



**ह्युमन राइट्स  
एण्ड जस्टिस सेन्टर**

**The Use of Declaration of Death in Cases of  
Enforced Disappearance  
Regulating the Status of Disappeared Persons in Nepal**

**Submission from the Human Rights and Justice Centre  
to the Commission of Investigation on Enforced Disappeared Persons**

**March 2018**

With the support of TRIAL International





The **Human Rights and Justice Centre (HRJC)** improves access to justice for victims of human rights violations in Nepal such as genocide, torture, enforced disappearances, extrajudicial executions and sexual violence.

The HRJC provides free legal support to victims regardless of their background, religious or political affiliation. Through a network of trusted Nepalese human rights lawyers, it litigates cases domestically and internationally to end impunity and enforce the rule of law

**TRIAL International** is a non-governmental organization fighting impunity for international crimes and supporting victims in their quest for justice.

TRIAL International takes an innovative approach to the law, paving the way to justice for survivors of unspeakable sufferings. The organization provides legal assistance, litigates cases, develops local capacity and pushes the human rights agenda forward.



## **Introduction**

1. The Human Rights and Justice Centre (hereinafter “the HRJC”) wishes to bring to the attention of the Commission of Investigation on Enforced Disappeared Persons (hereinafter “the CIEDP) the particular issue of the use of declarations of death in cases of enforced disappearance.
2. Under international law, enforced disappearance is characterized by the concealment of the fate and whereabouts of the victim. Because of the continuous and complex nature of this particular crime, enforced disappearance does not solely affect the disappeared person, but also subjects relatives to anguish and distress that may amount to torture or inhumane treatment.
3. Furthermore, the impossibility of establishing the legal status of disappeared persons leads to social and legal consequences for the families. An adequate legislative framework is indeed necessary to regulate matters related to, among others, social welfare, family law, and property rights.
4. In Nepal, the existing legal framework does not provide for the status of victims of enforced disappearance. As such, the settlement of administrative issues is conditioned upon the declaration of the death of the disappeared person.
5. In addition to re-victimizing families by forcing them to officially accept the death of their loved-ones and to arbitrarily determine a date, recourse to the presumption and declaration of death may have a negative impact on the investigation into the crime and prosecution of those responsible.
6. The present policy paper addresses the legal status of disappeared persons in Nepal through a brief analysis of existing gaps in the legislation and the consequences for relatives (Section I). Two emblematic cases are then presented, in order to underline the necessity to regulate the situation of victims of enforced disappearance (Section II). Finally, international standards on the matter as well as examples of other domestic practices are introduced (Section III).

### **I. Determining the status of disappeared persons in Nepal: the existing gaps in domestic legislation and the consequences for families**

7. Despite the recognition of enforced disappearance in the context of the transitional justice process and its mechanisms, the existing Nepalese legal framework does not address, nor does it provide for, a specific regulation of the status of victims<sup>1</sup> of this particular crime under international law. This has relevant implications in criminal law, as well as in fields such as social welfare, financial matters, family law and property rights. Hence, relatives of disappeared persons face a number of legal and social consequences that only add to the severe anguish suffered as a result of the enforced disappearance and the impossibility to learn the truth on the fate and whereabouts of their loved ones.

---

<sup>1</sup> For the purposes of the present policy paper, pursuant to international jurisprudence and law, “victim” means the disappeared person, as well as any individual who has suffered harm as the direct result of an enforced disappearance. See, among others, Art. 24, para. 1, of the International Convention for the Protection of All Persons from Enforced Disappearance.



8. While in 2007 and 2009 the Supreme Court issued two prominent decisions in relation to enforced disappearance in which it orders the government to undertake the necessary measures to enact adequate legislation for the protection of disappeared persons<sup>2</sup> and for the determination of their whereabouts<sup>3</sup>, it never addressed the problems faced by relatives or, in general, the regulation of the legal status of disappeared persons and their families.
9. Officially determining the status of their loved ones is however a step that most relatives must undertake in order to resolve a wide range of potential administrative issues arising from the enforced disappearance. Those may include regulating the status of marriage for the remaining spouse; implementing rights to inheritance; and dealing with management of property.
10. In the absence of a legal framework providing for situations of absence due to enforced disappearance, the sole provisions available to the families of those who have been forcibly disappeared are to be found in laws regulating the presumption and the recording of death. The Evidence Act of 2031 (1974) and the Birth, Death and Other Personal Event Registration Act of 2033 (1976) include the applicable provisions.
11. Section 32 of the *Evidence Act, 2031* (1974), on the “Burden of proving that a person is alive” after he or she goes missing<sup>4</sup>, states that:

“Provided that, when the question is whether a person is alive or dead, it is proved that such person has not been heard of for a period of twelve years by those who would naturally have heard of him/her if he/she had been alive, the burden of proving that he/she is alive is shifted to the person who claims it.”<sup>5</sup>
12. Hence, 12 years after the “triggering event” (i.e. the involuntary disappearance of the person concerned), relatives must assume the burden of proof and submit evidence that demonstrates the individual is still alive. Section 32 of the Evidence Act has however been regularly interpreted as establishing the presumption of death after 12 years of absence.<sup>6</sup>
13. While no application of the above-mentioned provision has yet occurred in relation to enforced disappearance committed by the State or the Maoists during the armed conflict, the existing Nepalese framework regulating the statutory period for the presumption of death of an individual is limited to Section 32 of the Evidence Act. In this context, if the Peace Accord were to be used as a date of reference to calculate the 12 years after which disappeared persons would be declared dead<sup>7</sup>, the presumption of death for all individuals forcibly disappeared during the conflict would be established in 2018.
14. With one of the constitutive elements of enforced disappearance being the concealment of the fate and whereabouts of the victim, relatives are however not in possession of any information concerning their loved ones. They are therefore unable to prove whether those who have been disappeared are alive and are actually calling

---

<sup>2</sup> *Rajendra Dhakal and others vs Government of Nepal*, Writ No. 3575, Supreme Court decision, 1 June 2007.

<sup>3</sup> *Baburam Giri and others vs Government of Nepal*, Judgment No. 8096, Supreme Court decision, 2 April 2009.

<sup>4</sup> The word “missing” is here used to clarify the distinction between enforced disappearance and other situations in which an individual is unaccounted for (e.g.: kidnapping, but also due to natural catastrophes) as a result of an involuntary disappearance. Section 32 does not provide for individuals who are the victims of enforced disappearance.

<sup>5</sup> Section 32 of the Evidence Act, 2031 (1974).

<sup>6</sup> *Umadevi Pokharel vs Lekhnath Pokharel* - not enforced disappearance case CLARIFY THE FOOTNOTE.

<sup>7</sup> Such decision was implemented in Bosnia and Herzegovina in order to determine a date after which the presumption of death would be established.



on authorities precisely to establish this: unveiling the truth on the circumstances of the enforced disappearance, the progress and results of the related investigations and the fate of the disappeared person, whether dead or alive.

15. It should be noted that an almost automatic presumption of death by courts and administrative offices at the end of the 12-year period carries a risk of guaranteeing impunity for those responsible, as it implies that an adequate and effective investigation into the disappearance may be dropped, and that the subsequent clarification of the fate and whereabouts of the victim may not be achieved. In addition, forcing the relatives to 'accept' the death of their loved-ones in spite of the uncertainty surrounding their fate contributes to re-victimizing the families of those forcibly disappeared.

16. Reference to the recording of deaths can be found in Section 2(a) of the Birth, Death and Other Personal Event Registration Act, 2033 (1976), which states that:

"Unless the subject or context otherwise requires, in this Act 'Personal Event' means birth, death, marriage, divorce and migration (change of residence) of a person."<sup>8</sup>

17. In addition, the Birth, Death and Other Personal Event Registration Act provides that:

Section 4. Information Regarding Personal Event: "(1) It shall be duty of the following persons to give information to the Office of the Local Registrar in the prescribed form for the registration of the personal event within thirty-five days of the occurring of such event in the following circumstance:

Notice of the birth or death, by the head of the family, and in his/her absence, from amongst one of the adult members of the family"<sup>9</sup>.

Section 9. Validity of Registration: "The registration certificate issued pursuant to Section 6 shall be the evidence of occurring of the personal event and such evidence may be submitted in any Office or Court and used in any personal transaction (activities).

Provided that, if it is proved that a person has received registration certificate by submitting false details, such registration certificate shall be revoked."<sup>10</sup>

18. The Nepalese legal framework thus does not envisage "absence due to enforced disappearance" as a personal event that could constitute the object of an official registration by relatives under the Birth, Death and Other Personal Event Registration Act. In fact, neither the event nor the date of the disappearance can be recorded, and families of the disappeared have no choice but to request the provision of a death certificate upon the delivery of false information to the registrar.

19. The legal status of a spouse, the right to inheritance, and the management of property are a few of the numerous issues that push families of forcibly disappeared individuals to request a death certificate.

20. It should be noted that many families have expressed the desire to be granted certificates of disappearance, instead of certificates of death, which would ensure the

---

<sup>8</sup> Birth, Death and Other Personal Event Registration Act, 2033 (1976), Section 2(a).

<sup>9</sup> *Ibid.*, Section 4(a).

<sup>10</sup> *Ibid.*, Section 9.



official recognition of the enforced disappearance of a relative, and would clarify the relationship between the disappeared individual and the certificate holder.<sup>11</sup>

21. In the absence of such document, many wives of forcibly disappeared men have faced numerous problems in establishing the relationship with their husband. As the conflict allowed for a context in which marriages with members of the Maoists would occur without the knowledge of the spouses' relatives, the wives of those who were disappeared encountered economic hardship and social exclusion after the peace accord. Faced with the impossibility to ascertain their relationship with the disappeared, and register the marriage, many women have been denied access to the social benefits they should be entitled to, in particular within the framework of the Interim Relief Program.
22. Even in situations where the relationship between two spouses does not need to be established following the disappearance of the husband, women face multiple social challenges. Often blamed for the disappearance of their husbands, they are simultaneously questioned for their persistence in obtaining the truth about the fate and whereabouts of the disappeared, and accused of enjoying the company of other men. Furthermore, many are the wives of disappeared men who decline to take off the visible symbols of their status as married women, such as the bangles on their wrists and *sindhur*.<sup>12</sup> Members of their community may criticize such choice, perceived as reluctance to be deprived from the higher status associated with marriage, and ostracize these women.<sup>13</sup> Such social stigma only adds to the anguish and psychological pain suffered as a result of the disappearance.
23. The provisions relating to civil law in the Nepalese legal framework are only developed in reference to a deceased person, with no consideration for individuals who have disappeared. For instance, provisions concerning property law state that inheritance is passed onto the inheritor after the bequeathed of the property is dead.<sup>14</sup> The property jointly owned by a family but which is registered in the name of the disappeared person cannot be transferred to his or her spouse until the death is established.
24. Similarly, the Banking and Financial Institution Act, 2063 B.S. prevails over the Muluki Ain. More particularly, Section 81 regarding claims on the bank deposit of a deceased states that the transfer of a bank account is only possible after delivering a death certificate issued by the concerned government authority on the proof of death.<sup>15</sup>
25. With regard to the application of the international standards concerning the status of victims of enforced disappearance, although Nepal has not ratified the International Convention on the Protection of All Persons (hereinafter, "the International Convention") from Enforced Disappearance itself, the Supreme Court in the *Rajendra Dhakal case*<sup>16</sup> found that there should be no barriers to the use of the provisions of the Convention as guiding principles.
26. In spite of such statement, the international framework with regard to enforced disappearances and the status of disappeared persons has not been included in the new Nepalese legislation. Many provisions of the Common Crime Code Act 2074

---

<sup>11</sup> The International Committee of the Red Cross (ICRC), Civil legal issues related to the families of the missing in Nepal, July 2015.

<sup>12</sup> The International Center for Transitional Justice (ICTJ), The Disappeared and Invisible. Revealing the Enduring Impact of Enforced Disappearance on Women, March 2015.

<sup>13</sup> *Ibid.*

<sup>14</sup> Muluki Ain (the Common Code), Chapter "Inheritance", Sections 1 & 2.

<sup>15</sup> Banking and Financial Institution Act, 2063 (2006), Section 81.

<sup>16</sup> *Rajendra Dhakal and others vs Government of Nepal*, Writ No. 3575, Supreme Court decision, 1 June 2007.



(2017),<sup>17</sup> which will be implemented from 26 August 2018 throughout Nepal, are indeed at odds with international law on enforced disappearance. In Section 210, the Act provides that the time limitation to file a complaint on enforced disappearance is 6 months from the date of knowing of having committed the offence or the person being or made public. As the Act does not function retrospectively, the legislation would not be applicable to the cases of conflict. Even in the prospective assumption of applicability of the Act to conflict cases (through amendments or such), the period of 6 months would be inappropriate as many years have passed since their disappearance.

27. Such legal framework does not give any other choice to families of individuals disappeared during the conflict to file cases for homicide. In doing so, the domestic legislation disregards both the complex and continuous nature of enforced disappearances, and prevents any adequate regulation of the legal status of disappeared persons and of their relatives.<sup>18</sup>
28. Finally, some of the recent practices of the CIEDP ought to be analyzed. Following the provision of a list of names by the Ministry of Peace and Reconstruction and the Informal Sector Service Centre (hereinafter “INSEC”), approximately 400 cases were transferred from the CIEDP to the TRC. Individuals whose names were included in the list were referred to as dead by the CIEDP. As the Conflict Victim Common Platform (hereinafter “CVCP”) stated that, even in cases where an effective and adequate investigation into the crime has been conducted, it is crucial to take into consideration the impact that the sudden public use of the word “dead” may have on families who have not been provided with the truth concerning the fate and whereabouts of their loved-ones.

## **II. Two emblematic cases: Mr. Narayan Sapkota and Mr. Dil Bahadur Khadka**

29. The accounts included in the following paragraphs present the events as described by the spouses of Mr. Narayan Sapkota and Mr. Dil Bahadur Khadka. They have been included in this policy paper in an attempt to provide a concrete illustration of the issues related to the declaration of death in cases of enforced disappearances in Nepal.

### **Mr. Narayan Sapkota**

30. On 13 March 2004, Mr. Narayan Sapkota, injured following his arrest by State forces, was resting at his home in Kalika VDC, in the Bardiya district, when around 8pm two individuals in civilian dress knocked on the door of the family’s house and asked for the victim. One of the individuals was known to Mr. Narayan Sapkota’s wife, Ms. Juna Sapkota, and was identified as Nabin. The other man was a stranger to the family.
31. Ms. Juna Sapkota had previously seen Nabin taking an active role in programs and public events organized by the Maoists. She therefore knew that he was in their rank.
32. Following Ms. Juna Sapkota’s indications concerning the location of her husband, the two men went upstairs and requested the victim to step out of the house with them in order to discuss some common business. They however remained vague as to the exact topic of the conversation they wished to have.

---

<sup>17</sup> Common Crime Code Act 2074 (2017), Sections 206 to 210.

<sup>18</sup> Please refer to Section III for a more detailed analysis.





33. As Mr. Narayan Sapkota explained that he was too unwell to join them, the two visitors left the house, only to come back a few minutes later, accompanied by three other men in civilian clothing. The five individuals again asked the whereabouts of Mr. Narayan Sapkota. Ms. Juna Sapkota, who was outside of the house washing dishes when the five men arrived, once more indicated that her husband was upstairs, resting. As they all arrived with Nabin, Ms. Juna Sapkota understood the other four men to be Maoist combatants. In addition, she identified them as members of the Tharu community.
34. The five men asked Mr. Narayan Sapkota to join them in order to attend a meeting that the Maoists were organizing in Kalika VDC. Mr. Sapkota once again insisted that he was too unwell to leave his house, but that he would meet with them the following morning if necessary.
35. Both Mr. Narayan Sapkota's wife and mother repeatedly begged the five men not to take him at night, especially in his condition. The five men refused to listen to the family's plea, and stated that the "party" had given them the order to bring Mr. Narayan Sapkota to the meeting. They added that if he was unable to walk, they would carry him. The five men then ordered Mr. Narayan Sapkota to get up and dressed.
36. As she could understand that the men would not leave without her husband, Ms. Juna Sapkota requested to go with them. The five men together with Mr. and Ms. Sapkota walked for about 4km before reaching Bakotia VDC around 9pm.
37. Ms. Juna Sapkota was asked to stay in a house belonging to Tharu people while her husband was moved to another location in Bakotia VDC to attend the meeting.
38. Although the men assured Ms. Juna Sapkota that they would bring her husband back within the following hour, she waited until morning in vain: neither Mr. Narayan Sapkota nor the men showed up. No one in the nearby houses was able to provide her with information concerning her husband. She was however informed by one villager that no meeting had been conducted in the location communicated by the five men.
39. At around 9am, a Tharu man arrived on a motorcycle, and explained to Ms. Juna Sapkota that he had been requested to bring her back to her house. When asked, he indicated that he had no information about the whereabouts of her husband.
40. After she arrived home, Ms. Juna Sapkota learned that Mr. Dil Bahadur Khadka had been taken along with her husband.<sup>19</sup> She proceeded to ask for Mr. Dal Bahadur Thapa, a supporter of the Maoists, to intervene in order to protect her husband's life. Mr. Thapa informed Ms. Juna Sapkota that she had no reason to fear for her husband's life, and that he would soon be returned to her.
41. Approximately two weeks after the events, on 30 March 2004, the Maoist newspaper Nepali Express announced that Mr. Narayan Sapkota and Mr. Dil Bahadur Khadka had been executed on the grounds of being exploiters, members of the elite, rapists, spies, and liars.
42. Approximately one week after the publication of the Nepali Express, Nabin returned to Kalika VDC, and informed Mr. Dal Bahadur Thapa that he had stayed with Mr. Narayan Sapkota for around 5 days following their departure from the victim's house, but had later left for Bardiya and he was unaware of the events that had then unfolded.

---

<sup>19</sup> The facts concerning the disappearance of Mr. Dil Bahadur Khadka are presented in paragraphs 44 to 50.





43. Numerous rumors concerning the location of Mr. Narayan Sapkota and Mr. Dil Bahadur Khadka's bodies reached the families of the two men in the days following the newspaper release. However, relatives and villagers searched in vain: they were unable to find any remains.

**Mr. Dil Bahadur Khadka**

44. On 13 March 2004, Mr. Dil Bahadur Khadka was watching television at his home, in Kalika VDC, in the Bardiya district, when around 8:15pm two individuals in civilian dress knocked on the door of the family's house and asked for the victim.

45. While one of the individuals was unknown to the victim's family, the other was identified as Nabin by Ms. Laxmi Khadka – Mr. Dil Bahadur Khadka's wife. As Ms. Juna Sapkota, she had previously seen Nabin taking an active role in programs and public events organized by the Maoists. She therefore knew that he was in their rank.

46. The two men asked Mr. Dil Bahadur Khadka to step outside the house for a brief conversation: the victim complied. Following a short exchange that could not be heard by Ms. Laxmi Khadka, the men explained that the victim had to accompany them but would return shortly. Mr. Dil Bahadur Khadka proceeded to leave his house with Nabin and the unknown man. This was the last time that Ms. Laxmi Khadka ever saw her husband.

47. The following day, Ms. Laxmi Khadka and her family began to search for Mr. Dil Bahadur Khadka. While they could not find any information as to where her husband had been taken, they learned that Mr. Narayan Sapkota had been taken as well.

48. Over six months after the disappearance of their relatives, the families of Mr. Narayan Sapkota and Mr. Dil Bahadur Khadka heard that a group of Maoists who had organized a meeting in Pandra Bihaga village bragged about having kidnapped and killed the two men.

49. Around that same time, Ms. Laxmi Khadka ran into Nabin and asked him to explain why he had taken her husband. His sole response was to indicate that he had not acted alone, and that he had simply fulfilled orders imparted by his hierarchy.

50. To this day, the fate and whereabouts of Mr. Narayan Sapkota and Mr. Dil Bahadur Khadka have not been clarified and no one has been prosecuted and sanctioned for these crimes.

**Ms. Laxmi Khadka and Ms. Juna Sapkota**

51. Despite the press release issued by the Nepali Express, neither Ms. Laxmi Khadka nor Ms. Juna Sapkota have "accepted" their husbands' death. They indeed stress that, in the absence of an adequate and effective investigation into the events, they have not been granted any information concerning the fate of their husbands and, in the event of their death, the whereabouts of their mortal remains. In addition, they cannot consider Mr. Narayan Sapkota and Mr. Dil Bahadur Khadka as dead until the remains of the victims are located and returned to them, so that they can perform the funeral rituals in accordance with their religious beliefs.



52. Economic hardship and social pressures however forced both Ms. Laxmi Khadka and Ms. Juna Sapkota into requesting a declaration of death approximately one and a half year after their husbands were disappeared.<sup>20</sup>
53. The victims' wives were strongly chastised by their family-in-law for failing to perform the last rites for Mr. Narayan Sapkota and Mr. Dil Bahadur Khadka. In particular, Ms. Juna Sapkota reports that she was repeatedly blamed for any sickness that would fall upon a member of the family and for any death of the family's animals that would occur.
54. While Ms. Laxmi Khadka refused to perform the final rites, Ms. Juna Sapkota could not bear the pressure and the exclusion of her family in law, and eventually complied with their request, although in the absence of her husband's body.
55. Both women however continued to dress as married women and denied to follow any of the traditions that come with widowhood. They argue that, as the fate and whereabouts of their husbands remain unknown, they cannot act as if they had accepted their death. They further indicate that they will continue to wear the clothing of married women until they are provided with the truth about what happened to Mr. Narayan Sapkota and Mr. Dil Bahadur Khadka, the circumstances of their disappearances and the identity of the perpetrators of the crimes at stake.
56. Such decision has been the source of social stigmatization for Ms. Laxmi Khadka and Ms. Juna Sapkota. Both women have been ostracized for refusing to wear the appropriate symbols of widowhood. They have been insulted and have constituted the object of vile rumors spread by villagers. Because of their decision not to act as widows, Ms. Laxmi Khadka and Ms. Juna Sapkota have indeed been described as women of loose morals.
57. Furthermore, both women had no choice but to declare the death of their husband in order to be granted compensation. Indeed, following the signing of the Peace Accord and prior to the establishment of an Interim Relief Program that acknowledged relatives of individuals who had been forcibly disappeared, Nepalese authorities would only offer financial compensation to the families of those who had been killed by the Maoists.
58. At that time, neither Ms. Laxmi Khadka nor Ms. Juna Sapkota could foresee the future provision of compensation for the crimes committed against their husbands. Faced with economic hardship following the disappearance of the families' breadwinners, Ms. Laxmi Khadka nor Ms. Juna Sapkota were forced to declare their husbands' death in order to be provided with a compensation of NPR 75'000.
59. As developed in the previous section, the transferring of property rights from one individual who has died or gone missing to a relative depends upon the declaration of death.
60. Both the Khadka and Sapkota families are farmers. As such, land is essential to their survival. Following the disappearance of their husbands, neither Ms. Laxmi Khadka nor Ms. Juna Sapkota was allowed to manage the lands that were in the name of their respective spouses.

---

<sup>20</sup> The death certificate for Mr. Narayan Sapkota was issued on 11 December 2005 while that for Mr. Dil Bahadur Khadka was issued by on 9 December 2005.



61. Faced with a legislative framework that fails to adequately regulate the legal status of those forcibly disappeared, both women were forced to request a declaration of death in order to have access to the management of their property.
62. In addition, as a result of the lack of provisions criminalizing enforced disappearances in Nepal, Ms. Laxmi Khadka and Ms. Juna Sapkota have had to file complaints for homicide before domestic jurisdictions. In addition to distorting the nature of the crime of enforced disappearance, such qualification carries the risk of the absence of an adequate investigation into the fate and whereabouts of the victims, and subsequent impunity for the perpetrators.
63. Finally, it should be noted that the wives of the disappeared, Ms. Juna Sapkota and Ms. Laxmi Kadhka, lodged complaints before the CIEDP. In the absence of a duly conducted investigation, their complaints were however transferred to the TRC on the grounds that their husbands were considered as dead. Ms. Juna Sapkota and Ms. Laxmi Kadhka argue that such a decision only added to their pain and suffering.
64. The cases of Mr. Narayan Sapkota and Mr. Dil Bahadur Khadka illustrate the wide range of legal and social consequences that fall upon the families of disappeared persons. As such, they exemplify the distress associated with the existing flawed legislation and the impossibility for relatives to obtain a certificate of “absence due to enforced disappearance”, being instead forced to declare their loved ones dead, even when they ignore their fate and whereabouts.

### **III. International standards in relation to declarations of death**

65. First and foremost, reference to the regulation of the legal status of individuals subjected to enforced disappearance at the international level can be found in Article 24 (6) of the International Convention. The provision states that:

“Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.”<sup>21</sup>
66. As such, the International Convention calls upon States to establish an adequate legal framework governing the status of disappeared persons. Indeed, the Committee on Enforced Disappearances (hereinafter, “the CED”) has explicitly indicated that the absence of particular provisions regulating the legal situation of disappeared persons fails to “accurately reflect the complexity of enforced disappearance.”<sup>22</sup>
67. Hence, although Article 24 (6) does not specifically address neither the exact process that should be followed by States, nor the form that the regulation of the legal status of those forcibly disappeared should take, the CED has clarified its position through a number of Concluding Observations.
68. Notably, the CED recommends States to review their legislation in order to establish procedures that govern the release of a declaration of absence as a result of enforced disappearance, and stresses the inadequacy of the presumption of death in such

---

<sup>21</sup> Article 24(6) of the International Convention on the Protection of All Persons.

<sup>22</sup> Committee on Enforced Disappearances (CED), Concluding Observations on Germany, UN Doc. CED/C/DEU/CO/1, 27 March 2014, para. 26



cases.<sup>23</sup> It should be noted that the CED refers to the declaration of absence as the appropriate instrument to address the legal status of both those forcibly disappeared and their relatives “in area such as social welfare, financial matters family law, and property rights.”<sup>24</sup>

69. The Working Group on Enforced or Involuntary Disappearances (hereinafter, “the WGEID”), in its understanding of enforced disappearance as a violation of, among others, the right to be recognized as a person before the law, underlines that this particular crime also infringes the rights of the families of those who have disappeared.
70. Because of the complex and continuing nature of enforced disappearance, the impact is indeed not limited to the person who has been directly subjected to the disappearance. In the absence of any information concerning the fate and whereabouts of their loved ones, relatives and close friends suffer anguish and stress that can amount to torture or inhumane treatment. As a result, they, too, are recognized as victims by international instruments and case law.<sup>25</sup>
71. Similarly, forcing relatives of disappeared persons to declare the death of their loved ones despite the uncertainty those persons’ fate, has been established in international jurisprudence as constituting cruel and inhuman treatment in violation of Article 7 of the International Covenant on Civil and Political Rights (hereinafter, “the ICCPR”).<sup>26</sup>
72. In particular relation to the provision of compensation to relatives of disappeared persons, international human rights bodies have stated that declarations of death could amount to inhumane and degrading treatment. Both the Committee against Torture (hereinafter, “the CAT”) and the Human Rights Committee (hereinafter, “the HRC”) have indeed observed that, under such circumstances, the families of those subjected to enforced disappearance suffer additional victimization.<sup>27</sup>
73. Furthermore, the WGEID has discussed at length on the impact that enforced disappearances have on the economic, social and cultural rights of the family of the disappeared individual.<sup>28</sup> As above illustrated through the situation in Nepal and the cases of Mr. Narayan Sapkota and Mr. Dil Bahadur Khadka, relatives often face economic hardship – in particular whenever the person who has been subjected to enforced disappearance is the breadwinner – and social exclusion. Dependents may not be able to enjoy their right to education and their right to health. Similarly, women who refuse to follow to act as widows may be ostracized and lose, together with their children, any clear place in society.
74. As explicitly stated by the WGEID, the legal uncertainty that surrounds the absence and status of those disappeared also prevents families from effectively exercising their rights and obligations.<sup>29</sup> In order to address issues such as status of marriage, access to social allowances, or management of property, the WGEID favors the use of a

---

<sup>23</sup> CED, Concluding Observations on Germany, UN Doc. CED/C/DEU/CO/1, 27 March 2014, para. 27; CED, Concluding Observations on the Netherlands, UN Doc. CED/C/NLD/CO/1, 27 March 2014, para.34-35.

<sup>24</sup> CED, Concluding Observations on the Netherlands, UN Doc. CED/C/NLD/CO/1, 27 March 2014, para.35.

<sup>25</sup> See *supra* note 1; and Human Rights Committee, *Quinteros Almeida v. Uruguay*, 1983; ; and Annual Report of the WGEID for 2012, UN Doc. A/HRC/22/45, 28 January 2013, para. 51.

<sup>26</sup> Among others, *Rizvanovic v. Bosnia and Herzegovina*, HRC Communication No. 1997/2010, UN Doc. CCPR/C/110/D/1997/2010, 21 March 2014.

<sup>27</sup> Committee Against Torture (CAT), Concluding Observations on Algeria, UN Doc. CAT/C/DZA/CO/3, 26 May 2008, para. 13. HRC, Concluding Observations on Algeria, UN Doc. CCPR/C/DZA/CO/3, 12 December 2007, para. 13

<sup>28</sup> Working Group on Enforced or Involuntary Disappearance (WGEID), Study on enforced or involuntary disappearance and economic, social and cultural rights, UN Doc. A/HRC/30/38/Add.5, 9 July 2015, para. 23-32.

<sup>29</sup> WGEID, General Comment on the right to recognition as a person before the law in the context of enforced disappearances, UN Doc. A/HRC/19/58/Rev.1, 2 March 2012, para. 5.



“declaration of absence by reason of enforced disappearance”, to be delivered with the consent of family no less than one year after the enforced disappearance.<sup>30</sup> While such minimum period of absence prior to the issuance of a certificate has received general support at the international level, suggestions have also been made to consider provisions for a shorter period as a result of particular events and circumstances.<sup>31</sup>

75. The WGEID has thus clearly stated that relatives of disappeared individuals should not be requested to produce a death certificate in order to be granted “social allowances and/or measures of reparation.”<sup>32</sup>
76. It should be noted that the WGEID has reaffirmed the fact that regulation of the legal status of disappeared individuals, especially through a declaration of absence as a result of enforced disappearance, should not constitute a basis for the termination of investigations by States authorities into the cases.<sup>33</sup>
77. With regard to the presumption of death, jurisprudence from the Inter-American Court of Human Rights (“the IACtHR”) has found that the arbitrary determination of a date on which the person subjected to enforced disappearance would have allegedly died cannot result from the use of presumption of death.<sup>34</sup> In doing so, State authorities are in contravention with the international standards that define the particular continuous nature of the crime of enforced disappearance, and contribute to the impunity of those responsible.
78. In addition to constituting a form of inhumane treatment for the families, regulating the legal situation of disappeared persons through the use of declaration of death indeed hinders the fight against impunity for the commission of this specific crime. As with Ms. Laxmi Khadka and Ms. Juna Sapkota, the lack of an adequate legal framework that criminalizes enforced disappearance according to international standards has forced many relatives of disappeared individuals to file homicide cases.
79. However, qualifying cases of enforced disappearances as homicides lead to a number of unwarranted consequences. While both crimes address the violation of the right to life, enforced disappearances are of a composite nature: they also entail the infringement of the right to liberty and security, as well as the right to recognition as a person before the law and to the administration of justice. Furthermore, enforced disappearances are continuous crimes, in that “the act begins at the time of the abduction and extends for the whole time that the crime is not complete, that is to say until the State (...) releases information pertaining to the fate or whereabouts of the individual.”<sup>35</sup> It is established that the crime continues until the perpetrator clarifies the fate and whereabouts of the disappeared person.<sup>36</sup> As such, enforced disappearances cannot be reduced to instantaneous crimes such as homicides.<sup>37</sup>

---

<sup>30</sup> *Ibid.*, para. 8.

<sup>31</sup> See for example: ICRC, Guiding Principles / Model Law on the Missing. Principles for Legislating the Situation of Persons Missing as a Result of Armed Conflict or Internal Violence: Measures to prevent persons from going missing and to protect the rights and interests of the missing and their families, February 2009.

<sup>32</sup> WGEID, Annual Report for 2012, UN Doc. A/HRC/22/45, 28 January 2013, para. 50

<sup>33</sup> WGEID, General Comment on the right to recognition as a person before the law in the context of enforced disappearances, UN Doc. A/HRC/19/58/Rev.1, 2 March 2012, para.10.

<sup>34</sup> *Radilla Pacheco v. Mexico*, Judgment of 23 November 2009, Inter-American Court of Human Rights (IACtHR)

<sup>35</sup> WGEID, Best Practices on Enforced Disappearances in Domestic Criminal Legislation, UN Doc. A/HRC/16/48/Add.3, 28 December 2010.

<sup>36</sup> Article 17.1 of the Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly Resolution 47/133 of 18 December 1992

<sup>37</sup> WGEID, Best Practices on Enforced Disappearances in Domestic Criminal Legislation, UN Doc. A/HRC/16/48/Add.3, 28 December 2010.



80. The criminalization of enforced disappearances in accordance with international standards is essential to the development of an adequate domestic framework that regulates the legal status of disappeared persons and of their relatives.
81. As previously pointed out, requesting families of disappeared individuals to officially accept the death of their loved ones through the registration process and the issuance of a certificate, exacerbates their psychological distress. Certain domestic legal systems have therefore adopted provisions that specifically respond to the needs of disappeared persons and their families, and take into consideration the nature of this crime.
82. Argentina was the first country to introduce declarations of absence due to enforced disappearances.<sup>38</sup> While the effects of Law 24321, adopted on 11 May 1994, are equivalent to those resulting from the presumption of death, the new legislation does not request families to consider the disappeared person as dead. Similarly, Colombia addresses the concept of 'absence as a result of enforced disappearance' and its related declaration in Law No. 1531 of 23 May 2012. In addition to considering both cases that have happened in the past and those that may occur in the future, the latter clearly states the issuance of a certificate of absence shall not hamper the continuation of investigations into the fate and whereabouts of the victim.<sup>39</sup>
83. While recognizing that the anguish and distress of the relatives of disappeared persons are exacerbated by the lack of an adequate legal status, the adoption of such laws also allows families to address the practical consequences of the disappearance. In Sri Lanka, the Registration of Deaths (Temporary Provisions) (Amendment) Act, No. 16 of 2016, establishes the criteria to be applied for the issuance of a temporary certificate of absence and the procedure to be followed. Notably, Section 8L states that relatives who had received or applied for certificates of death shall be granted a cancellation of such document and issued a certificate of absence.<sup>40</sup> Two years after the certificate of absence is delivered, an inquiry into the clarification of the fate and whereabouts of the disappeared person is conducted. The validity of the certificate of absence can then be extended for another two years or cancelled, depending on the family's wish.
84. As its importance can be found both at the symbolic and psychological level, the issuance of a certificate of absence has found support at the international level for a number of reasons. A declaration of absence indeed allows for the processing of administrative claims within the framework of the domestic legal framework, while concurrently ensuring the adequate recognition of the peculiarities of enforced disappearances and protecting families from further victimization.<sup>41</sup> Through the regulation of the legal situation of both the disappeared person and his or her family, the social consequences, such as loss of status and stigma, that fall upon relatives may be mitigated.
85. Declarations of death are conceived to protect the rights of the disappeared person while allowing entitled relatives to take provisional possession of his or her assets. Whereas declarations of death result in definitive effects, declarations of absence, if

---

<sup>38</sup> Gabriella Citroni, The Pitfalls of Regulating the Legal Status of Disappeared Persons Through Declaration of Death, *Journal of International Criminal Justice* 12, July 2014, pp. 787-803.

<sup>39</sup> *Ibid.*

<sup>40</sup> See Centre for Policy Alternatives, Guide to the Registration of Deaths (Temporary Provisions) (Amendment) Act, No. 16 of 2016, October 2016.

<sup>41</sup> The International Committee of the Red Cross (ICRC), Civil legal issues related to the families of the missing in Nepal, July 2015.



provided for in an adequate manner, take into account the possibility of a disappeared person's return.<sup>42</sup>

86. If regulated in accordance with international standards, certificates of absence balance the psychological and practical needs of relatives without hindering investigations into the cases. A declaration of absence indeed constitutes a means of guaranteeing that authorities continue to investigate the case. It officially acknowledges that an individual remains unaccounted for, and that the truth concerning his or her fate and whereabouts must be clarified. Moreover, in recognizing that the event – thus, the crime – is still ongoing, a declaration of absence takes into consideration the continuous nature of enforced disappearances and indicates that those responsible shall be prosecuted.<sup>43</sup>

### **Conclusion and recommendations**

87. In light of the above, the HRJC brings to the attention of the CIEDP that regulating the legal status of victims of enforced disappearances is a necessary step toward the adequate introduction of this particular crime into the domestic legislative framework.

88. The adoption of a notion of “declaration due to enforced disappearance” in countries such as Argentina, Colombia, and Sri Lanka constitute a strong example of measures that can be implemented in order to better address the complex and continuous nature of enforced disappearances. Such practice enables domestic authorities to adequately respond to the psychological and practical needs of relatives, while concurrently guaranteeing that the crime is duly investigated and that the fate and whereabouts of the victim are clarified.

89. The HRJC respectfully asks the CIEDP to:

- a. Consider the cases of Mr. Narayan Sapkota and Mr. Dil Bahadur Kadhka as enforced disappearances, and act upon such qualification;
- b. Take the necessary step to guarantee that the enforced disappearances of Mr. Narayan Sapkota and Mr. Dil Bahadur Kadhka are duly investigated;
- c. Take the necessary steps in order to ensure that investigations into all cases of enforced disappearance brought before it are duly conducted, and that the fate and whereabouts of victims are clarified;
- d. Ensure that such investigations are concluded prior to any transferring of cases to the TRC;
- e. Take into consideration the necessity to protect families from further victimization by avoiding to refer to disappeared persons as dead in official statements prior to the conclusion of any duly conducted investigation and to any personal communication with the relatives;

---

<sup>42</sup> ICRC, Guiding Principles / Model Lay on the Missing. Principles for Legislating the Situation of Persons Missing as a Result of Armed Conflict or Internal Violence: Measures to prevent persons from going missing and to protect the rights and interests of the missing and their families, February 2009

<sup>43</sup> See Centre for Policy Alternatives, Certificates of Absence: A Practical Step to Address Challenges Faced by the Families of the Disappeared in Sri Lanka, September 2015; ICRC, Guiding Principles / Model Lay on the Missing. Principles for Legislating the Situation of Persons Missing as a Result of Armed Conflict or Internal Violence: Measures to prevent persons from going missing and to protect the rights and interests of the missing and their families, February 2009





**HUMAN RIGHTS  
AND JUSTICE CENTRE**

- f. Recommend to the national authorities the introduction into domestic legislation of provisions establishing and regulating certificates of absence due to enforced disappearance;
- g. Recommend to the national authorities that the above-mentioned provisions establish procedures for the issuance of such certificates that are transparent, easily accessible, and free of cost;
- h. Recommend to the national authorities that the certificates of absence address all the practical needs expressed by families of disappeared individuals;
- i. Recommend to the national authorities that the certificates of absence do not prevent the continuation of investigations aimed at establishing the truth and clarifying the fate and whereabouts of the victims;
- j. Recommend to the national authorities to ensure that families who have been delivered death certificates shall have access to declarations of death;
- k. Recommend to the national authorities to amend domestic legislation so as to ensure that the criminalization of enforced disappearance is in line with international standards;

90. In conclusion, if the CIEDP were to deem it appropriate, the HRJC would like extend an invitation for a meeting in order to further discuss this crucial issue.

Kapil Aryal  
HRJC Chairperson

**Annexes**

1. Gabriella Citroni, The Pitfalls of Regulating the Legal Status of Disappeared Persons Through Declaration of Death, *Journal of International Criminal Justice* 12, July 2014, pp. 787-803.