

## An OHCHR Analysis of the Nepal Ordinance on Investigation of Disappeared People, Truth and Reconciliation Commission, 2012

The commitment of both parties to the conflict to establish the truth about the conduct of the war and to ensure that conflict victims receive both justice and reparations is enshrined in the Comprehensive Peace Accord and in the interim Constitution of Nepal. However, the enactment of the envisaged transitional justice mechanisms has been significantly delayed by the failure of political parties to agree on a text and the subsequent dissolution of the Parliament.

During the operation of its field presence in Nepal, OHCHR provided substantial technical advice on the process of drafting a law for the Commissions 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, OHCHR 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, which to date has not occurred. Based on an unofficial translation of the Ordinance which has been informally circulating in the public domain, OHCHR has a number of concerns with the content of this document.

As primary principles under international law for a transitional justice process, OHCHR notes that:

- a) **States should refrain from granting amnesties for genocide, crimes against humanity, war crimes or other gross violations of human rights, as such amnesties contravene principles under international law. Not only do amnesties for the above crimes violate international law, they also weaken the foundation for a genuine and lasting peace.**
- b) **Reconciliation processes between individuals should have the consent of both the victims and of the offenders.**
- c) **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. Criminal investigation and prosecution should be reinforced, but should not be replaced or delayed by other transitional justice processes such as truth seeking, reconciliation, reparations, and guarantees of non-recurrence.**

In relation to the ordinance, OHCHR has the following key concerns:

1. The ordinance empowers the Commission to recommend amnesties for perpetrators of gross violations of human rights

*In article 23 entitled "Provision regarding Amnesty", the Ordinance provides that, while investigating gross violations of human rights, the Commission can recommend to the Government of Nepal that a perpetrator be granted an amnesty.*

**OHCHR is of the view that the provisions of the ordinance empowering the Commission to recommend amnesties including for gross violations of human rights are inconsistent with Nepal's legal obligations under international law.**

Amnesties to exempt individuals from prosecution following a conflict may be appropriate in relation to some acts committed in a non-international armed conflict (e.g. legitimate acts of war or political crimes such as treason or rebellion). However, international law sets limits on the permissible scope of amnesties - it provides that amnesties to prevent the prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity, or other gross violations of human rights are inconsistent with the obligations of States under international law.

In this Ordinance, it is unclear whether the correct English translation of the text should use the word “amnesty” or “pardon”. However, for the purposes of this analysis, it is not the actual term used but the effect of the term that is relevant. An *amnesty* refers to legal measures that have the effect of retroactively nullifying legal liability. Therefore, any law or provision that has the effect of preventing prosecution for past crimes is an amnesty, irrespective of how it is named. An amnesty is distinct from a *pardon* which exempts an already prosecuted and convicted criminal from serving his or her sentence, without nullifying the underlying conviction. As the text of the Ordinance provides for forgiveness to be granted before prosecution has occurred, the effect of the text is to create an amnesty rather than a pardon.

The United Nations has consistently maintained the position that, in accordance with international standards, it cannot condone or encourage amnesties that prevent the prosecution of those responsible for serious violations of international law. A number of provisions of the international human rights treaties, to which Nepal is a party, also reflect this principle. Under article 2 of the *International Covenant on Civil and Political Rights* (ICCPR), all States parties are required to give effect to the general obligation to investigate allegations of violations of rights protected under the ICCPR promptly, thoroughly and effectively through independent and impartial bodies and to bring those responsible to justice (General Comment No. 10, CCPR/C/21/Rev.1/Add. 13, paras 15 and 18). The Committee has emphasized these obligations in respect of torture or cruel, inhuman or degrading treatment or punishment (article 7), arbitrary deprivation of life (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Furthermore, the obligation to investigate violations and prosecute those responsible also derives from the State’s duty to give effect to the victim’s right to an effective remedy under article 2(3) of the ICCPR and paras 11 to 13 of the *Basic Principles on the Right to a Remedy and Reparation*. The failure to investigate and bring to justice perpetrators of such violations may in itself give rise to a separate breach of the ICCPR, as pointed out by the Human Rights Committee (CCPR/C/21/Rev.1/Add.13, para. 18).

The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence highlighted in his most recent report to the General Assembly (A/67/368) that transitional justice measures must be conceived, established and implemented in a manner compliant with the rule of law if they are to be sustainable rights-enhancing instruments. The Special Rapporteur stressed that the notion of the rule of law is robust and includes compliance with international human rights law. He underscored that no country can claim to respect the rule of law if the violation of its most fundamental norms are not respected.

2. The ordinance empowers the Commission to initiate reconciliation processes in the absence of a request by the victim or the offender

*In article 22 entitled “Reconciliation”, the Ordinance provides that even when there are no requests from the victim and the perpetrator for reconciliation, the commission shall not be restricted from undertaking reconciliation.*

**The ability of the Commission to initiate a reconciliation process in the absence of an explicit request by the victim or the perpetrator is a matter of serious concern. Human rights principles require that reconciliation processes have the consent of both the victims and of the offenders.** The *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, adopted by Economic and Social Council 2002/12 (E/2002/INF/2/Add.2, Annex) provide guidance on this issue. In particular, principle 13 requires that fundamental procedural safeguards guaranteeing fairness to the offender and the victim be applied to restorative processes, including the following: “(c) Neither the victim nor the offender should be coerced, or induced by unfair means, to participate in restorative processes or to accept restorative outcomes.”

Furthermore, as the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence noted in his first report to the Human Rights Council (A/HRC/21/46), reconciliation should not be seen in isolation, without initiatives that promote justice, truth, reparations, and guarantees of non-recurrence. Reconciliation at the societal level is more than just one-to-one encounters but requires the establishment of institutions that are trustworthy and that genuinely embody the idea that victims as well as all others are *rights holders*. OHCHR also reiterates that reconciliation cannot replace the investigation, prosecution and punishment of those responsible for serious violations of international law.

3. Limited focus on justice and restricted procedures for initiating prosecution

*In article 28 entitled “Provisions on filing cases”, the Ordinance appears to limit the Attorney General’s ability to commence criminal proceedings against perpetrators to instances where the Ministry of Peace and Reconstruction has authorised such action, based on the recommendation of the Commission.*

As discussed above, **there is a well-established principle under international law that States have a duty to investigate and prosecute gross violations of international human rights law and serious violations of international humanitarian law.** This is reiterated in Principle 4 of the Basic Principles on the Right to a Remedy and Reparation: *“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”.*

The Government has a duty to ensure that the criminal investigation and prosecution of alleged perpetrators for serious violations committed during the conflict is an essential part of the transitional justice process. If there is sufficient evidence to commence proceedings, the initiation and conduct of such prosecutions should not be contingent upon the work of the Commission nor the authorisation of the Ministry. Although the Commission may recommend that such proceedings take place, it should be for a fully competent criminal court to determine the guilt or innocence of the alleged perpetrator. On the same basis, neither the Attorney General nor any other legal institution should be limited in their ability to commence such proceedings.

\*\*\*\*\*

OHCHR has previously provided detailed comments on the draft bills, including with regard to human rights definitions, the selection and appointment process for commissioners, and powers of the Commission. Many of these comments retain validity with respect to the current ordinance.