



संयुक्त राष्ट्र सङ्घका लागि नेपालको स्थायी नियोग
PERMANENT MISSION OF NEPAL
TO THE UNITED NATIONS
GENEVA

No. G/OHCHR/223

The Permanent Mission of Nepal to the United Nations and Other International Organizations in Geneva presents its compliments to the Office of the United Nations High Commissioner for Human Rights, Special Procedures Branch, and with reference to the joint communication Reference: AL NPL 2/2014 dated 3 July 2014 sent by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; the Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Special Rapporteur on violence against women, its causes and consequences, has the honour to transmit herewith the response of the Government of Nepal entitled "Government's views on the Act on Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2014" in this respect.

The Permanent Mission of Nepal to the United Nations and Other International Organizations in Geneva avails itself of this opportunity to renew to the Office of the United Nations High Commissioner for Human Rights, Special Procedures Branch, the assurances of its highest consideration.

Geneva, 12 December 2014

Office of the United Nations High Commissioner for Human Rights
Special Procedures Branch
Palais des Nations
CH-1211 Geneva 10.

OHCHR REGISTRY

15 DEC. 2014

Recipients :.....S.P.O.....
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**Government's views on
the Act on Commission on Investigation of Disappeared Persons, Truth and Reconciliation,
2014**

As a party to seven core international human rights instruments and four Geneva Conventions, among others, Nepal strongly upholds the fundamental rights and freedoms guaranteed by international human rights and humanitarian laws. Protection and promotion of human rights of all Nepalese citizens with equality and non-discrimination is one of the cardinal postulates of the governance system in Nepal.

The ten-year long armed conflict from 1996 to 2006 ended with the signing of the Comprehensive Peace Accord (CPA) in 2006. The Interim Constitution of Nepal was promulgated in 2007. With the successful election of second Constituent Assembly (CA) on 19 November 2013, the entire nation is actively engaged in the framing of a new democratic constitution. The primary goal of the Government of Nepal is to achieve socio-economic and political transformation within an overall framework of democratic polity and inclusive human rights regime through a new constitution written by the CA. The CA which also serves as the Legislature-Parliament, enacted the **Act on Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2014** after a wide consultation with stakeholders and extensive discussion in the Parliament with a view to fulfilling the obligations outlined in the CPA and the Constitution. The international human rights and humanitarian laws as well as the Supreme Court verdict given on 2 January 2014 with respect to the March 2013 Ordinance on truth and reconciliation were given thoughtful consideration during the legislative procedure. The statute on transitional justice is believed to be a landmark instrument to address the issues of **past human rights violations committed by both State and non-State actors**. The legislation aims at achieving greater national unity and reconciliation, as envisaged in the Constitution and the CPA. The GoN firmly believes that the newly enacted legislation is in tune with Nepal's national and international commitments. It may be noted that the question of constitutionality of the Act is being considered by the Supreme Court of Nepal, and hence it is *sub judice*, and any conclusion drawn against the Act from outside the court of law would be unacceptable. We request the Committee that the Act is a product of a unique peace process and political development in Nepal, while also conforming to the State's obligations under the national and international laws.

The GoN will fully honour the judgment of the Supreme Court once it comes out. At this stage, we deem it important to provide the following perspectives on the Act and the issue of Transitional Justice Mechanism (TJM) in the Nepalese context. On August 27, 2014, the GoN



also responded to the issues raised by the OHCHR through its technical note and attached letter signed by the High Commissioner for Human Rights.

1. The Question of Power to Recommend Amnesties for Gross Violations of International Human Rights Law

The Act does not have provision for blanket amnesty in the first place, and those spoken of are subject to specific conditions. In the case of serious violation of human rights, Nepal understands its obligations under the international law. The Act contains the provisions of fact-finding and investigation of the case, protection of witnesses, participation of victim in the entire process of justice, public disclosure of the fact and prosecution of the alleged perpetrator. One of the objectives of the Act, as enshrined in the Preamble, is to prosecute those who were involved in serious violation of human rights. The term 'serious violation of human rights' is categorically defined in Section 2 of the Act, which is in conformity with the provisions of international law. Murder, abduction and hostage taking, disappearance of persons, mutilation or disablement, physical or mental torture, rape and sexual violence, looting, seizure, breaking or arson of private and public property, forceful eviction from house and land or displacement by any other means and any types of inhuman act committed against international human rights or humanitarian law or other crimes against humanity are considered as crimes of serious nature. The Nepalese people have rights to truth on all issues surrounding the 10-year conflict, and see the perpetrators get investigated, prosecuted and penalized commensurate with the crimes. Section 26 provides for conditional amnesty, not blanket amnesty, looking at the severity, degree of involvement and nature of crime. The Commission on Investigation of Disappeared Persons and Truth and Reconciliation Commission may recommend conditional amnesty under certain terms and conditions which are clearly spelt out in Sub-section (4), (5) and (6) of Section 26.

Prior to making recommendation for amnesty, the Commission must hold close consultation with the victim for their consent. Likewise, any person recommended for amnesty in a certain crime can be prosecuted for other offence if the Commission finds that the person is involved in more than one crime of gross violation of human rights. Truth must be established and revealed first.

Hence, it cannot be presumed that the two Commissions envisaged by the Act, which enjoy structural and functional independence and autonomy, recommend for amnesty without considering the core values of human rights. As per the Sub-section 3 of Section 20, the Commission must abide by the universally accepted principle of justice and human rights while carrying out its activities. The provision of conditional amnesty, which is permitted even under international human rights law in order to create an environment of peace and reconciliation in a post-conflict society, cannot be interpreted as blanket amnesty. There are strong evidences from countries in similar situations that amnesties are effective in curbing abuses and excesses when

implemented in a credible manner and with political commitment. Amnesties may help achieve much-needed stability through the transition period. Trials and amnesties can co-exist without compromising accountability.

2. The Obligation to Investigate and Prosecute

Transitional justice mechanisms have been established in many post-conflict societies across the world to deal with the violation of human rights and humanitarian law during armed conflicts. In the absence of a transitional justice mechanism, victims of armed conflict may not get full justice. Ordinary criminal justice system may not be sufficient for seeking truth, providing reparation to victims, shaping collective memory to facilitate reconciliation process and reforming the institutions.

As stated above, the Act covers all elements that should be contained in a law aimed at establishing transitional justice mechanism. The provisions of fact-finding, investigation, holding perpetrators accountable, ensuring reparation for victims, and recommendation for prosecution are envisaged in the Act. As per Section 25, if any person except the one who has reconciled with victim pursuant to Section 22 and the one who is recommended for amnesty pursuant to Section 26 is found to be involved in serious violation of human rights after the investigation conducted by the Commission, the case must be recommended to the GoN. Importantly, as per Sub-section (3) of Section 21, the Commission is empowered to recommend to the GoN, through its interim report, to file case/s against the perpetrator found guilty of the serious violation of human rights. The provisions relating to filing the case are quite clear. Section 29 of the Act states that if the Commission submits its report to the GoN with a recommendation of prosecution against any perpetrator, the Ministry of Peace and Reconstruction is bound to forward such recommendation to the Attorney General, who has constitutional authority to file cases in which the Government of Nepal is the plaintiff. The Attorney General or a public prosecutor designated by him or her must decide whether a case can be prosecuted or not, based on ground and reason. If the Attorney General or public prosecutor takes the decision to file a case against the perpetrator, the case is tried in the Special Court. The provisions in Sub-sections (2), (3) and (4) of the Section 13 pave the way for investigation of the conflict related cases after consulting with concerned courts or bodies where the cases are under consideration. It does not substitute existing criminal justice mechanism. Any case *sub judice* in the court of law can be transferred to other bodies only in certain conditions as prescribed by the law. However, the Act does not provide for all existing conflict related cases to be diverted from the criminal justice process. In a country like Nepal where the judiciary is independent, capable and competent, media enjoys full freedom of expression, and civil society organizations work hand-in-hand as

government's partners in development, every investigation and prosecution will be conducted in a transparent and credible manner.

3. Commission's Reconciliatory Power vis-a-vis the Rights of Victims

The comments that the Commission is entrusted with broad power to facilitate reconciliation, including without the consent of victims, do not hold true. Section 22 of the Act does not grant any power to the Commission to facilitate reconciliation between the victim and the perpetrator without their freely expressed consent. Reconciliation by nature is a product of mutual and free agreement of both parties as it is purely a voluntary process. Sub-section (2) of the Section 22 states that the Commission may attempt at reconciliation between the perpetrator and the victim if the perpetrator repents and apologizes for the past wrong acts which are of pardonable nature. The Commission cannot execute forceful reconciliation. All relevant provisions of the legislation should be taken in perspective and interpreted in a holistic manner. Section 20 of the Act clearly states that the Commission shall perform its activities in an independent and impartial manner, and hence it cannot flout the basic values of justice and human rights while carrying out its responsibilities. There should be no doubt in the intention.

4. Guarantee of Impartiality and Independence of the Commission

The structural and functional independence of the Commission and its impartiality and autonomy are guaranteed by the Act. A clear provision contained in the Act states that a separate Recommendation Committee headed by a former Chief Justice recommends names of the chairperson and members of the Commission for appointment. The Committee must determine the public selection procedure and publish such procedure before making recommendations. The Committee's recommendations are binding to the GoN. Appointment of at least one woman member in the Commission is ensured by the Act.

Section 4 of the Act outlines the required qualifications of the chairperson and members of the Commission. They must be persons of integrity and high moral character with requisite experience of working in the field of human rights, peace, law, conflict management or sociology. The Act also guarantees terms and conditions of the service of the chairperson and members of the Commission.

Section 10 of the Act states that the Secretary of the Commission, who works as an administrative chief of staff of the Commission, is appointed from among the special class officers of Nepal Judicial Service. However, the Secretary thus appointed is not entitled to exercise power, function and duties of the chairperson and other members of Commission. Therefore, the appointment of the Commission's Secretary by the GoN would have no adverse effects on the independence and impartiality of the Commission.

Likewise, the provisions of Section 11 do not pose any hindrance in the smooth functioning of the Commission. **The GoN makes available the personnel required for the Commission only after consulting with the Commission. The Commission is empowered to appoint required number of personnel on contract basis. The Act has not given any room for GoN's discretion in the overall functioning of the Commission.** The duty of the GoN to make arrangements for office space, logistics and other necessary resources for the functioning of the Commission is guided by a standard rule of the legal system. This is equally applicable to all public constitutional bodies.

As provided in Section 27, the report submitted by the Commission to the GoN is a public document. It states that the report of the Commission must be tabled in the Legislature-Parliament for its disclosure to the public. The Act has no provision which authorizes the GoN to keep this document confidential.

Furthermore, the GoN may work out further provisions to implement the objectives of the Act while framing the Working Rules.

In conclusion, the peace process of Nepal started as a country-owned and nationally driven process with the signing of the CPA between the rebel group and the coalition of parties in the then Government has to fulfil the commitment to establish mechanism/s of transitional justice. This requirement is embedded in the CPA and has also been an integral part of the Constitution. The GoN believes that transitional justice mechanisms and processes are critical to ensuring lasting peace and stability in Nepal. The Act is a genuine endeavor made by the entire nation through extensive discussion based on ground reality and Nepal's national and international obligations. Implementation of the TJM is believed to be an effective vehicle to deal with the past, especially to heal up the wounds of armed conflict through sustainable peace and justice in society. The experience of other countries reveals that the mandates of TRCs are charted out to respond to specific situations and ground reality of the concerned country and meeting the ultimate goal of lasting peace and justice. As the GoN is actively engaged to establish the Commission at the earliest, we urge the international community and the UN Human Rights Mechanisms, including the OHCHR to extend full support to the process without expressing doubt in the intention for the sake of justice and peace in the Nepalese society. We want to ensure our constructive engagement with all stakeholders as this process moves forward.