



## **Comments and Recommendations on draft Truth and Reconciliation Commission Bill**

6 August 2007

### **Introduction**

The Truth and Reconciliation Commission Bill, a copy of which was provided to the Office of the High Commissioner for Human Rights in Nepal (OHCHR-Nepal), proposes the creation of a truth and reconciliation commission (TRC) with a mandate to investigate events surrounding the commission of gross violations of human rights and crimes against humanity committed during the course of the armed conflict that took place between the Government and CPN-Maoist between 13 February 1996 and 21 November 2006. The Commission, which will consist of up to seven commissioners, will have two years, with a possibility of a twelve-month extension, to complete its work. On the completion of its work, it will provide the Government with a report of its findings, and make recommendations as to reconciliation, prosecutions, amnesty and reparations. The Ministry of Peace and Reconstruction is mandated to implement the Commission's recommendations. The bill also proposes the creation of a Reconciliation and Peacebuilding Fund to finance implementation of the recommendations.

The analysis set out below is based on an official translation of the text provided by the Ministry of Peace and Reconstruction. As stated in the summary, further clarification of a number of provisions in the bill will be required from the Ministry of Peace and Reconstruction.

The transformation from conflict to lasting peace is a complex and time-consuming process involving a broad range of national stakeholders. Underlying this transformation is a recognition that victims of human rights violations, their families and society at large, have a right to truth, justice and reparation. There can be no lasting peace without meaningful accountability for past crimes. Given the gravity and breadth of such crimes, the concept of transitional justice recognizes that multiple, complimentary mechanisms, judicial and non-judicial, will be required to address issues of accountability and broader government reform efforts.

The credibility of any transitional justice mechanism will be determined early on by whether or not the consultation process was genuine. International best practice indicates that decisions on the use of transitional justice mechanisms should be based on extensive national reflection and broad consultation with diverse constituencies, including victim groups: broad support from the general public is essential for the endeavor. Civil society, particularly victims' groups and human rights NGOs, are likely to be the driving force. Consultations will primarily address identifying the content of any bill, including in the context of truth commissions, the appointment of commissioners. It is therefore essential that any transitional justice initiative is designed and conducted with the full participation of civil society groups. Though this may take time, international best practice indicates that such processes should never be rushed.

In addition to ensuring consultations are the product of deliberative, inclusive processes, it is also important to consider whether the political conditions for a TRC are such that victims, families and witnesses can testify without fear of retribution. Given the continued violence in the country, serious thought must be given as to whether the time is right for such a process.

## I. Independence, Impartiality and Competence

So as to ensure it has credibility among the population, the proposed TRC will require clear operational independence so that it can carry out its work without political interference. Thus, it is crucial that the Commission operate free of direct or indirect influence or control by government in relation to the appointment of commissioners, its staffing needs, research and investigations, reporting, recommendations and budgetary decision-making.

Though the draft states the Commission will operate in an independent and impartial manner, the bill contains numerous provisions which are contrary to these principles through direct or indirect Government involvement, including in the *appointment process, staffing, funding, recommendations of the Commission, extension of mandate and removal of a Commissioner/dismissal of the Commission*.

### a. Appointment process

Section 4 (2) empowers the Government to form a three-member committee, *with the consensus of the political parties*, to recommend for appointment, the chair and members of the Commission. According to the official translation, the Government *may* appoint persons based on the recommendations, but may have discretion to ignore them. The recommendations for appointment are to include persons from among “inter alia, human rights activists, psychologists, lawyers, civil society activists, victimologists and sociologists,” and include one woman.

Provisions of the bill create a perception of potential political involvement in the appointment process because they open up the possibility for appointments of persons with a close affiliation to the political parties. As stated above, truth commissions will garner the greatest public and international support if their members are selected through a consultative process. Such an appointment process should include a representative selection panel, appointed by a variety of sectors or societal groups (including civil society), to vet the nominations, interview the candidates and then recommend the final commissioners to the appointing authority. All efforts should be made to ensure the Commissioners represent the diversity of Nepalese society, including based on ethnicity, gender, caste, geographic region and religion. The bill does not address the issue of diversity.

### b. Staffing

Sections 11 and 12 relate to the staffing of the Commission. The chief administrative officer will be assigned from the Nepal Judicial Service and all other staff shall be made available by the Government (“Government...shall make available personnel required for the Commission”). If the Government is unable “to provide (the) required number of personnel,” the Commission may appoint personnel on a contractual basis.

The need to ensure independence and integrity of the Commission’s staff is essential. A commission that primarily consists of government civil servants will risk undermining its independence and integrity. Moreover, government civil servants are generally ill-equipped to provide the skills required by truth commissions. International best practice dictates that truth commissions function in an effective manner when staff have a variety of backgrounds, including human rights experts, investigators, statement-takers, legal experts, researchers, therapists or social workers, translators, computer specialists, data-entry staff and security personnel, among many others. The chief administrative officer will require effective administrative and management skills that a member of the Judicial Service may not have. In addition, it is important to bear in mind that the number of staff is likely to vary over the course of the Commission’s work. Recent commissions have typically had up-to 200-500 members at their peak workload.

c. Removal

Section 7 (2) places the authority to remove a Commissioner with a special committee of the Legislature-Parliament or the Constituent Assembly. The grounds for removal include “failing to honestly dispense positional duties, lack of working efficiency or being involved in bad conduct.” In order to alleviate political interference, the Legislature-Parliament/ Constituent Assembly should decide issues around removal of commissioners. Secondly, the current grounds for removal are sufficiently vague to justify removal without proper cause or due process. The *UN Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (UN Updated Principles on Combating Impunity)*, state that members of a commission should not be removed during their term in office “except on grounds of incapacity or behaviour rendering them unfit to discharge their duties and pursuant to procedures ensuring fair, impartial and independent determinations.”<sup>1</sup> In addition, members of a commission shall enjoy “privileges and immunities especially in relation to any defamation proceedings or other civil or criminal action brought against them on the basis of facts or opinions contained in the commission’s report.”<sup>2</sup>

d. Funding

Section 9 (2) states that “remuneration, conditions of service and benefits” of members of the Commission shall be determined by the Government. Section 13 (2) permits the Commission to seek foreign funding if resources provided by the Government are insufficient. In addition, the Government will make arrangements for “building, materials and other resources” required for the functioning of the Commission.

A major challenge for most, if not all, truth commissions is raising sufficient funds for carrying out their work. The budget for a truth commission is typically over \$5 million, with Government usually being the primary provider of financial assistance. The bill’s prohibition on outside funding subject to the consent of the Government is an inappropriate interference with the independence of the Commission.

With regard to salaries for the Commissioners, the bill is silent. In order to engender transparency and respect and a degree of gravity in these positions, many truth commissions pay salaries equivalent to those of senior judicial officials. With regard to the provision of a building and other material resources, Government’s traditionally provide such materials on a *gratis* basis. It is unclear in the provisions of the bill whether such materials will be provided on this basis.

e. Powers of the Commission

The TRC has authority to investigate incidents or events reported by victims or persons on their behalf; from third parties; and, it can conduct *ex officio* inquiries. The Commission does not have authority to investigate where a “matter [has been] already decided in accordance with existing laws.” (Section 15). In addition, complaints that are found “baseless during the course of the inquiry or investigation,” the Commission may reject further consideration of the complaint (Section 22).

Section 15 (a) suggests the Commission would be barred from considering the facts and circumstances surrounding events already deliberated upon by commissions of inquiry,<sup>3</sup> the police and courts. Given the inadequacies of some of these processes in holding perpetrators accountable and the lack of transparency with regard to past commissions of inquiry and their reports, it would seem inappropriate to deny the Commission access to materials and

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<sup>1</sup> Principle 7 (a).

<sup>2</sup> Principle 7 (b).

<sup>3</sup> E.g., the work of the Commission of Inquiry on Disappeared Citizens.

witnesses relevant to such processes. The TRC is not a judicial body and thus, will not be making judicial findings. Secondly, such information could be crucial to ensuring a broad and accurate picture of events that led to, and occurred during the armed conflict.

f. TRC and the Office of Attorney General

The Commission's mandate includes making recommendations for prosecuting perpetrators the Commission has "found guilty" (Section 24). Though the discretion to initiate, investigate and prosecute criminal offences is the sole domain of the Office of Attorney-General, the bill contains a provision that would interfere with such authority.<sup>4</sup> The Government's consent is required prior to the Office of the Attorney-General initiating criminal proceedings of those persons identified by the Commission as perpetrators of serious human rights violations or crimes against humanity (Section 28 (2) (a)).

g. Extension of Mandate

Section 36 of the bill places the authority to extend the mandate of the Commission with the Government. The provision raises the potential for government interference with the operations of the Commission. It may unnecessarily place an undue burden on the Commission to mollify any criticism of government actors and/or institutions for fear its operations could be curtailed before it completes its work, including its report and recommendations. Any extension of mandate should be within the domain of the Legislature-Parliament/Constituent Assembly.

h. Dissolution of the Commission

Section 37 permits the Government to dissolve the Commission if it "is unable to accomplish its tasks *for any reason*." Again, as with the provisions above, in order to alleviate the potential for government interference with work of the Commission, it would be preferable for the Legislature-Parliament/Constituent Assembly to be given this authority.

i. Freedom of speech

The oath of office contained in the bill states that the Commissioners "will not disclose any matter...except in cases of abiding by the existing laws." This provision is sufficiently vague so as to potentially prevent Commissioners from speaking to the press or public about the operations of the Commission, including commenting on testimony. Such a provision is unduly restrictive. Further clarification of this provision is required.

## **II. Amnesty Provisions**

The draft contains provisions that provide for the Commission to recommend *amnesty* for serious crimes under international law. Such provisions seriously undermine the right to justice, truth and reparation.

Specifically, the draft permits recommending amnesty for crimes that were committed in the course of one's 'duty' or for political purposes during the armed conflict, without further clarification. (Section 25) This overly broad provision could entail most of the unlawful conduct committed by government actors and CPN-M cadres and include grave breaches of the Geneva Conventions and other violations of international humanitarian law that are crimes under international law; crimes against humanity; and other violations of internationally protected human rights, including torture, enforced disappearance and extrajudicial execution. Provisions that prevent prosecution for these offences are inconsistent with the State's

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<sup>4</sup> Section 135 (2) Interim Constitution of Nepal (2007).

international treaty obligations, as well as under international customary law because they are inconsistent with the State's *primary* duty to undertake prompt, thorough, independent and impartial investigations of such acts.

With regard to perpetrators who are not recommended for amnesty, the central theme of the draft is the primacy of reconciliation over prosecutions, in essence a *de facto* amnesty. As for those perpetrators who have not reconciled with victims or their families, as mentioned above, any recommendation for prosecution is subject to the Government's consent

Perpetrators are ineligible for amnesty if they committed murder in circumstances in which the victim/s were "taking (sic) under control or carried out in an inhumane manner." Perpetrators are also exempt from amnesty for acts that amount to "inhumane and cruel torture" and rape. The bill does not define 'taking under control,' 'inhumane' or 'cruel.' The Commission has absolute discretion to determine whether a set of facts are inhumane or cruel, though all acts of torture are *de facto* inhumane or cruel. The words 'inhumane' or 'cruel' should be removed from the text. In addition, further clarification will be required as to whether those perpetrators who are ineligible for amnesty can avail themselves of the reconciliation provisions.

As stated above, those persons who *are* eligible for prosecution (having not qualified under the reconciliation provision or not recommended for amnesty, or the amnesty recommendation was rejected by the Government), can only be prosecuted with the *approval* of the Council of Ministers (section 28 (2) a).

The content of Section 25 would place Nepal in violation of its obligations under international human rights law and international humanitarian law, and is not in keeping with international standards. The prohibition of amnesties for international crimes goes beyond the prohibition for amnesty for genocide, war crimes and crimes against humanity. It extends to other gross violations of human rights and serious violations of international humanitarian law (see appendix).

In addition to international law obligations, as stated by the Secretary-General to the United Nations, the UN cannot endorse or condone processes that provide amnesties for genocide, crimes against humanity, war crimes or gross violations of human rights, nor undertake activities to foster them.<sup>5</sup>

### **III. TRC's and identifying the underlying causes of conflict & patterns of violence.**

Provisions of the bill suggest the work of the Commission will be limited to identifying individual responsibility only, and not the underlying causes of the conflict, including the role of the state actors and armed groups. Language contained in the Preamble and Chapters 2 and 3 explicitly indicates that the role of the Commission is to explore individual responsibility for serious human rights violations or crimes against humanity.

In post-conflict states, for peace to be sustainable it is essential to identify the root causes of conflict and those state institutions, armed groups and individuals responsible for past crimes. In this regard, truth commissions have an important role to play. Unlike prosecutions, they can reach out to thousands of victims in an attempt to understand the extent and patterns of past violations, as well as their causes and consequences. Effective truth commissions can

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<sup>5</sup> See *Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies*, 3 August 2004 (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.

help society understand and acknowledge a contested or denied history, where the voices and stories of victims are heard. TRC's can also examine the economic, social, cultural or religious dynamics that could have contributed to the conflict.

Some provisions of the bill do suggest a broader mandate than simply identifying individual responsibility, making reference to the obligation of state institutions to cooperate with the Commission, including the provision of documents and witnesses. In addition, Section 27 requires the Commission to issue a report that makes reference to "social, political, economic, cultural, and other causes underlying the armed conflict". However, these provisions do not explicitly require the commission as part of its mandate to address issues related to root causes and patterns of violations and abuse.

Any attempt at addressing crimes of the past must ensure that a multi-faceted approach is taken. Truth Commissions should see themselves as one part of a comprehensive transitional justice strategy and should be considered together with other initiatives such as prosecutions, reparations, vetting and institutional reform.

#### **IV. TRC's and Prosecutions**

Under international law, the State's *primary* duty is to undertake prompt, thorough, independent and impartial investigations of gross violations of human rights (including torture, enforced disappearance and extrajudicial execution) and serious violations of international humanitarian law (including crimes against humanity). National amnesty laws or provisions that prevent prosecution for these offences are inconsistent with the State's treaty obligations, as well as under international customary law because they are inconsistent with the duty to prosecute international crimes.

Truth commissions are *complementary* to prosecutions and not a substitute for a judicial process to establish individual criminal responsibility. Truth commissions should not in any way undermine the prospects of prosecution. Without meaningful accountability for serious human rights violations, with justice for victims and their families, the prospects of replacing a culture of impunity with a culture of peace and respect for the rule of law are slim.

The draft contains provisions that, potentially, could significantly undermine the State's obligation to prosecute. Firstly, it limits the mandate of the TRC to the investigation of *individual* perpetrators, and not those who may be considered accomplices to the crime, including possible State or CPN-M officials who ordered the perpetrator/s to commit the offence. Thus, the class of perpetrators identified by the TRC will be distorted and not reflective of the events that occurred in Nepal during the armed conflict. International standards state that in addition to focusing on perpetrators of criminal offences, a TRC's investigations should also include other actors, whether they ordered killings or actually committed them, including public officials or armed movements.<sup>6</sup>

Secondly, the bill states that if the perpetrator and victim 'reconcile,' the TRC would recommend against prosecution. Given the primary duty placed on the State, rather than a non-judicial body such as a TRC, to prosecute, it is both ill-conceived and inappropriate from an international human rights law perspective, for the TRC to have such authority.

#### **V. Reconciliation**

With regard to possible linkages between the Commission and other processes, the bill is weighted in favour of reconciliation at the expense of ensuring truth and justice for victims and their families. Rather than being a useful tool in identifying potential perpetrators for

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<sup>6</sup> Principle 8, *UN Updated Principles on Combating Impunity*,

prosecution, the bill heavily focuses on the role of the Commission in bringing about reconciliation. Though the Preamble states that purpose of the bill is to establish the truth and end impunity, the body of the text makes constant reference to reconciliation, with the implicit suggestion that reconciliation, not truth nor justice, is the primary purpose of the legislation.

Section 23 of the bill suggests the Commission, rather than the parties, will be responsible for ‘causing’ the reconciliation, by requesting the perpetrator to make an apology to the victim. Such an approach appears inherently coercive. The incentive for the perpetrator to apologize is that it will result in a recommendation to not prosecute (Section 24 (2)). The incentive for the victim is that he/she will receive compensation directly from the TRC. No such compensation is available if the victim rejects the offer of apology. Moreover, it does not appear the perpetrator is compelled to be a part to the truth-finding function of the Commission: the perpetrator is not compelled to provide a statement of events surrounding his or her involvement in criminal conduct or other events that may be relevant. If the attempts to reconcile fail, the provisions of the bill will nevertheless permit the commission to recommend amnesty.

## **VI. Reparations**

If the Commission “causes to be made” reconciliation, Section 23 authorizes the provision of “reasonable reparations...to the victim from the perpetrator...in lieu of the loss and damage caused to the victim.” The Commission can undertake a variety of activities “in order to persuade both the victim and the perpetrator for reconciliation,” including organizing workshops, rallies and ceremonies (Section 23 (4)). In addition to the Commission’s own role in directly providing reparations, Section 26 also authorizes the Commission to recommend the Government make similar provision for reparations to victims, but only if the Commission finds it “necessary.” In addition, the bill makes provision for a Reconciliation and Peacebuilding Fund (section 29) that shall be operated by the Ministry of Peace and Reconstruction and used to fund implementation of the recommendations. The bill does not provide a definition of what constitutes reparations to victims.

Contrary to international law and standards, the proposed reparation provisions are founded on a needs-based approach, rather than rights-based. The draft does not provide adequate guarantees to ensure victims are provided full and effective reparation in the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. In addition, international best practice dictates that the direct involvement of the Commission in the provision of reparations is not consistent with international best practice. Reparation programmes are complex. The design and implementation of such a programme should include victims and other sectors of civil society. They should deliver a variety of benefits ranging from the material to the symbolic, and, provided they address the individual and broader society, are more likely to have a greater reach and be more comprehensive than is suggested in the Bill.

## **VII. Public Hearings and Reports**

### **a. Hearings**

Section 19 (1) states “if it deems necessary to find the truth and facts on matters relating to gross violations of human rights and crime against humanity,” the Commission *may* hold public hearings. In Section 20 (1), the Commission is required to carry out its activities in “an open and transparent manner.” Activities that are “likely to have an adverse impact on dignity or security of any person or to jeopardize law and order or to have an adverse impact on the process of inquiry and investigation may be *carried out in a secret manner.*” In relation to the protection of witnesses appearing before the Commission, the bill provides for witnesses to

request confidentiality (Section 18 (5)). According to the official translation, the Commission has no discretion on the matter, and must accede to a request.

International best practice indicates that public hearings should be the norm as opposed to the exception. Public hearings have proven to be a very powerful and effective way to bring a commission's work to the public. By giving victims and survivors an opportunity to tell their story before a public audience, a commission can formally and publicly acknowledge past wrongs, allow victims the chance to be heard, reduce the likelihood of continued denial of the truth and make the work of the commission more transparent. Public hearings also help to engage the public as an audience, encouraging press coverage of the issues over a longer period and stimulating national discussion about the past.

Where specific populations have been particularly affected by the violence, international best practice suggests the creation of special procedures that would provide a degree of confidentiality. This is especially for cases involving children who were victims or perpetrators of abuse and women and girls who were sexually abused. Though many truth commissions include provisions for ensuring the confidentiality of witnesses, international best practice would dictate that this be in accordance with strict criteria permitting such hearings in exceptional circumstances. Otherwise, such a provision could be open to abuse by perpetrators attempting to shield their responsibility in serious human rights violations.

#### b. Report

Upon the completion of its work, the Commission is required to submit a report to the Government (Section 27) with recommendations on prosecutions, amnesty and reparation. In addition, the report may provide recommendations in relation to law reform, reconciliation measures and, implicitly, institutional reform. The Government is obligated to present the report to the Legislature-Parliament/Constituent Assembly. The obligation to implement the recommendations is exclusively with the Ministry of Peace and Reconstruction though it is not clear that it has the authority, given that many of the recommendations may relate to other institutions and actors.

The impact of the final report, with recommendations, will, to a significant degree, depend upon when and in what circumstances the report is released and publicized. Most important will be how the political authorities treat the report and whether they have any interest in publicizing and implementing its conclusions and recommendations. Even where there is sufficient political will, there may not be sufficient institutional capacity or funds to undertake the recommended measures.

#### c. Archiving

Section 37 (2) states that on the dissolution of the Commission "all...documents..." shall be transferred to the Ministry. No provision is made in relation to ensuring preservation of the Commission's documentation during the course of its work. Moreover, no provision is made for public access to the documents following the conclusion of the Commission's work, including access by victims and their families. *UN Updated Principles on Combating Impunity* state that, "at the outset of their work, commissions should clarify the conditions that will govern access to their documents, including conditions aimed at preventing disclosure of confidential information while facilitating public access to their work."<sup>7</sup> In addition, following the conclusion of the work of the commission, *UN Updated Principles on Combating Impunity* state the government has the obligation to ensure archives of the commission are preserved.<sup>8</sup>

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<sup>7</sup> Principle 8.

<sup>8</sup> Principle 14.

## VIII. Definitions

Throughout the bill, reference is made to a number of provisions that have significant importance under international law. For example, the role of the Commission is to investigate “*gross violations of human rights*” and “*crimes against humanity*,” and to make recommendations regarding “*reparations*” to “*victims*.” None of the above are included in the definitions section of the bill.

### a. Gross Violations of Human Rights

Under international law, “*gross violations of human rights*,” is generally intended to include “violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution, and slavery.”<sup>9</sup>

### b. Crimes against Humanity

The Rome Statute of the International Criminal Court defines “*crimes against humanity*” as certain acts committed as part of a widespread or systematic attack directed against the civilian population. The particular offences include, e.g., murder, extermination, enslavement, imprisonment or severe deprivation of physical liberty, torture, rape and other forms of sexual violence of a grave nature, enforced disappearances, and other inhuman acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health. The Statute defines ‘*torture*’ as the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused.

### c. Victims

In the context of gross violations of human rights, international law defines a ‘*victim/victims*’ as:

‘persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “*victim*” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.’<sup>10</sup>

In the context of disappearances, the definition of *victim* has been expanded recently to include relatives of the disappeared. In a decision of the *UN Human Rights Committee*, the Committee stated that the anguish individuals experience as a result of uncertainty about the fate of close relatives who are direct victims of enforced disappearance in itself constitutes cruel, inhuman or degrading treatment and is thus a violation of the ICCPR.<sup>11</sup>

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<sup>9</sup> See, e.g., *UN Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*.

<sup>10</sup> See *UN Basic Principles on and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law*, para. 8.

<sup>11</sup> *Quinteros Almeida v. Uruguay*, Communication No. 107/1981 (2003).

#### d. Reparation

The international legal basis for a right to *reparation* is enshrined in international human rights instruments.<sup>12</sup> In addition to treaty obligations, international standards have further elaborated the content of the right. The *UN 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*, endorsed by the UN General Assembly in 2005, define the content of reparations as including restitution, compensation, rehabilitation, satisfaction and guarantees of non-recurrence.

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<sup>12</sup> See *Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.

## RECOMMENDATIONS

### I. Independence, Impartiality and Competence

OHCHR-Nepal recommends the Ministry of Peace remove all provisions of the bill that potentially interfere with the independence, impartiality and competence of the Truth and Reconciliation Commission, particularly those in relation to the *appointment process, staffing, funding, recommendations, extension of mandate and dismissals*. Specifically:

- In order to ensure the credibility of the appointment process, OHCHR-Nepal recommends the Government replace a potentially politicized appointment process with a representative selection panel, appointed by a variety of sectors or societal groups (including civil society), to vet the nominations, interview the candidates and then recommend the final commissioners to the appointing authority. The bill should ensure that the Government must appoint the Commissioners from a list of the recommended candidates provided by the selection panel.
- OHCHR-Nepal recommends broadening the category of candidates so as to ensure greater gender participation and representation of the diverse Nepalese society.
- OHCHR-Nepal would recommend that criteria for staffing recruitment are based upon a variety of skills relevant to the functioning of a truth and reconciliation commission, including independence, integrity and competence.
- So as to ensure independence and impartiality, OHCHR-Nepal recommends against employing government employees/civil servants as Commission staff.
- OHCHR-Nepal recommends that the Legislature-Parliament/Constituent Assembly, not a special committee, be empowered with the authority to remove a Commissioner, for cause, based on international best practice. OHCHR-Nepal recommends the authority to dissolve the Commission, for cause, also be placed with the National Legislature-Parliament and in a manner that is consistent with international principles of fairness and impartiality.
- OHCHR-Nepal welcomes the Government's commitment to provide financial resources to the Commission, but so as to ensure independence and impartiality, OHCHR-Nepal recommends the removal of the provision requiring Government consent for funding from foreign sources.
- OHCHR-Nepal recommends clarity as to whether "building, materials and other resources," will be provided to the Commission on a *gratis* basis.
- OHCHR-Nepal recommends the Ministry further elaborate on the content of Section 15 (a) so as to ensure the Truth and Reconciliation Commission is not prevented from considering all relevant events and circumstances that occurred during the armed conflict, regardless of whether there has been a prior commission of inquiry, judicial or law enforcement investigation.
- OHCHR-Nepal recommends further elaboration of the content of Section 22, particularly regarding complaints that "cannot be implemented."

- OHCHR-Nepal recommends the Ministry of Peace to remove provisions of the bill that interfere with the independence and impartiality of the Office of Attorney-General.
- OHCHR-Nepal recommends clarification of the oath of office so as to ensure it does not prevent the Commissioners from speaking in public, and with the Press, about the operations of the Commission.

## II. Amnesty Provisions

- OHCHR-Nepal urges the Ministry of Peace to remove provisions of the bill that permit the Truth and Reconciliation Commission to recommend amnesty for gross violations of human rights and crimes against humanity.

## III. TRC's and identifying the underlying causes of conflict & patterns of violence.

- OHCHR-Nepal recommends the Ministry of Peace expand the mandate of the Truth and Reconciliation Commission to incorporate international human rights law principles of truth, justice and accountability.
- OHCHR-Nepal recommends the mandate of the Truth and Reconciliation Commission explicitly includes an exploration of the root causes of the conflict, including “social, political, economic, cultural, and other causes underlying the armed conflict,” with a view to identifying institutional and policy reforms so as to prevent future abuses.
- OHCHR-Nepal recommends the terms of reference of the Commission include investigations of all persons alleged to have been responsible for violations of human rights and/or humanitarian law, whether as perpetrators or accomplices, state officials or armed groups.

## IV. TRC's and Prosecutions

- OHCHR-Nepal recommends the removal of provisions that undermine the State's primary obligation to prosecute persons who have committed gross human rights violations and serious violations of IHL.

## V. Reconciliation

- OHCHR-Nepal recommends the Ministry remove the coercive role of the Commission regarding the relationship between perpetrator and victim in enforcing reconciliation.

## VI. Reparations

- OHCHR-Nepal recommends the Commission ensures any recommendations regarding reparations are consistent with international standards.
- OHCHR-Nepal would recommend against the Commission providing reparations directly to victims.
- OHCHR-Nepal recommends the removal of provisions that link reparations to reconciliation.

## **VII. Public Hearings, Reports, Archiving**

- OHCHR-Nepal encourages the Ministry to consider effective ways to bring the work of Commission to the public, including a greater reliance on public hearings.
- OHCHR-Nepal welcomes the provision that permits confidential hearings. This will be particularly important in instances dealing with specific groups of victims such as children and women and girls, but OHCHR-Nepal recommends the Ministry amend the provision relating to confidentiality so as to ensure that there are strict criteria to determine the exceptional circumstances in which hearings can be confidential.
- OHCHR-Nepal recommends providing for an explicit time-frame for when the Government shall present the report to the Legislature-Parliament/Constituent Assembly.
- OHCHR-Nepal recommends that the findings of the Commission are made widely available to the general public, and that information concerning human rights violations, including documents and witness testimony, are publicly available.
- OHCHR-Nepal recommends that the Government of Nepal appoint a monitoring body, rather than a Ministry, to monitor implementation of the recommendations. International best practice indicates the most effective body may be one that consists of government, civil society and donors.
- OHCHR-Nepal recommends provisions are incorporated into the bill which highlight the importance of preserving documents, including conditions that govern who will have access to them during the life of the Commission.
- OHCHR-Nepal recommends provisions are incorporated into the bill so as to ensure the Government takes steps to preserve, and provide access to, archives bearing witness to violations.

## **VIII. Definitions**

- OHCHR-Nepal recommends the bill incorporates the terms included in this document so as to ensure clarity and compliance with international standards.

## **Appendix: Provisions of International Law relating to prosecutions and amnesties**

### a. International Human Rights Law

The *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), both applicable in Nepal, impose a general 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 investigate and punish those responsible. Especially in relation to violations of the right to life, torture, enforced disappearance and extrajudicial execution, the granting of amnesty would not be compatible with Nepal's treaty obligations and other relevant international human rights standards.

### b. Geneva Conventions and International Humanitarian Law (IHL)

The provisions of Section 25 would also be inconsistent with the prohibition of amnesty for international crimes under international humanitarian law, including grave breaches of the Geneva Conventions and other violations of international humanitarian law including crimes against humanity. Article 3 common to the four Geneva Conventions (known as Common Article 3) applies to armed conflicts "not of an international character." It contains provisions governing the minimum protection of all persons not taking an active part in hostilities, including civilian populations and members of the armed forces in non-combat situations. Additional Protocol II to the Geneva Conventions also applies to non-international armed conflicts.

By virtue of Nepal's ratification of the four Geneva Conventions, both the Nepalese security forces and the CPN-M are bound by Common Article 3 of the Geneva Conventions. In addition, both parties are also bound by customary law applicable to internal armed conflicts including those provisions of Protocol II which constitute customary law.

With regard to 'political crimes,' IHL permits States to adopt amnesties for political offences such as treason and rebellion.<sup>13</sup> (Art. 6 (5)) In the view of ICRC, Art. 6 (5) should not be interpreted to provide an amnesty for those who have violated IHL because serious violations of IHL are international crimes. The Inter-American Commission on Human Rights has confirmed that Art. 6 (5) was not meant to provide amnesty for violations of IHL committed in non-international armed conflicts.<sup>14</sup> In addition, the International *ad hoc* Court for the Former Yugoslavia has affirmed that serious violations of IHL are international crimes and cannot be subject to amnesty.<sup>15</sup>

### c. UN international principles on impunity and reparation

Principle 4 of the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law*, adopted by the General Assembly in December 2005, states: "In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have a *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."

Principle 24 of the *UN Updated Principles on Combating Impunity*, endorsed by the UN Commission on Human Rights in 2005, principally states: "Even when intended to establish

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<sup>13</sup> Art. 6 (5) of the 1977 Protocol Additional (No. II) to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts.

<sup>14</sup> Inter-American Commission on Human Rights, Case 10.480, report 1/99.

<sup>15</sup> *Prosecutor v. Delalic*, 20 February 2001.

conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds:

“the perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations to which Principle 19 refers or the perpetrators have been prosecuted before a court with jurisdiction...outside the State in question.”

Principle 19 refers to the States “...obligation to undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for *serious crimes under international law* are prosecuted, tried and duly punished.” *Serious crimes under international law* are defined in the *UN Updated Principles to Combat Impunity* as including grave breaches of the Geneva Conventions and other violations of international humanitarian law including genocide, crimes against humanity and violations of international human rights such as torture, enforced disappearances and extrajudicial execution.