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

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence pursuant to Human Rights Council resolution 18/7.

In this connection, I would like to draw the attention of your Excellency's Government to information received regarding the possible promulgation of an ordinance establishing a Commission on Investigation of Disappeared Person, Truth and Reconciliation. Certain provisions of this ordinance would allegedly contravene international norms and standards. I am also concerned about the recent promotion of public officials allegedly involved in serious human rights violations or violations of international humanitarian law in the context of the armed conflict in Nepal.

In the aftermath of a conflict, as it has been the case in many other countries worldwide, Nepal has faced the difficult challenges of having to come to terms with the past violence while rebuilding and reconciling torn communities. As history has shown, transitional justice processes, through their four elements *i.e.* truth-seeking initiatives, justice, reparation and guarantees of non-recurrence, require collective efforts as well as a strong commitment with the view to restoring the dignity of the victims or their families, and truly achieving justice and reconciliation.

In this regard, I would like to commend the initial steps taken by the Government of Nepal towards the establishment of transitional justice mechanisms to address past violations of human rights and of international humanitarian law.

Through the signature of the Comprehensive Peace Accord (CPA) in November 2006, the Government of Nepal and the Communist Party of Nepal (Maoist) acknowledged that gross violations of human rights and serious violations of international humanitarian law had been perpetrated during the armed conflict in Nepal and committed to take measures to address these. In particular, both signatories agreed to:

- "make public the information about the real name, surname and address of the people who were disappeared by both sides and who were killed during the war and to inform also the family about it", para. 5.2.3;
- "constitute a National Peace and Rehabilitation Commission" in order "to rehabilitate people victimized and displaced by the war", para. 5.2.4;
- "constitute a High-level Truth and Reconciliation Commission […] 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 reconciliations in the society", para. 5.2.5;
- "constitute the National Peace and Rehabilitation Commission, the Truth and Reconciliation Commission, a High-level Recommendation Commission for the Restructuring of the State and other mechanisms as per necessity", para. 8.4.

The Interim Constitution of January 2007 reaffirmed the State's responsibility to constitute a high-level Truth and Reconciliation Commission and to provide relief to the families of victims of enforced disappearance based on the report of the commission established to investigate the cases of persons who were the subject of enforced disappearance during the course of the conflict, Interim Constitution of Nepal (15 January 2007), part 4, para. 33 (q) and (s).

On the basis of the aforementioned provisions of the CPA and the Interim Constitution, two draft bills for the establishment of a Truth and Reconciliation Commission and a Commission on Disappearances were introduced and made public respectively in July 2007 and November 2008 by the Ministry of Peace and Reconstruction (MoPR). Thereafter, consultations were held with a number of victims' groups and civil society organizations, which issued recommendations to the MoPR. Following their approval by the Council of Ministers, both bills were tabled in Parliament. In May 2010, the bills were transmitted to the Legislative Committee for further examination. To resolve outstanding issues, a sub-committee was established in April 2011.

Given the Legislative Committee's and the sub-committee's failure to finalise the draft bills, on 1 November 2011, the political parties concluded a seven-point agreement in which they committed to establish the Truth and Reconciliation Commission and Disappearances Commission within one month. A Task Force was mandated to finalise the bills. In January 2012, the Task Force presented its suggestions to the Legislative Committee. As possible alternatives to finalise the bills, the Task Force reportedly proposed *inter alia* that the Legislative Committee adopt the ways of seeking truth by the Truth and Reconciliation Commission and the Commission on the Disappeared and the granting of amnesties, however specifying that amnesty should be ruled out in some incidents of a serious nature. It further suggested that the possibility to enact a single Bill by merging the two bills could be considered. .

In this context, the following information has been drawn to my attention by a number of sources:

Following a Supreme Court ruling prohibiting its extension for another three months, the Constituent Assembly was automatically dissolved on 28 May 2012. The Legislative Parliament was also dissolved the same month.

In the absence of a legislative body, it is reported that on 28 August 2012, the Council of Ministers transmitted an ordinance establishing a Commission on Investigation of Disappeared Person, Truth and Reconciliation to the President of Nepal. In the event the ordinance is promulgated, the Commission would reportedly be vested with the competence to recommend to the Government the granting of amnesties including for crimes under international law. Additionally, the Commission would have the competence to initiate reconciliation processes in the absence of an application from the victim or the perpetrator.

Furthermore, I wish to refer to the press release issued by the High Commissioner for Human Rights on 8 October 2012. In this respect, I also wish to express my concern as to the promotion of Colonel [redacted] to the rank of Brigadier General, despite evidence of his alleged involvement in the arbitrary detention, torture and disappearances of individuals at the Maharajgunj Barracks in 2003-2004 and a Supreme Court order to investigate these allegations and bring to justice those responsible. The appointment of Mr. [redacted] as Inspector General of the Nepal Police is also a matter of concern given the ongoing investigation against him for his involvement in the enforced disappearance and extrajudicial killing of five students.

In light of these allegations, I would like to share my main concerns about the provisions of the ordinance as well as about the promotion of public officials allegedly involved in crimes under international law, and draw the attention of your Excellency's Government to international norms and principles applicable to the present case.

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

It is widely recognized that for violations constituting crimes under international law, States are bound by the principle *aut dedere, aut judicare*, according to which, they are required to either prosecute perpetrators of these crimes, or to extradite them. This principle is for instance set forth in the 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 (Basic Principles on the Right to a Remedy and Reparation) adopted by General Assembly resolution 60/147 (Annex, paras. 4-5).

Under article 2 of the International Covenant on Civil and Political Rights (ICCPR), all States parties are required to give effect to the general obligation to investigate allegations of violations of rights protected under the ICCPR promptly, thoroughly and effectively through independent and impartial bodies and to bring those responsible to justice (General Comment No. 10, CCPR/C/21/Rev.1/Add. 13, paras. 15 and 18). As noted by the Committee, these obligations arise notably in respect of torture or cruel, inhuman or degrading treatment or punishment (article 7), arbitrary deprivation of life (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). If

committed in a systematic manner against the civilian population, violations such as those referred to above may amount to crimes against humanity (CCPR/C/21/Rev.1/Add. 13, para. 18; article 7, Rome Statute of the International Criminal Court). Furthermore, the obligation to investigate violations and prosecute those responsible also derives from the State's duty to give effect to the victim's right to an effective remedy under article 2(3) of the ICCPR and paras. 11 to 13 of the Basic Principles on the Right to a Remedy and Reparation.

It should be further noted that the failure to investigate and bring to justice perpetrators of such violations may in itself give rise to a separate breach of the ICCPR, as pointed out by the Human Rights Committee (CCPR/C/21/Rev.1/Add.13, para. 18). This was further recalled in the Committee's communications *Yasoda Sharma v. Nepal*, No. 1496/2006 (CCPR/C/94/D/1469/2006, para. 7.10) and *Giri v. Nepal*, No. 1761/2008 (CCPR/C/101/D/1761/2008, para. 7.10).

Likewise, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) requires States parties to ensure that all acts of torture are criminal offences under their domestic legislation (article 4(1)) and that these offences are punishable by appropriate penalties taking into account the grave nature (article 4(2)). Article 7(1) of the CAT explicitly requires States to prosecute persons who have committed acts of torture on their territory or under their jurisdiction or to extradite them.

Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture are prohibited under common article 3 to the Geneva Conventions of 12 August 1949. A similar provision is enshrined in article 4(2)(a) of the Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977 (Protocol Additional II) which prohibits "violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment". Common article 3 of the Geneva Conventions require each party to the conflict to protect persons taking no active part in the hostilities, including civilians and "members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause". The protection of the civilian population against attacks is further embodied in article 13(2) of Protocol Additional II. It should be noted that under customary international law, all parties to an armed conflict, in the conduct of the hostilities, are required to distinguish at all times between civilians and combatants.

According to a recent study carried out by the International Committee of the Red Cross, there is sufficient State practice to establish the obligation under international customary law to investigate war crimes allegedly committed in the context of non-international armed conflicts and to prosecute those responsible (International Committee of the Red Cross, *Customary International Humanitarian Law*, vol. I, by Jean-Marie Henckaerts and Louise Doswald-Beck, Cambridge University Press, 2005, rule 58, pp. 609-610).

In addition to the well-established obligation to carry out an investigation into alleged violations, there is a growing recognition that gross violations of human rights and serious violations of international humanitarian law should not be subject to amnesties, as provided in a number of international instruments.

Of particular relevance is the Updated Set of Principles for the protection and promotion of human rights through action to combat impunity (Principles to combat impunity). Principle 24 states that "[t]he perpetrators of serious crimes under international law may not benefit from [amnesties and other measures of clemency] until such time as … the perpetrators have been prosecuted before a court with jurisdiction", even where such measures are intended to foster national reconciliation (E/CN.4/2005/102/Add.1). This view was also endorsed in decisions of international courts. For instance, the International Criminal Tribunal for the Former Yugoslavia stated that given the peremptory nature of the norm prohibiting torture, an amnesty for this act would be "null and void", and "[p]roceedings could be initiated by potential victims … before a competent international or national judicial body with a view to have the national measure declared internationally unlawful" (*Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, para. 155).

As mentioned in principle 6 of the Basic Principles on the Right to a Remedy and Reparation, a number of treaties also provide or imply that statutes of limitations are not applicable to gross violations of international human rights law and serious violations of international humanitarian law. Article 4(2) of the ICCPR provides that no derogation from articles 6 and 7 respectively prohibiting arbitrary deprivation of life and torture may be permitted (see also Human Rights Committee General Comment No. 32, CCPR/C/GC/21, para. 6). Similarly, no exceptional circumstances whatsoever may be invoked as a justification of torture under article 2(2) of the CAT.

Therefore, on the basis of these and other sources, and of established State practice, in my view, the provisions of the ordinance conferring to the Commission the competence to recommend amnesties including for gross violations of human rights and serious violations of international humanitarian law would be inconsistent with Nepal's legal obligations under international law.

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

The fact that the Commission on Investigation of Disappeared Person, Truth and Reconciliation would be entitled to initiate a reconciliation process in the absence of an explicit request by the victim or the perpetrator is equally a matter of concern to my mandate. While the prosecution of serious violations should be initiated *ex officio*, reconciliation processes require both the consent of the victims and of the offenders in order to be consistent with the very spirit of reconciliation. In this regard, I wish to refer to the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, adopted by Economic and Social Council 2002/12 (E/2002/INF/2/Add.2, Annex). Principle 2 defines restorative processes as "any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from

the crime, generally with the help of a facilitator." This requires the free and voluntary consent of the victim and the offender as stated in principle 7. Furthermore, principle 13 requires that fundamental procedural safeguards guaranteeing fairness to the offender and the victim be applied to restorative processes, including the following: "(c) Neither the victim nor the offender should be coerced, or induced by unfair means, to participate in restorative processes or to accept restorative outcomes."

Moreover, I wish to underline that "[v]ictims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families" in accordance with the Basic Principles and Guidelines on the Right to a Remedy and Reparation referred to above (A/RES/60/147, Annex, para. 10). Furthermore, "a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation." I am concerned that processes of reconciliation that can be initiated in the absence of a request from victims would unnecessarily burden victims.

At a broader level, I would like to propose to your Excellency 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. In addition to the conceptual difficulties associated with the idea of forcing people into processes that are supposed to lead to reconciliation, there are some practical considerations to keep in mind as well. No truth commission established heretofore has undertaken such a project – for good reason, in my opinion. In cases in which victims and perpetrators number in the thousands, if not tens of thousands, the institutional burden of bringing together the appropriate parties to such reconciliation events is overwhelming. Even assuming clarity about responsibility and excluding instances of multiple victimization (and neither assumption can be taken for granted, for if one could, the establishment of a commission would be less urgent), achieving the correct victim-perpetrator pairings would be immensely difficult and can lead to all sorts of complications, including some stemming from concerns about fair and equal treatment. Ultimately, it is not even clear that the risks of immense distractions this proposal poses for a truth commission are even worthwhile.

Reconciliation, as I argued in my first report to the Human Rights Council (A/HRC/21/46), 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. In short, 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*.

(3) The promotion of public officials allegedly involved in human rights violations or violations of international humanitarian law

I strongly believe that the fight against impunity, in particular for serious crimes, is critical to achieve justice and reconciliation. As stated in the aforementioned Principles

to combat impunity, "[p]ublic officials and employees who are personally responsible for gross violations of human rights, in particular those involved in military, security, police, intelligence and judicial sectors, shall not continue to serve in State institutions." Additionally, "[p]ersons formally charged with individual responsibility for serious crimes under international law shall be suspended from official duties during the criminal or disciplinary proceedings" (E/CN.4/2005/102/Add.1, principle 36(a)).

I therefore call on your Excellency's Government to ensure that any legislation establishing transitional justice mechanisms be in compliance with international norms and standards. With regard to the reported promotion of public officials who were allegedly involved in human rights violations, I would appreciate receiving information on the steps taken by your Excellency's Government to sanction perpetrators of gross violations of human rights and serious violations of international humanitarian law and prevent them from holding public office or from being promoted.

Since I am expected to report on these cases to the Human Rights Council, I would be grateful for your observations on the present letter. Your Excellency's Government's response will be made available in a report to the Human Rights Council for its consideration.

Finally, I wish to reiterate my disposal to undertake a country visit to Nepal to examine developments in the area of transitional justice and provide recommendations in the framework of my mandate, as already expressed in the letter sent to your Excellency's Government on 26 July 2012. I strongly encourage your Excellency's Government to respond positively to my request.

Please accept, Excellency, the assurances of my highest consideration.

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