

An Address to Members of the Constituent Assembly of Nepal

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**United Nations
Office of the High Commissioner for Human Rights in Nepal
OHCHR – Nepal**

Honourable Chairperson of the Parliamentary Committee on International Relations and Human Rights,
Honourable members and secretariat staff of the Constituent Assembly and Legislature Parliament,
Ladies and gentlemen,

It is a great privilege and honour to have this opportunity to speak with you, the members of Nepal's historic Constituent Assembly, and its Legislature Parliament. I especially wish to thank the Committee on International Relations and Human Rights for offering me the possibility to be here with you all today. I would also like to extend the personal greetings and well wishes of the High Commissioner Navi Pillay.

On my last visit to Nepal, in January 2008, the people of Nepal were about to hold the elections for this Assembly, and in so doing was taking vital steps in the process towards securing peace. Three years later, the peace process has endured, and political consensus on important issues continues to be hammered out, despite daunting challenges. While there is still some distance to go to accomplishing all the tasks within the Comprehensive Peace Agreement, the genuine commitment to a sustainable peace shown by all the major parties is truly commendable.

Today, I would like to focus on two major tasks that rest upon you. First, to fully turn the page of the conflict by addressing the claims of thousands of victims who continue to wait for truth and justice. Second, through drafting the new Constitution, to establish a new foundation for national order in the country based on respect for human rights, the rule of law and justice and equal rights for all Nepalis. As members of the Constituent Assembly, you shoulder the hopes of all Nepalese for a better, fairer society in which they can all claim their rights as equal human beings, and you have the full support of the United Nations and the international community in this historic endeavour.

At the outset, I would like to congratulate you for Nepal's ratification of most of the main international human rights instruments – most recently the Convention on the Rights of Persons with Disabilities. These instruments serve as a foundation for constitutional deliberations pertaining to human rights issues. They articulate, in language carefully worked out by the international community, a wide range of civil, political, economic, social and cultural rights, as well as the rights of particular groups, such as women, ethnic, religious, linguistic and sexual minorities, Dalits, migrants, indigenous peoples, children or persons with disabilities.

We at the Office of the High Commissioner for Human Rights note with great appreciation the public support the Constituent Assembly has given for Nepal's ratification of human rights instruments. In particular, we are very encouraged by the parliament's resolution instructing the Government to proceed with the ratification of the Rome Statute for the International Criminal Court. These international human rights commitments made by Nepal are crucial in guiding the two tasks that I wish to discuss today.

Honourable Chairperson,
Members and staff of the Constituent Assembly,
Ladies and gentlemen,

The future is built upon the past. But depending on how the legacies of the past are dealt with – with courage and truthfulness or with short-sightedness and denial – the future can be very different.

In the past, peace and justice were considered to be mutually incompatible goals. Securing peace with the cooperation of perpetrators of human rights violations was thought to outweigh the value of addressing justice. However, today there is growing recognition that, when properly pursued, peace and justice are mutually reinforcing. Experience from other post-conflict countries has shown that the simultaneous pursuit of peace and justice is not only possible, but in fact, *indispensable* to make peace, democratisation and development sustainable.

Indeed, pursuing accountability for perpetrators of human rights violations has proven to be an essential element in combating and preventing impunity. States that have brought those accused of serious human rights violations to trial have subsequently succeeded in preventing or reducing the recurrence of such violations. In contrast, in countries where the crimes go unaddressed and unpunished or amnesties for serious crimes are allowed, the resulting culture of impunity has exacerbated the further perpetration of human rights violations.

In this context, Nepal's commitment to establish transitional justice mechanisms – and to confront as well as address both the causes and the consequences of the ten-year conflict – was one of the most important elements of the Peace Agreement.

At its heart, transitional justice seeks to do two things: first, to restore and protect the dignity of individuals as bearers of fundamental human rights and freedoms; and second, to help recreate the

bonds of trust between citizens and State. In practical terms, criminal justice, truth seeking, reparations as well as institutional reform are all addressed through the creation of transitional justice mechanisms.

Establishing these mechanisms in Nepal – in particular the Disappearances Commission and the Truth and Reconciliation Commission – is both necessary and urgent. The Constituent Assembly must swiftly adopt the necessary draft legislation to establish these commissions. Furthermore, to ensure that the claims of the victims are genuinely addressed, these laws must be in line with international human rights standards. In this regard, a number of provisions of the current draft bills need to be modified to fully comply with international law. This would also reflect and respond to our hopes and aspirations expressed by victims' groups throughout the country during the ahead Constitutional process.

As the lead agency within the UN system in the area of transitional justice, OHCHR has supported transitional justice programmes in more than twenty countries. In Nepal, we are actively supporting this process and we stand ready to do whatever we can to assist you in this crucial endeavour.

However, these mechanisms alone are not enough. Transitional justice must consist of both judicial and non-judicial processes and mechanisms, including prosecution initiatives. Commissions cannot replace the regular criminal justice process that guarantees the rule of law in a society. It is an obligation for all states to undertake investigations and prosecutions of all cases of gross violations of human rights and serious violations of international human rights and humanitarian law. Furthermore, post-conflict amnesties cannot be granted to prevent prosecution of egregious human rights violations, including through pardons or the withdrawal of criminal charges. Transitional justice, and criminal justice, should work in a complementary fashion.

In this regard, there are a number of cases currently pending in Nepal, for which police investigations, and judicial proceedings, should continue regardless of the fact the establishment of transitional justice mechanisms remains a priority. It is deeply troubling that to date in Nepal no-one has been held accountable for crimes committed during the conflict. Criminal investigations have not moved forward, some perpetrators have even been promoted, and little action has been taken to address and redress the grievance of the victims.

We are all aware of the tremendous physical, psychological and material price paid by victims of abuses during armed conflicts. Paradoxically, victims often are the neglected part of the equation in efforts to fight impunity. Sadly, this has been the case here in Nepal as well. There is a clear need to rectify this gap. In particular, families of the disappeared have remained in the dark about the fate of their loved ones, and to this day, continue to suffer as they await the truth – and justice. They need to be relieved of this terrible burden; seeing those responsible held to account will allow them, and all of Nepali society, to move beyond the past conflict period and build confidence in the mechanisms of the state.

Central to any effective investigation and prosecution process is a successful witness and victims protection program. Witnesses and victims involved in investigations and prosecutions of human rights and international crimes cases have good reason to fear retaliation. They often live in volatile and insecure environments where their most fundamental human rights could be violated. Without any appropriate safety nets for their protection, the physical and psychological integrity of witness and victims as well as their privacy, dignity, reputation and even lives may be at risk. The capacity and the will of a state to render justice to victims and end impunity regarding past and current abuses come into question if the justice system is unable to secure convictions due to failures in the production of witness evidence. In this regard, I urge you to take the necessary legislative initiative to develop an effective legal framework for the establishment of an independent witness and victim protection system in Nepal. The voices and the needs of victims must not be drowned out by political developments.

Honourable Chairperson,
Members and staff of the Constituent Assembly,
Ladies and gentlemen,

The Constitution-making process offers an historic opportunity to strengthen the foundation for the Nepalese State firmly grounded on respect for human rights and justice. Nepal already has a strong constitutional tradition of guaranteeing fundamental rights together with an independent judiciary.

The adoption of a new Constitution will be a key benchmark in the success of Nepal's peace process. All stakeholders must work together to strengthen this country's fundamental legal framework. I assure you of OHCHR's commitment and support to this process.

The process of drafting the Constitution also offers an unprecedented opportunity to address longstanding discrimination and social exclusion. Combating discriminatory practices in Nepal – including 'untouchability' and bonded labour systems such as *Haliya*, *Kamaiya* and *Kamlari* – is undoubtedly one of the key priorities for the country.

In this regard, I note the efforts of the drafting Committees to date towards strengthening constitutional protection of all human rights in Nepal. I am pleased to see that the draft text contains a number of important provisions, including comprehensive non-discrimination clauses. It is also encouraging to see provisions on a number of collective rights, including rights of minorities and the marginalised.

At the same time, I would also like to highlight that a number of current draft provisions do not protect basic rights, such as the right to equality. Here, I note particularly gender-based discrimination vis-à-vis citizenship provisions, and inadequate respect for the rights of non-citizens. I also note that economic and social rights still lack enforceability on an equal footing with civil and political rights. If basic rights regarding food, health, education and employment are not guaranteed in the Constitution and made judicially enforceable then all human rights will fall short of full realisation.

Furthermore, the possible inclusion of a provision that could give amnesty for serious crimes under national and international law is of great concern. Such flaws in preliminary constitutional proposals need to be remedied in your on-going discussions, in line with Nepal's human rights treaty obligations.

A constitution does not by itself guarantee the enjoyment of people's rights. Experience from around the world tells us that even the most perfectly drafted Constitution does not, of itself, guarantee the enjoyment of human rights. The rights recognised in the Constitution must be given effect by independent bodies.

In this regard, I urge the adoption of a new law for the National Human Rights Commission, which will be an important step forward in advancing the accountability agenda. A strong, independent judiciary with sufficient power to hold the Government to account, and national human rights institutions that can adjudicate complaints of human rights violations, are vital for effective accountability mechanisms.

We are also pleased to note that the Legislature is currently considering two important bills that aim to advance protection and promotion of the human rights of one of the most marginalised groups in Nepali society – the Dalit Community. I am speaking of the Bill to properly criminalise untouchability practices and the Bill to create a strong, independent, and adequately resourced National Dalit Commission to focus on the defence of the rights of the community.

Passing these three laws – following the necessary amendments to ensure their consistency with international human rights standards and best practices – is of significant importance.

In Geneva, the High Commissioner and all of us at OHCHR were pleased to see Nepal undertake so positively the Universal Periodic Review process and accept a number of vital recommendations. But I would urge the Government to reconsider some of the recommendations it has rejected, and set in place mechanisms for the implementation of these recommendations.

Honourable Chairperson,
Members and staff of the Constituent Assembly,
Ladies and gentlemen,

Today, many countries of the world are undergoing significant and turbulent changes – Tunisia, Egypt, the Ivory Coast and Libya, to name but a few. The momentum for change is driven by the ardent aspirations of the people to reclaim their dignity and rights. They will have much to learn from the experience of Nepal over the past decade, today and into the future.

Distinguished members of the Constituent Assembly

OHCHR is and has been honoured to accompany the people of Nepal on your transition from conflict toward lasting peace and democracy. We hope to continue to assist you in your tireless endeavours to lay the founding law for a new Nepal that will rise up to the challenges of the past, and forthrightly weather the tests of the present and future. May I wish you long-term insight, vision and firm grounding in human rights in your important mandate.

Thank you.
