



BAR HUMAN RIGHTS
COMMITTEE OF
ENGLAND AND WALES

Ministry of Peace and Reconstruction

Singha Durbar

Kathmandu

Nepal

London, 29 September 2014

Dear Minister of Peace and Reconstruction,

The Bar Human Rights Committee of England and Wales (BHRC) together with experts from the International Senior Lawyers Project - UK (ISLP-UK) are writing in response to the passing of the Truth and Reconciliation Act 2014 (the "Act").

We are aware that in response to the internal armed conflict in Nepal between 1996 and 2006, the Comprehensive Peace Agreement of November 2006 stated that a Truth and Reconciliation Commission ("TRC") should be set up. Whilst the Act seeks to move forward this process, its provisions give rise to a number of significant concerns for the international community who fear that the commissions as they presently stand will not be able to meet their stated objectives as they are not credible and independent¹.

In a post-conflict scenario any such commission must allow those who have been victims of any crime to seek and achieve justice in a meaningful way.² As those who are frequently the subject of accusations hold positions of power or influence, transparency and credibility is essential. Any form of reconciliation process without these two principles at its core risks a culture of impunity to continue to permeate and become further entrenched. The Act does not adhere to these principles.

¹ EU Missions, including those of Denmark, Finland, France, Germany, and the UK have already called for credible and independent commissions.

² The UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Mr. Pablo de Greiff, has emphasised that reconciliation can never be achieved without a comprehensive approach to truth, justice, reparation and guarantees of non-recurrence and neither should it be ever conceived as an alternative to justice.

The UN Office of the High Commissioner for Human Rights notes in their Nepal Conflict Report the following three premises:

1. *Under international law, the Government of Nepal has a fundamental obligation to investigate and prosecute serious violations of international human rights law and international humanitarian law that were committed during the conflict;*
2. *Where there is a reasonable basis for suspicion that a serious violation of international law occurred, these cases merit prompt and independent investigation by a full judicial process; and*
3. *The transitional justice mechanisms are an important part of the transitional justice process but should complement criminal processes and not be an alternative to them.*³

Despite the decision of the Supreme Court on 2nd January 2014, which challenged an earlier Act and passed a directive to restructure the proposed TRC, the Act that was passed on 25 April 2014 is neither in conformity with the concerns that the court raised, nor with international standards, particularly as they relate to amnesties:

Under International law, amnesties are impermissible if they:

- a) *Prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights;*
- b) *Interfere with victims right to an effective remedy; or*
- c) *Restrict victims or societies right to know the truth about violations of human rights and humanitarian law*⁴.

It appears to have only made very minor changes to that which was sought to be enacted previously, paying lip-service to the ruling of the Supreme Court, and largely ignoring the Nepalese Government's own task force recommendations.

The Commissions and therefore the reconciliation process must be allowed to work without external interference and influence.

The Act portrays the process as limited-scope mediation between the differing parties and fundamentally neglects the pervasive power imbalance between the victim and the perpetrator. The very

³ <http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/NepalConflictReport.aspx>

⁴ Louise Mallinder, "Amnesties and International Criminal Law", p. 4 in William A. Schabas and Nadia Bérnáz (eds) *Handbook on International Criminal Law* (Routledge, 2010). Available at: http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1531701_code635316.pdf?abstractid=1531701&mirid=3

real risk in the legislation remaining in its present form is that significant numbers of victims will be left without any recourse to a proper justice mechanism. This in turn could lead the Nepalese Government to be isolated in the international sphere as a response to such failures.

Analysis of the Act

The Act endows the Commission with broad powers to

- resolve allegations of human rights abuses without recourse to criminal proceedings;
- recommend amnesties for human rights violations, including gross violations, committed during the conflict; and
- retain a discretion to recommend amnesty even for crimes of a serious nature⁵.

The wide scope of these provisions is inconsistent with the State's obligation, enshrined in a series of international human rights and international humanitarian law instruments, to investigate and prosecute gross human rights violations and serious violations of international humanitarian law. The provisions also jeopardise the right of victims to an effective remedy. Conversely the Act does not address any other crimes committed during the conflict which may not be against humanity or a serious/gross human rights violation, nor extend the definition of perpetrator to include businesses which may have been complicit.

Amnesties

As a matter of international law, there is a duty to prosecute serious international crimes or extradite to a jurisdiction that will prosecute.⁶ This duty is derived from international conventions.⁷ To offer amnesties, for example, in a case regarding war crimes or gross violations of human rights, is regarded as impermissible. The fact that this is a national conflict does not remove the impact of international human rights. Whilst this obligation to penalize was initially applicable only during international armed conflicts, International Criminal Tribunals for Rwanda and the former Yugoslavia indicate an extension of the prohibition to non-international conflicts. This has been backed up by resolutions made by the UN Commission on Human Rights⁸; Article 17 of the Rome Statute also highlights the obligation to

⁵ Which is not defined anywhere

⁶ Human Rights Watch, *The Meaning of 'the Interests of Justice'*, in Article 53 of the Rome Statute, June 1, 2005, <http://www.hrw.org/node/83018>, pp. 9-11

⁷ The obligation to 'extradite or prosecute' can be found in approximately 70 international criminal law conventions - Michael Kelly 'Cheating Justice by Cheating Death', *Arizona Journal of International & Comparative Law*, vol. 20 (2003), p. 497 For example, *The Geneva Conventions of 1949, applicable during armed conflict, establish a duty to provide 'effective penal sanctions for persons committing, or ordering to be committed... grave breaches of the Conventions.'*: Article 146 of the Geneva Convention Relative to the Protection of Civilian Persons in Times of War.

⁸ UN Commission on Human Rights calling for the investigation and prosecution of violations of international humanitarian law in the context of non international armed conflicts.: Rwanda - Resolution 2000/21; Former Yugoslavia - Resolution 2000/26; Sudan - Resolution 2001/18; Sierra Leone - Resolution 2001/20.

prosecute. National Courts have the first opportunity to prosecute international crimes, but also an obligation to prosecute them.⁹

We recognise that amnesties may be "*a political remedy at a national level, to begin to reconcile and rebuild a divided society*"¹⁰ but they are always highly controversial and should only be sparingly utilised. The potential for an amnesty irrespective of the crime as contemplated here¹¹ can never be justified¹². For example, under South Africa's Truth and Reconciliation Commission there was no blanket amnesty¹³. Instead individuals had to apply for amnesty and fully disclose human rights violations, and, in most cases, had to appear before the truth commission in a public hearing. Only crimes associated with a political objective were eligible.¹⁴ Even with these restrictions on the circumstances in which amnesty would be granted there were many critics of the system, particularly from victims of the regime.

Therefore, legislators must act carefully when dealing with legislation of this kind. There is clearly a duty to prosecute the most extreme crimes, many of which would not be encapsulated by the rape exclusion. Amnesties have a place in TRCs but they cannot be issued as a blanket solution to all past injustices; where they are utilised there is a requirement for clear limitations on their use.

Reconciliation

The Commission is provided with similarly broad powers to facilitate reconciliation between perpetrator and victim on the application of either party, provided that it has first recommended the perpetrator for amnesty. There is no explicit recognition that reconciliation may only take place with the consent of the victim. This raises concerns about forced participation in the process, contrary to the UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters. The UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence has emphasised that reconciliation should not be conceived as an alternative to justice. Provisions such as these, which divert perpetrators from the criminal justice system, should therefore be attended by the most rigorous guarantees of compliance with international standards.

⁹ *Rome Statute of the International Criminal Court (Rome Statute)*, A/CONF.183/9, July 17, 1998.

¹⁰ Lyons, B, *Between Nuremburg and Amnesia: The Truth and Reconciliation Commission in South Africa*, *Monthly Review*, 49, 1997, p. 21

¹¹ *Apart from cases of rape.*

¹² *It is also not expressly stated whether the granting of amnesty immunises against criminal /civil prosecution – we presume it does.*

¹³ *South Africa is particularly relevant as it was dealing with the aftermath of an internal conflict rather than a conflict between states. However, the jurisdiction has somewhat hardened since this example of the 1990s such that the concessions made then would probably not meet international standards now.*

¹⁴ *Human Rights Watch, Selling Justice Short: Why Accountability Matters for Peace*, (HRW, 2009), p. 9

Failure to utilise the criminal prosecution system

The Act also raises wider concerns about the fulfilment of the State's obligation to investigate and prosecute conflict-related violations. It appears to suggest that conflict-related cases already before the courts could be diverted from the criminal justice system for consideration by the Commission, which is likely to result at the very least in unacceptable further delay. New conflict-related prosecutions are further circumscribed not only by the amnesty and reconciliation provisions described above, but also by the requirement that such prosecutions can no longer be initiated by the victim or the court. It is only by a decision of the Attorney-General or designated prosecutor upon written instructions from the Ministry following a recommendation by the Commission¹⁵. Prosecutions may only be tried in a yet-to-be established Special Court, with no explicit guarantees as to the constitution or composition of the court or as to compliance with international fair trial standards¹⁶.

Absence of protections of impartiality, independence and transparency

The Act fails to provide guarantees with regard to the impartiality, independence and transparency of the Commission. In particular, there is presently no requirement for a transparent and consultative appointment process¹⁷, no proper guarantee of financial independence and no requirement that the Commission's reports should be made public.

Primarily, reconciliation should always follow justice.

A seriously flawed transitional justice process will only worsen existing socio-political tensions, and further, damage Nepal's image globally.

The Nepalese government can still show its commitment to addressing the wrongs of the past. Significant members of the international community remain willing to support the process and assist in its development. This means real steps to move out of the shadow of the past.

Yours Sincerely,

The Bar Human Rights Committee

¹⁵ There is also no clarity as to how a complaint that was initially deemed unfounded can be re-listed.

¹⁶ Particularly of concern given the finality of the Commission's findings and judgments. For example, there appear to be no provisions for reopening cases where there is new evidence or potentially recanting witnesses; it is unclear whether there are powers of subpoena.

¹⁷ Although at least one woman member is contemplated, but there would be more equal representation if the Commission was enlarged to 6 which could then have equal representation