

The relationship between Transitional Justice mechanisms and the Criminal Justice system

Can conflict-related human rights and humanitarian law violations and abuses be deferred or suspended on the basis of commitments to establish a Truth and Reconciliation Commission?

Legal opinion

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The relationship between Transitional Justice mechanisms and the Criminal Justice system: Can conflict-related human rights and humanitarian law violations and abuses be deferred or suspended on the basis of commitments to establish a Truth and Reconciliation Commission?

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I. INTRODUCTION

1. It has recently been enunciated in Nepal in a number of social, political and legal fora that accountability for conflict related human rights and international humanitarian law violations and abuses cannot be undertaken by the regular judicial system, and rather falls in the purview of transitional justice mechanisms. This position may be the result of imprecise information regarding transitional justice mechanisms that have been established elsewhere or from an erroneous interpretation of commitments and obligations ensuing from the Comprehensive Peace Accord (CPA) and the Interim Constitution that have given guidance to Nepal's peace process. At worst, it could be perceived as a deliberate attempt to further perpetuate impunity for violations committed during the armed conflict.
2. Transitional justice mechanisms have been established in a number of post-conflict and post-authoritarian situations to achieve a comprehensive set of objectives, including the establishment of truth and justice in relation to human rights and international humanitarian law violations. In most cases, these institutions were considered necessary as it was difficult for 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 have also been proven as instrumental in analysing patterns of violations and designing appropriate measures of response, including to support victims and affected groups in society.
3. Transitional justice mechanisms such as truth commissions are temporary by definition and receive specific, limited mandates. They have very different functions to courts of law in that, most notably, they deliberately prioritise the victims, whereas a court of law concerns itself primarily with the possible guilt of the accused. OHCHR has consistently affirmed that, "a truth commission should be viewed as complementary to judicial action",¹ not as a basis to supplant or suppress the regular judicial system. Accordingly, the regular judicial system cannot be held in abeyance because a commitment to establish transitional justice mechanisms has been made or even once these mechanisms are actually established and functioning. It cannot erode the obligation upon all states to take clear steps to provide justice for past violations.
4. This note will analyse the issue in terms of applicable international and national law, including case law.

¹ See *OHCHR Rule of Law Tools for Post-Conflict Countries: Truth Commissions* (2006), p. 27.

II. THE NATIONAL LEGAL AND POLICY FRAMEWORK

A. Comprehensive Peace Accord

5. Clause 5.2.5 of the Comprehensive Peace Accord (CPA) signed in 2006 obliges parties to the agreement to set up a Truth and Reconciliation Commission (hereafter, TRC) to establish truth about violations of human rights and to create conditions conducive to societal reconciliation.² The Clause neither designates the TRC as having exclusive powers to deal with international crimes and serious violations of human rights nor does it suggest that the jurisdiction of regular judicial mechanisms should be suppressed in any way. On the contrary, the meaning of Clause 5.2.5 is clarified when the clause is read together with Clause 7.1.3, which affirms the commitment of both parties to ensure that impunity is not protected and that the rights of victims and/or their families is safeguarded.³

B. Interim Constitution

6. Similarly, the Interim Constitution (2007) confirms that the State is responsible for constituting a high-level Truth and Reconciliation Commission to investigate violations, committed during Nepal's conflict. Article 33(S) of the Interim Constitution provides for the constitution of "a high-level Truth and Reconciliation Commission to investigate the truth about those persons involved in serious violations of human rights and crimes against humanity committed during the course of conflict, and to create an atmosphere of reconciliation in the society." By virtue of this provision, the function of the TRC appears to be limited to "investigate the truth" and create "an atmosphere of reconciliation". There is no indication that the investigation and prosecution of these violations should be deferred by the existing criminal justice system to a TRC or that any diversion from established criminal justice procedures is permitted.
7. On the contrary, the Interim Constitution reaffirms that powers relating to justice shall be exercised by courts and other judicial institutions in accordance with "the provisions of the constitution, the laws and the recognised principles of justice".⁴ Similarly, the Interim Constitution empowers the Attorney General "to make the final decision on whether or not to initiate any prosecution on behalf of the Government of Nepal in any court or judicial authority".⁵ As suggested above, a TRC has a different function to a court of law and to the Attorney General.

² CPA Article 5.2.5: Both sides agree to constitute a High-level Truth and Reconciliation Commission through mutual agreement in order to investigate truth about those who have seriously violated human rights and those who were involved in crimes against humanity in course of the war and to create an environment for reconciliation in the society.

³ CPA Article 7.1.3: Both parties express their commitment and state that necessary investigation will be undertaken against any individual involved in violating the rights mentioned in the agreement and action will be taken against ones that are found guilty. Both parties also ascertain that they will not protect impunity and along with it, the rights of the people affected by the conflict and torture and the families of the people who have been disappeared will be safeguarded.

⁴ Interim Constitution, Article 100.

⁵ Article 135 (2) of the Interim Constitution of Nepal 2007

C. Draft transitional justice legislation

8. Although not yet law, the draft bills pertaining to the establishment and functioning of the transitional justice mechanisms in Nepal are consistent with the position outlined above. Chapter three of the draft TRC bill and chapter four of the draft bill on the establishment of a Commission of Inquiry on Disappearance (CoI-D) detail the functions, duties and powers of the respective commissions: however, there is no suggestion that that these mechanisms override Nepali laws, the established role of the judiciary or international obligations in any way.
9. Furthermore, neither of the draft bills provide the commissions with prosecutorial powers, nor do they provide for a direct transfer to the criminal justice system of cases in which violations of human rights and international humanitarian law are evident. In this regard, the current draft bills limit the competence of the future commissions to addressing the Attorney General for necessary criminal prosecutions.

The complementary roles of a TRC and criminal justice and legal precedents in Nepal

10. The above assessment of the national legal framework clearly demonstrates the complementary roles of the TRC and the criminal justice system in terms of ensuring accountability. While a TRC is designed to reveal truth, including through investigating the causes, nature, and extent of the human rights violations, the regular criminal justice system is maintained to ensure justice, and as such to prosecute and punish individual perpetrators responsible for violations that constitute a crime under national or international law. As there has not been any provision or proposal for creating a special court, tribunal or alternative prosecutorial mechanism, criminal trials under the regular justice system are the only foreseen mechanisms to contribute to re-establishing the rule of law through ensuring individual criminal accountability.
11. Legal precedent exists in several decisions issued by the Supreme Court of Nepal that fulfil obligations to provide accountability for conflict-related violations and abuses, including enforced disappearances and extrajudicial executions. For example, in June 2007, the Supreme Court issued a decision on enforced disappearances in which it stressed the urgency of carrying out state obligations, under the Constitution and international law, to investigate and prosecute such offences.⁶ Reading the Interim Constitution's directives requiring the formation of transitional justice mechanisms in light of the rights of the victims to an effective remedy against breach of fundamental rights, including the right to life, the Court held:

The state may take a stand that the formation of a Commission with respect to matters pertaining to directive principles and

⁶ *Rajendra Dhakal et al v. Government of Nepal Ministry of Home Affairs et al*, decided on 1 June 2007.

*policies are to be done at its' own convenience in accordance with its own priorities. The state may also contend that the implementation of directive principles of the state is a matter at its own discretion. **However, the legal investigation, prosecution and provision of a remedy, to be carried out with respect to a remedial mechanism as a part of fundamental right, cannot be a matter of secondary priority and further cannot be a matter outside the jurisdiction of the court.** In fact, on matters relating to the investigation of truth and provision of a remedy in respect of disappeared person, no reason can be seen that gives rise to conflict between the jurisdiction of the court and any other organ of the state. Rather, it can be accepted that the obligation of the state with respect to this matter is an obligation to be borne jointly*

[emphasis added; unofficial translation].

This approach of the Supreme Court has subsequently been replicated in a number of cases (*Devi Sunuwar v. District Police Office, Kavre et. al*, WPN 0641/2063, decided on 18 Sep. 2007. *Purni Maya Lama v. DPO, Kavre etc. al*, WPN 1231/2063, decided on 10 March 2008. *Jaya Kishor Lav v. District Police Office Dhanusha et al*, WPN 0681/2063, decided on 2 Feb. 2009 related to violations committed during the conflict).

III. International legal framework

A. International humanitarian law

12. The duty of States to prosecute individuals for 'grave breaches' of international humanitarian law – the laws of war – is well established.⁷ Common Article 3 of the four Geneva Conventions of 1949 prohibits, among other things, summary executions, torture and other ill-treatment, the taking of hostages, and punishment without fair trial. Common Article 3 binds both parties to the conflict and adherence is not based on reciprocity - one party to the conflict cannot excuse its own violations on the basis that the other party to the conflict is also violating it. The High Contracting Parties are required to enact criminal legislation to prosecute individuals ordering or committing grave violations.

13. The duty to investigate and prosecute violations committed in the context of an internal armed conflict has been significantly reinforced over the past two decades, thanks in particular to the investigations into atrocities committed in the Balkans, which culminated in the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY). The body of jurisprudence of the ICTY constitute in this respect a very strong source of interpretation of states' obligations. The Rome Statute, which brought into

⁷ Under Articles 49, 50, 129 and 146 of Geneva Convention I, II, III, and IV of 1949 respectively.

being the International Criminal Court (ICC), sets out in its preamble the obligation of every state "to exercise its criminal jurisdiction over those responsible for international crimes". It has also recognized the issue of 'war crimes' in the context of an internal armed conflict. While no legal implications pertain to non-party states, such as Nepal, the establishment of the ICC is evidence of an international resolution that those most responsible for gross violations must not go unpunished. It also reflects the historic growth of international customary law - rules that, though not embodied in treaty law, have become widely accepted as binding as a result of the general practice of States.

B. International human rights law

14. Nepal has ratified both the *International Covenant on Civil and Political Rights* (ICCPR)⁸ and the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT),⁹ and is therefore subject to the general obligation of 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.
15. In both its General Comment number 31 and its decisions on individual cases,¹⁰ the Human Rights Committee has made it clear that the State party has a duty to thoroughly investigate alleged violations of human rights, particularly enforced disappearances and violations of the right to life, and to criminally prosecute, try and punish those deemed responsible for such violations.¹¹
16. Responding to a case in Nepal, *Sharma v. Nepal*, the Human Rights Committee has reaffirmed its position that the States parties are required under the ICCPR to take effective steps to investigate violations of human rights recognized 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.¹²

⁸ Under Article 2.3 (a), the ICCPR requires States parties to ensure that victims of violations of the Covenant "[...] have an effective remedy."

⁹ Under Articles 13 and 14 of the Convention against Torture (CAT), the right of torture victims to adequate remedy and reparation is guaranteed.

¹⁰ General Comment No. 31 regarding "Nature of the General Legal Obligation Imposed on States Parties to the ICCPR" issued by the Human Rights Committee in 2004 reads: "Where [investigations that States parties are required to undertake] reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under domestic or international law, such as torture and similar cruel, inhuman and degrading treatment [...] summary and arbitrary killing [...] and enforced disappearance".

¹¹ See *Bautista de Arellano v. Colombia*, Comm. No. 563/1993, CCPR/C/55/D/563/1993 (1995); *Chaparro v. Colombia*, Comm. No. 612/1995, CCPR/C/60/D/612/1995 (1997); *Hugo Rodríguez v. Uruguay*, Comm. No. 322/1988, CCPR/C/51/D/322/1988, 12.4 (1994).

¹² Considering a complaint lodged by Yeshoda Sharma in relation to disappearance of her husband Surya Prasad Sharma in the context of the armed conflict in Nepal, the Human Rights Committee, in November 2008, adopted the views that Nepal is under an obligation to provide the victim with an effective remedy, including a thorough and effective investigation into the disappearance and fate of her husband, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for her and her family for the violations suffered.

17. In order to give effect to the right to an effective remedy guaranteed under the human rights treaties including ICCPR, all alleged human rights and international humanitarian law violations committed by individuals on all sides of the conflict must be investigated and, if appropriate, prosecuted. The onus for respecting these obligations rest on all branches of the Government and the judiciary must implement these obligations irrespective of the actions of the executive - and *vice versa*. Bearing in mind that the rights of victims to an effective remedy applies at all times, bypassing this duty to investigate and prosecute for the mere reason that the Government has taken initiatives to set up transitional justice mechanisms constitutes a separate violation of the ICCPR's "effective remedy" provisions which obligates the State to implement effectively the international human rights treaties to which Nepal is a party.¹³ It is a constitutional imperative for all branches of the Government to ensure the right to remedy by prompting thorough, independent and impartial investigation of alleged violations of human rights.
18. International Human Rights Law obliges States to investigate allegations of serious violations and to prosecute suspected perpetrators. With respect to International Human Rights Law, the rule is set out in articles 2 of ICCPR, which requires a State party to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in it and also to ensure an effective remedy for any person whose rights have been violated. The UN Human Rights Committee has repeatedly held that the failure to investigate and punish perpetrators of human rights violations constitutes a separate violation of the ICCPR. Similarly, article 7 of the 1984 Convention against Torture (CAT), which Nepal ratified in 1991, obliges States parties either to try or to extradite anyone who perpetrates torture.
19. Nepal did exercise its prerogative to derogate from the ICCPR on two occasions during the conflict but as it is clearly stated under article 4 of ICCPR, these derogations can never apply to so-called underogable rights such as the right to life and the right to be free from torture. International human rights law remains in effect, despite a situation having reached a threshold of "armed conflict" such that IHL also applies. Both the Maoists and the Government were obliged to respect their prohibitions on certain types of acts in those areas where they were in effective control. All alleged violations with respect to International Humanitarian Law and International Human Rights Law- perpetrated by individuals on either side of the conflict - must therefore be subject to criminal investigation. Failure to provide this would constitute a separate violation of the ICCPR's effective remedy provisions, as well as of international customary law.

¹³ Interim Constitution of Nepal, article 33(m).

Relevant UN principles and policies

20. A vast body of instruments¹⁴ outlines the legal obligation of States to ensure accountability and provide redress to victims of violations of human rights. The *UN Principles on the Right to Remedy and Reparations* 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."*¹⁵

21. Similarly, Principle 19 of the *UN Updated Principles on Combating Impunity* indicates that,

*"States shall 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."*¹⁶

It would be appropriate to stress the terms 'prompt' and 'area of criminal justice' of this principle in the Nepal's context.

22. Furthermore, at no point during the Universal Periodic Review of Nepal at the Human Rights Council in January 2011 was there any suggestion that the envisaged establishment of transitional justice mechanisms offers an alternative to criminal justice procedures. On the contrary, recommendations made by member States called both for "perpetrators of human rights violations [to be] brought to justice" and for the urgent establishment of the Commissions as well as, notably, "that there be no amnesty for grave violations of human rights."

IV. Conclusion

23. The legal position that investigations and prosecutions for human rights and International Humanitarian Law violations committed during conflict would only be dealt with under transitional justice mechanisms is inconsistent both with Nepal's existing legal frameworks as well as with the country's obligations under international law including ICCPR and customary international law.

¹⁴ It should be noted that while many of these instruments do not have the legally binding character of ratified international treaties, many of their provisions have acquired the level of customary international law.

¹⁵ 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.

¹⁶ Principle 24 of the UN Updated Principles on Combating Impunity, endorsed by the UN Commission on Human Rights in 2005

24. As such Nepal is required to establish accountability for conflict related human rights and International Humanitarian Law violations through criminal justice procedures.