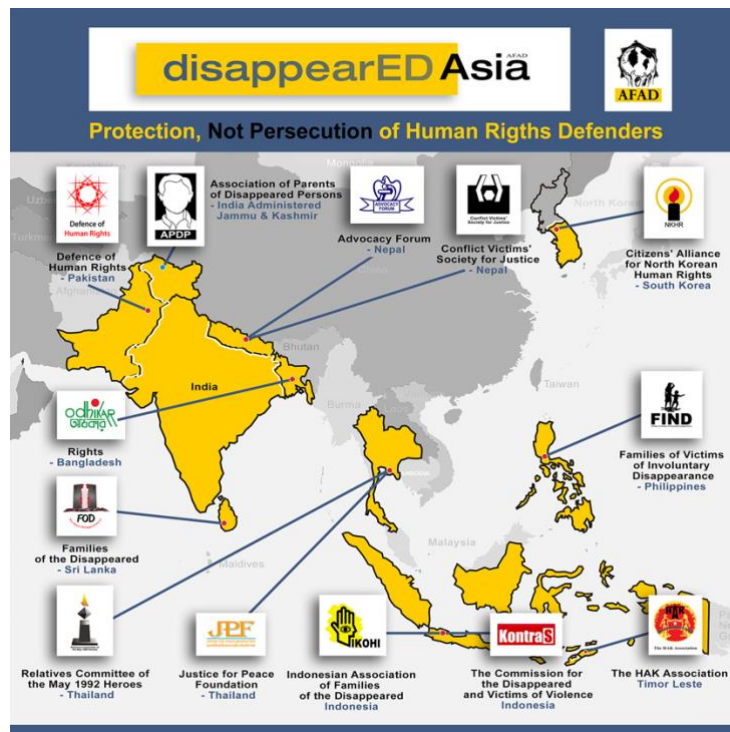


*a situationer for selected Asian countries*

# ENFORCED DISAPPEARANCES AND REPORTING MECHANISMS

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# Acronyms

<b>AFAD</b>	Asian Federation Against Involuntary Disappearances
<b>CEDAW</b>	Convention on the Elimination of all Forms of Discrimination Against Women
<b>CIDT</b>	Cruel, Inhuman and Degrading Treatment
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>CSO</b>	Civil society organization
<b>CTG</b>	Caretaker Government
<b>ECOSOC</b>	Economic and Social Council
<b>ED</b>	Enforced Disappearance
<b>EJK</b>	Extra-judicial Killing
<b>HRC</b>	Human Rights Council
<b>HRV</b>	Human Rights Violation
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICPPED</b>	International Convention for the Protection of all Persons from Enforced Disappearance
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>MO</b>	Member Organization
<b>NGO</b>	Non-Governmental Organization
<b>NHRC</b>	National Human Rights Commission
<b>OHCHR</b>	Office of the High Commissioner for Human Rights
<b>OPCAT</b>	Optional Protocol to the Convention Against Torture
<b>PIL</b>	Public Interest Litigation

<b>RTI</b>	Right to Information Act
<b>SAARC</b>	South Asian Association for Regional Cooperation
<b>SC</b>	Security Council
<b>SPMH</b>	Special Procedure Mandate Holders
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UPR</b>	Universal Periodic Review
<b>UN</b>	United Nations
<b>UNGA</b>	United Nations General Assembly
<b>WGEID</b>	Working Group on Enforced or Involuntary Disappearances

# EXECUTIVE SUMMARY

This is a situationer on enforced disappearances (ED) and reporting mechanisms for victims to get redress and justice, in selected Asian countries. The country reports of member organizations (MO) of The Asian Federation Against Involuntary Disappearances (AFAD) through its project funded by Bread for the World are the main source of this situationer.

The peoples in Bangladesh, Indonesia, Nepal, Pakistan, Sri Lanka, and the Indian states of Jammu and Kashmir, are suffering from increasing incidence of EDs and other gross human rights violations (HRVs). The perpetrators are usually agents of the state; among the victims are activists, human rights workers, and political opponents. Most of the victims are poor.

On the other hand, Japanese and South Korean citizens have been disappeared in North Korea but most of these are denied by the North Korean government.

The terrible weight of EDs on victims and their families is incalculable; the impact is borne across generations. The 2006 International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) has defined ‘victims’ as both the disappeared persons and those who have suffered harm thereafter (i.e., the families). Wives of victims are particularly impacted adversely. They take over the role of breadwinner aside from their other usual domestic duties. Aside from cultural norms that stigmatize and discriminate them for not being widows but whose husbands are nowhere to be found, their rights are also jeopardized. The disruption in the hierarchy and the shift of gender roles caused by EDs especially for women who are forced to work bring additional tension within the family, leading to what is called as ‘infra-familial harassment’. Women are berated by relatives for abandoning wifely and motherly duties in search for work, or their missing loved ones through advocacy. But women especially mothers are among those in the forefront in fighting for justice for their missing children.

“Enforced disappearance of persons” is the arrest, detention, or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, combined with a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time. The United Nations (UN) has adopted the ICPPED. The UN Declaration on Enforced Disappearances recognizes the practice of "disappearance" as a violation of the rights to due process, to liberty and security of a person, and to freedom from torture.

Most of the governments in this report, while signatories to the ICPPED, have not ratified it. They have not passed a law that defines ED as a crime that can be prosecuted under their penal code and justice system.

Reporting mechanisms refer to bodies, offices, or institutions that are mandated to assist victims or their advocates in establishing the whereabouts, seeking redress, and getting justice. The services of these mechanisms at the national level range from accepting complaints, conducting investigations, prosecution, hearing cases, educating the public, documenting cases, and getting government to act appropriately and timely. Reporting mechanisms are usually the human rights commissions and other similar commissions, committees of inquiry on the disappeared, and the judicial courts.

At the international level, the key components of reporting mechanisms in the UN that deal with human rights with universality are the (1) Office of the High Commissioner for Human Rights (OHCHR), (2) the UN Charter-based bodies (UN Human Rights Council [HRC] that includes under it the Universal Periodic Review [UPR] and Special Procedures), and (3) the UN Treaty-based bodies.

Civil society organizations (CSO) at both the domestic and international levels, may be considered to be support to the reporting mechanisms. They have conducted documentation and research on EDs and submitted these to the UN reporting mechanisms. They have provided guidance and assistance to victims and their families in locating the disappeared and in seeking redress. However, they are among the targets of state repression with perpetrators enjoying impunity. This has taken a toll on their capacity to continue their work.

The overall finding regarding the national reporting mechanisms is that they are usually inaccessible to the victims and their families. There is lack of transparency on the findings of investigations. The commissions' consultations with victims, their families, and CSOs are sporadic and not sustained. They do not have independence from government; they get inadequate funding and technical support. There is a very low ratio of prosecutions and convictions of perpetrators of EDs and other gross HRVs versus the number of complaints and reports filed.

But the commissions and committees have very narrow mandates in the first place; they are limited to conducting investigations and making recommendations for appropriate action toward redress and justice to victims. Of the numerous recommendations they had submitted, very few had been acted on by governments.

About the UN reporting mechanisms, despite severe limitations to their effectiveness in stopping EDs and bringing justice closer to the victims, they are important in providing avenues for victims,



their families, and support groups to report at the international level, the situation in their countries and their specific experiences. The political and moral pressure of this on governments cannot be fully measured. But without economic clout, the mechanisms' effectiveness is very much dependent on the cooperation (or lack of it) from governments concerned. These UN bodies do not have police power, nor military troops to back up their recommendations. At best, in the face of blatant disregard by governments concerned, these mechanisms are needed to amplify the anguish and suffering of victims and the impunity of authorities, by providing moral affirmation and a global audience.

The recommendations to make reporting mechanisms work are both immediate and long term/strategic. These range from reforms in the legal framework to the mandate and independence of commissions; improvements in the justice system to the ways the commissions operate. This includes a comprehensive program with a gender lens for assisting relatives of disappeared persons, in particular women, in coping with the consequences of the disappearance.

Strategic changes require an agenda that will push back against rising fascism and neo-Nazism in these countries and make genuine electoral democratic institutions work. Local CSOs are challenged to strengthen some more their partnership with victims or their relatives; for them and international CSOs to improve coordination and sharing of resources (including data/evidence and contacts with media) to escalate the pressure on local politicians. The efforts must be on a global scale otherwise it is easy to overlook local crimes and impunity.

Donors and lending institutions must be conscientized since governments are more sensitive to their demands. The UN must embark on a reform program that will enable its mechanisms to gain more authority and traction with individual states.

No less than a global solidarity movement against gross HRVs, specifically EDs taking place in tandem with intensified state repression, is necessary, with a program for justice involving multiple actors and simultaneous, coordinated actions of pressure.

# INTRODUCTION

Human rights violations are a common phenomenon globally, especially in Asia, where authoritarian regimes have come to power in states that have democratic values and principles in their constitution. With increasing violations of civil and political rights (e.g., freedoms of expression and of assembly) and the precarious situation of human rights defenders, there is an urgent need to promote and protect human rights.

Enforced disappearance is a crime against humanity as defined in the Rome Statute of the International Criminal Court. Article 7 of the Rome Statute states that “enforced disappearance” is a “crime against humanity” when committed as part of a widespread or systematic attack against any civilian population. “Enforced disappearance of persons” means the arrest, detention, or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

AFAD through its project funded by Bread for the World carried out research in seven (7) countries that focused on the reporting mechanisms for HRVs. The research was implemented by AFAD’s MOs.

Individuals and/or their families whose rights are violated often approach groups (civil society/human rights organizations and victims’ families) that work on promoting and protecting human rights. These groups, among which are AFAD’s MOs, have the knowledge and capacity to document these cases as well as approach national, regional, and international mechanisms and institutions for seeking redress. The research that they conducted for this report is informed by their grounded and experiential knowledge of EDs and reporting mechanisms.

A global and historical perspective to intensifying HRVs in Asia is provided next.

# The large view

We start with a quote from an Asian scholar Kanishka Jurasuriya.<sup>1</sup>

*After the global economic crisis of 2008, there has been a trend toward a configuration of institutions and ideologies of state-society relations with a more intensified authoritarian form. At the heart of these political changes is the rise of right-wing political and ideological forces that seek to use religious, ethnic and/or national communities to build coalitions which are hostile to pluralist politics. This trend is combined with the deepening of the neoliberal market-reform agenda within a more authoritarian framework, especially in a further consolidation of politically linked domestic conglomerates. (Jayasuriya, 2020)*

Authoritarian regimes are emerging and even, in some cases, consolidating, in many parts of the world, amid widespread poverty, failed institutions of governance, and unprecedented global inequality. While wars on terror fester in the most devastated places, governments including those in rich economies, have retreated from their duty of providing for basic social services like health and education, even during the pandemic while large corporations' participation in policy making and governance, advanced. The neo-liberal agenda, started some 50 years ago, has taken deep roots in the Global North as well as in the Global South regardless of status of economic or political development.

The transnationalization of capitalist production starting in the 1970s has virtually transformed many countries in Asia, Africa, and South America into factories where labor, taxes, and rent are cheap. Governments vie with each other in attracting global corporations to locate their production in their countries promising docile and cheap labor, tax holidays, and security of operations. In these factories for garments, food, and electronics<sup>2</sup>, work conditions are exploitative and hazardous, exemplified by those in Bangladesh, Pakistan, Indonesia, Nepal, and Sri Lanka, in

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<sup>1</sup> Kanishka Jayasuriya. The Rise of the Right. Southeast Asian Affairs

(2020), pp. 43-56. Published By: ISEAS - Yusof Ishak Institute. <https://www.jstor.org/stable/26938883>

<sup>2</sup> Clean Clothes Campaign

violation of UN statutes. Among the workers, women suffer much lower pay compared to men. Yet Asia's "low wage economy" has been portrayed as a model for other countries to follow.

It is in this context that we see rightist politics gaining traction, both in the global North and Global South. Even in well-established electoral democracies in Europe and the United States, right-wing and ultra-nationalist leaders gain popular support. India<sup>3</sup> exemplifies that a relatively well-established electoral democracy can produce populist<sup>4</sup> leaders who mobilize deep-seated prejudice and fear, pitting one group against another, as a strategy of control of political power and the country's resources.

Yet it is also during the recent decades that the world has produced landmark agreements such as the UN declarations on the rights of workers, of women, and on the protection of the environment. In 1992, the UN General Assembly adopted the declaration on the protection of all persons from enforced disappearance.

The fragility of institutions, widening then constriction of the democratic space, the flow and ebb of respect for human rights seems to be a recurrent pattern in the Global South. We observed this pattern in the countries covered in this report.

In the integrated report that follows this introduction, in the Background, we will identify patterns as well as particularities that may shed light on the questions Why are people forcibly disappeared, and why are mechanisms for redress not working.

The section that follows is the integrated report that is drawn mainly from the seven (7) country reports submitted by member organizations of AFAD shown in Table 1.

<sup>3</sup> <https://www.eastasiaforum.org/2018/06/26/populist-leaders-not-populist-parties-are-driving-asian-politics/>.

<sup>4</sup> Populists present themselves as savior or champion of the people, often playing up old ethnic or communal tensions, pitting one group against another.

**Table 1. Member organization- authors and title of case study reports**

<b>Member organizations</b>	<b>Title of case study reports</b>
Association of Parents of Disappeared Persons (APDP) - Kashmir	HRV Reporting Mechanisms in Indian administered Jammu and Kashmir
<i>ODHIKAR - Bangladesh</i>	Assessment of the Value of Existing Human Rights Violations Reporting Mechanisms and the Impact of Enforced Disappearance in Bangladesh
Citizens Alliance for North Korean Human Rights (NKHR) – South Korea	International Mechanism to Report Enforced Disappearances Committed by the North Korean Government against Persons from Other Countries
Defence of Human Rights (DHR) – Pakistan	Research on the HRV reporting mechanisms in Pakistan
Advocacy Forum/Conflict Victims’ Society for Justice (AF/CVSJ) – Nepal	Nepal Reporting Mechanisms
Families of the Disappeared (FOD) – Sri Lanka	Assessing the Value of Existing National Human Rights Violation Reporting Mechanisms in Sri Lanka

# INTEGRATED REPORT

## Objective of the integrated report

The overall objective of this integrated report is to describe the general situation of enforced disappearances (henceforth EDs) and the reporting mechanisms in the countries covered in the project. This in turn can serve as window to the overall situation in Asia given that the seven (7) case countries represent a sizeable portion of the Asian population and territory.

## Objectives of the country (case) reports

All the reports aimed to describe the human rights situation, with focus on EDs, in the country and the mechanisms, domestic and international, for redress, except Indonesia that focused only on the National Commission on Human Rights (*Komisi Nasional Hak Asasi Manusia/Komnas HAM*, and Korea, only on international mechanisms because of data inaccessibility from within the Democratic People's Republic of Korea (henceforth DPRK or North Korea). The reports also provided recommendations that may enable mechanisms to effectively contribute to stopping EDs and providing redress and justice to victims.

## Methodology

We describe first the methodology used in the case reports, then the methodology used in producing the integrated report.

## Methodology of the case studies

All the reports used both primary and secondary data. The primary data, mostly qualitative, were collected through in-depth interview or focus group discussion (FGD) or both interview and FGD. Selected through purposive sampling were victims, representatives of victims' families, activists, NGO representatives, current and former government officials of relevant government bodies.

Secondary data came from reports of CSOs, UN bodies, government offices, research reports of member organizations and news articles.

**Table 2. Primary data collection by country**

<b>Bangladesh</b>	<b>Indonesia</b>	<b>Kashmir</b>	<b>Korea</b>	<b>Nepal</b>	<b>Pakistan</b>	<b>Sri Lanka</b>
38 qualitative interviews (22 females, 8 males); FGD wd 18 persons (8 females, 10 males); Respondents from victims' families, NGOs, activists, other stakeholders ; 2 field visits	Interviewed current & former officials of Komnas HAM, former Attorney General, and civil human right advocate leaders		Interviewed 19 persons (family members of disappeared resettlers escaped resettlers or descendants, and witnesses)	Interviewed 20 victims (12 females, 8 males);  And stakeholders	Survey (20) & qualitative interviews (10) wd representatives of victims' families (18 males, 12 females)  Qualitative interviews (10) wd lawyers, HR defenders, officers from police & Commission of Inquiry of Enforced Disappearance	Qualitative interviews & FGD wd representatives of 20 victims' families (15 females, 5 males)  10 interviews with activists and former members of Human Rights Commission

## Integrated report preparation

Each country report was read twice: first reading was to identify relevant data; second reading to extract data. Relevant data extracted were then organized using two strategies. One, all data from each report were organized thematically to get the main findings per country; and two, patterns were compared across countries. Aside from similarities, findings that are unique in specific countries were examined to understand how these shed light on ED and the workings of the mechanisms.

Additional literature research was done by the Integrated Report writing team to have a sufficient basis for analysis and for appreciation of the significance of the findings provided in the reports.

In the next section, we provide a background to contextualize enforced disappearances and the reporting mechanisms' performance.

## SECTION ONE: BACKGROUND, HUMAN RIGHTS VIOLATIONS AND EDs SITUATIONER

### Background

There are patterns in the contemporary history of the case countries that have significant and direct impact on EDs and the performance of mechanisms for redress of EDs.

First, is a recent history of war and massive human rights abuses.

In Indonesia, almost a million were killed in the anti-communist killings between 1966 and 1969 starting when General Soeharto took power via a coup against President Soekarno. Thereafter, hundreds of thousands more died in massacres such as in what is termed “mysterious killings” (*Penembakan Misterius/Petrus*) of 1983-1986, Tanjung Priok massacre in 1984 and gross human rights violations that occurred during military operations in Aceh and Papua. Only a few of the perpetrators have been held accountable. Soeharto died without being brought to justice.

In Nepal, the armed conflict between the government and the Communist Party of Nepal-Maoist claimed the lives of 16,729 persons (est.), the displacement of 78,689 persons (est.) and the disappearance of 1,327 people (est.). Among the conflict's legacy is the continuing tension around questions of accountability of those involved.

Although the Korean war ended in 1953, the issues of separated families during the war and of South Koreans abducted to North Korea after the war are unresolved.

Sri Lanka used to be hailed as a global model for universal health care. But the civil war in the country between the state security forces and two armed groups, the People's Liberation Front (Janatha Vimukthi Peramuna or JVP) and Liberation Tigers of Tamil Ealam (LTTE) that ended only in 2009 weakened the entire system of governance including health care. During the armed conflict with the JVP, state agents killed civilians, forcibly disappeared thousands, detained and tortured suspected JVP supporters. On the other hand, a war crimes investigation in 2015 by the Office of the UN High Commissioner for Human Rights found that both government forces and the LTTE had committed war crimes, crimes against humanity, and other human rights violations.



The wounds from this recent history continue to fester and complicate redressal of HRVs in the country.

The Southern uprisings by Sinhala Youth led by JVP took place in 1971 and from 1988 to 91.

The War between the government and LTTE lasted about 30 years and came to an end in 2009 May. In 1971 and in 1989 the JVP also killed their opponents and the government forces killed or made disappear about 60,000 In 1988 uprising. During the war both LTTE and the government forces were accused in killing and making disappearances.

Second, much of the armed conflicts in Asia are legacies of colonialism that carved out borders according to the colonizers' interests regardless of historical, cultural identities and preferences of peoples. That colonizers played one ethnic group against others to divide and rule is a factor as well. More recently, in post-colonial Asia, the involvement of foreign governments in the armed conflicts and/or in the worsening HRVs complicates an already fraught situation. When the active war ends what are left are political-psychological-social wounds and trauma that weigh heavily on post-conflict governance for human rights.

Some of the case countries are illustrative.

The United States was implicated in the massacres during the Soeharto dictatorship, as part of its drive to stop the spread of communism<sup>5</sup>. The USSR supported North Korea in the "Paradise on Earth" operation that brought ethnic Japanese residing in Japan to North Korea.

The Korean war was part of the rivalry between capitalist powers on one hand (US, Japan) and socialist countries (USSR, China). The continuing tension in the peninsula is a backdrop to various HRV cases.

India's direct as well as indirect, subtle, and overt, involvement in the civil war in Sri Lanka was lengthy and complicated. The most criticized was the killing of Tamils by the Indian Peacekeeping

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<sup>5</sup> Vincent Bevins. The Atlantic. <https://www.theatlantic.com/international/archive/2017/10/the-indonesia-documents-and-the-us-agenda/543534/>

Force stationed in Sri Lanka on request by the Sri Lanka government when it was supposed to contribute to the de-escalation of active war and be neutral.

India is also reported to have aided the royal government of Nepal against the Communist Party-Maoist during the civil war. Other countries that were involved were Pakistan, Belgium, China, the United Kingdom, and the United States,

There was also the involvement of mercenaries. Illustrative are the British mercenaries who were investigated for war crimes by the UK Metropolitan Police. The private security company Keenie Meenie Services trained an elite unit of the Sri Lankan police called the Special Task Force (STF) in the 1980s to fight Tamil separatists. The STF has been implicated in a number of human rights abuses. These have included executions without trial and killings of Tamil civilians.<sup>6</sup>

In Jammu and Kashmir, the rivalry between India and Pakistan is a major factor for the persistent conflict. There are three distinct political orientations in Indian-controlled Kashmir. Independence is preferred by a decisive majority in the valley and by a sizable minority in the Jammu region. On the other hand, there appears to be two major political orientations in Pakistan-controlled Kashmir: loyalty to Pakistan; and support for independence.<sup>7</sup>

Third, is the use of national security or anti-terrorism, or the war on drugs, to justify and cover up EDs/HRVs. This is observed to be in tandem with heightened authoritarianism. Human rights activists and political opponents are depicted as terrorists or aiding terrorists without evidence. Pakistan, Sri Lanka, and Kashmir are examples.

Sri Lanka's Prevention of Terrorism Act (PTA) of 1979, supposedly a temporary measure to avert acts of terrorism during the civil war allows arrests without warrant for unspecified "unlawful activities," and permits detention for up to 18 months on government issued detention orders without a court appearance, or opportunity for bail. According to Human Rights Watch, *prisoners*

<sup>6</sup> <https://www.bbc.com/news/uk-england-london-55071099#:~:text=British%20mercenaries%20who%20were%20involved,1980s%20to%20fight%20Tamil%20separatists.>

<sup>7</sup> Chakma

*held without trial under the PTA do not have access to legal recourse, and are at heightened risk of torture and cruel, inhuman, or degrading treatment.*<sup>8</sup>

In the post conflict context, attacks by Buddhist extremists against Christian and Muslim minorities have continued, causing deaths and extensive property damage, with the security forces being complicit in some attacks.

The primary target of the law were the minority Tamils, but in 2019, after the bombings in Easter Sunday that killed more than 260 people, Muslims became the additional target. According to a BBC report, president, Gotabaya Rajapaksa, who as defence secretary led the war efforts against the Tamil rebels, came to power in November 2019 with a strong backing from Sinhala Buddhist nationalists. He campaigned on a platform of national security. To keep the vote base, the government has zeroed in on the Muslim minority. "In the post-war period, Muslims have become the new enemy," said Bhavani Fonseka, a human rights lawyer.<sup>9</sup>

Gothabaya as a high-ranking officer in the Army also has been accused in killing and disappearances in 1988 uprising. He is a member of RAJAPAKSHA family and four brothers of this family, are holding the key posts in the cabinet – President, Prime Minister, Minister of Finance and Minister of lands. PM's son is also a Minister.

Partly due to international pressure (i.e., European Union), a proposed amendment to the law was published by the government in January this year. But the most abused provisions of the law are untouched in the amended version.

Fourth, is the trend to use counter insurgency to cover up grave human rights abuses against people who are fighting for self-determination. It is common for the state to use paramilitary forces in its operations.

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<sup>8</sup> In a Legal Black Hole. Feb 7, 2022. <https://www.hrw.org/report/2022/02/07/legal-black-hole/sri-lankas-failure-reform-prevention-terrorism-act>

<sup>9</sup> Anbarasan Ethirajan. 14 Jan 2022. Discrimination and harassment haunt Sri Lanka's Muslims. <https://www.bbc.com/news/world-asia-59900733>

In Indonesia, frequently used against the people of Aceh, West Papua, and in East Timor are paramilitaries whose members also provide security to some logging, mining, and other commercial enterprises. Paramilitaries are linked to some of the most gruesome HRVs in Asia<sup>10</sup>.

In Kashmir, India's military deployment aims to suppress the indigenous movement for self-determination, which has been a point of contention and tension in the sub-continent. Indian-administered Kashmir is a severely militarized zone, with more than 700,000 deployed armed personnel, making it the region with the highest number of military presences during peacetime anywhere in the world. India is using "cross-border terrorism" and the conflict with Pakistan among its excuse for intense militarization in the region.

Fifth, is a trend to consolidate rightist-populist authoritarianism, even fascist regimes, erode already weak electoral democracy, in the context of economic crisis, worsening poverty and inequality, constriction in social welfare programs, endemic corruption, and institutionalized impunity. The COVID pandemic is being used to further restrict people's movement specially to hold protest assemblies.

Bangladesh is an apt example. After the restoration of democracy in the 1990s, the reins of power have oscillated between Khaleda Zia and Sheikh Hasina. The Caretaker Government system (CTG) was incorporated in the Constitution pushed by a popular movement led by the then opposition Awami League between 1994 and 1996 as a strategy of de-escalating the continuing enmity and violence between the two main political parties, BNP and Awami League.

But with the enactment of the Fifteenth Amendment to the Constitution in June 2011, the present government has unilaterally removed the provision for a CTG that mandates parliamentary elections. The situation has worsened henceforth after the incumbent Awami League government retained power through controversial and farcical elections. Unsurprisingly, the human rights situation has worsened, corruption soared while authoritarian rule is consolidated<sup>11</sup>.

In Indonesia, there was much hopefulness at the end of the Soeharto dictatorship for a democratic and accountable government. To have a closure to the gruesome episode of their history, a regime

<sup>10</sup> <https://reliefweb.int/report/indonesia/indonesia-grave-human-rights-violations-wasior-papua>

<sup>11</sup> <https://www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-bangladesh-2019>

of transitional justice was inaugurated post 1998.<sup>12</sup> Nepal, like Indonesia, went through a similar attempt at transitional justice at the end of the civil war.

But the gains toward more accountable governance, in both Nepal and Indonesia, were increasingly eroded. In Indonesia, the presidency of Joko Widodo ushered a range of illiberal trends, such as the use of legislative means to criminalize political opposition, the passing of social conservative legislation, the increasing role of the security agencies in the political process, targeting critics and human rights defenders and protesting students.

As in Bangladesh, Pakistan, and Sri Lanka, cyber security laws in Indonesia are being used to clamp down on free speech.<sup>13</sup>

The example of Modi, prime minister of India, clearly illustrates the destruction of democratic institutions and the ascendance of a regime that promotes racism and prejudice for consolidation of power. Box 1 below provides the details.

### ***Box 1. Supremacist politics and authoritarian governance***

Long ago, India was seen as a stable electoral democracy. Not anymore. We quote Arundhati Roy. (Narendra Modi, India's current prime minister) *belongs to a proto fascist organization called the RSS which believes that India should be a Hindu nation and that everyone else, all minorities and other religions should live as minorities with fewer rights... (He was) Chief Minister of Gujarat in 2001 when the massacre of Muslims in the streets and villages of Gujarat (happened). Slaughter, rape, pillaging, beating to death, starving to death, burning the bodies to the grave until they could not be identified. But that was the basis on which he became known as Hindu Hriday Samrat, the Emperor of the Hindu hearts. And since then, this hatred, these bodies, these false flag attacks, there's been a litany of them that has led him of course, to become the Prime Minister....*

*Hindu nationalists in a city called Haridwar and then in Delhi openly calling for the genocide of Muslims, for the killing of Christians. There have been hundreds of attacks on Christian churches over Christmas, statues of Jesus vandalized, churches broken into, people beaten up. And of course, as you know Muslims are regularly lynched on the streets. There's a social boycott of Muslim businesses in many places. (Indian Hindu nationalists) openly calling for violence against Dalits, against Muslims, against Christians, against Avivasis. All of this is being allowed to prosper and multiply under the benign gaze of Modi.*

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<sup>12</sup> Transitional justice in Indonesia will be discussed in the next chapter Legal Framework.

<sup>13</sup> <https://foreignpolicy.com/2021/10/13/indonesia-pandemic-authoritarianism-jokowi-cyberlaw/>

Following on his campaign promise, no doubt encouraged by the huge electoral victory of his party, Bharatiya Janata Party or BJP, Modi revoked the constitutional provision (Article 370) that gave Jammu and Kashmir relative autonomy and placed the province under the direct rule of the central government in New Delhi.<sup>14</sup>

The BJP-led government is hailing its decision to strip the state of Jammu and Kashmir of autonomy after seven decades, characterizing it as the correction of a "historical blunder".

*Professor Irfan Nooruddin observed that **the concern about Kashmir and in particular Article 370 and the special status of Kashmir has long been a talking point for the Indian right wing and its supporters, who have often argued that Article 370 is an example of the appeasement of Indian Muslims and of the special considerations provided to them. This has been part of the platform and manifesto of the BJP and the family of Hindu right-wing organizations for decades.***<sup>15</sup>

The fact that the Modi government has come to power with a massive mandate was probably interpreted as a vindication of its muscular response to the terror attacks earlier this year and the subsequent airstrikes on the Pakistani town of Balakot and an alleged training camp there. So, the government probably thinks that it has the remit to finally deliver on what a large part of its base has wanted for a very long time. And this is the time to do it, and to do it very quickly...Modi demonstrates "a willingness to flout basic norms of democracy".

One of the immediate effects of the abrogation of Article 370 was the abolition of the human rights commission in Kashmir.

Although India was established on the basis of secular ideology, Hindu identity has played and is still playing a key role in India especially when it becomes clear when Hindu-chauvinistic BJP emphasized the point that Muslims in India have been unduly pampered it has made the question of Kashmir's special status in the Indian Union as enshrined in Article 370 of India's constitution as its whipping boy<sup>16</sup>

Lastly, there is a noticeable weakening of civil society. The intensifying onslaughts on civil society, especially organizations that are active in working for government action to end ED and other HRVs, for justice to victims have taken a toll.

<sup>14</sup> <https://foreignpolicy.com/2019/08/05/inside-kashmirs-crisis-and-what-happens-next/>

<sup>15</sup> Elias Groll. Inside Kashmir's Crisis and What Happens Next. Aug, 2019.

<https://foreignpolicy.com/2019/08/05/inside-kashmirs-crisis-and-what-happens-next/>

<sup>16</sup> Chakma

In Sri Lanka, surveillance and intimidation have increased, targeting victims' families, human rights defenders, rights-based non-governmental organizations, as well as lawyers and journalists deemed critical of the government. There have been orders directing that only NGOs "with at least 70 per cent of their activities focused on development would be allowed to work", effectively enabling arbitrary interference with and prevention of a broad range of human rights work. The Sri Lankan Prime Minister Rajapaksa announced a special inquiry into NGOs which he claims are "spreading slander against the government".

During the war period and after till about 2015 the HR activists. Journalists from both Tamil and Sinhala were harassed, beaten up and killed under Mahinda Rajapaksa's regime. Then under the government during 2015 to 2019 only very few harassments of HR activists were reported. But under this present government under Rajapaksa brothers, more harassments were reported from North and East, and few cases also were reported from South. No disappearances were reported since 2015.

## Concluding remarks

We see examples where the end of war does not translate to the start of peace but of low intensity conflict. Of increasing resort to authoritarian measures and the erosion of mechanisms such as representative parties and unions that link citizens and social forces with the political process. Conservative political movements, right-wing governments and populism have emerged in what used to be democratic states exemplified by India and the impact of this on Kashmir and Jammu.<sup>17</sup>

## Human rights violations

Grave HRVs are happening in all the case countries predominantly committed by state agents: extrajudicial killings, illegal arrest and detention, custodial torture, sexual abuse, and enforced disappearances. Almost all the victims are citizens or nationals of the case countries that their

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<sup>17</sup> (Priya Chacko, <https://www.tandfonline.com/doi/full/10.1080/00472336.2018.1448108>)

governments are bound to protect. In Korea majority of the victims are foreign nationals (mostly South Koreans and Japanese) abducted into the North.

As earlier indicated in the Background, these are happening in the context of militarization, heightened state repression of dissent, speech, and assembly where electoral democracy mechanisms are eroded or subverted. Corollary to this is widespread impunity of suspected perpetrators. We now highlight the situation of HRVs in specific countries after which we focus on EDs.

## Bangladesh

The police arbitrarily arrest, detain, and deny victims access to justice mechanisms. There have been instances of extra judicial killing of detainees.

Torture of detainees is commonly done by the police and other state security agents. Many detainees subjected to torture in custody have died because of deprivation of adequate medical treatment. From 2009 to 2020, at least 780 individuals have died in jail due to lack of medical treatment and negligence by prison authorities.

The usual reason for the torture is to force a confession or to extort money from the victims.

## Indonesia

Even after the fall of the dictator Soeharto from power, grave HRVs continue, many of which are connected to the state's campaign against people's assertion of their right to self-determination in Papua, Aceh, Sulawesi, and East Timor as well as demands for accountability of top government officials.

Among the widely reported HRVs are:

- the Simpang KKA incident in May 1999 in North Aceh where the military randomly shot at hundreds of peaceful protesters killing 52 people.
- the military operation in Wasior Sub-district in Papua Province (formerly known as Irian Jaya) from April to October 2001. Human rights organizations estimate that over 140 people were detained, tortured, or otherwise ill-treated during the operation. One person died in custody because of torture while at least seven people are believed to have been extrajudicially executed.



- Twenty-seven people were sentenced to terms of imprisonment after unfair trials. Hundreds of people from villages in the area were internally displaced because of the operation and dozens of houses destroyed.<sup>18</sup>
- also, in Papua the Paniai case in December 2014, perpetrated by state forces: 11 persons were persecuted, 4 people died and 10 people were injured. The top commander of the troops is directly implicated in the investigation.

## Jammu and Kashmir

Since the onset of the conflict in 1989 when the movement for independent Kashmir openly challenged Indian rule, there has been increasing grave HRVs. Clampdown on freedoms of expression and assembly, application of repressive laws, and a general environment of criminalization of human rights advocacy have intensified. There is a pattern of disproportionate use of force by the state. The impunity of perpetrators using laws such as the Armed Forces Special Powers Act (AFSPA) of 1990 and the Jammu and Kashmir Public Safety Act of 1978 has become a pattern.

Many arrests happen during raids or routine patrolling or during cordon and search operations, or what has popularly been termed “crackdowns”.

## Nepal

Reported HRVs include extra judicial killings, torture, cruel, inhuman or degrading treatment by the government of detainees, arbitrary detention, grave restrictions on free expression, the press and the internet, including site blocking and criminal defamation laws; interference with the rights of peaceful assembly and freedom of association. There is government pressure on civil society illustrated in overly restrictive laws for nongovernmental organizations.

Lately, restrictions on the freedom of movement of refugees, notably resident Tibetans, have been reported.

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<sup>18</sup> <https://reliefweb.int/report/indonesia/indonesia-grave-human-rights-violations-wasior-papua>

On the rights of prisoners, Advocacy Forum, after visiting 1005 detainees, found that 19.8% of them were subjected to torture and ill-treatment. There are allegations of custodial deaths resulting from torture. Although it has been criminalized by law in 2018, not a single act of torture has been prosecuted.

## Sri Lanka

Civil society organizations and professionals deemed critical of government especially those working for human rights are among the usual targets of surveillance and harassment by state forces. Paramilitaries or non-state pro-government armed groups work with state armed force in some cases.

There is also a rise in attacks by Buddhist extremists against Christian and Muslim minorities seen to be either encouraged by the government or government is strangely unaware of it.

The COVID-19 pandemic has exposed government's disrespect for minorities' culture. As example is requiring cremation of those who died from COVID-19 even it is not required for public health. This violates the Muslim tradition of internment.

## Enforced disappearances

In all the case countries, EDs are taking place.

There is a pattern in the manner with which EDs are committed. One, persons were either arrested without a warrant or picked up by members of law enforcement agencies and their whereabouts untraceable. Two, in violation of the legal requirement of presenting the accused within 24 hours of arrest, after many days, they are charged with offenses or if the perpetrators are civilian or paramilitary agents, they are handed over to police with instructions to falsely implicate them in serious crimes. Or three, if the person is surfaced alive, there are signs of torture. Or when the body is found, there are signs of torture and murder.

In Bangladesh the police would often claim these persons were killed in a crossfire.

Or the disappeared are never found.

In Kashmir, families of ED victims commonly experience the following:

- First, they approach law enforcing officials to know the whereabouts, which invariably assure them that the detainees will be released shortly. After several visits to the police, the relatives are “politely” told that they did not arrest the detainee at all. The relatives now desperate approach other security officials or civil authorities for help including Deputy Commissioner and Divisional Commissioner. Some of them approach the politicians of different political parties who seem to be equally helpless.
- The police officials invariably hesitate to file a FIR against the security forces.
- These endeavors cost a lot of money. In most of the cases the relatives spend lakhs of rupees to know the whereabouts of their missing ones. They travel to different interrogation centers in the state and outside the state. They are hesitant to seek the judicial remedy, fearing that this will endanger the life of the detainee. Finally with the passage of time exhausting all the channels the dejected, desperate relatives take the legal recourse.
- The disappearances have economical dimensions. The disappearance of the earning member of the family threatens the very existence of the whole family.

In Pakistan, enforced disappearances have existed since the 1970s, but have significantly increased beginning in the early 2000s with Pakistan’s involvement in the US-led “War on Terror”. Since then, hundreds of people have reportedly “disappeared” after being abducted by security agencies from all over the country. The government maintains secret detention centers out of the jurisdiction of Pakistan’s legal system. The government has maintained secret internment camps where victims, often critics and activists, can ‘disappear’ for a short period of time<sup>19</sup>. These camps and its enabling law “Action in Aid to Civil Power Regulations” were already declared illegal by the Peshawar High Court. However, a ‘stay order’ filed by the government was granted by the Supreme Court versus the High Court Decision. Final judgment is pending up to this day<sup>20</sup>.

More recently, there is an emerging trend of “short-term enforced disappearances” of victims such as bloggers, activists, and government critics. Most of them were later transferred to and detained in secret facilities called Internment Centers in Khyber Pakhtunkhwa located in the north-western

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<sup>19</sup> The Khyber Pakhtunkhwa Internment Camp is an example of these government-sponsored secret detention facilities (Pakistan Report Summary, 2021; pp. 1-2)

<sup>20</sup> Ibid.

region of Pakistan. After being interrogated in secret detention for weeks or months and reportedly being subjected to torture, the victims are released without being charged of any offence.

The perpetrators are the police or other security agents of the state. In Sri Lanka and Indonesia, there are reports that paramilitary personnel are involved. In Kashmir the armed forces units deployed in identified insurgency areas are frequently shifted, making it difficult to identify perpetrators.

During the civil war (and in 1971 and 1988 insurrections in South) in Sri Lanka involving state forces, the communist JVP, and the separatist LTTE, between 60,000 to 100,000 persons were forcibly disappeared. Amnesty International, Human Rights Watch and Asian Human Rights Commission have attributed many of the disappearances to the Sri Lankan security forces, pro-government paramilitary groups and Sri Lankan Tamil militant groups.

There is no official figure of disappearances. But during the campaign against disappearances in South led by Mahinda Rajapaksha (Present PM), he used the figure 60,000. About 26,000 cases were reported to the presidential commission appointed in 1996. The Mannar Bishop in his report to LLRC He said the difference between the number who entered the “NO WAR ZONE “ and the number came out was nearly 147,000. This figure is other than the disappearances took place before and after this period.

State protection enables impunity of perpetrators. Impunity has become so widespread and institutionalized that many times, as experienced in Bangladesh, they have been reckless in their crimes such that it would be impossible not to identify the perpetrators.

## Korea

There are four categories of ED victims in North Korea: (a) North Koreans deemed a threat to the state; (b) South Koreans forcibly brought to the North or tricked to go to the North; (c) Japanese nationals; and (a) other foreigners. Most literature on this topic use the term “abduction” or “abductees” or “kidnapped”. The standard statement of the North Korean government on this issue is that it “affirmed that the abduction of other foreign nationals other than the Japanese does not exist”. Except that the term used is abduction, except for Nepal and Sri Lanka, it is essentially like other governments’ response: denial of the existence of EDs.

## *North Korean victims*

The widespread enforced disappearances against its citizens are a tool to punish the rebellious, plant fear among the citizens, and control their behavior. The UN Working Group on Enforced or Involuntary Disappearances (WGEID) reported that there are 316 outstanding cases of enforced disappearances of North Koreans as of August 2020.

Guilt by association is a common reason for enforced disappearance in the DPRK. There are cases where the suspect's whole family goes missing after the initial disappearance of the victim accused of a political crime. They are often brought to political prison camps (*kwanliso*) operated by the secret police.

These political prisoners are subjected to torture, inhumane treatment, exploitation and forced labor. An estimated 80,000 and 120,000 inmates are charged with political crimes and detained in North Korean prison camps.

## *Abduction of foreigners*

Over 80% of South Koreans were abducted to the North in the early part of the Korean war. Targeted were skilled workers and professionals. After the war at least 3,835 South Koreans were abducted by North Korean agents. Of these, 3,310 persons were returned to the South within one year of abduction, and nine abductees have escaped and returned as of 2014. However, 516 South Korean victims of enforced disappearance are still detained in North Korea.

The UN Commission of Inquiry in the DPRK concluded that well over 200,000 persons were taken from other countries such as South Korea and Japan to the DPRK. The North Korean government has refused to admit that it has committed any involuntary or enforced disappearances except the abduction of 13 Japanese citizens.

Most of the post-war abductees from South Korea were fishermen who had worked on vessels near the maritime border between the North and South. Korean air crew members and passengers, firm directors, actors, students, and pastors were abducted as well.

In 1969 the Korean Airline airplane YS-11 was hijacked to the North. The North Korean government has categorically denied its involvement. Up to now, the South Koreans victims' fates and whereabouts remain unknown.

The North Korean abduction of Southern civilians after the Korean War was largely ignored by both the South Korean government and public until the 1990s. There was not only the lack of understanding on the abduction issue but also the social stigma and discrimination attached to the victims' family due to the inter-Korean conflict within the Cold War context. Those abducted after the Korean War were easily framed as possible future North Korean spies; the victims' family members remaining in South Korea were often monitored and taken to police for interrogation by the South Korean authorities. Also, they often faced disadvantages, unable to pass identity screening for traveling abroad and getting stable jobs in both private corporations and government.

### *“Paradise on Earth” victims*

Approximately 93,340 in the community of ethnic Koreans in Japan (Zainichi Koreans) were displaced to North Korea between 1959 and 1984 in ‘the Paradise on Earth’ operation. This was supposedly a humanitarian repatriation program to allow the diaspora to return to their home country after the war. The operation was planned by the North Korean government and implemented by Chongryon, the General Association of Korean Residents in Japan, ostensibly an ethnic minority interest organization established in 1955 under the direct orders and support of the North Korean government. Many among the displaced Zainichi Koreans ultimately became victims of enforced disappearance, and their whereabouts unknown.

### *Japanese victims*

Of those brought to the North during the Paradise on Earth operation, 6,730 were Japanese nationals who were the spouses or children of Zainichi Koreans.

In addition, during the 1970’s and 1980’s, there were several incidents of abduction of Japanese citizens. The Japanese government has identified 17 Japanese citizens while North Korea in September 2002 has confirmed 15 had been abducted with an apology and promise to prevent any further similar acts. In October of that same year, five abductees returned to Japan. We will take this up further in the next section on Mechanisms.

**Table 3: Estimated number of victims of grave HRVs and EDs by country**

	Bangladesh	Indonesia	Kashmir	Korea	Nepal	Pakistan	Sri Lanka
Estimated # victims of HRVs	152 cases of persons tortured to death by law enforcement authorities (2009-2020)						After 2009 some disappearances took place but do not have an exact figure. Since 2015 no cases were reported.
Estimated # of EDs	587 EDs: 81 bodies found; 357 resurfaced; 149 still missing (2009-2020)		8,000+ (students, political activists, armed militants)			Commission on Inquiry for EDs in Pakistan (COIOED) received 8,122 cases since 2011. Of this number, 2,274 remain unsolved (September 2021)	

## Impact of EDs

The terrible weight of EDs on victims and their families is incalculable; the impact borne across generations. First the victims themselves who are surfaced - apart from the physical effects, carry the psychological and mental trauma. They have difficulties becoming active contributors in society and providing for their families. In addition to the trauma, this is also because the victims remain under observation and regularly tracked by authorities after their release and are, therefore, extremely afraid to open up or interact with anyone.

While women are also targets of rights violations<sup>21</sup>, enforced disappearance victims around the world are found to be ‘overwhelmingly’ men – ranging from 70 to 94 percent<sup>22</sup>. The 2006 International Convention for the Protection of All Persons from Enforced Disappearance has defined ‘victims’ as both the disappeared persons and those who have suffered harm thereafter, i.e. – the families<sup>23</sup>. Women from the household of the disappeared – wives, mothers, sisters, and daughters, bear the brunt of the socioeconomic impact<sup>24</sup>. The WGEID’s position is that all victims of EDs are entitled to reparation<sup>25</sup>.

Aside from the dreadful uncertainty suffered by families over the fate of their relatives, many of the families are surveilled, afraid to speak out, and suffering from trauma. Their economic, social, and mental wellbeing is adversely affected. Children are deprived of education and paternal care. In Kashmir, families who try to locate their relatives spend a lot of money as they go from office to office in different places. The process of declaring the disappeared as dead to access social services is also tedious and difficult especially for rural poor women who are often illiterate due to the inaccessibility of formal education.

The suffering of the families is not time bound. Speaking of families of ED victims in Indonesia, the Asian Legal Resource Center said: *The families of these victims are still suffering today; over 18 years since Suharto stepped down, their beloved remains missing. Moreover, most of the victims were the family breadwinners, or expected breadwinners.*<sup>26</sup>

<sup>21</sup> Dewhirst, P., & Kapur, A. (2015). *The Disappeared and Invisible: Revealing the Enduring Impact of Enforced Disappearance on Women*. International Center for Transitional Justice; p. 5

<sup>22</sup> Kapur, A. (2015, April 14). *Overlooked and invisible: the women of enforced disappearances*. Retrieved from Open Democracy: <https://www.opendemocracy.net/en/opensecurity/overlooked-and-invisible-women-of-enforced-disappearances/>

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Amnesty International, 2021; p. 17

<sup>26</sup> <https://alrc.asia/indonesia-no-justice-for-victims-of-enforced-disappearances>



Due to traditional gender roles and structural inequalities, it is difficult for women to fill the socioeconomic gap and cope in the aftermath of a disappearance<sup>27</sup>.

Wives of victims are particularly impacted adversely. They take over the role of breadwinner aside from their other usual domestic duties. Aside from cultural norms that stigmatize and discriminate them for not being widows but whose husbands are nowhere to be found, their rights are also jeopardized. For example, in Bangladesh, they cannot exercise their right to conjugal property without evidence of the husbands' demise. They cannot access bank accounts and land registrations as these are in the name of their disappeared husbands and since there is no proof of death through death certificate, they are unable to accomplish transactions as next of kin.

The International Center for Transitional Justice (ICTJ) reported in 2015 that women, particularly wives of the disappeared, see themselves as economic burden as they are left to stay with their in-laws<sup>28</sup>. In Nepal, infra-familial tensions emerge as in-laws see the wife of the disappeared as a 'threat' to family property and lineage through her children.

It is much harder for families if there are no longer males in the household to act as breadwinner or head. To illustrate, Amnesty International cited the case of Aqsa Dayo of Pakistan, whose brother Insaf was the former sole breadwinner of her household and forcibly disappeared in 2017. What remained of Aqsa's family was her ailing mother and a sister, with Aqsa and her sibling forced to do more sewing and embroidery work to support their needs while paying for their mother's healthcare bills.

Elder women especially in cultures where children are expected to support their aging parents are also burdened with the disappearance especially of a son.<sup>29</sup>

The ICTJ reported that when searching for leads on the disappeared loved ones, women and families were also vulnerable to extortion by con artists and even the perpetrators themselves who are offering information.

Women and girls in cultures where fathers and husbands form a protective presence, are at more risk to sexual violence and abuse after the disappearance of the male household head. Abusive state

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<sup>27</sup> Dewhirst, P., & Kapur, A., 2015; p. 6

<sup>28</sup> Ibid.

<sup>29</sup> Dewhirst, P., & Kapur, A., 2015; pp. 6-7

armed forces even target women relatives who turned to activism and advocacy for rights, for rape, harassment and other torture methods that are sexual in nature.

The disruption in the hierarchy and the shift of gender roles caused by EDs especially for women who are forced to work bring additional tension within the family, leading to what is called as ‘infra-familial harassment’. Women are berated by relatives for abandoning wifely and motherly duties in search for work, or their missing loved ones through advocacy.

Women married to disappeared persons also face ‘unique challenges’ as they are pressured to ‘conform to the traditional role of either a widow or a wife’. Wives of the disappeared do not enjoy the same privileges as their married peers due to the uncertainty of the fate of their husbands. In cultures like that of the Tamil in Sri Lanka and of Nepalese, married women are to wear artifacts to distinguish themselves. Reluctance to remove these markers are common to wives of the disappeared out of loyalty to the marriage or reluctance to give up social privileges associated to being married. Kashmiri women have even coined the term ‘half-widows’ to capture their plight and experience.

Women and families are also disenfranchised in terms of access to social services. Financial constraints brought about by the enforced disappearance of the breadwinner have made it harder for wives, women siblings, relatives, and children to access education and health care services. In Pakistan’s ED cases, children and younger siblings are often forced to stop schooling, and physically and psychologically distressed women and children cannot readily access health services.

Mrs. Manori Muththettuwagama, the president of the Sri Lanka Presidential Commission to inquire into the disappearances appointed in 1996 said that she dealt with thousands of disappearances and most of the people who spoke to her about the loss of a family member were women.

## They fight back

Despite facing heavy, multiple challenges, the women of the families of the disappeared fight back. They summon enough courage to speak. In Sri Lanka, the family members who persist in asking for answers include Tamil mothers and wives whose children and spouses were detained by security forces; the families who accompanied relatives who surrendered to military-run rehabilitation camps at the end of the war; and Muslim women whose loved ones were targeted by the LTTE, the army, or the police. The voices demanding the truth about the disappeared also include Sinhala women whose sons and husbands were taken by the police during the repression and uprising of JVP in the early 1970’s and the late 1980’s.

“I want to know where he is, but also why did they do this to him” is a call that has been heard from all sides of Sri Lanka’s deep ethnic divides. Successive episodes of armed conflict and political repression have left deep scars in Sri Lankan society and victims, who, despite their invisibility, stubbornly demand truth, acknowledgment, and justice.

The families’ hope was buoyed when in 2015 President Maithripala Sirisena was elected on a centrist platform and a commitment to truth, justice, and reconciliation. Later that year, the Sri Lankan government agreed to a UN Human Rights Council resolution that offered a roadmap for the search for the missing and forcibly disappeared. To the dismay of many, however, the government has done little since to implement these commitments and to take the opinions of victims seriously.

The Government established a permanent office, Office for Missing Persons (OMP), to reveal the truth on disappearances in every civil uprising and during the war. They called applications and got many applications but not a single case was inquired into until now.

In Bangladesh, mothers created a network among themselves, called ‘Mayer Daak’ (Mothers’ Call). Through grassroots organizations like this, the victim-families continue to struggle and build their solidarity with other families of the disappeared by participating in various activities such as organizing press conferences, protesting rallies, submitting memorandums to the authorities, and commemorating the International Day of the Disappeared and the International Week of the Disappeared.

In Indonesia, starting at the end of March 1998, some parents began to worry because of the news that their children were abducted by the military. Among them were the parents of Faisol Riza; Raharja Waluya Jati; Mugiyanto; Nezar Patria; Suyat Petrus Bima; Anugerah; Andi Arief; Herman Hendrawan, Yani Afri, Noval Alkatiri, Yadin Muhidin and Ucok Siahaan and the wife of Wiji Thukul.

They reported their disappearance to an NGO, the Commission for Missing Persons and Victims of Violence (*KontraS*). They also began to search for their disappeared loved ones by visiting the Commission on Human Rights (*Komnas HAM*), military headquarters, police headquarters, military police headquarters, House of Parliament, the Attorney General and different ministries of

government to relay one common question: “Where *are our children?*” Until now, the question remains unanswered<sup>30, 31</sup>.

But the Indonesian mothers of the disappeared continue to struggle for justice and human rights in Jakarta, not to mention those mothers in other parts of the country, such as Aceh and Papua, who are also struggling for the same cause.

## SECTION TWO: LEGAL FRAMEWORK, REPORTING MECHANISMS, CONCLUSIONS AND RECOMMENDATIONS

### Legal Framework

We now describe the existing legal framework for EDs. The legal framework includes the constitutional and domestic policy instruments that protect human rights in general. We then look at the legal framework for ED, in the domestic sphere. The questions we address here are: (a) is ED recognized as a crime; and (b) if it is not, are there laws or policies that could serve as legal basis for victims to get redress.

We first present the overall constitutional or legal framework for human rights.

#### *Protection of human rights in the constitution and laws*

In terms of constitutional guarantees, all the countries provide some protection for basic human rights including North Korea. However, what the constitution and some laws give, other specific laws or policies take away.

<sup>30</sup> [https://afad-online.org/voice/aug\\_2009/news\\_feature2.htm](https://afad-online.org/voice/aug_2009/news_feature2.htm)

<sup>31</sup> Ibid.

We cite examples.

The Bangladesh' constitution guarantees the rights to life, liberty, and protection of law. It has provisions for safeguards of arrested persons or in detention. It guarantees the right to speedy and public trial by independent courts, and prohibits torture, cruel, inhuman, degrading treatment or punishment.

The High Court Division (HCD) of the Supreme Court has the constitutional power to issue orders to enforce fundamental rights including for individuals who feel aggrieved can move to the HCD for enforcement of any of their fundamental rights guaranteed in the Constitution.

The Code of Criminal Procedure lays out clear procedures for ensuring that rights are not violated such as any person arrested must be brought before a judge within 24 hours of arrest. That person has the right to a legal counsel immediately after arrest, that family members are promptly informed about the time and place of the arrest and detention.

But in the Code of Criminal Procedure, there are sections that allow the police to arrest anyone on suspicion without a warrant, and in the case of warrants, the Code grants broad authority for magistrates to determine a sufficient basis for arrest.

The country's Supreme Court has ordered the revision of the Code to ensure compliance with international HR obligations but to date nothing has happened yet.

Bangladesh has also failed to adopt domestic legislation restricting law enforcement agencies' use of force and firearms in accordance with international law and guidelines, including the "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and on the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment" and the UN Code of Conduct for Law Enforcement Officials.

The general practice of Bangladesh is that international treaties do not automatically become part of the domestic law unless it is incorporated into the domestic legislations. Most of the international instruments ratified by Bangladesh have not yet been included into the domestic law to be enforced directly in domestic courts, thus, the status of international law in Bangladesh remains in many ways unincorporated and unimplemented.

Jammu and Kashmir - In its submission for its first Universal Periodic Review (UPR) in April 2008, India said that its “approach towards protection and promotion of human rights has been characterized by a holistic, multi-pronged effort.” It claims to have extensive guidelines to “educate police and security personnel to prevent violations”.

But the 2018 OHCHR Report on Jammu and Kashmir notes that the Armed Forces Special Powers Act 1990 (AFSPA) and the Public Safety Act 1978 (PSA) have “created structures that obstruct the normal course of law, impede accountability and jeopardize the right to remedy for victims of human rights violations.” The Indian Constitution has Article 22(3)(b) which provides for ‘preventive’ detention and restriction on personal liberties when state security is at risk”.

Most recently, whatever legal standards on respect for human rights, thin though these may be in Jammu and Kashmir, are practically rendered moot with the abrogation of Article 370 of the India constitution by the Modi government referred to in the previous section. Kashmir, especially, is virtually a police state.

### *Transitional justice*

There was much hopefulness at the end of armed conflict with the signing of the comprehensive peace agreement between the government of Nepal and the Communist Party-Maoist in 2006, and the fall of the Soeharto dictatorship in Indonesia in 1998. These two countries inaugurated a program to come to terms with the atrocities in the past by accounting for and rendering justice to victims in the hope that these gross violations will not happen again. The legal framework for human rights in these countries will be examined in the frame of transitional justice.

Transitional justice is a concept of justice that is strongly related to change in a political system and characterized as a series of legal responses and reforms to strengthen the human rights enforcement system, especially to establish responsibility for the gross human rights violations that occurred in the past.

Three of the goals in transitional justice are (1) investigation and truth-seeking mechanisms by the state, including the identity of the perpetrators, especially related to the rights of the victims and their family to know; (2) accountability and criminal responsibility of perpetrators, especially the ones in high command, through judicial mechanism, and institutional reform, including the state institutional system; and (3) end impunity.

The law creating the Indonesian Human Rights Court was enacted by the legislative assembly. There are several criminal law principles that are excluded in the implementation of this law such

as *ne bis ni idem*<sup>32</sup> and non-retroactive principle. Other provisions in the Law include compensation, restitution, and rehabilitation given to the victims of gross human rights violations.

The National Commission on Human Rights (Komisi Nasional Hak Asasi Manusia/Komnas HAM), the only body authorized to conduct preliminary investigation of suspected gross human rights violations was also established. (In the section on mechanisms, we will describe Komnas HAM in more detail.)

In Nepal, the peace accord included the establishment of a high-level truth and reconciliation commission. The law that created this body was passed in 2014, the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act (TRC Act). The law intended the commission to be independent, impartial, accountable, and high – level. It was tasked to investigate serious human rights violations during the armed conflict and to recommend appropriate legal action.

However, the Act came under scrutiny from civil society in Nepal as well as the UN because of inconsistencies in some of its provisions with international human rights standards. For instance, the Office of the United Nations High Commissioner for Human Rights (OHCHR) highlighted Section 26 of the Act, which gives the Commission broad powers to recommend amnesties without provision for the consent of the victim.

### *Legal framework for EDs*

Nepal has recognized EDs as a crime in 2018 in accordance with the ICPPED, and has passed a national legislation to the effect, the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act (TRC Act). This act gives ‘broad powers’ to recommend amnesties for violators especially during the period of armed conflict. In 2015, the Supreme Court of Nepal struck down these provisions and ordered amendments. The Government petitioned the ruling, but the Supreme Court affirmed its decision in 2020<sup>33</sup>.

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<sup>32</sup> Article 76 section (1) of the Indonesian Penal Code (*Kitab Undang-Undang Hukum Pidana/KUHP*) states that “no person shall be prosecuted again by reason of an act, which the verdict of an Indonesian judge with respect to him has become final.”

<sup>33</sup> Human Rights Watch. (2021, August 30). Nepal: Stop Stalling Enforced Disappearance Inquiries. Retrieved from Human Rights Watch: <https://www.hrw.org/news/2021/08/30/nepal-stop-stalling-enforced-disappearance-inquiries>

But the Penal Code does not allow complaints to be heard six months *post facto* or after the disappearance was made public.

Sri Lanka has a law that created the Office for Missing Persons.

In Pakistan in 2021, the Ministry of Human Rights (MOHR) proposed an amendment to the Penal Code which introduced ED as a crime. Albeit considered as a positive step, rights organization Amnesty International criticized the amendment to be ‘flawed’ and uncompliant of standards set by the international human rights law (IHRL). Amnesty International claimed that the amendment does not protect persons already persecuted by the law due to prior offense from disappearance and will not apply to Pakistani nationals and non-nationals who are already outside of the country.

The rest of the countries have no law criminalizing EDs suggesting a denial of its occurrence. Usually, the terms “abduction” and kidnapping” are used instead. In Sri Lanka, the government named it “involuntary removal of persons” but this was never clearly defined by the commissions that were created although it was understood that ‘removal’ implied abductions essentially by non-State actors.

South Korea, for reasons that will be discussed in the section on Mechanisms, call the disappeared during and after the Korean War as people about whom information cannot be known. Terminologies is a sensitive matter in the efforts of South Korea to improve relations with the North. Terminologies have become a part of the political and diplomatic tools of both North and South.

In Pakistan, EDs does not exist as a crime in the laws although the Supreme Court of Pakistan has held that the principles of the ICPPED were applicable in Pakistan as the Convention was inextricably linked with the right to life, guaranteed by Pakistan’s Constitution.

India has been publicly saying that it will ratify the ICPPED but has not done so up to this time. Furthermore, the nullification of the Articles 370 and 35(a) in 2019 which revoked the statehood of Jammu and Kashmir and led to the dissolution of the State Human Rights Commission (SHRC), and the inability of national institutions such as the Supreme Court and the National Human Rights Commission (NHRC) to hold state actors accountable have contributed to the worsening human rights situation in the region.

In closing, we observe that in the absence of a law or policy that explicitly recognizes EDs as a crime, victims and their families have to use existing legislation such as on kidnapping or abduction, but these have inferior remit. EDs on the other hand because it is defined by a UN treaty is a crime against humanity.



Table 4 below shows the comparative status of countries vis a vis legislation on ED and the ICPPED.

**Table 4: Legal framework regarding ED of countries at a glance**

	Bangladesh	Indonesia	Jammu & Kashmir	Korea	Nepal	Pakistan	Sri Lanka
Legislation /policy recognizing ED as a crime	none	None	none	None	Yes	Yes	None Yes
Signatory to the ICPPED*	No data/pls provide	Yes	Yes (India)	Yes	Yes	No	No data/pls provide Yes. Signed December 2015
Ratified the ICPPED	No data/pls provide	No	No	No	Yes	No	Yes Ratified in 2016 August

\*UN International Convention for the Protection of all Persons from Enforced Disappearance

## Mechanisms

In all the case countries, there are constitutional provisions mandating the protection of human rights although there are substantial variations in the scope and details. This constitutional mandate is to be expected since all of them are members of the United Nations and have therefore signed on to the Universal Declaration on Human Rights.

### *National Reporting Mechanisms*

In all the case countries except Korea where data are not accessible, there are existing national reporting mechanisms that can be used by victims, even in countries where there is no law that explicitly recognizes ED as a crime. It is not however the case that where there is a law, mechanisms are better performing compared to those without. We will take this up later in this section.

## *National commissions on human rights*

What are the national reporting mechanisms common to all the case countries (except Korea)? The national commissions on human rights are structures created to investigate gross HRVs. The other are the judicial courts. In some countries there are offices and processes within the police with specific functions to protect human rights.

The human rights commissions (HRC) usually have the following functions: research, mediation, information dissemination. Conducting preliminary investigation of reports or complaints of HRVs involving state agents filed to their office is its main mandate. The result of the preliminary investigation is submitted to the prosecutor, usually called the attorney general, who then proceeds to evaluate the evidence and files the appropriate cases in the courts. By law, the prosecutor's office and the commission should work in tandem as partners.

There are significant variations in the functions and authority of the HR commissions across the case countries. In Sri Lanka for example, the Human Rights Commission on top of its investigating function, is mandated to 'advise and assist the government in formulating legislations, directives and procedures to promote and protect human rights'. It can also recommend financial compensation for victims and families. While KomnasHam's (Indonesia) functions include mediation and consultations with civil society including partnering with the public in the conduct of its investigation.

In the two countries Nepal and Sri Lanka coming out of protracted civil war which caused thousands to be forcibly disappeared, ostensibly in response to widespread demand, both locally and internationally, mechanisms specifically for the disappeared were set up. In Nepal the Truth and Reconciliation Commission (TRC) was established by the Enforced Disappearances Enquiry, Truth, and Reconciliation Commission Act. In 2015, the Commission of Investigation on Enforced Disappeared Persons (CIEDP) was established to ascertain the fate of ED victims.

Established in 2000 based on Article 249 of Nepal's Constitution, the National Human Rights Commission (NHRC) is mandated to receive and investigate complaints, summon, and enforce attendance of parties involved in cases, recommend administrative and legal actions against violating state officials or non-state agents, review local policies in line with the promotion of rights, and monitor the observance of international rights covenants wherein Nepal is a party.

In Sri Lanka, the terminology used is "missing persons" – the Office for Missing Persons (OMP) was established in 2017 through the OMP Act, which is the law that introduced ED in the Sri Lankan legal framework. According to the law, the OMP is a 'permanent and independent institution' with the mandate of finding the fate of disappeared persons in Sri Lanka and protecting

the rights and welfare of victims' families. The OMP has investigative powers and thus can receive complaints and perform inquiries. Data from various government institutions and commissions carrying out investigations should be centralized at the OMP.

In addition to the OMP, there have also been several presidential commissions of inquiry. One of these was the Presidential Commission to Investigate into Complaints Regarding Missing Persons created by former President, Mahinda Rajapaksa.

It could be that of all the case countries it is Sri Lanka that has created the greatest number of reporting mechanisms. We will later see if this translates to better reporting and action.

Though OMP was established in 2017, applications were called yet up to now not a single inquiry was conducted.

A commission for Reparation (RC) was also established but they did not compensate a single case as the recommendations should come from OMP.

### *HR protection offices in the police*

Aside from the general mandate from the constitution and pertinent laws for the police and security agencies to respect human rights, in some countries, there are specific offices within the police and security systems with the explicit function of ensuring that the human rights of suspects, the arrested and detained are protected. For example, the Nepali Police have established a Human Rights Section in 2003 with three desks for (1) protection, (2) promotion and (3) coordination. Protection desks are for receiving complaints and 'bringing abusers to justice', while promotion desks are for training police officers to be rights-friendly and incentivize respect for human rights. The coordination desks are for intergovernmental agency and civil society coordination.

In Nepal and Kashmir for example, ED victim families can file the First Information Report (FIR) with the police. In Pakistan, if a person disappears within the country, the first step for the victim's family would be to file-complaint with the nearest police station from where he/she was abducted. In case the place of abduction is unknown, the complaint can be filed in the police station in the closest proximity.

### *The judicial courts*

In all the case countries, judicial courts from the supreme court to the lower courts can hear and decide cases of EDs and other HRVs. These cases could have reached the courts through the usual

processes followed for criminal cases or through the national prosecutors' office acting on the reports of human rights commissions.

Indonesia went a step further by creating the Human Rights Court as the special institution authorized to hold trials concerning gross human rights violations in tandem with Komnas HAM.

In Bangladesh, there is the public interest litigation (PIL). Here the courts accept cases filed by public-spirited persons on behalf of others, even though they themselves are not personally affected. PIL cases tend to benefit the poor and disadvantaged sections of society who, for many reasons, do not have access to the courts. It has the potential to be an effective tool for protecting human rights under a simplified complaint system particularly in the way it gives scope to holding government officials accountable. However, the future of the public interest litigation-based judicial activism depends on the state of the public interest litigation movement in Bangladesh, which now has still a long way to go in becoming an effective channel for justice.

### *Civil society*

In the face of tremendous difficulties getting prompt and apt action from the government, not to mention the obstacles thrown their way by government agents, victims and/or their families have partnered with human rights defenders and advocates. There are also organizations of lawyers, human rights activists and similar groupings. Common across these civil society organizations is the desire to provide solace and support to the victims and/or their families. Support usually is in the form of documentation, provision of advice and information especially for technical matters such as filing the FIR, or testimony with human rights commissions. They also conduct issue-based public advocacy and education and liaising with international mechanisms.

Rarely, if at all, do they provide financial assistance because they do not have this resource.

### **Problems and issues with national mechanisms**

Across all case countries, there are very low percentages of prosecution of cases and conviction. We give details.

### *The human rights commissions and similar bodies*

The Bangladesh commission has failed to conduct thorough investigation of a large majority of the cases of extra-judicial killings, enforced disappearances, and custodial torture committed by law enforcement agencies.

At the end of the active war between government and rebel forces in Sri Lanka and Nepal and the fall of Soeharto in Indonesia, there was much hope that the families of the disappeared will finally learn the fate of the victims and justice be done. But these did not happen. Sri Lanka is illustrative. We quote Cristian Correa: *The hopes of these victims reached a peak in 2015, when President Maithripala Sirisena was elected on a centrist platform and a commitment to truth, justice, and reconciliation. Later that year, the Sri Lankan government agreed to a UN Human Rights Council resolution that offered a roadmap for the search for the missing and forcibly disappeared. To the dismay of many, however, the government has done little since to implement these commitments and to take the opinions of victims seriously.*<sup>34</sup>

There is not much difference with what is happening in Nepal, where an estimated 1,327 EDs were committed during the civil war. In 2018, Nepal already introduced ED as an offense in its Penal Code. However, according to Human Rights Watch (HRW, 2021) after three years, not a single perpetrator has been prosecuted.

In addition, HRW notes that in 2020, the CIEDP published 2,506 names of alleged ED victims, but none of them were traced or found. Not a single perpetrator was also brought to justice<sup>35</sup>.

The Nepali NHRC in its 20-year report on October 2020 said that only 13 percent of the 1,195 recommendations it has issued were fully implemented by concerned government agencies.

The Human Rights Commission of Sri Lanka (HRCSL) has its status downgraded from A to B by the International Coordinating Committee on National Human Rights Institutions in 2007 due to its poor performance. However, the UN CHR in 2021 praised the Office for Missing Persons that despite its limited capacity and resources, it has helped to amplify the voices of the families and their situation.

Why is this the general pattern across the case countries? Let us identify the factors that contribute to this dismal performance.

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<sup>34</sup> Sri Lanka's wavering commitment to accountability for enforced disappearances. 8/29/2018.

<https://www.ictj.org/news/sri-lanka%E2%80%99s-wavering-commitment-accountability-enforced-disappearances>

<sup>35</sup> Human Rights Watch, 2021

## Factors for the poor performance of the national mechanisms

### *Commissions on human rights/inquiry/missing persons*

The commissions lack independence from the government represented by the appointing authority - the president or prime minister. They are not sufficiently shielded from vested political interests.

The commissions are dependent on the government for funding which probably should be the case since private funding may tarnish the credibility of the commissions. However, independence is compromised by delayed budget approval or fund release or control through budget tightening/loosening. Commissions in several countries suffer from delayed fund releases due to red tape and insufficient funding.

The inadequate budget has dire consequences. In Sri Lanka, for example, the Office for Missing Persons lack high-caliber investigators due to noncompetitive salaries.

More concerning is the authority given to the Sri Lanka president by the Commission of Inquiry (COI) Act to set the terms of reference for the commission. The President has the authority to add new members to the Commission at his/ her discretion and to alter, amend or revoke the warrant establishing a Commission at any time. The President can also give directions to the Commission's Secretary without consulting the Commission or its Chairman.<sup>36</sup>

The scenario gets more dire when the commissions themselves do not have the authority needed to fully perform their mandate.

We use Kashmir to illustrate. The *National Human Rights Commission (NHRC)* cannot compel the Indian Government to act promptly on ED and other rights violation cases. To cite an example: in 2001, the NHRC transmitted to the Indian Government 364 ED cases for action. The exchange between the NHRC and the Indian Ministry of Defense resulted to the dropping of most of the cases<sup>37</sup>.

<sup>36</sup> Presidential powers and Commissions of Inquiry, <http://www.dailynews.lk/2017/07/12/features/121666/presidential-powers-and-commissions-inquiry>

<sup>37</sup> The Ministry of Defense declared that state armed personnel were involved only in 85 out of 364 cases. And the Ministry commented only on 31 of the cases.

*There is lack of transparency in the appointment of commissioners.*

In Bangladesh, for example, the government has not established a clear, transparent, participatory, and merit-based selection and appointment process, in accordance with the Paris Principles. In September 2019, the Government appointed the new NHRC members through the same selection process that lacked transparency and had restricted civil society participation.

*The government has no political will or genuine commitment to human rights.*

It has been observed that the creation of commissions, the passage of laws and human rights pronouncements and creation of commissions/committees is for political mileage, to appease the public or critics in the UN and international NGOs.

This is clearly shown by Modi of India. Without any sensitivity to the feelings of the people of Jammu and Kashmir, he revoked Article 370 of the Indian Constitution that resulted to, among others, the abolition of the commission for human rights and other relevant local bodies. This also meant the dissolution of eight state commissions including the State Human Rights Commission (SHRC).

It is to be noted that in 2011, the SHRC urged the Indian Government to carry out investigation and DNA identification tests for the victims buried in unmarked mass graves in North Kashmir. The Government did not heed and deemed the recommendation ‘futile’ and ‘triggering’ for what it calls ‘serious law and order disturbances.

Before 2019 under the 19<sup>th</sup> amendment to the constitution the commissioners were appointed by the constitutional assembly which consisted by political party representatives and CSO members. They decided the commissioners. But after 20<sup>th</sup> amendment in 2020 now the president is the solo decider in appointing commissioners.

*Courts have no police power*

It is also that the appointing civilian authority does not want to displease the top echelon in the military or police. They need them to stay in power amid public discontent against rising authoritarianism/fascism as discussed earlier in the Background. In Indonesia, for example, despite strong evidence for the direct involvement of senior military officials in some of the celebrated human rights cases, there has been no conviction in this regard.

More than two years since President Widodo was inaugurated in October 2014, the Indonesian government has shown little effort to settle cases of enforced disappearances which occurred under the Suharto dictatorship and under successive governments. Until now, the President and the Parliament have not shown willingness to ratify the International Convention for the Protection of All Persons from Enforced Disappearance, despite signing it nearly seven years earlier<sup>38</sup>.

There are several obstacles in addressing cases of enforced disappearances in Indonesia, such as the absence of a national law on enforced disappearances, the unwillingness of the President and political parties to resolve the cases, the government's preference for political stability rather than dealing with enforced disappearances, and the limited role of the National Commission on Human Rights (Komnas HAM).

After Suharto stepped down in 1998, the transitional governments made no significant effort to search for the missing persons. Instead, enforced disappearances continue. For instance, the case of enforced disappearances against student activists in 1997-1998. There has been no progress on the solution of the case since previous President Susilo Bambang Yudhoyono and current President Joko Widodo were both reluctant to issue a presidential decree to establish an ad hoc human rights court for enforced disappearances against these student activists. Although in 2009 the parliament issued a recommendation to the president to establish such a court, the government ignored it. The parliament's recommendation is in line with the Indonesian law on the Human Rights Court, according to which cases occurring before the year 2000 should be brought to an ad hoc court, the creation of which a presidential decree is needed.<sup>39</sup>

In the last one year, the main priority of the Indonesian government has been economic development and political stability. Towards this end, President Widodo has made various efforts to approach opposition parties and persons, including Prabowo Subianto, former commander of special armed forces. Subianto was dismissed from the military service due to his alleged involvement in the case of enforced disappearances against student activists in 1997-1998.

<sup>38</sup> <https://alrc.asia/indonesia-no-justice-for-victims-of-enforced-disappearances/>

<sup>39</sup> Rommy Patra. The failure of settlement of human rights violations in Indonesia and its solutions.



This is an obstacle to resolving the case of enforced disappearances against student activists in 1997-1998, which have been investigated by the National Commission on Human Rights, the report on which has been submitted to the Attorney General.

In Bangladesh, the NHRC has not demonstrated any intention to investigate directly alleged human rights violations reported to have been committed by state security forces.

#### *Commissions lack authority*

While the appointing authority is given broad powers by the law, that of the commissions is significantly limited; often investigatory and recommendatory only. Usually, the final decision on the recommendations is with the president or the prime minister; with politicians.

The Sri Lankan Presidential Commission to Investigate into Complaints Regarding Missing Persons created by former president, Mahinda Rajapaksa is limited only to cases that happened between June 1990 to May 2009 even though there are many cases of disappearances after May 2009. Still the commission received 24,000 complaints relating to disappearances.

#### *Commissions lack competence*

Competence seems not to be a top consideration in the appointments of commissioners.

Apart from their functions of research, public education on human rights, their primary task is to undertake preliminary investigation of reports and complaints.

Often the commissions' reports are returned by the attorney general or the prosecutor to the commission for weak or incomplete data. Of course, it is also true that this is used as excuse by prosecutors who lack commitment to human rights protection.

The prosecutor and the commission do not act as partners, but sometimes even adversarial to one another.

We illustrate. KomnasHAM of Indonesia conducted investigations on 10 cases and submitted the results of the investigations to the attorney general (AG) but only 2 cases have been acted on by the AG and elevated to the courts.

This is the case of Tanjung Priok 1984. The report of the inquiry was submitted to the Attorney General on 7 July 2000. In 2006, the judicial process of the case was completed. All the defendants were acquitted.

The other case is of Peristiwa Irian/Papua 2000 (widely known as the case of Abepura 2000). The report of the inquiry was submitted to the Attorney General on 17 May 2001. This case had been investigated, which determined two defendants, Jayapura Police Commander Superintendent Daud Sihombing and Brigadier General Johny Wainal Usman. The two defendants were tried in the human rights court. Only Daud was accused of responsibility for the torture. The Human Rights Court in Makassar had decided to free Daud Sihombing on 8 September 2005 and Jhony Waenal Usman on 9 September 2005.

In the perception of civil society and the families of the victims, there are two factors for this. One, the Attorney General has never been serious in resolving the gross human rights violation cases by continuously returning the preliminary investigations' files back to Komnas HAM due to its failure to accomplish the formal and material requirements. Two, that indeed Komnas HAM lacks the competence in conducting the investigations to produce robust evidence.

In Sri Lanka, the HRCSL and the OMP do not coordinate. While a memorandum of understanding was signed between the two institutions for coordination on ED cases, followed by several discussions, they still have to 'fully settle' the terms of coordination.

### *Commissions lack transparency*

There are commissions that do not publicize their reports. There is a lack of commitment to make stakeholders genuine partners; many times, consultations with victims, their families and civil society are pro forma or do not take place at all.

The public oftentimes do not know about the commissions nor their work. In Sri Lanka, there is lack of public knowledge about the mandate of the various commissions and committees for human rights. That there is a communication gap between these mechanisms and the public is an understatement.

We now take up another set of mechanisms.

## Judicial courts/courts of law

### *Courts have no police power*

Supreme courts except India have generally shown diligence re justice for victims of HRVs (indicated in decisions and recommendations for relevant, celebrated cases) but they have no police

power. The implementation of their decision is dependent on politicians in government, police, and military.

However, the Indian Supreme Court has been instrumental in guaranteeing the constitutionality of repressive laws<sup>40</sup>, and enabling the state and its armed forces to commit rights violations with impunity. Laws such as the AFSPA, which provides for the state armed forces to conduct warrantless searches and arrests in areas considered ‘disturbed’, and the PSA, which provides for detention without trial up to two years, have been deemed ‘constitutional’<sup>41</sup> by the Supreme Court.

### *Major obstacles to access judicial mechanisms*

Across all the case countries, victims and their families often decide not to pursue their cases in the courts due to the exorbitant costs of litigation. The rights to fair trial and legal redress for grave human rights violations are practically denied to the people in this context.

In the specific example of the right to the writ of habeas corpus, victims’ families are usually unable to file habeas corpus petitions because of lack of finances.

Aside from the financial barrier, there are other major obstacles to effectively access the judicial mechanisms. These are threats to victims, their families and supporters from the perpetrators who are usually the police. This creates a widespread climate of fear such that victims would rather not file cases or complaints with the police or the courts.

A common fate of complaints filed in court against government agents – no conviction – contributes to lack of faith among the people in the judicial system. This and the common practice of transferring accused security or police agents, and widespread impunity like in Kashmir and Bangladesh altogether discourage victims from accessing the judicial mechanisms.

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<sup>40</sup> It was noted that the common premise used was these laws were enacted for the ‘sake of national security’

<sup>41</sup> The Indian Constitution has Article 22(3)(b) which provides for ‘preventive’ detention and restriction on personal liberties when state security is at risk. In the case of the PSA, the Supreme Court only held that authorities particularly the District Magistrate in Jammu and Kashmir should comply with ‘procedural safeguards’ - such as legally analyzing the circumstances leading to the deprivation of personal liberty (Sheriff & Masood, 2019).

## Human rights protection offices within police and security agencies

### *Conflict of interest*

With police and security agents of the state the usual suspects in EDs, reports indicating refusal to accept and/or file the FIR, threats to families and/or their supporters who are seeking redress do not come as a surprise. Covering up fellow police or military personnel implicated is not surprising. In Nepal, in most of the cases, the police refuse to even register the FIR and the victims have to seek Court orders to even get the FIR registered in the first place. But the police have been reported to refuse to act on complaints even with court ruling – especially when one of their own or a state official is involved.

### *Impunity*

Not only that perpetrator of EDs go unpunished, but victims, their families and supporters are threatened with harm when they demonstrate a desire to seek justice. This is a source of impunity because crimes are unpunished, and perpetrators continue to be in government. Impunity is double edged – while it encourages continuing HR abuses, it discourages the pursuit of justice as victims fear reprisal by perpetrators or their colleagues. It is also vicious cycle.

### *Institutionalized corruption*

In Bangladesh, one of the reasons for torturing prisoners is extortion: if you want the torture to stop, or that you will not be tortured, make your family come up with the money.

*Instead of government institutions promotive of redressal, barriers are encountered by people seeking redress and justice.*

In Kashmir, the FIR filing process is very tedious, making it especially difficult for families especially from those without formal education or connections in the bureaucracy. At the same time, they experience repeated refusals from the police that they have to file several times. This makes FIR filing too expensive in terms of time and travel for poor families.

Overall, there has been no reform in the police and military commensurate to the needs of a regime of justice, especially ending EDs and giving justice to victims.

## Civil society

While civil society's work, unlike mechanisms in government that are bound by law and international covenants to promote, encourage, and support ED victims' quest for redress and justice, is voluntary. Oftentimes born out of the members' own HRV ordeal or of personal principles and convictions, NGOs at risk to their lives, provide solace, technical and professional assistance (e.g. research and liaison) to help victims of EDs secure justice, or their families know their whereabouts and get justice. In the Background, we had noted the heightened dangers posed by increasingly repressive governments in the countries covered in this report. Repression and institutionalized impunity of perpetrators create fear among civil society advocates and HR workers. They are also limited in their efforts by limited financial capacity to assist victims.

Yet, compared to governmental mechanisms, the seven case country reports, by themselves, evidence the crucial roles NGOs have in helping ED victims, not mainly thru successful litigation in the courts or the commissions, but in documenting and evidencing the abuses and injustice victims suffered. Affirmation that it happened, that one has been a victim, is important for victims in contrast to denial or non-recognition by government.

NGOs have also been an important partner of UN mechanisms and international NGOs. But they are hobbled by actual risks to the life and security of members and officers, by state restrictions on their work and by financial limitations.

## International mechanisms

There is a well-established body of international laws and UN policies serving as legal framework for international mechanisms for addressing EDs.

## Legal framework of enforced disappearances under the international law

Under international law, every state is party to major international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The UN Declaration on Enforced Disappearances recognizes the practice of "disappearance" as a violation of the rights to due process, to liberty and security of a person, and to freedom from torture. International humanitarian law also provides protection against enforced disappearances by prohibiting acts that precede or follow a "disappearance." Common Article 3 of the Geneva

Conventions requires that persons taken into custody, whether civilians or captured combatants, be treated humanely in all circumstances. Such persons may never be subjected to murder, mutilation, cruel treatment or torture, or the passing of sentences and carrying out of executions, without a proper trial by a regularly constituted court.

Through inter-state complaint procedures, some human rights instruments allow state parties to initiate a procedure against another state party. In most cases, such a complaint may only be submitted if both the claimant and the defendant state have recognized the competence of the monitoring body to receive this type of complaint. However, inter-state complaint mechanisms are hardly used. Inter-state relationships are delicate and inter-state mechanisms may not be ideal procedures as states bringing complaints may elicit reprisals. In addition, many states have not recognized the competence of the supervisory bodies to receive inter-state complaints. Moreover, the human rights monitoring bodies play a passive role as they generally cannot initiate proceedings, and are largely dependent on information submitted by governments, NGOs, or individual petitioners.

## The UN mechanisms

The key components of international mechanisms in the UN that deal with human rights with universality are the (1) Office of the High Commissioner for Human Rights (OHCHR) and the (2) UN Charter-based bodies (UN Human Rights Council (HRC) that includes under it the Universal Periodic Review (UPR) and Special Procedures), and (3) the UN Treaty-based bodies.

## UN Charter-based Mechanisms

These mechanisms include the inter-governmental organs established based on the UN Charter such as the Human Rights Council (HRC), complaint procedures on human rights, and special procedures. Since existing state measures are insufficient to cope with the growing number of allegations regarding human rights violations, the main purpose of creating these mechanisms is to deal with gross violation of human rights of individuals through communications, fact-finding bodies, and special rapporteurs etc. However, it should be noted that these mechanisms can only be effective in promoting human rights if they constructively engage states on their identified priorities and challenges based on specific national situations.

## Universal Periodic Review

The UPR is a unique process of the Human Rights Council that involves periodic review of the human rights situation of the UN member States.

The Universal Periodic Review of the UN Human Rights Council is a peer review mechanism through which all 193 Member States of the UN detail on the positive actions they have taken to promote and protect human rights in their countries and provided recommendations to each other regarding human rights practices.

The reviews are based on the information provided by the State in the form of a “national report”, by the Special Procedures and other UN entities and by the reports provided by various national human rights institutions and non-governmental organizations.

However, since UPR recommendations are in no way binding and lack punitive sanctions for non-compliance, fulfillment of the recommendations relies on the willingness of the State party, entirely.

**Special Procedures** are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective working as one of the UN mechanisms to protect and promote human rights. These experts are non-paid and are elected for 3-year mandates, with a provision to extend for three more years, if necessary.

The Special Procedures carry out country visits, research, and study on the issues of human rights violations in the country visited. They receive the complaints from the victims of human rights violations or organizations complaining on behalf of them. They also receive and consider complaints from human rights victims or witnesses, inquire with governments on their behalf, and issue public statements.

These independent experts regularly report to the Human Rights Council on their findings and recommendations and at times are the only mechanism alerting the international community to certain human rights issue.

## The UN Treaty-based Mechanisms

These are committees of independent experts that monitor implementation of the substantive provisions of the core international human rights treaties. They are mandated to monitor how states – which have ratified the relevant treaty – comply with their obligations to implement the human rights guaranteed by the treaty. Most of the treaty-bodies are mandated to receive and consider

reports and each state party is obligated to submit regular reports to the relevant treaty body on how the rights are being implemented.

**Treaty-Based Mechanism:** The treaty-based reporting mechanisms derive their existence from the provisions contained in specific treaty and can be used only by the State member to the treaty, thus making it narrower than other UN reporting mechanism like Special Procedures, which are open to States that have not ratified the treaties concerned with alleged human rights violation. As with Special Procedures, the complaint can be brought by the victim/s or by third parties on behalf of the victim/s. While doing so, victims can opt for one of the following three procedures:

1. Individual communications can be submitted to the treaty bodies assigned by the specific human rights treaties, on the violations of human rights listed in that very treaty.
2. The provisions for State-to-state complaints are maintained in several human rights treaties, which allows State parties to complaint to the treaty body regarding the alleged human rights violations of the treaty by another State party.
3. The State party can submit an information to the relevant Committee detailing about the systematic violation of the rights contained in the Convention.

The Special Procedures-Special Rapporteurs and Working Groups only being able to conduct a country visit after the State party grants their request made it difficult for them to examine human rights violations.

### *UN mechanisms' work on EDs*

Data from the case country reports show that UN mechanisms have been active in performing their mandate, but because the governments concerned did not cooperate, there has not been any significant breakthrough or success toward a just resolution of ED cases. This suggests the hugely limited remit of authority of the UN mechanisms on one hand, and on the other hand, lack of respect for these mechanisms by the governments concerned. Except Korea which we will take up in a separate subsection, we now present the basis for this observation.

We now present the actions taken by the UN mechanisms per country and the response of the governments.



## **Bangladesh**

At present, there are 70 cases under the humanitarian procedure that are still outstanding and the WGEID has reiterated its concern that it continues to receive ED cases from Bangladesh, many of which relate to individuals linked to opposition political parties, and by the apparent practice of impunity in the country.

The WGEID has transmitted four general allegations to the Bangladeshi government in May 2011, March 2016, February 2017, and June 2019.

It has not received any information from the government on the cases and general allegations transmitted to it. The government also did not respond to WEIGD's request to visit the country.

Bangladesh has not ratified the International Convention for the Protection of All Persons from Enforced Disappearance, the Optional Protocol to the Convention against Torture (OPCAT), the First and Second Optional Protocols to the ICCPR, and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR).

## **Kashmir**

In 2009, the WGEID transmitted to the government of India general allegations pertaining to EDs in Kashmir.

The Indian Government replied that the allegations are inaccurate, that the Indian armed forces show restraint because of the "Government's emphasis on human rights protection."

In the 2020 WGEID Annual Report, the WGEID stated that it is concerned with the lack of progress on cases of enforced disappearance in Jammu and Kashmir. This has been compounded by the closure of the SHRC in 2019. WGEID emphasized that investigations should continue for as long as the fate of the victim of enforced disappearance remains unclarified (Art. 13 of the Declaration).

It also reminded the Indian government of the prevention of the stigmatization and harassment of mothers [family members] of the disappeared persons (Article 13 of the 1992 Declaration and the UN Working Group's General Comment on Women Affected by Enforced Disappearances), the right to compensation monitored by an independent judiciary (Working Group's General Comment on Article 19 of the 1992 Declaration), right to truth and right to justice (Article 13 of the 1992

Declaration), right to effective remedy (General Comment by WGEID), and the right of the family to have the remains of their loved one returned to them.

To date, the government of India has not acted on any of these.

On the other hand, the 2018 OHCHR Report:

- a. Noted that the 1990 AFSPA and the Jammu and Kashmir Public Safety Act 1978 have “created structures that obstruct the normal course of law, impede accountability and jeopardize the right to remedy for victims of human rights violations.”
- b. flagged the deteriorating human rights situation and the lack of accountability in numerous violations by the armed forces in Kashmir.
- c. stated its concern for the family members affected by the phenomena of enforced disappearance, especially the women. It recapitulated the concerns raised by the Committee on the Elimination of Discrimination against Women in 2014 of the unprecedented violence including enforced disappearance in conflict affected regions, including Kashmir.
- d. recommended the Government of India to conduct investigations into cases of human rights violations and into the unmarked graves in Jammu and Kashmir, enhance the competence of local human rights reporting mechanisms, and ratify conventions for the protection of people from EDs and torture (as recommended in India’s UPR in 2008, 2012 and 2017), and accept the request of the Special Procedures to visit India.

The government of India rejected the OHCHR report again (after the 2018 Report) alleging that the report was “fallacious, tendentious and [politically] motivated”, stated that the report’s focus should have been on the “cross-border terrorism” instead, and requested the OHCHR to not to publish the report.

Despite multiple requests by the High Commissioner to the Government for unconditional access to assess the situation in Jammu and Kashmir, the government denied it repeatedly.

Lastly, the UPR recommended for the government to ratify the Convention against Enforced Disappearance. The Convention has not been ratified up till now.

## **Nepal**

Between 2008-2021, the UN Human Rights Committee (HRC) rendered 26 decisions or “Views” on the applications submitted by individuals or groups of individuals or organizations on behalf of those individual/s against human rights violations.

The government has not initiated any steps to implement any of the 26 Views. It has not also responded to requests from the Special Procedures-Special Rapporteurs and Working Groups requests for country visit.

## **Pakistan**

The WGEID has received 1,144 cases of allegations of enforced disappearances from Pakistan from different organizations and individuals between 1980 and 2019, with a particularly large number in 2015-16. Out of these, 380 complaints have been submitted to it by civil society organization Defense of Human Rights alone.

WGEID undertook a country visit to Pakistan in 2012 and issued a report in 2013. The report expressed its concern at the continuing practice of enforced disappearances in Pakistan and gave a series of recommendations to the government. In its follow-up visit in 2016, the WGEID regretted that “most of the recommendations contained in its country visit report have not been implemented so far” and that the working group is still “gravely “over the reported widespread practice of enforced disappearances in Pakistan.

## **Sri Lanka**

The High Commissioner is concerned that harassment, surveillance, and scrutiny by security agencies of families, lawyers and others working on disappearances have undermined the work of the OMP.

It is also “deeply troubled” by the appointment in December 2020 of a new Chairperson of the OMP, who has just completed his term as Chair of the Presidential Commission of Inquiry (COI) on alleged political victimization. As noted above, the COI has obstructed and intervened in judicial proceedings on several “emblematic” human rights cases, including disappearances. His appointment will seriously undermine the independence and credibility of the OMP, eroding the trust of the victims’ families and thereby, the OMP’s ability to discharge its mandate effectively. The High Commissioner believes that the Government must demonstrate that the OMP is fully

independent and effective by ensuring that the OMP retains its full mandate, independence, resources, and political support needed for its crucial work.

The High Commissioner encourages a strong gender focus in the reparations program, given that many victims and survivors are women, and OHCHR stands ready to advice on best practice in this regard. The Office for Reparations remains operational and produced a draft Reparations Policy submitted to the Ministry of Justice in May 2020. According to the Government, the office has received 16,275 applications of which 4,385 have been processed.

During the 43rd session of the Human Rights Council, the Government renewed its pledge to undertake a review of the Prevention of Terrorism Act (PTA)<sup>42</sup>. The Counter-Terrorism Bill drafted by the previous Government which would have replaced the PTA was withdrawn. The Government confirmed to OHCHR its intent to revisit the PTA.

### *International civil society organizations*

International CSOs have significant contributions in efforts to address ED cases. Where the CSO is perceived to be neutral and independent like the International Committee of the Red Cross (ICRC), as demonstrated in the Korean abduction cases, its offices and channels served as venues for contending parties to meet. Or it provides humanitarian assistance to people affected and advice to governments.

In Sri Lanka, the ICRC focuses on responding to the humanitarian needs of people affected by the past armed conflict which includes addressing the multifaceted needs of families of missing people such as clarifying the fate and whereabouts of their missing relatives. It collaborates with the Sri Lanka Red Cross Society to promote humanitarian values and implement livelihood assistance activities in former conflict areas. It also helps authorities improve the existing prison management system and supports judicial medical institutions and authorities to safeguard the dignity of the dead and the living by enhancing their technical forensic skills.

On the disappeared cases in Sri Lanka, since 1990, the ICRC has been contacted by thousands of families whose loved ones went missing in connection with the past conflict. Under its

<sup>42</sup> The PTA has contributed to the prevalence of enforced disappearances in Sri Lanka. It allows for extended administrative detention as well as incommunicado and secrete detention, practices that dramatically increase risks to detainees.

humanitarian mandate, the ICRC has established a regular dialogue with Sri Lankan authorities on the comprehensive response required to address the multifaceted needs of these families.

Between October 2014 and November 2015, the ICRC conducted an island-wide assessment during which it met 395 families of missing persons, including those of missing security forces and police personnel, along with the authorities and organizations aiding these victims. It finds that the families also have emotional, economic, legal, and administrative needs.

The ICRC shared comparative best practice with the government of Sri Lanka in the process of drafting the OMP Act. ICRC has been providing technical support to the OMP in multiple ways to assist the Office in its functions. ICRC welcomes national mechanisms such as OMP and it always maintains a good relationship with government authorities to provide quality service to the victims.

## Concluding remarks on international mechanisms of the UN

Despite severe limitations to their effectiveness in stopping EDs and bringing justice closer to the victims, the UN mechanisms provide avenues for victims, their families and support groups to report at the international level, the situation in their countries and their specific experiences. The political and moral pressure of this on governments cannot be fully measured. But without economic clout, the mechanisms effectiveness is very much dependent on the cooperation (or lack of it) from governments concerned. These UN bodies do not have police power, nor military troops to back up their recommendations. At best, in the face of blatant disregard by governments concerned, these mechanisms are needed to amplify the anguish and suffering of victims, the impunity of authorities, by providing moral affirmation and a global audience.

### *Mechanisms for EDs in Korea*

We discuss the Korean mechanisms separately.

The case of Korea is atypical. In contrast to the rest of the case countries included in this report, there is the use of intergovernmental channels, diplomacy, and geopolitical interests to resolve ED cases. While UN mechanisms and civil society organizations took part, the more visible mechanisms were those deployed at the highest level of government.

These various efforts, channels and mechanisms must be seen in the context of larger geopolitical issues in the Korean peninsula such as denuclearization and the normalization of relations between the north and the south. Attempts by both South and North Korea to normalize relations impacted negotiations on EDs.

Korea is also different because unlike the other countries, international attention was shone on foreigners abducted into North Korea whereas in the other countries no such level of attention has been given even to nationals who are ED victims of their own governments.

In Section One we had given details on ED victims of North Korea. We now focus on the ways and the mechanisms with which redress and resolutions were sought using two examples, the Japanese and South Korean abductees.

## **The case of the abducted Japanese citizens**

There was pressure on the Japanese government indicated in the millions of signatures on the petitions written by the Association of the Families of Victims Kidnapped by North Korea submitted to the Prime Minister. The 13 Japanese victims' cases are the most successfully addressed enforced disappearance case committed by the DPRK. This also illustrates how the case figured in the larger geopolitical interests of Japan and North Korea.

### ***Box 2: EDs in the menu of international politics***

*Inside the room, seated around the table with Koizumi, were Shinzo Abe, deputy cabinet secretary; Norimoto Takano, deputy minister for foreign affairs; Hitoshi Tanaka, director general of the Asian and Oceanian Affairs Bureau of the Ministry of Foreign Affairs (MOFA); Isao Iijima, personal secretary to the prime minister; and Kenji Hiramatsu, MOFA's director of the Northeast Asian Affairs Division. Koro Bessho, another secretary to the prime minister*

*It was September 17, 2002, and Koizumi was sitting in a specially designated anteroom on the ground floor of the Paekhwawon (Hundred Flowers) Guest House in Pyongyang.*

*"If the North Koreans won't acknowledge their wrongdoings," Tanaka said to Koizumi, "you have to push them." Abe pressed further: "Unless they disclose in full what took place and formally apologize for their wrongdoings, you should not sign the joint statement. If they don't do that, you should get up and leave."*

*Takano broke the silence, agreeing, for the most part, with Abe: "We should consider not signing the statement if their attitude remains the same."*

*The Pyongyang Declaration, which, if signed by the two leaders, would become the basic document for normalization of diplomatic relations between the two countries....*

*Koizumi slowly walked down the ramp to become the first Japanese prime minister to visit North Korea since the end of World War II.* <sup>43</sup> (Brookings Institute. *Prime Minister Koizumi's visit to North Korea.* [https://www.brookings.edu/wp-content/uploads/2016/07/peninsulaquestion\\_chapter.pdf](https://www.brookings.edu/wp-content/uploads/2016/07/peninsulaquestion_chapter.pdf), pp1 to 3)

This is the only case that North Korea has confirmed the abduction, offered an apology, and promised to prevent any further similar acts. The joint declaration of the DPRK and Japan to normalize relations was signed. In October of that same year, 2002, five abductees returned to Japan.<sup>44</sup> Three family members of Hitomi Soga arrived in Japan on July 18, 2004.<sup>45</sup>

However, there are 12 more Japanese abductees who are recognized by the Japanese government yet whose fates and whereabouts remain unclear. Pyongyang claims that the remaining abductees have already passed away without providing any sufficient evidence or satisfactory account of their death.

The Japanese government has continuously engaged with the DPRK through various consultations, talks on normalizing relations, intergovernmental consultations until 2014. During these meetings,

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<sup>43</sup> Japan is a signatory of the International Convention for the Protection of All Persons from Enforced Disappearance in 2007.

<sup>44</sup> Prime Minister Kim Jong il announced the fates of 13 abductees: five were alive, and eight were dead. Moreover, while promising to punish those responsible and to prevent any recurrence, Kim assured Japan that he would facilitate meetings between the abductees and their families as well as the return of abductees to Japan. In response, Prime Minister Junichiro Koizumi demanded the continuation of an investigation, the return of those alive, and the prevention of any recurrence.

From September 28 to October 1, 2002, the Japanese government dispatched an investigation team that met with victims and collected information on abductees who have not yet been accounted for. At the 12th round of the negotiations to normalize diplomatic relations between Japan and North Korea held from October 29 to 30, 2002 the Japanese government raised questions concerning the limited, inconsistent, and dubious information from North Korea and requested more information.

<sup>45</sup> Bruce Wallace, "Alleged Army Defector, Family Arrive in Japan / U.S. Says It Will Delay Extradition Bid until He's Healthy," *SFGATE*, July 19, 2004, sec. News, <https://www.sfgate.com/news/article/Alleged-Army-defector-family-arrive-in-Japan-2740365.php>.

Japan requested information about the unresolved cases and other possible Japanese victims of North Korean abduction.

It also used a mixture of strategies and mechanisms. It used sanctions against the North Korean government. It advocated the issue through international mechanisms and in the UN resolutions on the Situation of Human Rights in the DPRK which was adopted by the Human Rights Council and the General Assembly. It urged action on abduction crimes against its citizens when the UN Security Council held four meetings on “the situation in the DPRK” in December 2014.

Japan also used international political alliances to add pressure on North Korea. To illustrate: the Japanese government convinced the leaders of the United States, South Korea, and China to address the abduction of Japanese citizens during their summits with the North Korean government.

Also, in DPRK's 2nd cycle of Universal Periodic Review (UPR), the Japanese government recommended that the North Korean government put an end to all human rights violations, including those associated with abductions. It also recommended that DPRK set a specific timeframe and take concrete action to resolve the issue of abductions as soon as possible, including by repatriating the abductees. In the 3rd cycle of the North Korean UPR, Japan again recommended that DPRK take concrete action towards the early resolution of the abductions issue.

More recently, seeking the support of other nations to resolve the abduction issue, specifically the question of full disclosure by North Korea of all pertinent data on the case, Japanese Prime Minister Shinzo Abe adopted the multilateral frameworks, including the G7 Biarritz Summit in August 2019 and the ASEAN. At the Japan-China-ROK Trilateral Summit in December, Prime Minister Abe sought cooperation from South Korean President Moon Jae-In and Chinese Premier Li Keqiang of the State Council for the early resolution of the North Korean abduction of Japanese citizens. As a result, the issue was referenced in the outcome document.

The Japanese government has shown its determination to resolve the abductions issue, ensure security of all abductees and their reunion with families in Japan, provide a full account of the truth in all abduction cases, and restore justice for the victims and their family members. Comparing mechanisms used to report other types of enforced disappearance committed by the DPRK, a noticeable difference in this case is the active involvement of the government at the highest level in addressing the issue.



## **Geopolitical Context**

The DPRK continues to refuse inspection on its territory by the UN Human Rights Council as well as other international human rights organizations. The Special Investigation Committee established by the North Korean government in 2014 to conduct comprehensive and full-scale investigation on all Japanese abductees was unilaterally dissolved by the North Korean government in February 2016, although the Committee was supposed to continue its investigation on specific cases, including whether abductees entered North Korea, their living circumstances and the details of how each abduction took place. The dissolution was a reaction to Japan's announcement of sanctions against North Korea in response to its nuclear test in January 2016 and a ballistic missile launch in February 2016.

## **UN Mechanisms**

As seen in the earlier discussion, the use of UN mechanisms in Korea has a different profile from that in the other countries. Here it is the government of victims that resorts to the UN mechanisms whereas in the other countries it is the citizens and CSOs against their own governments.

The abduction of foreigners by the North Korean government has been included in 13 consecutive annual resolutions on the Situation of Human Rights in the DPRK which have been adopted by the United Nations Human Rights Council. There have also been 16 resolutions by the General Assembly as of January 2020. The resolutions adopted by the UN General Assembly in December 2019 and 2020 expressed grave concern about the long years of suffering experienced by abductees and their families, and the lack of positive action by North Korea, notably since the investigations on all the Japanese nationals commenced on the basis of the government-level consultations held between Japan and North Korea in May 2014, and requested that North Korea provide accurate information to the families of the victims on the fates and whereabouts of their missing relatives and resolve all issues related to all abductees at the earliest possible date, in particular the return of all abductees to Japan.

Moreover, the UN COI on Human Rights in the DPRK officially recognized the Japanese abduction crimes committed by the North Korean government through investigation, including visits to Japan, the ROK, the U.S., the United Kingdom and Thailand.<sup>46</sup>

## South Korean Abductees

Over half a century after the Korean War, no prisoner of war and abducted South Korean citizens, totaling over 100,000 has been officially recognized by the DPRK, or allowed to return to their home country. However, 60 families in South Korea had opportunities to meet with their abducted family members or their descendants in North Korea, but the once-off meetings did not lead to the permanent return of the victims and regular communication between families.

Unlike Japan, the South Korean government has been less vigorous in pursuing redress and justice for South Koreans abducted to the north at the internal arena. While it has used the North Korean Universal Periodic Reviews (UPR) and the Working Group on Enforced or Involuntary Disappearances (WGEID)<sup>47</sup> to advocate for its abducted citizens, it has more often used direct North and South dialogue, diplomacy, and negotiations. ***South Korea's priority is to normalize relations with the North, ease border tension and in response to a significant portion of the South Korean people who want normalization of relations.***

### *The larger view*

North Korea views the south due to its hosting of US military bases with nuclear capability and its close alliance with the United States as a threat. South Korea thinks the north desires to expand its politico economic and ideologic agenda to the south. These are some of the sources of the tension in the Korean peninsula. The north's development of nuclear arms heightens the already tense situation. This and an increasingly vocal segment of the south population wanting normalization of relations with the north, is the immediate context for South Korea's deployment of a more nuanced

<sup>46</sup> “Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea.”

<sup>47</sup> <https://www.ohchr.org/en/issues/disappearances/pages/procedures.aspx>

strategy in addressing the abduction issue. South Korea has set up in fact the Ministry of Unification to study issues pertinent to normalization of relations.

During the inter-Korean talks from 2002 to 2007, the issue of South Korean abductees was indirectly discussed as “people about whom information cannot be known during and after the Korean War”. This term blurs responsibility of the North Korean government and the nature of their disappearances.

There has however been a significant improvement since the first inter-Korean summit in 2000. Following the summit, 63 long-term political prisoners were repatriated from South Korea to the North, and family members of South Korean abductees to North Korea started to request that the South Korean government take proper steps to verify fates and whereabouts of their loved ones detained in North Korea and to take them back to South Korea.<sup>48</sup>

Acknowledging the growing demand, the South Korean government started to take domestic measures to seek the truth and compensate the South Korean victims who were abducted to North Korea after the Korean War. As a preparation procedure to pass a special bill to support the victims and their family members, the Ministry of Unification and relevant institutions began joint investigations on the post Korean War North Korean abduction cases through March and September 2006. As a result, the “Act on the Agreement after the Abduction Victim Compensation and Support for the Military Armistice” was enacted in April 2007, specifying that it is the responsibility of the South Korean government to verify the fates of South Korean abductees to North Korea, to assist the reunion of the abductees with their family members in the South and to compensate the victims, their family members and escaped abductees who returned to South Korea.

Based on the Act, aside from the compensation given to the victims’ families, in cooperation with the Ministry of Unification, Ministry of the Interior and Safety and Korean National Police Agency, the Abducted Victim Compensation and Support Committee conducted investigations to get to the truth and evaluate whether applicants meet the qualifications for the compensation required by the law. In the *White Paper on Supporting South Korean Victims Abducted by North*

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<sup>48</sup> “Ministry of Unification: South Korean Abductees after the Korean War,” accessed March 4, 2021, <https://reunion.unikorea.go.kr/abduct/html/supportSummary.html>.

*Korea after the Korean War* published by the Committee in 2011 is a list of recognized abductees and relevant information such as their names, birthdays, dates of abductions, and circumstances surrounding the abduction.

South Korea's strategy of using soft diplomacy instead of pressure politics as done by Japan, has borne some fruits. From 2002 to 2007, at four Inter-Korean Red Cross Talks, five Ministerial Level Talks and a Prime Minister Level Talk, the issue of "people about whom information cannot be known"<sup>49</sup> was discussed and mentioned in the outcome documents. Both North and South Korea agreed to determine the fates of these people and to include the matter in the category of separated families at the 7th Inter-Korean Red Cross Talk held in February 2006. The issue was last discussed at the 9th Inter-Korean Red Cross Talk in November 2007. According to the Ministry of Unification of South Korea, the fates of 133 specially categorized separated family members (South Korean abductees detained in the DPRK) were verified by the North Korean government as of March 11, 2021. 64 of them are post-war South Korean abductees to North Korea, and 21 families in South Korea had opportunities to meet with their abducted family members or their descendants in North Korea.

### *Use of international UN mechanisms<sup>50</sup>*

The South Korean government has also resorted to international mechanisms to address the issue. At the 1st cycle of the North Korean UPR in December 2009, the South Korean government recommended that the DPRK guarantee separated families the fundamental right to know the fate of their family members across the border, and to communicate and regularly meet together. At the 2nd cycle in May 2014, the South Korean government again took up the issues of abductees, prisoners of war and separated families. The issues of abductees and prisoners of war were readdressed at the third cycle of the North Korean UPR in May 2019 as well as with the Working Group on Enforced or Involuntary Disappearances (WGEID).

<sup>49</sup> Correct classification is a significant issue because enforced disappearance. is considered an international crime.

<sup>50</sup> *There are no* regional inter-governmental systems in Asia like treaties, courts, commissions, or other institutions to report and protect human rights violations.

There have been criticisms of how the South Korean government has addressed the abduction issue with North Korea, among which are the use of the term “people about whom information cannot be known during and after the Korean War” and for downplaying the issue considering its policy of normalization of relations with the north.

The South Korean government has not yet ratified the International Convention for the Protection of All Persons from Enforced Disappearance to seek cooperation to resolve the North Korean abductions.

### *International CSOs for the Korean cases*

The International Committee of the Red Cross (ICRC) has participated in various ways and instances in efforts to address the abduction cases between the north and the south. Between 2002 and 2007 for instance, ICRC organized four Inter-Korean Red Cross Talks. These and several other high level inter-governmental meetings produced documents where both North and South Korea agreed to determine the fates of “people about whom information cannot be known during and after the Korean War” and to include the matter in the category of separated families at the 7th Inter-Korean Red Cross Talk held in February 2006. The issue was last discussed at the 9th Inter-Korean Red Cross Talk in November 2007.

There are other international civil society organizations (CSOs) that have investigated and reported the enforced disappearances by the North Korean government through international mechanisms. Their contributions are important especially to UN mechanisms that cannot access data on the ground due to the absence of government permission. For instance, the Citizens Alliance for North Korean Human Rights (NKHR) has submitted NGO reports for the North Korean UPR sessions and submitted a total of 105 enforced disappearance cases committed by the North Korean government to the WGEID as of 2020.

To raise awareness about the forced mass displacement operation and following enforced disappearances of the displaced resettlers in North Korea, NKHR published an extensive investigation report in 2020 and included the detailed findings in an NGO report which was submitted to assist the preparation of the list of issues on DPRK for the Human Rights Committee’s 131st Session. Regarding the 516 unresolved cases of the North Korean abduction of South Korean citizens during the postwar era, NKHR has focused on raising awareness and documentation. Ninety-three relevant cases have been submitted to the UN WGEID as of 2020.

Although it is difficult to measure the effectiveness of NGOs' endeavors due to the continuous denial of the DPRK and limited access to the country, it is certain that the accumulated reports from various CSOs contribute to pressure relevant authorities to address the enforced disappearance crimes committed by the North Korean government.

## General observations on UN mechanisms

Based on the experiences of victims and CSOs, the UN mechanisms have not been very effective in making respondent governments act decisively on reports, complaints, and recommendations. ODHIKAR in Bangladesh explains. The key weakness of UN human rights bodies is that, while they are set up for dialogue and engagement, they lack the teeth to effectively protect rights where a state is not willing to cooperate. Unlike the Security Council, UN human rights bodies do not have enforcement powers, and unlike international financial institutions, the UN human rights machinery does not have any leverage over states that fail to comply with their obligations.

Thus, the UN reporting mechanisms cannot carry out assertively and speedily their goal of protecting victims and ending EDs. What they often do is to call attention to and cite the states for non-cooperation and for impunity.

# CONCLUSIONS

## Concluding remarks on national mechanisms

We now describe the **national** reporting mechanisms in all the case countries (except Korea) using the following parameters: accessibility; transparency; accountability; efficiency; and effectiveness. We do this while keeping in mind the larger and historical context discussed earlier in Section One, Background. We also keep in mind that most of the countries have not recognized ED as a crime indicated in the absence of legislation and nonratification of the International Convention for the Protection of Persons from Enforced Disappearance (ICPPED) as well as the existence of laws and policies that contradict principles for human rights such the statute of limitation in the penal code that proscribes the filing of complaints on EDs after a specific time frame. ED victims during the armed conflict such as in Nepal, Sri Lanka and Kashmir cannot seek recourse, therefore.

### Accessibility

The national reporting mechanisms are generally not accessible. Examples include: it is difficult and tedious filing the FIR, especially for poor and illiterate families in rural communities. The police are not supportive nor facilitative. It is difficult to get started with the process of registration of the cases, right from the police stations to the Commission. Families spend time and money going from office to office many times following up on leads.

The issue of language is another barrier to the inclusion of the victim families in the overall processing of the case because the judge and officials in the hearing usually speak in English which is not understandable to the families of the victims.

### Transparency

There is lack of transparency about the work of the reporting mechanisms. The commissions and/or committees, for instance, do not actively educate the public about their work and on the ways by which EDs can be reported. Lack of people's knowledge in this regard results to many of the cases being unreported. With families who have submitted complaints, it is common for them not to have been provided any report on their case. There are commissions that do not publicize their reports. They are only obliged in Sri Lanka for instance to report to the president.

The commissions' consultations with victims and families and CSOs are sporadic and unsustainable. In various instances the commissions hesitate to conduct consultations as this might displease the president or prime minister. In Bangladesh, the HR commission consult only progovernment NGOs. There is a lack of commitment to make stakeholders genuine partners. Many times, consultations with victims, their families and civil society are pro forma or do not take place at all.

## Accountability

There is no system or law that makes the reporting mechanisms, except the judicial courts and mechanisms embedded in the police/security, accountable to the families of victims and to the public. Accountability to the appointing authority is felt more by the commissions and committees for example than accountability to the public. In Sri Lanka, families who have been interviewed for this report said that the Commissions of Inquiry into Disappearances of Persons (COI) is like a "post office" where they submit their cases only. In this regard, no update has been provided to the victims' families, neither by the commission or by any other authority. It is to the president that the commissions are obliged by law to report their findings. Governments are more sensitive about their accountability to the donors than to the people.

## Efficiency

When the volume of complaints and cases submitted to the commissions, committees, courts and police across all the countries is compared to the number of prosecutions and convictions of perpetrators of EDs and other gross HRVs, it is clear that the reporting mechanisms are not efficient. This is the lens to use because these mechanisms are a critical part of the entire system that is supposed to facilitate, promote, encourage, and support victims, their families and the public in general to get redress and justice for the enforced disappearances. It is also therefore a core component of a regime of justice that ends EDs and impunity.

## Effectiveness

That governments continue to act nonchalantly over increasing cases of EDs, keep and protect suspected criminals in the police and other security agencies, ignore UN mechanisms' requests for visits as well as their recommendations, intensify attacks on critics and civil society, when we use these as signs of effectiveness of the national reporting mechanisms, the verdict is dismal.



But we make this judgment with reservation. If we remember that most commissions and committees have made numerous recommendations to the government for action, it can be said that they have overall done their job. In the first place, the commissions and committees are limited to conducting investigation and making recommendations only.

At the same time, if we look at the thousands of reports and complaints filed at the commissions and committees, the FIRs in the police stations, we might think there is still a window of possibility that people find them useful. On the other hand, it could be true as well that this is because there is no other channel or recourse.

***Box 3: The case of Mohammad Shafi Dar, Kashmir.***

The case below demonstrates how the current local reporting mechanism lacks accountability, transparency, accessibility, and efficiency.

In May 1990, Mohammad Shafi Dar was picked up by the Border Security Force for having links with the Al-Jihad militancy group (which the victim family denied). His family had to wait for a period of 18 years to file a FIR and even after the report was filed, no progress or investigation was made. Due to the delay in filing the FIR, therefore covered by the proscription period, no investigation was done. Eventually with the intervention of some higher officials in government an investigation started. But there was no transparency. When Nazir Ahmad Dar, brother of Mohammad Shafi Dar, approached the Government in 2003 for the grant of relief, he was denied and told that the case was closed without having been given any explanation for the reasons why.

Mohammad Shafi Dar's family, upon learning that the case was closed without any explanation, reached out to the SHRC in 2003. The SHRC issued a decision in 2007 which identified the perpetrator, Mr. Chauhan and indicted him of the crime. The SHRC directed that a case be registered and recommended that *ex-gratia* and compassionate employment should be provided to the family of the victim. The government responded by saying that until the main cause of the disappearance of the victim is not certain, the recommendations of SHRC would stand withheld. As per 2014, the case was still under investigation which also means that the family has not yet been provided with relief and grants.

# RECOMMENDATIONS

How can reporting mechanisms work in situations of protracted war or low intensity conflict or gross HRVs like in Kashmir, Pakistan, and Korea? When almost all institutions for democratic governance are suspended or emasculated or removed? When there is practically no democracy?

Still, we make some recommendations with the hope that even though substantially limited, when changes are made, the reporting mechanisms, may be able to make a difference in the countries concerned.

We organize the recommendations in two categories: tactical/immediate; and strategic/long term.

## Necessary tactical/immediate changes

On the legal framework:

- Ratify the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) and create laws and amend existing ones to make them consistent with the Convention and other international laws. Governments to enact laws on EDs, recognizing it as a crime and making it punishable in accordance with the principles of the ICPPED.
- Reform the penal code to remove proscriptions that prevent victims from pursuing justice due to time lapse.

Structural reforms:

- Reform the dysfunctional justice and police systems.
- Train and orient police on human rights.
- Make the reporting procedures accessible, facilitative and transparent (e.g., FIR filing).

Reform the justice system

- Suspected perpetrators, including personnel from the police and security agencies, are suspended from official duties during the investigation and are tried only by competent courts, and not by military courts.

For the commissions, committees of inquiry

- Insulate the commissions and committees from political pressure and ensure their independence.
- Ensure transparency in the selection and appointment of commissioners based on competence and integrity; that the selection process of commissioners is based on a broad consultative process which includes members from different stakeholder groups such as human rights organizations and victims' groups.
- Provide the commissions, committees with adequate support (funds and technical)
- Commissions, committees develop more efficient systems of operation and produce credible reports.
- The attorney general and the commissions to work as partners; avoid competition.
- Make consultations with stakeholders mandatory and genuinely partnering.
- Make final reports available to the victims, families, and the public.
- Mandatory reporting to complainants/victims on status and updates of their cases
- Active and sustained public awareness raising on human rights, the laws, and the mechanisms that victims can avail of.
- Set up witness protection program.

Reparation of victims and their families

A comprehensive program with a gender lens must be formulated to assist relatives of disappeared persons, in particular women, in coping with the consequences of the disappearance. Mechanisms should be established to provide for appropriate social and medical support for relatives of disappeared persons in relation to the physical, mental, economic, and other consequences of the absence of the disappeared. A program of reparation and rehabilitation should be set up for all victims of enforced disappearances.

Strategic, long-term changes

The key to the success of reporting mechanisms is the state/government. It has been clearly demonstrated in the case of the Japanese abductees that when government is committed to pursuing a just resolution and deploys its resources and channels from the highest range of government, results are produced. It is also clear in the case of the rest of the countries that when government undermines commissions/committees, ignores recommendations, stymie processes of prosecution and conviction, protects suspects no mechanism will be effective in accomplishing its mandate.

The strategic aim is to push back against rising fascism and neo-Nazism. Unless genuine electoral democratic institutions work, reporting mechanisms, both national and international will not be effective. There might be some small victories or short-term gains, but these are not sustainable. This is not to mention the fact that unchecked repression by the state operates as a vicious cycle: it creates fear, victims and stakeholders do not report or complain therefore, HRVs escalate, impunity gets institutionalized, HRVs intensify.

Local CSOs are challenged to strengthen some more their partnership with victims or their relatives; for them and international CSOs to improve coordination and sharing of resources (including data/evidence and contacts with media) to escalate the pressure on local politicians. The efforts must be on a global scale otherwise it is easy to overlook local crimes and impunity.

Donors and lending institutions must be conscientized since governments are more sensitive to their demands. The UN must embark on a reform program that will enable its mechanisms to gain more authority and traction with individual states.

No less than a global solidarity movement against gross human rights violations, specifically enforced disappearances, in tandem with intensified state repression, is necessary, with a program for justice involving multiple actors and simultaneous, coordinated actions of pressure.

END OF REPORT