

BRIEFING PAPER

***COMPROMISING JUSTICE: NEPAL'S PROPOSED ORDINANCE
ON COMMISSION ON DISAPPEARED PERSONS, TRUTH
AND RECONCILIATION (2012)***

OCTOBER 2012

I. OVERVIEW

This briefing paper examines the proposed Ordinance for the establishment of a Commission on Disappeared Persons, Truth and Reconciliation ('the Commission'), assessing its compliance with international law. The Ordinance was adopted by the Council of Ministers on 27 August 2012 and submitted to the President for promulgation on 28 August 2012.¹

In the decade-long conflict, serious human rights abuses were committed by both sides, the Nepali army and security forces as well as members of Communist Party of Nepal (Maoists). These egregious crimes, which included enforced disappearance, torture and ill-treatment and unlawful killings, were aided and abetted by a climate of political and legal impunity for perpetrators. On 8 October 2012, the United Nations High Commissioner for Human Rights released a comprehensive report documenting and analyzing serious violations of international law, along with a database of around 30,000 documents. The Report archive records up to 9,000 serious violations of international human rights law or serious violations of international humanitarian law. The Report is a sharp reminder of the need for a transitional justice mechanism that provides a sustainable foundation for peace.

In signing the Comprehensive Peace Accord (CPA) on 21 November 2006, the Government of Nepal and the Communist Party of Nepal showed their commitment to seeking truth, obtaining justice and ensuring reparations for the victims during the conflict. The Comprehensive Peace Agreement and the Supreme Court of Nepal have both called for the establishment of two transitional justice mechanisms: a Truth and Reconciliation Commission (TRC) and a Commission on Disappeared Persons (CDP).

Almost six years later, the Government has not fulfilled its promises. Successive governments have withdrawn a significant numbers of cases, some involving serious crimes, saying that they are 'political' in nature. In October, the Nepali Cabinet decided to promote Colonel Raju Basnet, ignoring allegations of his involvement in systematic enforced disappearances and torture. The Government's decision to promote Kuber Singh Rana to the rank of Inspector General of Police despite the ongoing investigation against him for his involvement in the enforced disappearance and extrajudicial killings of five students was taken in disregard of the Supreme Court's own directive.

The Ordinance represents a political bargain between the political parties, and the proposed Commission seems designed to avoid accountability for those responsible for gross human rights violations and crimes under international law committed over the course of Nepal's decade-long conflict.

¹ Interim Constitution 2007, Article 88: The President is empowered to promulgate any Ordinance if he/she is satisfied that it is necessary to take such immediate action.

The proposed Commission is in principle given powers of inquiry,² and its proceedings and activities are to be in principle open and transparent.³ But these considerations are insufficient to shield the Commission from political pressure given the Commission's politicized appointments process, its limited scope and mandate, its power to recommend the granting of amnesties for crimes under international law, as well as its lack of relationship with the criminal justice process. Thus it is highly improbable that the Commission will be an effective mechanism for providing truth, justice and reparation to victims.

The International Commission of Jurists makes the following recommendations to the Government of Nepal:

- (1) Withdraw the ordinance and implement existing Supreme Court rulings
- (2) Implement the structure agreed to in the Comprehensive Peace Agreement

The International Commission of Jurists makes the following recommendations to the international community:

- (3) Press the Government to support the transitional justice process
- (4) Implement the recommendations made by the Office of High Commissioner for Human Rights "Nepal Conflict Report" released on 8 October 2012
- (5) Ensure that assistance and training does not benefit individuals or units facing credible allegations of human rights violations
- (6) Engage in cooperation and assistance, where possible, into the investigation and prosecution of any individuals facing credible allegations of serious violations of international human rights law and humanitarian law, including prosecution of suspected perpetrators under the principle of universal jurisdiction.

II. POLITICAL CONTEXT

The dissolution of the Constituent Assembly (Legislature-Parliament) on 27 May 2012, precipitated a constitutional crisis that has left Nepal without an effectively functioning government. The legislative and executive functions, in particular, remain confused, without clear guidelines as to who is responsible for these functions. In this environment, the Nepali cabinet has asserted its authority to legislate through ordinances, which raise concerns in respect of the principle of separation of powers.

The Ordinance forwarded by Prime Minister Baburam Bhattarai's caretaker government arises from this troubled context. It emerged from the Cabinet on an

² Including the power to subpoena persons and documents (ss. 14(1)(a)-(d)), the power to authorise search and seizure of documents and objects (s. 14(3)), the authority to collect evidence (s. 14(1)(e)) and conduct on-the-spot investigations (s. 14(1)(f)), the power to authorise exhumations with respect to enforced disappearances (s. 14(6)), as well as general contempt powers (s. 16).

³ Section 19.

'urgent' basis with tacit consensus of the leading political parties for non-prosecution and amnesties, and without participation by victims' organizations and civil society.⁴ The Ordinance also deviates significantly from previous commitments and positions taken on transitional justice in Nepal by the political parties and various branches of the Nepali government, including:

- (1) The 2006 Comprehensive Peace Accord (CPA);
- (2) The Interim Constitution of Nepal 2007;
- (3) The two draft bills prepared by the Nepali legislature that were negotiated to address the establishment of a Truth and Reconciliation Commission and a separate Disappearances Commission;⁵
- (4) The 1 June 2007 decision of the Supreme Court,⁶ which envisioned the Truth and Reconciliation Commission and Commission on Disappearance as two separate Commissions.

Therefore, it is easy to see why the proposed Ordinance has been strongly criticized for lacking legitimacy. The Cabinet has to date not explained why it has seen fit to promulgate an 'urgent' Commission that seems to ignore the extensive previous debates on transitional justice, and in particular the outcome of the legislative process, which represented the best approximation of a consensus among civil society and victims' organizations with respect to the transitional justice process.

Nepal's president has refused to approve the proposed Ordinance as at the time of this Briefing Paper (October 2012) but the exact status of the Ordinance and its future remain unclear.

III. APPLICABLE INTERNATIONAL LAW

The duty to guarantee human rights is fundamental in international law and standards.⁷ Under international law and standards, States have a duty to investigate, bring to justice and punish perpetrators as well as provide remedy and

⁴ Following dissolution of the Constituent Assembly/Legislature-Parliament on 27 May 2012, the President directed the Government to act in a caretaker capacity. The Interim Constitution 2007 provides that in the event that the Prime Minister is relieved of his/her office when he/she ceases to be a member of the Legislature-Parliament (Article 38(7)(b)), the Council of Ministers will continue to function in a caretaker capacity until a new Cabinet is constituted (Article 38(9)).

⁵ The establishment of a Truth and Reconciliation Commission was agreed to by the parties in the 2006 Comprehensive Peace Agreement (Clause 5.2.5), and further enshrined in the Interim Constitution 2007 (Article 33(s)). The Interim Constitution 2007 also envisages the formation of a Disappearances Commission (Article 33(q)), and the Supreme Court in *Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal v. Nepal Government & Ors.* (Case No. 3775/2055) also directed the Government to form a Disappearances Commission in line with international standards.

⁶ *Rabindra Dhakal v. Government of Nepal*, Nepal law Journal, (2007, Jun vol. 49).

⁷ Article 2, ICCPR; CAT; Article 6, International Convention on the Elimination of All Forms of Racial Discrimination; Article 2(c), the Convention on the Elimination of All Forms of Discrimination against Women; the International Convention for the Protection of All Persons from Enforced Disappearance; the Declaration on the Protection of All persons from Enforced Disappearance; the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions; Article 1.1, the American Convention on Human Rights; Article 1, the Inter-American Convention on Forced Disappearance of Persons; Article 1, the Inter-American Convention to Prevent and Punish Torture; Article 1, the African Charter on Human and Peoples' Rights; Article 3, the Arab Charter on Human Rights; Article 1, the European Convention on Human Rights.

reparations for injuries. The general standard, accepted by all UN Member States through adoption by UN resolution 147 of 16 December 2005, is that

The obligation to respect, ensure respect for and implement human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

- (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
- (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- (c) Provide those who claim to be victim of a human rights or humanitarian law violation with equal and effective access to justice...irrespective of who may ultimately be the bearer of responsibility for the violations; and
- (d) Provide effective remedies to victims, including reparation...⁸

In situations of serious human rights violations 'where the system in place is unable to function effectively and extraordinary measures are needed in order to bring justice,'⁹ or where it might be inappropriate for the domestic criminal system to carry out investigative procedure due to perceived or actual bias and lack of impartiality, an *ad hoc* Commission of Inquiry can play an important role in the fulfilment of a State's obligation to investigate human rights abuses.¹⁰ Any such Commission of Inquiry must adhere to the requirements enumerated under international law, notably in international standards,¹¹ to effectively discharge the State's duty to provide remedy and reparations for human rights violations.

IV. PROBLEMS OF THE PROPOSED COMMISSION

The Ordinance's problems extend beyond the faulty process that led to its proposal. The proposed Ordinance, if accepted, violates applicable international law

⁸ *United Nations 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*, UNGA Resolution 60/147 of 16 December 2005, UN Doc. A/RES/60/147, para 3 ('UN Basic Principles on Right to a Remedy').

⁹ International Commission of Jurists, *Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity*, Geneva, 2012, p 22, accessed at: <http://www.icj.org/nepal-toothless-commissions-of-inquiry-do-not-address-urgent-need-for-accountability-icj-report/>

¹⁰ *Ibid.*

¹¹ *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, recommended by Commission on Human Rights resolution E/CN.4/RES/2005/81 of 21 April 2005 (UN Impunity Principles); see also Office of the United Nations High Commissioner for Human Rights, Geneva, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. HR/P/PT/8/Rev. 1 (2004), para 107-119; *United Nations Principles on the Effective Prevention and Investigation of Extrajudicial Executions, United Nations Manual on the Effective Prevention and Investigation of Extra-Legal Arbitrary and Summary Executions (Minnesota Protocol)*, UN Doc. E/ST/CSDHA/.12 (1991), Principles 6 - 13; See also International Commission of Jurists, *Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity*, Geneva 2012, p 23 ('Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity').

and standards, as well as decisions of Nepal's Supreme Court and previous political commitments. The proposed Commission's mandated authority is insufficient to support the difficult process of establishing truth and providing justice. In fact, the proposed Commission's structure seems designed to stymie this process.

A. Extremely Limited Mandate and Scope

Under international law, the scope of a Commission of Inquiry should be sufficiently flexible and wide to ensure that the inquiry is not hampered by overly restrictive terms of reference.¹²

Scope

The scope of the Commission's inquiry into "serious violations of human rights" is also extremely limited as the enumerated list provided in the Ordinance is prefaced to include only those acts carried out "against the civilian population or unarmed persons in a systematic manner",¹³ which restricts jurisdiction to crimes against humanity. The requirement that acts be perpetrated in a 'systematic manner' is used under international criminal law to deliberately exclude individual human rights violations. Crimes against humanity are only those acts committed as part of a preconceived plan or policy.¹⁴ Restricting the scope of the Commission to crimes against humanity excludes almost all of the violations and crimes that were committed during the conflict.

Mandate

The Commission's mandate is twofold: (i) to facilitate and promote reconciliation between victims and perpetrators,¹⁵ (ii) to carry out inquiries in respect of serious human rights violations.¹⁶ The Commission is further mandated to make recommendations, based on its findings, for the granting of amnesties¹⁷ and reparations¹⁸.

The Commission's report and recommendations are implemented by the Ministry of Peace and Reconstruction ('the MoPR'), the initiating agency. The MoPR is required to forward the recommendations relating to the granting of amnesties to the

¹² *Ibid.*

¹³ Section 2(j). The list of acts of "serious violations of human rights" includes: murder; abduction and hostage taking; enforced disappearance; causing deformities and grievous hurt; physical or mental torture; rape and sexual violence; looting, seizure, vandalism or arson of private and public property; forceful eviction from homes and land or displacement by any other means; and any type of inhuman act committed in violation of international human rights and humanitarian law, and other crimes against humanity.

¹⁴ See for example: *Prosecutor v. Dusko Tadic*, Judgment, ICTY Trial Chamber (7 May 1997), Case No. IT-94-1-T, para. 648; and *Prosecutor v. Dragoljub Kunarac, et. al.*, Judgment, ICTY Appeals Chamber (12 June 2002), Case No. IT-96-23 & IT-96-23/1-A, para. 94.

¹⁵ Preamble para. 2; ss. 3(1) and 13(1)(a).

¹⁶ Preamble para. 1; ss. 3(1), 13(1)(b) and 22.

¹⁷ Section 23.

¹⁸ Section 24.

Cabinet, who ultimately decides to grant amnesties.¹⁹ With respect to reparations, the MoPR implements the Commission's recommendations or delegates such functions to other relevant agencies, after seeking approval from the Cabinet.²⁰

B. Forced Reconciliation

The Ordinance empowers the Commission to promote reconciliation between victims and perpetrators, even where neither party has requested intervention from the Commission:²¹ in effect, it forces victims to give up their right to justice as part of the "reconciliation" process.

International standards reject forced reconciliations. The UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence stated in its first annual report to the Human Rights Council that "reconciliation should not be conceived as either an *alternative* to justice or an aim that can be achieved independently of the implementation of the comprehensive approach to the four measures (truth, justice, reparations and guarantees of non-recurrence)."²² The Special Rapporteur indicated "reconciliation is, at minimum, the condition under which individuals can trust one another as equal rights holders again or anew;"²³ such conditions cannot be forced by the Commission.

C. Amnesty

The mandate of the Commission confers authority to recommend the granting of amnesties for all violations within its scope, including torture, enforced disappearances and crimes against humanity.²⁴ Amnesties violate the State's duty under international law to provide effective legal remedy to victims and victims' families.²⁵ They perpetuate impunity, by enabling perpetrators of crimes or human rights violations to evade accountability.²⁶ Amnesties also contravene Nepali Supreme Court jurisprudence, notably in the *Rabindra Prasad Dkahal Case* where the Court held that those accused and convicted of enforced disappearance can neither be granted amnesty nor pardoned.

On 1 June 2007, the Supreme Court of Nepal issued a directive order to the Government to take into account the international standards and Impunity

¹⁹ Section 27(2)(a).

²⁰ Section 27(2)(b).

²¹ Section 22(1). " ... if there is not filed such application [to the Commission for reconciliation] from victim or perpetrator, no restriction shall be deemed to restrict the Commission from promoting reconciliation."

²² Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, *Report to the Human Rights Council*, UN Doc. A/HRC/21/46 (9 August 2012), para. 37.

²³ *Id.*, para. 38.

²⁴ Sections 23 and 2(j).

²⁵ Article 24, UN Impunity Principles, *op. ed* cite 11. The UN Human Rights Committee has also stated in its *General Comment No. 20 concerning prohibition of torture and cruel treatment or punishment* that "[a]mnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future."

²⁶ Definitions, 'A', UN Impunity Principles, *op. cit.* note 11.

principles embodied in OHCHR rule of law tools for post conflict Truth Commissions in forming such a commission. The Court held that

It is also equally important to enact a provision that uphold the international standard that pardon cannot be granted to persons who should be prosecuted for their alleged involvement in the act of disappearance, as well as to persons who are convicted for their direct responsibility or complicity in the act of disappearance. For this purpose, it is expedient to adopt the International Convention for the Protection of All Persons From Enforced Disappearance as a guideline.

The Ordinance not only fails to comply with international legal standards on independence, it fails to comply with the Supreme Courts directive.

D. Commission's Lack of Independence and Impartiality

All Commissioners will ultimately be appointed on the basis of consensus between the political parties.²⁷ Such politicisation of the appointments process, especially given tacit agreement between the political parties for non-prosecution of crimes and for amnesties, seriously undermines the independence, impartiality and competence of the Commission. This problem is not overcome by stipulations within the Ordinance that the Commission shall be independent and impartial,²⁸ or the establishment of a Recommendations Committee – comprising a former Chief Justice of the Supreme Court as Chairperson and a representative of the National Human Rights Commission (NHRC) as one of its members²⁹ – for the nomination of Commission Members, and a requirement that the Chairperson of the Commission will be a former judicial officer.³⁰ This follows the failed model of the NHRC and other national institutions that are intended to fulfil independent monitoring and oversight roles, but suffer from political paralysis or reports that reflect the lowest common denominator.

The Commission will also be dependent on the Government for its funding and resources,³¹ and it will require Government approval before receiving any external assistance.³² Given the political nature of the Commission's appointment, there is a well-founded concern that sources of its funding, or conditions attached to them, are likely to further compromise its independence.

The appointment of an officer from the judicial service, accountable to the Government under the *Civil Service Act* 1993, as Member Secretary of the Commission and therefore chief executive authority of the Commission, also potentially threatens the Commission's independence.

²⁷ Section 3(4).

²⁸ Preamble para. 1; s. 20.

²⁹ Section 3(3).

³⁰ Section 4(f).

³¹ Section 12(1).

³² Section 12 (2).

The Ordinance ignores the Jun 1, 2007, directive order of the Supreme Court of Nepal issued to the Government of Nepal to take into account relevant international standards, in particular embodied in OHCHR rule of law tools for post conflict Truth Commissions, while forming such commission. The Court states:

In order to investigate cases of enforced disappearance it is also necessary to provide for a provision in the Act for a separate commission of inquiry with respect to such disappeared persons. Given that separate powers, skills and procedures are necessary to effectively probe such issues, it is necessary to adopt as guidelines the Criteria for Commissions on Enforced Disappearance, developed under the auspices of the United Nations Office of the High Commission for Human Rights.

It is clear from the foregoing that the personal independence of Commission Members and the structural independence of the Commission fall far short of the standards elucidated in the UN Impunity Principles that commissions of inquiry “must be established through procedures that ensure their independence, impartiality and competence”³³ and that they be provided with transparent funding and resources to ensure that their independence and credibility are never in doubt.³⁴

V. THE PROPOSED COMMISSION AND THE CRIMINAL JUSTICE SYSTEM

A commission of inquiry can assist States in satisfying their obligation to investigate and fulfil victims’ right to truth. However, such extraordinary *ad hoc* mechanisms are not intended to substitute the regular criminal process and by themselves are not able to not fulfil victims’ right to justice. In other words, the role that commissions of inquiry play is necessarily complementary to the criminal process, and should not be used to displace or substitute normal criminal investigations and prosecutions.

UN Impunity Principles, Article 8:

“[C]ommissions of inquiry are not intended to act as substitutes for the civil, administrative or criminal courts. In particular, criminal courts alone have jurisdiction to establish individual criminal responsibility, with a view as appropriate to passing judgement and imposing a sentence.”

A. Lack of Mandate to Recommend Prosecutions

The Commission has been excluded from making recommendations for the prosecution of persons whom it might find, on the basis of its inquiries, to be responsible for serious human rights violations. Without such recommendations

³³ UN Impunity Principles, *op. cit.* note 11, Principle 7.

³⁴ *Id.*, Principle 11.

from the Commission, prosecutions would have to be initiated through the MoPR and Council of Ministers, who would have to act on their own initiative before investigations and prosecutions might occur. This is highly unlikely given the control exerted by the political parties over the process. The previous experience of Commissions of Inquiry in Nepal shows that these Commissions have been used to avoid prosecution.³⁵

In addition, Commissions are not conferred authority to even give advice or input to the MoPR on any matter concerning prosecutions, preservation of evidence, need for police investigations.

B. Prosecutions a Virtual Improbability

Although the Ordinance provides that the Office of the Attorney General ('OAG') retain its discretion in prosecuting criminal cases, section 28 is rendered meaningless as:

- (i) The OAG is authorised to exercise its prosecutorial discretion only after receiving written instructions from the MoPR³⁶ (which also displaces the Attorney General from his/her constitutional role as chief legal adviser of the Government)³⁷, despite the Commission not being mandated to make recommendations for prosecutions to the MoPR;
- (ii) The provision has no relationship with the *Government Cases Act* 1992, which sets out the process by which criminal cases are initiated in Nepal;³⁸ and
- (iii) There is no provision made for the preservation and protection of evidence. For example, even the handing over of bodies to families of the disappeared is made a function of the Commission without any regard for evidentiary relevance or the outcome of amnesty applications.³⁹

C. Non-criminalisation of Serious Crimes

It should also be noted that several of the serious human rights violations enumerated in the Ordinance⁴⁰ are not defined⁴¹ or even recognised as crimes

³⁵ See Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity, *op. cit.* note 11.

³⁶ Section 28(1).

³⁷ Interim Constitution 2007, Article 135(1).

³⁸ The *Government Cases Act* 1992 stipulates that information of any crime must first be registered by the police in written form – also known as a First Information Report – (s. 3) and sent to the OAG, which then determines whether further formal investigations will be carried out and directs such police investigations accordingly (s. 6). Where there is sufficient evidence in the investigation file to demonstrate that a crime has been committed, the OAG then files a charge sheet in court to initiate criminal proceedings (s. 18).

³⁹ Section 14(6).

⁴⁰ Section 2(j).

⁴¹ It is noted that s. 2(k) provides two definitions for the “act of disappearing a person”, taking into account enforced disappearances by both State and non-State actors; however, such definition does not amount to criminalisation of the act, and the definition also fails to recognise enforced

under Nepali law, notwithstanding the directions from the Supreme Court to the Government to criminalize such offences. These include:

- (i) **TORTURE:** In *Rajendra Ghimire v. Office of the Prime Minister, et. al.* (Case No. 3219/2062), the Supreme Court directed the Government to criminalise torture, in line with its obligations as State party to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- (ii) **ENFORCED DISAPPEARANCE:** The Supreme Court in the *Rabindra Prasad Dkahal Case* directed the Government to criminalise enforced disappearance in accordance with the UN International Convention for the Protection of All Persons from Enforced Disappearance, and to ensure that amnesties and pardons would not be available to those suspected or found guilty of the crime.
- (iii) **CRIMES AGAINST HUMANITY:** In *Raja Ram Dhakal v. Office of the Prime Minister, et. al.* (Case No. 2942/2059), the Supreme Court directed the Government to formulate national legislation for the implementation of the four Geneva Conventions.

Even if there were the political will to prosecute perpetrators of such offences, the absence of a specific crime under Nepali law would render the offence unjusticiable.

VI. DEPARTURE FROM THE FOUR PILLARS OF TRANSITIONAL JUSTICE

From the foregoing, it is clear that the Ordinance as proposed departs significantly from the transitional justice framework as agreed to by key stakeholders (and as originally envisaged in the two bills) in several respects:

(1) TRUTH: There can be no meaningful right to truth when the Commission is constituted for political expediency, and when its competence with respect to the preservation of forensic evidence is non-existent.

(2) JUSTICE: Without any real or direct link between the Commission's finding and the criminal justice system, the Commission will not be able to provide justice to victims. This not only violates the Supreme Court's decision that the right to a remedy, including the right to justice, be ensured in the transitional justice process,⁴² it contravenes Nepal's duty under international law to provide an effective legal remedy and reparations for human rights violations.

disappearance as a continuous crime (see: UN Working Group on Enforced or Involuntary Disappearances, *General Comment on Enforced Disappearance as a Continuous Crime*).

⁴² *Liladhar Bhandari & Ors. v. Government of Nepal & Ors.* (Case No. 0863/2064) In *Liladhar Bhandari v. Government of Nepal*, The Supreme Court of Nepal has recognised vetting as one of the measures of transitional justice. Furthermore the Supreme has elaborated the obligation to vetting in *Rajendra Dhakal v. Government of Nepal*, Writ No. 3575, Supreme Court decision, 1 June 2007.

(3) REPARATION: Given that the Commission will be a politically constituted mechanism, it is unlikely that it will be able to provide full reparation, especially with respect to satisfaction through judicial decisions.

(4) INSTITUTIONAL REFORM: The Ordinance does not specifically mandate the Commission to make recommendations in relation to guarantees of non-recurrence, including the prohibition of those accused and/or convicted of crimes and serious human rights violations to hold public offices. Again, this not only violates the Supreme Court's ruling, it violates the duty under international law to provide an effective remedy which includes cessation and prevention of recurring violations.⁴³

VII. RECOMMENDATIONS

The International Commission of Jurists makes the following recommendations to the Government of Nepal:

- (1) Withdraw the ordinance and implement existing Supreme Court rulings
- (2) Implement the structure agreed to in the Comprehensive Peace Agreement

The International Commission of Jurists makes the following recommendations to international community

- (3) Press the Government to support the transitional justice process
- (4) Implement the recommendations made by the Office of High Commissioner for Human Rights "Nepal Conflict Report" released on 8 October 2012
- (5) Ensure that assistance and training does not benefit individuals or units facing credible allegations of human rights violations
- (6) Engage in cooperation and assistance, where possible, into the investigation and prosecution of any individuals facing credible allegations of serious violations of international human rights law and humanitarian law, including prosecution of suspected perpetrators under the principle of universal jurisdiction.

⁴³ In *Sunil Ranjan Singh & Ors. v. Government of Nepal & Ors.* (Case No. 067/2067) the Supreme Court directed that appropriate legislation and guidelines be put in place to ensure that security officials are vetted before appointment or promotion to higher public office.