

Mandates of the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on the situation of human rights defenders; 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

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Excellency,

We have the honour to address you in our capacities as Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on the situation of human rights defenders; 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 27/1, 34/5, 34/19, 27/3 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 Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2071, adopted on 25 April 2014 (henceforth "TRC Act")**; **the lack of significant progress in the work of the Truth and Reconciliation Commission (TRC) and Commission on the Investigation of Enforced Disappearance (CIEDP)**; **the need to enhance participation and to better guarantee the protection of victims and witnesses, and implement court verdicts concerning transitional justice and addressing conflict-era cases promptly and effectively.**

We would like to recall previous communications from Special Procedures, including 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 and the ruling of the Supreme Court of January 2014. We thank your Excellency's Government for the reply of 12 December 2014 and would like to reiterate some of 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.

Compliance of the TRC Act and Nepalese legislation with international human rights norms and standards, especially in relation to the right to justice

We take note of the ruling of the Supreme Court of 26 February 2015 (Order 069-WS-0057) 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 note with appreciation the commitment expressed by your Excellency's Government to "fully honour the judgment of the Supreme Court once it comes out" (Government reply of 12 December 2014). We are concerned however by information that indicates that, as of today, no legislative

measures have been taken to comply with the Supreme Court judgments, including 26 February 2015 verdict.

In relation to the right to justice, we see with concern expressions formulated in the Government's reply, that seem to reveal a perception from the authorities that, without amnesties, transitional justice mechanisms would represent a threat to achieve the much-needed stability and reconciliation in Nepalese post-conflict context. We wish to confront this apparent perception by recalling that the four elements that compose transitional justice measures - truth, justice, reparation and guarantees of non-recurrence - are elements of a comprehensive approach and all share common goals. They are functionally designed to provide recognition to victims, foster trust among individuals and particularly in State institutions, strengthen the rule of law and promote social cohesion or reconciliation. These measures are parts of a whole, each with corresponding legal obligations, which work best when designed and implemented in relation to one another, rather than being alternatives among which States can pick and choose.

In that sense, contributions of criminal prosecutions to transitional processes, and to achieve stability and reconciliation, are manifold. At the most general level, criminal prosecutions provide recognition to victims as rights holders. They also provide an opportunity for the legal system to establish its trustworthiness. Effective prosecutions, in systems that respect due process guarantees, strengthen the rule of law and finally, in doing all of the above, contribute to social reconciliation. More concretely, criminal prosecutions in cases of serious violations, especially in contexts in which the law has been applied arbitrarily, offer the possibility of giving life to the principles of equality and the supremacy of law. No one, regardless of rank or status, is above the law. More practically, given the complexities of criminal trials for massive violations and abuses, prosecutions help to develop transferable skills, contributing to the overall capacity of domestic judicial systems (see A/HRC/21/46 and A/HRC/27/56).

Some of these concerns and recommendations were highlighted by the Working Group on Enforced or Involuntary Disappearances in the follow up report to its country visit to Nepal (A/HRC/19/58/Add.4), presented to the Human Rights Council in 2011. The Working Group stressed the need for a Truth and Reconciliation Commission bill that would comply with international law requirements; that would ensure the needs of victims for truth, justice and reparations; that would not provide a general amnesty for perpetrators of serious human rights violations, including enforced disappearances; and that would allow for the prosecutions of serious crimes.

Given the reported high prevalence of sexually-related crimes during the relevant period, we would like to recall that the Committee on the Elimination of Discrimination against Women (CEDAW) in its general recommendation No. 19 (1992), defines gender-based violence against women as impairing or nullifying the enjoyment by women of human rights and fundamental freedoms, and constitutes discrimination within the meaning of article 1 of the Convention on the Elimination of All forms of Discrimination Against Women (ratified by your Excellency's Government on 22 April 1991), whether perpetrated by a State official or a private citizen, in the public or private sphere. Thus,

the Committee considers that States parties are under an obligation to act with due diligence to investigate all crimes, including that of sexual violence perpetrated against women and girls, to punish perpetrators and to provide adequate compensation without delay. We would also like to recall that the CEDAW Committee in its general recommendation No. 30 (2013), recommended that states ensure that: substantive aspects of transitional justice mechanisms guarantee women's access to justice, by mandating bodies to address all gender-based violations, by rejecting amnesties for gender-based violations and by ensuring compliance with the recommendations and/or decisions issued by transitional justice mechanisms; and that support for reconciliation processes do not result in blanket amnesties for any human rights violations, especially sexual violence against women and girls (para 81).

We would further like to recall that the CEDAW Committee, in its latest concluding observations urged the authorities to investigate, prosecute and punish all acts of violence, including acts of sexual violence perpetrated by the armed forces, Maoist combatants and private actors, through transitional and restorative justice (see CEDAW/CNPL/CO4-5, para 36 (b)).

We would like to bring to the attention of your Excellency's Government that it is an obligation to fully investigate and bring to justice the perpetrators of violations of human rights in line with Articles 2, 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR), which Nepal acceded to on 14 May 1991. Article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), to which Nepal acceded on 14 May 1991, specifically stipulates State Parties' obligation to a prompt and impartial investigation wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction. 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. 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). Moreover, the Principles on Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, in particular principle 9, recall the duty to conduct thorough, prompt and impartial investigations of all suspected cases of extra-legal, arbitrary and summary executions.

Ongoing cases before the judiciary

Over the last months, some crucial rulings and orders on conflict-related cases have revealed the importance of the independence of the judiciary to advance toward transitional justice initiatives. We take note of the release by the Supreme Court, on 7 February 2017, of the full text of its judgment against the Government's decision to withdraw criminal cases on political grounds. On 13 April 2017, the Supreme Court issued an order to arrest within seven days Bal Krishna Dhungel, a leader of the Communist Party of Nepal who had been convicted of murder in 2004. It is reported that

Mr. Dhungel has not been arrested yet, despite a circular issued by Inspector General of Nepal police on 23 April 2017 ordering his arrest.

We have further been informed that Nanda Prasad Adhikari and his wife, Ganga Maya Adhikari, began a hunger strike on 23 October 2013, to protest the failure of successive Nepali governments to ensure a credible investigation of the killing in 2004 of their son, Krishna Prasad Adhikari, allegedly by members of the United Communist Party of Nepal–Maoists (UCPN-M). Nanda Prasad Adhikari died on 22 September 2014, after more than 300 days on hunger strike. It is reported that in April 2014, the Chitwan District Attorney filed charges against 13 people allegedly involved in the killing of Krishna Prasad Adhikari. However, those arrested were reportedly released on bail after three days in custody. It is reported that the case is still pending in Court and that the final hearing was due to take place on 5 June 2017, but was again postponed to 12 July 2017. We have been informed that Ganga Maya Adhikari is again on hunger strike.

We also take note of the first conviction by a civilian court of Nepal Army personnel for war crimes in the Maina Sunuwar case, on 16 April 2017. It is reported that none of the sentenced officers were present in the District Court of Kavre during hearings. We note with great concern that reportedly none of the army officers sentenced have been arrested yet in order to serve their sentences. Moreover, Major Basnet –the only serving Army official was acquitted despite his involvement in the arrest of the 15-year-old girl. A failure to pursue criminal accountability against Major Basnet would likely lead to a denial of justice and a perpetuation of the culture of impunity. However, the Attorney General reportedly took the decision not to appeal against the District Court’s decision to acquit Major Basnet. We urge the Government of Nepal to take the prompt and necessary measures to implement the ruling of the Court. We also urge the Government to hold perpetrators accountable and secure redress for victims.

Criminalization of torture and enforced disappearances

We have been informed that the Government registered in 2014 the Bill to Control Torture and Cruel, Inhuman or Degrading Treatment (Control). It is reported however that the Bill does not comply with international standards. In particular, the definition of torture and ill-treatment would be limited to the crime of mistreatment while in detention, narrower than definitions provided by the CAT, which include torture and cruel, inhuman and degrading treatment both in detention and in non-detention settings. We also express concern on the penalty of five years of imprisonment for perpetrators of torture and ill-treatment, which does not comply with the proportionality principle set by international norms and instruments. Grave concern is also expressed at the 90-day statutory limitation to file a case for alleged torture, which would also contravene international standards. We therefore urge the Government to review the draft legislation, in order to ensure its compliance with international norms and standards, particularly with the CAT, and promptly adopt such legislation.

In relation to the criminalization of enforced disappearances, we received information that indicates that a draft bill has been prepared by the CIEDP and,

reportedly, submitted to the Ministry of Peace and Reconstruction in 2015. We note with concern, however, that no draft legislation has been tabled in the Parliament to criminalize enforced disappearances, contradicting international obligations and the judgment of the Supreme Court of 1 June 2007 (Rajendra Prasad Dhakal). We therefore urge your Excellency's Government to accelerate the process of drafting the bill that criminalizes enforced disappearances, in consultation with relevant stakeholders, including victims and civil society organisations, and to promptly adopt such foundational legislation.

In this sense, we also wish to recall article 4 of the Declaration on the Protection of All Persons from Enforced Disappearance which states that all acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness (para.1). Mitigating circumstances may be established in national legislation for persons who, having participated in enforced disappearances, are instrumental in bringing the victims forward alive or in providing voluntarily information which would contribute to clarifying cases of enforced disappearance (para.2).

Lack of significant progress in the work of the Truth and Reconciliation Commission (TRC) and Commission on the Investigation of Enforced Disappearance (CIEDP)

We take note with satisfaction of the renewal on 8 February 2017 of the mandate of the Truth and Reconciliation Commission (TRC) and Commission on the Investigation of Enforced Disappearance (CIEDP) pursuant to Section 38 of the TRC Act. We note with attention that the CIEDP has registered at least 2,886 complaints of disappearance and that the TRC has received over 58,000 complaints. We welcome important developments, including that the Commissions have started to hold public hearings and that CIEDP has commenced investigations through the formation of a team of national experts on forensics, with representation of victims and forensic specialists. It is also reported that the TRC Commission has recently established its extended offices in the seven federal provinces headed by the joint attorney general of each province.

Nevertheless, we have been informed that since the establishment of both Commissions, and only few months left in their mandates, these 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, the recommendations on reparations to victims and on institutional reform and vetting. Moreover, the renewal of the mandate of the Commissions, only for one additional year, does not seem sufficient to provide the guarantees for effective planning and implementation of their mandate and functions. We have also been informed that the two mechanisms have not been provided with sufficient resources and that victims in the region have very little knowledge of the activities conducted by both Commissions.

In this connection, we recall our previous communication, where we raised concerns regarding the selection of the Recommendation Committee members under Article 3.3 of the TRC Act, four of which are to be appointed by the government, and the establishment of the selection procedure for the appointment of the Commission members, by the Recommendation Committee, under Article 3.5 of the TRC Act. As expressed in our previous communication, this procedure may be subject to manipulation, or at least, is open to the appearance of lack of impartiality. Your Excellency's Government responded to this allegation by stating that the provision of a separate selection panel, which includes members from the National Human Rights Institution and academics, provides enough guarantees of impartiality. Nevertheless, we wish to reiterate our concerns, and underline new allegations received in relation to the lack of impartiality and independence of the Commission members. In particular, we reiterate our concerns at the reports that indicate that members are drawn from different political parties, and some of them hold public positions, leading to the politicization of the work of the TRC and further challenging the capacity of the Commissions to operate with impartiality.

In this regard, we would like to recall that 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.

The need to enhance participation and to better guarantee the protection of victims and witnesses

We wish to further highlight that the most recent 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).

In this regard, we would like to bring to the attention of your Excellency's Government information we have received that indicates an increase in the number of threats and intimidations to victims who have filed complaints before the Commissions. For instance, it has been reported that a district office of Nepal Police has allegedly demanded copies of complaints against members of the police force, lodged at the Commissions. While we note that CIEDP has implemented some measures aiming at protecting confidentiality of complaints, we stress the acute need to reinforce existing measures to ensure the security and confidentiality of the data and to provide an effective protection of victims and witnesses. The victims have also been concerned with the recent act of the TRC to set up the extended offices in all seven federal provinces with a view to investigating the cases filed in the TRC. The concern of the victims is particularly to do

with the confidentiality and protection of the files and complaints when the provincial TRC offices start the investigation (each provincial office is reportedly going to investigate 1000 cases), as they are headed by the joint attorney general of the concerned province with members from Nepal Bar Association and civil society. This, as rightly pointed out by the victims, might increase the protection concerns of the victims and particularly so as Nepal currently lacks any legal framework concerning victim and witness protection.

In this connection, we note with concern that the provisions of the TRC Act (Section 39. 1) require the Commissions to handover all their archives and documents to the Ministry of Peace and Reconstruction after an eventual dissolution of the Commissions. We recall the key principles set in *the general recommendations for truth commissions and archives* of the Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence (A/HRC/30/42, Annex), in particular in relation to the criteria having to do with preservation, accessibility, and trustworthiness of the host institution in deciding on the adequate repository of archives. We therefore urge the amendment of the corresponding provisions of the TRC Act (Section 39. 1) and consider an alternative of entrusting those archives to an independent institution that complies with the above-mentioned criteria.

With regards to the protection of victims and witnesses, we would like to recall that Principle 15 of the aforementioned principles establishes that complainants, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation. The mandate of the Special Rapporteur on extrajudicial executions has submitted a report to the Human Rights Council (A/HRC/8/3) on “Commissions of Inquiry” in which it outlines international safeguards in the establishment of commissions of inquiry, including protection for witnesses and commission members, transparency of funding, and sufficient resources (A/HRC/8/3 para. 25).

Furthermore, adding to the concerns expressed in our previous communication (JAL NPL 2/2014) on the lack of victims’ consent in reconciliation processes, we would like to bring to the attention of your Government information we received that indicates that the CIEDP has developed an extended ante-mortem data and information collection form and has reportedly piloted it in some districts, gathering ante-mortem information without the informed and written consent of the victims. We reiterate that prior, informed and written consent of the victims while collecting ante-mortem data is essential and urge the adoption of measures to correct this practice by the Commissions. In this regard, we reiterate our concerns expressed in our previous communication (JAL NPL 2/2014) on the lack of victims’ consent in reconciliation processes.

We also note with concern allegations on the lack of victims consultation regarding case shelving, to the point that victims have been pushed to bring the case-shelving procedure before the Supreme Court on 1 February 2017. It is reported that the Supreme Court issued a stay order against the Guidelines for shelving the complaints prepared by the Truth and Reconciliation Commission, indicating that current criteria

would leave a significant number of complaints out of the investigation process, denying the victims their right to justice.

In conclusion, 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, and the lack of attention to ensure a victim-centric approach, not only contradicts international obligations, but also leaves the many victims of the conflict and their relatives in a situation of despair and vulnerability.

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.

In this sense, we also wish to highlight the need to ensure the full participation of women in these processes, as recommended in the General comment of the Working Group on Enforced or Involuntary Disappearances on women affected by enforced disappearance (A/HRC/WGEID/98/2). The experience of the Working Group demonstrates that women generally do not talk about themselves, preferring to elevate the stories of their husbands and children. Interviews, public hearings, public and media materials, and databases used in the truth-seeking process must include a gender perspective, facilitate women's participation and make their suffering and issues visible.

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 therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information on any measures that your Excellency's Government has taken, or intends to take, to bring Nepal legislation in

conformity with international norms and standards, in particular in relation to the amendments to the TRC Act and the adoption of legislation that criminalizes enforced disappearances as well as torture and other forms of cruel, inhuman and degrading treatment and punishment.

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 implement the court rulings and orders on transitional justice mentioned in this communication.
5. Taking into consideration the extension of the term of both Commissions by one year and the fact that more than four months already elapsed, please provide information on how the TRC and CIEDP Commission are planning to operate in the remaining period, in order to deliver the mandate entrusted to them in an effective manner.
6. 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. In particular, please provide information on any measures taken:
 - to ensure victims' security, including measures of protection, measures to guarantee the confidentiality of the information provided and to secure an adequate repository of archive, including amendments to Section 39.1 of the TRC Act;
 - to enhance the capacity of victims, especially for the most vulnerable, to participate effectively and independently in these processes, including interim relief and psychosocial support;
 - to promote victim's information and to obtain their consent, in particular in relation to reconciliation processes and in the context of gathering ante-mortem data; and
 - to ensure consultation with victims in the context of case-shelving procedures, making sure that any criteria set forth do not leave any victim out of the investigation process, denying their right to justice.

We would appreciate receiving a response within 60 days and remain available for any type of technical advice on legislative reform that your Government may require. We look forward to further engaging with your Excellency's Government, and take this opportunity to reiterate the request for a country visit by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.

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

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

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