

**TRIAL**

track impunity always

**SUBMISSION**

**for**

**Second Cycle of the UNIVERSAL PERIODIC REVIEW (UPR)**

**on NEPAL**

**MARCH 2015**

**Submitted by**

**TRIAL (Track Impunity Always)**

## Background

On 25 January 2011, the Working Group on the Universal Periodic Review (WG-UPR) reviewed Nepal. As a result, on 8 March 2011, the report of the WG-UPR was published,<sup>1</sup> containing a number of recommendations to Nepal. Four years later, Nepal will be subjected to a second review. This report provides information to the WG-UPR on the state of implementation of a selected number of recommendations issued in 2011.

### A. Criminalisation of Enforced Disappearance (Rec. 108.26) and Torture (Rec. 106.3) and Ratification of the International Convention for the Protection of All Persons from Enforced Disappearance (Rec. 108.26)

1. **Enforced disappearance and torture continue not being codified as separate offences under the Nepalese Criminal Code (1992 State Cases Act).**
2. On 27 March 2014, in the framework of the drafting of the transitional justice bills, the government formed a “task force”, including victims’ representatives, with the mandate of issuing recommendations on the legal framework to the government. After ten days, the task force presented its report, including three draft bills: two for the establishment of transitional justice mechanisms and one aimed at criminalising serious human rights violations under Nepalese law, including enforced disappearance and torture.<sup>2</sup>
3. The government eventually passed the two laws related to the transitional justice process, after substantially modifying the contents, but failed to adopt the proposed draft bill for the criminalisation of gross human rights violations.
4. Despite the recommendations issued by the task force, **the Parliament of Nepal has not taken any further initiative to initiate a drafting process for the inclusion of enforced disappearance as a separate criminal offence in the domestic criminal legislation.** While it is possible to find a definition of the “act of disappearing a person” in the Truth and Reconciliation Commissions Act (TRC Act) of 25 April 2014, this has the only purpose of defining the scope of a transitional justice mechanism’s mandate and it **does not replace the proper criminalization of enforced disappearance**, which would require criminal sanctions attached to the offence.
5. There is no information of **any intention of Nepal to ratify the Convention for the Protection of All Persons from Enforced Disappearance and to recognise the competence of the Committee on Enforced Disappearances pursuant to Arts. 31 and 32 of the Convention.**
6. On 21 November 2014, the draft Torture, Cruel, Inhumane and Degrading Treatment (Control) Bill was tabled at the Parliament. **The draft Bill is not in line with international standards**, by proposing punishments of five-year of prison and/or monetary fines up to Nepalese Rupees (NRs) 50,000 (approx. USD 500) for those found guilty of inflicting torture and encouraging it, and establishing a 90-day statute of limitations for the filing of complaints of torture.
7. Moreover, the 1996 Torture Related to Compensation Act (**TRCA**), which establishes the possibility for torture victims to file a complaint in order to obtain compensation, **provides for a 35-day statute of limitations that prevents many victims from obtaining any kind of redress.**

<sup>1</sup> A/HRC/17/5. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/116/42/PDF/G1111642.pdf?OpenElement>.

<sup>2</sup> Nepal News, *TRC Task Force Submits Report; Denies Amnesty for Grave Crimes*, 4 April 2014. Available at: <http://www.nepalnews.com/index.php/politics-archive/32980-trc-task-force-submits-report-denies-amnesty-for-grave-crimes>.

8. As per crimes of sexual violence, the **current legislation criminalises rape only as a form of sexual violence and it does not encompass male victims**. Moreover, **the statute of limitations to file a criminal complaint concerning rape is of 35 days, thus concretely discouraging many victims from seeking justice**.
9. **War crimes, crimes against humanity, and genocide continue not being autonomously defined and criminalised under Nepalese law**.

#### Recommendations

- Amend the *1992 State Cases Act* so as to **permit the registration of criminal complaints of torture and enforced disappearance**;
- **Codify enforced disappearance as a separate crime under Nepalese legislation**, defining it in accordance with Art. 2 of the Convention for the Protection of All Persons from Enforced Disappearance and attach to the crime of enforced disappearance a sanction (or a range of sanctions) commensurate to the nature and gravity of the crime;
- Ratify without delay the Convention for the Protection of All Persons from Enforced Disappearance and recognize the competence of the Committee on Enforced Disappearances pursuant to Art. 31 and 32 of the Convention;
- **Amend the Torture, Cruel, Inhumane and Degrading Treatment (Control) Draft Bill**, so as to attach to the crime of torture a sanction (or a range of sanctions) commensurate to the nature and gravity of the crime and to remove the statute of limitations;
- Give the Torture, Cruel, Inhumane and Degrading Treatment (Control) Draft Bill legislative priority; and enact it without further delay;
- Ensure that criminal proceedings concerning torture and enforced disappearance are **not subjected to any statute of limitations**;
- Amend the 1996 TRCA and abolish the statute of limitations for the submission of complaints.
- Ensure that **Police act on allegations of torture and enforced disappearance also in the absence of formal criminal complaints** and, in general, take all the necessary measures to remove any possible legislative or *de facto* obstacle to investigation and prosecution of those allegedly responsible for these crimes;
- **Criminalize forms of sexual violence other than rape**, such as sexual slavery, enforced pregnancy, forced prostitution, forced sterilization, forced nudity, genital and breast mutilation, forced circumcision;
- **Amend the 35-day statutory limitation** for filing complaints of rape and other forms of sexual violence;
- Ensure that **war crimes, crimes against humanity, and genocide are criminalized under national legislation in accordance with internationally recognized standards**, taking into account, in particular, the 1998 Rome Statute of the International Criminal Court, the four 1949 Geneva Conventions and their Optional Protocols, the 1907 Conventions on the Laws and Customs of War and the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide.

#### **B. Investigation of Allegations of Extrajudicial Killings (Rec. 107.15, 108.18, 108.19) and other Human Rights Violations (Rec. 107.15, 108.22), Prosecution of Those Responsible (Rec. 107.17, 107.24, 108.19), and Establishment of Complaints Mechanisms on the Conduct of Law Enforcement Personnel (Rec. 108.17, 108.18, 108.29)**

10. Allegations of extra-judicial killings and other abuses committed by law enforcement personnel continue not being registered or thoroughly investigated, and those responsible continue not being prosecuted and adequately sanctioned. The situation is the source of particular concern in the region of the Terai.

11. In 2014 alone, **at least five citizens have been arbitrarily killed in the region of the Terai by Nepalese security forces**, evidencing a **re-emerging trend of extra-judicial killings**.<sup>3</sup> The most recent case is the arbitrary killing on 14 February 2015, in Sarlahi district, of Mr. Chhatu Sahani, from Dalit ethnicity. This follows the arbitrary killing, perpetrated on 12 January 2015, of Mr. Rajaram Jha (a district level leader of the political party Terai Madhes Democratic Party) in the Dhanusha district; the torture resulting in the extra-judicial killing on 24 October 2014 of Mr. Madhu Tajpuriya from Sijuwa in Morang district; and the excessive use of force resulting in the arbitrary killing on 11 October 2014 of Mr. Jaya Narayan Patel from Simrangaudh in Bara district. Previously, on 7 August 2014, Mr. Dinesh Adhikari was shot dead by police officers.
12. The described situation comes accompanied with an increasing number of episodes of excessive use of force by the police in several protests organised in January 2015, which resulted in dozens of protestors, most of them regional political leaders, injured.
13. The families of the victims of those killed by the State face several obstacles in obtaining justice. In the first place, there is a widespread practice by the **Nepalese Police to refuse to register initial criminal complaints** -First Information Reports (FIR)- when State authorities are involved in the complaint. Despite the fact that it is the legal obligation of the Police to register such complaints, the refusal to do so is not sanctioned.
14. Secondly, even in cases in which the prosecution eventually took place, **political interference in the independence of the judiciary led to the withdrawal of the cases from the criminal courts**. Furthermore, **the sanctions imposed to the perpetrators often fail to reflect the serious nature of the crimes at stake**. In the only case in which five perpetrators of an extra-judicial killing, committed during the conflict, have been prosecuted and sanctioned by the criminal justice system, the punishments imposed to them were between 1 and 2 years of imprisonment.<sup>4</sup>
15. Local NGOs reported that on several occasions **those responsible for extra-judicial killings have not even been punished through disciplinary action**. While the Nepal Police Human Rights Unit claims that departmental action has been initiated against more than 500 police personnel for committing “human rights violations”, the identity of the perpetrators concerned, the kind of violation committed, and the kind of disciplinary action taken remains unknown to the general public.
16. Furthermore, several army personnel allegedly involved in extra-judicial killings and torture cases and against whom charges have been pressed before criminal and civil courts, instead of being suspended, have actually been ascended. Overall, the **government failed to adopt guidelines for vetting to prevent those accused of human rights violations from holding public office and being promoted**.
17. To date, no external oversight mechanism or special investigative unit mandated to conduct independent and impartial investigations has been established. Similarly, **no specific complaint mechanism has been enabled to guarantee the access to justice of those victims of abuses by law enforcement personnel** and to ensure that perpetrators do not enjoy impunity any longer.

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<sup>3</sup> For more details about these cases see Terai Human Rights Defenders Alliance (THRDA), *Human Rights Bulletin*, 20 January 2015 and THRDA, *Situation update: unrest in the Terai Region*, 18 February 2015, Ekantipur, ‘Chari’ killed in cold blood: Oli, 8 August 2014. Available at: <http://www.ekantipur.com/2014/08/08/editors-pick/chari-killed-in-cold-blood-oli/393285.html> and My Republica, UML lawmakers warn House disruption over gangster Chari murder case, 7 August 2014. Available at: [http://www.myrepublica.com/portal/index.php/portal/post\\_cartoon\\_comment.php?action=news\\_details&news\\_id=80480](http://www.myrepublica.com/portal/index.php/portal/post_cartoon_comment.php?action=news_details&news_id=80480).

<sup>4</sup> Nepali Times, *Justice under threat*, 22-28 august 2014. Available at: <http://nepalitimes.com/article/nation/justice-for-dekendra-thapa,1619>.

### Recommendations

- Ensure that **criminal complaints of extra-judicial killings and torture are duly registered**, that the allegations therein reported are **promptly, effectively, impartially, independently and thoroughly investigated** and that those allegedly responsible for such violations are duly prosecuted, judged and, if found guilty, sanctioned;
- Amend the current legislation on FIRs to **ensure that State officials who refuse to register a criminal complaint face administrative as well as criminal sanctions**;
- Refrain from any interference with courts' proceedings, take all the possible steps to grant the independence of the judiciary and ensure that the executive will **put an end to the policy of withdrawal of cases**;
- Make sure that State authorities abide by the rule of law while carrying out their daily duties as well as while contrasting armed groups active in the region of Terai; in particular, ensure that **no recourse is made to arbitrary detention, torture, extra-judicial killings and enforced disappearance**. To this end, consider establishing an independent oversight mechanism mandated to control State agents' conduct, with a specific focus on Terai.
- Adopt guidelines for vetting to prevent those accused of serious human rights violations from holding public office and being promoted.

### C. Establishment of a Transitional Justice Mechanism in line with International Standards (Rec. 106.33, 106.34, 107.25, 108.22), Investigation of Conflict-related Human Rights Violations, Prosecution and Punishment of Those Responsible (Recs. 106.35-106.38, 107.2, 107.3 108.24,108.25, 108.30)

18. A transitional justice mechanism, consisting in the establishment of two separate Commissions, has been created in January 2015. Nevertheless, **it does not comply with international standards and the procedure that led to its adoption has not been sufficiently inclusive of representatives of victims' organisations.**
19. The Supreme Court of Nepal ordered the government to amend the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance – 2069 (2013), on the grounds that the transitional mechanisms thereby envisaged contravened international standards. Disregarding this decision, and simulating a consultation with victims and other stakeholders, on 25 April 2014 **the Parliament passed the TRC Act**. The latter basically reproduces the text of the 2013 Ordinance.
20. The TRC Act provides for the creation of two different commissions: the Truth and Reconciliation Commission (TRC) and the Commission of Investigation of Enforced Disappeared People (CIEDP). The main issues of concern in relation to the TRC Act can be summarised as follows: a) flawed understanding of the notion of reconciliation and related excessive power of the Commissions; b) powers to recommend amnesty for crimes under international law and gross human rights violations; c) lack of criminalisation of offences that amount to crimes under international law and inadequate prosecution system; d) non-recognition of victims' right to reparation; and e) lack of independence of the Commissions.
21. Between June and July 2014, **four writ petitions were submitted to the Supreme Court challenging several provisions of the TRC Act**, including those giving the government the power to grant amnesty; as well as the procedure for appointment of the Commissioners. While the cases were *sub-judice* before the Court, a Recommendation Committee was appointed. It shortlisted and then selected the Commissioners. **On 10 February 2015 the Commissioners were appointed and the Commissions were given full shape.**

22. On 26 February 2015, the Supreme Court **annulled some wording of Section 26(2) and 29(1) of the TRC Act that gave discretionary powers to the transitional justice mechanisms to recommend amnesty, and which allowed the Ministry of Peace and Reconstruction to decide whether or not to prosecute perpetrators of crimes of serious nature.** Likewise, the Supreme Court held that the victim's consent should be made mandatory for reconciliation and that cases that are pending before various courts cannot be transferred to the Commissions.<sup>5</sup> **The extent to which this decision will be implemented is yet to be seen.** The two petitions concerning the legality of the Recommendation Committee were quashed as the Committee had already been dissolved. A fourth petition brought by Forum for Women, Law and Development<sup>6</sup> is still pending<sup>7</sup>.

#### Recommendations

- Ensure that the Supreme Court decision of 26 February 2015 is fully implemented, so that:
  - a) the TRC and CIEDP are not given the power to recommend amnesties for those accused of gross human rights violations;
  - b) governmental authorities are not given any margin of discretion to decide criminal prosecution against perpetrators of human rights violations;
  - c) the transitional justice mechanisms do not put excessive emphasis on reconciliation.
- Ensure that the creation of the transitional justice mechanisms does not serve as a pretext to hinder criminal prosecution against those responsible for gross human rights violations;
- Ensure that the Commissions adopt measures to protect victims and witnesses during the process.

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<sup>5</sup> Supreme Court of Nepal, Case *Suman Adhikari et.al. v. Government of Nepal et.al.*, Writ No. 070-WS-0050, decision of 26 February 2015.

<sup>6</sup> Supreme Court of Nepal, Writ Petition No. 070-WS-0052

<sup>7</sup> The hearing is scheduled for 16 April 2015.