

Mandates of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Special Rapporteur on violence against women, its causes and consequences

REFERENCE:
AL NPL 1/2020

16 March 2020

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and Special Rapporteur on violence against women, its causes and consequences, pursuant to Human Rights Council resolutions 36/7, 36/6, 35/15, 34/19 and 41/17.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the reported lack of effective consultation with victims concerning the amendment of the Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2071 (2014).

We would like to recall previous communications from Special Procedures concerning the Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2071 (2014) and related issues. In particular, we would like to recall OL NPL 1/2019, of 12 April 2019, concerning the reported lack of impartiality, independence and transparency in the procedure for the appointment of the members of the Truth and Reconciliation Commission (TRC) and Commission on the Investigation of Enforced Disappearance (CIEDP); the reported lack of progress in the work undertaken by both commissions; and the possible amendment of the Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2071 (2014). We would further like to recall OL NPL 4/2017 of 27 July 2017, which expressed concern about the shortcomings of the Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2071 (2014), and the lack of significant progress in the work of the TRC and the CIEDP. The communication called on the Government to enhance participation and protection of victims and witnesses, implement court verdicts concerning transitional justice, and to address conflict-era cases promptly and effectively. In addition, we would like to recall JAL NPL 2/2014, of 3 July 2014, which called on the Government to amend several provisions of the TRC Act to put it in conformity with international standards, in particular those relating to the TRC's competence to recommend amnesties for perpetrators including for gross violations of human rights and serious violations of international humanitarian law.

We thank your Excellency's Government for the replies of 12 December 2014 and 7 June 2019 and encourage you to respond substantially to the remaining communication. We would like to share additional remarks concerning the process of consultation with victims in the drafting of the amendment of the Act. In your response of 7 June 2019 your Excellency's Government indicated that the Ministry of Law, Justice and Parliamentary Committee had constituted a committee to facilitate a broad-based consultation process between the representative organizations of the victims and other stakeholders and submit a draft proposal for the amendment of the Act.

According to the new information received:

Consultation with victims

In September 2019, the Government was in discussions with victim groups to finalize the modalities for a nationwide consultation on the amendment of the Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2071 (TRC Act). The Government proposed organising seven consultations in Nepal's seven provinces simultaneously where all stakeholders including conflict victims, political leaders, civil society members, government officials and security forces personnel would meet together for the consultations. This was to be followed by one national-level consultation in Kathmandu.

In mid-September 2019, victim advocacy groups met then Minister of Law and Justice and noted some key demands to make consultations transparent and productive. While they welcomed the Government's initiative to call for such consultations, they warned against consultations with victims in the presence of other stakeholders especially security forces and politicians. They argued that their presence would intimidate victims and prevent them from speaking openly. They also suggested that the government organise a separate one-day consultation with victims in each province, and draft a comprehensive questionnaire to get structured information from them.

Civil society representatives later learned that the Government decided to convene the seven consultations simultaneously, despite the concerns expressed by several actors in this regard. This was considered detrimental as victim group's leaders and human rights defenders would be unable to simultaneously attend all consultations and provide effective assistance to the victims in the different regions. In this connection, the Minister of Law and Justice promised to invite the victim groups for a second discussion before finalising the modalities of the consultations. However, there was no follow-up from the Government until early January 2020.

On 7 January 2020, the Foreign Minister of Nepal informed victim advocacy groups that the seven provincial-level consultations would be held on 13 January 2020.

Victims and human rights organisations severely criticized the hurried manner in which the consultations were conveyed. Firstly, the consultation process was not perceived as broad-based, fair or transparent. The Government announced the date for the consultations just seven days earlier and the venues of the consultations were disclosed the night before or in the morning of the consultations. The victims groups requested to delay the consultation to allow sufficient time for potential participants to be informed and prepared, to no avail. The seven consultations lasted 2 to 3 hours, which seemed very short to allow sufficient time for everyone to be heard.

In addition, the two main victims advocacy organizations were asked to nominate a maximum of five victims for every provincial consultation. This prevented the participation of a large number of victims and limited the representation of several categories of victims. Despite the request from victims groups, consultations were not carried in remote districts or organized by type of violation.

On the other hand, while the Government agreed to consult victims separately from political leaders and security forces, they invited groups such as former child soldiers and organisations representing families of security forces personnel killed during the conflict. This was perceived as an attempt to draw false equivalence among these groups and disrupt focused discussions on human rights and international humanitarian law violations during the conflict.

Furthermore, while the Government did use a questionnaire, they refused to share the draft with relevant stakeholders before the consultations and did not take on board suggestions to make the questions more focused and simple for victims to understand. The final questionnaire was complex and over reliant on technical and legal terms that many victims may not have understood.

Due to these shortcomings, victim's groups have denounced the consultations as deficient, calling on the Government to organise follow-up focused consultations at the district level to ensure broad and effective participation of victims.

The one-day national consultation in Kathmandu has not yet taken place.

Appointment of new commissioners

On 18 January 2020, soon after the consultations, the Government appointed new commissioners for one year to the Truth and Reconciliation Commission (TRC) and the Commission on the Investigation of Enforced Disappearance (CIEDP). Civil society and international observers denounced the lack of independence and transparency around the recommendation and appointment process, and noted the appointment should have taken place after the TRC Act is amended and brought in line with international standards.

Amendment of the TRC Act

A draft amended TRC Act is reportedly in the final review stages and could be tabled in the ongoing Parliament session (which runs until the end of March). Civil society voices have expressed concern that the Government may rush a poorly amended and insufficiently consulted bill to show progress during its UPR 3rd cycle review in November 2019.

While we do not wish to prejudge the accuracy of these allegations, we wish to recall our concern at the reported lack of effective consultation with victims concerning the amendment of the Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2071 (2014), and the attempt to rush a poorly amended and insufficiently consulted text through Parliament. Concerns are also expressed at the reported lack of independence and transparency around the recommendation and appointment of new commissioners to the Truth and Reconciliation Commission (TRC) and the Commission on the Investigation of Enforced Disappearance (CIEDP).

In connection with the above alleged facts and concerns, please refer to the Annex on Reference to international human rights law attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the information provided.
2. Please indicate how the seven provincial level consultations ensured a broad wide and effective participation of all interested victims, including all categories of victims and victims residing in remote locations, to ensure their views are accurately and comprehensively represented. Please inform if further consultations are planned to engage the victims who were not able to participate in the previous round of consultation.
3. Please provide information on how the inputs received from victims and civil society were or will be given due consideration and inclusion in the amended Act.
4. Please provide information about the measures taken to ensure the independence and transparency of the recommendation and appointment of the new commissioners to the Truth and Reconciliation Commission (TRC) and the Commission on the Investigation of Enforced Disappearance (CIEDP), and to guarantee the compliance of this procedure with International standards on the appointment of members of such commissions.

This communication and any response received from your Excellency's Government will be made public via the communications reporting website within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to guarantee the broad and effective consultation with victims in the process of amendment of the Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2071 (2014), and to guarantee that the amended Act to be presented to Parliament is compliant with international standards.

We would like to take this opportunity to remind your Excellency's Government of the pending visit requests from the Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence and from the Working Group on Enforced or Involuntary Disappearances. We look forward to receiving your invitation to visit the country soon.

Please accept, Excellency, the assurances of our highest consideration.

Fabian Salvioli

Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

Luciano Hazan

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Dubravka Šimonovic

Special Rapporteur on violence against women, its causes and consequences

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, and without prejudice to the accuracy of these allegations, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards.

Concerning the need to ensure effective participation of victims, we would like to recall that the Updated set of principles for the protection and promotion of human rights through action to combat impunity emphasize the meaningful role of victims and other sectors of civil society in transitional justice processes and the importance of broad public consultations in decisions related to the establishment and composition of truth commissions, the design, implementation and assessment of reparation programmes, as well as in the establishment of institutional reforms aimed at preventing a recurrence of violations (see principles 6, 32 and 35).

Human Rights Council resolution 12/11 stresses the importance of a comprehensive process of national consultation, particularly with those affected by human rights violations, in contributing to a holistic transitional justice strategy that takes into account the particular circumstances of every situation and is in conformity with human rights. It further underlines that truth-seeking processes have to be designed founded on broad national consultations with the inclusion of victims and civil society, including nongovernmental organizations (op. 5 and 12)

We wish to highlight that the reports of the mandate of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence address in detail the question of victims' participation in transitional justice processes. The Special Rapporteur provides examples of the indispensable contributions by victims to transitional justice measures and also warns that participation can involve security risks for victims, social risks, economic costs and risks of re-traumatization, among others, which need to be properly addressed (A/HRC/34/62 and also A/71/567).

Victims' participation is central in transitional justice processes. First, for epistemic reasons which relate to the contributions that victims can make to the quality of information on the basis of which transitional justice measures can be designed, operated and monitored. Victims not only have a privileged perspective on the ways in which systems and institutions that were meant to guarantee their rights failed to do so, but also on what constitutes effective redress in terms of truth, criminal justice, reparation and guarantees of non-recurrence. Second, for legitimacy reasons which recall that participation provides victims a measure of recognition not only as victims but also as rights holders; this in turns helps victims become visible and gain a place in the public sphere frequently denied to them. The equalizing effect of participation facilitates the identification of commonalities of experiences, values and principles among different types of victims, as well as between victims and non-victims, which is important for the sake of coalition- and consensus-formation regarding transitional justice policies. And finally, the participation of victims recalls to all that discussions about transitional justice

are not merely technical matters, but are essentially about human beings, their dignity and rights.

Concerning the selection of members of the TRC and the CIEDP, we would like to recall that the Updated set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/add.1) stressed that Commissions of inquiry, including truth commissions, must be established through procedures that ensure their independence, impartiality and competence and that they shall be constituted in accordance with criteria making clear to the public the competence and impartiality of their members, including expertise within their membership in the field of human rights and, if relevant, of humanitarian law. They shall also be constituted in accordance with conditions ensuring their independence. In determining membership to the commission, concerted efforts should be made to ensure adequate representation of women as well as of other appropriate groups whose members have been especially vulnerable to human rights violations (Principle 7).

Similarly, the Principles on Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, in particular principle 11, provides that members of independent commissions of inquiry shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these Principles.

As noted by the Special Rapporteur on the promotion of truth, justice reparations and guarantees of non-recurrence, truth commissions derive their power to a large extent from the moral authority and competence of commissioners. Hence, selecting suitable commissioners is a crucial factor in their good functioning (A/HRC/24/42, para. 53). The procedure needs to be transparent guaranteeing the independence, impartiality, expertise and legitimacy of the Commission. As such, some attention should be paid to the representation of the different sectors of society. The Special Rapporteur underscored the need for a clear articulation of the relevant selection criteria of commissioners, which must include professionalism, integrity and expertise, in addition to reputation, as fundamental criteria (para. 103).