

# Enforced Disappearance Commission Truth, Justice and Reparation for Dignity

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## Abstract

*The Commission of Investigation on Enforced Disappeared Persons (CIEDP) mandates pursuance of both retributive justice and restorative justice. The Commission is a last step to conclude Nepal's peace process. The principal objective is to examine the complete truth inviting application from victim's families, investigate actual facts whereabouts the fate of victim and assist to ensure justice for victims, prosecuting perpetrators in crime against humanity and recommending reparation for dignified life. The paper as prepared based upon a practical observation approach rather than theoretical conception, analyzing armed conflict, peace process, advocacy to transitional justice and use of international standards and domestic practices. The CIEDP modalities may lead into office management, application announcement, data interpretation, collection of DNA reference samples to develop a DNA data bank, victim's burial site identification and exhumation and recommendations.*

*Enforced disappearance is a prototypical continuous act. The act occurs when a person secretly arrests, detains, tortures and disappears by conflicting forces, but refuses to acknowledge whereabouts of his or her fate<sup>1</sup>. The dead body decomposes in such a way as not to ever be found. Single woman of disappeared person (man) suffers a lot each and every movement in compared to children and senior citizens. She lacks of self-identity, quasi "wife or widow" in the family or society. Networking tracking methods or snowball techniques and public hearings shall apply for this study. International forensic experts shall be invited to assist in accomplishing the challenging tasks.*

*The CIEDP, Truth and Reconciliation Commission (TRC) was formed from a single Act, 2014. Some believe that TRC is liable more as perpetrator, but the CIEDP as victim-centric. The Act 2014 repeats 26 times of reconciliation and 21 times of amnesty instead of 4-time disappearance and 5-time disappeared persons. No provisions for reconciliation and amnesty are attracted to the CIEDP unlike the TRC. Ruling Nepali Congress has a sharp interest in TRC as it wants to return confiscated private properties from the Maoist cadres. The main opposition, UCPN (Maoist), has given a priority to CIEDP while more than fourth-fifths of its activists have involuntarily disappeared. Thus, the CIEDP is shadowed. Despite such priorities, both CIEDP and TRC are truth-seeking Commissions. A number of international community, forefront victims' families and civil society individuals and institutions have protested the formation of the CIEDP and TRC. A few raised questions on selection procedures, experiences and qualifications of the Commissioners.*

**Keywords:** *Enforced Disappearance, Commission, Truth, Justice, Reparation and Dignity*

## 1. Introduction

“I never tell a lie, they<sup>2</sup> are already killed”.

- Krishna Prasad Bhattarai<sup>3</sup>

Formation of the Commission of Investigation on Enforced Disappeared Persons is a last step towards implementation of the Comprehensive Peace Agreement (CPA) of November 21, 2006, compliant to Interim Constitution 2007 and with respect to the Supreme Court's landmark mandamus on enforced disappearance of June 1, 2007 and January 2, 2014. The high-level truth-seeking CIEDP is formerly established on February 11, 2015<sup>4</sup> as a first step to attain retributive justice and restorative justice mechanisms<sup>5</sup>. The Commission is formed based on Investigation on Enforced Disappeared Persons (IEDP) and TRC Act, 2014. The soul and spirit of the Commission is no less than the objective of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), but Nepal is yet to ratify it. Enforced disappearance is a prototypical continuous act. The act begins at the time of his or her arrest or abduction and that extends for entire period of torture, cruel and inhumane degrading treatment and solitary detention till the crime (disappearance) is not completed. Enforced disappearance is against the criminal offence and a crime against humanity.

The CIEDP has its own Charter. The Charter states that CIEDP was constituted by the Government of Nepal based on the recommendation submitted by the CIEDP and TRC Recommendation Commission, headed by former Supreme Court Chief Justice Om Bhakta Shrestha. The five member Recommendation Commission was formed under the IEDP and TRC Act 2014. The CIEDP is an independent, impartial and accountable high-level Commission.

The objective of the CIEDP is to examine and document a complete truth of cause, nature and degree of disappeared persons; invite applications from victims' families and others and provide identity card to them; investigate actual facts whereabouts the fate of victims and provide post-investigation information regarding enforced disappeared persons to the victims' applicants and to the general public; assist in restoring the victims' dignity in the society testifying his or her belongings or recorded testimonies; and recommend reparations to the victims' families and prosecution against the confirmed perpetrators involved in serious violations or abuses of human rights and crime against humanity.

The paper is analyzed based on the author's active involvement for his studies on the process before, during and after the Maoist-launched People's War and drew lessons from the various interpretations of peace accords and agreements, transitional justice and use of international human rights standards and practices. The personal experience is described either through literature reviews or participation observation of truth-seeking through thorough investigation. Criminal justice and prosecution of crimes are also a great asset to this study. The study purely follows practical approach rather than theoretical conception.

## 2. Background

The CPN (Maoist) initiated the People's War on February 13, 1996 in Nepal, with the main objectives of sweeping away constitutional monarchy, bureaucratic capitalism, feudalistic mode of society - semi-feudalistic and semi-imperialistic - and the historical roots of social inequality. They conducted the armed struggle and kept forwarding a 40-point list of demands concerning nationality, democracy and livelihood, to establish a patriotic, democratic, progressive and prosperous People's Republic of Nepal<sup>6</sup>.

Nine out of these forty demands relate to nationality, eight of those concern Indian power, politics and property. They are: Repeal of the Nepal India Treaty 1950 and all other unequal agreements. Repeal of the Integrated Mahakali Treaty (IMT). Regulate the open border between Nepal and India and prohibit the entry of vehicles with Indian number plates into Nepal. Repeal of Gorkha recruitment. Implement work permits and set up priority to Nepali workers. Abolish monopoly of foreign capital in Nepali economy. Implement self-reliant national economy. And, ban objectionable foreign media and control cultural pollution.

Even though India (mainly Prime Minister Manmohan Singh, Shyam Saran, Sitaram Yechury, SD Muni and a few others) played a pivotal role to end Nepal's armed conflict by creating an environment conducive to a formal dialogue between the constitutional forces and the unconstitutional Maoist party of Nepal, this resulted in an agreement of 12 understandings in New Delhi on November 21, 2005. Thus, the agreement ended the one decade old called People's War.

According to *Nepal Conflict Report 2012* produced by the UNOHCHR, at least 13,000 people were extra judicially killed during February 13, 1996 to November 21, 2006; Maoist launched the People's War where more than 1,302 people have been disappeared. The Government figures stated 17,265 unlawful killings<sup>7</sup> whereas Government is responsible for 63 percent and the Maoists for 37<sup>8</sup>. Another study said that a total of 17,700 people were extrajudicially killed<sup>9</sup> on the serious violations of International Human Rights Law (IHRL) and International Humanitarian Law (IHL)<sup>10</sup>. The *Transitional Justice Reference Archive* (TJRA) recorded over 2,000 incidents of killings<sup>11</sup>. *Comprehensive Peace Accord: Human Rights Status 2006-2011* of National Human Rights Commission stated that 78,689 people were involuntarily displaced and 1,327 forcefully disappeared<sup>12</sup>.

#### Representative Case I

[Pseudonym], a 14 years old girl, was arrested without warrant by the Nepal Army from a relative's home in Kathmandu on the night of November 15, 2003. She was taken to the Bhairabnath Battalion barracks in Maharajgunj where she was interrogated and tortured by Nepal Army personnel. She was illegally detained there until her release on June 3, 2004. With regard to a girl under the age of 16, the RNA Task Force writes in its 2006 report that the then Royal Nepal Army learnt a 14-year old girl from Lalitpur district, had been arrested and detained by the Bhairabnath Battalion "E" Company. She was finally handed over to her family in the presence of civil society and ICRC representatives.

The OHCHR stated that the Task Force report acknowledges that she was arrested by the Bhairabnath Battalion, but did not appear anywhere in the official lists of former detainees given to OHCHR by a Bhairabnath Battalion officer on March 30, 2006. However, the RNA did eventually release her. The OHCHR stated that she allegedly disappeared at the Maharajgunj barracks till seven months.

Source: Nepal Conflict Report 2012

There are no numerical records of arbitrary arrest, detention and torture and other cruel, inhumane and degrading treatment or punishment. State security mechanisms evolved into serious violations of human rights and humanitarian laws. Similarly, the Maoists kangaroo security forces were responsible for human rights

violations throughout the decade of armed conflict. Conflict related killings and violation of international standards occurred throughout all 75 districts except Manang and Mustang district in Nepal. Millions of the people were affected by the armed conflict across the country. More than 200,000 people were displaced from their homes; a large scale of educational institutions was disrupted; basic health and government services were paralyzed; economic hardships were further exacerbated; and chaos and bloodshed were reported daily.

Enforced disappearances (ED) had been the most serious human rights violations and abuses committed during the entire People's War period. The record shows that enforced disappearance was initiated as early as 1997<sup>13</sup>, the following year of the People's War. In 1997, seven cases of enforced disappearances were reported, but 47 in 1998 and 61 in 1999<sup>14</sup>.

The cluster of disappearances first emerged during the Girija Prasad Koirala lead-Government “intensified security mobilization” operation named *Kilo Sierra II* (May 26 to November 7, 1998) in Maoist strongholds such as Rapti-zone, especially in Rukum, Rolpa, Jajarkot, Salyan Districts in the Mid-Western Region, Gorkha in the Western Region and Sindhuli in the Central Region<sup>15</sup>. During *Kilo Sierra II* operation, armed police units were transferred from Kathmandu to these regions and established new police posts. Police units were also mobilized in other districts namely Kailali, Kalikot, Ramechhap, Pyuthan, Achham, Bardiya, Surkhet and Banke in the Mid-Western and Far-Western Regions. The operation resulted in an alarming increase of extrajudicial killings, disappearances, torture and arbitrary arrests<sup>16</sup>.

### Representative Case II

On May 26, 2006, OHCHR submitted investigations report on arrest, detention, torture and keep (cases of) enforcing disappearances to the Prime Minister-cum-Defense Minister. The report states that enforced disappearance individuals arrested by the then RNA were held in Maharajgunj barracks in Kathmandu in 2003 on suspicion of being linked to the Maoists. The reports said 49 alleged cases of enforced disappearance linked to the RNA’s 10th Bhairabnath Brigade, Maharajgunj. Those solitary confinement detentions were consistently denied by the RNA and, being detained, were disappeared. National and international appeals for information and clarification were ignored. Detainees were hidden from inspection. The fundamental guarantee of judicial control over detentions was denied. International standards were rejected. The only official documentation available regarding any of these detentions was prepared when some of the detainees were eventually transferred to civilian custody following *habeas corpus* proceedings.

All the past-victims and witnesses interviewed by the OHCHR consistently describe the cruel, inhuman or degrading conditions in which the detainees were held for up to 18 months, permanently handcuffed and blindfolded. A number of detainees were subjected to various methods of torture or beating by plastic pipes on the lower back, legs and soles of the feet, repeatedly deeding into water and applying electric shocks. In almost all cases, victims of torture, including women, were compelled first to remove their clothing and were subjected to continue speaking abusive and degrading languages. There were acts of torture involving sexual humiliation of both male and female detainees. Detainees were repeatedly threatened with execution and buried in clandestine land.

Former detainees continue to suffer the psychological and physical consequences of torture and ill-treatment. The NHRC on Aug 27, 2006 stated that 66 individuals, including 5 women, have gone missing from the Bairabnath Battalion between 2002 to early 2005.

*Source:* Nepal Conflict Report 2012

Enforced disappearance significantly intensified during the proclamation of State of Emergency (November 23, 2001 to January 29, 2003) that formally mobilized the then Royal Nepal Army to fight against the Maoists<sup>17</sup>. The State of Emergency also promulgated the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) 2001 that consequently intensified with an alarming number of reports of

disappearances<sup>18</sup>. The highest number 277 cases of enforced disappearances were received in 2002<sup>19</sup>.

The Apex Court states that the act of disappearance is a criminal offence<sup>20</sup>. Besides, the judges ordered to provide interim relief to the families of the victims without prejudice. The Supreme Court gave a verdict to form a panel of judges to submit a report after thorough investigation of whereabouts of 49 detainees being detained under the solitary confinement into the Bhairabnath battalion in Kathmandu<sup>21</sup>.

OHCHR Nepal conducted investigations into detention, torture and continuing disappearance of individuals arrested by the then Royal Nepalese Army during 2003-2004. OHCHR confirmed that a total of 49 individuals who were into the custody of the Bhairabnath battalion between September-December 2003 but whoever remained disappeared. Nepal

Government denied any knowledge of their whereabouts. The actual number in this category is significantly higher<sup>22</sup>. A few of them appeared in public in more than a period of a decade.

### 3. Review of Enforced Disappearance

#### 3.1 Definition

Enforced disappearance defines by numbers of international instruments or standards, such as Charter of United Nations, the Universal Declaration of Human Rights, and the Declaration on the Protection of All Persons from Enforced Disappearance (DPPED), 1992, Inter-American Convention of Enforced Disappearance of Persons in 1994 and International Convention on the Protection of All Persons from Enforced Disappearances (ICPPED), 2006.

The Article 1.3 of the Charter of UN states, "...in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Article 3 of the Universal Declaration of Human Rights defines, "everyone has the right to life, liberty and security of person."

#### Representative Case III

Krishna Prasad Adhikari, 26 was a soldier of the Nepal Army, Deudakala VDC of Bardiya district. He was allegedly abducted by the Maoists on July 18, 2004 while he was home on leave. A group of 10-Maoist arrived, blindfolded him, tied his hands behind his back and took him away in the direction of the forested area. His family has not seen him since, but Maoists acknowledged in July 2008 that he was killed. But, no information whereabouts of his body has yet to be unknown. The OHCHR reported that the Maoists failed to cooperate fully into the investigations of disappearances.

*Source:* Nepal Conflict Report 2012

Against Article 4 "all acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties" of the DPPED, the general comment said, "...enforced disappearances occur when persons are arrested, detained or abducted against their will...". However, the Government should disclose the fate or whereabouts of the persons concerned.

The article 1 of the Declaration on the Protection of all Persons from Enforced Disappearance 1992 states, "Any act of enforced disappearance is an offence to human dignity...a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights...".

Article 2 of the ICPPED defines, "enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons ...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."

UN Working Group on Enforced or Involuntary Disappearances on enforced disappearance defines three cumulative elements, "Deprivation of liberty against the will of the person; Involvement of government officials, at least by acquiescence and refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person"<sup>23</sup>. Article 1 of the DPPED defines, "Any act of enforced disappearance is an offence to human dignity".

Article 2 of the IEDP and TRC 2014 Act on enforced disappearances says, "If any person arrested, detained, or taking control of by any other means by any person given the authority by law to arrest, investigate or implement a law or by a security personnel is not allowed to meet concerned persons or concerned persons are not given information as to where, how and in which state he/she is kept in after the time period as provided for in the law that such a

person needed to be presented before the authority that hears the case has elapsed”. It further states, “If any person is arrested or abducted or taken control of or deprived of his/her personal liberty in any other ways by any organization or organized or unorganized group during the armed conflict<sup>24</sup>”.

Usually, a person is arrested by the State security forces in plain clothes or without uniform. Generally, such arrests do not issue any arrest warrant and the document does not furnish any more information that a particular person was arrested. If any organized group captures, takes away and hides a person without acknowledging the state, it is called abduction. In both cases, a person is not allowed to meet any family member or lawyer and is kept in a separate secret place.

Enforced Disappearance is denial of all access to the families and relatives, lawyers and courts and holds outside the protection of the law. The ED is a deprivation derived from the laws of war<sup>25</sup> where a person secretly abducted or involuntarily imprisoned either by a State or armed group and refuses to acknowledge whereabouts of his/her fate. The ED is a complex human rights violation<sup>26</sup>. Enforced disappearance insults the voices of the victims, their families and communities and national and international human rights instruments. Thus, enforced disappearance is a crime against humanity<sup>27</sup>. The enforced disappearance ultimately offends the right to recognition of each person; the right to life, human security and liberty; and right not to be subjected to arbitrary arrest, detention and abduction; solitary confinement; torture and other cruel, inhuman treatment or punishment, humanity and human dignity.

Both IHRL and IHL define enforced disappearance as core elements of human crime. The concerned Government, including its security forces, extends the responsibility of the enforced disappearance under the IHRL, whereas both armed conflicting actors take responsibility of enforcing disappearance under the IHL. The armed group and ruling party shall be held liable for each enforced disappeared person. Besides, the involved actor (alleged perpetrator of both conflict parties) of enforced disappearance shall take their personal responsibility for such offence or crime against humanity.

### **3.2 Crime against Humanity**

The 4th Preambular paragraph of the DPPED defines “...enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity<sup>28</sup>”. However, this paragraph is no longer in line with existing international law due to persuasive evidence of existing international law on this issue that can be found in the international criminal tribunals, hybrid tribunals and in the Rome Statute of the International Criminal Court<sup>29</sup>.

The UN Working Group on Enforced or Involuntary Disappearances (UNWGEID) issues a general comment on crime against humanity which defines, “The notion of crimes against humanity has been recognized for a long time in international law. The connection between enforced disappearances and crimes against humanity was explicitly acknowledged in 1983 Resolution...any act of enforced disappearance is considered, according to this test, to be a crime against humanity<sup>30</sup>”. Similarly, the 6th Preambular paragraph of the Inter-American Convention on Forced Disappearance of Persons 1994 reaffirms, “the systematic practice of enforced disappearances of persons constitutes a crime against humanity<sup>31</sup>”.

Article 18 of the 1996 International Law Commission draft Code of Crimes against Peace and Security for Mankind defines, “A Crime against Humanity means any of the following acts,

when committed in a systematic manner or on a large scale and instigated or directed by a Government or any organization or group”. Any Act means “applicable to all crimes enumerated in the article, among which enforced disappearances<sup>32</sup>”.

Article 7 paragraph 1, 1998 Rome Statute of the International Criminal Court gives a general definition of the enforced disappearance as a crime against humanity. The enforced disappearance “acts where committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack<sup>33</sup>”. Article 5 of the ICPPED 2006 states “The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law”<sup>34</sup>.

The crimes against humanity claims and practices of enforced disappearances are evaluated by the UN Working Group in the light of the criteria listed in the Rome Statute, as interpreted by international and hybrid I tribunals. These are the competent authorities in international, regional or domestic arenas<sup>35</sup>.

General Comment on Enforced Disappearance is as a continuous crime stated by the Working Group on Enforced or Involuntary Disappearances. Various international treaties such as international, regional and domestic tribunals recognize enforced disappearances as continuing acts and continuing crimes. Article 17.1 of the DPPED ensures “Acts constituting enforced disappearance shall be considered a continuing offence as long as perpetrators continue to conceal the fate and whereabouts of persons who have disappeared<sup>36</sup>”.

Enforced disappearance is a prototypical continuous act. The act begins at the time of the disappearance or abduction and that extends for the whole period till the crime is not complete. Enforced disappearance continues until the State admits his or her arrest and detention and releases information pertaining to the fate of whereabouts<sup>37</sup>. The enforced disappearance is a grave threat to the right to life in which the Working Group considers enforced disappearance as a unique and consolidated act, and not a combination of acts<sup>38</sup>.

### **3.3 UN Working Group**

The new mandate of the UN Working Group which is adopted by the Human Rights Council in September 2014 is to assist families in determining whereabouts of their family members who are involuntarily disappeared by the conflicting parties. The Working Group works in a humanitarian capacity to communicate between family members of victims of enforced disappearance, sources of reporting disappearance and the concerned Government. Cases of enforced disappearance shall write full name of the victim: day, month and year of disappearance; place of disappearance; State or State-supported forces considered responsible; information about any search that has been identified<sup>39</sup>.

The Group’s principal purpose is to receive, examine and transmit Government’s reports of enforced disappearance to relatives of conflict disappeared victims or human rights organizations acting on their behalf. The Working Group requests concerned Government to carry out investigations and to inform the Working Group of the results. The Group follows up or evaluates those requests of information on a periodic basis. Enforced disappearance cases remain open in the Working Group’s database until whereabouts of the person is determined<sup>40</sup>.

Along with the adoption by the UN General Assembly in 1992 of the Declaration on the Protection of all Persons from Enforced Disappearances, the Group entrusts monitoring the progress of States in fulfilling their obligations and assists Government with its implementation. Besides, the Group draws the attention of both Governments and non-

governmental organizations on the different aspects of the Declaration. It recommends ways of overcoming hindrances on the course of realization of its provisions. The Working Group has a preventive role which assists States in overcoming problems to the realization of the Declaration. It provides advisory services when requested<sup>41</sup>.

The Working Group does not directly investigate individual cases; adopt measures of protection against reprisals; establish individual or State responsibility in cases of enforced disappearance; judge and sanction; carry out exhumations; grant just satisfaction or forms of reparation; nor deal with disappearance perpetrated by non-State actors<sup>42</sup>.

The Working Group asked Nepal Government to implement the recommendations made by them to criminalize the enforced disappearances in domestic law. The Group held a follow-up visit to Nepal in 2004 to assist the Government in preventing future disappearance and to address the issues of impunity and reparations<sup>43</sup>. The Group welcomed Nepal Government's decision of December 2004 to create a national registry of persons held in detention centers. The Working Group greeted the 2007 decision of the Supreme Court to ensure justice and redress for victims of enforced disappearances<sup>44</sup>.

On May 12, 2006, the Working Group requested to commence a follow-up mission to Nepal. A reminder letter was sent on July 20, 2009, but on October 2, 2009, the Working Group was informed it was not able to extend an invitation to visit the country<sup>45</sup>. The Working Group has transmitted 672 cases of disappearance to the Nepal Government; "of those, 79 cases have been clarified on the basis of information provided by sources, 135 cases have been clarified on the basis of information provided by the Government, and 458 remain outstanding<sup>46</sup>". However, only 136 cases were reported by the Group of which 125 were sent under the urgent-action procedure till the end of 2004<sup>47</sup>.

The Working Group team visited Nepal from December 6 to 14, 2004<sup>48</sup> on the invitation of the Government. The sole purpose of the visit was to discuss the cases of enforced disappearance received and transmitted by the Working Group to the Government of Nepal and to examine the situation of disappearances in the light of international human rights standards<sup>49</sup>. That was the first visit of the Working Group.

In July 2014, the Working Group drew attention to Nepal Government on IEDP and TRC Act 2014. The TRC has provisions to recommend amnesties and reconciliation in favor of perpetrators even in grave violations of human rights and serious violations of international humanitarian law. The Group said, "The special procedures mandate holders called upon the Government to initiate speedily a process of amendment, with an emphasis on the amnesty provisions, and in line with international standards<sup>50</sup>". The Government replied that there is no any blanket amnesty; amnesty depends upon the cruelty, degree of involvement and nature of the crime<sup>51</sup>. The Working Group thanked the Government for its reply and welcomed the decision of the Supreme Court of February 26, 2015 to amend the provision of amnesty in the transitional justice act<sup>52</sup>.

The Working Group and the Committee on Enforced Disappearances coexist side by side and seek to collaborate and coordinate their activities to prevent and eradicate enforced disappearances<sup>53</sup>.

### **3.4 Rights of Conflict Victim**

The conflict victims have not been mentioned in many understanding, peace accord and agreements signed between the Government of Nepal and the Maoist party on various dates starting from May 2006 to 2012. However, article 5.2.3 under the Comprehensive Peace Accord, 2006 said that both Nepal Government and the CPN (Maoist) agree to make public the

information about the real name, surname and address of the people who were disappeared by both sides and who were killed during the war and to inform also the family about it within 60 days from the date on which this Accord has been signed<sup>54</sup>. Article 33.q of the Interim Constitution 2007 obliges the Government of Nepal “to provide relief to the families of victims on the basis of the report of Investigation Commission constituted to investigate the cases of disappearances made during the course of conflict”<sup>55</sup>. In May 2007, the then interim Legislature-Parliament proposed a Bill to amend the Civil Code to criminalize the practice of “enforced disappearances” and “abduction or hostage taking.” That had been a major initiative to conflict victims in compliance of international standards. However, it was heavily criticized by human rights groups and that was ultimately withdrawn<sup>56</sup>.

The definition of a victim is limited to a victim of an intentional violent crime. Victim is a natural person who suffers from harm (i.e., physical, mental, emotional and economic) directly caused by a criminal offence regardless of the familial relationship between them<sup>57</sup>. Article 24 of the ICPED defines the victim means “the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance”. Every victim has the right to know the truth concerning the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. The article has ensured the legal system that the victims of enforced disappearance have the right to obtain reparation<sup>58</sup> and prompt, fair and adequate compensation.

Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. Not only do enforced disappeared victim person get compensation, “anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”<sup>59</sup>. International human rights law recognizes that victims include not only close relatives of the victim, but any person damaged as a direct consequence of the criminal offence<sup>60</sup>.

None of the articles of the IEDP and TRC Act 2014 has directly mentioned victim’s rights except violations and abuses of human rights. Victim’s rights constitute as an important part of the UN and International standards on war crime or armed conflict trials. South Africa’s Truth and Reconciliation Commission<sup>61</sup> deprived to ensure right to the victims as it primarily focused for reconciliation and amnesty. Similar processes were also applied by the Commission for Truth and Friendship in East Timor<sup>62</sup> and Grenada’s Truth and Reconciliation Commission<sup>63</sup>.

The CIEDP urges Government of Nepal to produce victims’ and witness’ rights special law<sup>64</sup> and enforced disappearance act from the Legislative-Parliament as early as possible. There are diverse needs of the victims which are to be understood and addressed timely to respect the voices of them<sup>65</sup>. The article 7.1.3 of the peace accord 2006 agrees to ensure rights of the victim of conflict and the family of disappeared persons to obtain relief. However, some positive decisions are taken by the Supreme Court’s directives on victim’s rights and rights to enforced disappearance of February 26 2015, January 2, 2014 and June 1, 2007. The Government is to be in compliance with the directives of the Supreme Court formulating the laws regarding victim’s rights and enforced disappearance.

#### **4. Supreme Court’s Verdicts**

Numbers of Committees or Commissions were formed to investigate the status of detainees previously. On May 25, 2005, the first inquiry of the enforced disappearance was formed, headed by Baman Prasad Neupane, Joint Secretary of the Ministry of Home Affairs. The Committee was asked to investigate whereabouts the status of 776 disappeared persons. Only

22 percent of them were identified. The remaining 78 percent statuses of other writ petitioners were stated as unknown and unidentified<sup>66</sup>.

On August 28, 2006, the Supreme Court for the first time gave an order to investigate four arrested persons who were disappeared in 1999 and 2002. A three-member Detainees Investigation Task Force (DITF) headed by Appellate Court judge Lokendra Mallick was constituted on August 31, 2006<sup>67</sup> respecting the Court's verdict. The panel member comprises the representative of the Attorney General's Office and the Nepal Bar Association. The specific objective was to investigate the actual status of four enforced disappeared persons namely Rajendra Dhakal, Bipin Bhandari, Dil Bahadur Rai and Chakra Bahadur Katuwal<sup>68</sup>. Finally, a comprehensive report was submitted to the Supreme Court.

The report of the Detainees Investigation Task Force 2007 said that, after the thorough investigation, the DITF found that Chakra Bahadur Katuwal was taken into custody by the Army and died because of severe torture. All three Rajendra Prasad Dhakal, Bipin Bhandari and Dil Bahadur Rai were arrested by security forces and disappeared in a planned way<sup>69</sup>. However, the report failed to address whether the disappeared persons were alive or already dead.

Nevertheless, the DITF 2007 report recommended a high level disappearance investigation commission to be formed to impartially and independently investigate the cases of those enforced disappearances during the armed conflict. The report said that the disappearance is a crime against humanity. The retroactive law is to be enacted. It should issue appropriate judicial directives to stop the repeated arbitrary arrest and detention. The report further suggests that "those involved in the violation of human rights should be trial according to law and that the victim family should be given appropriate compensation"<sup>70</sup>.

Every conscious people welcome the landmark verdict of the Supreme Court of June 1, 2007 over a large number of enforced disappearance cases including 80 *habeas corpus* writs<sup>71</sup>. The

**Supreme Court forwarded Criteria for Commission of Investigation on Enforced Disappeared Persons (June 1, 2007)**

"[...] the jurisdiction of the commission is clear; that the commission's inquiry does not replace the jurisdiction of the Court; that persons nominated for such a commission are appropriate and competent for such work; that the terms of office and conditions of service and facilities are provided for; that representation of women and other castes or communities are guaranteed; that the powers, duties and functions of the commission are prescribed in the Act itself; and that, in considering the nature of the problem, investigations could be initiated on the basis of information received from any source. It is also necessary to have provisions on continuous inquiry until the status of an allegedly disappeared person is determined; the availability of protection and security for victims, witnesses, plaintiffs, advocates and investigator, so as to solicit their continuous assistance in the probes; the right and opportunities for the victims to record their statements and raise their concerns, and if desired, to keep their statements confidential if so called for; and the power of the Commission to conduct searches and to question all persons who it deems necessary. It is also necessary to ensure the means and resources necessary for such commission to accomplish its goals".

Source: *Habeas Corpus* writ files on behalf of Rajendra Prasad Dhakal

Apex Court ordered the Government to enact a separate high-level Investigation Commission to criminalize the past enforced disappearances in line with international human rights law and international humanitarian law mentioned in the Charter of United Nations and Human Rights Council. The Council is a forum that empowered to prevent violations or abuses, discrimination and inequity protecting the vulnerable victims exposing perpetrators<sup>72</sup>.

OHCHR-Nepal also welcomes the Supreme Court's ground-breaking decision of June 2007 where a large numbers of pending enforced

disappearance were finalized through single verdict. Lena Sundh, the then Representative of

the UN High Commissioner for Human Rights in Nepal, said “The Supreme Court’s historic decision is a highly positive development and must be fully and promptly implemented. It is hoped that this decision will boost the efforts of victims and their families in finding out what happened to their loved ones and in their pursuit of justice, as well as in ending impunity for persons responsible for serious human rights violations in Nepal”<sup>73</sup>.

The Court ordered urgently incorporating the provisions of law related to the rights of detainees (access of the lawyers and families to the detainees, the right of the detainees to be informed of the reason of his detention), the judicial remedies available to both detainees and their families, the right to compensation, an appropriate complaint filing mechanism, a flexible statute of limitations that does not hinder the investigation process, the creation of formal detention centers, humanitarian treatment while in detention; adequate documentation of detention conditions, name, title, address and other relevant details of the person who ordered detention, the right of the families to know all conditions of the detainee and adequate record keeping regarding detainees’ mental and physical condition<sup>74</sup>. The Court further said, “It is also equally important to enact a provision that uphold the international standard that pardon cannot be granted to persons who should be prosecuted for their alleged involvement in the act of disappearance...”<sup>75</sup>.

The Apex Court issued directive to the respondents (Government of Nepal, the Ministry of Home Affairs, and the Office of the Attorney General) to undertake the necessary act for the protection of disappeared persons that include provisions for a Commission of Investigation to scrutinize the causes of disappearance and the status of disappeared persons. The Investigation Commission shall sufficiently be powerful to carry out in-depth and comprehensive inquiries of said persons and submit a report on their findings. Respondents shall initiate criminal investigations on the basis of the report and initiate prosecutions based on propriety and necessity<sup>76</sup>.

To pursue the Court’s order, the Government formed a three-member high-level Commission for the Investigation of Disappeared Citizens headed by former Justice Narendra Bahadur Neupane on June 26, 2007. Two members were Raman Kumar Shrestha and Sher Bahadur KC<sup>77</sup>. As, the Commission was formed based on Panchayat Investigation Commission Act 2026 (1969), the decision was condemned from all corners. The international community, including human rights groups, severely criticized the team as inconsistent, inadequate and contrary to the spirit of Supreme Court judgment and international standards.

Against the submission of draft bill on Enforced Disappeared Persons in May 2007, prominent human rights organizations, namely Amnesty International, Asian Federation against Involuntary Disappearances, Human Rights Watch, International Center for Transitional Justice, International Commission of Jurists, Asian Centre for Human Rights and Nepalese human rights organizations, demanded its amendment<sup>78</sup>. Finally, the Parliamentary Committee on Law, Justice and Legislative Relations was compelled to withdraw the draft bill in November 2007 and ordered Government to draft a new disappearance bill respecting the Supreme Court’s decision and international human rights and humanitarian standards.

One year later, on November 16, 2008, the Maoist Chairman Prachanda-led Government made public a new draft on Enforced Disappearance of Persons (Crime and Punishment) Bill 2062 (2008). The bill proposed five-year jail term and up to Rs 500,000 (US \$5,000) as fine to the main perpetrators who were involved in enforced disappeared persons. And the assistants of such crimes will be subjected to half of the jail term and half the fine amount of the main perpetrator. Those involved in disappearing children and women will have to face an additional two-year jail term.

The bill had made a provision to establish a high-level five-member independent commission to prove the cases of disappearance. A recommendation committee shall be formed headed by the Chairman of the Constituent Assembly (CA) and two incumbent ministers. The committee shall recommend five-members for the commission comprising human rights activists, lawyers, conflict experts, psychologists and sociologists with at least 10 years of professional experience<sup>79</sup>. The Ordinance formally criminalized enforced disappearance as a crime against humanity, providing reparation to the victims and their families and prosecution to the perpetrators<sup>80</sup>. Even though, it neither met international human rights standards nor Supreme Court directives<sup>81</sup>. On the active support of the international community and human rights organizations, the victims and their families initiated tireless campaigning and lobbying against the Ordinance<sup>82</sup>.

The Enforced Disappearance of Persons (Crime and Punishment) Bill was never tabled for discussion in the CA-legislative parliament<sup>83</sup>. The Government passed from the cabinet as an Ordinance on February 5, 2009, bypassing second and third largest parties namely Nepali Congress and CPN (UML) and national and international human rights organizations. Thus, prominent human rights organizations submitted a strong joint appeal to the Nepal Government on August 30, 2009 to bring the draft bill fully in line with international human rights standards. The proposed numbers of amendments to the draft bill were:

- “Defining ‘enforced disappearance’ consistently with the internationally recognized definition and recognizing that, under some circumstances, the act of enforced disappearance amounts to a crime against humanity;
- Defining the modes of individual criminal liability, including responsibility of superiors and subordinates, consistent with internationally accepted legal standards;
- Establishing minimum and maximum penalties for the crime of enforced disappearance and for enforced disappearance as a crime against humanity;
- Ensuring the independence, impartiality and competence of the Commission of Inquiry into Enforced Disappearances;
- Ensuring that the Commission of Inquiry is granted the powers and means to effectively fulfill its mandate;
- Ensuring that all aspects of the Commission’s work respect, protect and promote the rights of victims, witnesses and alleged perpetrators;
- Ensuring that the recommendations of the Commission are made public and implemented”<sup>84</sup>.

The above-mentioned recommendations were based on international law and standards related to the investigation and prosecution of enforced disappearances and jurisprudence of regional and international human rights bodies, treaties, and international declarations and practice of international and national criminal jurisdictions<sup>85</sup>. The amendment memorandum of understanding was signed by the Accountability Watch Committee, Advocacy Forum Nepal, Asian Federation against Involuntary Disappearances, Human Rights Watch, International Center for Transitional Justice, the International Commission of Jurists and the Informal Sector Service Centre<sup>86</sup>.

On July 1, 2009, the International Coalition against Enforced Disappearances wrote a letter to the Prime Minister Madhav Kumar Nepal and urged his Government help to prevent enforced disappearances establishing a truth-seeking commission for justice, punishing the perpetrators and providing reparations to the victims and their families<sup>87</sup>. PM Nepal addressed to the UN General Assembly on September 26, 2009 in which he reiterated that the Nepal Government was ready to set up a Commission to Investigate Enforced Disappearance. The International

Commission of Jurists 2009 requested to suspend the promotion of Major General Toran Bahadur Singh until a credible, impartial and independent investigation is conducted<sup>88</sup>. He was accused of crimes including torture and enforced disappearance under international law.

Having some cosmetic amendments into the Enforced Disappearance bill, the Government tabled it into the legislative-parliament on December 4, 2009. The punishment of enforced disappearance was amended to increase to 7 years and identified five types of reparations such as restitution, compensation, rehabilitation, satisfaction and guarantee of non-repetition. However, 24 lawmakers put forward 77 amendment proposals, but that bill was finally sent to the Legislative Committee of the CA for further consideration<sup>89</sup>. A series of amendments to definition, punishment and limitation on the bill was forwarded by the Transitional Justice Advocacy Group<sup>90</sup> on the active support of prominent human rights organizations<sup>91</sup>.

In April 2011, after completing section-wise discussion at the Legislative Committee of the CA, the bill was almost ready to table for adoption. Due to differing opinions amongst committee members on provisions of amnesty, reconciliation and definition of human rights violations, the bill failed to table in the legislative-parliament. To resolve the differences in the Disappearance bill, a five-member sub-committee was formed. The Sub-Committee was further expanded with two additional members in May 2011. However, the 10-day time frame at first and repeated extensions of times failed to submit the draft. Arguments and their own priorities between the Nepali Congress and the Maoist party delayed to resolve the differences. Nepali Congress wished to form the TRC, first owing to reconciliation and amnesty provisions as well as to return the property confiscated by the Maoists, but the Maoists preferred to form Enforced Disappeared Commission as most of their victims were their cadres<sup>92</sup>.

On November 1, 2011, the political parties signed a historic 7-point agreement. The article 4 of the agreement stated that the bill on the IEDP and the TRC shall be endorsed by the legislative-parliament building consensus in the spirit of reconciliation as per the Comprehensive Peace Accord<sup>93</sup>. A high-level political Task Force was formed to finalize the

**Key Elements of the Supreme Court on Enforced Disappeared Persons Ordinance (January 2, 2014)**

- “[...], the Supreme Court ruled that amnesties for crimes under international law and gross violations of human rights are impermissible (para 34).
- [...] these two commissions have to be established in line with prevailing human rights standards (para 20).
- [...] commissions should not encourage forced “reconciliation” between victims and perpetrators (para 56. A).
- [...] statutes of limitation cannot apply to serious crimes (para 56. C).
- [...] amend Nepalese criminal law to allow private investigation and prosecution to ascertain victims' right [...] (para 56).
- [...] 'victims' as principal actors, the centrality of their role in the amnesty and reconciliation process [...] all fundamental provisions to be included in the commissions' mandates (para 56.D)”.

*Source: Advocacy Forum-Nepal, TRIAL and REDRESS: June 2014*

bill. In January 2012, the Task Force submitted a Suggestion Paper that proposed a merger of the Disappearance Commission and TRC emphasizing truth-seeking. Continuing contradictory views were expressed for granting amnesty on the serious nature of human rights violations. In May 2012, Government decided to withdraw two pending CIEDP and TRC bills for the purpose of merging

two Commissions<sup>94</sup>. The process stalled while CA-Legislative Parliament was dissolved by the then PM Baburam Bhattarai on May 27, 2012, announcing a fresh election date for November 22, 2012<sup>95</sup>. On August 27, 2012, the cabinet of the caretaker Government endorsed an Ordinance of transitional justice mechanism and forwarded it to the President for his final approval<sup>96</sup>. The Ordinance includes a provision of pardon for those involved in extrajudicial

killings and enforced disappearance during the armed conflict<sup>97</sup>. The single ordinance for the formation of Disappearance and Truth and Reconciliation Commissions was prepared neither based on prevailing international human rights standards, practices and previous historic political and peace agreements. Nor did it follow the Supreme Court directives. Despite protests and criticisms by National Human Rights Commission, victim groups and human rights defenders, the President approved the bill in seven-month or on March 14, 2013.

Two human rights defenders filed a petition at the Supreme Court on March 24 challenging the Ordinance. On April 1, 2013, a single bench of Justice Sushila Karki issued the interim order<sup>98</sup>. On January 2, 2014 the Supreme Court handed over its decision regarding a transitional justice mechanism. It annulled the Ordinance as unconstitutional and directed the government to amend its text properly following international standards and practices<sup>99</sup>.

Following the directives of the Supreme Court, the Government appointed a 5-member draft committee chaired by Raju Man Singh Malla, Secretary within the Office of the Prime Minister<sup>100</sup> on the course to establish for a Commission on Enforced Disappearance and Truth and Reconciliation Commission<sup>101</sup> on April 3, 2014. While the UCPN (Maoist), the main opposition party, protested to the government on unilateral formation of a draft, the government reformed a 6-member task force on April 6 comprising two representatives of each Nepali Congress, UML and Maoist parties with the mandate to finalize the CIEDP and TRC bills. Second-rank leaders or committee members were: Barsha Man Pun and Khim Lal Devkota of the UCPN (Maoist), Radheshyam Adhikari and Ramesh Lekhak of NC and Pradip Gyawali and Agni Kharel of the UML<sup>102</sup>.

The Nepali Congress Government finally tabled an IEDP and TRC Bill at the Legislative Parliament on April 18. The Bill was adopted by the CA on April 25. The CA members had tabled 18 amendments on 119 points of the Bill, but were forced to withdraw them by their respective party leaders<sup>103</sup>. The Bill finally became an Act while the President promulgated it on May 11, 2014.

The Supreme Court directed the establishment of a separate Commission to Investigate Enforced Disappeared Persons while the UNOHCHR submitted credible evidence of systematic enforced disappearances and testimonies and tortures in Bhairabnath Battalion<sup>104</sup> to the Maoist activists under the command of Colonel Raju Basnet in 2003<sup>105</sup>. Even though the same Maoist leader Dr. Baburam Bhattarai-led Government promoted alleged war crime criminal Basnet to Brigadier General on October 4, 2012<sup>106</sup>. Human Rights Watch says, "Cabinet decision reinforces impunity<sup>107</sup>". Bhattarai took that decision just to remain in the Prime Minister for longer period against the wishes of his party cadres and severe criticism of the international community and the civil society organizations and individuals in Nepal.

It is to be remarkable that the leaders of the ruling class and the Maoists were protected or enjoyed even in the armed conflict, but people of countryside were very much suffered. The same countryside people are being suffered in the name of peace and constitution-making nowadays.

Moreover, single woman of disappeared person (man) suffers a lot each and every movement in compared to children and senior citizens. She lacked of self-identity, quasi-"wife or widow" in the family or society. The severe suffering finds particularly in countryside. While head of the household disappeared, the same woman has been responsible to care children, senior citizens and other works. The position of single woman in poor, marginalized, vulnerable and disadvantaged is further deteriorated in the village. No effective psycho-social counseling or services has reached there yet. Reparation to the family of disappeared person and prosecuting to the confirmed perpetrator<sup>108</sup> are cry in a thin voice.

## 5. NEFAD's Critical Engagement

The National Network of Families of the Disappeared and Mission (NEFAD) is a national common platform of district-based associations of families of disappeared and missing in Nepal. It aims to provide support, advocacy and relief for the families of the disappeared and missing. The NEFAD is an independent network organization that serves the needs and wishes of the conflict-affected family members. Network has now been spread up to 68 districts, almost all over Nepal. It has already welcomed the Supreme Court's mandamus on enforced disappearance of February 26, 2015, January 2, 2014 and June 1, 2007 and has urged the Government and both Commissions to respect and follow the Supreme Court's directives. It wishes to create an environment conducive to the formation of victim-centered Transitional Justice in Nepal.

The author himself has done a preliminary assessment review on the data of enforced disappearance collected by the Peace Ministry. There are a total of 1,506 enforced disappeared cases that cover 69 districts of 75 ranging east to west and south to north in Nepal. The male comprises 91 per cent whereas 77 per cent persons were killed by the state security forces, 13 per cent by unidentified groups and 10 per cent by the Maoists. The highest number, 248 (16.5%) persons, were disappeared from Bardia district alone followed by 122 (8%) in Banke, 114 (7.5%) in Dang and 97 (6.5%) in Rolpa districts. Other major 16 districts that attain more than 20 cases of enforced disappearance are: Kanchanpur (42), Kavre (40), Salyan (39), Siraha and Chitwan (37), Sindhupalchowk (35), Kailali (33), Baitadi and Dhading (29), Kalikot (28), Gorkha (27), Nuwakot (26), Kathmandu (25), Baglung (24), Morang (23) and Ramechhap (20).

The NEFAD conducted a national-level meeting in Bardiya district in 45 days of the formation of the CIEDP. It invited almost all representatives from its district networks which finally came up with 9-point Bardiya Declaration as pre-requisites to engagement with the CIEDP.

First, the CIEDP is to respect the Supreme Court verdicts and internationally established principles of transitional justice. Two, the NEFAD asked the Commission to ensure a victim centric approach following with detailed program schedules. Third, the Commission is to engage with NHRC and other concerned agencies. Fourth, NEFAD also wishes to share CIEDP's engagement with conflict victims. Fifth, it sets Commission's priority on the issues related to transitional justice mechanism. Sixth, development of rules and regulations and operation procedures shall be incorporated in consultation and participation with victims' families. Seventh, it solicits to have access to all documents developed by the CIEDP regarding protection of victim's families and witnesses. Eighth, the Commission is to create an institutional and physical environment to ensure victim rights of all types such as children, persons with disabilities, women and victims of sexual violence. Finally, a support mechanism is to be developed to address families' practical requirements and legal-administrative challenges.

In response to NEFAD's 9-point critical engagement, the CIEDP shall truly follow all directives instructed by the Supreme Court of various dates. The formation of a CIEDP is a last step of transitional peace mechanism; it will pursue all theoretical and practical human rights standards and instruments. The program schedule has already been developed. The CIEDP shall not only engage with NHRC and security forces, but it is improving its relations with international communities and other related experts and institutions. The IEDP and TRC Act 2014 has given a mandate to work with conflict victims alone, giving top priority to end the transitional justice mechanism.

The CIEDP website ([www.ciedp.gov.np](http://www.ciedp.gov.np)) is under construction, but many documents are already linked in it. The draft Regulations, duly submitted to the Government for its revision and approval, has already mentioned environment conducive in favor of children, persons with disabilities, women, victims of sexual violence and senior citizens. Protection to victim's families and witnesses shall also be a sole concern of the CIEDP. The Code of Conduct (CoC) and Terms and References (ToRs) of the CIEDP have already stated more issues and concerns than the NEFAD put forward. It means there is no longer any hesitation to accept the NEFAD's critical engagement. However, confident building measures are to be developed based on direct or indirect and formal or informal dialogues when required.

## 6. Working Modalities

The virtual realities given below may help to understand truths about what happened during the tenure of the armed conflict. Based on true bitter incidents and facts, the CIEDP has developed its working modalities. The following are just emblematic case studies.

**Virtual Reality I:** It was twilight, difficult to recognize newcomers. Someone knocked at the door and asked if the household head or targeted family member was at home. A voice from inside asked, "Who are you?" Someone replied, "It is us; please open the door. We have a little work with you." Recognizing the voice, those inside opened the door. The visitors entered and seized the embattled family member from the house. Visitors at first asked him/her to go out with them. She or he normally resisted for not wanting to go with them fearing torture, other cruel inhumane and degrading treatment and possible extrajudicial killings or disappearances. The family members screamed, begging them for not to take him or her. The visitors assured them she or he will return the next day or soon after preliminary inquiries and took him/her outside. As the family member tried to protect him or her, the group threatened them with possible retaliation. The visitor group forcefully took out from the house. The arrested or abducted person never returned.

**Virtual Reality II:** It was nearly sunset or dusk, inviting evening; a man was waiting for public transportation in a lonely place. A vehicle stopped in front of him. A few unfamiliar civilian-dressed personnel got down, surrounded and asked him to go with them for some purposes or inquiries. He simply protested and denied going with them. He argued, "Who are you? What have I done wrong? Why should I go with you? ..." keep seeking some help from the surroundings. No one was there. Or none of the stranded or being watched dared to ask, "What are you doing? Leave him out" fearing possible action from them. He was involuntarily taken, dragging and pushing him into the vehicle<sup>109</sup>. As soon as he entered into the cab, he was blindfolded by mask. His hands were forcefully pulled back and handcuffed. He was severely threatened to be killed if he made noise or shouted, asking for help. Public reported his clandestine arrest and someone filed a petition into the Court. Despite Court's verdict to make him public, he was disappeared for ever.

**Virtual Reality III:** A person is secretly arrested, detained, tortured and disappears by armed forces from any place and they keep refusing to acknowledge the whereabouts of his/her fate. The forces try hard to decompose, burying his/her dead body in such a way not to ever be found.

The CIEDP shall use certain tools and techniques to collect DNA and burial remains. The working methods or modalities of the CIEDP may lead into eight-step or phase: Internal Office Management, Announcement of Application, Interpretation of Data, Rapid DNA Testing (Collecting DNA Reference Sample), Identification of Victim's Body Burial Site, Exhumation, Recommendation and Reparation.

The internal management leads to formation of required rules and regulations, office set-up, fulfillment of needed officials, collection of secondary data and literature reviews. This process took more time than expected. The entire Commissioner was compelled to stay in a single room more than six-month of its formation. Besides, CIEDP was without a secretary for about 100 days of its establishment. The absence of administrative and financial head Secretary paralyzed entire office management works of the CIEDP.

However, the CIEDP had already prepared numbers of papers including procedures of meetings, development of code of conduct to Commissioners, organization and management, policy development to hiring experts and terms and references. The regulations of the CIEDP have already been completed and put forward to the concerned ministry for its revision and final approval from the Government of Nepal. Similarly, the CIEDP has already completed the survey of disappeared persons' data reviewing the literatures. Author's paper on *Enforced Disappearance Commission: Roles of International Community* is available in Lund University's link<sup>110</sup>.

Submission of the application to the families of victims shall be announced by electronic-print media, radios, televisions and others. The CIEDP shall also request for political parties, civil society, National Network of Families of the Disappeared and Mission (NEFAD) and other NGOs, government officials and social workers to support the endeavors. Asking support from the GoN, an official shall be deployed at each VDC in 20 districts<sup>111</sup> as a focal person. A focal person shall collect details of the complaint of a victim's family and shall assist to fill-up the forms. A receipt shall also be provided to the applicant **and copy of all collected documents with stamped of the CIEDP shall be given to the applicant in the next interview.**

A Special Desk Officer (SDO) shall be established either at District Peace Committee and District Development Committee or Chief District Officer office. A Training of Trainers (SDOs) shall be provided prior to announcement of application. If the application date is lost in local areas, ie, village development office (VDC), the applicant shall submit application at the concerned District Office six months before the working deadline of the CIEDP and TRC Act 2014 mentioned. Such District Desk Office shall be established in all disappeared persons' affected districts. Special attention shall also be provided to the districts or VDCs as required. Temporary offices shall be established either within the premises of VDC or other local government offices, mobilizing their own officials. That process shall be one kind of action research.

The preliminary investigation of victims' application shall be studied on the course of interpretation of data. The researchers shall develop a short profile of each victim annulling the duplication. The *tameli* (postponement) of application shall be done if process of application shall be found weak or enough testimonies could not be furnished. If required documents were found either by researcher of the CIEDP or applicant himself or herself, the postponement of application shall be reopened.

A rapid DNA testing for reference samples (collection) shall be conducted for each victim's family based on the preliminary findings. For this, trained technicians with kits shall be mobilized to collect biological material, mainly blood samples of the disappearance person's biological family members (father-mother or daughter-son)<sup>112</sup>. If close family members could not be found, blood from close relatives shall also be taken to use reference samples to confirm individual characteristic identity of possible bodies. Finally, a DNA data bank shall be developed of each disappeared person on the course to matching suspect with evidence received after the extraction of DNA from exhumation remains.

To identify disappeared person's burial sites, informal-formal and indirect-direct dialogue shall be held with families or relatives of victims, witnesses, former security officials, individuals or institutions working with victims' families, political parties, civil society and among others. It is to be noted that many of the victims' dead bodies who were forcefully arrested, tortured and disappeared by the state security forces may be found within the premises of army barracks or police posts, and nearby such barracks and posts and bodies were already burnt during armed conflict. But, the Maoists abducted, tortured and disappeared persons may be found in the jungle of a nearby community. In regards to extract the right information from the informant, there is a provision of reward. Article 35 of the Act 2014 said, "The Commission may reward the person, organization, agency or institution or investigating authority who supported the Commission in matter of enquiry conducted by the Commission to investigate truth and facts pursuant to this Act".

An audio-visual lab shall be established to hold digital video conference (DVC) in general, to record (audio-visual) interview of the alleged perpetrators and witnesses, to make a documentary film of victim's family and possible burial sites and to document the process of exhumation among others. The audio-visual lab shall assist in maintaining secrecy and in reducing the security risk. Audio-visual equipments and experts shall also be needed to accomplish the required tasks. Even authority of the CIEDP shall involve conducting public hearings in complex cases of disappearances. Exhumation at possible burial sites is a part of the transitional justice mechanism. It is a lengthy process. A well-equipped forensic lab with high-skilled technicians shall be established before to initiate the field research. The team shall be comprised of archaeologist, anthropologist, post-mortem doctor, pathologist and other concerned specialists.

The article 14.6 of the Act 2014 stated that, if disappeared person has already been killed and dead body has already been buried, the Commission shall carry out the exhumation of such places. Similarly, the article 32.1 of the Act said that the Commission shall accomplish the tasks of hiring native or foreign experts or specialized agencies of the concerned field, as per necessity.

There are no problems in conducting exhumation at the burial sites in the jungle, but it is very much challenging to identify and exhume the burial sites committed by the state security forces. Networking tracking methods or snowball techniques shall be followed to trace and identify the possible burial sites for the exhumation. The DNA of the human remains found in the course of exhumation shall be extracted and matched with a data bank of concerned victims. Finally, the remains shall be delivered for victim's family to conduct last rites and rituals.

The Government shall be responsible to provide all required personnel to the Commission. If government fails to provide needed personnel, the CIEDP shall hire short term-long term national and international researchers-consultants to accomplish the task. At the end of the research, a complete report shall be submitted to the Government to take action against the perpetrators and provide reparation to the victims' families.

A rapport and good coordination shall be developed with the concerned International Community, Ministries and Institutions either directly by the CIEDP or by seeking support from the line-Peace Ministry. The active participation of all with full accountability shall subsequently conclude transitional justice or the last step of peace process of Nepal.

## 7. Critical Appraisal

With respect to criminal prosecutions, Amnesty International identified 40 truth commissions established around the world between 1974 and 2010. Of the 40 commissions examined, only three: South Africa, East-Timor and Grenada, had given the power to grant immunity even for serious human rights violations under international law in connection with truth-seeking processes<sup>113</sup>. Nepal's two truth-commissions, namely Commission of Investigation on Enforced Disappeared Persons and Truth and Reconciliation Commission, are the newest ones formed in February 2015. There are no provisions of reconciliation and amnesty into the CIEDP, but the TRC has them in the Act 2014.

On February 26, 2015, the Supreme Court annulled the amnesty and reconciliation provisions of the transitional justice. Responding to the appeal filed by 234 conflict victims in June 2014, the Supreme Court curtailed the discretionary power to grant amnesty for war crimes and crime against humanity. The verdict formally ends the provision that perpetrators would get acquitted without trial<sup>114</sup>. Earlier, the TRC could recommend amnesty to perpetrators except in cases of rape and other serious human rights violations. Article 2.j of the IEDP and TRC Act, 2014 stated that murder, enforced disappeared persons, rape and other sexual violence fall under the category of serious violation of human rights. Article 22.4 of the Act 2014 provision, "the Commission may encourage the perpetrator and the victim for reconciliation" has been cancelled.

There is a single IEDP and TRC Act, 2014. Because of experiences, nature of works, title of the Commission and mandates incorporated into the Act, some people believe that TRC is liable more to perpetrator rather than to ensure justice and reparation for dignified citizens (to the victims and victims' families). CIEDP is victim-centric owing to its reserve nature, low profile activities and mandate. The Act 2014 repeats 26 times of reconciliation and 21 times of amnesty instead of 4 times disappearance and 5 times disappeared persons. No provisions of reconciliation and amnesty attract to the CIEDP. There is sharp interest of Government, political parties and security forces between the two Commissions. Ruling Nepali Congress has a sharp interest in TRC as it wants to return confiscated private properties from the Maoist cadres. The main opposition UCPN (Maoist) has given a priority to CIEDP while more than fourth-fifths of its activists are involuntarily disappeared by the security forces.

The CIEDP is shadowed due to Government's low priority to it in reality. The policies and programs and budget of 2015-2016 have been stressed upon to provide all necessary resources and equipment to the CIEDP, but Nepal Government allocated just 20 per cent of actual cost put forward by Rs. 270 million Nepalese currency. The Peace and Reconstruction Minister, in our first meeting on February 13, 2015, stated that they are ready to provide whatever the resources and assistance the CIEDP needs. He also asked for not having to take any financial support from the donor agencies.

The article 14.6 of the IEDP and TRC Act 2014 has mentioned right to exhumation stating, "If the Commission is convinced of the fact that a person made to disappear has already been killed and the dead body has been buried in a particular place, the Commission may ascertain the reality by carrying out the exhumation of such place". Similarly, article 14.7 of the Act stress, upon carrying out exhumation and if the Commission finds the dead body or human remains of a victim, there is a provision to conduct DNA and autopsy tests to identify the concerned victim. No standard guidelines and protocols relating to exhumation and autopsy have been formed. The exhumation, DNA extract and test and autopsy are expensive, time consuming and require international forensic experts. The following example shall be praiseworthy to understand more on this.

Five youths were arrested from Janakpur on October 8, 2003, but disappeared since then. A complaint was lodged at the National Human Rights Commission (NHRC) Nepal immediately after they disappeared. The Commission recommended to the Government of Nepal for the legal action against erstwhile senior Nepal Police officers<sup>115</sup>. The District Attorney of Dhanusha district issued directives to the District Nepal Police Office, Dhanusha on November 25, 2009 to exhume the dead bodies. The NHRC Nepal initiated exhumation 10 months later in September 2010 only. A total of 64 trenches, 9 extensions and 4 blocks had been excavated at the suspected sites. For DNA tests, 19 reference blood samples were collected from biological family members. Human remains of all five dead bodies were examined at the Forensic Department of Tribhuvan University Teaching Hospital, Maharajgunj. Those remains were sent to Laboratory of Biology Department, Forensic Medicine Hjelte Institute of University of Helsinki, Finland for DNA tests in 2011. The final report of DNA test arrived in July 2014 only<sup>116</sup>.

The above-mentioned case study took more than a decade. A number of cases of enforced disappearance shall also be exhumed by the CIEDP. A credible forensic lab is to be established before identification of burial sites and exhumation initiated. International forensic experts shall be hired. However, Government of Nepal, principally Finance Ministry, denied allocating money to establish a forensic lab. **On the whole, present Finance Minister Dr. Ram Saran Mahat is not sensitive to conclude Nepal's peace process. It might happen because of his clandestine links with alleged or suspicious perpetrators. The devalued of CIEDP-mandated works by Minister Mahat shall derail the entire peace process.**

Article 18 of the Act 2014 mentioned the provision to establish an audio-video lab to conduct public hearing on the cases of enforced disappearance, but the budget did not allocate for this in the 2015-2016 fiscal year. This is just a small example of Government of Nepal bias against the CIEDP. If the CIEDP derailed its works in the lack of resources, equipments and experts, the author shall compel to initiate hunger strike "fast unto death" and file a case in the Supreme Court for mandamus to ensure justice to the victim's families.

The work of the CIEDP is very much tough and challenging. It may even invite inquiry for former Prime Ministers, Ministers, bureaucrats, leaders and security personnel who were taking position during a decade tenure of the Maoist-launched People's War. Because of high risks, the officials are hesitating to join with the CIEDP. Financial incentive shall need to encourage the officials. The Government should be proactive on this provision too.

The Accountability Watch Committee (a forum of victims), some lawyers and human rights defenders and a few civil society leaders issued a statement on May 13, 2014 calling for a boycott of the Commissions, unless the main areas of concern victims and human rights organizations are addressed in line with international standards and practices<sup>117</sup>. Both CIEDP and TRC are truth-seeking Commissions. A number of international community, forefront victims' families and civil society individuals and institutions protested the formation of the CIEDP and TRC because of their vested zest and zeal. A few raised questions on selection procedures, experiences and qualifications of the Commissioners. **They criticize mainly due to the appointment of *afno manchhe* (leaders' trusted cadres) rather than *ramro manchhe* (qualified, independent and neutral professionals).**

Why did some civil society organizations become critical of supporting CIEDP and TRC? There are numbers of reasons. First, a large number of international human rights individuals and institutions want to correct their mistakes and wrongdoings from Nepal and the forthcoming Commission in Sri Lanka, learning negative consequences from South Africa. It is remarkable that a great number of alleged perpetrators were white people in comparison to black. The amnesty and reconciliation provisions protected the elite people in South Africa. Thus, they have a fear whether a repetition shall occur in Nepal too. Second, some individuals and institutions shall have general desire to be in compliance with international standards, practices and domestication for them. Third, the forefront civil society actors could not be

come out from their existing superior complexity, self-centeredness and jealousy. Fourth, a few transitional justice veterans wish to appoint experienced and qualified commissioners to accomplish the tasks successfully.

Fifth, a few international organizations who are working in the name of restoring peace and justice protested the CIEDP fearing of losing their jobs from NGOs if transitional justice ends in Nepal. Lastly, some of them want to make truth-seeking commissions as independent, neutral, high-moral character and professional bodies. They want to initiate both retributive justice and restorative justice in this transitional Nepal.

The CIEDP is not formed respecting peace accord and Interim Constitution, but from the pressure of the international community and human rights organizations and a strong network of the victim's families. Thus, Nepal Government desires to form the Investigation of Enforced Disappearance Persons for not having truth and justice, but to calm the international community and victim's families.

Nepal is yet to ratify the UN Convention 2006 to stop the acts of forceful disappearance to persons. Even though Nepal is compelled to ensure international human rights provisions and some of the laws are related to ban enforced disappeared persons. UN Human Rights Committee stressed that transitional justice mechanisms cannot rule out criminal prosecution of serious human rights violations. It recommended that Nepal Government follow transitional justice in accordance with the Supreme Court mandamus.

Enforced disappearance has a long, neglected and complex history. The CIEDP discovers and reveals the truth of actual facts whereabouts the fate of disappeared persons. It assists seeking justice in prosecuting perpetrators related for war crime and crimes against humanity. It also assists in redressing justice for victim's families, recommending reparation to live and let live with full dignity.

Dignity is a quality of being worthy of honor. The concept of dignity expresses the innate idea of rights to valued, respected and ethical treatment for each and every citizen of the nation. Thus, the dignity is a non-derogatory, inalienable and inherent right. The prime duty of state is to respect, protect and promote human dignity without distinction of caste, ethnicity, race, sex, age, religion, class, geography, color and profession.

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## Endnotes

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\*Note: **Dr. Pathak** is a Commissioner in the Commission of Investigation on Enforced Disappeared Persons (CIEDP). Literatures and analyses expressed in this paper do not necessarily represent the views of the Commission, but author alone. Mr. Pathak highly appreciates the editing works of a copy editor **Dr. Bruce Cook**, USA.

<sup>1</sup> Pathak, Bishnu. May 18, 2015. *Nepal's Enforced Disappearance Commission: Roles of International Community*. TRANSCEND Media Service.

<sup>2</sup> 'they' refer to Enforced Disappeared Persons

<sup>3</sup> During 1996 to 1999, a total of 142 persons were disappeared after taken into custody by the security forces. While Civil Society members visited the then Prime Minister of Nepal in August 22, 1999 and asked him to respect the international human rights standards and humanitarian practices, Bhattarai said so. This is just a representative example of how elected government was irresponsible to respect the life, liberty, security and dignity of the sovereign citizens. Pathak, Bishnu. 2005. *Politics of People's War and Human Rights in Nepal*. Kathmandu: BIMIPA Publications. Also, Sapkota, Dhani Ram. 2008. *Enforced Disappearance in Nepal and the Responsibility of Protect in the Context of International Law*. A Thesis Submitted in Partial Fulfillment of the

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<sup>4</sup> more than eight years of the CPA was signed.

<sup>5</sup> Both justices complement each other

<sup>6</sup> Pathak, Bishnu. 2005. *Politics of People's War and Human Rights in Nepal*. Kathmandu: BIMIPA Publications.

<sup>7</sup> Asian Human Rights Commission. February 15, 2012. *NEPAL: Families of the disappeared in a legal and emotional limbo*. That statement was submitted by the Asian Legal Resource Centre (ALRC), a non-governmental sister organization of the AHRC.

<sup>8</sup> Pathak, Bishnu. March 8, 2008. *Human Rights and Nepal Police*. Kathmandu: CS Center. p. 2.

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<sup>16</sup> Ibid

<sup>17</sup> Pathak, Bishnu. 2005. *Politics of People's War and Human Rights in Nepal*. Kathmandu: BIMIPA Publications.

<sup>18</sup> In November 2001, the Nepal Government proclaimed a state of emergency promulgating the Terrorist and Disruptive (Control and Punishment) Ordinance (TADO). TADO was re-promulgated into the Terrorist and Disruptive Activities (Control and Punishment) Act, 2002 (TADA) on April 10, 2002 initially with a validity of two years, till 2004. Subsequently, it was re-enacted five times through Ordinances each lasting for six months. The last re-promulgation was March 27, 2006 which expired on September 26, 2006..

<sup>19</sup> UNHR. October 8, 2012. *Nepal Conflict Report*. Geneva: OHCHR. p. 18-19.

<sup>20</sup> Dhakal, Rajendra et al. Jan 21, 1999. *The Government of Nepal (writ no.3575) Disappearance Case*. OHCHR

<sup>21</sup> Human Rights Yearbook 2007. 2008. *Enforced Disappearances in Nepal*. Kathmandu: INSEC

<sup>22</sup> UNOHCHR. May 2006. *Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks*. Kathmandu.

<sup>23</sup> UN Working Group on Enforced or Involuntary Disappearances. Online Available in <http://www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx> (Accessed on August 13, 2015)

<sup>24</sup> *Commission of Investigation on Enforced Disappeared Persons and Truth and Reconciliation Commission Act 2014*.

<sup>25</sup> Finucane, Brian. 2010. "Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War". *Yale Journal of International Law*. Vol. 35, p.171.

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<sup>27</sup> Pathak, Bishnu. May 18, 2015. *Nepal's Enforced Disappearance Commission: Roles of International Community*. TRANSCEND Media Service.

<sup>28</sup> A/RES/47/133. December 18, 1992. *Declaration on the Protection of All Persons from Enforced Disappearance*. United Nations General Assembly.

<sup>29</sup> General Comment on Enforced Disappearances as a Crime against Humanity. Online Available in [www.ohchr.org/Documents/Issues/Disappearances/GCas\\_crime\\_against\\_humanity.pdf](http://www.ohchr.org/Documents/Issues/Disappearances/GCas_crime_against_humanity.pdf) (Accessed on July 17, 2015)

<sup>30</sup> Ibid

<sup>31</sup> Inter-American Convention on Forced Disappearance of Persons, June 9, 1994. Online Available in [www.cidh.oas.org/Basicos/English/Basic11.Disappearance.htm](http://www.cidh.oas.org/Basicos/English/Basic11.Disappearance.htm) (Accessed on July 17, 2015)

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<sup>33</sup> A/CONF.183/9. July 17, 1998. *Rome Statute of the International Criminal Court*. United Nations.

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- <sup>39</sup> UN Human Rights. Working Group on Enforced or Involuntary Disappearances. Online Available in <http://www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx>
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- <sup>51</sup> Ibid.
- <sup>52</sup> Ibid.
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- <sup>58</sup> The reparation obtains from restitution, rehabilitation, satisfaction, restoration of dignity, reputation and guarantees of non-repetition
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- <sup>71</sup> International Commission on Jurists. March 2009. *A Briefing Paper on Disappearances in Nepal: Addressing the Past, Securing the Future*. Kathmandu.
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- <sup>79</sup> Kathmandu Post. November 17, 2008. *Disappearance bill to be retroactive*. Kathmandu: Kantipur Publication
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<sup>104</sup> On May 26, 2006, the UN OHCHR Nepal published a report on investigation of disappeared persons arrested by the Nepal Army and held in Maharajgunj barracks in Kathmandu in 2003 on suspicion of being linked to the Communist Party of Nepal (Maoist). The report says, "...at least 49 persons, and probably a significantly higher number, remain disappeared." During interrogations, officers stopped asking questions related to any of these former detainees. Most former detainees interviewed by OHCHR believe that these detainees were executed. However, few of them are now on public. For more see, Pathak, Bishnu and Chitra Niraula. September 15, 2006. *Ratification of International Criminal Court to Just Peace*. Situation Update 8. Kathmandu: Peace and Conflict Studies Center.

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<sup>108</sup> Determine by Courts and National Human Rights Commission, Nepal

<sup>109</sup> Without or with private number place

<sup>110</sup> <http://www.sasnet.la.se/content/bishnu-pathak-report-nepals-enforced-disappearance-commission> (Accessed on August 22, 2014).

<sup>111</sup> Where large number of enforced disappearance persons' are found by the survey. They are: Bardia, Banke, Dang, Kanchanpur, Kavre, Salyan, Siraha, Chitwan, Sindhupalchowk, Kailali, Baitadi, Dhading, Kalikot, Gorkha, Nuwakot, Kathmandu, Baglung, Morang and Ramechhap.

<sup>112</sup> Child inherits half of the DNA from its parents.

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<sup>115</sup> Senior Superintendent of Police Chuda Bahadur Shrestha, Superintendent of Police Kuber Singh Rana, Major Anup Adhikari of Dharapani Army Barrack of Number 9 Field Battalion, and the Chief District Officer of Dhanusha District Rewati Raj Kafle. NHRC Nepal. July 23, 2014. *A Brief Report on the Exhumation at Tallo Godar of Dhanusha District*. Janakpur.

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