

Universal Periodic Review Mid - Term Report on Nepal's UPR Second Cycle May 2018

Nepal's second Universal Periodic Review (UPR) was undertaken during the 23rd session of the Working Group on the Universal Periodic Review in November 2015. During the interactive dialogue, 73 delegations made statements on Nepal's human rights situation and made 195 recommendations, of which the Government of Nepal supported 152 either partially or fully, and noted 43 recommendations.¹

The recommendations cover a broad range of issues including transitional justice and impunity, national human rights institutions, women's human rights and gender equality, sexual orientation and gender identity, caste based discrimination, and human rights defenders.

The Government's acceptance of 152 recommendations was a welcome step, though the fact that it did not accept a number of critical recommendations is concerning. Equally troubling is the Government's failure to implement many of the accepted recommendations.

In this submission, the ICJ raises specific concerns about the Government of Nepal's failure to fulfill its stated commitment to implement the recommendations made during the second cycle of UPR review in 2015. The recommendations discussed in this submission, many of which restate existing legal obligations of Nepal, relate to four areas:

- i) Transitional justice
- ii) Legislative framework to address serious human rights violations
- iii) Accountability for past human rights violation
- iv) International mechanisms

i) Transitional Justice

During the second cycle of Universal Periodic Review in 2015, the Government of Nepal fully supported recommendation **121.28** concerning the functioning of the Truth and Reconciliation Commission and Commission on Disappearances, and claimed recommendations **122.4, 122.5, 122.63, 122.64** concerning amendments of TRC Act were already implemented or in the process of implementation.

121.28 Take steps to ensure that the Truth and Reconciliation Commission and the Commission on Disappearances function in accordance with

¹ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17241&LangID=E>

international standards, and bring the perpetrators of serious human rights violations to justice (Canada);

122.4 Implement the decision of the Supreme Court of 26 February 2015 [with regard to the incompatibility of the Truth and Reconciliation Commission and the Commission on Disappearances with Nepal's international obligations], as soon as possible (Switzerland);

122.5 Bring the 2014 Act on the Commission on Investigation of Enforced Disappeared Persons, Truth and Reconciliation into compliance with international norms, particularly with regard to the definition of amnesty, witness protection and the delays in processing complaints (Belgium);

122.63 Implement the Supreme Court rulings of 2013 and 2015 on the Truth, Reconciliation and Disappearance Act so that investigation into human rights violations committed during the civil war, compensation for victims and reconciliation efforts are undertaken in accordance with international standards on transitional justice (Czech Republic);

122.64 Ensure the effective functioning of the Truth and Reconciliation Commission and full implementation of its recommendations, including prosecution of those responsible for violent insurgency (India);

123.28 Amend the 2014 Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act (TRC) in compliance with the Supreme Court ruling of 26 February, 2015 in order to uphold international standards relating to accountability for gross violations of international human rights and international humanitarian law (Denmark)

In February 2015, the Government constituted the Truth and Reconciliation Commission (TRC) and the Commission on Investigation of Disappeared Persons (CoID), each with a two-year mandate (now extended twice) to investigate incidents of human rights violations during Nepal's decade-long armed conflict.² The Commissions continue to operate under weak mandates and legal frameworks that are not fully in accord with international standards, without adequate technical expertise and resources, and vulnerable to political pressure.

Despite persistent calls by civil society and the international community, and a decision by the Supreme Court of Nepal, the Government has failed to take necessary steps to amend the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act, 2014 (TRC Act).³ The Supreme Court in its 2015 verdict ruled certain provisions of the TRC Act to be unconstitutional and in contravention of Nepal's international legal obligations - including the provisions that would allow for amnesties for gross human rights violations and crimes under international law.

In addition, the framework for the operation of the Commissions lacks adequate safeguards to guarantee the independent and impartial operation of the Commissions and the Commissioners, leaving them vulnerable to political pressures. For these reasons, the UN Office of the High Commissioner for Human Rights (OHCHR) has not provided technical support to the Commissions.⁴

² The TRC and CoID were established in Nepal on 10 February 2015 with two years' mandate, which was extended for one more year on February 9, 2017. The mandate of both commissions was again extended for one more year through an Ordinance promulgated on 20 January 2018.

³ *Suman Adhikari et al v. Prime Minister and Council of Ministers*, Nepal Law Journal 2071, volume 12.

⁴ http://www.ohchr.org/Documents/Countries/NP/Nepal_UN%20osition_supportTRC_COIDP_Feb2016.pdf

To date, the TRC has received 60,298 complaints of human rights violations, and the CoID has received 3093 complaints of enforced disappearance.⁵ While the Commissions have started preliminary investigations in some cases, the investigation teams lack technical knowledge, expertise and financial resources. Other concerns include a lack of transparency in the appointment process for investigators, and to ensure the confidentiality of victim and witness testimony, and the physical security of victims and witnesses. These factors, and the generally non-consultative approach of the Commissions has created distrust among stakeholders, including victims of human rights violations and abuses in the conflicted and members of civil society.⁶

ii) Inadequate legislative framework

The Government fully supported the recommendations **121.3, 121.4, 121.26** concerning the formulation / enactment of domestic legislation to criminalize serious crimes, including torture and enforced disappearance, and to investigate and punish perpetrators.

121.3 Introduce legislation providing appropriate criminal penalties for acts of torture; establish independent procedures to ensure that all allegations of torture are investigated promptly, thoroughly, impartially and independently; that any officials responsible for torture are held accountable; and that any victims of torture have the right to remedy and reparations (Germany);

121.4 Explicitly prohibit torture and enforced disappearances as criminal offences under Nepali law (Norway);

121.26 Promptly investigate all allegations of torture, arbitrary detention, extra-judicial and summary executions and punish perpetrators (New Zealand)

The Government supported recommendations to enact domestic legislation to address serious crimes, including torture and enforced disappearance. However, these crimes under international law have yet to be made specific criminal offences under Nepali law in accordance with international standards.⁷

The enactment of a new Criminal Code,⁸ which will be effective from mid-August 2018, will criminalize torture, enforced disappearance and genocide, but it will not address violations committed during the conflict. In addition, the new code is flawed in a number of respects – for instance, the definitions of these crimes

⁵ Data received from the TRC and CoID.

⁶ See International Commission of Jurists, *Nepal: transitional justice mechanisms have failed to ensure justice for victims*, August 2017, <https://www.icj.org/nepal-transitional-justice-mechanisms-have-failed-to-ensure-justice-for-victims/>

⁷ See International Commission of Jurists, *Achieving Justice for Gross Human Rights Violations in Nepal Baseline Study*, October 2017, <https://www.icj.org/wp-content/uploads/2017/10/Nepal-GRA-Baseline-Study-Publications-Reports-Thematic-reports-2017-ENG.pdf>, pg 13.

⁸ The Criminal Code, Penal Code, Criminal Procedural Code, Civil code and civil procedural code were endorsed by the Legislative – Parliament on August 9, 2017, approved by the President on October 16, 2017 and will come into force from September 17, 2018.

do not fully reflect the accepted definitions under international law and good practice, as called for by the Supreme Court.⁹

The definition of enforced disappearances does not adequately address superior command responsibility; fails to recognize the continuous nature and permanent nature of enforced disappearance, or enforced disappearance as a crime against humanity; and the provisions on the penalties for enforced disappearance are inconsistent with international standards. The Criminal Code also provides for an unacceptably brief six months limitation period to file complaints of torture and enforced disappearance,¹⁰ which is a major obstacle for victims seeking to exercise their right to an effective remedy and reparation.

iii) Accountability for sexual violence committed during the conflict

The Government considered the recommendations **122.8**, **122.9**, **122.13**, **122.14** and **122.59** as already implemented or in the process of implementation. These recommendations concerned the need to take steps to address the sexual and gender based violence, including rape committed during the armed conflict.

- 122.8** Develop a national action plan to end gender-based violence and to bring rape laws in line with international standards (Australia)
- 122.9** Bring the laws on rape in compliance with international norms, particularly with regard to the legal definition of rape and the timeframe to file complaints (Belgium)
- 122.13** Bring rape laws in line with international standards and remove the 35-day limitation on lodging a complaint of rape with the police (Republic of Korea)
- 122.14** Remove, or at least extend, the 35-day statute of limitations of reporting rape cases (United Kingdom of Great Britain and Northern Ireland)
- 122.59** Adopt effective measures for the protection of and assistance to victims of gender-based violence and ensure that all cases of gender-based violence are duly investigated and perpetrators prosecuted (Czech Republic)

No tangible steps have been taken to ensure effective accountability and justice to victims of rape and other sexual violence during a decade long conflict – particularly, there remains an unacceptably short statute of limitations for rape.

Much of the conduct constituting sexual violence is not specifically criminalized, and rape is narrowly defined in Nepalese law.¹¹ Furthermore, the statute of limitation to file complaints of rape has created a bar for many rape victims who are unable to register complaint within that period of time. The Supreme Court ordered the Government of Nepal to revise the statute of limitation, considering it “unreasonable” and “unrealistic.”¹² While the recently enacted Criminal Code

⁹ *Rabindra Dhakal on behalf of Rajendra Dhakal v. The Government of Nepal and others; Rajendra Ghimire et al v. Prime Minister and Office of the Council of Ministers and others.*

¹⁰ Section 170 and 210 provides six months limitation periods to file such complaints.

¹¹ The Country Code (Muluki Ain) defined that the crime of rape can only be perpetrated against a woman or minor girl.

¹² *Sapana Pradhan Malla v. Prime Minister and Council of Minister et al.*, Writ. No. 3561 (2006).

has extended the statute of limitation for one year, this presents an insurmountable legal obstacle to victims of rape during the conflict seeking redress.¹³

iv) International mechanisms

The Government supported the recommendations **123.1**, **123.2** and **123.21** concerning the study of the possibility of the ratification of Optional Protocol of the Convention Against Torture and acceding to the Rome Statute of the International Criminal Court.

- 123.1** Study the possibility of accepting the competence of the Committee against Torture (Panama)
- 123.2** Study the possibility of the ratification of the Optional Protocol to the Convention against Torture (Panama)
- 123.21** Take all necessary measures towards acceding to the Rome Statute of the International Criminal Court (Cyprus)

The Government of Nepal supported recommendations to study the possibility of accepting the competency of the Committee against Torture to receive individual communications and engage, if requested, the inquiry procedures under article 21 and 20 respectively of the Convention Against Torture; to study the possibility of the ratification of the Optional Protocol to the Convention against Torture; and take all necessary measures towards acceding to the Rome Statute of the ICC. However, no significant steps appear to have been taken to meet these commitments. In its plan of action to implement the UPR recommendations, the Government committed to constitute an expert team to study the possibility of ratification of the OP-CAT and the Rome Statute, but no information is available regarding the formation of such a committee.

13 Section 229 of Chapter on Rape, Criminal Code.