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Amnesty and Reconciliation
in Nepal's Truth and
Reconciliation Commission
Bill

Navigating Amnesty and Reconciliation in Nepal's Truth and Reconciliation Commission Bill

During peace negotiations, there is often a belief that providing amnesties for certain crimes will help promote national reconciliation. Nepal's Truth and Reconciliation Commission (TRC) Bill currently contains provisions on both amnesty and reconciliation. However, the Bill itself is not explicit in linking the ability to recommend amnesty to its reconciliation provisions.¹ This briefing note seeks to explore the concepts of amnesty and reconciliation, and highlight a few implications of the Bill's provisions for victims.

What is Amnesty?

An amnesty is a bar on any future prosecutions in respect of specific criminal conduct that occurred before the amnesty came into place. Generally an amnesty refers to conduct that occurred during a specified period or was linked to a particular event, such as an armed conflict.² Amnesties also often relate to a certain category or categories of people, for example, members of the rebel forces or State agents.³ There are different types of amnesties: self-amnesties, blanket amnesties, and conditional amnesties. Self-amnesty is a term used to describe amnesty provisions which are passed by the alleged perpetrators to give themselves immunity from prosecutions. Blanket amnesties are generally understood to apply to all members of specific categories (for example, members of armed opposition groups or of the armed forces), do not generally establish any mechanism for determining who qualifies for the amnesty, and do not require the beneficiary to satisfy any conditions.⁴

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¹ Similarly, the legislation that established the amnesty process in the framework of the South Africa TRC did not mention reconciliation. Promotion of National Unity and Reconciliation Act 34 of 1995, Ch. 4, Amnesty Mechanisms and Procedures.

² Office of High Commissioner for Human Rights (OHCHR), Rule-of-Law Tools for Post-Conflict States, "Amnesties", United Nations, New York and Geneva 2009, at 5-6.

³ Id. 6. Amnesties are best understood as distinct from pardons (an official act that exempts a convicted criminal or criminals from serving his, her or their sentence(s), in whole or in part, without expunging the underlying conviction), although sometimes States have used the term pardon or clemency for an act that is actually an amnesty.

⁴ For example, the Lomé Peace Agreement in Sierra Leone, Article IX of the agreement provides that: "After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement." The UN Secretary-General, Kofi Annan, rejected in his

Conditional amnesties require the perpetrator to satisfy conditions specified in the amnesty law before he or she is granted amnesty.

Are Amnesties Legal?

Under international law amnesties cannot be granted for war crimes, crimes against humanity, genocide or torture. Furthermore, the duty under international law to provide redress renders amnesties unlawful in respect of other gross violations of human rights.⁵ While there is no strict definition of “gross violations of human rights,” it is assumed that they include:

...genocide, slavery and slave trade, murder, enforced disappearances, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, deportation or forcible transfer of population, and systematic racial discrimination... Deliberate and systematic deprivation of essential foodstuffs, essential primary health care or basic shelter and housing may also amount to gross violations of human rights.⁶

When have they been used by truth commissions?

The South African TRC has been the only truth commission to grant amnesties, using a truth-for-amnesty formula. It adopted a very specific model to facilitate this process. The legislation which created the TRC established a “Committee on Amnesty” which, unlike other parts of the TRC, was a quasi-judicial body that was chaired by a judge who presided over the proceedings, testimony, and cross-examination. The amnesty committee was entrusted with the task of evaluating whether the regulation’s specific conditions for amnesty had been fulfilled and thereby whether amnesty should be granted or refused. Amnesties were therefore not automatic, but conditional. The amnesty committee could only grant an amnesty if it was satisfied that the applicant had made a full disclosure of all relevant facts, and that the act was associated with a political objective and was proportionate to this objective. A total of 7,112 applications for amnesty were filed, and the process of reviewing each was slow due in part to the quasi-judicial nature of the proceedings.⁷ Ultimately, 5,392 applicants were refused and only 849 were granted amnesty.⁸ The Office of High Commissioner for Human Rights has stated that it is doubtful whether the South Africa TRC amnesty provisions would be found acceptable by international human rights bodies if they

report to the UN Security Council the proposed amnesty, stating that “[a]s in other peace accords, many compromises were necessary in the Lome Peace Agreement. As a result, some of the terms which this peace has been obtained, in particular the provisions on amnesty, are difficult to reconcile with the goal of ending the culture of impunity, which inspired the creation of the United Nations Tribunals for Rwanda and the Former Yugoslavia, and the future International Criminal Court. Hence the instruction to my Special Representative to enter a reservation when he signed the peace agreement stating that, for the United Nations, the amnesty cannot cover international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law [...].”

⁵ See, e.g., 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. While these Basic Principles do not create law, they were adopted by the General Assembly which recognized that they represented the state of existing international law. See also, OHCHR, Rule-of-Law Tools for Post-Conflict States, “Amnesties”, United Nations, New York and Geneva 2009, 20-21.

⁶ OHCHR, Rule-of-Law Tools for Post-Conflict States, “Amnesties”, United Nations, New York and Geneva 2009, 21.

⁷ Dugard J., “Reconciliation and Justice: The South African Experience” *Transitional Law and Contemporary Problems*, 1998.

⁸ <http://www.doj.gov.za/trc/amntrans/index.htm> (accessed 22 September 2009).

were implemented today.⁹ Commentators have also noted that the high number of amnesty applications was probably due, in part, to a credible threat of prosecutions in South Africa at the time the commission was set up.

Several other truth commissions have been provided with a mandate that included the ability to *recommend* rather than provide amnesties, provided that no recommendation is given for serious violations of international humanitarian law, crimes against humanity, and gross human rights violations. The Liberian TRC could recommend amnesty in the event the persons applying provided “full disclosures of their wrongs and thereby expressing remorse for their acts and/or omissions, whether as an accomplice or a perpetrator, provided that amnesty or exoneration shall not apply to violations of international humanitarian law and crimes against humanity in conformity with international laws and standards . . .”¹⁰

Kenya’s Truth, Justice and Reconciliation Commission is also able to receive applications for amnesty and recommend the granting of amnesty for acts provided that “they do not qualify as a gross violation of human rights.”¹¹

Can Nepal’s TRC grant amnesty?

Nepal’s TRC Bill currently contains an amnesty provision which allows the TRC to recommend amnesties, but only on the condition that the applicant fully discloses information about their own activities during the armed conflict,¹² and only for certain crimes. The provision states no recommendation for amnesty shall be made for a person involved in the following crimes: (a) any kind of murder committed after taking the person into custody (whether State or non-State); (b) murder of an unarmed person; (c) torture;¹³ (d) rape; (e) disappearance of a person and (f) abduction and hostage taking.

The Commission will have to decide whether it will recommend amnesty for serious crimes not included in this list, as well as for lesser crimes. In recommending amnesty, the TRC will need to take into account Nepal’s existing obligations under international human rights law, international humanitarian law and international criminal law.¹⁴ This includes the duty to investigate and prosecute gross human rights

⁹ OHCHR, Rule-of-Law Tools for Post-Conflict States, “Amnesties”, United Nations, New York and Geneva 2009, 33 (stating “it is doubtful whether it would survive scrutiny under the legal standards developed by such bodies as the Human Rights Committee and the Inter-American Commission on and Court of Human Rights.”).

¹⁰ An Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia enacted by the National Transitional Legislative Assembly on May 12, 2005, s.26(g); see also s. 45 (stating that “[t]he TRC shall further recommend for amnesty persons who so qualify under terms and conditions referred to Section 26(g) and reparations for victims, specific actions of government to be taken in furtherance of its findings, the enactment of specific legislations and legal and governmental reform measures to address specific concerns identified by the TRC and affecting relevant governmental authorities or functionaries.”) In its recommendations the TRC stated “General amnesty for children is desirable and appropriate. Amnesty for crimes lesser than gross violations is also desirable and in certain circumstances appropriate to foster national healing and reconciliation.” Final Report of the Commission for Truth and Reconciliation of Liberia, Vol. 1, 6.

¹¹ <http://www.tjrkenya.org/index.php/about-tjrc/mandate-and-activities>.

¹² Nepal Secretariat of Legislative Parliament, A Bill Made for Making Provisions Related to a Truth and Reconciliation Commission, (unofficial translation), Registered December 2009, s. 25(4) (hereinafter TRC Bill). See National Unity and Reconciliation Act 34 of 1995, Ch. 4, Amnesty Mechanisms and Procedures.

¹³ It is assumed that the TRC will interpret the word torture to include the international standard comprising “torture and other cruel, inhuman or degrading treatment or punishment.”

¹⁴ International Covenant on Civil and Political Rights (ICCPR) (1966) and its Optional Protocols (1966 and 1989); International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965); Convention on the

violations, crimes against humanity and serious violations of international humanitarian law. If the TRC does recommend amnesty for such crimes, then it will not “bring impunity to an end” as the TRC Bill’s preamble promises.¹⁵ Furthermore, Nepal will almost certainly be in breach of international law.

Victim Consultation

The TRC Bill states that the Commission may consult the victim prior to making a recommendation for amnesty.¹⁶ While this power is framed as discretionary, the Commission should, as a matter of policy, consider this a mandatory requirement. The Commission should also clarify the procedural, financial and logistical details of how such consultation will take place and be facilitated. The South African TRC’s amnesty process provided for victim participation, but because it lacked such planning and clarity, it suffered from inadequate financial support to facilitate victim attendance and a lack of sufficient notice to victims so they could attend relevant proceedings.¹⁷

It would also be prudent for the Nepal TRC to produce guidelines to explain the purpose and effect of victim consultations as well as the circumstances under which amnesty might be recommended. This should include, amongst other things, the Commission’s understanding of Nepal’s obligations under international law. Such guidelines would be an important step towards increasing the level of transparency that would help manage expectations of all parties and support consistency in decision making.

Elimination of All Forms of Discrimination against Women (CEDAW) (1979) and its Optional Protocol (1999); Convention against Torture and All Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984); Convention on the Rights of the Child (CRC)(1989) and its Optional Protocols (2000) and the Optional Protocol to the Convention on the Rights of the Child (CRC-OP-AC) on the involvement of children in armed conflict, the First Optional Protocol to the Convention on the Rights of the Child (CRC-OP-SC) on the sale of children, child prostitution and child pornography; the Convention on the Rights of Persons with Disabilities (CRPD) (2006). Too often it is forgotten that all of the provisions apply to women, and not simply the obligations that specifically target women. Nepal has yet to ratify Additional Protocols I and II of the Geneva Conventions (1979); the Optional Protocol to CAT (2002); the International Convention on the Rights of All Migrant Workers and Members of their Families (CMW) (1990); and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED). Nor has Nepal ratified the Rome Statute of the International Criminal Court (ICC) (1998).

¹⁵ TRC Bill, Preamble, stating that the TRC will be established “[t]o bring impunity to an end by bringing the persons involved in gross violations of human rights and crimes against humanity by bringing them within the confinement of law and also to make all aware that such acts would be punishable in the future too.”

¹⁶ TRC Bill, s. 23(4). “In case of application for amnesty pursuant to Sub-section 3, the Commission may, prior to its decision in relation to making a recommendation or not for amnesty to such person, consult the victim as per need in such matter.” (This provision assumes that there is an identifiable link between the victim and the perpetrator).

¹⁷ In South Africa, a separate Amnesty Committee was established to review applications for amnesty from the TRC. Victims had right to be notified of the place and time of the hearing of the perpetrator, attend and participate through testifying or presenting other evidence. TRC Act, § 19(4)(a) and (b). However, “In many cases victims were given very little advance notice of a hearing—in some cases they were notified the day before and thus were often unable to attend even if they wanted to... Those who were given enough notice of the hearing were often unable to attend because of lack of time or money. For many victims, getting to a hearing required hours of travel and in many cases the loss of a day of work and thus much needed wages. The TRC did not have the resources to provide transportation and other assistance to allow victims to attend the hearings. For the vast majority of victims such costs made attendance extremely difficult, even impossible in some cases. To compound this problem, applications that had been scheduled for one day might be rescheduled to another, sometimes at the last minute. This was mostly caused by the fact that the amnesty hearings had as their primary focus the perpetrator-applicants. Hearings were scheduled first based on the availability of the applicants and their legal representatives.” Slye, Ron, *Victims as the Heart of the Matter: The South African Amnesty Process as Promised in Practice*, 8 (April 2003). Available at SSRN: <http://ssrn.com/abstract=1022145>.

Can Nepal's TRC reconcile victims and perpetrators? What does reconciliation mean in the Bill?

Nepal's TRC Bill includes provisions on reconciliation, both at the societal and individual level. The Bill states that the TRC has been established "for investigating the truth of incidents of gross violation of human rights and about the persons involved in these incidents during the course of armed conflict, creating an environment conducive for reconciliation in the society and for recommending reparations for victims."¹⁸ The focus of the TRC is therefore on truth-seeking, reparation and reconciliation.

There is also a specific provision in the TRC Bill which deals with the issue of reconciliation. This section gives the Commission the ability to facilitate personal reconciliation between victims and perpetrators.¹⁹ Under this provision either the victim or the perpetrator may file an application for reconciliation. Yet, this assumes that the perpetrator will be easily identifiable as linked to a particular crime and a particular victim.

The provision also gives the Commission the power to compel the perpetrator to provide reasonable compensation as part of the reconciliation process.²⁰ This is concerning because it implies that the payment of compensation is contingent upon the Commission facilitating and ensuring that the parties reconcile. It also creates a real risk of inequality and asymmetry in the amount of compensation received by victims who have suffered similar violations, as this would be dependent on the identification of the perpetrator, the decision to undertake a reconciliation process and the perpetrator's capacity to pay. In addition, it could create confusion and difficulties for a later reparations program, with some victims having already received compensations of varying amounts, whilst others have received nothing. At the same time, the provisions on compensation in the TRC bill should not be considered as reparations, nor be confused with such. According to international law, reparations should not be made contingent on any act or concession from the victim. Reparations are rather a right of the victim as a form of redress for the harm done.

¹⁸ TRC Bill, s.3.

¹⁹ TRC Bill, s. 23. "(1) If a victim or a perpetrator files an application to the Commission for reconciliation, the Commission may have them reconcile. However, the absence of an application from victim or perpetrator, will not prevent the commission from undertaking collective reconciliation. (2) The Commission may, in relation to making reconciliation pursuant to Sub-section (1), ask the perpetrator to apologize to the victim for his/her past misdeeds. (3) The Commission shall, in relation to making reconciliation pursuant to Sub-section (1), make the perpetrator provide reasonable compensation for damages caused to the victim. (4) The Commission may in relation to reconciling pursuant to Sub-section (1), carry out or cause to be carried out the following activities in order to motivate the victim and the perpetrator: (a) To organize reconciliation functions in conflict-ravaged areas by involving perpetrators and victims and their families, (b) To make arrangements for putting up statutes or memorials in memory of those who were killed during the armed conflict by involving the perpetrator, victim and his/her family in the process, (c) To publish various articles, essays, songs, art, etc. relating to reconciliation, (d) To increase social and societal harmony, (e) To carry out other appropriate tasks. (5) If a victim has already been killed or is a minor or is mentally impaired, according to this section, the Commission may reconcile such persons with his/her family-members and the perpetrator. (6) Notwithstanding anything written in this section, there can be no reconciliation without the victim's consent. (7) If reconciliation is carried out between the victim and the perpetrator as per this Section, then no action shall be taken on any other issues except for the crimes mentioned under Section 25 (2)."

²⁰ TRC Bill, s.23 (3). Note that the TRC Bill is similar to other TRC laws in that it only has recommendatory powers regarding reparations, as a comprehensive policy and program will need to be established that will necessarily involve a range of ministries as well as a budget to support the policy.

In addition to having the mandate to assist individuals to reconcile, the Bill also provides the TRC with the power to conduct broader community-based reconciliation activities “to motivate the victim and the perpetrator.”²¹ The Commission can undertake such collective reconciliation activities without receiving any application or request from victims or perpetrators. This section of the Bill, seems to focus on national or community level, rather than individualized reconciliation initiatives.

The ambiguity in the term reconciliation and what the commission might do to help facilitate reconciliation will likely be a challenge to the Nepal TRC as it has been for many truth commissions. The Sierra Leone TRC sought to facilitate reconciliation through the use public hearings at the district level, in the belief that “[t]he combination of an official body (the TRC) actually listening to the victims and the perpetrators publicly apologizing to the victims aimed to create a cathartic experience leading to reconciliation.”²² The Chilean Truth Commission (“Rettig Commission”) addressed the question of reconciliation by noting that, “from the beginning the Commission understood that the truth it was to establish had a clear and specific purpose: to work toward the reconciliation of all Chileans.”²³ In Timor-Leste, the Reception, Truth and Reconciliation Commission’s (CAVR) objective was to “promote national reconciliation and healing following the political conflict in East Timor, and in particular following the atrocities committed in 1999.”²⁴ The CAVR sought to fulfill this mandate through truth seeking, community reconciliation, and making recommendations to Government for further action on reconciliation and the promotion of human rights. With respect to reconciliation, the CAVR held “community reconciliation process hearings,” which facilitated the reintegration of perpetrators of lesser crimes back into their community. The focus was on communities and “was not designed as an individual reconciliation process between victim and deponents.”²⁵ In many cases the victims with whom the perpetrators were seeking to be reconciled were villages and neighborhoods.

²¹ TRC Bill, s.23 (4).

²² Pettersson, Björn, *Post-Conflict Reconciliation in Sierra Leone: Lessons Learned*, in Report prepared by International IDEA for the Office of the High Commissioner for Human Rights (OHCHR) Annual Head of Field Presences Meeting Geneva November 2004 at 12. The author further stated that “a number of reconciliation sessions were held in each district, directly following the week of public hearings. During these sessions, particularly illustrative witnesses, often perpetrators, were invited to tell their story and ask the community for forgiveness. In almost theatrically staged and very emotional sessions, selected perpetrators would kneel in front of the traditional and religious community leaders and ask for forgiveness. Sometimes victims and perpetrators would shake hands. Prayers and emotional speeches would round up the sessions,” *ibid.*, 13. However, he notes that truth-seeking may not be sufficient to provide reconciliation because, “Reconciliation is not only an inter-personal and inter-communal process but also linked to government policies and structural macro-level reforms to address the original causes of the conflict,” *ibid.*, 24.

²³ Report of the Chilean National Commission on Truth and Reconciliation, 40, (February 1991). In its findings, the Commission states that reconciliation means that “[t]he various sectors of society affected must also be brought back together. In this regard it should be noted that this Commission has heard numerous statements from those who suffered indicating their desire that the nation be brought back together and reflecting their spirit of not seeking revenge. Hence it is to be hoped that those who are in a position to help advance reconciliation with some gesture or specific act will do so. They could, for example, make available the information they may have on the whereabouts of those who disappeared after arrest or the location of the bodies of people who were executed or tortured to death and have not yet been found. Only by taking such steps will we advance toward the national reconciliation that is an utter necessity and is also the primary condition for avoiding a repetition of past events.” *Ibid.* at 1113 (trans.).

²⁴ United Nations Transitional Administration in East Timor, Regulation 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, Preamble.

²⁵ Judicial System Monitoring Program, *Unfulfilled Expectations: Community Views on CAVR's Community Reconciliation Process*, 2004, 8.

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The Nepal TRC Bill uses the term reconciliation, which is *melmilap* in Nepali, but does not provide a definition of what reconciliation means. *Melmilap* can be translated as “a settlement” so does not necessarily capture the full meaning of reconciliation. Moreover, the drafting of the reconciliation provision in the TRC Bill is troubling. It is unclear how any TRC could cause reconciliation “to be made.” Reconciliation is both a personal and a social process that may or may not occur over a long time period and cannot be crystallized into a single, formalized event. While uncovering the truth, providing reparations, ensuring criminal accountability of perpetrators, or implementing institutional reforms may in different ways contribute to reconciliation, it is difficult to imagine that a truth commission can definitively reconcile victims and perpetrators, although it may be helpful in stimulating reconciliation.²⁶ In the CAVR example above, the local reconciliation process was undertaken with the consent of the victims, perpetrators and community leaders, and was not forced by the Commission. In addition, the reconciliation process was only used to address, in principle, far less serious crimes, such as property crimes and arson. Murder, torture and sexual offences were explicitly excluded from the process.

Conclusion

While amnesty and reconciliation are not explicitly linked in Nepal's TRC Bill, they both have serious implications for victims. If the provision on recommendations for amnesty remains, then the Commission should routinely consult relevant victims in its decision-making process on amnesty recommendations. In addition, victims should have an active and empowered role in the decision-making process, and the Commission should provide substantial weight to the views of the victims in making its recommendations.

With respect to reconciliation, the Bill contains provisions that relate to both societal reconciliation and direct reconciliation between victims and perpetrators. This has potential to create confusion as the Commission implements its mandate. With respect to societal reconciliation, provided the Commission is credible, and perceived as credible, then the truth-seeking process and recommendations for a comprehensive reparations program as well as for prosecution and institutional reform will no doubt go a long way to creating confidence in the state and its institutions. However, many other measures will need to be taken to heal communities, and the TRC is simply one step in what should be a comprehensive process. The model for reconciliation given in the TRC Bill, which provides for the Commission's power to “have” victims and perpetrators reconcile, is of great concern. Comparative experience indicates that individual reconciliation is highly personal. In addition, there are great risks in placing pressure on victims, which could create a potentially coercive and divisive process, rather than an opportunity to assist in healing.

²⁶ Commentators have stated that the amnesty hearings did provide a forum for acts of reconciliation in South Africa. Slye notes that “[i]n fact all of the participants in the amnesty process... raised the issue of reconciliation at some point in the process. Incidences of forgiveness, apology, or reconciliation between a victim and perpetrator occurred during some hearings, and immediately before or after other hearings. Slye, at 15.