

Mandates of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; 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.

REFERENCE: AL
NPL 2/2014:

3 July 2014

Dear Mr. Dhungana,

We have the honour to address you in our capacity as Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and Special Rapporteur on violence against women, its causes and consequences pursuant to Human Rights Council decision 25/116, and resolutions 18/7, 26/12, 25/13, and 23/25.

In this connection, we would like to refer to the letter of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence of 22 October 2012 and the letter of the Working Group on Enforced or Involuntary Disappearances of 21 March 2013 in relation to the proposed and later adopted Ordinance on Investigation of Disappeared Persons, Truth and Reconciliation Commission 2069 (2013).

We would like to draw your Government's attention to the analysis put at the disposal of the Government of Nepal by the High Commissioner for Human Rights on the **Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (2014)** adopted on 25 April 2014 (henceforth the Act), as contained in the technical note published on 1 July 2014.¹

The incompatibilities of the adopted Act with international obligations as identified among others by the Office of the High Commissioner for Human Rights (OHCHR) are of grave concern to our mandates. In light of the existing obligations of Nepal under international law, we strongly call on your Government to initiate

¹ See http://www.ohchr.org/Documents/Countries/NP/OHCHRTechnical_Note_Nepal_CIDP_TRC_Act2014.pdf.

amendments to the adopted legislation, in line with international standards, the ruling of the Supreme Court of January 2014, and following appropriate consultation with victims, families of victims, civil society and the national human rights commission.

We would like to offer additional reflections on the questions of 1) the competence of the Commission to recommend amnesties for perpetrators including for gross violations of human rights and serious violations of international humanitarian law; 2) the competence of the Commission to initiate reconciliation processes in the absence of a request by the victim or the offender, and 3) the selection procedures for Commission members.

1) The competence to recommend amnesties for perpetrators including for gross violations of human rights and serious violations of international humanitarian law

Beyond the analysis provided for by OHCHR in relation to the incompatibility of the Commission's competences to recommend amnesties for perpetrators including for gross violations of human rights and serious violations of international humanitarian law and our concerns raised in the letters of 22 October 2012 and 21 March 2013 respectively, we would like to draw your attention to the consequences that such amnesties could entail.

Amnesties for such violations would convey to the Nepalese society that some people are above the law. Indeed, the legal provision of amnesties in those cases could – short of encouragement – certainly be interpreted as a direct acquiescence by the State for future international crimes to take place. Specifically in respect of disappearances, the Declaration on the Protection of All Persons from Enforced Disappearances states that persons who have or are alleged to have committed an act of enforced disappearance 'shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction'. Amnesties for gross human rights violations or serious violations of international humanitarian law cannot be part of a rule-of-law-based society. States have a due diligence responsibility to end impunity and hold accountable those responsible of such serious violations.

We therefore strongly call on your Government to urgently initiate a process of amendment of the Act, in line with international standards, the ruling of the Supreme Court of January 2014, and following appropriate consultation with victims, families of victims, civil society and the national human rights commission. The Government must ensure that the country meets its international obligations for the prevention of future violations.

2) The competence of the Commissions to initiate reconciliation processes in the absence of a request by the victim or the offender

We also subscribe to the concern expressed by OHCHR about the competence of the Commission to initiate a “reconciliation” process in the absence of an explicit request by the victim or the perpetrator.

We would like to draw the attention of your Government to the fact that history provides multiple examples of the contradictions associated with forcing people into processes whose success depends, precisely, on the exercise of choice on the part of participants. Attitudes cannot be coercively transformed.

Reconciliation is not to be conceived in terms of an outcome that can be pursued in the absence of initiatives that promote justice, truth, reparations, and guarantees of non-recurrence, among other interventions (A/HRC/21/46). Reconciliation at the social level is not a matter of one-to-one encounters – even less if those are unrequested – but of establishing institutions that are trustworthy and that genuinely embody the idea that victims as well as all others are rights holders.

The process of reconciliation cannot be “reduced” to a pardon procedure among individuals. Gross human rights violations and serious violations of international humanitarian law do not only constitute a violation of the rights of each of the victims, but a violation of the very principle of the rule of law. Individual agreements, the more if they are given under pressure and frequently in situations of physical insecurity, fail to address the systemic and structural dimension of such violations.

3) Undefined selection procedures for the appointment of members of the Commission and the Recommendation Committee prone to possible misuse

Truth commissions derive their power to a large extent from the moral authority and competence of commissioners. Hence selecting suitable commissioners is a crucial factor in their good functioning (A/HRC/24/42, para. 53).

We note that the law establishes in its article 3 paragraph 3 a *Recommendation Committee* consisting of five members, four of whom are appointed by your Government. In this connection, we note that the appointment procedures for the selection of the members of the Recommendation Committee are not defined by the current legislation.

The procedure needs to be transparent guaranteeing the independence, impartiality, expertise and legitimacy of the Commission. As such, some attention should be paid to the representation of the different sectors of society. In this, the use of selection panels is certainly more appropriate than the effort to guarantee representation through the outright apportioning of Commission’s seats. Hence, technical expertise in the core areas of work of a commission should hence be the main criteria for members of a Recommendation Committee. Furthermore, individuals with records raising questions of conflict of interest given their connection with events or represented groups that the commission is likely to investigate, should not be part of such a commission.

We also note that the Recommendation Committee is the one to define the selection procedure for the appointment of the Commission members (article 3 paragraph 5 of the Act). Given the lack of procedures for the selection of at least four of the Recommendation Committee members, this competence of the Recommendation Committee may be subject to manipulation, or at least, open to the appearance of lack of impartiality.

For Nepal to come to terms with its past, such Commission needs to be granted functional independence. Lack of transparency in the process that will lead to the selection of commissioners raises questions about the autonomy of the commission *ab initio*. Furthermore, the Commission should be granted full access to information, as well as the necessary financial, human and logistic resources.

Finally, let us express our disappointment at the minimum participation of only one woman among the five members of the Recommendation Committee. Given the reported high prevalence of sexually-related crimes during the period of inquiry, this is not only disappointing but unlikely to enable the Commission to contribute to the growing tendency of truth-seeking initiatives to adopt a strengthened gender perspective.

In light of the afore-mentioned concerns, we strongly call on your Government to speedily initiate a process of amendment, with an emphasis on the amnesty provisions, and in line with international standards.

We would also like to respectfully recall that three of our mandates have pending requests for a country visit to Nepal, which we would encourage you to honour in 2014.

We would like to inform your Government of our intention to issue shortly a news release which will indicate that we have been in contact with your Government in view of the concerns highlighted above.

Your Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Mr. Dhungana, the assurances of our highest consideration.

Pablo De Greiff

Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

Ariel Dulitzky

Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances

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