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Position Paper on the Ordinance for the formation of the Inquiry into Disappearance, Truth and Reconciliation Commission 2013

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The Accountability Watch Committee (AWC) is gravely concerned by the provisions contained in the Ordinance on the Enquiry into Disappearance, Truth and Reconciliation Commission, endorsed by the President on 14 March, 2013 on the recommendation of the Council of Ministers.

The participation of victims, other stakeholders as well as the National Human Rights Commission is compulsorily required in the process of drafting of a law. The bills placed before the dissolved Legislature Parliament were prepared following nationwide consultations. The AWC cannot agree with the secretive way in which the Ordinance under review has been prepared, to the extent that the stakeholders were kept in complete darkness. It is no surprise that an Ordinance prepared behind closed doors by the executive does not represent the feelings of the victims and other stakeholder individuals and groups. The AWC makes the following points against the backdrop of the Ordinance going against the feelings of the victims and also against the international treaty obligations of Nepal, as well as the principles and values of transitional justice prepared by the United Nations:

1. Firstly, the title given to the Ordinance is not only defectivebut also misleading. The victims who are said to have become disappeared (*"bepatta bhayeka")* did not disappear themselves voluntarily; the bitter truth behind that remains that they were forcibly abducted and robbed of the right to life and freedom. Thus only the wording "bepatta parieka" (those who were subjected to enforced disappearance) can do justice to the humanitarian tragedy of disappearance. Further, the Ordinance is unconstitutional and illegal for the simple reason that both the Commission on the Disappeared and the Commission for Truth and Reconciliation have been dovetailed into one commission under the present Ordinance, whereas the Comprehensive Peace Accord (2005), the Interim Constitution of Nepal (2007) as well as the directives of the Supreme Court in several cases ask for the formation of two separate commissions. Thus the provision for the formation of only one Commission is in itself unconstitutional as well as unlawful.

2. The definition of 'serious human rights abuse' in Section 2 (j) of the Ordinance is misleading. The link of this definition with the rest of the Ordinance has not been established. In Sections 3 (1) and 23 (2), instead of using the term 'serious human rights abuse', the terms like 'serious crimes' and 'crimes of a serious nature' have been used. The commission cannot give amnesty to crimes of a serious nature. However, it is not clear whether 'crimes of a serious nature' and 'serious human rights abuse' are one and the same. Likewise, the Ordinance brings within the purview of 'serious human rights abuses' crimes which do not fall within the ambit of International Law, such as abduction and capture, looting and confiscation of personal and public property, vandalization and arson, forced ouster from property or other

kinds of displacement. In such cases, amnesty may be given. However, amnesty cannot be given to crimes against humanity or war crimes, such as killing in captivity, torture, disappearance and rape. Such crimes must be mentioned as 'serious crimes' or 'serious human rights abuse'. The attempt of diluting the gravity of serious crimes by mixing up many crimes into one place cannot be acceptable.

3. Section 3 (5) relating to the process of selecting the members of the commission is unclear. Likewise, the eligibility of those who can be members of the commission is restricted to a small category. The criteria for public selection as well as the handling of complaints should be clearly specified. When the Government of Nepal forms the commission under Section 3 (1), it should be clearly stated that there would be no political interference based on political power sharing on the nomination made by the Recommendation Committee under Section 3 (3).Art. Section 19 (3) says that the commission may on occasion give its details regarding its proceedings, which also implies that the commission is also authorised not to do so. Such a provision has the potential to wrest the right of victims and the general public to be informed.

4. In Section 21, it is said that if the commission does not find adequate basis to start proceedings against a complaint, the proceedings can be set aside as closed ('tameli'). This may create conditions where the commission can set aside the proceedings of cases relating to serious human rights abuses as closed ('tameli') by merely stating that there is not enough basis to start proceedings. Neither is there any recourse for appeal, nor has it been made clear whether cases can be picked up again for filing complaint in the then existing bodies if evidence becomes available after the term of the commission is over.

5. The provision of Section 22 relating to conducting reconciliation between the parties is not based on voluntary spirit. The commission can conduct reconciliation even if only a perpetrator seeks it. There is a provision for reconciliation if the perpetrator proposes to pay a specific sum as compensation. It has not been made clear which kinds of crimes cannot be eligible for reconciliation. There is no requirement for the perpetrator to reveal the truth in order to satisfy the victim. The provisions neglects completely the present condition in Nepal, where perpetrators are found in the upper echelons of government, in leadership positions in political parties and in economically well-off position, while the victims are in an unusually weakened state. Such a provision cannot be acceptable.

6. The provisions relating to amnesty are misleading. Section 23 (1) provides for amnesty for all kinds of crimes. Section 23 (2) says that grave crimes will not be eligible for amnesty, but there is no definition of grave crimes. There is no link established between Section 2 (j) relating to grave human rights abuse and Section 23 (2). In Sec. 23(3) it is mentioned that the perpetrator should express regret convincingly, but there is no reference to the need to tell the total truth, which should be accepted by the victim. In Section 23 (2), it is mentioned that the commission may discuss the matter with the victim, if an application is made for amnesty. Such a provision, which requires the commission to merely consult the victim whereas it should be taking the permission of the victim, goes against International Law and hurts the dignity of the victims. Section 23 (5) requires the perpetrator to speak as much of the truth as he knows, whereas the provision should have been as 'to the satisfaction of the victim'. By mentioning in Section 23 (1) and (6) that the 'adequate basis and reasons' shall be as prescribed, an attempt has been made to shift the proceedings to legislative acts and ordinance. The 'basis' and 'reasons' are clearly going to be weak when regulations are made 'as prescribed'. The basis and reasons for amnesty should have been laid down in the Ordinance itself. The amnesty referred to in Section 23 (7) is equivalent to outright forgiveness. Such a listing should be prepared by the government and endorsed by the President, and be published in the Gazette.

7. The provision for reparation in Section 24 does not clarify that reparation is a right of the victims. According to International Law, this is a right rather than a facility or privilege given as required. The existing provision, therefore, needs to be amended accordingly.

8. Section 25, which deals with the sanctioning powers of the commission, is controversial and also against the existing criminal justice system. Section 25 (1) provides that the commission may not sanction action even against persons who have not been given amnesty. Section 27 provides for the commission to send the recommendation for prosecution to the Ministry, and under Section 29 the Attorney General is required to decide whether the case should be prosecuted or not, and a notice shall be published in the gazette specifying which court shall try the case. When action is taken under Section 25 (3) it is unclear whether the provisions under Section 29 will be activated. Likewise, it is unclear which court will hear the proceedings recommended by the commission under Section 25(3). The provisions of Section 25(3) are welcome, but there is no clarity on their implementation.

9. Section 27 deals with the provision relating to submission of the commission's report. The bases for the main report are provided under sub-sections (a) to (f) of Sec. 27(1). Sec. 27(1) (f) provides that if there is a need for a law for the implementation of the report, such a recommendation is to be included in the report. Similarly, the responsibility for the implementation of the report of the commission is given, under Section 28 (2) (d), to the Ministry. Under it, the Ministry is given the responsibility to determine if a law is required to implement the action recommended by the commission. Section 28(3) recommends a set of priorities including legal and institutional reforms, the making of law and reform of the justice system and their gradual implementation. Till date, torture, disappearance, war crimes and crimes against humanity are not yet defined as criminal offences punishable under the existing law. For this reason, the provision for action under Section 25 and the provision under Section 29 for prosecution of cases in the court are meaningless for the purpose of the crimes mentioned above. Under the existing conditions, it is impossible to carry out the action contemplated. For this reason, either laws should be made which are retroactive, or the Ordinance to establish the commission should itself define those crimes.

10. Regarding the provision relating to case filing under Sec. 29, the report of the commission under Sec. 27 shall be sent by the Ministry to the Attorney General or the government lawyer designated by him. If such a notice comes from the Ministry, the relevant authority will have to decide whether to prosecute or not. If the decision is to prosecute, then it should be published in the gazette, including reference to the particular court which will hear the case. Such a case has to be filed within 35 days. The reason for making this provision of Section 29 seems to be unclear. By leaving the decision on prosecution in cases of grave human rights abuses chiefly in the hands of the Attorney General or the government lawyer designated by him there are possibilities of such cases being abandoned. The limitation of 35 days is also unreasonable. Further, it is not clear why the provisions of Section 25 (3) and Section 29 are different. Besides these points, the provisions made in the Ordinance regarding the support of the commission as well as the protection of witnesses and victims are inadequate. Meanwhile, there is no provision for the vetting of those who are guilty or under suspicion. Likewise, there is no obligation to send the recommendations by the National Human Rights Commission to the Ministry, or to publish notification in the Gazette, including designating the appropriate court.

    Against the backdrop of the Supreme Court recently having ordered the government to compulsorily follow recommendations of the NHRC and to proceed with actions as recommended, the Ordinance goes against the intent of the Supreme Court decision. It is unclear why a provision such as this is included regarding the

recommendations of the proposed commission. According to the existing State Cases Act, 2049, the Ministry is not required to issue any directive to prosecute in any case or to designate any court . The relevant provision of the Ordinance seems to have been drafted with a 'mala fide' intent, specifically to prevent the Attorney General's Office from proceeding with a case under existing constitutional provisions and laws. In fact, the provision under Section 29, under which the Attorney General can send the case to the police for more evidence or create a special department within his own office with police included, – goes against the constitutional and existing criminal law as well as the State Cases Act, 2049. Hence, this provision cannot be acceptable.

11. The 13 point position paper recently brought out by the Government of Nepal intending to prove the procedural and the substantive legality and justification of the Ordinance is not only superficial and baseless rather also not based on the facts.

For these reasons, the Accountability Watch Committee concludes that the provisions of the Ordinance are not victim-friendly, are against the Interim Constitution and against national and international laws, and that the law-making process has been secretive and non-transparent. Hence, in this context, the AWC makes this public declaration about its stand as follows:

1. As the AWC does not see any basis to believe that the commission formed under the Ordinance shall be free, autonomous and effective, it is bound to be influenced by political power and administrative apparatus. Since there is a grave apprehension that the Ordinance promulgated even without having consultation with the victims and other stakeholders will virtually remain confined to promoting impunity rather than guaranteeing justice and providing immunity to the perpetrators through the means of amnesty, the AWC out rightly rejects the Ordinance and the commission to be made on its basis.

2. This Committee announces its decision neither to accept the commission nor to be involved in any collaboration or coordination with it in case it is set up on the basis of an Ordinance ignoring the voice of the victims and the stakeholders. Also, if the commission is established by force despite all the objections, the Committee declares that it will not hesitate to boycott it.

3. As the country is presently standing on the thresholds of elections, and the primary responsibility of the present government is to complete the election process, and also realizing the fact that the sensitive task of establishing the transitional justice mechanism requires broader public participation, the AWC believes that the work of enacting law for the creation of an independent, competent and effective commission should be left for the elected Legislature Parliament to be completed through its legislative procedures.

4. Besides, since transitional justice is not a substitute of the regular criminal justice system rather only complementary to it, the AWC appeals that until such time that transitional justice mechanisms are created, the incidents of grave violations of human rights and abuse of humanitarian law from the conflict era should be addressed by further improving and activating the existing criminal justice system.

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