

OHCHR Technical Note

The Nepal Act on the *Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (2014)* – as Gazetted 21 May 2014

Summary

1. On 25 April 2014, the Parliament of Nepal passed the *Act on Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (2014)* to create two Commissions: the Truth and Reconciliation Commission and the Commission on Investigation of Disappeared Persons (“the Commission”). On 21 May 2014, the Act was published in the Official Gazette.
2. While OHCHR welcomes efforts by the Government of Nepal to advance the peace process, it notes that the Act contains several provisions that do not fully conform with Nepal’s obligations under international law. Concerns about similar provisions were previously raised by OHCHR in relation to the August 2012 draft bill, the March 2013 Ordinance and the April 2014 bill. The purpose of this Note is to provide an analysis of the Act and highlight where it does not fully comply with international law and standards. OHCHR encourages the Government of Nepal to amend the Act so that it is fully consistent with Nepal’s obligations under international law.
3. The power of the Commissions to recommend amnesties for *gross violations of international human rights law* or *serious violations of international humanitarian law* is inconsistent with Nepal’s international legal obligations and the UN’s policy against amnesties. 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. Amnesties are also impermissible if they interfere with victims’ rights to an effective remedy, including reparation.
4. The powers granted to the Commission under sections 13 and 29 could also result in the avoidance or delay of criminal investigations and prosecutions, which would be inconsistent with international law. Truth-seeking does not absolve 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 or completed, not replaced, by truth-commissions.
5. Entrusting the Commission with a broad authority to facilitate reconciliation, including without the consent of the victim, is problematic. Reconciliation, by its nature, primarily takes place at an inter-personal level and should not be forced upon people by the Commission.
6. The terms such as “serious violation of human rights”, “act of disappearing a person” and “reparations” used in the Act are not clearly defined and are used inconsistently. The terms should be defined in full conformity with international law, notably international human rights law.
7. The Act does not provide sufficient guarantees of independence and impartiality for the Commissioners and the operation of the Commission itself.
8. Provisions concerning reparations 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.

1. Powers to Recommend Amnesties for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law are Inconsistent with International Law and UN Policy

Section 26 gives the Commission broad powers to recommend amnesties.

Section 26(2) states: “[n]otwithstanding whatsoever mentioned in Sub Section (1), the Commission shall not recommend for amnesty to the perpetrators involved in rape and other crimes of serious nature in which the Commission follows the investigation and does not find sufficient reasons and grounds for amnesty.”

Section 26(4) authorises the Commission to recommend amnesties for “gross violations of human rights committed during the course of armed conflict” where a perpetrator submits an application stating the acts committed, accepts repentance, agrees to apologise and commits not to repeat such acts in future.

Section 25(2) excludes taking legal action against perpetrators “who have reconciled with victims pursuant to section 22” or “who are recommended for amnesty pursuant to section 26”.

Where the violations recommended for an amnesty amount to gross violations of international human rights law or serious violations of international humanitarian law, the amnesties are inconsistent with international law and the UN’s policy against amnesties.

Amnesties are regulated by a substantial body of international law that sets limits on their permissible scope. According to international law, States have a duty to undertake investigations and, where sufficient evidence exists, to ensure prosecutions of gross violations of human rights and serious violations of international humanitarian law.¹

Amnesties may also violate the right of victims to an effective remedy, including reparations.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)). 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.³

¹ 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). The obligation to investigate and punish alleged perpetrators of IHL violations is now also regarded as an obligation under customary international law. See also Report of the 3rd universal meeting of national committees on the implementation of IHL (at page 32) which states that amnesties “are not allowed in the case of international crimes”: <http://www.icrc.org/eng/assets/files/publications/icrc-002-4138-1.pdf>

² This right is 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.

³ 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 & 18 (2004). See also General Comment No. 3 of the Committee against Torture, Implementation of article 14 by State parties, CAT/C/GC/3 (2012). See further, e.g., *Mukunda Sedhai v. Nepal*, CCPR/C/108/D/1865/2009, para. 10.

The prohibition on amnesties under international law extends to gross violations of human rights.⁴ Gross violations of human rights have been widely recognized to include extrajudicial, summary or arbitrary executions; torture and other cruel, inhuman or degrading treatment or punishment; slavery; enforced disappearance, rape and other forms of sexual violence of comparable gravity.⁵ Although the term “gross violations of human rights” has not been formally defined, “it is generally assumed that 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 fall into this category. 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.”⁶

In its 2014 Concluding observations, the Human Rights Committee urged Nepal to create a transitional justice mechanism and “ensure its effective and independent functioning in accordance with international law and standards, including by prohibiting amnesties for gross violations of international human rights law and serious violations of international humanitarian law”.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 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 provisions in the Act that give the Commission powers to recommend amnesties for gross violations of international human rights law and serious violations of international humanitarian law fail to comply with Nepal’s international legal obligations, and are also inconsistent with the UN policy on amnesties. OHCHR strongly urges the Government of Nepal to amend the provisions of the Act relating to amnesties to ensure their compliance with international law.

⁴ 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.

⁵ 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. Also, the UN Security Council Resolution 1820 (2009) notes that rape and other forms of sexual violence can constitute a war crime, crime against humanity or a constituent act with respect to genocide. It stresses the need for the exclusion of sexual violence crimes – not only rape – from amnesty provisions in the context of conflict resolution processes.

⁶ 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.

⁷ See Human Rights Committee, Concluding observations on the second periodic report of Nepal, CCPR/C/NPL/CO/2, para 5 (c) (2014).

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.

2. The Obligation to Investigate and Prosecute

The Act contains two provisions that refer to the link between the Commission and criminal prosecutions or conflict-related proceedings in other bodies:

Section 13(2) states that “Notwithstanding whatsoever mentioned in the prevailing laws, the Commission, in consultation with concerned courts or bodies concerning the cases under consideration, shall investigate the cases relating to the incidents that occurred during the armed conflict”. Further, section 13(3) provides “Notwithstanding whatsoever mentioned in the prevailing laws, the Commission shall investigate the complaints in different bodies relating to incidents that occurred during the armed conflict.”

Section 29(1) states that “The Attorney General or a Public Prosecutor designated by him shall, after necessary investigation, decide on 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 on allegation of serious human rights violations.” Section 29(2) provides that “The Attorney General or a Public Prosecutor shall, if the Ministry writes to prosecute pursuant to sub-section (1), decide whether a case can be prosecuted or not.”

Under section 29(4), “if a decision is made pursuant to sub-section (2) to file a case against a perpetrator, the Public Prosecutor shall have to file a case at the Special Court.” The Act further specifies that “Special Court refers to a court formed by the Government of Nepal pursuant to the law, to hear and decide the cases decided by the Attorney General or a Public Prosecutor designated by him pursuant to the sub-section 2, on the basis of a recommendation made by the Commission.”

These provisions raise several concerns:

- a) Sections 13(2) & (3) could be read to suggest that existing conflict related cases would be diverted from the criminal justice process and sent to the Commission for consideration. This may result in criminal investigations or prosecutions being possibly delayed, prevented or even denied.
- b) Prosecution will only be allowed if an amnesty is not recommended, and if proceedings are initiated in accordance with section 29. It is unclear if section 29 limits the powers of the Attorney General to initiate prosecution only upon receiving written instructions from the Ministry of Peace and Reconstruction. In addition, the procedures set down in this section suggest that conflict-related prosecution can no longer be initiated by a victim or by a Court itself.
- c) Where a decision to prosecute is made under section 29, prosecution can only take place in the Special Court, still to be formed. The time needed to establish the Special Court could result in further delay in processing cases already before the regular courts.
- d) The Act does not contain guarantees that the Special Court proceedings will be conducted impartially, objectively and in accordance with international standards of fair trial. Such guarantees should be explicitly provided.

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 States of their legal obligations with regard to furthering criminal accountability. The Commission must not be used to avoid or delay criminal investigations and prosecutions, which should be reinforced or complemented, not replaced, by truth-commissions.

OHCHR considers that, where the Commission's powers under sections 13 and 29 result in the avoidance or delay of criminal investigations or prosecutions, this may constitute 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).

3. Broad Powers of Reconciliation with Respect to the Rights of Victims

Section 22 gives broad powers to the Commission to facilitate reconciliation where a perpetrator or a victim files an application to the Commission and the perpetrator is recommended for amnesty under section 26(2). Section 22 is silent on the need for the consent of the victim to be obtained before a reconciliation process can be initiated.

In the process of the Commission's determination on recommending an amnesty, section 26(5) refers to a consideration of "the consent, dissent of the victim and gravity of the incident". However, this section is unclear as to whether it is mandatory for the Commission to seek the victims' views during the process of recommending an amnesty.

Moreover, according to section 25(2), the Commission shall not recommend for investigation and prosecution perpetrators who have been reconciled with victims pursuant to section 22 and who are recommended for amnesty pursuant to section 26.

Entrusting the Commission with a broad authority to facilitate reconciliation, including without the consent of the victim, is highly problematic and may be inappropriate. Reconciliation, by its nature, primarily takes place at an inter-personal level and should not be forced upon people by the Commission.

The Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters state that "[t]he victim and the offender should be able to withdraw such consent at any time during the process." Furthermore, "[a]greements should be arrived at voluntarily," and "[n]either the victim nor the offender should be coerced, or induced by unfair means, to participate in restorative processes or to accept restorative outcomes."

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)."⁹ 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."¹⁰

⁹ 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.

¹⁰ *Id.* para. 38.

4. Human Rights Terminology and Definitions Require Clarification and Alignment with International Law

Various terms used in the Act are not clearly defined and are used inconsistently. These terms should be defined in full conformity with international law, notably international human rights law and standards:

- a) *“Serious violation of human rights”*: Section 2(j) defines “serious violation human rights” as a range of acts that are *“committed systematically or targeting against unarmed person or civilian population during the armed conflict.”* OHCHR also notes that section 26(2), which concerns the amnesty, uses the term *“rape and other crimes of serious nature”*, while section 26(4a) refers to “gross violation of human rights”. Neither term is defined in the Act nor is it clear whether they are intended to carry the same definition as “serious violation of human rights”. In relation to the specific categories of acts listed in section 2(j), OHCHR recommends that each should be based on the definitions used under international law.¹¹
- b) *“Act of disappearing a person”*: The definition in section 2(k) of the “Act of disappearing a person” 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.
- c) *“Rape and sexual violence”*: It is important to note that Nepal currently applies a 35-day statute of limitations to the crime of rape. OHCHR encourages Nepal to remove provisions on prescription as they impede the right to an effective remedy and reparations for victims.
- d) *“Reparation”*: Refer to discussion in section 8 below.

In addition, OHCHR notes that several “serious human rights violations” listed in article 2(j) of the Act are not recognized as crimes under Nepali law. For instance, torture and enforced disappearance are not criminalized to the extent required by relevant international treaty obligations. OHCHR recommends that Nepal takes 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.

5. Lack of Guarantees of Impartiality and Independence

Sections 3 to 12 address the formation of the Commission. Section 3(2) states that the Commission shall comprise of “five members... with minimum one woman,” to be recommended by a Committee appointed by the Government under section 3(3).

¹¹ A detailed analysis of the definition and scope of unlawful killing, enforced disappearances, torture, arbitrary arrest and sexual violence can be found in OHCHR’s *Nepal Conflict Report* of 2012: <http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/NepalConflictReport.aspx>

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. 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. **The Act does not contain provisions that facilitate consultative and transparent nomination and selection processes, as outlined above. Such provisions should form part of the “public selection procedure” referred to in section 3(5).**

It will be important to ensure that gender perspective and expertise are incorporated in the work of the Commission through other additional means. Such measures should include securing further appointment of qualified women at expert levels and as staff of the Commission with experience in addressing gender based and sexual violence. Operational procedures and guidelines should also be adopted to take into account the specific experiences and needs of women, children and marginalized groups. Such guidelines could include gender sensitive policies; protocols for investigation and collection of testimony; and procedures for gender disaggregated data collection and analysis. The Commission should also consider the creation of a gender unit with a mandate to conduct regular training and sensitization of staff and be empowered to ensure the mainstreaming of gender into all aspects of the Commission’s work, the conduct of gender specific activities; and the inclusion of a gender perspective in the final report. The Commission should also consider the creation of a children unit with a mandate to conduct regular training and sensitization of staff and be empowered to ensure that the specific rights and experience of children are integrated into all aspects of the Commission’s work, the conduct of its activities; and are included in its final report.

Section 4 outlines the qualifications of the Chairpersons and Members.

It would be helpful if the Act would provide additional specifications regarding the required characteristics of the commissioners, including competence, independence, neutrality, integrity and expertise in human rights.

Section 10 states that the Government shall appoint “a Gazetted Special Class Officer of the Judicial Service” as the secretary of the commission. According to section 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, 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.

Section 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.”

Provisions of section 12 should be reviewed to provide sufficient guarantees of financial independence of the Commission.

Guarantees of transparency are important to ensure the impartiality and independence of the Commissions. *Section 27 requires the Commission to submit its report to the Government, then for the Government to submit the report to the legislature-Parliament within 30 days.* This section should further include a requirement that the Government of Nepal makes the report public as early as possible after its finalisation.

6. Reparations

Section 2(e) of the Act defines “reparation” as “compensation, facility or concession made available to the victims as stipulated in section 23.” Section 23(1) seems to provide for a broader understanding of “reparation”, including “compensation, restitution or rehabilitation or any other appropriate arrangement to the victim.” Section 24(2) specifies a number of facilities and measures that may be recommended as reparations according the situation of a victim of their family. Additionally, section 24 provides processes for returning seized or confiscated property and recommending compensation for the actual loss incurred due to the seizure or confiscation.

A number of international legal instruments enshrine access to an effective remedy and reparations as a right.¹² 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.¹³ “Full and effective reparations” are defined to include various forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-recurrence.¹⁴

The definition of “reparation”, particularly in section 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, rehabilitation, but also measures of “satisfaction” and guarantees of non-recurrence.

¹² The Universal Declaration of Human Rights (art. 8), the International Covenant on Civil and Political Rights (arts. 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.

¹³ 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 11(b).

¹⁴ See A/RES/60/147, principle 18.