

Commitments to establish transitional justice mechanisms should not justify impunity

Dealing with the international crimes committed during an armed conflict, both human rights and international humanitarian law violations, has never been an easy task. In many post-conflict peace processes across the world, special frameworks, referred to as transitional justice mechanisms, have been established to focus on this matter.

In Nepal, the fact that the parties to the Comprehensive Peace Agreement have committed and provided for the establishment of such transitional justice mechanisms certainly reflects this practice and constitutes a welcome development. These mechanisms should achieve a comprehensive set of objectives, including the establishment of truth in relation to human rights and international humanitarian law violations and pave the way for justice and reparation for the victims. They are also necessary as it would be difficult for the national courts and other rule of law institutions in the country to deal with all aspects of these violations and their broader impact upon the society. The transitional justice mechanisms may for example analyse patterns of violations committed and design appropriate measures to support affected groups.

Yet, a commitment to establish transitional justice mechanisms cannot constitute an excuse for not investigating and prosecuting cases that have already been initiated, or cases where there are sufficient grounds for prosecution, including when evidence is already available. OHCHR-Nepal has continuously stressed that investigations and prosecutions, in particular for the most serious crimes, should continue now, in parallel with the process to establish the transitional justice mechanisms, as well as when these will be up and running.

While bills for the establishment of a Truth and Reconciliation Commission and a Commission of Inquiry on Disappearances have already been introduced at the Legislature-Parliament, and are currently pending before the legislative committee, it remains impossible to know exactly when, if, and under what forms they will be adopted. More importantly, in their current form, the bills do not provide for mechanisms with prosecutorial powers nor for the direct handover to the criminal justice system of those cases that reveal human rights and international humanitarian law violations which constitute crimes under national or international law.. The current draft bills limit the competence of the future Commissions in this regard to addressing the Attorney General for necessary criminal investigation and prosecution.

The Supreme Court of Nepal has issued several landmark decisions requiring immediate criminal investigation and prosecution of serious human rights violations committed during the conflict, including enforced disappearance and extrajudicial executions. In June 2007, for example, the Supreme Court issued a decision on enforced disappearances in which it stressed the obligations of the Government, under the Constitution and international law, to investigate and prosecute such offences. Based on the findings of a Supreme Court Task Force, which investigated four disappearance cases, the Court ordered the Government to conduct a criminal investigation into the killing of Chakra Bahadur Katuwal following his enforced disappearance. Although the police claims that the case is under investigation, no actual progress has been made to date. However, this example of judicial

intervention illustrates that prosecutions and criminal investigations into serious conflict related crimes should be continued regardless of the Government's initiatives towards the establishment of transitional justice mechanisms.

The International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, both applicable in Nepal, impose an obligation on all States Parties to provide an effective remedy against violations of the rights and freedoms contained in these core human rights treaties. This includes a duty to promptly investigate and punish those responsible.

In its General Comment number 31, and in numerous decisions on individual cases, the Human Rights Committee has made it clear that State parties have a duty to investigate thoroughly alleged violations of human rights, in particular violations of the right to life including extrajudicial killings and enforced disappearances, and to criminally prosecute, try and punish those responsible of such violations. In one of the cases involving Nepal, *Sharma v. Nepal*, the Human Rights Committee reaffirmed its position that all States parties are required under the ICCPR to take effective steps to investigate violations of human rights recognised as criminal and to bring to justice those who are responsible for these violations, as well as to provide an effective remedy to the victims. As such, Nepal is obliged to undertake immediate measures to investigate such cases and to bring the perpetrators to justice.

The rights of victims to an effective remedy (right to truth, justice and reparation) applies at all times, particularly in relation to enforced disappearances, unlawful killings and torture. This duty to investigate and prosecute cannot be bypassed on the grounds that the Government has taken the initiative to set up transitional justice mechanisms, which are designed to work alongside the criminal justice system in a complementary fashion, especially when these mechanisms are not yet functional.

Impunity in Nepal remains one of the main issues affecting the peace process, both for crimes committed during and after the conflict. Progress in the investigation and prosecution of cases would demonstrate the willingness of the authorities to move towards a society based on the principle of accountability and respect for the rule of law, and would at the same time represent a concrete step towards sustainable peace in Nepal.

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