

General allegation

124th session (17–21 May 2021)

Nepal

1. The Working Group received information from credible sources alleging difficulties encountered in Nepal in implementing the Declaration on the Protection of All Persons from Enforced Disappearance. The general allegation mainly focuses on alleged loopholes in the domestic legislation to address the enforced disappearances perpetrated by State forces that occurred in Nepal throughout the 1996–2006 civil war.
2. Nepal underwent a civil war from 1996 to 2006, during which gross human rights violations were reported to be committed on a widespread and systematic scale by all parties involved, including extrajudicial killings, sexual violence and torture. In particular, the widespread practice of enforced disappearances of persons taken in control or arrested by the State forces was documented.
3. Although the conflict ended in 2006, to date the Nepalese authorities have been allegedly unable or unwilling to make substantial progress in dealing with the related gross human rights violations, including the enforced disappearances that occurred during the conflict. The conflict ended formally on 21 November 2006 with the signing of a Comprehensive Peace Accord (CPA), which included a provision on the establishment of a Truth and Reconciliation Commission. There was also a constitutional provision and an order of the Supreme Court in 2007, directing the government to form an independent commission to investigate on and elucidate the fate and whereabouts of disappeared persons, and to prosecute those responsible. However, a Truth and Reconciliation Commission was only established by the government on 10 February 2015.
4. The Parliament of Nepal, on 21 April 2014, adopted the Enforced Disappearances Inquiry, Truth and Reconciliation Commission Act (“TRC Act”), subsequently establishing the Truth and Reconciliation Commission (“TRC”) and the Commission on the Investigation of Enforced Disappeared Persons (“CIEDP”) in 2015. However, the Supreme Court of Nepal deemed several provisions of the TRC Act to be unconstitutional and in conflict with international standards. The Supreme Court expressed its concern regarding, amongst others, the provisions that would allow amnesties for crimes under international law and gross human rights violations, including enforced disappearances, and the lack of adequate guarantees of the independence and impartiality of the two commissions. Subsequently, the Supreme Court ordered the amendment of the TRC Act. The Government of Nepal then filed a petition in the Supreme Court to review its decision, but it was rejected by the Court on 27 April 2020. Nevertheless, the TRS Act has not yet been amended, remaining, thus, at odds with the international standards, and inadequate to address the gross human rights violations occurred during the conflict, including enforced disappearances.
5. Initially, both commissions were entrusted with a 2-year mandate to receive and examine complaints on the gross human rights violations perpetrated during the conflict, bring about reconciliation, and to recommend legal action and reparation. The Government of Nepal has renewed both commissions’ 2-year mandate three times in order to complete the remaining work: on 9 February 2017 for one year, on 6 February 2018 for one additional year and on 8 February 2019 for a third time.
6. According to sources, the last extension came amidst the growing frustration and discomfort among victims vis-à-vis the incapacity to deliver of the two

commissions. The victims and civil society organizations for a long time have been flagging that extending the mandate of the commissions without an amendment of the laws was meaningless. According to the information received, the TRC and the CIEDP have fallen short of international standards, both in constitution and operation, despite repeated orders by the Supreme Court. Moreover, when a draft to amend the TRC Act was presented by the Nepal Government, it was reportedly insufficient, and it seemed to weaken even further the transitional justice process and be at odds with international human rights standards.

7. On 25 March 2019, the government reportedly formed a recommendation committee to appoint new commissioners, who were only officially nominated on 18 January 2020. According to sources, it is alleged that the appointments were politically influenced, and that they disregarded the victims' sentiments, the opinions of the national stakeholders, and the concerns expressed by the international community, including those in a joint communication sent to the Government of Nepal by the Working Group, together with a group of Special Procedures mandate holders, on 12 April 2019.

8. In February 2020, the CIEDP announced to have performed detailed investigations into 2000 cases. However, the Commission would have merely called the families of the disappeared persons to verify a second time the facts in their initial complaints, rather than for other enquiries.

9. According to the information received, victims' groups and civil society organizations are still demanding the amendment of the TRC Act to bring it in compliance with international law. However, and despite its public commitment, the government has not taken any concrete steps to amend it. The government claims to be working on the amendment, but the preparatory work is reportedly not transparent. Victims' groups are called for consultations at the last minute, with a limited number of stakeholders being convened and without adequate preparation. The government's call for consultations to amend the TRC Act (conducted on 13 January 2020) was reportedly denounced by various victims' groups for these reasons.

10. On 4 February 2021, the government extended for an additional six months the mandate of the two commissions. The information received underscores, however, the ineffectiveness and the lack of independence of the commissions during the past six years, and the unlikelihood that they will efficiently contribute to expose the truth, guarantee access to justice and provide reparation to the victims, especially in the absence of a reform of the applicable legal framework and without ensuring a truly transparent and participative process. The sources argue that the mere extension of the mandate of transitional justice mechanisms "and in particular the CIEDP" without a genuine reform of the applicable legal framework and without ensuring a truly transparent and participative process, may hinder the victims' rights and does not fulfil Nepal's international human rights obligations.

11. The Working Group also received information on how the socioeconomic situation of the relatives of the disappeared, and particularly women, has been affected. Officially determining the status of their loved ones is a step that most relatives must undertake in order to resolve a wide range of administrative issues arising from the enforced disappearance. Those may include regulating the status of marriage for the remaining spouse, implementing rights to inheritance, and dealing with management of property.

12. According to the information received, in the absence of a legal framework providing for situations of absence due to enforced disappearance, the sole provisions available are found in laws regulating the presumption and the recording of death, in particular, the Evidence Act of 2031 (1974) and the Birth, Death and Other Personal Event Registration Act of 2033 (1976). In accordance with these pieces of legislation, after 12 years during which a person has not been heard of, the burden of proving that the person is alive transfers to the person making the claim. The sources claim that,

de facto, Section 32 of the Evidence Act has been interpreted as establishing the presumption of death after 12 years of absence.

13. The Working Group was also informed that “absence due to enforced disappearance” is not included among the personal events that can be officially registered by relatives under the Birth, Death and Other Personal Events (Registration) Act, 1976. Consequently, families of the disappeared have no choice but to request the provision of a death certificate upon the delivery of false information to the register concerning the supposed death of the disappeared. It is also reported that on 28 January 2021, the CIEDP started distributing identity cards to the relatives of the disappeared persons during the conflict. Nevertheless, the identity cards reportedly do not recognize the enforced disappearance nor the legal status of the victim and do not contain the name of the disappeared person.

14. As regards the criminalization of enforced disappearance, on 17 August 2018, the National Penal Code came into effect. Chapter 16 of the Code, based on the recommendations of national and international bodies, criminalizes enforced disappearance as a separate autonomous crime. However, the rules contained in it, reportedly do not fully comply with international standards. Moreover, the application of the Code allegedly does not include the enforced disappearances that took place during the conflict.

15. It is also alleged that the following elements are in conflict with relevant international human rights standards:

(a) The definition of enforced disappearance, which refers to persons reported “missing” and not necessarily subjected to “enforced disappearances”, diluting the criminal scope of the provision (Section 206);

(b) The restriction of the potential perpetrators to “persons of security personnel having authority by law to make arrest, investigation or enforcement of law”, excluding various state agents who may be formally given different attributes, as well as persons or groups of persons acting with the tolerance, support or acquiescence of state agents (Section 206 (2) (a));

(c) The superior command responsibility in cases of enforced disappearances (Section 207(5));

(d) The sanctions envisaged for enforced disappearances, which consist of a maximum of 15 years and a fine up to 500.000 Nepalese Rupees, which reportedly not only fails to establish a minimum sentence for the offender, but also is not proportionate with the gravity of the crime (Section 206(7));

(e) The notion of reparation for victims of enforced disappearance, which provides that the disappeared is only entitled to a pecuniary compensation (indeterminate amount) from the perpetrator and does not recognize the relatives of the disappeared as victims (Section 208);

(f) The statute of limitations for criminal proceedings on enforced disappearance, which states that “no complaint may be taken into consideration after the expiry of six months from the date on which knowledge of the commission of the offence was obtained or from the date on which the missing person was found or made public” (Section 210);

(g) The failure to codify enforced disappearance as a crime against humanity when committed in the context of systematic attacks against any civilian population.

16. The Working Group would be grateful for your Excellency’s Government cooperation and observations on the following questions:

(a) Whether the facts reported in the allegation are accurate. If not, what are the true facts?

(b) What are the measures that your Excellency's Government has taken, or intends to take, to bring Nepal's legislation in conformity with international norms and standards, in particular in relation to the amendments to the TRC Act?

(c) Please indicate if and how the provisions of the National Penal Code criminalizing enforced disappearances recognize the continuous nature of the crime, allowing the prosecution of perpetrators who committed enforced disappearances during the conflict;

(d) What are the measures that your Excellency's Government has taken or intends to take to enhance the effectiveness and implementation of the mandate and functions of the TRC and CIEDP Commissions?

(e) Please provide information on any measures that your Excellency's Government has taken, or intends to take, to ensure the effective participation of victims in the design and implementation of transitional justice processes.

17. The Working Group requests your Excellency's Government to provide a response to the above questions within sixty days.