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**OHCHR Comments on the Nepal “Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance – 2069 (2013)”**

**3 April 2013**

**Background**

On 14 March 2013, the President of Nepal promulgated the “*Commission on Investigation of Disappeared Person, Truth and Reconciliation Ordinance – 2069 (2013)*” (the Ordinance).

The establishment of two Commissions, one to address Disappearances and a second Truth and Reconciliation Commission, was foreseen in the 2006 Comprehensive Peace Accord (CPA) signed between the then Seven Party Alliance and the Communist Party of Nepal-Maoist (CPN-M) and in the Interim Constitution of Nepal of 2007. OHCHR acknowledges the dedicated efforts of political parties, State bodies, civil society and the international community to realise the commitments in the CPA and the interim Constitution. In this regard, OHCHR notes the particular challenges that have arisen around reaching agreement on the establishment of the Commissions.

A previous draft law to establish this Commission was subject to significant debate and consultation by the Constituent Assembly of Nepal before its dissolution in May 2012. OHCHR provided substantial technical advice on the drafting process and supported the Ministry of Peace and Reconstruction in holding public consultations on the draft with victims groups and civil society. In December 2011, following reports of the imminent passage of legislation to establish the Commission with a power to grant amnesties for serious violations of human rights, the High Commissioner for Human Rights wrote a letter to the Prime Minister noting that such amnesties are inconsistent with international law. On 28 August 2012, the Council of Ministers transmitted the *Ordinance on Investigation of Disappeared People, Truth and Reconciliation Commission, 2069 (2012)* to the President of Nepal for promulgation. This text contained important differences to that which had been subject to consultation and debate by the Constituent Assembly. Based on an unofficial translation of the Ordinance which was never publically released, OHCHR issued a technical note providing a commentary and analysis of the draft Ordinance.

While the Ordinance promulgated on 14 March 2013 includes some amendments to the text of the August 2012 draft, the main concerns raised previously by OHCHR in terms of international law have not been addressed. In particular, OHCHR regrets that the promulgated Ordinance establishes a Commission with power to grant amnesties which would be inconsistent with Nepal’s international legal obligations to investigate gross violations of human rights and serious violations of international humanitarian law, and to ensure that those responsible are brought to justice.

**Summary of concerns**

1. The comments in this analysis are based on an unofficial translation of the Ordinance. OHCHR strongly encourages the Government of Nepal to provide an official translation into English. OHCHR further notes that the text of the Ordinance contains some inconsistencies and lacks clarity in several key provisions. An Ordinance with such significant ambiguities creates legal uncertainty.

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1. OHCHR understands that this version of the Ordinance was not subject to consultation with the National Human Rights Commission, nor with the broader public. The text was negotiated amongst the four main political parties as part of a political compromise that would facilitate national elections. OHCHR notes that consultations with victims and others affected by the conflict are essential to ensure that their rights and concerns are reflected. Comprehensive consultations can also be instrumental in facilitating national ownership over the process and the credibility of a Commission.
2. The proposed powers of the Commission under article 23 to grant amnesties for ‘serious crimes’ are inconsistent with Nepal’s international legal obligations to investigate and prosecute gross violations of human rights and serious violations of international humanitarian law. OHCHR urges the Government of Nepal to remove such powers from the Ordinance. OHCHR further notes that the United Nations has consistently maintained the position that, in accordance with international laws and standards, it cannot encourage or support amnesties that prevent the prosecution of those responsible for war crimes, crimes against humanity, genocide or gross violations of human rights.
3. An exercise by the Commission of its powers under articles 25, 28 and 29 which can result in avoiding, delaying or otherwise compromising criminal investigation and prosecutions, would also be in violation of Nepal’s obligations under international law. OHCHR urges the Government of Nepal to amend these provisions to ensure compliance with international law.
4. Some definitions in the Ordinance do not comply with international law and should be revised. These include the definitions for: “serious violations of human rights” and “act of disappearing a person”.
5. Entrusting the Commission with broad authority over reconciliation, including the power to reconcile parties without their consent, is highly problematic and inappropriate. Reconciliation, by its nature, is more appropriately addressed at an inter-personal level and should not be forced upon victims by the Commission.
6. The definition of “reparation”, particularly in article 2(e), would benefit from further clarity and alignment with international standards. The definition should specify that victims have the **right** to reparation, and that full and effective reparations include not only restitution, compensation, and rehabilitation but also measures of “satisfaction” and guarantees of non-recurrence.
7. The provisions for the selection of Commissioners contained in the Ordinance are problematic and do not ensure the necessary levels of independence, impartiality and competence necessary to win public trust and support and to achieve the Commission’s objectives. OHCHR recommends that these provisions be amended to ensure guarantees of broad public consultation and representation, as well as integrity, independence and impartiality.
8. The Ordinance does not provide the Commission with a mandate to make recommendations in relation to guarantees of non-recurrence, including legislative and institutional reforms necessary to ensure respect for the rule of law and protection of human rights. In accordance with good practice, the Ordinance should be revised to include provisions that allow the Commission to meaningfully contribute to accountability, reparations and institutional reforms.
9. OHCHR recommends that the Ordinance be amended to incorporate a more comprehensive approach to achieving the four pillars of transitional justice - truth, justice, reparations and guarantees of non-recurrence - in a complementary manner, in recognition of these as essential foundations to achieving genuine reconciliation.
10. OHCHR notes that this analysis identifies key concerns from a human rights perspective and is not necessarily a comprehensive analysis. OHCHR stands ready to provide support and advice to the Government of Nepal to amend the Ordinance in order to ensure its compliance with international law, and encourages broad-based consultations on transitional justice processes.

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***1. Amnesties Inconsistent with International Law and UN Policy***

Article 23 of the Ordinance empowers the Commission to grant amnesties:

Article 23(1) gives the Commission broad powers to recommend to the Government of Nepal the granting of an amnesty “if deemed reasonable”.

Article 23(2) states that “Notwithstanding anything contained in sub-section (1), serious crimes which lack sufficient reasons and grounds for granting amnesty following the investigation of the Commission, including rape, shall not be recommended for amnesty by the Commission”.

OHCHR notes that the language used in article 23(2) is unclear and moreover, “serious crimes” is not defined in the Ordinance although it is possible that “serious crimes” refers to “serious violations of human rights” defined in article 2(j). Despite these ambiguities, article 23(2) appears to facilitate the granting of amnesties where it is “deemed reasonable” by the Commission, for gross violations of international human rights law and serious violations of international humanitarian law. This power is inconsistent with Nepal’s obligations under international law.

Amnesties are regulated by a substantial body of international law that sets limits on their permissible scope. (Refer to the extended discussion in Annex 1 to this document) According to international law, States have a duty to undertake investigations and, if warranted by the results of their investigations, to ensure prosecutions of gross violations of human rights and serious violations of international humanitarian law. These obligations are enshrined in a number of international treaties to which Nepal is a party, notably: the International Covenant on Civil and Political Rights (ratified by Nepal in 1991), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified by Nepal in 1991) and the four Geneva Conventions (ratified by Nepal in 1964).[[1]](#footnote-1)

Amnesties may also violate the right of victims to an effective remedy, including reparations, established under article 8 of the Universal Declaration of Human Rights and protected by article 2 of the International Covenant on Civil and Political Rights.[[2]](#footnote-2) Notably, the International Covenant on Civil and Political Rights requires Nepal to ensure that victims of violations of the Covenant “have an effective remedy” (art. 2 (3) (a)). The Human Rights Committee has reaffirmed the duty of States parties to “ensure that individuals…have accessible and effective remedies”…and to “make reparation to individuals whose Covenant rights have been violated.”[[3]](#footnote-3) When particularly serious violations of human rights occur, disciplinary and administrative remedies do not adequately satisfy States parties’ obligations to provide adequate and effective remedies. Instead, the Human Rights Committee has made clear that the State Party has a duty to investigate thoroughly alleged violations of human rights and to ensure that those responsible for violations, in particular torture and similar cruel, inhuman and degrading treatment, summary and arbitrary killing, and enforced disappearance, are brought to justice.[[4]](#footnote-4)

The prohibition on amnesties under international law extends to gross violations of human rights.[[5]](#footnote-5) Gross violations of human rights have been widely recognized to include extrajudicial, summary or arbitrary executions; torture and similar cruel, inhuman or degrading treatment; slavery; enforced disappearance, rape and other forms of sexual violence of comparable gravity.[[6]](#footnote-6) In addition, although the term “gross violations of human rights” has not been formally defined, it is generally assumed to

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also include genocide, slavery and slave trade, murder, enforced disappearances, torture or other cruel inhuman or degrading treatment or punishment, prolonged arbitrary detention, deportation or forcible transfer of population, and systematic racial discrimination. Deliberate and systematic deprivation of essential foodstuffs, essential primary health care or basic shelter and housing may also amount to gross violations of human rights.”[[7]](#footnote-7)

The United Nations has consistently maintained the position that, in accordance with international laws and standards, it cannot condone or encourage amnesties for genocide, crimes against humanity, war crimes or gross violations of human rights.[[8]](#footnote-8) The UN’s position regarding amnesties has been subsequently reaffirmed multiple times, including in the 2006 revised Guidelines for United Nations Representatives in Certain Aspects of Negotiations for Conflict Resolution (adopted by the Secretary-General), the 2010 Guidance Note of the Secretary-General on United Nations Approach to Transitional Justice, and the Secretary-General’s 2011 report on the rule of law and transitional justice.

The Ordinance therefore not only fails to comply with Nepal’s international legal obligations but is also inconsistent with the UN policy on amnesties. OHCHR strongly urges the Government of Nepal to amend the provisions of the Ordinance relating to amnesties to ensure its compliance with international law.

***2. The Obligation to Investigate and Prosecute***

The Ordinance contains three articles that address the link between the Commission and criminal prosecutions:

In article 25 (1), the Ordinance authorises the Commission to “recommend for action, as per the existing laws, to perpetrators not designated for amnesty”. Article 25 (2) indicates that this recommendation should be done through a report to be submitted to the Government after the completion of inquiry by the Commission. Article 25 (3) allows the Commission, if deemed necessary to “correspond with the Office of the Attorney General to prosecute those perpetrators who were not designated for amnesty, prior to the submission of the report.”

According to article 28 (1), the Ministry of Peace and Reconstruction is responsible for implementation of the recommendations made in the report of the Commission pursuant to article 25. In order to implement these recommendations, the Ministry should “correspond to the Office of the Attorney General pursuant to article 29.”

Article 29 (1) states that the “Attorney General or a Public Prosecutor designated by him shall, after necessary investigation, decide on the matter whether a case can be prosecuted or not against any person, if the Ministry writes on the basis of the recommendation of the Commission to prosecute any person found guilty of allegation of serious human rights violations.” Article 29 (4) then seems to suggest that the Attorney General or a Public Prosecutor “may file a case within 35 days” of such a decision to prosecute, “whatever provision is made in any other existing law”.

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These provisions raise several concerns:

1. Firstly, there is a lack of clarity in these important provisions concerning the relationship between article 25 and article 29. This should be clarified by the Government of Nepal. The provision in article 29 (1) would appear to inappropriately limit the powers of the Attorney General to initiate prosecution only upon receiving written instructions from the Ministry of Peace and Reconstruction. However, article 25(3) seems to allow the Commission to address directly the Office of the Attorney General, if deemed necessary, to prosecute alleged perpetrators who were not designated an amnesty.
2. While article 29 (4) is unclear, it suggests that the Attorney General or Public Prosecutor must file the case within 35 days of the decision to prosecute. Such a short and restricted limitation period can unduly limit the possibility of prosecution and result in impunity.
3. While not directly stated in the Ordinance, these provisions suggest that conflict-related crimes would be sent to the Commission for consideration instead of being investigated and prosecuted through the criminal justice process. Consideration by the criminal justice system would only be allowed if an amnesty is not recommended, and if proceedings are initiated in accordance with the restrictive processes set out in articles 25, 28 and 29. This interpretation is supported by a number of press statements by the former caretaker Government.

According to international law, **States have a duty to ensure the prompt, thorough, independent and impartial criminal investigation of gross violations of international human rights law and serious violations of international humanitarian law and where sufficient evidence exists, to prosecute the alleged perpetrators.**

Truth-seeking does not absolve the States of their legal obligations with regard to criminal justice. The Commission must not be used to avoid or delay criminal investigations and prosecutions, which should be reinforced, not replaced, by truth-commissions.

OHCHR believes that an exercise by the Commission of its powers under articles 25, 28 and 29 which may result in avoiding, delaying or otherwise compromising criminal investigations and prosecutions, would be a violation of Nepal’s legal obligations under the International Covenant on Civil and Political Rights (ratified by Nepal in 1991), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified by Nepal in 1991) and the four Geneva Conventions (ratified by Nepal in 1964). These provisions of the Ordinance should therefore be amended to ensure compliance with international law.

***3. Human Rights Terminology and Definitions***

Various terms used in the Ordinance are not clearly defined, inconsistent in their use and would benefit from the integration of international human rights definitions and standards:

1. *“Serious violation of human rights”:* Article 2 (j) defines“serious human rights violation”as a range of acts that are *“committed systematically or targeting against unarmed person or community.”* This definition is drafted in a manner that is confusing and does not correspond to international law. OHCHR also notes that article 23(2), which concerns the amnesty, uses the term “*serious crimes*”, which is not defined in the Ordinance and it is unclear whether it is intended to carry the same definition as “serious human rights violations”.
2. *“Act of disappearing a person”:* Article 2 (k) defines “disappearance” but this definition does not correspond to the definitions used under international law. The International Convention for the Protection of All Persons from Enforced Disappearance defines “enforced disappearance” as “*the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law*.” Nepal is not yet a member to this Convention, but OHCHR encourages reference to the standards in the Convention as a good practice. In addition, the OHCHR *Nepal Conflict*

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*Report*, issued by OHCHR in 2012, contains an extensive discussion on the definition of “enforced disappearance” under international law.[[9]](#footnote-9)

1. *“Reparation”*: Refer to discussion in section 5 below.

In addition, OHCHR notes that several “serious human rights violations” listed in article 2(j) of the Ordinance are not recognised as crimes under Nepali law. Most importantly, torture and enforced disappearance are not criminalized to the extent required by relevant international treaty obligations. OHCHR recommends that Nepal take all the necessary steps to criminalize these offences, as well as to ratify the International Convention for the Protection of All Persons from Enforced Disappearance.

***4. Broad Powers of Reconciliation***

The Ordinance contains several provisions relevant to reconciliation:

*Article 13(b) provides that the Commission’s functions, duties and powers include, “to get reconciled the perpetrator and the victim.” Article 22 (1) further provides that “if a perpetrator or a victim files an application to the Commission for reconciliation, the Commission may reconcile mutually between them.” Article 22 (5) further states that “the Commission may seek consent from the victims to make reconciliation in accordance with this article.”*

The way in which the text of the Ordinance has been drafted empowers the Commission to conduct reconciliation between victims and perpetrators without consent of the parties involved. The Commission may choose to seek consent from the victim prior to seeking reconciliation, but this appears to be optional rather than mandatory. Entrusting the Commission with such a broad authority is highly problematic and inappropriate. Reconciliation, by its nature, is more appropriately addressed at an inter-personal level and should not be forced upon people by the Commission.

The UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, in his first annual report to the Human Rights Council, stated that “reconciliation should not be conceived as either an *alternative* to justice or an aim that can be achieved independently of the implementation of the comprehensive approach to the four measures (truth, justice, reparations and guarantees of non-recurrence).”[[10]](#footnote-10) He went on to discuss the nature of reconciliation, noting that these four measures can achieve “at minimum, the condition under which individuals can trust one another as equal rights holders again or anew… [however]…implementing these measures does not guarantee that reconciliation will be achieved.”[[11]](#footnote-11)

OHCHR recommends that the Ordinance be amended to incorporate a more comprehensive approach to achieving the four measures of truth, justice, reparations and guarantees of non-recurrence in an equal manner, in recognition of these as essential foundations to achieving genuine reconciliation.

***5. Reparations***

Several articles in the Ordinance concern reparations for victims of the conflict:

Article 2 (e) of the Ordinance defines “reparation” as “compensation, facility or concession made available to the victims as stipulated in article 24.” Article 24 (1) seems to provide for a broader understanding of “reparation”, including “compensation, restitution or rehabilitation or any other appropriate arrangement, as per necessity, to the victim through inquiry and investigation carried out in accordance with this Ordinance.” Furthermore, Article 24 (2) provides that the Commission may make recommendations to the Government to provide

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“facilities and concessions” to victims with regard to free education and health-care facilities, skill-oriented training, loan facilities, arrangements of habitation, employment facilities, and other measures. Additionally, Article 26 provides that “while carrying out investigation in accordance with the Ordinance, if it is found the property of any victim has been seized or confiscated, the Commission may cause to return such seized or confiscated property from the concerned person.”

The right to a remedy and reparations is enshrined in numerous international legal instruments, including the Universal Declaration of Human Rights (art. 8), the International Covenant on Civil and Political Rights (art. 2 and 9), the Convention on the Elimination of All Forms of Racial Discrimination (art. 6), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 14), the International Convention for the Protection of All Persons from Enforced Disappearance (art. 24) and the Convention on the Rights of the Child (art. 39). In addition, the Hague Convention respecting the Laws and Customs of War on Land (art. 3), the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (art. 91), and the Rome Statute of the International Criminal Court (arts. 68 and 75) are also relevant.

Furthermore, in 2006 the General Assembly reaffirmed the right of victims to adequate, effective and prompt reparation in the Basic Principles on Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[[12]](#footnote-12) “*Full and effective reparations*” are defined to include various forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-recurrence.[[13]](#footnote-13)

The definition of “reparation”, particularly in article 2 (e), would benefit from further clarity and aligning with international standards. The definition should specify that victims have the **right** to reparation, and that full and effective reparations include not only restitution, compensation, rehabilitation, but also measures of “satisfaction” and guarantees of non-recurrence.[[14]](#footnote-14)

***6. Selection Process for Commissioners***

The nomination, selection and appointment process for commissioners often determines the real or perceived independence, impartiality and competence of a truth commission. International experience shows that both the selection of commissioners and the design of the selection process are often the first test for the level of public trust and support that a commission will receive. Without a transparent and inclusive process, as well as civil society support, a commission is not likely to fully achieve its objectives.

Commissioners should be widely respected members of society who are accepted as being neutral by all sides of the previous conflict. At a minimum, the group as a whole should be seen to be representative of a fair range of views. In other countries that have established truth commissions, commissioners have been expected to be of highest integrity and to be widely respected members of their societies, to have shown a commitment to and experience from human rights activities and/or related fields relevant to the work of the commission. As a collective entity, the commission should be made up of a diverse group of professionals, which as far as possible also reflects the country’s ethnic, geographic, demographic and religious make up. Gender balance is imperative.

Experience has shown that truth commissions will gain the greatest public support if their members are selected through a consultative process that involves the full range of gender, ethnic, regional and religious groups, as well as different political views. It is also important that the selection process is not politicized.

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The Ordinance does not contain provisions that facilitate consultative and transparent nomination and selection processes, as outlined above. The provisions detailing various steps in the selection process should be added to the Ordinance.

Articles 3 to 12 address the formation of the Commission. Article 3(1) states that the Commission shall comprise of “five members, with minimum one woman.” It will be important to ensure that gender perspective and expertise are incorporated in the work of the Commission through other additional means, including through senior staff members and consultations with NGOs and other experts. Operational guidelines that take into account the specific experiences and needs of women, children and marginalized groups should also be adopted.

Article 4 outlines the qualifications of the Chairpersons and Members, including “high moral character.” It would be helpful if the Ordinance would provide additional specifications regarding the characteristics of the commissioners, including competence, independence, neutrality, integrity and expertise in human rights.

Article 10 states that the Government shall appoint a “civil servant working as a Gazetted Special Class Officer of the Judicial Service as the secretary of the commission.” According to article 11, the Government “shall make available personnel required for the Commission” and in doing so, shall consult the Commission. The Commission may appoint its personnel on a contract basis if the Government does not have the expert personnel or is unable to provide required number of personnel.

The above provisions, particularly concerning the Government “appointment” of the Secretary of the Commission, do not provide the necessary guarantees of independence and impartiality. Furthermore, it should be borne in mind that sensitive human rights investigations often involve scrutinizing the role of State agents. Measures will need to be taken to ensure that if State personnel are seconded to the Commission, they meet the criteria of being impartial, and are not themselves implicated in any way in any of the violations or crimes falling under the mandate of the Commission.

Article 12 addresses “resources, materials and auditing of the Commission.” It provides, inter alia, that the Government shall make arrangements for building, materials and other resources required for the functioning of the Commission.” The Commission may also avail required materials and resources in the form of grant, but only after approval of the Government. Provisions of article 12 should be reviewed to provide sufficient guarantees of financial independence of the Commission.

***7. Institutional Reforms***

The Ordinance does not provide the Commission with a mandate to make recommendations in relation to guarantees of non-recurrence, including legislative and institutional reforms necessary to ensure future respect for the rule of law and protection of human rights.

For example, to support non-recurrence, the Commission might recommend that:

* Public officials and employees who are personally responsible for gross violations of human rights, in particular those involved in military, security, police, intelligence and judicial sectors, shall not continue to serve in public institutions.
* Persons formally charged with individual responsibility for serious crimes under international law shall be suspended from official duties during the criminal or disciplinary proceedings.
* Civilian control of military and security forces as well as of intelligence agencies must be ensured, and civil complaints procedures should be established and their effective operation assured.[[15]](#footnote-15)

The Ordinance should be revised to include relevant provisions to allow the Commission to call for legislative and institutional reforms, including vetting. In this way, the mandate of the Commission would allow for its meaningful contribution to accountability, reparations and institutional reforms.

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**Annex 1: International legal obligations with regard to administration of justice**

Amnesties that prevent the prosecution of individuals who may be legally responsible for war crimes, genocide, crimes against humanity and gross violations of human rights are inconsistent with the obligations of States under various sources of international law. These sources are set out below.

**1.1 The obligation to investigate and prosecute**

Under international law, States have a duty to undertake investigations and, when appropriate, prosecutions of violations of human rights and international humanitarian law, and to provide reparations for the victims. The UN General Assembly expressed the obligation in the clearest of terms when it adopted the “Basic Principles on the Right to Remedy,”

*In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.[[16]](#footnote-16)*

This obligation is also expressed in international human rights treaties to which Nepal is a party.

* Article 2 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Nepal in 1991, requires the Government of Nepal to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in that treaty and also to ensure an effective remedy for any person whose rights have been violated. The UN Human Rights Committee has interpreted article 2 to confirm the obligation under international law to investigate and prosecute. This is clearly stated in the ICCPR General Comment 31, paragraph 18: “…States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations…Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (see General Comment 20 (44)) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility. Other impediments to the establishment of legal responsibility should also be removed, such as the defence of obedience to superior orders or unreasonably short periods of statutory limitation in cases where such limitations are applicable. States parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law.”[[17]](#footnote-17)

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* Already in 1995, in *Bautista de Arellana* v. *Colombia*, the Human Rights Committee ruled that Colombia had a duty to investigate thoroughly allegations of forced disappearances and to criminally prosecute those responsible.[[18]](#footnote-18) Under IHL, perpetrators bear individual criminal responsibility for serious violations they commit, and must be prosecuted and punished.
* The four Geneva Conventions of 1949, ratified by Nepal in 1964, set forth explicit obligations on states parties’ regarding criminal punishment of serious violations of the rules of IHL in armed conflict. The obligation is contained in the “grave breaches regime,” set out in the four Geneva Conventions. Each Convention specifies a list of crimes that, whenever violated, oblige the state to ‘try or extradite’ the perpetrator. For example, article 50 of the First Geneva Convention specifies the following list: “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”. [[19]](#footnote-19)
* This has been reaffirmed on several occasions by the UN Security Council, specifically in relation to the conflicts in Afghanistan, Burundi, Democratic Republic of the Congo, Kosovo and Rwanda.[[20]](#footnote-20) In a resolution on impunity adopted without a vote in 2002, the then UN Commission on Human Rights recognized that perpetrators of war crimes should be prosecuted or extradited.[[21]](#footnote-21) The Commission adopted other resolutions, most of them without a vote, requiring the investigation and prosecution of persons alleged to have violated IHL in Sierra Leone, the Republic of Chechnya of the Russian Federation, Rwanda, Sudan, Burundi, and the former Yugoslavia.
* It is now regarded as a customary international legal obligation to investigate and punish alleged perpetrators of IHL violations – in either international or non-international armed conflicts.[[22]](#footnote-22)

The UN has developed guidelines for such investigations that centre around four universal principles: *independence, effectiveness, promptness and impartiality*.[[23]](#footnote-23) These four principles lie at the heart of human rights protection and are binding on UN members in that they have been relied upon and further developed in the jurisprudence of UN-backed international courts and also have been agreed upon by the States represented within the relevant United Nations bodies.

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#### **1.2 The obligation to provide reparations**

#### The legal basis for the right to a remedy and reparations for victims of violations of human rights is enshrined in various international human rights instruments. Article 8 of the Universal Declaration of Human Rights states: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

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Several international human rights conventions to which Nepal is a party, have elaborated on the scope of this obligation.

Article 2 (3) of the ICCPR requires that States Parties make reparation to individuals whose Covenant rights have been violated. The Human Rights Committee has stated that “without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2(3), is not discharged. In addition to the explicit reparation required by articles 9(5) and 14(6), the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”[[24]](#footnote-24)

Furthermore, the Committee has stated that “the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party’s laws or practices.”[[25]](#footnote-25) It should be noted that the right to an effective remedy is non-derogable during public emergency, as the obligation is inherent in the ICCPR as a whole.[[26]](#footnote-26)

The obligation to provide reparations is also found in article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, ratified by Nepal in 1971: “States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions...as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”

Article 14 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by Nepal in 1991, provides that “[e]each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.”

Although Nepal is not yet a party to the International Convention for the Protection of All Persons from Enforced Disappearance, OHCHR encourages compliance with its provisions as good practice. Article 24 (4) states that “[e]ach State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation. Article 24(5) further specifies that “[t]he right to obtain reparation referred to in [sub] paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as: (a) Restitution; (b) Rehabilitation; (c) Satisfaction, including restoration of dignity and reputation; ( d ) Guarantees of non-repetition.”

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1. The obligation to investigate and punish alleged perpetrators of IHL violations is now also regarded as an obligation under customary international law. [↑](#footnote-ref-1)
2. See also the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,* General Assembly resolution 60/147, principles 4 and 6. [↑](#footnote-ref-2)
3. [↑](#footnote-ref-3)
4. Human Rights Committee General Comment No. 31 [80], Nature of the General Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, paras 15 & 16 (2004). Ibid para 18. [↑](#footnote-ref-4)
5. *See* Updated set of principles for the protection and promotion of human rights through action to combat impunity, UN doc E/CN.4/2005/102/Add.1, principle 19. [↑](#footnote-ref-5)
6. See United Nations Office of the High Commissioner for Human Rights, Rule-of-law tools for post-conflict States *on Amnesties* OHCHR Geneva 2009, page 21. [↑](#footnote-ref-6)
7. See United Nations Office of the High Commissioner for Human Rights, Rule-of-law tools for post-conflict States *on Reparations Programmes* OHCHR Geneva 2008, footnote 4, page 1. See also *Amnesties,* page 21. [↑](#footnote-ref-7)
8. See Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, 3 August 2004 (UN document S/2004/616). See also statement from the new Secretary-General: “…the Organization cannot endorse or condone amnesties for genocide, crimes against humanity, war crimes or gross violations of human rights, nor should it do anything that might foster them.” Spokesperson for Secretary-General Ban Ki-moon, 24 July 2007. [↑](#footnote-ref-8)
9. The United Nations Office of the High Commissioner for Human Rights, *Nepal Conflict Report 2012*, OHCHR Geneva 2012, section 6.2 at pages 111–114. [↑](#footnote-ref-9)
10. Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, *Report to the Human Rights Council*, UN Doc. A/HRC/21/46 (9 August 2012), para. 37. [↑](#footnote-ref-10)
11. *Id*. para. 38. [↑](#footnote-ref-11)
12. See A/RES/60/147, principle 11(b). [↑](#footnote-ref-12)
13. See A/RES/60/147, principle 18. [↑](#footnote-ref-13)
14. *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, principle 18. [↑](#footnote-ref-14)
15. *See* Updated set of principles for the protection and promotion of human rights through action to combat impunity, UN doc E/CN.4/2005/102/Add.1, principle 36. [↑](#footnote-ref-15)
16. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,* General Assembly resolution 60/147, article 4. [↑](#footnote-ref-16)
17. Human Rights Committee General Comment No. 31 [80], Nature of the General Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, paras 15 & 16 (2004). [↑](#footnote-ref-17)
18. Human Rights Committee, *Bautista de Arellana* v. *Colombia*, communication no. 563/1993, 27 October 1995, para 8.6. *See also* Human Rights Committee, *José Vicente and Amado Villafañe Chaparro, Luís Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres* v. *Colombia*, communication no. 612/1995, 29 July 1995, para 8.8; Human Rights Committee, *Rajapakse* v. *Sri Lanka*, communication no. 1250/2004, 14 July 2006, para 9.3. [↑](#footnote-ref-18)
19. See article 49 of the First Geneva Convention; article 50 of the Second Geneva Convention; article 129 of the Third Geneva Convention; and article 146 of the Fourth Geneva Convention. [↑](#footnote-ref-19)
20. Security Council resolution 978 (1995), Security Council resolution 1193 (1998) Security Council resolution 1199 (1998). [↑](#footnote-ref-20)
21. United Nations Commission on Human Rights, resolution 2002/79, para 11. [↑](#footnote-ref-21)
22. Jean-Marie Henckaerts and Louise Doswald-Beck for the International Committee of the Red Cross, *Customary International Humanitarian Law* (3 vols.), (Cambridge, Cambridge University Press, 2005), rule 158 [↑](#footnote-ref-22)
23. *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, Economic and Social Council resolution 1989/65, annex, Available from www1.umn.edu/humanrts/instree/i7pepi.htm; *The Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, recommended by General Assembly resolution 55/89 Available fromwww2.ohchr.org/english/law/investigation.htm. [↑](#footnote-ref-23)
24. Human Rights Committee General Comment No. 31 [80], Nature of the General Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, para 16 (2004). [↑](#footnote-ref-24)
25. Ibid, para. 17. [↑](#footnote-ref-25)
26. Human Rights Committee, General Comment 29, para 14: “This clause . . . constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.” [↑](#footnote-ref-26)