accountable.

---

[34] See, for example, *International Commission of Jurists*, "India: repeal Armed Forces Special Powers Act immediately", 5 November 2015, accessed at: https://www.icj.org/india-repeal-armed-forces-special-powers-act-immediately/

[35] AIR 1984 SC 571.

[36] http://www.ensaaf-org.jklaw.net/publications/other/judicial_blackout.pdf

[37] See International Peoples' Tribunal on Human Rights and Justice in Indian-Administered Kashmir and the Association of Parents of Disappeared Persons "Alleged Perpetrators - Stories of Impunity in Jammu and Kashmir" December 2012, available at: https://jkccs.files.wordpress.com/2017/05/alleged-perpetrators.pdf, pp. 23-24.

[38] *Extra Judicial Execution Victim Families Association* (*EEVFAM*) *and another v. Union of India, 2016.*

[39] *International Commission of Jurists,* India: authorities must fully investigate Manipur killings as ordered by Supreme Court, 30 July 2017, accessed at: https://www.icj.org/india-authorities-must-fully-investigate-manipur-killings-as-ordered-by-supreme-court/

Commitments and recommendations

India signed the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) on 6 February 2007, but has not yet ratified the Convention. Several UN Special Rapporteurs have commented on cases of enforced disappearance in India, and recommended that the ICPPED be ratified.

For example, a report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions on India in 2013 noted that, "lengthy and ineffective proceedings exist in Punjab where large-scale enforced disappearances and mass cremations occurred between the mid-1980s and 1990s. The lack of political will to address these disappearances is evident in a context where steps to ensure accountability have been reportedly inconclusive".[40] The Special Rapporteur was also "presented with several cases of enforced disappearances in Jammu and Kashmir, and the difficulties to seek accountability and redress in those cases".[41] He recommended that India ratify the ICPPED. Another UN expert, the Special Rapporteur on human rights defenders found that "widows and other relatives of disappeared have been harassed and intimidated because of their advocacy work" in India,[42] and also gave details of the harassment faced by human rights defenders highlighting enforced disappearances.

In 2008, during India's first Universal Periodic Review, in response to a recommendation from the Government of Nigeria that India ratify the Convention on Enforced Disappearance, the Government of India responded by saying the process of ratification was underway.[43] In 2012, the ICPPED was still not ratified, and eight countries made recommendations encouraging its immediate ratification.[44] However the Government of India accepted none of these recommendations. Similarly, in its 2017 UPR, India received another five recommendations to ratify the ICPPED. The outcome document will be adopted in September 2017. At the time of writing, the Government has not taken any concrete steps towards ratification of the ICPPED.

India extended a standing invitation to all thematic special procedures of the UN Human Rights Council on 14 September 2011, committing to always accept requests to visit from all special procedures. However, in its

[40] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/23/47/Add.1, at Para 67.
[41] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/23/47/Add.1, at Para 87
[42] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/23/47/Add.1, at Para 88
[43] Response of the Government of India to the recommendations made by delegations during the Universal Periodic Review of India, A/HRC/8/26/Add.1 25 August 2008, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/161/58/PDF/G0816158.pdf?OpenElement
[44] Spain, Iraq, Uruguay, Argentina, Austria, Portugal, Chile France. Report of the Working Group on the Universal Periodic Review, A/HRC/21/10, 9 July 2012, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/151/08/PDF/G1215108.pdf?OpenElement

latest annual report, released in July 2016, the Working Group on Enforced or Involuntary Disappearances stated that it had made requests to visit India in 2010 and 2015, but had not received a response.[45]

The Working Group also noted that it had not yet received a response to a letter regarding allegations of continuing construction work on the site of a newly discovered mass grave, which had been sent in January 2015.[46]

India acceded to the ICCPR in in 1979. It is not a party to the CAT. The Human Rights Committee last reviewed India's implementation of the ICCPR in 1997, when it expressed concern the "continuing reliance on special powers under legislation such as the Armed Forces (Special Powers) Act…in areas declared to be disturbed and at serious human rights violations, in particular with respect to Articles 6, 7, 9 and 14 of the Covenant, committed by security and armed forces acting under these laws as well as by paramilitary and insurgent groups."[47] The Human Rights Committee urged early enactment of legislation for mandatory judicial inquiry into cases of disappearance and death, ill-treatment or rape in police custody.

India's next report to the Human Rights Committee was due in December 2001. However, India has failed to meet the deadline and its fourth periodic report is now 16 years overdue.

[45] *Ibid*, p. 5,
[46] *Ibid*, p. 20.
[47] UN Human Rights Committee, Concluding observations of the Human Rights Committee, UN Doc. CCPR/C/79/Add.81

Enforced disappearance in India: A summary

Estimated number of enforced disappearances	Estimates range from 354 to more than 8000.
Regions where most cases reported	Jammu and Kashmir Manipur and other North Eastern states Punjab
Is enforced disappearance a specific criminal offence?	No.
WGEID visit and recommendations	Requests sent in August 2010 and November 2015 are pending.
Emblematic cases	*Extra Judicial Execution Victim Families Association* (*EEVFAM) and another v. Union of India* (2017) • Security forces do not have "absolute immunity from trial by the criminal court" • Access to justice is a fundamental right for victims
Commission of Inquiry on enforced disappearances	No. COIs constituted for extrajudicial killings and in response to *habeas corpus* writs but not specifically for enforced disappearances.
UPR recommendations	Recommendations to ratify ICCPED and criminalize enforced disappearances received in 2008, 2012 and 2017. Recommendations accepted in 2008, but "noted" in 2012.
Related UN Human Rights Treaties	ICCPR: Acceded to in 1979 ICPPED: No (signed in 2007) CAT: No (signed in 1997) OPCAT: No Rome Statute: No
Human Rights Committee	Last review: 1997 Committee expressed concern at excessive detention powers and incompatibility of national security legislation with the ICCPR.

Pakistan

Context

While there are reports that the practice of enforced disappearance has existed in Pakistan since at least the 1970s, such cases have been recorded in significant numbers in the early 2000s, beginning with Pakistan's involvement in the US-led "war on terror" in late 2001. Since then, hundreds of people accused of terrorism-related offences have reportedly been "disappeared" after being abducted by security agencies and detained in secret facilities. The practice continues unabated until today, with spikes in numbers of alleged enforced disappearances every time the military launches an offensive in the North-Western region of Pakistan, notably in the Federally Administered Tribal Areas. (FATA).

Cases of enforced disappearances are also reported Balochistan, where the practice is used against political activists and people who are considered sympathetic to separatist or nationalist movements in the province. In recent years, there has been a rise of cases of enforced disappearance in Sindh, where political activists have largely been targeted.[48]

The practice has now become a national phenomenon. In August 2015, Zeenat Shahzadi, a Pakistani journalist who had been following the alleged enforced disappearance of an Indian engineer, Hamid Ansari, went "missing" from Lahore. According to Zeenat's family, she had been receiving threatening phone calls asking her not to pursue the case before her alleged enforced disappearance. Two years later, her fate and whereabouts remain unknown. Zeenat's case is one of the rare cases of alleged enforced disappearance where the victim is a woman. Earlier this year, a number of bloggers and activists were also allegedly "disappeared" from major cities in Punjab.[49]

There is a wide range in estimates of the overall number of cases. Defence of Human Rights, a non-governmental organization working towards the recovery of disappeared persons, has reported that more than 5,000 cases of enforced disappearance have still not been resolved.[50] The Voice of Baloch Missing Persons alleges 18,000 people have been forcibly disappeared from Balochistan alone since 2001.[51] The officially constituted Commission of Inquiry on Enforced Disappearances, on the

[48] See, for example, "Concerns voiced over rise in 'enforced disappearances' in Sindh", *The News*, 29 July 2017, accessed at: https://www.thenews.com.pk/print/219686-Concerns-voiced-over-rise-in-enforced-disappearances-in-Sindh and *Human Rights Commission of Pakistan*, "HRCP's alarm at missing men in SIndh turning up dead", 5 December 2014, accessed at: http://hrcp-web.org/hrcpweb/hrcps-alarm-at-missing-men-in-sindh-turning-up-dead/

[49] See "Pakistan: UN expert calls for return of four disappeared human rights and social media activists", 11 January 2017, accessed at: http://www.un.org/apps/news/story.asp?NewsID=55943#.WM8JHIUmQ5U and "Pakistan activist Waqass Goraya: The state tortured me", *BBC News,* 9 March 2017, accessed at: http://www.bbc.co.uk/news/world-asia-39219307

[50] Information provided by DHR to the ICJ.

[51] Information received by the ICJ from the VBMP.

other hand, reports 1,256 cases of alleged enforced disappearance as of 31 July 2017.[52] The Human Rights Commission of Pakistan, which documents human rights violations in 60 selected districts in the country, has documented nearly 400 cases of enforced disappearance since 2014 from the 60 districts it monitors.[53] Thus, even taking the most conservative estimates, a significant number of enforced disappearances remain unresolved in the country.

The Government has failed to bring perpetrators to account in even a single case involving enforced disappearance. On the contrary, it has enacted legislation that facilitates the perpetration of enforced disappearance - including by explicitly legalizing forms of secret, unacknowledged, and incommunicado detention - and giving immunity to those responsible.[54]

National legal framework

Enforced disappearance is not recognized as a distinct crime in Pakistan. On the rare occasion that police register criminal complaints in such cases, they do so for the crimes of "abduction" or "kidnapping".

Sections 359 to 368 of the Pakistan Penal Code relate to the crimes of "kidnapping" and "abduction". The crime of kidnapping is of two kinds: kidnapping from Pakistan and kidnapping from lawful guardianship, and is punishable with a maximum of seven years imprisonment and a fine.

The crime of "abduction" is regulated by section 362 of the Penal Code and is defined as "whoever by force compels, or by any deceitful means induces, any person to go from any place." Section 364 prescribes a punishment of ten years imprisonment for the crime of "kidnapping or abducting in order to murder". Section 365 relates to kidnapping or abducting "any person with intent to cause that person to be secretly and wrongfully confined" and prescribes a punishment of a maximum of seven years imprisonment.

Police also register complaints of enforced disappearances under section 346 of the Penal Code that relates to "wrongful confinement in secret", and prescribes a penalty of two years imprisonment.

When registering a complaint under these provisions for alleged enforced disappearances, police often refuse to identify members of the security or intelligence forces as the alleged perpetrators. In most cases, such complaints are filed against "unknown persons".

[52] Monthly Press release of Commission of inquiry on enforced disappearances for the month of July 2017.
[53] Information received from the Human Rights Commission of Pakistan.
[54] See, for example, *International Commission of Jurists*, "Military Injustice in Pakistan", June 2016, accessed at: http://www.icj.org/wp-content/uploads/2016/06/Pakistan-Military-court-Advocacy-Analysis-brief-2016-ENG.pdf.

Pakistan's Constitution guarantees the right to life, liberty and security of a person; the right to a fair trial; and right to freedom from arbitrary arrest and detention as "fundamental rights". Allegations of violations of these constitutional protections, which are necessarily invoked in cases of enforced disappearance, have been challenged at the Supreme Court and high courts as human rights petitions.

Families of "disappeared" people have also made *habeas corpus* petitions in the high courts and the Supreme Court under Article 199 and 184(3) of the Constitution respectively, requesting the courts to find out the whereabouts of their "missing" loved ones. Courts have responded by directing concerned authorities to "trace" the whereabouts of "missing persons" and producing them before court. However, despite the defiant attitude and repeated failure of members of security forces to follow directions of the courts in cases of enforced disappearances, the courts have refrained from using its contempt of court powers to compel authorities to implement their orders.

Jurisprudence

The Supreme Court first took up the issue of the widespread practice of enforced disappearances in Pakistan in December 2005, when it took *suo motu* notice under Article 184(3) of the Constitution of a news report citing the growing numbers of enforced disappearances in the country.[55]

Soon after, the Human Rights Commission of Pakistan (HRCP) petitioned the Supreme Court under Article 184(3) to take notice of more cases of enforced disappearance. The HRCP submitted a list of 148 "missing persons" – individuals allegedly subjected to enforced disappearance – to the Supreme Court.

During the hearings, the Supreme Court acknowledged evidence establishing that many of the "disappeared" were in the custody of the security agencies and summoned high level military intelligence officials before the Supreme Court to explain the legal basis of the detention and to physically produce the detainees.[56]

As the number of cases of enforced disappearances pending in the Supreme Court steadily grew, the Court directed the Government to establish a Commission of Inquiry on Enforced Disappearance to investigate enforced disappearances across Pakistan and to provide recommendations to curb the practice. The Government complied with the Court's orders and constituted a commission in 2010. The mandate of the Commission expired in December 2010, and in March 2011, the Interior Ministry formed a new Commission to continue its work. The 2011 Commission was initially established for six

[55] Article 184(3) of Pakistan's Constitution enables the Supreme Court to assume jurisdiction over matters involving a question of 'public importance' with reference to the 'enforcement of any of the fundamental rights' of the citizens of Pakistan. It may do so either on the application of party (a petition) or of its own accord (commonly referred to as *suo motu* notice).

[56] See, for example, Reema Omer, *Dawn*, "Justice for the disappeared", 29 July 2013, accessed at : https://www.dawn.com/news/1032711/justice-for-the-disappeared

months, but its mandate has since been extended a number of times, and the Commission remains in operation at the time of writing. Among other functions, the Commission has the mandate to "trace the whereabouts of allegedly enforced disappeared persons", "fix responsibility on individuals or organizations responsible", and "register or direct the registration of FIRs against named individuals…who were involved either directly or indirectly in the disappearance of an untraced person."[57] Despite the broad mandate, the Commission has failed to hold perpetrators of enforced disappearances criminally accountable.

In October 2012, the Supreme Court issued an interim order in what is known as the "Balochistan Law and Order case". The Court held that there was "overwhelming evidence" implicating the Frontier Corps (a paramilitary force) in cases of "missing persons" and acknowledged that at least a hundred people were still "missing" from Balochistan.[58] The Court also noted that the issue of "missing persons" has "become a dilemma as their nears and dears are running from pillar to post spending their energy despite poverty and helplessness but without any success, which aggravated the mistrust not only on law enforcing agencies but also on civil administration."[59]

A year later, in one its strongest judgments yet on the practice of enforced disappearances, the Supreme Court held in the *Mohabbat Shah* case[60] that the unauthorized and unacknowledged removal of detainees from an internment centre amounted to an enforced disappearance. The Court expressed concern at the "kafkaesque workings"[61] of the security forces and held that "no law enforcing agency can forcibly detain a person without showing his whereabouts to his relatives for a long period" and that currently, there was no law in force in Pakistan that allowed the armed forces to "unauthorizedly detain undeclared detainees". The Court gave reference to a number of international instruments including the DED and ICPPED, and said that the practice of enforced disappearance is considered a "crime against humanity" all over the world.[62] Finally the Court held that armed forces personnel responsible for the enforced disappearances should be dealt with "strictly in accordance with law".[63]

Notably, the Supreme Court also held that even though Pakistan has not yet become a party to the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), principles enunciated in the Convention are applicable in Pakistan in the interpretation of other

[57] Gazette of Pakistan, 1 March 2011.
[58] Constitution petition no.77 of 2010, para 14.
[59] *Ibid*, para 10.
[60] HRC No.29388-K/13, 10 December 2013.
[61] *Ibid*., para 15.
[62] *Ibid.,* para 16. Under international law, an enforced disappearance is a crime against humanity if committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (See Art. 7, para 1 of the Rome Statute).

[63] See *International Commission of Jurists*, "ICJ urges Senate to reject 'Protection of Pakistan' Bill", 14 May 2014, accessed at: http://www.icj.org/icj-urges-senate-to-reject-protection-of-pakistan-bill/, p.5.

rights such as the right to life.[64]

The Government responded by filing for a review of the judgment, asking the court to delete remarks implicating the agencies as such findings could "demoralize the troops".

In March 2014, after repeated court orders, the defense minister lodged FIRs for wrongful confinement against some military officers allegedly responsible for the "disappearances". However, the provincial government reportedly referred the matter to the military for further investigation and possible trial under the Army Act, 1952.[65] Since military trials are secret and not open to the public, what became of the case is not known.

Commitments and recommendations

The Pakistani Government has committed to criminalize enforced disappearances on multiple occasions. However, it has taken no concrete steps to fulfil this commitment.

During Pakistan's first Universal Periodic Review in 2008, Pakistan accepted recommendations made by France, Brazil and Mexico to ratify the Convention on Enforced Disappearances. The Convention, among other obligations, requires enforced disappearance to be made an autonomous crime.

Four years later, during Pakistan's second Universal Periodic Review, the Government once again received a number of recommendations asking it to ratify the Convention and make enforced disappearance a distinct crime. This time, Pakistan "noted" the recommendation on the ratification of ICPPED, but accepted recommendations related to the criminalization of enforced disappearance.

Pakistan is up for review before the Human Rights Council for the third time this year. However, the Government has taken no steps towards implementation of the accepted recommendations.

There have been numerous other calls on the Government to recognize enforced disappearance as a distinct crime. For example, the Government constituted a "Task Force on Missing Persons" in 2013 to provide recommendations on how to deal with the prevalent practice. The Task Force submitted its report in December 2013. While the report has not been made public, members of the Task Force have revealed that one of the recommendations in its report was the criminalization of the practice.[66]

---

[64] *Ibid.*

[65] Nasir Iqbal, *Dawn News*, "Main accused will be court-martialled, govt tells SC", 17 April 2014, accessed at: https://www.dawn.com/news/1100408/main-accused-will-be-court-martialled-govt-tells-sc

[66] See, for example, Faisal Siddiqi, *Dawn,* "Missing Persons", 13 June 2015, accessed at : https://www.dawn.com/news/1187811/missing-persons

UN human rights mechanisms

On 26 February 2013, the United Nations Working Group on Enforced and Involuntary Disappearances (WGEID) published its report on Pakistan, following the WGEID's visit to the country in September 2012.

The report expressed concern at the continuing practice of enforced disappearances in Pakistan and made a series of recommendations to the government. One of the recommendations was that the crime of enforced disappearance be established and included in the Criminal Code of Pakistan in line with the definition given in the Convention on Enforced Disappearances.[67] The WGEID also recommended that Pakistan review its "constitutional, legislative and regulatory provisions, in particular 'preventive detention' regimes and rules allowing for arrest without warrant", and ensure "deprived of liberty shall be held in an officially recognized place of detention."

In its follow up report to the Human Rights Council in September 2016, the WGEID regretted that "most of the recommendations contained in its country visit report have not been implemented", and again reiterated the importance of recognizing enforced disappearance as a distinct, autonomous crime.[68]

Similarly, in its Concluding Observations following the first review of Pakistan's implementation of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment, the Committee against Torture also recommended that Pakistan "should ensure that enforced disappearance is a specific crime in domestic law, with penalties that take into account the grave nature of such disappearances."[69]

The UN Human Rights Committee also made similar recommendations in its Concluding Observations issued after Pakistan's first ICCPR review in July 2017. The Committee expressed concern at the "absence of explicit criminalization of enforced disappearances in domestic law" and recommended Pakistan should "criminalize enforced disappearance and put an end to the practice of enforced disappearance and secret detention."[70] The Committee also urged that Pakistan should also ensure that "all allegations of enforced disappearance and extrajudicial killings are promptly and thoroughly investigated; all perpetrators are prosecuted and punished, with penalties commensurate with the gravity of the crimes…"[71]

---

[67] Report of the Working Group on Enforced or Involuntary Disappearances on its mission to Pakistan, 26 February 2013, UN Doc. A/HRC/22/45/Add.2, p. 20.
[68] Report of the Working Group on Enforced or Involuntary Disappearances, Addendum, Follow-up report to the recommendations made by the Working Group, 13 September 2016, UN Doc. A/HRC/33/51/Add.7.
[69] *Committee against Torture*, "Concluding observations on the initial report of Pakistan", 1 June 2017, UN Doc. CAT/C/PAK/CO/1.
[70] *UN Human Rights Committee*, "Concluding observations on the initial report of Pakistan", July 2017, UN Doc. CCPR/C/PAK/CO/1.
[71] *Ibid*., para 20.

At the time of writing, Pakistan has taken no steps to implement the recommendations related to enforced disappearance made by the WGEID, the Committee against Torture or the Human Rights Committee.

Enforced disappearance in Pakistan: A summary

Estimated number of enforced disappearances	Estimates range from 1256 to more than 18,000.
Regions where most cases reported	National Most cases reported from the Federally Administered Tribal Areas, the Provincially Administered Tribal Areas, Khyber Pakhtunkhwa, Balochistan and Sindh.
Is enforced disappearance a specific criminal offence?	No.
WGEID visit and recommendations	WGEID visited in 2012 (2016 follow-up) WGEID made a number of recommendations including: the crime of enforced disappearance be included in the Criminal Code of Pakistan in line with the definition given in the Convention on Enforced Disappearances.
Emblematic cases	*Mohabbat Shah* (2013) The Supreme Court held: • No law enforcing agency can forcibly detain a person without showing his whereabouts to his relatives for a long period • Perpetrators should be dealt with strictly in accordance with the law • Principles enunciated in ICPPED are applicable in Pakistan in the interpretation of other rights
Commission of Inquiry	Commission of Inquiry on Enforced Disappearance (2010) Commission of Inquiry on Enforced Disappearance (2011-present)
UPR recommendations	Pakistan received a number of recommendations in both UPRs in 2008 and 2013. Pakistan has accepted recommendations to criminalize the practice and noted recommendations to ratify the ICPPED.
Related human rights treaties	ICCPR: Ratified in 2010 CAT: Ratified in 2010 OPCAT: No ICPPED: No Rome Statute: No
Human Rights Committee	First review in 2017: The Human Rights Committee expressed concern at the "absence of explicit criminalization of enforced disappearances in domestic law" and recommended Pakistan should "criminalize enforced disappearance and put an end to the practice of enforced disappearance and secret detention.
CAT Committee	First review in 2017: CAT committee recommended Pakistan should ensure that enforced disappearance is a specific crime in domestic law, with penalties that take into account the grave nature of such disappearances.

Nepal

Context

Nepal faced a protracted internal armed conflict from 1996 to 2006. During the decade-long conflict, gross human rights violations and abuses were committed by the Government, including the then Royal Nepal Army and the Communist Party of Nepal (Maoist). These crimes included a widespread and systematic practice of enforced disappearances.[72]

Conflict-related "disappearances" were reported as early as 1997 and escalated significantly following the declaration of a state of emergency and mobilization of the Royal Nepalese Army in November 2001.[73] According to human rights groups, the fate and whereabouts of more than one thousand possible victims of enforced disappearance are unknown.[74]

A Comprehensive Peace Agreement (CPA) put an end to the conflict on 21 November 2006, with both sides agreeing to hold perpetrators of human rights violations and abuses accountable and provide access to effective remedies and reparation to victims. Under the CPA both parties expressed their commitment to make public, within 60 days after the signing of the CPA, the real names, surnames and address of the people "disappeared" by them and of those killed during the war and provide information thereof to the family members as well.[75] Similarly, the 2007 Interim Constitution also obliged the Government of Nepal to provide relief to the families of the victims who were subjected to enforced disappearance during the course of armed conflict based on the report of the inquiry commission constituted in relation to such persons.[76] More than ten years later, however, these promises remain largely unfulfilled.

---

[72] See *International Commission of Jurists*, "ICJ mission to Nepal urges human rights measures to ensure stability and long term peace", 3 November 2006, accessed at: https://www.icj.org/icj-mission-to-nepal-urges-human-rights-measures-to-ensure-stability-and-long-term-peace/, International Commission of Jurists, Briefing Paper, Disappearance in Nepal: Addressing the Past, securing the future, March 2009, available at: http://nepalconflictreport.ohchr.org/files/docs/2009-03-00_report_icj_eng.pdf; *International Commission of Jurists,* "Authority Without Accountability: the struggle for justice in Nepal", October 2013, at: https://www.icj.org/uk-court-decision-a-victory-in-the-struggle-for-justice-in-nepal/, *International Commission of Jurists*, Briefing Paper, "Compromising Justice: Nepal's Proposed Ordinance on Commission on Disappeared Persons, Truth and Reconciliation, 2012" October 2012, available at https://www.icj.org/wp-content/uploads/2012/10/TJ-Ordinance-Briefing-Paper-FINAL-VERSION.pdf and *International Commission of Jurists*, Briefing Paper "Justice Denied: the 2014 Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act" May 2014, Briefing Paper available at: https://www.icj.org/wp-content/uploads/2014/05/Nepal-TRC-Act-Briefing-Paper.pdf.

[73] Informal Sector Service Center (INSEC) Human Rights Year Book 1997.

[74] See *International Commission of Jurists*, "Nepal: end impunity for enforced disappearances", 29 August 2014, accessed at: https://www.icj.org/nepal-end-impunity-for-enforced-disappearances/

[75] Article 5.2.3 of the CPA.

[76] Article 33 (q) of interim Constitution 2007, available at: http://www.wipo.int/edocs/lexdocs/laws/en/np/np006en.pdf

National legal framework

Enforced disappearance is not yet recognized as a distinct, autonomous crime in Nepal.

On 2 November 2014, Nepal's Ministry of Law, Justice, Constituent Assembly and Parliamentary Affairs tabled five Bills before the Legislative Parliament, including a Bill to amend the Criminal Code. The Bill on the Criminal Code sets out numerous reforms to the laws contained in the National Code 1963 (known as the '*Muluki Ain* 2020'). Among the key reforms, the Bill proposes to criminalize enforced disappearance. The Bill is a positive initiative, however, it falls far short of Nepal's international obligations and the Convention on the Protection of All Persons from Enforced Disappearance (CED) in several respects, including: the definition of enforced disappearance inadequately addresses superior command responsibility for enforced disappearances; it does not expressly make the prohibition against enforced disappearance absolute; the provisions on penalty for enforced disappearance are inconsistent with international standards; and the bill, if enacted, will only be effective from August 2018, with no retrospective effect. [77]

The bill was endorsed by the Legislative parliament on 9 August 2017. It needs presidential assent to come into force.

Commissions of Inquiry

The Government of Nepal responded to widespread calls for accountability for human rights violations during Nepal's conflict by enacting the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act in 2014. Pursuant to the Act, two Commissions of Inquiry (COIs) were established in February 2015. The first, the Truth and Reconciliation Commission (TRC), has a mandate to investigate cases of serious human rights violations, including unlawful killings, torture, including rape and sexual violence, ill-treatment and a range of other serious crimes committed during the conflict. The second is the Commission of Investigation on Disappeared Persons (CoID), which has a mandate to investigate the allegations of enforced disappearances during the armed conflict. The COIs were established initially for a two-year period in February 2015, but in February 2017, their mandates were extended for one more year.

Despite repeated Supreme Court rulings that any mechanism for transitional justice must conform to international standards and lead to criminal accountability for gross human rights violations, [78] these

[77] *International Commission of Jurists*, "Serious Crimes in Nepal's Criminal Code Bill, 2014', March 2017, accessed at: https://www.icj.org/wp-content/uploads/2017/03/Nepal-Serious-Crimes-Bill-Advocacy-Analysis-Brief-2017-ENG.pdf.

[78] See, for example, International Commission of Jurists, "Nepal: Government must implement landmark Supreme Court decision against impunity", 27 February 2015, at URL https://www.icj.org/nepal-government-must-implement-landmark-supreme-court-decision-against-impunity/

Commissions continue to have a legally flawed mandate which, among other problems, allows the Commissions to recommend amnesties for gross human rights violations, including enforced disappearances. In addition, the legislation establishing the Commissions does not provide sufficient guarantees for the independent and impartial operation of the Commissions and the Commissioners, making them vulnerable to political pressures.[79] For these reasons, the UN Office of the High Commissioner for Human Rights (OHCHR) has refused to provide technical support to the COIs, and many donors have withheld financial support.[80]

As of August 2017, the CoID has received around 2922 complaints of alleged enforced disappearances.[81] With just seven months left into its extended mandate, the CoID has only started preliminary investigations into some of these cases. However, according to information received by the ICJ, these investigations raise serious concerns: the investigation teams have inadequate human and financial resources to handle the large number of cases; the appointment process of the investigators is opaque and non-consultative; and the Commissions have taken no measures to ensure confidentiality and security of victims and witnesses who participate in the investigations.

Victims have expressed concern that the investigators in many districts have asked them about their interest in reconciliation, even where there complaints are of serious conflict-era crimes such as enforced disappearance.[82]

In the absence of a law criminalizing enforced disappearance, it also remains uncertain under what legal provisions alleged perpetrators would be tried even if the CoID made recommendations for prosecution.

Jurisprudence

Nepal's Supreme Court has on a number of occasions directed the Government of Nepal to expressly criminalize the act of enforced disappearance in accordance with international standards.

In June 2007, the Nepal Supreme Court in *Rajendra Prasad Dhakal v. Government of Nepal* (2007) ruled on a large number of enforced

---

[79] For a detailed analysis of the legal mandate of the commissions, see *International Commission of Jurists*, "Justice Denied: The 2014 Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act", May 2014, accessed at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Nepal-TRC-Act-Briefing-Paper.pdf.

[80] OHCHR Technical Note: The Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (2014), at URL http://www.ohchr.org/Documents/Countries/NP/OHCHRTechnical_Note_Nepal_CIDP_TRC_Act2014.pdf.

[81] Available at: http://ciedp.gov.np/ne/news.php?id=50

[82] For more information on the operation of the COIs, see *International Commission of Jurists*, "Nepal: transitional justice mechanisms have failed to ensure justice for victims", 8 August 2017, accessed at : https://www.icj.org/nepal-transitional-justice-mechanisms-have-failed-to-ensure-justice-for-victims/

disappearance cases, including 80 *habeas corpus* writs, and ordered the government to immediately investigate all allegations of enforced disappearances. The Court also directed the Government to: criminalize enforced disappearance in accordance with the UN International Convention for the Protection of All Persons from Enforced Disappearance; take action against officials found guilty of perpetrating enforced disappearances; and ensure that amnesties and pardons were not available to those suspected or found guilty of the crime.[83] These elements were reiterated in the Court's judgment in *Madhav Kumar Basnet v. Government of Nepal* (2014).[84]

More than ten years after the Supreme Court's landmark judgment in *Rajendra Prasad Dhakal,* the Court's directives are yet to be implemented. As discussed earlier, a bill criminalizing enforced disappearance was approved by the legislative assembly in August 2017, but the provisions in the bill fails to accord fully with international standards on enforced disappearance and the directives of Supreme Court. For example, the definition inadequately addresses superior command responsibility for cases of enforced disappearances; it does not expressly make the prohibition against enforced disappearance absolute; and the provisions on the penalty for enforced disappearance are inconsistent with international standards.[85]

Commitments and recommendations

The Nepali Government has undertaken to make enforced disappearance a distinct and autonomous offence on multiple occasions. However, it is yet to fulfil this commitment.

During Nepal's first Universal Periodic Review (UPR) in 2011, Nepal received recommendations from France and Slovenia that it criminalize enforced disappearances. Nepal also received recommendations from Sweden, Chile, Spain and others to ratify the International Covenant for the Protection of All Persons from Enforced Disappearance (CED).

Nepal accepted the recommendations on criminalizing enforced disappearance, and claimed the Enforced Disappearance (Offence and Punishment) Bill, 2010, was under consideration of the Legislative Committee of the Parliament. Nepal rejected recommendations on ratifying the CED.

In its 2015 Universal Periodic Review, Nepal once again accepted a recommendation made by Norway to expressly prohibit torture and enforced disappearance as criminal offences under Nepali law. Nepal's delegation responded by claiming that a Bill on Criminal Code submitted

---

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

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

[85] *International Commission of Jurists*, "Serious Crimes in Nepal's Criminal Code Bill, 2014", March 2017, accessed at: https://www.icj.org/wp-content/uploads/2017/03/Nepal-Serious-Crimes-Bill-Advocacy-Analysis-Brief-2017-ENG.pdf.

at the Legislature Parliament has provisions to criminalize the act of enforced disappearance.

As of the time of writing, the bill is pending the President's approval.

UN human rights mechanisms

At the invitation of the Government of Nepal, the Working Group on Enforced or Involuntary Disappearances visited the country from 6 to 14 December 2004, at a time when the armed conflict was ongoing. In its report, the Working Group expressed concern that enforced disappearances in Nepal were "widespread"; that the practice was "used by both the Maoist insurgents and the Nepalese security forces", and that "perpetrators were shielded by political and legal impunity". It made a number of recommendations, including "As soon as possible, Nepalese criminal law be amended to create a specific crime of enforced or involuntary disappearance."[86]

UN treaty monitoring bodies such as the UN Human Rights Committee have also called on Nepal to criminalize enforce disappearances. In its Concluding Observations on Nepal's second periodic report in 2014, for example, the UN Human Rights Committee recommended that Nepal should ensure that all gross violations of international human rights law, including enforced disappearances, "are explicitly prohibited as criminal offences under domestic law".

[86] UN Working Group on Enforced or Involuntray Disappearances, *Report of the Working Group on Enforced or Involuntary Disappearances: Mission to Nepal,* January 2005, UN Doc. E/CN.4/2005/65/Add.1.

Enforced disappearance in Nepal: A summary

Estimated number of enforced disappearances	Approximately 1300 from 1996 to 2006.
Regions where most cases reported	National.
Is enforced disappearance a specific criminal offence?	No. Bill criminalizing enforced disappearances awaiting Presidential assent.
WGEID visit and recommendations	WGEID visited in December 2004 The Working Group made a number of recommendations, including: "As soon as possible, Nepalese criminal law be amended to create a specific crime of enforced or involuntary disappearance".
Emblematic cases	*Rajendra Prasad Dhakal v. Government of Nepal* (2007). The Supreme Court directed the Government to: • Criminalize enforced disappearance in accordance with the UN International Convention for the Protection of All Persons from Enforced Disappearance; • Take action against officials found guilty of perpetrating enforced disappearances • Ensure that amnesties and pardons were not available to those suspected or found guilty of the crime.
Commission of Inquiry	Yes. Commission of Investigation on Disappeared Persons established in 2015 and has started preliminary investigations.
UPR recommendations	Nepal received a number of recommendations to ratify the ICPPED and criminalize enforced disappearance in both UPRs (2011 and 2015). Nepal accepted the recommendations on criminalizing enforced disappearance and rejected recommendations on ratifying the ICPPED.
Related UN Human Rights Treaties	ICCPR: Acceded to in 1991 CAT: Acceded to in 1991 OPCAT: No ICPPED: No Rome Statute: No
Human Rights Committee Concluding Observations	Concluding Observations, 2014: Ensure that all gross violations of international human rights law, including enforced disappearances are "explicitly prohibited as criminal offences under domestic law."

Sri Lanka

Context

The first incidents of enforced disappearances in Sri Lanka were recorded in the wake of the first armed insurrection by the Janatha Vimukthi Peramuna (JVP) against the Government in the early 1970s. The State security apparatus, comprising the security forces and police, upon the orders from the Government responded to JVP violence through Emergency Regulations,[87] which put most arrests and detentions outside the reach of the usual checks and balances afforded to law enforcement. This gave security forces and the police unprecedented power to use powers accorded to them by the Emergency Regulations in the name of security.

By the time of the JVP's second armed insurrection in 1987, serious human rights violations were part and parcel of state counter-insurgency strategy. Successive governments have adopted this counter-insurgency strategy. During the conflict with the Liberation Tigers of Tamil Eelam (LTTE) beginning in 1983, a number persons, mostly Tamils, were allegedly subjected to enforced disappearance by the Governments, and others were "disappeared" by the LTTE and other paramilitary groups. The period towards the end of the war in 2009 witnessed a spike in cases of enforced disappearances of mostly Tamils involved in fighting for the LTTE and those suspected of supporting the LTTE. Notably, Sinhalese journalists from the South critical of the government at the time were also "disappeared". "White van" disappearances[88] became a common "anti-terror" tactic, but paramilitary groups, private individuals as well as law enforcement authorities engaged in similar practices of abductions for ransom and extortion.

Estimates of the number of "disappeared" have varied. Then Foreign Minister Mangala Samaraweera has set the figure at 65,000 cases of "missing persons" filed with Commissions of Inquiry since 1994 (i.e. excluding the "disappearances" during the insurrection periods), while the most recent Commission of Inquiry headed by Maxwell Paranagama set the figure of those who have gone "missing" since 1983 (beginning or the war) at over 20,000, of which at least 5,000 are members of the armed forces engaged in the war. The UN Working Group on Enforced or Involuntary Disappearances, following its visit in 2015, stated that over the years, the Working Group has transmitted communications concerning

[87] Emergency Regulations can be enacted under the Public Security Ordinance by the President "as appear to him to be necessary or expedient in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community." The regulations afford broad powers of arrest and detention to law enforcement authorities. Emergency Regulations were in place in Sri Lanka almost continuously since the early 1970s until it lapsed in 2011.

[88] 'White van abductions' is a phrase coined due to the number of abductions and kidnappings that took place in white-coloured vans that did not bear number plates, operated by shadowy squads, some of whom are alleged members of state security forces and police.

over 12,000 cases of enforced disappearance to the Government, of which 5,750 are outstanding.

A number of past government initiatives responding to enforced disappearances have taken the form of Presidential Commissions of Inquiry (COI), with a total of at least eight COIs constituted since 1991.[89] Consecutive COIs failed to provide answers to families of the "disappeared", as they, by law, are merely fact-finding initiatives that do not confer an obligation on the President to make their findings public or take action. The recommendations in the reports for either further investigation by law enforcement or legal action against alleged perpetrators have therefore not materialised. Over time, COIs have been part and parcel of a structure of State impunity, and have harboured little faith in the affected parties. COIs that have operated at great expense to the public have not fulfilled their purpose, and as the establishment of so many COIs has proven, has played no role in deterring the incidence of disappearance. The Lessons Learnt and Reconciliation Commission [90] (LLRC), a COI appointed in 2010 noted that it was 'alarmed by a large number of representations made alleging abductions, enforced or involuntary disappearances, and arbitrary detention.' Yet, recommendations made by the COI to prevent the reoccurrence of enforced disappearances, were not implemented.

Given the extent of alleged violations of human rights during the final stages of the armed conflict, in June 2010, the UN Secretary-General appointed a Panel of Experts to advise him 'regarding the modalities, applicable international standards and comparative experience relevant to an accountability process, having regard to the nature and scope of alleged violations of international humanitarian and human rights law during the final stages of the armed conflict in Sri Lanka.' The report[91] (more commonly known as the Darusman report) found credible allegations and violations that point to the commission of enforced disappearances.

The change in government at the beginning of 2015 renewed expectations for a fresh approach to transitional justice and reconciliation. President Sirisena during his first few months in office demonstrated interest in moving towards a durable solution to the ethnic issue and address the needs of the war affected. At the UN Human Rights Council in 2015, the Government laid out its proposals for transitional justice, which included, the establishment of a permanent "Office on Missing Persons" (OMP) with a mandate that covers wartime enforced disappearances, including from the insurrection periods. However, almost a year since coming into law,

[89] See International Commission of Jurists, "Post-War Justice in Sri Lanka: Rule of Law, the Criminal Justice System, and Commissions of Inquiry", January 2010, accessed at: https://www.icj.org/icj-releases-report-documenting-the-history-of-impunity-for-human-rights-violations-in-sri-lanka-2/

[90] The LLRC report, November 2011, accessed at: http://docs.wixstatic.com/ugd/bd81c0_45c0a406040640818894ce01c0bd8ca3.pdf

[91] Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, March 2011, accessed at: http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf

the OMP has still not been operationalized. A proposed amendment to the OMP was passed in parliament in June 2017. In July the President assigned the OMP to the Minister of Reconciliation, a portfolio he himself holds- a move that has been questioned for its constitutionality.[92] The OMP remains to be operationalized, as the Minister must declare through a gazette that the office is operational by a certain date. The gazette is yet to be issued.

National legal framework

Enforced disappearance is not recognized as a distinct, autonomous crime in Sri Lanka. The Government signed the International Convention for the Protection of All Persons from Enforced Disappearance in 2015, and ratified the treaty in 2016. Enabling legislation that provides for enforced disappearances to be established as a crime, in draft form, is pending in parliament at the time of writing. Criticisms of the bill have emerged from certain civil society groups. The South Asian Centre for Legal Studies has alleged that the bill "will be unable to satisfy its international obligations in the prosecution of perpetrators of enforced disappearances due to inadequacies in the definition of enforced disappearance in the Bill, the absence of some of the necessary modes of liability to try the crime, and the lack of clarity with respect to the retroactive applicability of the Bill."[93] The widespread or systematic practice of enforced disappearances is also not yet recognized as a crime against humanity in domestic legislation.

Since the Penal Code does not recognize the crime of enforced disappearance, prosecution generally relies on the offences of abduction (in the absence of proof of death), wrongful restraint and wrongful confinement in cases of alleged enforced disappearances. The sanction for these offences may extend to seven years and a fine. However, these offences are inadequate to capture the full gravity of the crime, and even where culpability is found for existing offences, the sentences are grossly inadequate.

Lodging complaints of enforced disappearances has proven troublesome for families of the "disappeared". Due to intimidation and harassment by the police who are unwilling to record the alleged perpetrator in the complaint, families of the "disappeared" are reluctant to approach law enforcement to record their complaints. This lack of strong first evidence serves as an obstacle during trial stage of the case.

The Constitution also guarantees the right to liberty, security of person, right to equal protection of the law, right to a fair trial, freedom from

[92] *Centre for Policy Alternatives*, "Importance of Adhering to the Constitutional and Legal Framework in the Establishment and Operationalizing of the Office on Missing Persons (OMP)", 24 July 2017, accessed at: http://www.cpalanka.org/press-release-importance-of-adhering-to-the-constitutional-and-legal-framework-in-the-establishment-and-operationalizing-of-the-office-on-missing-persons-omp/

[93] *South Asian Centre for Legal Studies*, "Commentary on the Bill titled International Convention For the Protection of All Persons from Enforced Disappearances", 5 May 2017, accessed at: http://sacls.org/resources/publications/reports/commentary-on-the-bill-titled-international-convention-for-the-protection-of-all-persons-from-enforced-disappearances

arbitrary arrest, detention or punishment as well as the prohibition of torture or cruel, inhuman or degrading treatment or punishment. Violations of these Constitutional rights, which are necessarily invoked in cases of enforced disappearance, have been challenged at the Supreme Court as Fundamental Rights petitions.

Furthermore, the jurisdiction of the Court of Appeal in writ applications of *habeas corpus* can be invoked in terms of Article 141 of the Constitution to seek whereabouts of the "disappeared" while in official custody. *Habeas corpus* writs were primarily sought during the period between 1988 and 1990, at the height of the second insurrection. The Court of Appeal under writ jurisdiction is empowered to either order that the individual concerned be produced in person in court or alternatively, to order a court of first instance to enquire and submit a report on the alleged detention.[94] Such cases, however, face many challenges such as law enforcement officers denying taking the person into custody and prolonged delays in the inquiry process.

Jurisprudence

In the 1989 *Embilipitiya* case,[95] the High Court convicted six soldiers as well as the school principal for conspiring to abduct, and abducting and kidnapping the students in order to murder and/or with intent to secretly and wrongfully confine them. The soldiers convicted, however, were fairly junior officers. Despite evidence that the children had been detained for a long period at an army camp that is under the charge of a Lieutenant, he was acquitted on the basis that there was no evidence linking him to the enforced disappearances.[96]

In a 1988 Kandy High Court case,[97] the court adopted an approach inconsistent with judicial attitudes at the time. In similar cases judges had acquitted those accused based on "belated complaint and ostensibly inconsistent testimony."[98] However in this case, the court indicated that if the accused had taken the victim into custody, it was his obligation to produce him in court, which he failed to do. He was therefore convicted under section 356 of the Penal Code for kidnapping or abducting any person with intent to cause that person to be secretly and wrongfully confined.[99]

---

[94] See Kishali Pinto-Jayawardena, *Post-War Justice in Sri Lanka: Rule of Law, the Criminal Justice System and Commissions of Inquiry,* International Commission of Jurists (2010), pp. 46-47, accessed at: https://www.icj.org/sri-lanka-icj-releases-report-documenting-the-history-of-impunity-for-human-rights-violations-in-sri-lanka/

[95] More than fifty Sinhalese students were "disappeared" when a school principal colluded with soldiers at a nearby army camp to abduct children and keep them in custody, never to be seen again.

[96] See *International Commission of Jurists*, "Authority without Accountability: The Crisis of Impunity in Sri Lanka", November 2012, accessed at: http://www.refworld.org/pdfid/50ae365b2.pdf

[97] The case involved a police constable who had, along with unidentified persons, abducted a victim from his house during the second JVP insurrection.

[98] See Kishali Pinto-Jayawardena, *Enforced Disappearances; The Legitimacy of the Law in Deterring Grave Human Rights Violations in Sri Lanka – State of Human Rights Report – 2008*, Law & Society Trust (2009), p 145.

[99] *Ibid, supra fn.2*

In a 2008 Galle High Court case concerning the enforced disappearance of three people,[100] police officers were convicted of unlawful detention while the Officer-in-Charge was also convicted for permitting unlawful detention at the police station where he was in charge. The judgment was important in that it established the concept of superior responsibility where a superior keeps a person in wrongful confinement with knowledge that the person had been abducted or kidnapped.[101]

Despite some very few successes, impunity for enforced disappearances remains pervasive. The number of COIs established to inquire into disappearances have led to limited accountability, with many inquiries concluding that findings were insufficient to pursue criminal investigations and prosecutions. Some COI findings were taken up by the Disappearances Investigation Unit of the Police Department, but the Missing Persons Unit of the Attorney General's department, to which these findings were referred, only succeeded in a few convictions.[102] Given the conflict of interest of the Attorney-General's office - a representative of the State - conducting prosecutions where persons accused are State agents, the 1994 COI recommended an Office of Independent Prosecutor. The recommendation was never implemented.

Commitments and recommendations

In 2010, President Mahinda Rajapaksa established the Lessons Learnt and Reconciliation Commission to investigate the breakdown of the 2002 ceasefire agreement and identify lessons learned to promote national unity and reconciliation. The report made a number of findings, including the need to criminalize enforced disappearances as an individual crime.

The Report of the UN Working Group on Enforced or Involuntary Disappearances following its visit in 2015 made several recommendations to the Government, including to "adopt comprehensive legislation on enforced disappearances without delay" and "swiftly make enforced disappearance a separate offence consistent with the definition contained in the Declaration on the Protection of All Persons from Enforced Disappearance and punishable by appropriate penalties that take into account its extreme seriousness." The WGEID specifically recommended that the offence should cover the various modes of criminal liability, including committing, ordering, soliciting or inducing the commission of, attempting to commit, being an accomplice to or participating in an enforced disappearance, and it should also expressly provide for the sanctioning of command or superior responsibility for such crime. [103]

[100] In this case, six defendants were police officers and the seventh was an Officer-in-Charge.
[101] *Ibid.*
[102] *Ibid, supra n.1,* p. 102.
[103] The Report of the Working Group on Enforced or Involuntary Disappearances on its mission to Sri Lanka, accessed at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/33/51/Add.2

Similarly, the Committee against Torture in its Concluding Observations on Sri Lanka's fifth periodic report recommended that Sri Lanka should accelerate "the process of adoption of legislation that will criminalize enforced disappearances" and ensure that "this crime will be punished with penalties that take into account its grave nature."[104]

As mentioned above, a draft law recognizing enforced disappearance as an autonomous crime is pending before Parliament, and is expected to be passed in the coming months.[105]

[104] Committee against Torture, *Concluding observations on the fifth periodic report of Sri Lanka,* UN Doc. CAT/C/LKA/CO/5, January 2017.
[105] The bill "International Convention for the Protection of All Persons from Enforced Disappearance" accessed at: http://www.parliament.lk/uploads/bills/gbills/english/6035.pdf

Enforced disappearance in Sri Lanka: A summary

Estimated number of enforced disappearances	Estimates range from 20,000 to 65,000 during the civil war
Regions where most cases reported	North and East during the war period as well as the South during the insurrection periods.
Is enforced disappearance a specific criminal offence?	No
WGEID visit and recommendations	Last visit: 2015. Recommendations include to adopt comprehensive legislation on enforced disappearances without delay and to swiftly make enforced disappearance a separate offence consistent with the definition contained in the Declaration on the Protection of All Persons from Enforced Disappearance and punishable by appropriate penalties that take into account its extreme seriousness.
Emblematic cases	High Court Kandy Case No.1284/99 (1988) • Established that failure to produce before courts those who have been unlawfully taken away by Police, is kidnapping or abducting with intent to cause that person to be secretly and wrongfully confined. High Court Galle Case No. 1947/2008 • Established the concept of superior responsibility where a superior keeps a person in wrongful confinement with knowledge that the person had been abducted or kidnapped.
Commission of Inquiry on enforced disappearances	At least eight Commissions of Inquiry on enforced disappearances constituted since 1991.
UPR recommendations	Recommendations include to create an independent mechanism to look into the issue of disappeared persons with its own unique database; investigate and prosecute those responsible for abductions and forced disappearances and increase awareness of the State security services about these offences; and to maintain a public and accessible list of all detainees in the country, including those that were detained for incidents related with the armed conflict, received in 2012. These recommendations were "noted".
Related UN Human Rights Treaties	ICCPR: Acceded to in 1980 ICPPED: Ratified in 2016 CAT: Acceded to in 1994 OPCAT: No Rome Statute: No
Human Rights Committee	Last review: 2014 Committee expressed concern at the slow rate at which cases of enforced disappearances have been investigated and prosecuted and about reports of continued enforced disappearances, including of human rights defenders, journalists, clergymen, aid workers and activists.

Bangladesh

Context

While enforced disappearances took place during the 1971 liberation war, until 2009 there appear to have been only a few isolated cases reported in the country. Since 2009, however, when the Awami League Government led by Sheikh Hasina Wazed came into power, the number of reported enforced disappearances significantly increased. Human rights organization Odhikar has reported over 370 cases of enforced disappearances allegedly committed by Bangladesh law enforcement agencies from 2009 to July 2017.[106] Human Rights Watch recorded over 90 cases of enforced disappearance in 2016 alone.[107] As of July 2017, the UN Working Group on Enforced and Involuntary Disappearances (WGEID) more than 40 outstanding cases from Bangladesh.

The Government, however, has denied the practice enforced disappearance in the country and has refused to cooperate with the WGEID. The Working Group in its 2016 report regretted that "no information has been received from the Government in connection with two general allegations transmitted on 4 May 2011, concerning the alleged frequent use of enforced disappearance as a tool by law enforcement agencies, paramilitary and armed forces to detain and even extrajudicially execute individuals and on 9 March 2016, concerning the reportedly alarming rise of the number of cases of enforced disappearances in the country."[108]

Bangladesh has also not accepted the WGEID's request made in March 2013 to visit the country. The WGEID's reminder, sent in November 2015, has also received no response from the Government.

Since 2009, a large majority of those subjected to enforced disappearance are members of opposition political parties and other political activists. According to families of the people "disappeared", those responsible for the enforced disappearance include law enforcement agencies, specifically members of Rapid Action Battalion (RAB) or the Detective Branch of the Police.

National legal framework

Enforced disappearance is not recognized as a distinct, autonomous offence in Bangladesh. On the rare occasion that police register criminal complaints in such cases, they do so for the crimes of "abduction", "kidnapping" or "wrongful confinement".

---

[106] *Odhikar*, Human rights monitoring reports.
[107] *Human Rights Watch*, "'We Don't Have Him": Secret Detentions and Enforced Disappearances in Bangladesh", July 2017, accessed at: https://www.hrw.org/report/2017/07/06/we-dont-have-him/secret-detentions-and-enforced-disappearances-bangladesh
[108] Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC/33/51, July 2016, accessed at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/167/14/PDF/G1616714.pdf?OpenElement

Sections 362 to 365 of the Bangladesh Penal Code relate to the crimes of "kidnapping" and "abduction". The crime of "abduction" is regulated by section 362 of the Penal Code and is defined as "whoever by force compels, or by any deceitful means induces, any person to go from any place." Section 364 prescribes a punishment of ten years imprisonment for the crime of "kidnapping or abducting in order to murder". Section 365 relates to kidnapping or abducting "any person with intent to cause that person to be secretly and wrongfully confined" and prescribes a punishment of a maximum of seven years' imprisonment. Sections 339 to 348 relate to wrongful confinement, with penalties ranging from one to three years depending on the length of the confinement.

In addition, Article 31 of the Constitution of Bangladesh guarantees the inalienable right "to be treated in accordance with law, and only in accordance with law" and provides "no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law."

Bangladesh is also party to the Rome Statute of the International Criminal Court (ICC), which defines the widespread or systematic practice of enforced disappearance as a crime against humanity.

Like India, in Bangladesh a prosecutor must obtain a prior government "sanction" before lodging any criminal complaint against a state official, permission that is seldom granted. The law also allows both police officers and the Rapid Action Battalion to escape prosecution if they can show that they acted in "good faith."

Families of "disappeared" people have the recourse of filing writs of *habeas corpus* in the High Court Division of the Supreme Court. However, law enforcement agencies rarely comply with the directions of the courts, making this remedy ineffective.

Jurisprudence

In a significant judgment, the Appellate Division of the Supreme Court of Bangladesh in May 2016 dismissed the Government's appeal against a 2003 High Court judgment setting guidelines to prevent the abuse of police powers to arrest without a warrant. The Supreme Court upheld the guidelines ensuring that police powers to arrest without a warrant and magistrate's powers on remand are consistent with constitutional safeguards and international standards on arrest and detention.[109]

[109] These guidelines include: A member law enforcement officer making the arrest of any person shall prepare a memorandum of arrest immediately after the arrest, and obtain the signature of the arrestee with the date and time of arrest; a law enforcement officer who arrests a person must intimate to a nearest relative of the arrestee and in the absence of his relative, to a friend to be suggested by the arrestee, as soon as practicable but not later than 12 hours of such arrest notifying the time and place of arrest and the place in custody; and an entry must be made in the diary as to the ground of arrest and name of the person who informed the law enforcing officer to arrest the person or made the complaint along with his address and shall also disclose the names and particulars of the

In response to the Government's claim that broad police powers are required to ensure security given the rise in terrorism in the country, the Supreme Court held that "fundamental rights, people's life and liberty and their security should be given primacy over other terrorism" and that "on the plea of terrorism, we cannot give a blank check to the law enforcing agencies to transgressing the fundamental rights of the citizens of the country." The Court added that it should be borne in mind that "a terrorist does not lose his fundamental rights even after commission of terrorist activities…he should not be deprived of his precious rights preserved in the constitution." Furthermore, it held that "if we cannot maintain the fundamental rights of the citizens of the country and allow police officers to use abusive power it will be difficult to establish constitutional law and the rule of law in this country at any point of time."[110]

The Supreme Court also cited obligations under the ICCPR and international standards such as the Code of Conduct for Law Enforcement Officials, 1979, and insisted that they must be implemented in their "true spirit".

Even though the judgment does not expressly relate to the practice of enforced disappearance, the Supreme Court's observations and findings necessarily mean that unacknowledged detention or other deprivation of liberty is unlawful in Bangladesh.

Commitments and recommendations

In February 2017, a number of UN human rights experts called on Bangladesh to "halt an increasing number of enforced disappearances in the country." The WGEID said the number of cases has risen from a few isolated cases a few years ago to more than 40 and that the number is continuing to grow. They further said: "independent reports blame the Rapid Action Battalion of the Bangladesh Police for several disappearances and extra-judicial executions, notably of political opponents of the Government."[111]

In its second UPR in 2013, Bangladesh accepted a number of recommendations to ratify the International Convention for the Protection of All Persons from Enforced Disappearance. As on August 2017, Bangladesh has not taken any steps to fulfill that commitment.

In its Concluding Observations following the initial review of Bangladesh's implementation of the International Covenant on Civil and Political Rights

---

relative or the friend, as the case may be, to whom information is given about the arrest and the particulars of the law enforcing officer in whose custody the arrestee is staying.

[110] *Bangladesh v. Bangladesh Legal Aid and Services Trust (BLAST)*, civil appeal no.53 of 2004, 24 may 2016, accessed at: http://www.supremecourt.gov.bd/resources/documents/734650_Civil_Appeal_No_53_of_2004_final_2016.pdf

[111] "UN expert group urges Bangladesh to stop enforced disappearances", 24 February 2017, accessed at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21220&LangID=E

(ICCPR) in 2017, the UN Human Rights Committee expressed concern that "domestic law does not effectively criminalize enforced disappearances" and recommended that Bangladesh "effectively criminalize enforced disappearance".[112]

Enforced disappearance in Bangladesh: A summary

Estimated number of enforced disappearances	370 cases from 2009 to 2016.
Regions where most cases reported	National
Is enforced disappearance a specific criminal offence?	No.
WGEID visit and recommendations	Request made in 2013 and reminder sent in 2015.
Emblematic cases	*Bangladesh v. BLAST* (2016) Supreme Court upheld guidelines ensuring that police powers to arrest without a warrant and magistrate's powers on remand are consistent with constitutional safeguards and international standards on arrest and detention.
Commission of Inquiry	No.
UPR recommendations	In its second UPR in 2013, Bangladesh accepted a number of recommendations to ratify the International Convention for Protection of All Persons from Enforced Disappearance.
Related UN Human Rights Treaties	ICCPR: Acceded to in 2000 CAT: Acceded to in 1998 OPCAT: No ICPPED: No Rome Statute: Ratified in 2010
Human Rights Committee Concluding Observations	First review in 2017 Committee observed "domestic law does not effectively criminalize enforced disappearances" and recommended that Bangladesh "effectively criminalize enforced disappearance."

[112] UN Human Rights Committee, "Concluding observations on the initial report of Bangladesh", UN Doc. CCPR/C/BGD/CO/1, para 19-20.

Conclusion and Recommendations

South Asia has among the highest number of credible and unresolved allegations of enforced disappearances in the world: tens of thousands of cases have been documented in Sri Lanka, Nepal, Pakistan and India, and since 2009, there has also been a surge in enforced disappearances in Bangladesh.

At present, enforced disappearance is not established in law as a distinct crime in any South Asian country. This omission poses a major hurdle to bringing perpetrators to justice. In the absence of a specific legal framework on enforced disappearance, many unacknowledged deprivations of liberty or concealed killings by law enforcement agencies are considered "missing persons" cases.

On the rare occasions where criminal complaints are registered against alleged perpetrators, complainants are forced to categorize the crime as "abduction" or "kidnapping", offences that do not reflect the nature or complexity of enforced disappearance, and often do not provide for penalties commensurate to the gravity of the crime. They also fail to recognize as victims relatives of the "disappeared" person and others suffering harm as a result of the enforced disappearance, as required under international law.

Furthermore, a number of legal consequences, including those that implicate other States and international cooperation in the crime, are not engaged. Among others, these include: the obligation to prosecute or extradite for prosecution those under their jurisdiction accused of enforced disappearance; the duty not to transfer a person to another country where that person would be at real risk of enforced disappearance; the prohibition of amnesties; and the restrictions on statutes of limitation.

While not yet party to the ICPPED (with the exception of Sri Lanka), all five States studied as a part of this report are parties to the International Covenant on Civil and Political Rights (ICCPR) and four of them are party to the Convention against Torture, both of which establish clear legal obligations surrounding the prevention, protection from, and remedy for enforced disappearance. These obligations are reinforced by the UN Declaration on the Protection of all Persons from Enforced Disappearance and repeated consensus UN General Assembly and the UN Human Rights Council resolutions supported by all of these States, committing them to combat the practice.

These legal instruments obligate States to take effective legislative, administrative, judicial or other measures to prevent acts of enforced disappearance, ensure perpetrators are held criminally accountable, and provide effective remedies and redress to victims. The criminalization of enforced disappearance in domestic law is essential to fulfilling these obligations.

While a comprehensive set of reforms, both in law and policy, is required to end the entrenched impunity for enforced disappearances in the region, criminalizing the practice would be a significant first step.

The ICJ makes the following recommendations to the Governments of India, Pakistan, Nepal, Bangladesh and Sri Lanka:

1. Establish enforced disappearances as a specific criminal offence in their penal codes, in line with the internationally agreed definition set out in Articles 2 and 3 of the International Convention for the Protection of All Persons from Enforced Disappearance;

2. To make it effective, ensure that national laws and policies provide for the duty to conduct prompt, thorough, impartial investigations into allegations of enforced disappearance with a view to criminal prosecution of those responsible;

3. Make enforced disappearances a crime against humanity in their criminal law, where carried out as part of a widespread or systematic practice as defined under international law, together with provisions for the investigation, prosecution and appropriate penalties for such a crime;

4. Ensure that subordinates who commit the offence of enforced disappearance cannot use the defense that they were obeying orders or instruction;

5. Ensure that the crime of enforced disappearance is not subject to prescription or statutes of limitations, and recognize that the crime is continuous in nature and persists for as long as the fate and whereabouts of the "disappeared" person is unknown, placing the person outside the protection of the law;

6. Provide in law that authorities must assume investigation and, where warranted, prosecute where the offence is committed on any territory under its jurisdiction, as well as when the alleged offender is one of its own nationals, irrespective of territory. They should similarly provide for authorities to investigate and prosecute alleged offenders present on the State's territory, unless they extradite or surrender that person to another State or international tribunal for prosecution;

7. Ensure that the victims of enforced disappearance, including family members of "disappeared" persons, have access to effective remedies the right to obtain prompt, fair and adequate compensation and other reparation; and they can effectively exercise that right in practice;

8. National legislation should expressly provide that subordinates who receive orders to commit enforced disappearances have the right and duty not to obey those orders;

9. The sentence for enforced disappearance should be commensurate with the seriousness of the offence, in line with offences of similar gravity, such as homicide;

10. Ensure superiors have criminal responsibility for enforced disappearance where such persons knew or ought to have known that a subordinate was committing or about to commit the crime, but failed to take all necessary and reasonable measures to prevent the crime, or to submit the matter for investigation and prosecution;

11. Ensure only competent civilian courts have jurisdiction over alleged enforced disappearances and military courts are barred from exercising jurisdiction over human rights violations allegedly perpetrated by the military; and

12. Ratify or accede to the International Convention for the Protection of All Persons from Enforced Disappearance.

Commission Members

July 2017 (for an updated list, please visit www.icj.org/commission)

Acting President:

Prof. Robert Goldman, United States

Vice-President:

Justice Michèle Rivet, Canada

Executive Committee:

Prof. Carlos Ayala, Venezuela
Justice Azhar Cachalia, South Africa
Prof. Andrew Clapham, UK
Justice Radmila Dragicevic-Dicic, Serbia
Ms Imrana Jalal, Fiji
Ms Hina Jilani, Pakistan
Mr Belisário dos Santos Júnior, Brazil

Other Commission Members:

Professor Kyong-Wahn Ahn, Republic of Korea
Justice Adolfo Azcuna, Philippines
Mr Muhannad Al-Hasani, Syria
Mr Abdelaziz Benzakour, Morocco
Justice Ian Binnie, Canada
Sir Nicolas Bratza, UK
Mr Reed Brody, United States
Prof. Miguel Carbonell, Mexico
Justice Moses Chinhengo, Zimbabwe
Ms Roberta Clarke, Barbados-Canada
Justice Elisabeth Evatt, Australia
Mr Roberto Garretón, Chile
Prof. Jenny E. Goldschmidt, Netherlands
Prof. Michelo Hansungule, Zambia
Ms Gulnora Ishankanova, Uzbekistan
Mr. Shawan Jabarin, Palestine
Justice Kalthoum Kennou, Tunisia
Prof. David Kretzmer, Israel
Prof. César Landa, Peru
Justice Ketil Lund, Norway
Justice Qinisile Mabuza, Swaziland
Justice José Antonio Martín Pallín, Spain
Prof. Juan Méndez, Argentina
Justice Charles Mkandawire, Malawi
Mr Kathurima M'Inoti, Kenya
Justice Yvonne Mokgoro, South Africa
Justice Sanji Monageng, Botswana
Justice Tamara Morschakova, Russia
Justice Egbert Myjer, Netherlands
Justice John Lawrence O'Meally, Australia
Justice Fatsah Ouguergouz, Algeria
Dr Jarna Petman, Finland
Prof. Mónica Pinto, Argentina
Prof. Victor Rodriguez Rescia, Costa Rica
Mr Alejandro Salinas Rivera, Chile
Prof. Marco Sassoli, Italy-Switzerland
Justice Ajit Prakash Shah, India
Justice Kalyan Shrestha, Nepal
Mr Raji Sourani, Palestine
Justice Philippe Texier, France
Justice Stefan Trechsel, Switzerland
Prof. Rodrigo Uprimny Yepes, Colombia

International Commission of Jurists

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00
f +41 22 979 38 01
www.icj.org