



TÉLÉCOPIE • FACSIMILE TRANSMISSION

DATE: 12 April 2019

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OBJET/SUBJECT: **JOINT COMMUNICATION FROM SPECIAL PROCEDURES**

Please find attached a joint communication sent by 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; the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Rapporteur on violence against women, its causes and consequences.

I would be grateful if this letter could be transmitted at your earliest convenience to His Excellency Mr. Pradeep Kumar Gyawali, Minister for Foreign Affairs.



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Mandates 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; the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Rapporteur on violence against women, its causes and consequences

REFERENCE:
OL NPL 1/2019

12 April 2019

Excellency,

We have the honour to address you in our capacities as 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; Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and Special Rapporteur on violence against women, its causes and consequences, pursuant to Human Rights Council resolutions 36/6, 35/15, 34/19, 36/7 and 32/19.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the reported lack of impartiality, independence and transparency in the existing procedure for the appointment of the members of the Truth and Reconciliation Commission (TRC) and Commission on the Investigation of Enforced Disappearance (CIEDP), which may affect the selection of new commissioners in April 2019; the reported lack of progress in the work undertaken by both commissions; and the possible amendment of the Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2071 (2014).

We would like to recall previous communications from Special Procedures concerning the shortcomings in the procedure for the appointment of the members of the Truth and Reconciliation Commission (TRC) and Commission on the Investigation of Enforced Disappearance (CIEDP) and in the Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2071 (2014). In particular, we would like to recall AL NPL 6/2012, of 22 October 2012, which expressed concern about the proposed and later adopted ordinance on Investigation of Disappeared Persons, Truth and Reconciliation Commission 2069 (2013), the provisions of which would contravene

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His Excellency
Mr. Pradeep Kumar Gyawali
Minister for Foreign Affairs

international norms and standards, and called on the Government to ensure that any legislation establishing transitional justice mechanisms be in compliance with these norms. We would also like to recall JAL NPL 2/2014, of 3 July 2014, which called on the Government to amend several provisions of the TRC Act to put it in conformity with international standards, in particular those relating to the TRC's competence to recommend amnesties for perpetrators including for gross violations of human rights and serious violations of international humanitarian law, and concerning the undefined selection procedures for the appointment of members of the Commission. We would further like to recall OL NPL 4/2017 of 27 July 2017, which expressed concern about the shortcomings of the Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2071 (2014), and the lack of significant progress in the work of the TRC and the CIEDP. The communication called on the Government to enhance participation and protection of victims and witnesses, implement court verdicts concerning transitional justice, and to address conflict-era cases promptly and effectively.

We thank your Excellency's Government for the reply of 12 December 2014 and encourage you to respond to the remaining communications. We would like to reiterate our concerns and share additional remarks in relation to recent developments relative to the implementation of the TRC Act and the work of both Commissions.

According to the new information received:

Since their establishment in 2014, by the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act 2071 (TRC Act), the Truth and Reconciliation Commission (TRC) and the Commission on Investigation on Enforced Disappeared Persons (CIEDP), have registered 63,000 cases but have not been able to resolve any of them. Beyond registering those cases, the commissioners have failed to prove significant progress on other crucial aspects of their mandate, including in relation to truth-telling initiatives, the investigation of cases filed before them, the study of the nature and patterns of the serious human rights violations, the identification of perpetrators of grave violations, including of sexual violence and rape against women and girls, the recommendations on reparations to victims and on institutional reform and vetting.

The TRC and CIEDP have been widely criticised for the lack of progress in their work and for their lack of independence and credibility. Concerns were also raised, including in the above mentioned communications, about the TRC's power, under the TRC Act, to recommend amnesties for perpetrators of gross violations of human rights and serious violations of international humanitarian law and to initiate reconciliation processes in the absence of a request by the victim. The TRC Act was also subject of concern because of the definitions of crimes contained therein which are not in compliance with international law.

With an initial mandate of two years, the mandates of the commissions were extended, for a year in 2017. It was expected that the expiration of mandates for

the TRC and CIEDP in 2018 could have provided an opportunity to amend the Act to bring it in compliance with international norms. However, on 6 January 2018, the Government issued an ordinance to extend the mandate of both Commissions for another year, without proposing amendments to the TRC Act. This move was perceived as a setback in achieving any meaningful reconciliation through transitional justice in Nepal, and damaged the hopes of victims to obtain justice for the violations suffered.

On 6 February 2019, the mandates of the TRC and CIEDP were extended for another year, with the possibility of another extension until 2021. The extension did not include a substantive amendment to the TRC Act. The only exception was a change in the provision defining how long commissioners can serve in the office. The amended provision imposes a requirement that the commissioners end their tenure on 13 April 2019, enabling the Government to appoint new commissioners.

On 26 March 2019, in his address to the Human Rights Council, the Minister of Foreign Affairs noted the Government's intent to amend the laws governing the commissions and move forward with the transitional justice process "guided by the Comprehensive Peace Accord, the directive of the Supreme Court, relevant international commitments, concerns of the victims and the ground realities". He added that there will be no blanket amnesty in the cases of serious violations of human rights.

On 25 March 2019, the Government established a panel that will lead the candidate selection process for appointment.

Civil society organizations have expressed concern that the appointment process will lack independence and transparency as it had been denounced in 2015. The TRC Act establishes a selection procedure for the appointment of the Commission members by a Recommendation Committee consisting of five members, four of whom are appointed by the Government, conferring wide influence to the Government. The appointment procedures for the selection of the members of the Recommendation Committee are not defined by the current legislation. Due to the shortcomings of the selection procedure, during the initial appointment of the members of the TRC and CIEDP, in 2015, concerns had been raised by numerous national and international actors, including in the above mentioned communications, about the insufficient guarantees for the impartiality, independence and transparency in the appointment process.

Civil society organizations have strongly advocated the Government to make substantive amendments to the TRC Act with broad-based consultations with stakeholders, in addition to the appointment of commissioners, to ensure the transitional justice process moves forward.

Reports indicate the absence of broad-based meaningful consultations with victims and civil society on different aspects of transitional justice process, including appointment of commissioners and the commissions' mandates.

While we do not wish to prejudge the accuracy of these allegations, we wish to recall our concern at the reported lack of impartiality, independence and transparency in the existing procedure for the appointment of the members of the Truth and Reconciliation Commission (TRC) and Commission on the Investigation of Enforced Disappearance (CIEDP), which may affect the selection of new commissioners in April 2019. In addition, we recall our serious concern at the reported lack of progress in the work undertaken by both commissions since 2014. Moreover, we restate our concern regarding the provisions of the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act 2071 (2014), which continue to be inconsistent with international human rights norms, including those granting the TRC and the CIEDP mandate to recommend amnesties for perpetrators of gross violations of human rights and serious violations of international humanitarian law and to initiate reconciliation processes in the absence of a request by the victim.

We reiterate our serious concerns for the lack of progress in the implementation of the transitional justice initiatives in Nepal. We emphasize that protracted transitional justice processes and delays in establishing the measures that should guarantee the right to truth, the delivering of justice and the access to reparations to the victims, including medical and psychosocial care for women and girl victims of sexual violence and rape, and the lack of attention to ensure a victim-centric approach through broad-based consultations, not only contradicts international obligations, but also leaves the many victims of the conflict and their relatives in a situation of despair and vulnerability.

We welcome your Excellency's Government announcement of its intent to amend the laws governing the commissions and move forward with the transitional justice process, as well as its commitment not to impose blanket amnesty for serious human rights violations.

We therefore strongly call on your Government to urgently initiate a process of amendment of the Act, in line with international standards concerning its mandate and the selection of its members. Such amendment should follow appropriate consultation with victims, families of victims, civil society and the national human rights commission. We further call on your Government to ensure fairness, impartiality and transparency in the appointment of members of the commission.

We would like to take this opportunity to remind your Excellency's Government of the pending visit requests from the Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence and from the Working Group on Enforced or Involuntary Disappearances. We look forward to receiving your invitation to visit the country soon.

In connection with the above alleged facts and concerns, , we would like to draw the attention of your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above.

Concerning the selection of members of the TRC and the CIEDP, we would like to recall that the Updated set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/add.1) stressed that Commissions of inquiry, including truth commissions, must be established through procedures that ensure their independence, impartiality and competence and that they shall be constituted in accordance with criteria making clear to the public the competence and impartiality of their members, including expertise within their membership in the field of human rights and, if relevant, of humanitarian law. They shall also be constituted in accordance with conditions ensuring their independence. In determining membership to the commission, concerted efforts should be made to ensure adequate representation of women as well as of other appropriate groups whose members have been especially vulnerable to human rights violations (Principle 7).

Similarly, the Principles on Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, in particular principle 11, provides that members of independent commissions of inquiry shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these Principles.

As noted by the Special Rapporteur on the promotion of truth, justice reparations and guarantees of non-recurrence, 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). 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. The Special Rapporteur underscored the need for a clear articulation of the relevant selection criteria of commissioners, which must include professionalism, integrity and expertise, in addition to reputation, as fundamental criteria (para. 103).

Concerning the mandate of the TRC to recommend amnesties, we would like to recall in this regard the ruling of the Supreme Court of February 2015, which found the power of the commissions to grant amnesties under Section 26 of the TRC to be unconstitutional, ordering the amendment of the TRC Act in compliance with international norms and standards. We welcome your Government's commitment to abide by this ruling.

We would also like to add that international law sets limits to the adoption of amnesties insofar as they foster impunity and prevent States from complying with their international obligations to investigate and prosecute those responsible for human rights

violations. Amnesties are particularly incompatible with crimes that represent serious human rights violations, such as torture, summary executions, enforced disappearances and genocide, among others.

The Human Rights Committee ruled that all impediments to establishing the legal responsibility of persons who have committed serious human rights violations should be removed. In its General Comment No. 31 the Committee established that in cases where violations such as torture, summary and arbitrary deprivations of life and enforced disappearances have been committed by a public official or State agent, the States concerned may not exempt the perpetrators from their personal legal responsibility through amnesties and prior immunities (para. 18).

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.

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. The Human Rights Committee has observed that failure to investigate and failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant on Civil and Political Rights, acceded by Nepal on 14 May 1991. Such failures lead to impunity, which can encourage a repetition of the crimes by others in subsequent incidents (General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 15).

Specifically in respect of disappearances, we wish to recall that 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’.

We welcome your Excellency’s government announcement of its intention not to impose blanket amnesties for serious human rights violations and urge you to respect this principle.

Concerning the mandate of the TRC to initiate reconciliation processes in the absence of a request by the victim, we wish to note that 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 (A/HRC/24/42, para. 49).

In his report on challenges faced by truth commissions, the Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence stressed that 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 (A/HRC/24/42, para. 49).

Concerning the need to enhance participation and to better guarantee the protection of victims and witnesses, we would like to recall principle 6 of the Updated set of Principles according to which [...] decisions to establish a truth commission, define its terms of reference and determine its composition should be based upon broad public consultations in which the views of victims and survivors especially are sought.

We wish to further highlight that the reports of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence address in detail the question of victims’ participation in transitional justice processes. The Rapporteur provides examples of the indispensable contributions by victims to transitional justice measures and also warns that participation can involve security risks for victims, social risks, economic costs and risks of retraumatization, among others, which need to be properly addressed (A/HRC/34/62 and also A/71/567).

Victims’ participation is central in transitional justice processes. First, for epistemic reasons which relate to the contributions that victims can make to the quality of information on the basis of which transitional justice measures can be designed, operated and monitored. Victims not only have a privileged perspective on the ways in which systems and institutions that were meant to guarantee their rights failed to do so, but also on what constitutes effective redress in terms of truth, criminal justice, reparation and guarantees of non-recurrence. Second, for legitimacy reasons which recall that participation provides victims a measure of recognition not only as victims but also as rights holders; this in turn helps victims become visible and gain a place in the public sphere frequently denied to them. The equalizing effect of participation facilitates the identification of commonalities of experiences, values and principles among different types of victims, as well as between victims and non-victims, which is important for the sake of coalition- and consensus-formation regarding transitional justice policies. And finally, the participation of victims recalls to all that discussions about transitional justice are not merely technical matters, but are essentially about human beings, their dignity and rights.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the information provided.
2. Please provide information on any measures that your Excellency's Government has taken, or intends to take, to bring Nepal's legislation in conformity with international norms and standards, in particular in relation to the amendments to the TRC Act.
3. Please provide information on any measures that your Excellency's Government has taken or intends to take to enhance the effectiveness and implementation of the mandate and functions of the TRC and CIEDP Commissions.
4. Please provide information on any measures that your Excellency's Government has taken, or intends to take, to ensure the effective participation of victims in the design and implementation of transitional justice processes.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

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



Bernard Duhaime

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



Agnes Callamard

Special Rapporteur on extrajudicial, summary or arbitrary executions



Nils Melzer

Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment



Fabian Salvioli

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