

April 2011

## Advocacy Forum and the Redress Trust

Comment on Nepali Draft Criminal Code, Draft Criminal Procedure Code and Draft Sentencing Bill: Provisions relevant to a Fair Trial, Enforced Disappearance and Sexual Violence

### Introduction

Advocacy Forum (“AF”) and the Redress Trust (“REDRESS”) welcome the opportunity to consider and provide comment on the draft Criminal Code 2066 BS, Criminal Procedure Code 2066 BS and Sentencing Bill 2066. We contend that we are well placed to comment on the draft legislation; AF is a Nepali non-governmental organisation (NGO) which works to promote human rights and rule of law and REDRESS works internationally to assist victims of torture and related international crimes to obtain justice and reparation.

In light of our experience in both campaigning for rights of the victims of human rights violations, as well as working to reform criminal justice system, we respectfully make the following considered comments and recommendations relating to the draft legislation, particularly from the perspective of defendants and victims<sup>1</sup> of enforced disappearances and sexual violence.

Below follow a short summary of key recommendations in relation to the draft Criminal Code, draft Criminal Procedure Code and Sentencing Bill. This is followed by a detailed analysis from the perspective of the right to fair trial (Annex 1), the crime of enforced disappearances (Annex 2) and finally in relation to the crime of sexual violence (Annex 3).

### SUMMARY OF KEY RECOMMENDATIONS

#### Draft Criminal Code

##### Fair Trial Perspective

- Amend **definition of “judge” and “court”** to ensure that **only judicial bodies are empowered** to adjudicate criminal cases in line with the doctrine of separation of powers and to ensure the impartiality of the justice system (s3).
- Wherever the laws of Nepal require that a procedure takes place **“in court” or “before a judge”** it means that the matter should enjoy the **full, undivided and uninterrupted attention** of the **presiding judge** (s3).

##### Enforced Disappearance Perspective

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<sup>1</sup> The term “victim/s” in this comment is used to include the sense employed by the Human Rights Committee in *Yasoda Sharma v. Nepal*, as referring to any person negatively affected by the disappearance, including, but not limited to, family members: No.1469/2006 (6 November 2008) UN Doc. CCPR/C/94/D/1469/2006 available at <<http://www1.umn.edu/humanrts/undocs/1469-2006.pdf>>.

- We recommend the adoption of a Nepal-specific adaptation of the definition of “enforced disappearance” as contained in the International Convention against Enforced Disappearances (“Disappearance Convention”).<sup>2</sup>
- The criminalization of command liability for certain offences is welcomed. We submit that **chain of command criminal liability should be applicable to all offences in Chapters 15 (Unlawful Detention) and Chapter 16 (Disappearances)**. In addition, we recommend that it be made clear that the current definition includes criminalization not only of direct acts of disappearance, but also the **criminalization of persons in command who order, incite, instigate, or facilitate** another party to commit a disappearance, or **officials who indirectly support or acquiesce** to the occurrence of a disappearance. ‘Officials’ shall mean **State officials** and particular to the Nepali context, **non-State officials, acting as if they were State officials**.
- We further recommend that in the case that an act of disappearance is part of the **widespread or systematic attack** targeted against civilian population, it shall be **defined as a crime against humanity** as per the Statute of International Criminal Court.<sup>3</sup>
- To truly recognize both the continuous nature and seriousness of this crime as a crime against humanity,<sup>4</sup> we recommend the **removal of any limitation period** in relation to making complaints pursuant to Chapter 16: Disappearance of Persons **whilst a person remains disappeared**. In the case that **the person reappears**, we recommend **increasing the limitation period to one year**.
- A minimum penalty for the crime of Enforced Disappearance should be introduced.
- We also take this opportunity to urge the Government of Nepal to consider becoming a signatory to the International Convention for the Protection of All Persons from Enforced Disappearance (“Enforced Disappearances Convention, ICAED”) that entered into force on 23 December 2010.

### Sexual Violence Perspective

- The **definition of rape** should impose on the perpetrator the onus to prove, on the balance of probabilities that the victim gave her/his **unequivocal and voluntary consent** to engage in the sexual act.
- The **definition of rape should include marital rape and be gender-neutral**; i.e. include protection for men and boys, transgender who may also be victims of sexual assault.  
*(2) If any person commits sexual intercourse with any person, including marriage partner, without his/ her unequivocal and voluntary consent or commits sexual intercourse by taking the consent of any person sixteen years of age or under shall be deemed to have committed "Rape".*
- The **definition of sexual intercourse should be broadened** to include any unwanted penetration of the body by an object to ensure that situations in which objects other than bodily organs are used to commit the offence to ensure that victims are protected from all forms of rape.
- **Amend prohibition to commit sexual harassment**. The current section criminalizes a wide range of conduct. We recommend **dividing the section into two: sexual assault**, defined as unwanted physical sexual contact, with a more significant penalty, and **sexual harassment** defined as any indirect conduct of an unwanted sexual nature.

<sup>2</sup>International Convention for the Protection of All Persons from Enforced Disappearance 2006, General Assembly Resolution 61/177, UN Doc. A/RES/61/177 (2006), adopted on 20 December 2006.

<sup>3</sup>Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.

<sup>4</sup>Enforced Disappearance is defined as a crime against humanity at Article 5 of the Rome Statute of the International Criminal Court; n3, above.

- The **limitation periods** and **penalties for child marriage (S175) and child sexual abuse (S226)** must be amended to reflect the seriousness of these crimes and the particular vulnerability of child victims to intimidation and oppression.

## Draft Criminal Procedure Code

### Fair Trial Perspective

- Legal Representation : The proposed provisions with regards to the detainees rights to legal counseling (section 13 and section 130) is not compatible with international standards, Nepal's constitutional guarantee and the case laws that the Supreme Court has developed. Upon arrest, the **arresting official shall notify** the detainee's nominated **legal representative** and permit a **confidential communication** to take place. If the defendant's legal representative is uncontactable or the detainee has no nominated legal representative, **the official shall contact the court-appointed lawyer or lawyer provided by Legal Aid Committee by telephone** and permit a confidential communication to take place. The said court appointed lawyer shall be available 24 hours per day (s13).
- **Interrogations** shall take place in the presence of a **defence lawyer or other nominated person**; further, all interrogations **shall be recorded in audio or video form** (s14) to ensure an accused's right to silence is respected and that the risk of torture is reduced (s14).
- There shall be a **presumption in favor of bail** unless the court is satisfied that there are reasonable grounds to believe that there is a risk of flight, interference with evidence or re-offending by the accused, as per the Human Rights Committee conclusions on the right to liberty in *Van Alphen*<sup>5</sup>(s 67).
- **Defendants shall not be required to make a statement at the jail-bail hearing (s109), nor shall a defendant be required to produce any evidence (s99) prior to the close of the prosecution case.** A defendant, *only* after hearing the full evidence against him/her, may choose to waive the right to silence and may choose to call evidence. No negative inferences may be drawn from an accused's choice not to call evidence or make a statement; consistent with the practical application of two of the fundamental aspects of a fair trial: the right to silence and the presumption of innocence.<sup>6</sup>
- **Judges shall perform all judicial tasks personally** (s180).

### Combined Victim Perspective

- We recommend the inclusion of a **positive obligation on the Nepal Police**, or other relevant authority, **to register any complaint made pursuant to section 4.** If an official refuses to register a complaint as a First Information Report ("FIR"), the official must provide the reasons for such decision to the complainant *in writing*; a failure to do so shall result in departmental action.
- The **Government Attorney should hold the decision-making power** and political responsibility in relation to **non-investigation of all complaints.**
- A **special investigative team should be established** and utilized wherever there is an apparent **conflict of interest** between the perpetrator and the investigating authority.

<sup>5</sup> *Van Alphen v The Netherlands* No 305/1988 (1990) UN Doc CCPR/C/39/D/305/1988.

<sup>6</sup> Articles 24(7) and 24(5) of Interim Constitution of Nepal 2063 BS (2007 AD) available at <<http://www.supremecourt.gov.np/ic.pdf>> (The "Interim Constitution"); Articles 14(3)(g) and 14(2) of International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976, ratified by Nepal May 1991) 999 UNTS 171 (ICCPR) available at <<http://www2.ohchr.org/english/law/ccpr.htm>> ("ICCPR").

- **Guidelines for witness protection measures** should be **included** in the legislation.

### Draft Sentencing Bill

#### **Fair Trial Perspective**

- Imprisonment shall only be imposed where no other penalty would be appropriate; it shall be a penalty of last resort, in line with the right to liberty (s15).
- Sentencing Guidelines outlining aggravating and mitigating factors in any case shall be enacted as per the Chapter 3 of the previous draft of this Bill (2066BS).
- If an offender is unable to pay the fine immediately, the court shall order to deposit the fine in installments within a stipulated time to ensure that economically disadvantaged Nepali's are not discriminated against, whilst also reducing the stress on the prison system and saving financial and other government resources (S23).

#### **Combined Victim Perspective**

- Penalties for rape are significant in the draft Bill; **other sexual offences should have similarly strong penalties** to ensure consistent deterrence of offenders.
- The **Victim Relief Compensation Fund should be established as a matter of priority** to ensure that victims are not re-traumatized by having to pursue compensation through the courts.