



## STATEMENT OF TRIAL (*Track Impunity Always*)

### FOR THE SECOND CYCLE OF THE UNIVERSAL PERIODIC REVIEW (UPR) ON NEPAL

September 2015

#### 1- About the Statement

This statement is delivered by TRIAL (*Track Impunity Always*) in view of the 2<sup>nd</sup> cycle of the UPR on Nepal. In March 2015, TRIAL formally submitted information<sup>1</sup> on the state of implementation of a selected number of the recommendations issued in 2011 at the conclusion of the 1<sup>st</sup> cycle of the UPR to the Working Group on the UPR (WG-UPR).<sup>2</sup>

In view of its mandate and expertise, TRIAL wishes to refer to the lack of implementation of previous UPR recommendations, as well as to the existing situation concerning the following matters:

- **The lack of adequate codification of enforced disappearance under Nepalese criminal legislation, as well as failure to ratify to the International Convention on the Protection of All Persons from Enforced Disappearance and to recognise the competence of the Committee on Enforced Disappearances** to receive and examine individual and inter-state communications;
- **The lack of adequate codification of torture under Nepalese criminal legislation;**
- **The failure to investigate, prosecute, and sanction those responsible for gross human rights violations, with a special emphasis on extra-judicial killings in the region of the Terai; and**
- **The flaws of the newly established transitional justice mechanisms.**

For each of the above-mentioned issues, concrete suggestions on **questions that should be posed to the representatives of Nepal during the 2<sup>nd</sup> official UPR review**, and on **recommendations to be formulated**, will be made.

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<sup>1</sup> TRIAL, Submission for Second Cycle of the UPR on Nepal, March 2015. Available at [http://www.trial-ch.org/fileadmin/user\\_upload/documents/CAJ/Nepal/2015\\_UPR\\_Report\\_Final.pdf](http://www.trial-ch.org/fileadmin/user_upload/documents/CAJ/Nepal/2015_UPR_Report_Final.pdf)

<sup>2</sup> The list of recommendations made and the responses by the Government of Nepal is available at [http://www.upr-info.org/sites/default/files/document/nepal/session\\_10\\_-\\_january\\_2011/recommendationstonepal2011.pdf](http://www.upr-info.org/sites/default/files/document/nepal/session_10_-_january_2011/recommendationstonepal2011.pdf)

## 2- Statement

After the 1<sup>st</sup> UPR cycle, Nepal accepted or noted recommendations formulated by Slovenia, France, Chile, Spain, Sweden, Argentina, and Japan concerning the need to criminalise enforced disappearance under domestic legislation in line with international standards and to ratify the International Convention on the Protection of All Persons from Enforced Disappearance.

### i) **Non-Criminalisation of Enforced Disappearance and the Failure to Ratify the International Convention for the Protection of All Persons from Enforced Disappearance**

At the time of writing, **Nepal has not criminalised enforced disappearance as a separate offence under its domestic legislation<sup>3</sup>** and has **neither taken any step to ratify the International Convention for the Protection of All Persons from Enforced Disappearance**, nor to recognise the competence of the Committee on Enforced Disappearances to receive and examine individual and inter-state communications pursuant to Arts. 31 and 32 of said Convention.

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 merely has the purpose of defining the scope of the transitional justice mechanism’s mandate and hence does not replace the proper criminalisation of enforced disappearance, which requires that criminal sanctions be attached to the offence.<sup>4</sup>

Furthermore, **Nepalese Police consistently refuses to register criminal complaints** -First Information Reports (hereinafter, FIRs)- when they are related to State authorities’ conducts. Despite the legal obligation of the Police personnel to register complaints, the refusal to do so is not sanctioned.<sup>5</sup>

Since FIRs can only be registered in relation to criminal offences enlisted in Annex 1 of the 1992 State Cases Act, which includes the list of criminal offences for which the public prosecutor can initiate legal proceedings against the perpetrators, and enforced disappearance does not figure in such document, victims of such crime are prevented from filing criminal complaints. Therefore, in order to comply with its international obligations, it is not sufficient that Nepal passes new legislation criminalising enforced disappearances. The problems regarding

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<sup>4</sup> For reference, please see *supra* n. 1, paras. 1-5.

<sup>5</sup> For reference, please see TRIAL (Track Impunity Always) Conflict Victims’ Society for Justice (CVSJ) Forum for the Protection of People’s Rights (PPR) Nepal Himalayan Human Rights Monitors (HimRights) National Network of Families of Disappeared and Missing (NEFAD) Terai Human Rights Defenders Alliance (THRD Alliance) Terror Victims’ Orphan Society of Nepal (OTV-Nepal), *Written Inforamtion for the Consideration of the Nepal’s Second Periodic Report by the Human Rights Committee*, February 2014, paras. 7-22. Available at: [http://www.trial-ch.org/fileadmin/user\\_upload/documents/CAJ/Nepal/NEPAL\\_REPORT\\_to\\_HRC\\_TRIAL.pdf](http://www.trial-ch.org/fileadmin/user_upload/documents/CAJ/Nepal/NEPAL_REPORT_to_HRC_TRIAL.pdf)

registration of criminal complaints described above can only be addressed by amending Annex 1 of the State Case Act of 1992, in view of including the act of enforced disappearance therein.

#### Questions to be Posed during the Official Review

- What measures have been taken to ensure that enforced disappearance is criminalised as a separate offence under domestic legislation?
- Is Nepal planning to amend the *1992 State Cases Act* so as to allow the registration of criminal complaints of enforced disappearance?
- What measures has Nepal taken to ratify the International 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?

#### Recommendations

Nepal must **criminalise enforced disappearance as a separate offence under its domestic legislation**, in line with international standards and ensure that it is punishable by appropriate penalties that take into account its extreme seriousness.

Nepal must **amend the 1992 State Cases Act so as to permit the registration of criminal complaints relating to enforced disappearances**.

Nepal must **ratify the International Convention for the Protection of All Persons from Enforced Disappearance** and recognise the **competence of the Committee on Enforced Disappearances** pursuant to Arts. 31 and 32 of the Convention.

#### ii) Lack of Adequate Criminalisation of Torture

After the 1<sup>st</sup> UPR cycle, Nepal accepted or otherwise expressed support to the recommendations formulated by Switzerland, Denmark, the United Kingdom, Brazil, Sweden, and Slovenia concerning the need to criminalise torture under Nepal's domestic law, in line with the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

At the time of writing, **Nepal has not adopted any legislation criminalising torture**. Therefore, there are no legal avenues for victims of torture to file a criminal complaint (FIR) with the police, and there is no legal obligation for the Police to investigate *ex officio* cases of torture.

On 21 November 2014, **the draft Torture, Cruel, Inhumane and Degrading Treatment (Control) Bill** was tabled in Parliament. By proposing punishments of five-year of prison and/or monetary fines up to Nepalese Rupees 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 concerning cases of torture, the draft Bill **is not in line with international standards.**

Victims of torture may make a complaint before the Human Rights Unit of Nepal Police that monitors and investigates human rights violations by their own personnel; however, victims regularly report that they do not trust this mechanism, fearing further torture and ill-treatment if complaints are made.<sup>6</sup> This Unit, moreover, does not provide for any measure to protect victims and witnesses from possible retaliations.<sup>7</sup>

The prevailing law on torture in Nepal is the **1996 Torture Related to Compensation Act (TRCA)**, which establishes the possibility for torture victims to file a complaint before the court in order to obtain compensation and provides for a **35-day statute of limitations that prevents many victims from obtaining any kind of redress.**<sup>8</sup> Moreover, victims of torture face serious *de facto* obstacles to obtaining justice, given that in many cases it may be difficult for victims of torture to access courts, for reasons including poverty, lack of knowledge or geographic remoteness.<sup>9</sup>

Nepal is a signatory to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and hence has a duty to investigate, prosecute and punish those allegedly responsible for inflicting acts torture. Nevertheless, **Nepal has not recognised the competence of the Committee against Torture to receive and examine individual communications** alleging violations of the rights set out in the CAT.

#### Questions to be Posed during the Official Review

- What measures has Nepal adopted to ensure that the draft Torture, Cruel, Inhumane and Degrading Treatment (Control) Bill is brought in line with the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment and eventually adopted?
- Is Nepal planning to amend the TRCA and abolish the statute of limitations for the submission of complaints or, at least, to bring it in line with international standards and to ensure that it is of an adequate length?
- Which measures have been adopted by Nepal to ensure that the Police act on allegations of torture 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?
- Is Nepal planning to recognise the competence of the Committee against Torture to receive and examine individual communications alleging violations of the rights set out in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by making the necessary declaration under Art. 22 of the Convention?

<sup>6</sup> Advocacy Forum, *Nepal: Is the Government Unable or Unwilling to Prevent and Investigate Torture?*, June 2013, p.84.

<sup>7</sup> For detailed information, see *ibid.*, *supra* n. 7 and Terai Human Rights Defender Alliance, *Torture in Terai*, February 2015.

<sup>8</sup> For reference, please see *supra* n. 1, paras. 6-9.

<sup>9</sup> Advocacy Forum, *Torture in Nepal in 2014: More of the Same*, June, 2015, p. 36.

## Recommendations

Nepal must **amend the draft Torture, Cruel, Inhumane and Degrading Treatment (Control) Bill** so as to bring it in line with the Convention against Torture, and enact it without any further delay.

Nepal must **amend the 1996 TRCA and abolish the statute of limitations for the submission of complaints** to obtain compensation in cases of torture.

Nepal must ensure that **the Police Act on allegations of torture also in the absence of formal criminal complaints** and, in general, take all the necessary measures to remove any possible *de jure* or *de facto* obstacle to investigation and prosecution of those allegedly responsible for these crimes.

Nepal must **recognise the competence of the Committee against Torture to receive and examine the individual communication** alleging violations of the rights set out in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by making the necessary declaration under Art. 22 of the Convention.

### iii) Non-implementation of the recommendation relating to investigation and prosecution of allegations of extrajudicial killings and other human rights violations

After the 1<sup>st</sup> UPR cycle, Nepal accepted or otherwise expressed support to the recommendations formulated by Argentina, Hungary, the United Kingdom, Germany, Sweden, Austria, Japan and the Czech Republic concerning the obligation to conduct thorough and effective investigations concerning gross human rights violations, including extra-judicial killings, especially in the region of the Terai, and to identify, prosecute and sanction those responsible.

However, **allegations of extra-judicial killings and other abuses committed by law enforcement personnel continue to be neither registered nor 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, where numerous extra-judicial killings have been reported. Moreover, **perpetrators of gross human rights violations during the conflict continue to enjoy impunity.**

It should be further noted that, as stated above, there is a widespread practice by the Nepalese Police refusing to register initial criminal complaints (FIR) when State authorities are implicated in the complaint. The situation is exacerbated by the absence of an independent and external oversight mechanisms to investigate and prosecute crimes allegedly committed by State actors, and by the absence of any vetting guidelines to prevent those

accused of serious human rights violations from holding public office and being promoted. As a result, the families of the victims of those killed by the State are unlikely to receive justice.<sup>10</sup>

In the last couple weeks, **several protests and demonstrations regarding the draft Constitution have taken place across the country.** Security forces have responded with the use of excessive use of force against demonstrators. The escalation of violence led to the killing of eight police officers by demonstrators in western Nepal on 24 August 2015. Expressing concerns over the incident, Rupert Colville, spokesperson for the UN High Commissioner for Human Rights (OHCHR) reiterated the call of the Nepal National Human Rights Commission for an independent, thorough and impartial investigation into all deaths and injuries resulting from the alleged disproportionate use of force by security personnel, as well as into the deaths of the security officers. The government of Nepal declared some western districts and low lands as “riot-hit areas” and mobilised the Army by means of Section 6 of the Local Administration Act 1971, which provides some prerogatives to the army mandated with the maintenance of peace and security. While this does not amount to a declaration of a state of emergency, **the risk of abuse of power by the police and army is thus increasing.** In fact, more incidents, instances of repression of demonstrators, including extra-judicial killings, and acts of violence have been reported.

#### Questions to be Posed during the Official Review

- What are the measures that Nepal plans to take in order to ensure that gross human rights violations, including extra-judicial killings and crimes committed during the conflict, are investigated and that those responsible are prosecuted and sanctioned?
- Is Nepal planning to establish external oversight mechanisms, such as an independent police complaints mechanism or a special investigative unit to investigate and prosecute crimes allegedly committed by State actors?
- What measures is Nepal planning to take in order to guarantee the registration of FIRs in cases involving state agents?
- Which measures has Nepal taken to ensure that security forces avoid any excessive use of the force in the context of demonstrations and protests? Which measures has Nepal taken to ensure that all reported crimes, including gross human rights violations perpetrated by State actors in the context of the repression of demonstrations are promptly, impartially and thoroughly investigated and that those responsible are prosecuted and sanctioned?

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<sup>10</sup> For reference, please see *supra* n. 1, paras. 10-17.

## Recommendations

**Nepal must ensure that criminal complaints of extra-judicial killings and torture are duly registered, that the allegations reported therein are promptly, effectively, impartially, independently and thoroughly investigated and that those allegedly responsible for such violations are duly prosecuted and, if found guilty, sanctioned.** Additionally, Nepal must ensure accountability for perpetrators of such crimes committed during the decade-long armed conflict (1996-2006).

Nepal must establish an **independent and external oversight mechanism mandated to overview State agents' conduct**, with a specific focus on Terai and all areas interested by recent demonstrations.

Nepal must **adopt guidelines for vetting** to prevent those accused of serious human rights violations from holding public office and being promoted. The vetting processes should be promoted in Nepal as a regular administrative process.

### iv) The Flaws of the Newly Established Transitional Justice Mechanisms

After the 1<sup>st</sup> UPR cycle, Nepal accepted the recommendations formulated by the Czech Republic, the Republic of Korea, Norway, the United States of America, Australia, Switzerland, Sweden, Denmark and the Netherlands concerning the establishment of transitional justice mechanisms in line with international standards and aimed at addressing the gross human rights violations committed during the conflict.

These recommendations have only been **partially implemented however, because, although transitional justice mechanisms have eventually been established, they do not fully meet international standards.**

In February 2015, the Truth and Reconciliation Commission (TRC) and the Commission on Investigation of Enforced Disappeared Person (CIEDP) were set up and entrusted a two-year mandate. The commissions were formed while writ petitions concerning the TRC Act were *sub judice* before the Supreme Court. On 26 February 2015, the Supreme Court – in deciding those writ petitions – quashed its amnesty provisions, highlighted the importance of victims' consent for reconciliation, and ordered the government of Nepal to respect the previous decisions of the Supreme Court, as well as the relevant provisions under international law. Victims' groups and human rights organisations continue to express their concerns in relation to the process and the contents of the TRC Act itself.<sup>11</sup>

To date, the commissions have not been able to win the trust of the victims and even the commissioners are not clear about their mandate and how to exercise it. There also seems to be a lack of coordination between the two mechanisms. Conflict victims<sup>12</sup> are less optimistic about the ongoing transitional justice process and they consider the following issues to remain problematic:

<sup>11</sup> For reference, please see *supra* n. 1, paras. 18-22.

<sup>12</sup> Views expressed by the victims during 2 days workshop organised by the ICTJ and CVCP on 20-21 August, 2015 Kathmandu.

- The **victims seriously felt that they are not a part of the ongoing process**, as they are not consulted by the commissioners and representatives of the government. Furthermore, they feel that the Commissions have not paid any attention to their needs.
- Though it is clear that the commissions will not investigate the cases *sub judice* in court, the question is still unclear in relation to those cases where courts have previously not ruled in their favour or quashed the petitions. Thus, the **existing relationship between regular court and the transitional justice mechanisms remains unclear**.
- In theory, the commissions have accepted that there will be no amnesty for the perpetrators of serious human rights violations. However, as explained above, **Nepal still lacks the adequate legislation to prosecute those accused of crimes such as torture or enforced disappearance**. Likewise, the conflict-era cases of rape or other forms of sexual violence cannot be prosecuted given the application of a 35-day statute of limitation.
- **The commissions do not have a concrete plan on how to protect victims and witnesses** or on how to store information and testimonies collected.
- Information is lacking as to how the Commissions will coordinate among themselves and avoid overlap, with the risk that certain families will need to file their cases before both Commissions.

The commissions are currently drafting their rules of procedure, which are thus not functioning yet. On 21 May 2015, the government of Nepal filed a review petition before the Supreme Court seeking a review of the 26 February 2015 decision on the TRC Act. The petition was registered on 24 May 2015 and is currently pending.

#### **Questions to be Posed during the Official Review**

- Which measures have been taken to ensure that the established transitional justice mechanisms fully meet international standards and their approach is victim-centred?
- How will the commissions ensure the victim-centred transitional justice processes in Nepal? What steps will the commissions take to win the trust of the victims within the transitional justice processes?
- Which measures have been taken to ensure accountability for conflict-related crimes and end impunity in Nepal?
- Which measures will the commissions take to protect victims, witnesses and their representatives during the processes? How will the commissions ensure confidentiality and protect information while storing it?



## Recommendations

- Nepal must ensure that the TRC and CIEDP undertake a victim-centred approach that enable the victims to receive truth, justice and reparation. Furthermore, Nepal must ensure that the TRC and CIEDP operate in a fully transparent manner, ensuring cooperation and avoiding overlapping among them.
  
- Nepal must ensure that regardless of the outcome of the review petition, **the TRC and CIEDP are not given the power to recommend amnesties for those accused of gross human rights violations and the governmental authorities are not given any margin of discretion to decide criminal prosecution against perpetrators of gross human rights violations.**
  
- Nepal must 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.**
  
- Nepal must ensure that the Commissions adopt measures to **protect victims, witnesses and their representatives during the process.**