Nepal: OHCHR position on UN support to the Commission on Investigation of Disappeared Persons and the Truth and Reconciliation Commission: 16 February 2016

1. The normative foundation for the work of the United Nations in advancing transitional justice is the United Nations Charter, the international human rights treaties to which Nepal is a party (*international law*), as well as a number of declarations, principles, and guidelines (*international standards and principles)*.

2. The United Nations has consistently maintained the position that, in accordance with international laws and standards, it cannot condone or encourage amnesties for genocide, crimes against humanity, war crimes or gross violations of human rights.[1] The United Nation's position regarding amnesties has been reaffirmed multiple times, including in the 2010 Guidance Note of the Secretary-General on United Nations Approach to Transitional Justice, and the Secretary-General's 2011 report on the rule of law and transitional justice.

3. The United Nation's position on amnesties is based on the obligation of a State to ensure the prompt, thorough, independent and impartial criminal investigation of gross violations of international human rights law and serious violations of international humanitarian law and where sufficient evidence exists, to prosecute the alleged perpetrators.

4. In addition, there is a duty on States to ensure an effective remedy, which is established in the *International Covenant on Civil and Political Rights* (article 2(3)(a)). An effective remedy encompasses both access to justice through criminal investigation and prosecution, and reparation for harm suffered. When gross violations of human rights have been committed, disciplinary and administrative remedies do not adequately satisfy the obligation on States to provide an effective remedy.

5. On 25 April 2014, the Parliament of Nepal passed the *Act on Commission on Investigation of Disappeared Persons and Truth and Reconciliation* ("the Act"), creating the Commission on Investigation of Disappeared Persons (COIDP) and the Truth and Reconciliation Commission (TRC). The Act was published on 21 May 2014. On 10 February 2015, the Government of Nepal established these two Commissions.

6. In June 2014, OHCHR issued a Technical Note providing an analysis of the Act and offered recommendations to the Government to ensure compliance with international laws and standards.[2] The Note concluded that the provisions in the Act that give the Commission powers to recommend amnesties for gross violations of international human rights law and serious violations of international humanitarian law fail to comply with Nepal's international legal obligations, and are also inconsistent with the United Nations policy on amnesties.

7. The Technical Note also noted OHCHR concern that the powers granted to the Commission under sections 13 and 29 could result in the avoidance or delay of criminal investigations and

[1] See Report of the United Nations Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, 3 August 2004 (UN document S/2004/616). See also statement from the new Secretary-General: "…the Organization cannot endorse or condone amnesties for genocide, crimes against humanity, war crimes or gross violations of human rights, nor should it do anything that might foster them." Spokesperson for Secretary-General Ban Ki-moon, 24 July 2007.

[2] http://www.ohchr.org/Documents/Countries/NP/OHCHRTechnical_Note_Nepal_CIDP_TRC_Act2014.pdf

prosecutions, which would be inconsistent with international law. Truth-seeking does not absolve States of their legal obligations with regard to criminal justice. The Commission must not be used to avoid or delay criminal investigations and prosecutions, which should be reinforced or completed, not replaced, by a truth commission.

8. Other provisions in the Act fall short of international standards and principles:
    a. Guarantees of impartiality and independence are essential to ensure public trust and support.[3] However, the Act does not contain provisions to ensure the independence and impartiality of the Commissioners or the operation of the two Commissions.
    b. Provisions concerning reparations should specify that victims have the right to reparation, and that full and effective reparations include not only restitution, compensation, rehabilitation, but also measures of "satisfaction" and guarantees of non-recurrence.
    c. The broad authority to facilitate reconciliation, including without the consent of the victim, is problematic as the nature of reconciliation means it cannot be forced upon people.
    d. Terms such as "serious violation of human rights", "act of disappearing a person" and "reparations" used in the Act are not clearly defined and are used inconsistently. These terms should be defined in full conformity with international law.

9. On 26 February 2015, the Nepal Supreme Court, in Order 069-WS-0057, ruled in favour of 234 victims of the conflict by upholding the primary role of the courts in delivering justice for criminal acts committed during the conflict. The Court held that any provisions of the Act that serve to compromise this judicial role are invalid, including the power to grant amnesties, powers to divert such cases from the courts or to otherwise interfere in such cases. However, OHCHR notes that no legislative or administrative action has been taken to reflect the decision of the Supreme Court in the enabling law or procedures of the Commissions.

10. In the absence of steps by the Government of Nepal to ensure that the enabling law and procedures of the COIED and TRC are in compliance with its international legal obligations, the United Nations is unable to provide support for these institutions.

11. OHCHR encourages the Government of Nepal to amend the *Act on Commission on Investigation of Disappeared Persons and Truth and Reconciliation* so that it is fully consistent with Nepal's obligations under international law. This step is essential for the United Nations to consider supporting the work of the two Commissions.

[3] On the selection of Commissioners, see also Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff A/HRC/24/42, paras, 53 to 62.