

# Peace without Justice and Accountability?

**A caution against impunity  
in post-conflict Nepal**

Report by an Independent Delegation  
of International Lawyers to Nepal  
October 2024



# Contents

<b>I.</b>	<b>Executive summary</b>	<b>4</b>
<b>II.</b>	<b>Introduction</b>	<b>7</b>
<b>III.</b>	<b>Background</b>	<b>9</b>
	i. The Nepali armed conflict	9
	ii. The establishment of the Federal Democratic Republic of Nepal	9
	iii. Transitional justice	10
	iv. The commitments of the Comprehensive Peace Agreement	12
	v. Interim relief programmes	12
	vi. Early efforts towards transitional justice	13
	vii. The Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act 2014	14
	viii. The Truth and Reconciliation Commission and the Commission on Investigation of Enforced Disappeared Persons	15
	ix. The ordinary criminal courts	16
	x. The National Human Rights Commission	17
	xi. Ongoing state abuses	18
	xii. Amending the 2014 TRC Act	19
	xiii. The view of the international community	20
	xiv. The current Transitional Justice Bill	21
<b>IV.</b>	<b>Legal considerations in the Transitional Justice Bill</b>	<b>23</b>
	i. Definitions within the Bill	23
	ii. Nepal's international human rights obligations	24
	iii. Nepal's obligations under international criminal and humanitarian law	27
<b>V.</b>	<b>Concerns arising from the Transitional Justice Bill</b>	<b>28</b>
	i. Conflation of human rights violations and international crimes	28
	ii. Incomplete list of human rights violations	29
	iii. Limitation on victims	31
	iv. Amnesties resulting from two-pronged categorisation of human rights violations	32
	v. Lack of clarity as to applicable sentences	33
	vi. Victims of conflict-related sexual violence and other vulnerable victims	34
	vii. Appointments to the Special Court and Commissions	37
	viii. Recommendations for prosecutions	39
	ix. Wider concerns	39
	(a) Unrealistic burdens on the Commissions and Courts	39
	(b) Safeguarding conflict-era evidence and data	40
	(c) Funding and wider issues with implementation	41
	(d) Safeguarding civic space and ensuring a victim-centred process	42
<b>VI.</b>	<b>Final conclusions of the delegation</b>	<b>45</b>
<b>VII.</b>	<b>Final recommendations of the delegation</b>	<b>48</b>

# Executive summary

I.

1. The present report has been prepared by an independent delegation of international lawyers at the request of Nepali civil society organisations. In 2024 the delegation was invited to conduct a fact-finding investigation and legal analysis on the rule of law and access to justice in the context of ongoing steps to implement a transitional justice process concerning the 1996–2006 Nepali armed conflict.
2. While the delegation was in Nepal, a Bill to amend the existing transitional justice law was under the consideration of the Nepali Parliament, and the transitional justice process was halted. On this basis, the delegation met with a wide spectrum of stakeholders in Kathmandu, Nepalgunj, Bardiya and Janakpur in order to consider broad views and perspectives on transitional justice. This included meetings with conflict victims; civil society organisations; elected national and local government representatives; state authorities; members of the judiciary; human rights lawyers and defenders; journalists; the diplomatic community and UN representatives. The delegation also consulted an extensive collection of reports and documents from a wide range of stakeholders, and drew lessons from other transitional justice processes, including the process in Colombia. The delegation is grateful to all stakeholders for their willingness to provide information and insights, particularly victims who courageously shared the harms they suffered as well as their experiences and concerns regarding the transitional justice process.
3. The delegation recorded widespread concerns as to some of the provisions in the Bill. The Bill has now been passed as *A Bill to Amend the Disappeared Persons' Enquiry, Truth and Reconciliation Commission Act, 2071*, with some positive amendments – however significant concerns persist. While the delegation commends positive steps taken by the government of Nepal in the transitional justice process so far there are serious concerns as to the ability of the process proposed by the bill as passed to effectively and meaningfully provide access to justice in line with international standards. The majority of this report was drafted immediately prior to the passage of the Bill into law and therefore refers to the legislation consistently as a 'Bill'. However, the analysis that follows is equally as applicable to the legislation as passed and therefore we hope can provide some guidance to the Nepali state as to how the law might best be implemented.
4. Urgent, concrete steps are needed to address the waning trust of victims in the process and to rebuild confidence in the government's commitment to overcome these challenges. Therefore, this report aims to constructively highlight its commentary on the Bill as passed; its conclusions and recommendations based on the information it received from all stakeholders, and to encourage the government of Nepal to implement a transitional justice process which will combat impunity, strengthen the rule of law and afford inclusive justice.
5. The delegation's main findings are as follows:
  - a. There are ongoing failures to implement a legal framework for transitional justice that is in line with Nepal's obligations under international law, constitutional law and the judgments of its Supreme Court. Victims need effective and meaningful access to justice for crimes and human rights violations committed during the armed conflict. Continued delays contribute to a culture of impunity for abuses and deprive victims of truth, remedies and guarantees of non-recurrence. A concrete plan for the practical implementation and monitoring of the transitional justice process, including strategies for providing necessary financial, technical, expert and human resources, is also required.
  - b. It is apparent to the delegation that there is a critical need for the transitional justice process to be realised in a manner which provides all victims with access to transparent, predictable and inclusive justice. It is important that the transitional justice process adopts a victim-centred approach inclusive of all victims, with particular attention to those who are vulnerable or from historically marginalised groups. The government must be sympathetic to the obstacles such victims will face to participating in the process, and address them as a priority. In the meantime, the regular justice system should continue to be available to victims to seek investigation and prosecution of conflict-era cases.
  - c. The existing transitional justice commissions have been deprived of the expertise, investigative capacity and resources necessary to fulfil their investigative mandates, and recommendations from the National Human Rights Commission have not been implemented. In addition, the independence of the transitional justice commissions is at risk. Their independence is key to restoring the trust of stakeholders, including



The delegation was made up of Bruno Menzan (Côte d'Ivoire), Camila Zapata Besso (UK and Colombia), Aswini Weeraratne (UK), Haydée Dijkstal (USA and the Netherlands), Kishali Pinto-Jayawardena (Sri Lanka) and María del Rosario Arango Zambrano (Colombia). This photo was taken with counterparts from the Nepali legal community.



victims. To ensure that transitional justice mechanisms can comprehensively address all documented abuses, it is necessary that steps are taken to independently preserve conflict-era archives, evidence and data, and to ensure the commissions' access to all information.

- d. The transitional justice Bill has now been passed into law, while concerns about its legal framing remain unaddressed. Those concerns still require urgent attention, to avoid further complications to the implementation of the transitional justice process, and ensure legal certainty for victims seeking to engage with it. These include questions as to (1) the precise sources of law that will be relied on to define impugned violations; (2) language in the Bill conflating distinct areas of international law; (3) the exhaustive nature of the list of human rights violations in the Bill which may exclude relevant violations not listed; (4) the exclusion of certain victims and/or international crimes in the Bill; (5) language affording potential *de jure* and/or *de facto* amnesties from prosecution for gross human rights violations and/or international crimes contrary to Nepal's international obligations; and (6) lack of clarity on the criteria applicable to sentencing and vague language on proposals for leniency.
  - e. Civil society, the international community and the media are important stakeholders in the transitional justice process. The role of civil society in Nepal is crucial to assisting victim participation and advocacy. Nepal's free and independent media is key to maintaining public awareness. The international community is key to supporting Nepal to implement transitional justice in line with international law obligations.
6. Based on its conclusions, the delegation has made a number of recommendations, in the hope that they will encourage action for comprehensive transitional justice, with adherence to international law. The recommendations to the Nepali government include the following:

**7.**

**To the government of Nepal:**

- a. Urgently remedy transitional justice delays by implementing a transitional justice process in compliance with Nepal's domestic and international legal obligations.
- b. Demonstrate a concrete commitment to access to justice for conflict victims through truth-seeking, accountability and reparations mechanisms and, in the interim, accelerate access to the regular justice system for all conflict-era cases.
- c. Ensure clarity in the Bill's framing and definitions in order to accurately reflect distinct foundational aspects of international law and principles of inclusiveness.
- d. Incorporate into the legal framework the full scope of obligations which apply to Nepal under international law, and ensure key historic crimes under the special court's jurisdiction are clearly criminalised with set penalties.
- e. Ensure that amnesties are not granted for gross human rights violations, that sentences reflect the crime's gravity, and that prosecutions proceed where the evidence warrants them, without political interference.
- f. Take steps to guarantee access to justice for victims from historically marginalised groups, including women, Dalit peoples, Indigenous communities, LGBTI persons, victims with disabilities and victims of conflict-related sexual violence. Protect their rights and facilitate psychosocial support.
- g. Safeguard the independence or impartiality of the transitional justice process, including for the judges, the commissions and courts, and provide a transparent appointment process focusing on diversity, representation and relevant expertise.
- h. Provide the Truth and Reconciliation Commission and the Commission on Investigation of Enforced Disappeared Persons with the funding, investigative capacity, infrastructure, technical knowledge, expertise and strategy to conduct thorough investigations into all abuses.
- i. Develop an independent mechanism for the preservation and utilisation of conflict-era archives and data by which all evidence held by the government and security forces can be transferred and protected.
- j. Agree and communicate a clear road map which provides certainty on the timeline and practicalities for delivering transitional justice.
- k. Take steps to address ongoing state abuses and to guarantee non-repetition by attending to cases of state torture, extrajudicial killing and other abuses by the security services, providing training and reform of the police, implementing an independent expert mechanism to investigate such abuses, and effectuating the NHRC's recommendation on investigation and prosecution of abuses.
- l. Protect a robust and independent civil society in Nepal by reviewing and revising legislation, policies and practices that are shrinking civic space and limiting the activities of human rights defenders. Civil society and human rights defenders have been, and will continue to be, crucial to assisting the transitional justice process and advocating for the rights of vulnerable victims.

**8.**

Finally, the report recommends that the international community encourage and support the Nepali government to develop a transitional justice process that is in line with international law. The delegation encourages all stakeholders to support a transitional justice process rooted in and compliant with international standards, in order to ensure a process tailored towards peace and protecting the dignity of victims.

## II.

# Introduction

9. From 12 to 18 March 2024, an independent fact-finding delegation of international human rights lawyers travelled to Nepal. The delegation was organised in response to an invitation by Nepali civil society organisations, as a result of concerns regarding Nepal’s long-overdue transitional justice process to address human rights violations committed during Nepal’s armed conflict, which ended in 2006. Its visit took place while a Bill to amend the existing transitional justice law was before the Nepali Parliament. The delegation conducted a fact-finding investigation and legal analysis of rule of law and access to justice in this context. Following the delegation’s fact finding, and while this report was being prepared, the Bill was passed into law on 29 August 2024. The delegation’s commentary on that final Bill is set out at Section V (“legal considerations”) and Section VI (“concerns arising”) of this report.
10. The delegation was made up of six human rights experts spanning seven different nationalities, who acted pro bono:

Kishali Pinto-Jayawardena, jurist, constitutional lawyer, and Commissioner of Sri Lanka’s Right to Information Commission (Sri Lanka);

Aswini Weeraratne, King’s Counsel, Barrister at *Doughty Street Chambers*, former vice-chair of the UK Bar Human Rights Committee (“BHRC”) and former chair of the Human Rights Lawyers Association (“HRLA”) (UK);

María del Rosario Arango Zambrano, Lawyer for Forest Peoples Programme in Colombia, former national officer of the OAS mission to support the peace process in Colombia, and formerly representing conflict victims before the transitional justice courts (Colombia);

Haydée Dijkstal, Barrister at *33 Bedford Row Chambers*, and Executive Committee member of the BHRC (USA and the Netherlands);

Bruno Menzan, Legal Officer at the African Commission on Human and Peoples’ Rights and the African Union Commission (Côte d’Ivoire);

Camila Zapata Besso, Barrister at *Doughty Street Chambers*, and Executive Committee member of the HRLA (UK and Colombia).

11. The delegation met in Kathmandu, Nepalgunj, Bardiya and Janakpur with conflict victims; civil society organisations; elected national and local government representatives; state authorities; members of the judiciary; human rights lawyers and defenders; journalists; the diplomatic community and UN representatives in order to understand the long road to delivering transitional justice in Nepal.
12. For the duration of the assignment, the delegation was able to rely on local logistical support from Peace Brigades International, Advocacy Forum-Nepal, and Santosh Sigdel, a Nepali human rights lawyer, who functioned as an essential bridge between the delegates and the stakeholders they visited. The delegation would like to express its gratitude to all the individuals and organisations who assisted the delegation or took the time to speak with its members.
13. The delegation found that, despite the urgent need of victims to receive justice, the broad support of state actors across the political spectrum, and keen encouragement from domestic civil society organisations and the international community, the state has as yet been unable to effectively implement a transitional justice process in line with international standards, and ongoing proposals fall short of meeting them.



14. On the last day of its mission, the delegation issued a press release<sup>1</sup> and met with journalists representing the spectrum of Nepal's media landscape. The delegation's activities, along with its initial concerns, were reported in the national media.<sup>2</sup>
15. This report builds on those initial concerns, the delegation having reflected on the valuable information received from all stakeholders met during the delegation's mission. The delegation has been assisted by the wealth of national and international legal literature on Nepal's armed conflict and its efforts towards transitional justice. That has assisted the delegation in understanding the domestic historical and legal background to its own findings.
16. The report is intended to encourage the Nepali state to combat impunity and achieve justice for victims by implementing a transitional justice process that complies with international human rights standards. The delegation's concerns and recommendations reflect those already made by the international community at the UN and civil society level. While this report aims to provide constructive criticism and recommendations based on information from stakeholders and other information collected, the delegation wishes to acknowledge the effort and great steps forward that Nepal has already taken.

Lawyers from the delegation travelled to Janakpur and met with civil society organisations.



1 IDIL Nepal press release, 'International legal experts: TJ bill represents a transformational opportunity for Nepali justice - if details are strengthened and wider rule of law obstacles are overcome' (19 March 2024).

2 See e.g. MyRepublica, 'Int'l legal experts meet govt, civil society representatives to understand challenges to rule of law, including access to TJ and judicial independence' (19 March 2024). All hyperlinked references in this report were last accessed on 31 August 2024.



# Background

## i. The Nepali armed conflict

17. Between 1996 and 2006 the then Communist Party of Nepal (Maoist faction) (“CPN-M”) waged a ‘people’s war’ against then-monarchical Nepali government forces. In the decade of fighting, tens of thousands of people suffered serious violations of international human rights and humanitarian law, including unlawful killing, enforced disappearance, torture, rape and other forms of sexual violence, the use of child soldiers, arbitrary arrest and forced displacement. Both government security forces and Maoist guerrillas were responsible for the abuses. Victims included non-combatant civilians, as well as Maoist combatants and members of state forces.<sup>3</sup>
18. The delegation heard first-hand accounts from conflict survivors, particularly unarmed civilians, former Maoist combatants and their family members, as to the range of abuses endured. It learned that, proportionally-speaking, members of historically marginalised and impoverished communities, such as Dalit and Indigenous peoples, suffered particular targeting as a result of being stigmatised as potential Maoist recruits.
19. The armed conflict ended on 21 November 2006 when a Comprehensive Peace Agreement<sup>4</sup> was made between the government and the Maoists. This included express commitments on transitional justice for victims of conflict-related violations. The Maoists entered mainstream politics; the monarchy was abolished in 2007, and a democratic republic was declared in 2008. Transitional justice, however, is yet to be implemented.

## ii. The establishment of the Federal Democratic Republic of Nepal

20. The 2015 Constitution establishes Nepal as a federal democratic republic, and includes extensive fundamental rights provisions. It responded, in significant part, to the struggles of the Madhesh Movement and other minority groups for increased political representation. While the gains made by the constitution are impressive, wider criticisms persist as to the state’s implementation of its protections, many of which are outside the scope of this report but provide important context.<sup>5</sup> government proposals to amend the constitution are ongoing.<sup>6</sup>
21. Since the end of the armed conflict, Nepal has enjoyed a relatively stable peace. The country has been governed by ruling coalitions between its major political parties, including the CPN-Maoist Centre (broadly representative of the Maoists), the Nepali Congress, the CPN-Unified Marxist Leninist, the Rastriya Swatantra Party, the Janata Samajbadi Party and the CPN-Unified Socialist. Notwithstanding the ‘CPN’ moniker shared by some of these parties, they represent a diverse political landscape, with differing views on the Maoist insurgency. The Nepal Army is currently the largest provider of personnel to UN peacekeeping missions worldwide.<sup>7</sup>
22. Throughout its successive governments, accountability for perpetrators and redress for victims of conflict-related violations has consistently been at the forefront of Nepali public discourse across the political spectrum, and has been used as a tool for political negotiations. Discourse, however, has not yet translated past deficient legislative efforts into concrete action for transitional justice.

<sup>3</sup> See the UN Office of the High Commissioner for Human Rights (“OHCHR”), ‘Nepal Conflict Report’ (October 2012), for the best summary of the major categories of conflict-related violations.

<sup>4</sup> Comprehensive Peace Accord signed between Nepal government And the Communist Party of Nepal (Maoist) (22 November 2006).

<sup>5</sup> See, for example, the International Commission of Jurists, ‘Human rights and the Rule of Law in a Federal Nepal: recommendations from an ICJ High-Level Mission’ (July 2020).

<sup>6</sup> The Kathmandu Post, ‘Time to amend the Constitution’ (9 July 2024).

<sup>7</sup> UN, ‘Contribution of Uniformed Personnel to UN by Country and Personnel Type’ (31 March 2024); The Kathmandu Post, ‘Nepal becomes top troops contributor to UN peacekeeping missions’ (8 February 2024).

Janaki Mandir Hindu temple in Janakpur.



### iii. Transitional justice

- 23.** The 2004 Report of the UN Secretary-General on ‘The rule of law and transitional justice in conflict and post-conflict societies’ defines the notion of transitional justice as *“the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation”*.<sup>8</sup>
- 24.** The report makes clear that victim-centred justice is a crucial component to ensuring long-lasting peace:
- “Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities. Approaches focusing only on one or another institution, or ignoring civil society or victims, will not be effective.”*<sup>9</sup>
- “the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice. At the same time, the heightened vulnerability of minorities, women, children, prisoners and detainees, displaced persons, refugees and others, which is evident in all conflict and post-conflict situations, brings an element of urgency to the imperative of restoration of the rule of law.”*<sup>10</sup>
- 25.** Transitional justice must be underpinned by the rule of law, ensuring the equal application of laws and accountability consistent with human rights standards.<sup>11</sup> The broad range of transitional justice processes may include a combination of both judicial and non-judicial mechanisms, individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, and other guarantees of non-recurrence.<sup>12</sup>

<sup>8</sup> UN Secretary-General, ‘Report on the rule of law and transitional justice in conflict and post-conflict societies’ (23 August 2004) UN Doc S/2004/616, §8.

<sup>9</sup> *Ibid.*, summary §2.

<sup>10</sup> *Ibid.*, §2.

<sup>11</sup> *Ibid.*, §6.

<sup>12</sup> *Ibid.*, §8.

26. Criminal justice for serious violations of human rights and humanitarian law prevents recurrence, secures dignity for victims whose former tormentors are made to answer for their crimes, establishes a record of past events, promotes national reconciliation and contributes to lasting peace.<sup>13</sup> Amnesties can never be permitted to excuse genocide, war crimes, crimes against humanity or gross violations of human rights.<sup>14</sup>
27. However, other mechanisms may be needed in addition to the criminal justice process to ensure holistic justice and conciliation, in particular to:
- “help satisfy the natural need of victims’ relatives to trace their loved ones and clarify their fate; to ensure that victims and their relatives are able to obtain redress for the harm they have suffered; to meet the need for a full, comprehensive historical record of what happened during the period of conflict and why; to promote national reconciliation and encourage the emergence of moderate forces; and to ensure the removal from the justice and security sectors of those who may have connived in the violation of human rights or aided and abetted repression.”*<sup>15</sup>
28. To this end, truth commissions can be a valuable complementary tool, because they take a victim-centred approach to establishing a historical record and recommending remedial action. Ascertaining the whereabouts of disappeared persons is crucial to victims’ rights to truth and remedy. Vetting processes are also key to restoring public trust in national governance institutions.<sup>16</sup>
29. Reparations provide concrete remedies to victims and restore confidence in the state. However, solely monetary reparations are unlikely to be satisfactory. They should be combined with non-monetary elements, such as the restitution of victims’ legal rights, programmes for rehabilitation, official apologies and commemoration,<sup>17</sup> to comprehensively address victims’ wider needs.
30. Since the UN Secretary-General’s 2004 report, the goals of transitional justice have been articulated and built upon in various United Nations documents, including the several 2006 and 2009 OHCHR ‘Rule-of-law tools for post-conflict states’;<sup>18</sup> the 2010 guidance note of the UN Secretary-General on the ‘United Nations approach to transitional justice’;<sup>19</sup> the 2011 report of the Secretary-General on ‘The rule of law and transitional justice in conflict and post-conflict societies’;<sup>20</sup> several reports of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence;<sup>21</sup> the 2018 Joint Study of the Special Rapporteur and the Special Adviser to the Secretary-General on the Prevention of Genocide on ‘The contribution of transitional justice to the prevention of gross violations and abuses of human rights and serious violations of international humanitarian law, including genocide, war crimes, ethnic cleansing and crimes against humanity, and their recurrence’;<sup>22</sup> several resolutions of the UN General Assembly, Human Rights Council and Commission on Human Rights;<sup>23</sup> the 2022 report of the UN High Commissioner for Human Rights on ‘Human rights and transitional justice’;<sup>24</sup> and, most recently, the 2023 ‘Guidance note of the Secretary-General: Transitional Justice: a Strategic Tool for People, Prevention and Peace’.<sup>25</sup> The delegation’s analysis of the transitional justice process in Nepal has been formulated with the principles arising from these in mind.

13 *Ibid*, §§38–39.

14 *Ibid*, §10 and §32.

15 *Ibid*, §37.

16 *Ibid*, summary §4.

17 *Ibid*, §§54–55.

18 OHCHR, ‘Rule-of-law tools for post-conflict states’ on ‘Truth Commissions’ (2006) UN Doc HR/PUB/06/1; ‘Mapping the Justice Sector’ (2006) UN Doc HR/PUB/06/2; ‘Monitoring Legal Systems’ (2006) UN Doc HR/PUB/06/3; ‘Prosecution initiatives’ (2006) UN/Doc HR/PUB/06/4; ‘Vetting’ (2006) UN Doc HR/PUB/06/5, and ‘Amnesties’ (2009) UN Doc HR/PUB/09/1.

19 UN Secretary-General, ‘Guidance note: United Nations approach to transitional justice’ (March 2010) UN Doc ST/SG(09)/A652.

20 UN Secretary-General, ‘Report on the rule of law and transitional justice in conflict and post-conflict societies’ (12 October 2011) UN Doc S/2011/634.

21 UN Human Rights Council (“HRC”), ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff’ (9 August 2012) UN Doc A/HRC/C/21/46; ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence’ (23 August 2013) UN Doc A/68/345; ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff’ (7 September 2015) UN Doc A/HRC/30/42; ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence’ (12 October 2017) UN Doc A/72/523; ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence’ (25 July 2018) UN Doc A/HRC/39/53.

22 HRC, ‘Joint study of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Adviser to the Secretary-General on the Prevention of Genocide on the contribution of transitional justice to the prevention of gross violations and abuses of human rights and serious violations of international humanitarian law, including genocide, war crimes, ethnic cleansing and crimes against humanity, and their recurrence’ (6 June 2018) UN Doc A/HRC/37/65.

23 See UN General-Assembly (“UNGA”) Res 68/165 on ‘Right to the truth’ adopted on 18 December 2013 (21 January 2014) UN Doc A/RES/68/165; HRC, ‘Resolution on ‘Human rights and transitional justice’ adopted on 7 October 2022 (12 October 2022) UN Doc A/HRC/RES/51/23, and the prior resolutions of the HRC and UN Commission on Human Rights listed therein at recital 2.

24 HRC, ‘Report of the Office of the United Nations High Commissioner for Human Rights: Human rights and transitional justice’ (12 January 2022) UN Doc A/HRC/49/39.

25 UN Secretary-General, ‘Guidance note: Transitional Justice – a Strategic Tool for People, Prevention and Peace’ (11 October 2023)

#### iv. The commitments of the Comprehensive Peace Agreement

31. In the Comprehensive Peace Agreement (“CPA”), both sides to the conflict agreed to “investigate [the] truth about people seriously violating human rights and involved in crimes against humanity, and to create an environment of reconciliations in the society”.<sup>26</sup> They committed to “impartial investigation and action” to ensure “the right of the victims of conflict and torture and the family of disappeared to obtain relief”, and emphasised that “impunity will not be tolerated”.<sup>27</sup> They agreed to make the whereabouts of the disappeared and killed public known within 60 days.<sup>28</sup> Almost 18 years later, these promises are yet to be fulfilled.

#### v. Interim relief programmes

32. Between 2008-2012, an ambitious government interim relief programme was implemented through Local Peace Committees established at the district and village development committee level,<sup>29</sup> to collect data on conflict victims and provide modest *ex gratia* cash payments to some victims and their families, to help meet their immediate needs. These benefits reached over 30,000 people categorised as victims, and around 80,000 internally displaced people. Families of the *recognised* deceased and disappeared, those who had suffered disabilities, and those whose property had been damaged during the conflict were eligible. Modest scholarships were also offered to children of the deceased.
33. However, some categories of victims, including survivors of sexual violence and torture, were not included in interim relief programmes.<sup>30</sup> This is a significant omission that has only recently been recognised. It is well known, for example, that during armed conflict women and girls are increasingly and deliberately targeted for sexual violence,<sup>31</sup> and will be particularly affected by the lack of interim relief including psychosocial support and healthcare. This omission has, also, by many accounts exacerbated the extant position, due to the ongoing social stigma sexual violence carries in Nepal, whereby data collected by existing transitional justice mechanisms in relation to conflict related sexual violence is limited or incomplete. This leaves an additional justice lacuna that must be filled if the scale of the issue is to be properly understood and remedies are to be provided (see §141 below).
34. Former child soldiers, which numbered over 4,000,<sup>32</sup> did not benefit from the interim relief programme either. After the end of the conflict, they were put in cantonments until 2010, during which those who were verified to be minors at the time of their recruitment were “disqualified” and demobilised.<sup>33</sup> They were ineligible to join the Nepali Army, as some former CPN-M cadres who were over 18 at the time of verification were allowed to do.<sup>34</sup> Rehabilitation packages were provided to them, which included either education support, or training in vocational or other skills,<sup>35</sup> however these did not include financial benefits.<sup>36</sup> Only around half the number of former child soldiers participated in rehabilitation,<sup>37</sup> for diverse reasons, including dissatisfaction regarding the content of the rehabilitation package, political pressure not to do so, and a lack of confidentiality in the registration process.<sup>38</sup> Former child soldiers continue to face barriers to their rehabilitation, including not being seen as victims,<sup>39</sup> untreated physical injuries, mental health issues, poverty, a lack of family or social support, and stigma.<sup>40</sup>
35. The delegation also heard complaints from some conflict survivors who perceived that they had been left out of interim relief on discriminatory political grounds, or due to bureaucratic obstacles in proving that their family members were dead or disappeared.

26 CPA, §5.2.5.

27 CPA, §71.3.

28 CPA, §5.2.3.

29 See, further, Nepal Transition To Peace Institute (NTPI) Working Paper, ‘The Enduring Importance of Local Peacebuilding in Nepal - Should Local Peace Committees be continued?’ (May 2016).

30 UN International Organization for Migration (IOM), ‘Report on Mapping Exercise and Preliminary Gap Analysis of the Interim Relief and Rehabilitation Programme: Interim Relief and Rehabilitation to the Victims of Nepal’s Armed Conflict’ (December 2010).

31 Committee on the Elimination of Discrimination against Women (“CEDAW Committee”), ‘General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations’ (1 November 2013) UN Doc CEDAW/C/GC/30, §35.

32 Peace Envisioners and Trial International, ‘A quest for justice: the status of children involved in Nepal’s armed conflict’ (June 2019), §14 and §42.

33 *Ibid*, §§37-44.

34 *Ibid*, §45.

35 *Ibid*, §§46-47.

36 *Ibid*, §50.

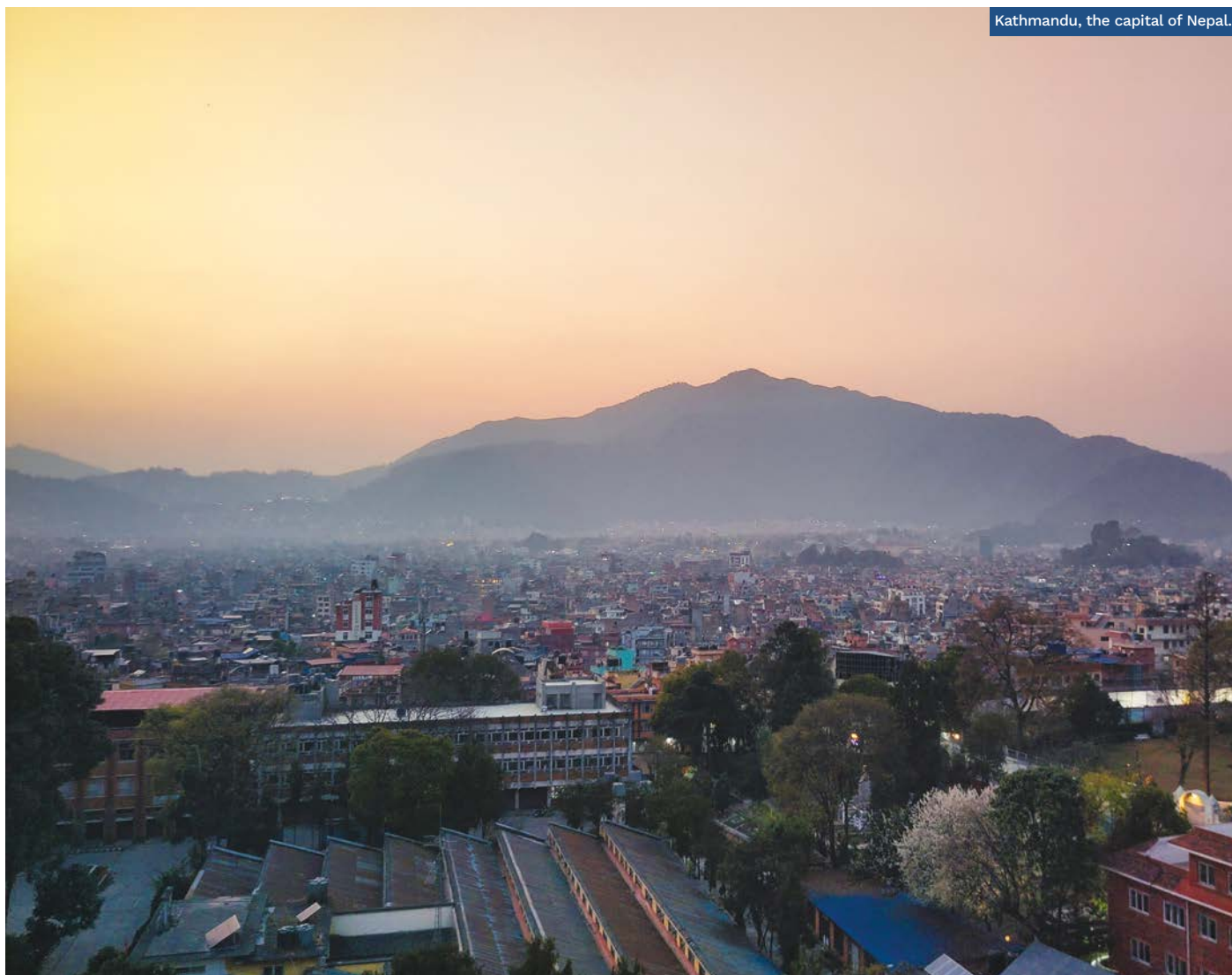
37 *Ibid*, §§48-49.

38 *Ibid*, §§49-51.

39 *Ibid*, §52.

40 *Ibid* §§53-57. See also Kul Chandra Gautam (former Assistant Secretary-General of the UN and Deputy Executive Director of UNICEF) writing for The Kathmandu Post, ‘Transitional justice has failed former child soldiers’ (20 November 2021).





## vi. Early efforts towards transitional justice

- 36.** The CPA envisioned the forming of a truth and reconciliation commission to investigate the full range of human rights violations. Furthermore, in response to a number of petitions of writs of habeas corpus filed in the Supreme Court, the Supreme Court ordered the government to establish a Commission of Inquiry on Enforced Disappearances.<sup>41</sup> However, setting these up was immediately problematic.
- 37.** In 2007, an initial committee was politically appointed to draft the laws to establish the commissions. The resulting drafts proposed an amnesty to those committing crimes ‘in the course of achieving political objectives’ or ‘while performing their duty’, rightly attracting criticisms from victims and civil society because it effectively provided impunity for both members of the security forces and former Maoist combatants. Government consultations with victims, civil society and the OHCHR ensued. An agreement on the draft bills was reached, that the commissions would focus on truth-seeking, recommending reparation and reforms, and facilitating amnesty for less serious crimes. Amnesties were not to apply to serious violations such as murder, enforced disappearance, torture, rape and sexual violence, which would be prosecuted.<sup>42</sup> The bills were tabled in parliament in February 2010, and received further amendment proposals by parliamentarians that were reflective of victims’ concerns. However, the bills were withdrawn by the government following an election-related parliamentary dissolution. In their place, on 14 March 2013 an executive Ordinance was passed which removed the prohibition on amnesties for serious violations.

<sup>41</sup> *Rabindra Prasad Dhakal and Ors (on behalf of Rajendra Prasad Dhakal) v government of Nepal, Ministry of Home Affairs and Ors* (2007) NKP 2064 BS, Issue No. 2, Decision No. 7817, pp169–250.

<sup>42</sup> Advocacy Forum-Nepal, ‘Special Brief: Transitional Justice at Crossroads’ (January 2014).

38. In January 2014 the Supreme Court of Nepal held that the ordinance violated the rights of the victims, and that the legal framework for transitional justice must be designed with the following principles in mind: the need for expert assistance and wider consultations with stakeholders, especially victims; that gross violations of human rights cannot be the subject of amnesty; that legislation must be enacted to criminalise gross violations including torture and enforced disappearance; that victims' consent is mandatory prior to an amnesty being offered in a case where it is available, and that effective reparation for victims must be provided.<sup>43</sup>
39. Following the ruling, in March 2014 the government established a committee of experts to draft another bill, with the consultation of representatives of victims' groups. The committee was only given around a month to do so, but it expected wider consultations to be held following the draft. Instead, a different bill was tabled in parliament, drafted solely by political parties in consensus. It was not subject to parliamentary debate or wider consultation. In April 2014 the bill was passed using a fast-track procedure.<sup>44</sup>

### vii. The Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act 2014

40. The resultant Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act 2014 ("the TRC Act") created the Truth and Reconciliation Commission ("TRC") and the Commission on Investigation of Enforced Disappeared Persons ("CIEDP").
41. The TRC Act was promptly challenged in the Supreme Court. Victims, civil society actors and the international community, including the OHCHR, urged the government to postpone the establishment of the commissions until the Court had delivered its judgment.<sup>45</sup> The government did not wait. It established the commissions in early 2015.
42. In February 2015, the Supreme Court delivered a seminal judgement which found that the TRC Act violated the Court's previous decisions, Nepal's Constitution and its international obligations.<sup>46</sup> That was because reconciliation requires victims' consent and cannot be used as a tool for impunity for gross human rights violations, contrary to the effects of the TRC Act; the TRC Act impermissibly allows for governmental ministry intervention in referrals from the TRC to the Attorney General for prosecutions, and the Act empowers the TRC to make recommendations for amnesties in all cases except for rape, which is impermissible in cases of gross violations that are subject to a duty to prosecute.<sup>47</sup> The Act has since been the subject of several attempts at amendment to address the Supreme Court's judgement, none of which have as yet been fruitful.
43. In 2017, the Supreme Court issued its Opinion on a government bill to establish the Transitional Justice Special Court required by the TRC Act, which provided for appointment of judges by political consensus, and a self-contained appeals process whereby both trials and appeals would be heard within different tiers of the Special Court. The Court held that, to ensure independence, judges will need to be from the pool of judges selected by the Judicial Council for the High Courts, that appeals against decisions of the Special Court would need to be to the Supreme Court in accordance with the Constitution, and that legislation criminalising and setting penalties for crimes under the Special Court's jurisdiction is needed.<sup>48</sup>
44. **CONCLUSION:** the ongoing failure of the Nepali state to implement a legal framework for transitional justice which is in line with its obligations under international law, constitutional law and the judgments of its Supreme Court, weakens both domestic and international rule of law, and entails an ongoing failure to respect the human rights of its conflict victims.
45. **RECOMMENDATION:** without further delay, develop and implement an effective transitional justice process that is in line with Nepal's international obligations, international human rights standards, and the guidance of its Supreme Court.

<sup>43</sup> *Madhav Kumar Basnet et al v Office of the Prime Minister and Ors* (2014) NKP 2070 BS, Issue No. 9, Decision No. 9051, pp. 1101-1155.

<sup>44</sup> Advocacy Forum-Nepal, 'The state of transitional justice in Nepal: briefing paper' (February 2019), p10.

<sup>45</sup> See, e.g. OHCHR, 'Technical Note: The Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2017' (2014).

<sup>46</sup> *Suman Adhikari and Ors v Office of the Prime Minister and Ors* (2015) NKP 2071 BS, Issue No. 12, Decision No. 9303.

<sup>47</sup> Advocacy Forum-Nepal, 'The state of transitional justice in Nepal: briefing paper', pp10-12.

<sup>48</sup> *Ibid*, p14, citing the *Opinion and reaction of the Supreme Court on the Bill to establish a Transitional Justice Special Court of 2017*.

## viii. The Truth and Reconciliation Commission and the Commission on Investigation of Enforced Disappeared Persons

46. Since 2015, and pending amendments to the TRC Act to bring it in line with the Supreme Court's rulings, the TRC and CIEDP have continued to operate under successive mandates. The TRC has, at the time of writing, received around 64,000 complaints of human rights violations, and the CIEDP has received more than 3,000 complaints of enforced disappearance. During their mandates, the Commissions have not completed investigations in a single one of these cases.
47. The Commissions suffer from a lack of trust, funding, technical knowledge, legitimacy and expertise. They lack the capacity, infrastructure and strategy necessary to conduct evidence-collecting for the purposes of safely investigating what happened, where the remains of disappeared persons are, who is responsible, and recommending prosecutions. Even if they were to recommend prosecutions, there is no legal or institutional framework by which those prosecutions can be pursued. Key *historic* crimes such as torture and enforced disappearance have not yet been *clearly* codified (whilst the 2017 Penal Code now criminalises both, torture was not a codified crime at the time of the conflict, whereas it may be argued that enforced disappearance is a *continuing* crime to which the new Penal Code applies), other crimes (such as rape) are already time-limited under existing laws, and the Special Court which is required by the TRC Act to hear such cases does not yet exist. The Commissions' credibility has been diminished by the deficient legal framework on which they are forced to rely. They are subject to political appointments, without consultative selection processes. Amidst controversies, commissioners' mandates have not been extended since July 2022, as of when their substantive work has halted.
48. On 12 March 2024, the Supreme Court issued a detailed order in response to a petition by conflict victims challenging the prolonged delay in establishing a transitional justice process. The Court held that there was an ongoing violation of the right of victims to timely and fair justice. It issued an order of mandamus, directing the government to (i) establish a recommendation committee to appoint commissioners for the TRC and CIEDP within one month, and (ii) conduct a victim's consultation within 15 days to devise a working guideline for the Commissions to undertake preliminary investigations under the leadership of the Secretary until the full Commission is constituted.<sup>49</sup>
49. On 12 April 2024, the government announced the formation of a recommendation committee to appoint members to the TRC and CIEDP, comprising of four government-appointed prominent figures including a former Chief Justice, a former Supreme Court Justice, a former ambassador to the USA, and a social activist. During consultations prior to the announcement, a large group of victims and civil society groups asked that commissioners not actually be appointed until after the TRC Act had been amended, and only pursuant to those amendments. On 30 April 2024 the National Human Rights Commission announced that it would not exercise its power to appoint a recommendation committee member *ex-officio* until there was a clear government commitment to amend the TRC Act within a specified timeline.<sup>50</sup> The committee's work has therefore not started at the time of writing.
50. In its meetings with victims' groups, human rights lawyers and civil society organisations, a real sense of frustration was expressed as to the workings of the Commissions. The delegation heard that victims face obstacles in accessing the Commissions' files on their complaints, or understanding the extent to which those complaints have been acknowledged or investigated. There is also a paucity of information on the extent to which the Commissions have probed into military archives which are not accessible to victims, or as to whether conflict-era cases of serious human rights violations have already been confidentially tried in the country's military courts, without victim participation. The delegation heard that the Commissions are widely perceived by victims' groups, civil society organisations and the international community to be unable to fulfil their mandate, and at worst as vehicles for ongoing impunity.<sup>51</sup> Staff from the Commissions and government representatives who met with the delegation acknowledged that building up public trust in their institutions would be an uphill struggle.
51. **CONCLUSION:** the practical, technical and legal shortcomings of the TRC and CIEDP must be remedied as a matter of urgency, because the efficacy of the transitional justice process hinges upon them.
52. **RECOMMENDATION:** ensure swift access to justice for conflict victims, which must include truth-seeking, accountability and comprehensive reparations. Justice is already overdue, and should not be denied to victims any longer.

<sup>49</sup> Advocacy Forum-Nepal, 'Transitional Justice: Recent Update' (May 2024).

<sup>50</sup> *Ibid.*

<sup>51</sup> See also International Commission of Jurists, 'Human rights and the Rule of Law in a Federal Nepal: recommendations from an ICJ High-Level Mission'; Advocacy Forum-Nepal, 'The state of transitional justice in Nepal: briefing paper'.



Representatives from the delegation and PBI meet with civil society organisations, members of the legal community and representatives from the National Human Rights Commission in Nepalgunj.



## ix. The ordinary criminal courts

**53.** While they await the establishment of a transitional justice process, and pending the criminalisation of conflict-era gross human rights violations, victims have sought justice via the ordinary Nepali courts for extrajudicial killings, relying on the historic codification of murder as a domestic crime, and on the argument that enforced disappearance is a continuing offence. However, these have led to a vanishingly small number of prosecutions.<sup>52</sup>

**54.** An important example is the case of Maina Sunuwar, a child who was disappeared and tortured to death in the Panchkhal army barracks in 2004. To use Advocacy Forum-Nepal’s summary of what happened:

*“Around 6 a.m. on February 19, 2004, a group of 15 uniformed soldiers arrived at Maina Sunuwar’s house. Security personnel said they were looking for her mother Devi Sunuwar but since Devi was not in the house, they took Maina away in her place. They told Maina’s father, Purna Bahadur, that if he wanted Maina back he should bring her mother, Devi, to Lamidanda Barracks in Kavre. The following day, a group of around 25 people, including the principal of Maina’s school, Purna Bahadur, and one of Maina’s teachers went to the Lamidanda barracks. When they asked about Maina and demanded her release, security forces in the barracks denied having arrested Maina. The group then went to the army barracks at Panchkhal, where officials again denied any involvement in her arrest. Maina’s mother repeatedly visited the District Administration Office and DPO of Kavre, Lamidanda army camp, and Panchkhal army camp, but they all denied the arrest and threatened her instead. At one point, some security forces at Panchkhal army barracks told Maina’s mother that Maina had not “disappeared,” but had been “killed in an anti-[Maoist] terrorist operation.” In April 2004, Maina’s mother visited the NA Headquarters in Kathmandu where she was told that Maina had been killed and that her clothes and other things had been sent to the police. Under sustained pressure from the international community, including from the UN High Commissioner for Human Rights, Louise Arbour, the army proceeded with an internal inquiry and brought three soldiers allegedly responsible before a court martial on April 21, 2004. According to army records, the accused were only charged with minor offences of using improper interrogation techniques and not following procedures during the disposal of Maina’s body. They were sentenced to six months’ imprisonment.”<sup>53</sup>*

**55.** Eventually, in 2017 the Kavre District court convicted and sentenced the soldiers *in absentia* to life imprisonment for murder. The delayed police investigation in that case had led the Supreme Court to lay down a further number of relevant principles, including that the civilian courts have jurisdiction over

<sup>52</sup> See Human Rights Watch (“HRW”) and Advocacy Forum-Nepal, ‘Breaking Barriers to Justice: Nepal’s Long Struggle for Accountability, Truth and Reparations’ (5 March 2024), p40.

<sup>53</sup> Advocacy Forum-Nepal, ‘Maina Sunawar: Extrajudicially killed by the then RNA’ (2011).



the killing of civilians by the army during the conflict; justice cannot be delayed and denied on the basis that it will be delivered by yet unestablished transitional justice mechanisms, and the authorities have an obligation to investigate and prosecute conflict-era cases where the evidence warrants it.<sup>54</sup>

56. Following Maina's case, families of victims of extrajudicial killings and enforced disappearances have continued to seek justice through the ordinary courts. Some of these cases have led the Supreme Court,<sup>55</sup> and the High Court,<sup>56</sup> to order a prompt investigation. That includes the killing of Arjun Lama, a school official in the Kavre district, by the Maoists. One of the accused is Agni Sapkota, a senior CPN-Maoist leader. However, in 2009 Kavre police told Advocacy Forum-Nepal that they were unable to locate and arrest Sapkota, despite him being a then-serving member of Nepal's Constituent Assembly. He was later made speaker of the House of Representatives, until 2022.<sup>57</sup>
57. The UN Human Rights Committee has also found that several such cases amount to serious human rights violations and has called on the state to investigate, prosecute and punish those responsible,<sup>58</sup> but those calls have not been heeded. Advocacy Forum-Nepal's lawyers have been told by police that conflict-era cases are not being pursued because they will be subject to the transitional justice process,<sup>59</sup> despite the Human Rights Committee having repeatedly found that existing transitional justice mechanisms such as the TRC are not an adequate judicial remedy,<sup>60</sup> and that such mechanisms cannot serve to dispense with the criminal prosecution of serious human rights violations.<sup>61</sup> In 2024, Advocacy Forum-Nepal and Human Rights Watch reported that of the 62 cases of extrajudicial killing they had tracked since 2008, "there has been hardly any progress towards prosecution since 2011".<sup>62</sup>
58. **CONCLUSION:** the investigation and prosecution of conflict-era cases should no longer be held up – victims are entitled to justice without delay and the wait for an effective transitional justice process does not justify ongoing impunity. Further setbacks to such a process will further entrench impunity and deprive victims of redress, which is long-overdue and desperately needed. However, until that is effective, the doors to the regular justice system should not be closed to victims.
59. **RECOMMENDATION:** cease stalling the access of conflict-era victims to ordinary justice behind transitional justice; instruct police to investigate first information reports relating to conflict-era crimes without delay.

## x. The National Human Rights Commission

60. The robust mandate of the National Human Rights Commission ("NHRC"), Nepal's constitutional human rights watchdog, allows it to investigate complaints of conflict-era human rights violations and recommend action and prosecution against their perpetrators. However, the delegation heard that conflict victims lack trust in the NHRC due to political appointments of its commissioners,<sup>63</sup> and a wholesale failure on the part of the government to fulfil its recommendations. The NHRC has repeatedly recognised the problem of victim confidence as regards existing transitional justice mechanisms and its own recommendations, and the need for the government to do more.<sup>64</sup>

54 *Devi Sunuwar v District Police Office Kavre and Ors* (2007) NKP 2064 BS, Issue No. 6, Decision No. 7857. The case is now again before the Supreme Court, the Nepal Army having sought annulment of the convictions on the basis that the case should be handled by the TRC, because it says the officers concerned were tried and sentenced for minor offences in 2005 by court martial, so the rule against double jeopardy applies. See The Kathmandu Post, 'Maina Sunuwar murder case: SC orders Kavre court to produce documents' (23 May 2024), and International Commission of Jurists, 'Legal Briefing on the Nepal Army's Petition to Overturn Convictions for Maina Sunuwar Killing' (November 2018), which argues that the Army's petition is legally unfounded.

55 The following case reference has been provided to the delegation by Advocacy Forum-Nepal as an example, although the judgment has not been accessed by the delegation in preparing this report: *Nandakali Budhamagar et al v Madhav Prasad Ojha, Chief District Officer, Kanchanpur et al* (23 April 2017) 066-CR-0058; see also Advocacy Forum-Nepal, 'Arjun Bahadur Lama: Extrajudicially killed by Maoists' (2011).

56 The following case references have been provided to the delegation by Advocacy Forum-Nepal, but have not been directly accessed by the delegation: *Rupesh Shah v District Police Office Sunsari et al* (6 February 2023) High Court Biratnagar, Writ no. 078-WO-0193; *Kuber Prasad Apgain v District Police Office Morang et al* (6 February 2023) High Court Biratnagar Writ no. 078-WO-0189; *Chham Kumari Basnet v District Police Office Baglung et al*, (5 July 2022) Baglung Bench of Pokhara High Court, Writ no. 078-WO-0007; *Bimal Bahadur Chhetri KC v District Police Office Baglung et al* (5 July 2022) Pokhara High Court Baglung, Writ no. 078-WO-0008; *Annath Baral v District Police Office Kaski et al* (29 November 2022) Pokhara High Court, Writ no. 078-WO-0033; *Aarti Sharma v District Police Office Kaski et al* (29 November 2022) Pokhara High Court, Writ no. 078-WO-0034.

57 HRW and Advocacy Forum-Nepal, 'Breaking Barriers to Justice', p42.

58 See, e.g. *Sharma v Nepal*, Views (28 October 2008) Comm 1469/2006, UN Doc CCPR/C/94/D/1469/2006; *Yubraj Giri v Nepal*, Views (24 March 2011) Comm No 1761/2008, UN Doc CCPR/C/101/D/1761/2008; *Dev Bahadur Maharjan v Nepal*, Views (19 July 2012) Comm No 1863/2009, UN Doc CCPR/C/105/D/1863/2009; *Kedar Chaulagain v Nepal*, Views (28 October 2014) Comm No 2018/2010, UN Doc CCPR/C/112/D/2018/2010; *Chhedulal Tharu v Nepal*, Views (3 July 2015) Comm No 2038/2011, UN Doc CCPR/C/114/D/2038/2011; *Purna Maya v Nepal*, Views (17 March 2017) Comm No 2245/2013, UN Doc CCPR/C/119/D/2245/2013; *Gyan Devi Bolakhe v Nepal*, Views (19 July 2018) Comm No 2658/2015, UN Doc CCPR/C/123/D/2658/2015; *Fulmati Nyaya v Nepal*, Views (18 March 2019) Comm No 2556/2015, UN Doc CCPR/C/125/D/2556/2015; *Puniram Tharu and Nira Kumari Tharuni v Nepal*, Views (14 March 2022) Comm No 3199/2018, UN Doc CCPR/C/134/D/3199/2018; *RR, KR and SR v Nepal*, Views (14 March 2022) Comm No 2906/2016, UN Doc CCPR/C/134/D/2906/2016. For details of further cases, see the OHCHR Database.

59 HRW and Advocacy Forum-Nepal, 'Breaking Barriers to Justice', p40.

60 See, *inter alia*, *Giri v Nepal*, §6.3; *Chaulagain v Nepal*, §6.3, and *RR, KR and SR v Nepal*, §6.4.

61 See, *inter alia*, *Purna v Nepal*, §11.4; *Nyaya v Nepal*, §6.5; *Chhedulal Tharu v Nepal*, §9.3, and *Puniram Tharu and Nira Kumari Tharuni v Nepal*, §6.4.

62 HRW and Advocacy Forum-Nepal, 'Breaking Barriers to Justice', p40.

63 See, further, UN Press Release, 'Nepal: UN experts express concerns for independence and integrity of the NHRC' (27 April 2021).

64 NHRC, 'Annual Report 2020' (February 2021), p26; 'Annual Report (Summary) (FY 2021-2022)' (December 2022), p67; 'Annual Report (Synopsis) Fiscal Year 2017/2018' (February 2024), p54.

61. The rate of implementation of the recommendations of the NHRC, where they have come, has been very low. In October 2020, the NHRC published 20 years of data, and a list of 286 individuals, including state officials, in respect of who its investigators had recommended to the state that there was evidence requiring investigations and prosecutions.<sup>65</sup> None of its recommendations regarding legal action on conflict-era cases have yet been implemented.<sup>66</sup> The delegation understands that in January 2024 the Supreme Court ordered the government to present the list to the Attorney General for prosecution; to amend the NHRC's empowering act to bind the state to act on the NHRC's recommendations, and the NHRC to transfer the complaints it has received to the TRC and CIEDP once those are operational and the TRC Act has been amended.<sup>67</sup>
62. **CONCLUSION:** there has been a failure to implement the recommendations of the NHRC.
63. **RECOMMENDATION:** implement the recommendations of the NHRC, particularly in respect of recommendations for investigation and prosecution of state abuses, and the vetting of those found by the NHRC to be responsible for human rights violations, without delay.

### xi. Ongoing state abuses

64. The delegation heard from victims and civil society that the failure to implement transitional justice, and to confront the abuses of the armed conflict, has contributed to an ongoing culture of impunity for state abuses in Nepal, particularly in respect of cases of police torture and extrajudicial killings since the conflict. Torture only became a criminal offence in 2018.
65. The delegation was particularly troubled when told in its meetings with police in Janakpur and Nepalgunj that cases of state torture and extrajudicial killings have “ceased” since the conflict, even though such cases have been well-documented, at the national<sup>68</sup> and international level.<sup>69</sup> To the contrary, victims' groups, and Advocacy Forum-Nepal, told the delegation that victims of torture face reluctance and intimidation from the police, and in some cases a refusal to lodge ‘First Information Reports’ (“FIRs”) to commence investigations into torture, which victims understand to be an effort by the authorities to ‘protect their own’ from torture allegations.<sup>70</sup>
66. That is despite the fact that in 2020, in response to a writ challenging the lack of investigations into extrajudicial executions by security forces in the Terai region in 2015, the Supreme Court held that the government must form an independent agency with specially trained experts to investigate allegations of a serious and violent nature made against security personnel, and establish a legal and institutional framework to facilitate investigations that are independent, impartial and effective. The Supreme Court recognised that the police should not investigate allegations of their own abuses, but held that, pending the establishment of the independent mechanism, the police must conduct thorough investigations.<sup>71</sup> There is still an urgent need for an independent investigative mechanism to investigate state abuses.
67. **CONCLUSION:** the failure to implement transitional justice, and to confront the abuses of the armed conflict, is part and parcel of the ongoing culture of impunity for state abuses in Nepal, which fosters present day rights violations.
68. **RECOMMENDATION:** Address cases of torture, extrajudicial killing, sexual violence, enforced disappearance and other abuses by the security services since the conflict. It is necessary to implement an independent expert mechanism to investigate such abuses, and ensure appropriate training and reform of the police and security services to ensure non-repetition.

65 HRW, ‘Nepal: carry out rights panel’s recommendations’ (3 November 2020).

66 NHRC, ‘Annual Report (Synopsis) Fiscal Year 2017/2080’, p54.

67 Advocate Birendra Prasad Thapaliya v National Human Rights Commission (NHRC) et al, Writ no. 072-WO-0450; see also The Kathmandu Post, ‘Supreme Court intervenes to make rights commission’s role more effective’ (29 January 2024).

68 See, e.g. NHRC, ‘A Precise Report on the Recommendations and State of Implementation in the 20 Years of NHRCN (May 2000–June 2020)’ (June 2020); Advocacy Forum-Nepal, ‘Countering Impunity in Torture: Need for Independent Investigative Mechanism in Nepal’ (June 2021); ‘Torture in Nepal in 2019: The Need for New Policies and Legal Reform’ (June 2020), ‘Rise of Torture in 2018: Challenges Old & New Facing Nepal’ (June 2019), ‘Torture of Juveniles in Nepal: A Continuing Challenge’ (June 2018). Advocacy Forum-Nepal’s several reports on torture in Nepal, dating back to 2006, can be found on its webpage.

69 See, e.g. *Bholi Pharaka v Nepal*, Views (15 July 2019) Comm No 2773/2016, UN Doc CCPR/C/126/D/2773/2016; HRW, ‘No Law, No Justice, No State for Victims: The Culture of Impunity in Post-Conflict Nepal’ (November 2020); International Commission of Jurists, ‘Human rights and the Rule of Law in a Federal Nepal: recommendations from an ICJ High-Level Mission’; US State Department, ‘Nepal 2023 Human Rights Report’ (April 2024).

70 See, further, Advocacy Forum-Nepal, ‘Torture in the context of transitional justice in Nepal’ (26 June 2023).

71 Advocacy Forum-Nepal, ‘Countering Impunity in Torture: Need for Independent Investigative Mechanism in Nepal’, citing at pp57–58 the judgment of the Supreme Court in *Mandamus and Ors* (6 January 2020) Writ. No. 067-WO-1043.



In Janakpur, members of the delegation were extremely grateful to the victims groups who travelled from across the region to give testimony regarding abuses committed during both the civil war and the Madhesh Movement.

## xii. Amending the 2014 TRC Act

69. Ten years after the passage of the TRC Act, the amendment Bill was finally passed in 2024. In the decade-long interval several iterations of draft amendment bills failed, because they reproduced the same problems, and lacked political support.
70. Mistrust of the government is now rife amongst victims, their families and the human rights defenders that advocate for their demands. This includes the widespread perception that there is a lack of political will to implement a necessary comprehensive transitional justice process that puts victims, accountability and redress at its centre. There have been ongoing calls by victims' groups and human rights organisations for an open, transparent process that ensures meaningful and wide consultations on different aspects of draft legislation. There is a pervasive concern that government efforts to implement transitional justice to date have instead focussed on ensuring impunity for members of the security forces and former Maoist rebels who are now in, or continue to exercise, positions of power.
71. The delegation heard from a wide range of victims' groups that, quite aside from amnesty for prosecutions, they are focused on the ability of a transitional justice process to deliver accountability; discover truth; locate the dead and disappeared; provide reparation, transform the rule of law in Nepal; increase public trust in state institutions, and ensure non-repetition, to fulfil the unaddressed aspirations of Nepal's peoples' movements.
72. That all said, in its meeting with elected government representatives and state officials, the delegation noted a commitment to implementing transitional justice in line with international standards and the Supreme Court's order, and that many of their stated imperatives for taking it forward aligned with victims' aspirations for Nepali society as a whole.
73. The delegation, which included Colombian members, was pleased to hear from government and state officials of a keen interest in the Colombian transitional justice process, as a potential model and point of reference for Nepal. In the view of the delegation, several lessons from that context may be relevant to Nepal, whilst recognising that transitional justice must cater to Nepal's specific national context, and there is no one-size-fits-all approach. That said, a commitment to a transitional justice process which adheres to international standards must be the irreducible minimum.
74. **CONCLUSION:** the delegation hopes that, while victims' trust in the state has waned, there is potential for it to be rebuilt alongside concrete steps to achieve transitional justice.
75. **RECOMMENDATION:** implement transitional justice in the context of a wider commitment to combat impunity and strengthen the rule of law.



### xiii. The view of the international community

76. The UN was unable to provide its support to the work of the TRC and the CIEDP under the TRC Act, their empowering law, because it was not in compliance with Nepal's international law obligations.<sup>72</sup>
77. In its Universal Periodic Review ("UPR") midterm report of 2023 to the UN Human Rights Council, the National Coalition for UPR-Nepal, a coalition of 440 Nepali civil society organisations, found that none of the 12 recommendations relating to transitional justice that were made to Nepal by several states in the third UPR cycle in 2021 had been implemented, despite Nepal having supported them.<sup>73</sup>
78. On his visit to Nepal in October 2023, UN Secretary-General António Guterres stated:  
*"The next few years will be decisive, as Nepal... embarks on the final stages of the peace process with transitional justice. Transitional justice must help to bring peace to victims, families and communities. The United Nations stands ready to support Nepal to develop a process that meets international standards, the Supreme Court's rulings, and the needs of victims – and to put it into practice".*<sup>74</sup>
79. The delegation's meetings with several diplomatic missions to Nepal revealed that they recognise the importance of acknowledging the country's commitment to peace, the independent and forward-leaning approach of its judiciary, and the executive's commitment to progressing an effective transitional justice process. They noted the importance of a victim-centred approach, as well as the need to avoid further delay in delivering transitional justice. Some diplomatic representatives expressed a commitment to constructively supporting the process once it gets moving, *providing* that it adheres to international standards.



Women human rights defenders shared their experiences of trying to access justice in Nepal.

72 OHCHR, 'Nepal: Position on UN support to the Commission on Investigation of Disappeared Persons and the Truth and Reconciliation Commission' (16 February 2016).

73 National Coalition for UPR-Nepal, 'Nepal Civil Society UPR Mid-Term Review' (July 2023).

74 UN Secretary-General, 'Secretary-General's joint press encounter with the Prime Minister of Nepal, Mr. Pushpa Kamal Dahal 'Prachanda' (29 October 2023).



80. **CONCLUSION:** it is of the utmost importance that the international community as a whole encourages and supports the Nepali government to develop a transitional justice process that is *in line with international law*. The international community's role in this regard is a crucial bulwark against non-compliance with international human rights and the need for accountability, which is ultimately geared towards lasting peace and protecting the dignity of victims.

81. **RECOMMENDATION:** the international community as a whole should encourage and support Nepal to develop a transitional justice process that is *in line with international law*. It should constructively support the Nepali transitional justice process, providing that it adheres to international standards.

#### xiv. The current Transitional Justice Bill

82. On 19 March 2023, the Bill for the Amendment of the Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act (2014), widely referred to as the 'Transitional Justice Bill', was presented to parliament. The Bill was then discussed in the Parliamentary Committee on Law, Justice and Human Rights, under the House of Representatives.

83. The Parliamentary Committee formed a Sub-Committee to consult with various stakeholders and build consensus on the Bill's provisions. Consultations with parliamentarians, victims groups, civil society organisations and international human rights organisations ensued. The Sub-Committee presented its report to the Parliamentary Committee, highlighting issues it deemed important for political leaders to resolve. In July 2024, a task force comprising leaders of three major political parties (Nepali Congress; CPN-Maoist Centre and CPN-Unified Marxist Leninist) was established to forge consensus on the issues raised. On 8 August 2024, the Sub-Committee approved the recommendations of the task force, meaning the Bill was mature enough to be presented to the Legislature. The House of Representatives (lower house) endorsed the Bill on 14 August, and the National Assembly (upper chamber) unanimously endorsed the Bill without further amendments on 22 August, notwithstanding demands by victims, the NHRC and international human rights organisations for further revisions. It received the Presidential seal on 29 August. At the time of writing, the Bill is expected to come into force.

84. This development marks a positive step forward, with major political parties coming together on issues they had previously contested, and addressing some of the concerns raised by victims and civil society groups. Some aspects of the Bill were highlighted by stakeholders the delegation met with as important and welcome steps towards progress. For example, the Bill provides that the TRC and CIEDP shall provide interim relief, psychosocial counselling, compensation and other wider benefits following their preliminary investigation,<sup>75</sup> prioritising some victims who were left out of earlier programmes (victims of rape, sexual violence and torture).<sup>76</sup> It requires the TRC and CIEDP to make policy recommendations to the government in respect of providing relief and assistance to victims (and/or their families) who were killed, injured or disabled in the armed conflict, including "discharged combatants"<sup>77</sup> (which includes former child soldiers), security forces personnel,<sup>78</sup> and those injured before or after the signing of the CPA as a result of landmine explosions.<sup>79</sup> It allows the TRC and CIEDP to establish offices in provinces and districts as required.<sup>80</sup> It includes a provision for a transitional justice fund and a committee to advise on its use.<sup>81</sup> It mandates the TRC to study the root causes and impact of the conflict and recommend institutional reforms.<sup>82</sup> It guarantees the right to reparation.<sup>83</sup> It also provides for appeals against decisions of the Special Court to be to the Supreme Court.<sup>84</sup> The delegation commends those efforts.

85. However several problems remain. The overwhelming concern expressed by stakeholders, including victims' groups and their advocates, was that the Bill does not comply with domestic and international law, so will hinder comprehensive justice for victims and entrench impunity. While there was some relief that long-overdue transitional justice is finally on the horizon, the proposals were considered to be practically unworkable to the victims the delegation spoke to. There is a fear from victims that it will repeat the mistakes of the past. Conflict survivors who spoke to the delegation in Janakpur expressed that:

75 Bill, section 23(1).  
76 Bill, section 23(1B).  
77 Bill, section 25A(1)(b).  
78 Bill, section 25A(1)(a).  
79 Bill, section 25A(1)(c).  
80 Bill, section 13(7C).  
81 Bill, section 23A.  
82 Bill, section 13(1)(a3).  
83 Bill, section 22A.  
84 Bill, section 29E.

*“Both Commissions (TRC and CIEDP) were very unsatisfactory in terms of the legal provisions under which they were established, the consultations around the process of appointment of commissioners which was highly politicised, and the manner of their working. There has been ‘political capture’ of these bodies. Earlier local peace committees at the district level collected this data and then, this task was transferred to the Commissions. This was like going from bad to worse. We have no faith in these Commissions.”*

*“I do not expect that anything will come from these newest developments to amend the TRC Act. Nothing has helped us, nothing ever will.”*

86. **CONCLUSION:** while the delegation is tentatively optimistic about the state’s efforts to remedy the TRC Act, it shares many of the concerns it heard from stakeholders, which continue to apply to the Bill as passed. Its reasons for doing so are set out below.



Lawyers from the delegation prepare their initial conclusions.

# Legal considerations in the Transitional Justice Bill

- 87.** Since the Bill's registration, commentary and recommendations on the Bill have been provided by various stakeholders, including the NHRC;<sup>85</sup> UN Mandate Holders – including Special Rapporteurs and Independent Experts;<sup>86</sup> Nepali civil society organisations;<sup>87</sup> the International Commission of Jurists, Amnesty International and Human Rights Watch,<sup>88</sup> and other members of civil society. These recommendations have been made pursuant to Nepal's international obligations, arising from international treaties that Nepal is a state party to. It is Nepal's legal obligation to ensure that the transitional justice process is compatible with those standards.
- 88.** The delegation's discussions with stakeholders, including victims and members of civil society, involved receiving information and perspectives on the Bill's adherence to international law. The delegation heard concerns from stakeholders, while conducting its own independent analysis, on whether the Bill reflects Nepal's international obligations under various forms of international law – including international human rights law, international criminal law and International Humanitarian Law.
- 89.** These international obligations are of direct relevance to the transitional justice process. Section 9(1) of Nepal's Treaty Act of 1991 states that in cases of inconsistency of domestic law with an international treaty to which Nepal is a state party, the domestic law shall be void for the purposes of the treaty, and the provisions of the treaty shall be enforceable as good as Nepali laws. Article 51(b)(3) of the 2015 Constitution calls upon the state to pursue policies to implement international treaties and agreements to which Nepal is a state party.
- 90.** Based on this, the following section reflects the delegation's independent analysis, comments and concerns on the alignment of the final Bill, as passed, with international standards when setting out definitional elements for the transitional justice process.

## i. Definitions within the Bill

- 91.** A particular issue of concern raised to the delegation about the Bill regarded the specific acts, abuses and offences outlined in the Bill as capable of being raised and examined during the transitional justice process.
- 92.** The Bill offers a two-pronged categorisation of human rights violations – namely, abuses considered to be (i) 'human rights violations' and those considered to be (ii) 'serious human rights violations.' The two categories of abuses within the Bill are defined as follows:

<sup>85</sup> NHRC, 'Transitional Justice and NHRC Nepal' (8 July 2024) (in Nepali); The Kathmandu Post, '[NHRC wants war crimes and crimes against humanity to be non-amnestiable](#)' (8 July 2024).

<sup>86</sup> Mandates of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on violence against women and girls, its causes and consequences (9 July 2023) Communication Ref. AL NPL 1/2023 ("UN Special Procedures, Comm Ref. AL NPL 1/2023, 9 June 2023").

<sup>87</sup> See, for example, the Submission of 29 Nepali civil society organisations to the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Special Rapporteur on violence against women, its causes and consequences (10 April 2023).

<sup>88</sup> Joint Statement of the International Commission of Jurists, Amnesty International and HRW, '[Nepal: new transitional justice law a flawed step forward – address serious shortcomings; robust implementation is key](#)' (20 August 2024); HRW, '[Breaking Barriers to Justice; Nepal's Long Struggle for Accountability, Truth and Reparations](#)'; HRW, '[Nepal: Seize Chance to Ensure Justice for Conflict Atrocities](#)' (5 March 2024); HRW, '[Nepal: More Progress Needed on Transitional Justice Law](#)' (11 January 2024); Joint Statement of the International Commission of Jurists, Amnesty International and HRW, '[Nepal: Transitional Justice Bill Needs to Protect Victims, not Abusers](#)' (23 March 2023).

- (i) ‘Human rights violations’ – any act except serious human rights violations committed in contravention of domestic laws, international human rights law or humanitarian law, during the armed conflict in a targeted or planned manner against an unarmed individual or community.<sup>89</sup>
- (ii) ‘Serious human rights violations’ – any of the following acts committed during the armed conflict by any of the parties to the conflict:<sup>90</sup>
  - (1) Rape and serious sexual violence.<sup>91</sup>
  - (2) Any of the following acts committed against an unarmed individual or community in a targeted or planned manner:<sup>92</sup>
    - (a) Intentional or arbitrary killing;<sup>93</sup>
    - (b) Enforced disappearance, meaning the act of disappearing a person during the conflict whose whereabouts are still not known;<sup>94</sup>
    - (c) Cruel or inhuman torture.<sup>95</sup>

**93.** The Bill allows for amnesties to be recommended, and/or reconciliation with victims to be entered into, in respect of some of these abuses, which function as a bar to prosecution.<sup>96</sup> Utilising the two-pronged categorisation of abuses, the Bill allows the TRC and the CIEDP to recommend amnesty,<sup>97</sup> and/or victims reconcile with perpetrators,<sup>98</sup> for acts considered to fall under the Bill’s definition of ‘human rights violations’, but not for acts considered under the Bill to be ‘serious human rights violations’.

**94.** Amnesties can be recommended considering “*the harm suffered by the victim*” as well as “*commitments*” made by the perpetrator in their statement when applying for the amnesty (including acceptance of responsibility for the ‘human rights violation’, regret, apology and a promise of non-repetition).<sup>99</sup> Reconciliation also requires recognition, regret and an apology to the victim, and may be achieved by way of reconciliatory site visits, memorialisation, and other acts.<sup>100</sup> It appears that a recommendation for amnesty, or reconciliation, can only be achieved “*upon the free consent of the victim*”.<sup>101</sup> Compensation from the perpetrator (or, if they are impecunious, the state) may be required before amnesty is recommended, or during the reconciliation procedure.<sup>102</sup>

## ii. Nepal’s international human rights obligations

**95.** Given the Bill’s focus on acts defined as human rights violations, the delegation has reviewed Nepal’s international human rights obligations.

**96.** The government of Nepal is party to international human rights treaties and instruments which provide broad human rights protections that the government must guarantee. These include, for example, the Convention on the Prevention and Punishment of the Crime of Genocide,<sup>103</sup> the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (“CAT”),<sup>104</sup> International Covenant on Civil and Political Rights,<sup>105</sup> International Covenant on Economic, Social and Cultural Rights,<sup>106</sup> Convention on the Rights of the Child,<sup>107</sup> Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict,<sup>108</sup> ILO Convention Concerning the Prohibition and Immediate

<sup>89</sup> Bill, section 2(j).

<sup>90</sup> Bill, section 2(j1).

<sup>91</sup> Bill, section 2(j1)(1).

<sup>92</sup> Bill, section 2(j1)(2).

<sup>93</sup> Bill, section 2(j1)(2)(a).

<sup>94</sup> Bill, section 2(j1)(2)(b).

<sup>95</sup> Bill, section 2(j1)(2)(c).

<sup>96</sup> See Bill, section 25(2).

<sup>97</sup> Bill, section 26.

<sup>98</sup> Bill, section 22.

<sup>99</sup> Bill, section 26(5) and (5A).

<sup>100</sup> Bill, section 22(2) and (4).

<sup>101</sup> Bill, sections 22(1) and 26(5A).

<sup>102</sup> Bill, sections 22(3) and 26(7)-(7A).

<sup>103</sup> Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”) (Nepal – Accession: 17 January 1969).

<sup>104</sup> Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (“CAT”) (Nepal – Accession: 14 May 1991).

<sup>105</sup> International Covenant on Civil and Political Rights (“ICCPR”), (Nepal – Accession: 14 May 1991).

<sup>106</sup> International Covenant on Economic, Social and Cultural Rights (“ICESCR”), (Nepal – Accession: 14 May 1991).

<sup>107</sup> Convention on the Rights of the Child (“CRC”), (Nepal – Signature: 26 Jan 1990; Ratification: 14 Sep 1990).

<sup>108</sup> Optional Protocol on the CRC on the involvement of children in armed conflict, (Nepal – Signature: 8 September 2000; Ratification: 3 January 2007).



Nepali lawyers discuss the obstacles to justice in the country.



Action for the Elimination of the Worst Forms of Child Labour,<sup>109</sup> Convention on the Elimination of All Forms of Discrimination against Women,<sup>110</sup> International Convention on the Elimination of All Forms of Racial Discrimination,<sup>111</sup> and Convention on the Rights of Persons with Disabilities.<sup>112</sup> In addition, Nepal must respect the rights and protections set out in the Universal Declaration of Human Rights as adopted by the General Assembly on 10 December 1948.<sup>113</sup>

97. Among the rights set out in these instruments – which constitute human rights violations in Nepal if violated – are, by way of non-exhaustive examples, the right against torture or cruel, inhuman or degrading treatment or punishment,<sup>114</sup> the right to self-determination,<sup>115</sup> right to life,<sup>116</sup> the right to an effective remedy,<sup>117</sup> the right against arbitrary arrest and detention,<sup>118</sup> due process and a fair trial upon arrest and detention,<sup>119</sup> freedom of movement,<sup>120</sup> freedom of thought, expression and association,<sup>121</sup> the right to equal protection,<sup>122</sup> entitlement to all rights without distinction based on a prescribed group,<sup>123</sup> the right against discrimination of women based on sex,<sup>124</sup> the right to opportunity and favourable conditions to work,<sup>125</sup> the right to own and not be arbitrarily deprived of property,<sup>126</sup> the right to privacy and a family life,<sup>127</sup> the right to the highest attainable standard of physical and mental health,<sup>128</sup> the

<sup>109</sup> ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Nepal – Signature: 3 January 2002; Ratification 3 January 2003).

<sup>110</sup> Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), (Nepal – Signature: 5 Feb 1991; Ratification: 22 April 1991).

<sup>111</sup> International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), (Nepal – Accession: 30 Jan 1971).

<sup>112</sup> Convention on the Rights of Persons with Disabilities (“CRPD”), (Nepal – Signature: 3 Jan 2008; Ratification: 7 May 2010).

<sup>113</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (“UDHR”).

<sup>114</sup> CAT, Article 1; ICCPR, Article 7; UDHR, Article 5.

<sup>115</sup> ICCPR, Article 1; ICESCR, Article 1.

<sup>116</sup> ICCPR, Article 6; UDHR, Article 3; CRC, Article 6.

<sup>117</sup> UDHR, Article 8.

<sup>118</sup> UDHR, Article 9; ICCPR, Article 9.

<sup>119</sup> ICCPR, Articles 9-11, 14, 15; UDHR, Articles 10, 11.

<sup>120</sup> ICCPR, Article 12; UDHR, Article 13.

<sup>121</sup> ICCPR, Article 18, 19; UDHR, Articles 18-20.

<sup>122</sup> UDHR, Article 7; ICCPR, Article 3; ICESCR, Article 3.

<sup>123</sup> UDHR, Article 2; ICCPR, Article 2; ICESCR, Article 2.

<sup>124</sup> CEDAW, Articles 1, 2.

<sup>125</sup> ICESCR, Article 6, 7; UDHR, Article 23; CEDAW, Article 11.

<sup>126</sup> UDHR, Article 17.

<sup>127</sup> ICESCR, Article 10; ICCPR, Article 17; CRC, Article 15; UDHR, Article 12.

<sup>128</sup> ICESCR, Article 12; UDHR, Article 25. See also, CRC, Article 19.

Women's rights organisations have played a crucial role in demanding justice for victims of abuses committed during and since Nepal's civil war.



right to education,<sup>129</sup> the right to culture,<sup>130</sup> the right against discrimination,<sup>131</sup> protection of the rights of disabled persons,<sup>132</sup> and the right to recognition as a person before the law.<sup>133</sup>

- 98.** While Nepal has not signed the International Convention for the Protection of All Persons from Enforced Disappearance, provisions protecting against enforced disappearances are contained in a number of the above international legal instruments, and the corresponding rights, to which Nepal is bound.<sup>134</sup>
- 99.** In addition to the Universal Declaration of Human Rights, Nepal is also obligated to follow the guidance set out by the UN General Assembly in a number of other documents. For example, Nepal must adhere to the rights and standards provided in the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,<sup>135</sup> and those provided in the Declaration on the Protection of all Persons from Enforced Disappearance, adopted by the General Assembly on 18 of December 1992.<sup>136</sup> As regards standards of detention, Nepal must follow the guidance provided in the UN Standard Minimum Rules for the Treatment of Prisoners, also known as ‘the Nelson Mandela Rules’, adopted by the UN General Assembly as essential principles for the treatment and management of prisoners.<sup>137</sup>
- 100.** Nepal must be guided by the ‘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’ as adopted by the General Assembly on 16 December 2005.<sup>138</sup> The ‘Updated set of principles for the protection and promotion of human rights through action to combat impunity’ is

<sup>129</sup> ICESCR, Article 13; CRC, Article 28; UDHR, Article 26.

<sup>130</sup> ICESCR, Article 15; UDHR, Article 27.

<sup>131</sup> CERD, Articles 1, 2; CRC, Article 2.

<sup>132</sup> CRPD, Article 1; CRC, Article 23.

<sup>133</sup> ICCPR, Article 16; UDHR, Article 6.

<sup>134</sup> See, further, Working Group on Enforced or Involuntary Disappearances, ‘International standards on enforced or involuntary disappearances’.

<sup>135</sup> Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 9 December 1975) UNGA Res 3452 (XXX).

<sup>136</sup> Declaration on the Protection of all Persons from Enforced Disappearance (adopted 18 December 1992) UNGA Res 47/133.

<sup>137</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (adopted 17 December 2015) UNGA Res 70/175, UN Doc A/RES/70/175.

<sup>138</sup> 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 (adopted 21 March 2006) UNGA Res 60/147, UN Doc A/RES/60/147 (“Basic principles”).

also relevant.<sup>139</sup> Both documents provide that the right to a remedy and to the truth are applicable to both human rights and humanitarian law violations, and that the right must be respected. The latter emphasises the importance of undertaking wide public consultations with victims and other sectors of civil society in transitional justice processes.

### iii. Nepal's obligations under international criminal and humanitarian law

- 101.** The delegation has reviewed Nepal's obligations under international criminal and humanitarian law. While Nepal is a party to a number of international human rights instruments which carry obligations for the government, Nepal has not joined key instruments relating to international criminal law.
- 102.** Key among those is the Rome Statute of the International Criminal Court. Nepal has not deposited an instrument of accession to the Rome Statute with the UN Secretary-General. Therefore, it has not accepted the jurisdiction of the International Criminal Court for acts committed on its territory which are crimes enumerated within the Rome Statute; namely war crimes, crimes against humanity and genocide.
- 103.** Despite this fact, the universality of the Geneva Conventions of 1949 is relevant – particularly given the Bill's specific language on the relevance of international humanitarian law. Central to international humanitarian law, the 1949 Geneva Conventions have been ratified by 196 States – including Nepal<sup>140</sup> – leading the International Committee of the Red Cross (“ICRC”) to describe international humanitarian law, and the obligations and prohibitions it conveys for all parties fighting in a conflict, as a “*universal body of law*.”<sup>141</sup>
- 104.** Yet, Nepal is not a party to the Geneva Conventions' two Additional Protocols from 1977 – the Additional Protocol I relating to the protection of victims of International Armed Conflict, nor Additional Protocol II relating to the protection of victims of Non-International Armed Conflicts.
- 105.** **RECOMMENDATION:** Nepal should take steps towards becoming a state party to the Rome Statute, the International Convention for the Protection of All Persons from Enforced Disappearance, and Additional Protocols I and II to the Geneva Conventions, as a measure for guaranteeing non-repetition.

<sup>139</sup> UN Commission on Human Rights, 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity' (8 February 2005) UN Doc E/CN.4/2005/102/Add.1 (“Updated set of principles”).

<sup>140</sup> Geneva Conventions of 1949 (Nepal – Accession: 7 February 1964; Entry into Force: 7 August 1964).

<sup>141</sup> ICRC, 'Frequently asked questions on the rules of war' (20 July 2023).



# Concerns arising from the Transitional Justice Bill

## i. Conflation of human rights violations and international crimes

- 106.** As a starting point, the delegation notes that the language used in the Bill departs from the usual language adopted under international human rights law which sets out the violation from the perspective of the victim by focusing on the right deprived of that victim. Yet, the language of the Bill approaches the list of included ‘serious human rights violations’ by describing the prohibited act of the perpetrator. Despite this approach, the delegation acknowledges that for many of the listed ‘violations’ or offences, an applicable and corresponding human right can be deduced. For example, when listing the offence of ‘intentional or arbitrary killing’, ‘enforced disappearance’ and ‘cruel or inhuman torture’ as violations, the delegation understands that this relates to violations to the right to life,<sup>142</sup> the right to liberty and security of person,<sup>143</sup> and the right to freedom from torture, inhuman and degrading treatment.<sup>144</sup>
- 107.** However, a number of ‘violations’ are more akin to crimes – and particularly international crimes. The Bill lists ‘acts committed in contravention of humanitarian laws during the armed conflict’ as ‘human rights violations’, and ‘rape or serious sexual violence’, ‘intentional or arbitrary killing’, ‘cruel or inhuman torture’ and ‘enforced disappearance’ as ‘serious violations’. By way of a non-exhaustive list, the acts of perpetrators described in the Bill, and which are understood by the delegation to have occurred during the conflict, more clearly align with war crimes defined under the Rome Statute, including: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;<sup>145</sup> committing outrages upon personal dignity, in particular humiliating and degrading treatment;<sup>146</sup> taking of hostages;<sup>147</sup> carrying out executions without previous judgment by a regularly constituted court, affording all indispensable judicial guarantees;<sup>148</sup> committing rape, sexual slavery, enforced prostitution, forced pregnancy, and any other form of sexual violence also constituting a serious violation of common article 3 to the Geneva Conventions,<sup>149</sup> and conscripting or enlisting children into armed forces or groups or using them to participate actively in hostilities.<sup>150</sup>
- 108.** Notably, while the TRC Act 2014 listed ‘crimes against humanity’ among the ‘gross violations of human rights’ which can be subject to the jurisdiction of the Commissions, the Bill removes reference to such acts. Removal of crimes against humanity from the language appears to mean that neither the TRC nor the Special Court would have jurisdiction over such crimes. While it is noted that the TRC Act’s listing of crimes against humanity as a human rights violation still raises issues of conflation between the areas of international law, it is noted that some offences remaining in the Bill which do not have a direct or clear foundation as a human rights violation, fall more clearly within the scope of war crimes, or crimes against humanity (when committed in a widespread or systematic nature). This can be seen with the Bill’s listing of ‘rape or serious sexual violence’, ‘intentional or arbitrary killing’, ‘cruel or inhuman torture’ and ‘enforced disappearance’, which are listed as ‘serious human rights violations’, but fall more squarely within the framing of an international crime.<sup>151</sup>

<sup>142</sup> ICCPR, Article 6.

<sup>143</sup> ICCPR, Article 9.

<sup>144</sup> ICCPR, Article 7.

<sup>145</sup> Rome Statute, Article 8(2)(c)(i); see also Article 8(2)(e)(ix)-(xi).

<sup>146</sup> Rome Statute, Article 8(2)(c)(ii).

<sup>147</sup> Rome Statute, Article 8(2)(c)(iii).

<sup>148</sup> Rome Statute, Article 8(2)(c)(iv).

<sup>149</sup> Rome Statute, Article 8(2)(e)(vi).

<sup>150</sup> Rome Statute, Article 8(2)(c)(vii).

<sup>151</sup> For example, the Rome Statute defines crimes against humanity as including murder (Article 7(1)(a)); extermination (Article 7(1)(b)); torture (Article 7(1)(f)); enforced disappearance of persons (Article 7(1)(i)); “Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” (Article 7(1)(g)), and “Other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or mental or physical health” (Article 7(1)(k)).



From left to right: Sabine Guenther (PBI), Haydée Dijkstal (delegate from 33 Bedford Row Chambers), María del Rosario Arango Zambrano (delegate from Forest Peoples Programme), Ojaswee Bhattarai (Advocacy Forum Nepal), Bishnukala Bhandari (Treasurer of Executive Board, Advocacy Forum Nepal), Santosh Sigdel (Nepali human rights lawyer), Bikash Basnet (Advocacy Forum Nepal), Kishali Pinto-Jayawardena (delegate from Sri Lanka's Right to Information Commission), Aswini Weeraratne (delegate from Doughty Street Chambers), Mandira Sharma (ICJ), Camila Zapata Besso (delegate from Doughty Street Chambers), Ben Leather (PBI). The final lawyer from the group of delegates, Bruno Menzan from the African Union Commission is absent from this photo.

109. The framing and source of law for each prohibited act listed in the Bill could have a significant impact on practical implementation of the process – particularly on the ability of the TRC and CIEDP carry out their mandates vis-à-vis these listed abuses.
110. With the sources of law of each prohibited act and precise definitions of the acts unclear, it is uncertain whether the mechanisms of the transitional justice process will use international human rights case law to define each act and analyse the evidence, or whether the evidence will be set against the elements of crimes as defined under international criminal law. It is further understood that international crimes, such as crimes against humanity, are not codified under Nepal's criminal legislation.<sup>152</sup>
111. **CONCLUSION:** questions remain as to the precise sources of law which will be relied upon to define the prohibited acts set out in the Bill. Acts listed as 'human rights violations' or 'serious human rights violations' within the Bill are more akin to crimes. The blanket use of the term 'human rights violations' to define all acts for which the transitional justice process can examine seems to conflate distinct areas of international law – international human rights law with international criminal law or international humanitarian law. There is concern that this could result in complications with implementation of the Bill, particularly when these prohibited acts are raised and considered. Clarity on these foundational questions is vital to ensure successful implementation of the Bill as passed, and a predictable process for victims.
112. **RECOMMENDATION:** Rectify definitional issues in the Bill that conflate human rights violations and international crimes.

## ii. Incomplete list of human rights violations

113. The enumerated list of 'human rights violations' and 'serious human rights violations' provided in the Bill leaves documented abuses and crimes committed during the country's conflict subject to recommendations for amnesty and/or the reconciliation, thus potentially without recourse to prosecution during the transitional justice process. Indeed, a review of the numerous human rights instruments for which Nepal is a party (see above), and Nepal's obligations under international humanitarian law as set

<sup>152</sup> UN Special Procedures, Comm Ref. AL NPL 1/2023, 9 June 2023, p3.

Bruno Menzan (delegate from the African Union Commission) makes a point during a meeting in Kathmandu.



out in the 1949 Geneva Conventions, reveal further human rights and humanitarian obligations amounting to international crimes when violated, than are listed as ‘serious violations’ in the Bill.

- 114.** For example, the qualification that ‘torture’ must be ‘cruel or inhuman’ to constitute a ‘serious human rights violation’ sits at odds with the definition of the crime of torture under Article 1 of the CAT, which provides no such gloss. Furthermore, the definition of the ‘serious human rights violation’ of ‘enforced disappearance’ as a person ‘whose whereabouts remain unknown’ appears to exclude those who were disappeared for months or years, but whose remains have subsequently been found.
- 115.** Moreover, the Bill does not reflect the crime against humanity of persecution, nor the crime of genocide, as ‘serious human rights violations’. During the delegation’s mission to Nepal and during meetings with stakeholders, the delegation heard about the impact of caste discrimination against the Dalit community, who were stigmatised and targeted as Maoists by the security forces. The delegation heard of similar stigmatisation and targeting against Tharus Indigenous peoples, to the point that of the 156 cases of enforced disappearance by state authorities documented by OHCHR in Bardiya, where the majority of the population are Tharu, 85 percent of the victims were Tharu.<sup>153</sup> It seems particularly important to the delegation that gross human rights violations such as these should be characterised as such to be brought under the jurisdiction of transitional justice mechanisms and subjected to criminal accountability, in addition to being studied as a root cause of the conflict.
- 116.** This concern has been similarly noted by UN Special Procedures Mandate Holders who raised in June 2023 “alarm that the Bill excludes from its current definition of ‘serious human rights violations’ many acts that may amount to gross violations of human rights, war crimes and crimes against humanity and would therefore not be examined by the TRC or subject to prosecution by the Special Court.”<sup>154</sup>
- 117.** **CONCLUSION:** the delegation is concerned that the list of ‘serious human rights violations’ set out in the Bill, will operate, in practice, as a potentially exhaustive list of prohibited acts which will be considered during the transitional justice process, which does not reflect the extent of human rights violations and/or international crimes requiring accountability under international law.

<sup>153</sup> OHCHR, ‘Conflict-related disappearances in Bardiya District’ (December 2008), p17.

<sup>154</sup> UN Special Procedures, Comm Ref. AL NPL 1/2023, 9 June 2023, p4.



118. **RECOMMENDATION:** rectify definitional issues in the Bill that appear to exclude from the definition of ‘serious human rights violations’ acts that may amount to gross violations of human rights and/or international crimes. Review the list of prohibited ‘serious violations’ with a view to incorporating the full scope of protections and obligations for Nepal under international law into the Bill’s list. This is important to ensuring inclusivity in the process and the right to a remedy for all conflict victims, as well as to address the root causes of the conflict within the process.

### iii. Limitation on victims

119. The Bill’s language appears to limit recourse to only certain victims – leaving others who suffered harm outside the scope of the process.
120. The Bill’s list of ‘human rights violations’ and ‘serious human rights violations’ limits consideration of such acts to only those which were committed in a *targeted or planned manner* against an *unarmed* individual or community. This overly broad language, which is not reflected in international law, has been recognised with extreme concern because it may be interpreted to exclude alleged combatants who were victims of even the prohibited acts listed in the Bill, and/or gross human rights violations and/or international crimes.<sup>155</sup> It also omits acts (such as murder, torture and enforced disappearance) which may constitute gross human rights violations and/or international crimes regardless of whether they were carried out in a targeted or planned manner, or where the steps taken to plan or target the prohibited act cannot be proved.<sup>156</sup> The delegation recalls the lack of clarity that victims have faced in trying to ascertain the extent to which the Commissions are able to probe into military archives, where important evidence of such plans would presumably be located.
121. Based on the information and accounts received by the delegation, this limitation raises concern about the inclusive nature of the transitional justice process. The delegation heard that combatants were also victims, and that children, marginalised communities, and the poor, were particularly vulnerable to recruitment. The delegation also heard about enforced disappearances committed against combatants or perceived combatants. The delegation met with victims who had been permanently injured and disabled during the conflict, whose injuries affected every aspect of their day-to-day lives, and heard from family members of victims – themselves indirect victims – about the threats they faced to their livelihoods, and the obstacles they faced to education, after the male heads of their households were killed or disappeared, or after children were recruited into hostilities. These would all appear to be excluded from the language of the Bill, leaving such victims and their surviving family members outside the process.
122. Such limitations are at odds with the guidance of the UN General Assembly in the ‘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’. The Basic Principles set out the obligation to “[p]rovide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice.”<sup>157</sup> The ‘Updated set of principles for the protection and promotion of human rights through action to combat impunity’ provides that “Every people has the inalienable right to know the truth about past events...”<sup>158</sup>, and that states must “undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and to ensure that those responsible for serious crimes under international law are prosecuted, tried and duly punished”<sup>159</sup>.
123. **CONCLUSION:** the Bill appears to exclude certain victims of gross human rights violations and/or international crimes from the transitional justice process, contrary to their right to equal and effective access to justice, remedy and truth.
124. **RECOMMENDATION:** rectify definitional issues in the Bill that appear to exclude certain victims from the transitional justice process.

<sup>155</sup> For the avoidance of doubt, combatants are capable of being victims of gross human rights violations. They are also capable of being victims to war crimes as defined under the Rome Statute, which include, in non-international armed conflicts, “serious violations of article 3 common to the four Geneva Conventions ... committed against persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause” (Article 8(2)(c)); and “other serious violations of the laws and customs applicable in armed conflicts not of an international character” such as sexual violence (Article 8(2)(e)(vi)), using child combatants (Article 8(2)(e)(vii)), killing or wounding treacherously a combatant adversary (Article 8(2)(e)(ix)), declaring that no quarter will be given (Article 8(2)(e)(x)), and subjecting persons who are in the power of another party to the conflict to physical mutilation, etc (Article 8(2)(e)(xi)).

<sup>156</sup> UN Special Procedures, Comm Ref. AL NPL 1/2023, 9 June 2023, p4.

<sup>157</sup> Basic Principles, Principles II(3)(b), and II(3)(c).

<sup>158</sup> Updated Set of principles, Principle 2.

<sup>159</sup> *Ibid*, Principle 19.



Despite the multiple obstacles they face, women human rights defenders have played a pivotal role in advancing the struggle for justice in Nepal.

#### iv. Amnesties resulting from two-pronged categorisation of human rights violations

- 125.** Beyond the initial discomfort with setting out human rights violations in a hierarchical manner which is not reflected in international human rights law, the delegation is aware that the tiered approach stems from the Bill's intended function of allowing the TRC and CIEDP to recommend amnesty, and victims to consent to reconciliation, in respect of 'human rights violations' but not 'serious human rights violations'. The delegation interprets both 'amnesties' and 'reconciliation' under the Bill to amount to amnesties properly understood, given that they operate as a prospective bar to prosecution.<sup>160</sup>
- 126.** The exclusion from the definition of 'human rights violations' and 'serious human rights violations' of acts that may amount to gross violations of human rights, including torture (properly defined), killing, enforced disappearances, war crimes, crimes against humanity and other international crimes, and thus their susceptibility to amnesty, amounts to a *de jure* and/or *de facto* amnesty from prosecution.<sup>161</sup> That may infringe Nepal's international obligations to investigate, punish and prosecute, and to provide adequate redress to victims of, serious human rights violations and/or international crimes,<sup>162</sup> as well as the 2015 Supreme Court ruling which struck down amnesties to perpetrators of serious crimes under international law. The delegation is particularly mindful of the power imbalance that may exist between perpetrators and victims, which may bear undue pressure on victims to accede to amnesties.
- 127.** Gaps such as these, which impede the lawful, logistical and practical implementation of the process, and its compliance with international law, should be addressed and rectified. As stated by the UN High

<sup>160</sup> OHCHR, 'Rule-of-law tools for post-conflict states: Amnesties', p5; see also ICRC Advisory Service on International Humanitarian Law, 'Amnesties and International Humanitarian Law: Purpose and scope', *International Review of the Red Cross*, vol.101, no. 910, 2019, p358 and footnote 2.

<sup>161</sup> *Ibid*, p6; see also OHCHR, 'Rule-of-law tools for post-conflict states: Amnesties', pp6-9.

<sup>162</sup> Pursuant to, for example, the UNCAT (Articles 4-7), the Genocide Convention (Articles 1 and 4), and the rules of customary international law obliging states to investigate and prosecute persons suspected of having committed war crimes in non-international armed conflicts, and the exception of such persons from amnesty (see Rules 158 and 159 of the rules of customary international humanitarian law identified in ICRC, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol 1 (Cambridge University Press 2005), pp607-614); see also Committee against Torture, 'General Comment No. 2: Implementation of article 2 by States parties' (24 January 2008) UN Doc CAT/C/GC/2, §5; Committee against Torture, 'General comment No.3 (2012): Implementation of article 14 by States parties' (13 December 2012) UN Doc CAT/C/GC/3, §41; CCPR, 'General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev1/Add.13, §18; 'General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) UN Doc HRI/GEN/1/Rev.9 (Vol. I) p202, §§8 and 15. For an overview of Nepal's duty to investigate, prosecute and punish, see Advocacy Forum-Nepal, 'Memo on State Duty to Investigate, Prosecute and Punish' (2020) (available on request). On amnesties, see OHCHR, 'Rule-of-law tools for post-conflict states: Amnesties' (UN Doc HR/Pub/09/1, 2009), and Advocacy Forum-Nepal, 'Memo on International Standards Regarding Amnesty' (2020) (available on request).

Commissioner for Human Rights, Volker Türk, upon the adoption of the Bill:

*"I welcome the adoption of this revised law as an important step forward, even if some provisions leave gaps and ambiguities. It is imperative that the legislation is interpreted and implemented in a manner that upholds victims' rights, including to truth, justice and reparations and that guarantees accountability in full compliance with international human rights standards".<sup>163</sup>*

- 128.** By way of comparison, Colombia's law on amnesties, pardon and special criminal treatment of 2016 is clear in stating that under no circumstances shall amnesty or pardon be granted for crimes against humanity, genocide, war crimes, the taking of hostages other severe deprivation of liberty, torture, extrajudicial executions, enforced disappearance, rape and other forms of sexual violence, child abduction, forced displacement, as well as the recruitment of minors, in accordance with the Rome Statute.<sup>164</sup> The Colombian Constitutional Court held that the law's original provision for amnesties for war crimes not classified as "serious" where they were not committed in a "systematic manner" to be unenforceable as contrary to international law.<sup>165</sup>
- 129.** Having overwhelmingly heard from stakeholders in Nepal about the difficulties with implementation of existing legislation, the delegation encourages steps to anticipate and address in advance all potential hurdles to effective implementation of the transitional justice process in good faith. The delegation urges the Nepali government, legislature and courts to ensure that the laws underpinning the transitional justice process meet international standards and prevent impunity for international crimes and gross human rights violations.
- 130.** **CONCLUSION:** the Bill appears to afford *de jure* and/or *de facto* amnesties from prosecution for offences amounting to gross human rights violations and/or international crimes, contrary to Nepal's international obligations. Transitional justice should never be geared towards ensuring impunity for the most powerful.
- 131.** **RECOMMENDATION:** ensure that all acts amounting to gross violations of human rights and/or international crimes are not the subject of amnesty.

#### v. Lack of clarity as to applicable sentences

- 132.** The Bill states that sentencing for crimes will be as per 'prevailing' law.<sup>166</sup> The Bill allows the Attorney General or a public prosecutor authorised by him to, except in cases of rape or sexual violence, request a 75 per cent reduction in the sentence prescribed under prevailing law for acts constituting 'human rights violations' and 'serious human rights violations' under the Bill, considering the perpetrator's contribution to the truth, their cooperation in the investigation, their repentance, apology and promise of non-repetition, the circumstances and reasons of the incident, and the principles of transitional justice.<sup>167</sup> The Bill provides for the ultimate decision on mitigation in sentencing to be by the Special Court according to several factors, including the Attorney General's recommendation,<sup>168</sup> but it does not provide for the precise criteria that will be applied by the court in calculating leniency.
- 133.** In the view of the delegation, that proposal is unduly broad and vague as to the applicable criteria. The delegation hopes that, prior to the Special Court's operation, this uncertainty will be resolved, in line with the right of victims to an effective remedy and the need for punishment to reflect the gravity of the crimes committed, even when balancing the imperative to incentivise participation of perpetrators in the transitional justice process.<sup>169</sup>
- 134.** The Colombian transitional justice process incentivises the participation of parties to the armed conflict by providing for a complex system of special sanctions and alternative sanctions (reduced prison sentences) for those responsible for international crimes or gross violations of human rights, where the perpetrator confesses to the crime; acknowledges responsibility; contributes to truth-seeking (including the whereabouts of disappeared persons); commits to non-repetition and non-reoffending, and personally redresses the victims, including by providing adequate reparations. Leniency decreases and sanctions become more onerous the less and the later that perpetrators fulfil these conditions, which encourages them to do so fully, and at an early stage. Perpetrators who frustrate the transitional

<sup>163</sup> OHCHR, 'Nepal: Türk welcomes adoption of transitional justice law, calls for victim-centred implementation' (22 August 2024).

<sup>164</sup> Law 1820 of 2016, Article 23.

<sup>165</sup> Constitutional Court of Colombia, Judgment C-007/18 (1 March 2018), §§512-523.

<sup>166</sup> Bill, section 29(6).

<sup>167</sup> Bill, section 29(2) and (6).

<sup>168</sup> Bill, section 29D(1) and (2).

<sup>169</sup> See, further: Advocacy Forum-Nepal, 'Memo on Leniency in Sentencing and its Legitimacy' (available on request).



justice process, or who are found responsible following adversarial proceedings but still fail to meet these conditions, are liable to ordinary sanctions of up to 20 years imprisonment.<sup>170</sup> Actors such as FARC members and military personnel who breach the conditionality regime for accessing and maintaining the benefits granted under the Peace Agreement,<sup>171</sup> or who have not provided early, timely and exhaustive contributions to the truth,<sup>172</sup> are subject to the ordinary justice system, where sentences are even higher. This carefully conditioned leniency system has proven to encourage engagement with transitional justice, given that 90 per cent of perpetrators prosecuted by the Special Jurisdiction for Peace (“JEP”) have acknowledged their responsibility.<sup>173</sup>

**135. CONCLUSION:** the precise criteria applicable to sentencing for conflict-era crimes is still unclear. Current proposals for leniency in the context of transitional justice are unduly broad and vague.

**136. RECOMMENDATION:** ensure that key historic crimes under the special court’s jurisdiction are clearly criminalised with set penalties and clear criteria for the court itself to calculate leniency, to guarantee legal certainty within the transitional justice process. These criteria should be guided to guarantee victims’ rights. Ensure that sentences reflect the gravity of the crime, even when leniency is applied.

## vi. Victims of conflict-related sexual violence and other vulnerable victims

**137.** Both international human rights law and international humanitarian law prohibit acts of sexual violence during conflict. Gender based violence, including sexual violence constitutes discrimination within Article 1 of CEDAW.<sup>174</sup> Sexual violence can constitute a war crime, a crime against humanity, torture or an element of genocide, and all victims of sexual violence, particularly women and girls, must have equal protection under the law and equal access to justice. The UN Security Council has stressed the “importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth and national reconciliation.”<sup>175</sup>

**138.** Sexual violence against women, in particular, is not a special feature of, or unique to, war, but is also related to experiences of women during peace time. And so it appears to be in Nepal where there is evidence of enduring patriarchal attitudes: the delegation heard that Nepali society maintains attitudes to sexual violence that pre-date the conflict so that often survivors are questioned or blamed, while a perpetrator is afforded the benefit of the doubt.

**139.** The delegation is concerned that views on gender violence based on the traditional cultural inequality of women in Nepali society remain prevalent notwithstanding constitutional protection and legal reforms. In the most recent visit of the UN Special Rapporteur on violence against women, its causes and consequences to Nepal, the Special Rapporteur found that “[v]iolence against women in Nepal is pervasive, occurring in both the private and the public spheres throughout the country, and is further compounded by the persistence of entrenched patriarchal attitudes, gender stereotypes and harmful practices.”<sup>176</sup> It disproportionately affects women and girls who face intersecting and multiple forms of discrimination, such as Dalit women, Indigenous women, LGBTI persons, women from religious minorities, women with disabilities, women living in remote areas, single women (widows), women affected by leprosy and women human rights defenders.<sup>177</sup> Domestic violence continues to permeate Nepali society. It is still under-reported and there is a high level of impunity for perpetrators, “owing in part to the lack of public awareness about this societal problem, fear of retaliation and stigmatization, the lack of trust in law enforcement agencies and the low quality of existing services and protection mechanisms for victims

<sup>170</sup> See Clara Sandoval, Hobeth Martínez-Carrillo and Michael Cruz-Rodríguez, ‘The Challenges of Implementing Special Sanctions (*Sanciones Propias*) in Colombia and Providing Retribution, Reparation, Participation and Reincorporation’, *Journal of Human Rights Practice*, Vol. 14, Issue 2, 2022, pp478–501.

<sup>171</sup> See JEP, ‘The JEP excludes Márques, Sierra and Castellanos for seriously violating the conditionality regime’ (8 August 2023) (in Spanish); DHColumbia, ‘The JEP Appeals Chamber decides the final expulsion of Robinson Javier González del Río’ (28 May 2024) (in Spanish).

<sup>172</sup> JEP, ‘The JEP has rejected and definitively excluded 2,772 people who requested entry into this Jurisdiction’ (4 October 2019) (in Spanish). See also, specifically, El Espectador, ‘El Oso’ leaves Justice and Peace – the Baranquilla Court revoked Marco Tulio Pérez’s benefits for not confessing to the gender crimes he committed against women in San Onofre’ (11 September 2024) (in Spanish); El Tiempo, ‘El Oso’ sentenced to 24 years in prison for raping 10 women’ (11 September 2018) (in Spanish); JEP, ‘The appeals section of the JEP rejects the submission of General (R) Iván Ramírez Quintero for facts related to the occupation of the Palace of Justice’ (11 August 2022) (in Spanish); El Espectador, ‘Retired General Iván Ramírez sentenced for disappearance during the occupation of the Palace of Justice’ (19 June 2024) (in Spanish); Cajar, ‘General Jesus Armando Arias Cabrales expelled from the JEP – Column by Rafael Barrios Medivil in Confidencial Colombia’ (21 March 2023) (in Spanish); Pares, ‘Sentence set for alias Jorge 40’ (28 January 2022) (in Spanish). Victims’ attorneys have also sought a return to the ordinary justice system in the cases of Colonel Nelson Velásquez Parrado, Colonel Juan Carlos Barreda Curado, and General Diego Luis Villegas Muñoz – see JEP Youtube, ‘Day 2 hearings on victims’ observations, subcase Antioquia, case 3’ (2 March 2024), from 7 hours 29 minutes.

<sup>173</sup> JEP, ‘In 2024 the JEP will launch the Restorative System’ (29 December 2023) (in Spanish), see the enclosed video at 6:10 minutes.

<sup>174</sup> CEDAW Committee, ‘General recommendation No. 19: Violence against women’ (1992) UN Doc A/47/38, §6; ‘General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19’ (26 July 2017) UN Doc CEDAW/C/GC/35.

<sup>175</sup> UNSC Res 1820 (19 June 2008) UN Doc S/RES/1820, §4.

<sup>176</sup> HRC, ‘Report of the Special Rapporteur on violence against women, its causes and consequences on her visit to Nepal’ (19 June 2019) UN Doc A/HRC/41/42/Add.2, §27.

<sup>177</sup> *Ibid.*, §65.

of violence”.<sup>178</sup> The limited data available at the time of the Special Rapporteur’s report indicated that gender-based violence was the leading identifiable trigger for violent deaths in Nepal,<sup>179</sup> and that the number of cases of sexual violence and rape is increasing.<sup>180</sup>

- 140.** While noting the paucity of documentation, the catalogue of conflict-related sexual violence revealed by OHCHR research in its 2012 report makes for grim reading. It includes rape, attempted rape, threats of rape, gang rape, forced nudity, and rape in front of one’s children as among the most common types of sexual violence in the conflict period. Children, pregnant women, lactating mothers and women with disabilities were also among the victims. Data collected identified children as being especially vulnerable and more than one third of victims of sexual violence are said to be under the age of 15.<sup>181</sup> Perpetrators reported are both Maoists and military personnel, with the majority of allegations being made against the latter.<sup>182</sup>
- 141.** The delegation heard of the pervasive difficulty faced by victims of conflict-era sexual violence, in coming forward to register their complaints and openly express their experiences. Trauma, stigma, shame and fear caused by cultural attitudes noted above have inhibited their ability to disclose sexual violence against them and access any remedies. The delegation heard that these attitudes exist even within the TRC, for example, a view that encouraging victims of sexual violence to come forward would create tensions leading to the destruction of families. The husbands of some victims of rape are still unaware of what their wives endured, which makes providing reparation and treatment a highly sensitive task.
- 142.** The delegation also heard that some complaints made to state authorities may not have been registered at all. Where victims might have disclosed sexual violence to Local Peace Committees in the course of applying for government ‘interim relief’ programmes, their complaints will have not been categorised or followed-up, because those programmes did not cover sexual violence victims. That creates a gap in accountability and data collection that would need to be revisited by the TRC, NHRC and/or Special Court.
- 143.** Moreover, the delegation heard that many conflict-era victims, including but not limited to sexual violence survivors, face additional obstacles to registering their complaints, including belonging to marginalised communities, lacking confidence in the justice system, suffering from trauma-related mental health issues, having been children at the time of the abuses they suffered, suffering acute poverty and being illiterate, which inhibits their access to rights advice or support from civil society organisations. Many have not yet registered their complaints because of a lack of trust in the authorities or the TRC.
- 144.** Even where victims have approached the TRC (or the police), the delegation heard that the staff taking their statements have appeared to victims and their advocates to have had no training on the sensitivities involved in conducting interviews on gender-based and sexual violence, including the need to maintain confidentiality. In addition, complainants’ have felt their credibility to be doubted, and there seemed to be confusion as to whether such complainants could qualify as conflict victims, compounding concerns that many complaints made may not have been registered at all.
- 145.** Of the 64,000 or so cases reported to the TRC, only around 300 are said to include allegations of sexual violence or rape.<sup>183</sup> The Special Rapporteur has expressed concern that this indicates that “*many victims and survivors have not been able to register complaints, and they are often afraid to do so for fear of repercussions*”.<sup>184</sup> Several concerns and recommendations regarding the transitional justice process have also been made by the UN Committee on the Elimination of Discrimination against Women.<sup>185</sup>
- 146.** Experiences of rape and murder after rape have been widely reported including in the Nepali press and, as with most conflicts, it is not difficult for the delegation to accept accounts it heard that the conflict in Nepal also gave rise to many more cases of sexual violence than currently recorded. The delegation also considers it reasonable to accept that it is likely that these victims are predominantly women or children, often from minority communities, and that the numbers thus far recorded are indeed likely to be an underestimate.
- 147.** The delegation was concerned to hear a minister articulate the view that numbers of conflict related sexual violence complaints are few and already recorded by the TRC. We are concerned that this reveals

<sup>178</sup> *Ibid*, §29.

<sup>179</sup> *Ibid*, §28.

<sup>180</sup> *Ibid*, §34.

<sup>181</sup> OHCHR, ‘Nepal Conflict Report’, pp172-173.

<sup>182</sup> *Ibid*, p23.

<sup>183</sup> The Kathmandu Post, ‘Conflict-era rape victims’ trauma compounds’ (19 February 2024).

<sup>184</sup> Report of the Special Rapporteur on violence against women, its causes and consequences on her visit to Nepal (2019), §58; see also OHCHR, ‘Nepal Conflict Report’, p23.

<sup>185</sup> CEDAW Committee, ‘Concluding observations on the sixth periodic report of Nepal’ (14 November 2018) UN Doc CEDAW/C/NPL/CO/6, §§22-23.

an ongoing instinct to minimise the occurrence of sexual violence during the conflict in the face of mounting anecdotal and research evidence to the contrary.<sup>186</sup> The delegation is unable to accept that the numbers of victims of conflict-related sexual violence are as already recorded and limited. Accounts of women being arbitrarily held and raped in army barracks, some giving birth to children who to this day do not know the identity of their fathers, are widely reported. The delegation heard testimony from a female victim in Bardiya that women have been additionally victimised within a society which questions their character, and credibility, as a result. Precise figures are unavailable, including of the numbers of children born through rape during the conflict and there is no official data.

- 148.** The delegation was concerned to hear that the Bill only proposes that victims of conflict-related rape and serious sexual violence be provided with an additional three-month window to register their complaints,<sup>187</sup> to circumvent the statutory limitation barrier. In the view of the delegation, that is a remarkably small window of time, bearing in mind the obstacles these victims have faced to disclosure, which the state appears to be making no wider efforts to address. Similar concerns were voiced by the Special Rapporteur in respect of a previous iteration of the bill.<sup>188</sup> This all risks leaving out the most vulnerable members of society from the transitional justice process. In the words (as translated) of a sexual violence survivor who spoke to the delegation in Kathmandu, the proposal “*shows insensitivity to the plight of conflict-era victims*”.
- 149.** In its General Recommendation No. 30 on ‘women in conflict prevention, conflict and post-conflict situations’, the UN Committee on the Elimination of Discrimination against Women requires state to “*prevent, investigate and punish all forms of gender-based violence, in particular sexual violence perpetrated by State and non-State actors, and implement a policy of zero tolerance*”.<sup>189</sup> This is reflected in Nepal’s second National Action Plan for the implementation of UN Security Council Resolutions 1325 and 1820 on Women, Peace and Security.<sup>190</sup> This is a key strategy aimed at gender empowerment and ending gender-based violence. The first phase (2011-2018) has been criticised for failing to recognise and act upon the needs and concerns of women and for victims and survivors of conflict-related sexual violence in particular, and for lacking a holistic or human rights-based approach to violence against women. It did not sufficiently address the need for adequate services for crisis, shelters or safe houses.<sup>191</sup>
- 150.** Nepal is in the midst of carrying out its delayed second phase of the National Action Plan (2022-2025). Adopted in August 2023, it now has less than 12 months to run. It has the laudable aim of “*institutional strengthening to ensure access to justice for the victims and survivors of sexual and gender-based violence*” and “*implementing recovery programmes for conflict-affected women, children, people with disabilities and people with mental health problems*” at the centre of its operational strategy.<sup>192</sup> It further aims to “*fully guarantee the proportional and meaningful participation and security of women in the entire process of conflict transformation and peace building*”<sup>193</sup> and “*address the specific and overall needs of women and children survivors of the conflict, ensuring an environment where they can participate meaningfully in areas of their concern and live a dignified life.*”<sup>194</sup> Attempts to address the shortcomings of the earlier National Action Plan have been welcomed.<sup>195</sup>
- 151.** Its implementation is envisioned through agencies at all levels: national, provincial, district and local. NGOs and victims’ groups are committed to its implementation and the Conflict Victims Women’s Network has been recognised as an implementing partner. The delegation heard that the UNDP is also committed to this programme. However, significant concerns remain at barriers to implementation. The delegation heard evidence of a lack of awareness of NAP II at national and local government level, and a lack of resources and priority from the government and other agencies, including dedicated personnel and finances.<sup>196</sup>
- 152.** **CONCLUSION:** In the view of the delegation, much more needs to be done to meet the aims of NAP II, if it is not to fade into oblivion, and to address previous shortcomings in respect of conflict-related victims of sexual violence. It is of the utmost importance that the transitional justice process puts

<sup>186</sup> In the HRC case of *RR, KR and SR v Nepal*, RR was a 16-year-old girl accused of being a Maoist, taken from her family, raped and murdered by soldiers. The government submissions refused to accept that RR had been raped even in the face of compelling evidence and findings by domestic and martial courts.

<sup>187</sup> Bill, section 13(6A).

<sup>188</sup> Report of the Special Rapporteur on violence against women, its causes and consequences on her visit to Nepal (2019), §59.

<sup>189</sup> CEDAW Committee, ‘General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations’, §38(b).

<sup>190</sup> government of Nepal Ministry of Home Affairs, ‘The Second National Action Plan for the Implementation of United Nations Security Council Resolution 1325 and 1820 Resolution on Women, Peace and Security (FY 2022/2023-2024/2025)’ (2022) (“NAP II”).

<sup>191</sup> Report of the Special Rapporteur on violence against women, its causes and consequences on her visit to Nepal (2019), §20

<sup>192</sup> NAP II, p12.

<sup>193</sup> NAP II, remarks.

<sup>194</sup> NAP II, p11.

<sup>195</sup> See, Advocacy Forum-Nepal, ‘Briefing on the Implementation of National Action Plan II for the Implementation of the UN Security Council Resolutions 1325 and 1820 on Women, Peace and Security’ (December 2023).

<sup>196</sup> See, further, *ibid*, pp8-9.



The lawyers meet with civil society representatives in Bardiya.



vulnerable victims, including victims of conflict-related sexual violence, former child-soldiers and those from historically marginalised groups, at its centre. This can only be done if effective measures are put in place to ensure sensitivity to the obstacles they face in accessing justice, to combat those obstacles, and to assist victims in seeking accountability and redress without delay. This must be a government priority.

153. **RECOMMENDATION:** implement safeguards that protect the rights of conflict-era victims of sexual and gender-based violence, and facilitate their access to justice, including by extending the time period for complaints to be made, and being sensitive to the obstacles they face at disclosure, such as confidentiality. Facilitate access to justice for historically marginalised groups, including former-child soldiers, women, Dalit peoples, Indigenous peoples, LGBTI persons and those with disabilities. Ensure psychosocial support is available to victims during their engagement with transitional justice processes, and that child-sensitive and trauma-informed investigations are conducted.

### vii. Appointments to the Special Court and Commissions

154. The Bill empowers the government to appoint High Court judges to the Special Court, in *consultation* with the Judicial Council.<sup>197</sup> The delegation is concerned that this may fail to adhere to constitutional guidance set out in the Supreme Court's 2017 Opinion, which requires judges to be selected by the Judicial Council to ensure their independence.
155. Avoiding the appointment of commissioners and judges selected based on their political affiliations, in favour of a public, independent and transparent selection process based on merit, expertise and

<sup>197</sup> Bill, section 29A.

representation, protects against complaints of political bias, which can undermine the legitimacy of transitional justice processes. Commissioners appointed to the Nepali TRC and CIEDP have already been met with a lack of trust by victims on this basis. The delegation learned that the Judicial Council itself is constitutionally subject to political appointments: it is headed by the Chief Justice who is appointed by the country's President, and its membership includes the Law and Justice Minister, and a jurist appointed on the recommendation of the Prime Minister, as three of its five members.<sup>198</sup> The delegation noted that the level of executive influence over its appointment inevitably raises questions about the independence of the appointees; both as to its perceived and actual independence. The integrity of the process is key. This should be addressed in the context of transitional justice, and current proposed constitutional amendments.

- 156.** The Colombian experience indicates that both the selection committees and those who are appointed to senior positions in justice mechanisms will be the centre of criticism and questioning, so they should be carefully selected to guarantee the legitimacy of the transitional justice process. An independent election committee, appointed by various external delegates and not including parties to the armed conflict, was formed to elect senior positions in the Comprehensive System of Truth, Justice, Reparation and Non-Repetition. These included the magistrates of the JEP, the director of the investigation and accusations unit of the JEP,<sup>199</sup> the director of the special unit for the investigation and dismantling of criminal organisations of the office of the Attorney General,<sup>200</sup> the director of the Unit for the Search of Missing Persons (UBPD), and the commissioners of the Truth Clarification Commission (CEV). The election process lasted three months, was public, and carried out through a secure online platform which published the resumes of the candidates and allowed anyone to make comments, which were only visible to the committee members. The interviews of the shortlisted candidates were also made public on the online platform, and an algorithm was developed, with the support of the UNDP, to quantify the profile of candidates according to the selection criteria set out in the 2016 Peace Agreement.<sup>201</sup>
- 157.** The Colombian constitutional amendment that created the Comprehensive System of Truth, Justice, Reparation and Non-Repetition required that all of its components must respect gender, ethnic and cultural diversity.<sup>202</sup> Per the Peace Agreement, justices of the JEP must have extensive experience in human rights, intentional humanitarian law and conflict resolution.<sup>203</sup> In addition, the selection committee promoted the selection of people belonging to groups that have historically been discriminated against, who may have been excluded from judicial appointments due to their lack of political leverage.<sup>204</sup> Magistrates, and those exercising judicial or prosecutorial functions, had to be lawyers, but other commissioners needed not be. This allowed for non-lawyer leaders of victims' organisations, journalists and psychologists to be included on the Truth Clarification Commission.<sup>205</sup>
- 160.** These tools have been effective. 55 percent of the magistrates of the JEP are women. These figures contrast with the makeup of the high courts of ordinary justice in Colombia, which are predominantly male.<sup>206</sup> Affirmative action in the selection of JEP magistrates has meant that 8 percent of elected magistrates are Indigenous, while 12 percent are Afro-Colombian, whereas the representation of these groups is almost non-existent in the Colombian higher courts.<sup>207</sup> In addition, 35 percent of magistrates are from the capital, whereas the remainder are from regional territories where the conflict was suffered more intensely.<sup>208</sup> 4 percent of magistrates are military.<sup>209</sup> Similar representative achievements have been made in the Truth Clarification Commission, which has over 40 percent women commissioners, and includes Afro-Colombian and indigenous commissioners. The first director of the Unit for the Search of Disappeared Persons was a woman human rights lawyer with particular experience representing victims from social organisations in the search for their disappeared relatives.

<sup>198</sup> 2015 Constitution of Nepal, Article 153.

<sup>199</sup> The entity in charge of the investigation and prosecution in cases that fall under the jurisdiction of the JEP.

<sup>200</sup> In addition to the JEP's competence to investigate and prosecute state agents and former FARC combatants, the Colombian Peace Agreement created an investigation unit within the Attorney General's Office that would be responsible for investigating and prosecuting members of criminal organisations before the ordinary courts. Thus, it is a unit created within an ordinary, non-transitional entity, but its director was chosen by the independent committee in charge of appointing the senior officials of the comprehensive transitional justice system.

<sup>201</sup> Santiago Pardo Rodríguez, 'A Second Chance on Earth: Understanding the Selection Process of the Judges of the Colombian Special Jurisdiction for Peace', *Notre Dame Journal of International & Comparative Law*, Vol. 10, Issue 2, 2020, pp209-266.

<sup>202</sup> Legislative Act 01 of 2017.

<sup>203</sup> Colombian Peace Agreement 2016, Articles 65-66.

<sup>204</sup> Santiago Pardo Rodríguez, 'A Second Chance on Earth: Understanding the Selection Process of the Judges of the Colombian Special Jurisdiction for Peace', p224.

<sup>205</sup> Truth Clarification Commission, 'The Commissioners' (in Spanish).

<sup>206</sup> Corporación Excelencia en la Justicia, 'Paridad de género en las Altas Cortes de Colombia' (2021) (in Spanish).

<sup>207</sup> Santiago Pardo Rodríguez, 'A Second Chance on Earth: Understanding the Selection Process of the Judges of the Colombian Special Jurisdiction for Peace', pp258-259.

<sup>208</sup> *Ibid*, p249.

<sup>209</sup> *Ibid*, p261.



161. This is comparable to Nepal, where representation of women in the judiciary only reaches 11 percent, and there are only three women Supreme Court justices.<sup>210</sup> The delegation understands that historically marginalised communities, such as Dalits and Tharus who were particularly victimised by the armed conflict, are also be underrepresented in the Nepali judiciary. Increased support for gender, ethnic, occupational and regional equity in transitional justice entities would enhance their representativeness of Nepali society as a whole, and those differentially affected by the armed conflict.
162. In this regard, the delegation welcomes the Bill's provision that the recommendation committee for the appointment of commissioners to the TRC and CIEDP shall include at least one woman,<sup>211</sup> as shall the five-member Commissions themselves;<sup>212</sup> that commissioners must not *inter alia* be members of any political party at the time of appointment,<sup>213</sup> must be an appropriately qualified justice who *inter alia* has worked in the field of human rights, peace, law, conflict management or sociology,<sup>214</sup> and must not have *inter alia* been involved in the armed conflict or recommended for prosecution for human rights violations by the NHRC.<sup>215</sup> However, it notes that similar provisions are not made in respect of justices of the Special Court.
163. **CONCLUSION:** the politicisation of the judges and commissioners involved in the transitional justice process would threaten its independence and integrity, and the perception of its integrity by stakeholders, which is key to the viability of the process.
164. **RECOMMENDATION:** ensure that the institutions at the heart of the transitional justice process, and the processes for their appointment, are not tainted by a lack of independence or impartiality, or a perception of the same. Judges and commissioners should be individuals with proven expertise in peace-building and victim-centred justice, and should be reflective of the gender, ethnic and regional makeup of the country. They should be selected through a transparent and public selection process, free from interference by political parties at any stage.

### viii. Recommendations for prosecutions

165. The Bill states that when a recommendation for prosecution is received from the TRC or CIEDP by the Attorney General, the Attorney General or a government attorney authorised by him shall decide, based on the evidence received, whether or not to file the case within one year.<sup>216</sup> The delegation notes that the Attorney General is constitutionally appointed by the President of Nepal, on the recommendation of the Prime Minister.<sup>217</sup> Prosecutions will be a matter of the highest political interest in Nepal, particularly where the accused continue to hold political power. It is of the utmost importance that their pursuance is independent of political bias.
166. **CONCLUSION:** the delegation is concerned that the text of the Bill appears to give unfettered discretion to the politically-appointed Attorney General to pursue prosecutions.
167. **RECOMMENDATION:** guarantee that the institutional transitional justice framework contains safeguards to ensure that prosecutions are recommended and pursued where the investigation warrants them, without political interference.

### ix. Wider concerns

- (a) Unrealistic burdens on the Commissions and Courts
168. The delegation welcomes the Bill's extension of the tenure of the Commissions to four years, extendable if necessary, to complete their work, including collecting evidence for the purposes of recommending prosecutions.<sup>218</sup> However, given that the TRC has received around 64,000 complaints and the CIEDP over 3,000 cases since 2015, but neither have been able to complete a single investigation, nor find disappeared persons, even this time frame appears to be overly optimistic. That is particularly so given that the Bill does not explicitly afford the Commissions the further training in probing human rights violations

<sup>210</sup> Royal Norwegian Embassy in Kathmandu, 'How "Access to Justice" contributes to strengthening gender equality' (10 March 2024).  
<sup>211</sup> Bill, section 3(3).  
<sup>212</sup> Bill, section 3(2).  
<sup>213</sup> Bill, section 4(b).  
<sup>214</sup> Bill, section 4(d) and (f).  
<sup>215</sup> Bill, section 5 (d) and (e).  
<sup>216</sup> Bill, section 29(3).  
<sup>217</sup> 2015 Constitution of Nepal, Article 157(2).  
<sup>218</sup> Bill, section 38.



and international crimes, the investigative capacity or resources necessary for them to complete their investigative mandates.

169. The Bill proposes that the Special Court will only be composed of three members,<sup>219</sup> to hear all cases of ‘human rights violations’ and ‘serious human rights violations’. It also appears to the delegation that such a number is optimistic, given the caseload the Court will need to handle.
170. **CONCLUSION:** the state has not yet acted to ensure the Commissions have the expertise, investigative capacity and resources necessary for them to fulfil their investigative mandates.
171. **RECOMMENDATION:** ensure that the TRC and CIEDP are given the funding, investigative capacity, infrastructure, technical knowledge, expertise and strategy necessary to conduct evidence-collecting for the purposes of safely investigating cases, where the remains of disappeared persons are, who is responsible, and recommending prosecutions. Increase the number of judges in the Special Court as needed.
- (b) Safeguarding conflict-era evidence and data
172. The delegation heard anxious concerns from Nepali victims’ groups and civil society organisations that the safety and organisation of the archives of the Local Peace Committees (which are currently under government control), military archives (which are under military control), the TRC and the CIEDP is unclear. The delegation also heard concerns about risks to archives held by civil society organisations.
173. In Colombia, safeguarding archives has been at the core of the transitional justice process. Experience shows that when investigations and judicial proceedings are initiated against alleged perpetrators in former or current positions of power, the risks of damage, destruction, disappearance and prohibition on access to archives belonging to state authorities, victims and civil society organisations increases.<sup>220</sup> As a result, measures have been taken to independently safeguard and protect archives belonging to state authorities and civil society organisations, and to order, classify, systematise and establish criteria for access to information from state archives, with international technical support where necessary.<sup>221</sup>
174. In this regard, the delegation welcomes the Bill’s provisions that oblige state agencies to cooperate with investigations, allow the Commissions to seek mandatory suspension of a person holding public office *if* it appears likely that such a person would destroy evidence, recommend individuals involved in ‘serious human rights violations’ for vetting, and seek departmental action if a person holding public office is found guilty of a human rights violation. However, the Bill does not provide for the independent safeguarding of conflict-era evidence held by parties to the conflict, to ensure the viability of investigations and prosecutions. Nor does it provide for the suspension from public office of any person against whom a prosecution has been filed, or include vetting as a form of punishment available to the Special Court. The delegation notes, in particular, that the UN Committee against Torture has made clear that State officials should not be allowed to continue in their positions throughout the duration of the investigation concerning their alleged acts of torture.<sup>222</sup> In these respects, the Bill falls short.
175. **CONCLUSION:** Nepal’s transitional justice process will only be effective if underpinned by adequate mechanisms for independently preserving and ensuring access to conflict-era archives, evidence and data. That must involve urgently and safely extracting them from the control and access of parties to the conflict, including those in government, the military and the police, who should be presumed have an interest in their concealment, and in the obfuscation of command responsibility. Furthermore, the suspension of those suspected and/or convicted of gross human rights violations from holding public office prevents further abuses and ensures non-recurrence.
176. **RECOMMENDATION:** remove the conflict-era archives of the national security forces from the forces’ and the governments’ control. Ensure governmental and civil society archives are independently safeguarded, for the access and investigation of transitional justice investigative bodies. Develop mechanisms for the independent safeguarding of conflict-related data generally, including that emanating from the state, the TRC, CIEDP and NHRC, civil society and victims’ groups. Provide for the suspension from public office of any person against whom a prosecution is filed, until the case is determined. Make vetting available to the Special Court as a punishment.

<sup>219</sup> Bill, section 29A(1).

<sup>220</sup> See, e.g. Verdad Abierta, ‘Evidence on ‘false positives’ burned in Antioquia’ (17 June 2017) (in Spanish).

<sup>221</sup> See, e.g. Law 1448 of 2011; Decree 4803 of 2011; JEP Auto 001 (12 May 2018); JEP Auto OPV 182 (25 April 2023).

<sup>222</sup> UN Committee against Torture, ‘Concluding Observations: Armenia’ (6 July 2012) UN Doc CAT/C/ARM/CO/3, §13.



(c) Funding and wider issues with implementation

**177.** The delegation notes that the debate and vision for transitional justice in Nepal has been focussed almost exclusively on the adoption of the Bill.

**178.** The delegation is concerned that, while legislative change must obviously be the priority in the short-term, it would only be the starting point for the transitional justice process. The practical implementation of that process will require a clear and detailed action plan. However, this raises critical and foundational questions, including precisely how that will be financed, what technical, expert, institutional and human resources will be necessary for transitional justice, and how the development of the process will be monitored and evaluated. As the delegation understands it, all of those questions are yet to be resolved. As was anxiously expressed to the delegation by Advocacy Forum-Nepal:

*“Transitional justice is not currently a priority for the international donor community, although this may change with the adoption of the Bill. But the country needs its support. If the process starts again, assistance will be needed for victims to engage with the Commissions; violations to be investigated, and legal processes to be taken forward. We will need funding, capacity-building and skills for that.”*

**179.** It was clear from the delegation’s meetings with stakeholders and governmental representatives that there is a hope, and an expectation, that the international donor community will play a role in the process by assisting Nepal to meet these needs. Indeed, the Bill explicitly envisages that a ‘fund’ for tasks such as investigations, truth-seeking, relief and reparation shall comprise of, *inter alia*, money from foreign governments or international organisations, and that the Commissions may be assisted by foreign experts or specialised agencies. In the view of the delegation, in order for the transitional process to receive the broad international support it requires, it will need to be capable of meeting international standards at the outset.

**180.** **CONCLUSION:** there is still no clear plan for the practical implementation of the transitional justice process, including how it will be financed, what technical, expert, institutional and human resources will be necessary, and how it will be monitored and evaluated. International support will be key. That brings the ability of the process to meet Nepal’s international obligations into sharp relief.

**181.** **RECOMMENDATION:** develop a clear road map for transitional justice, including working with international and national stakeholders to identify the technical expertise and financial resources necessary to implement a victim-centred process in line with international standards. The international donor community must be attuned to ensuring that its support to the transitional justice process demands adherence to international law and transparency on the use of resources.



(d) Safeguarding civic space and ensuring a victim-centred process

**182.**

The Colombian experience indicates that victim participation is resource intensive. Several mechanisms were established for the participation of victims in the proceedings before the transitional justice entities, all of which required the work of technical teams, days of reflection and discussion, meetings, exchanges, and trips to access hearings. Among them, the following stand out, for which the support of the international community was essential:

- During the first five years of the operation of the mechanisms of the Comprehensive System of Truth, Justice, Reparation and Non-Repetition, civil society organisations were able to submit reports to the Commissions and to the JEP so that they could be included in investigations. These reports could be of a regional nature, on patterns of crime; on particular cases; on violence against particular Indigenous peoples, ethnic minorities, LGBTI people or women; the underlying causes of the conflict, and the individual and collective impacts caused by human rights violations.
- The JEP has mechanisms in place for victims to participate in prioritisation decisions.
- Victims can formulate questions to be asked directly or through the magistrates to alleged perpetrators and witnesses at hearings.
- Victims can make observations on the contributions of witnesses to truth.
- Victims can participate in the Truth and Accountability Acknowledgment hearings.
- Victims participate in the construction of special sanctions.

**183.**

Nepal has a robust and vibrant civil society landscape which has been active in the quest for transitional justice, including victims' groups, community organisations, national Bar associations, national and international NGOs. These human rights defenders have supported conflict victims by providing psychosocial, legal, advocacy and other practical support, to assist them in disclosing, documenting and collecting records of their experiences, seeking justice for human rights violations, and when engaging and articulating their demands in the context of public consultations on the transitional justice process.

The delegation took place over the course of a week and included numerous meetings in the capital city, as well as trips to Janakpur, Nepalgunj and Bardiya.





The national media has also placed a central role in promoting public awareness. In a recent presentation to the UN Human Rights Council, the government acknowledged that it “regarded civil society and the media as indispensable partners in the promotion and protection of human rights”.<sup>223</sup>

184. The delegation notes that an active role for Nepali and international civil society will be key to the success of a victim-centred transitional justice process. That role can involve:
- Advocacy: on behalf of victims in ongoing consultations, and during the transitional process itself.
  - Support: offering technical expertise, logistical, financial or other support to the process itself, including in investigations, locating the disappeared, retrieving human remains (which requires particular expertise), evidence collection and organising data, monitoring the work of the Commissions,<sup>224</sup> and providing legal, practical and psychological support to victims and accused persons in order to facilitate their participation in the process.
  - Mobilisation/capacity-building/education: working with stakeholders, particularly those who face existing obstacles to participation, including those from vulnerable and marginalised groups, disabled persons and those lacking capacity, to empower them to engage with the process.
  - Independent action: facilitating grass-roots truth-telling and documentation to supplement the work of the process; memorialisation, safeguarding civil society archives, and assisting victims in advocating for their demands, including before the courts.
  - Space for modelling alternatives: creating safe spaces where victims can generate their own understandings of truth-telling, memorialisation, reconciliation and collective identity, to assist in their recovery.
185. With all of that in mind, the delegation was concerned to hear fears articulated by several Nepali and international civil society organisations that the trend of legislative and policy developments since the 2015 Constitution has been to shrink civic space in Nepal.
186. That includes the National Integrity and Ethics Policy of 2018 (currently under resumed discussion),<sup>225</sup> which provides for unduly restrictive and discretionary governmental oversight on the terms of the registration of national and international NGOs, burdensome reporting requirements, restrictions on their human resources, the scope of their activities and their funding.<sup>226</sup> The proposed policy has attracted criticism from UN Special Rapporteurs, who have expressed concern that the policy’s provisions “underline an intended policy aimed at hindering civil society’s ability to operate, especially NGOs and INGOs that are advocating for the promotion of ideas that are not shared by the government”, which “constitute unacceptable impediments to the rights to freedom of expression and association” and may “cause self-censorship among NGOs and INGOs” and “have a devastating impact on organizations promoting human rights whose advocacy and work often imply presenting alternative voices to the authorities’ views and policies”.<sup>227</sup> Civicus Monitor, a global civil society alliance, has concluded that civic space in Nepal is currently ‘obstructed’.<sup>228</sup>
187. The delegation also heard of recent attacks against human, environmental and indigenous rights defenders, and journalists, by the police and non-state actors, which have received varying levels of state redress.<sup>229</sup> Although it was pleased to hear of an order made by the Ministry of Home Affairs on the ‘Security and Protection of Human Rights Activists’ in 2021,<sup>230</sup> its continuation is a concern.
188. **CONCLUSION: civil society in Nepal has stepped in and provided a crucial source of support to conflict victims where the state has been unable to. It has also persistently advocated for transitional justice in midst of many hurdles. Its continued strength and diversity is crucial to ensuring the holistic efficacy of**

<sup>223</sup> HRC, ‘Report of the Working Group on the Universal Periodic Review: Nepal’ (30 March 2021) UN Doc A/HRC/47/10.

<sup>224</sup> C.f. the responsibility of the Kroc Institute in providing technical support and monitoring the implementation of the Colombian Peace Agreement (per Article 6.3.2). See also the most recent report of the Kroc Institute, Josefina Echavarría Álvarez et al, ‘Seven Years of Implementation of the Final Agreement: Prospects for Strengthening Peacebuilding at the Midpoint (December 2022 to November 2023)’ (Kroc Institute, University of Notre Dame and Keogh School of Global Affairs, 7 May 2024).

<sup>225</sup> The Kathmandu Post, ‘government pushes for tough ethics code for officials, I/NGOs’ (2 August 2024).

<sup>226</sup> See, e.g. Centre for Media Research-Nepal, ‘Shrinking of Civic Space: Drafting of CSOs Policies in Nepal’, Policy Paper Series No. 18 (June 2021).

<sup>227</sup> Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on freedom of religion or belief (11 July 2018) [Communication Ref. OL NPL 1/2018](#), p4.

<sup>228</sup> Civicus Monitor, ‘Tracking Civil Space: Nepal!’

<sup>229</sup> See, for example, Amnesty International, ‘Report on Nepal’ (2023); Freedom House, ‘Freedom in the World Report: Nepal’ (2024); OHCHR, ‘Nepal: Retaliations against human rights defenders over business complex ‘deplorable’, say UN experts’ (14 May 2024); The Kathmandu Post, ‘Three convicted in murder of environment activist Dilip Mahato’ (15 February 2023); Civicus Monitor, ‘Environmental defenders at risk, journalists targeted and concerns around the new cyber security policy’ (29 September 2023).

<sup>230</sup> The Himalayan Times, ‘Special provisions for security of human rights defenders’ (13 February 2021).

Survivors of human rights violations committed during the civil war shared their experiences with members of the delegation.



a transitional justice process that puts victims, and a human rights-based approach, at its centre. The country's free and independent media will also be key in maintaining public awareness as to transitional justice developments. As such, the Nepali state must accompany its transitional justice process with effective efforts to comply with its international obligations as regards civic space, journalists and human rights defenders.

189. **RECOMMENDATION:** review and revise the legislation, policies and practices that are shrinking civic space in Nepal, and safeguard civil society and the rights of human rights defenders as required by international human rights law.

vi.

# Final conclusions of the delegation

- 190.** The ongoing failure of the Nepali state to implement a legal framework for transitional justice which is in line with its obligations under international law, constitutional law and the judgments of its Supreme Court, weakens the domestic and international rule of law, and entails an ongoing failure to respect the human rights of its conflict victims (§44).
- 191.** Victims are entitled to justice without delay. Further delays in conducting an effective transitional justice process will entrench impunity and deprive victims of redress, which is long-overdue and desperately needed (§58).
- 192.** The failure to implement transitional justice, and to confront the abuses of the armed conflict, is part and parcel of the ongoing culture of impunity for state abuses in Nepal, which fosters present day rights violations (§67).
- 193.** The state has not yet afforded the transitional justice commissions the expertise, investigative capacity and resources necessary for them to fulfil their investigative mandates (§168).
- 194.** There has been a failure by the state to implement the recommendations of the NHRC (§62).
- 195.** While the delegation is tentatively optimistic about the state's efforts to remedy the TRC Act, it shares many of the concerns it heard from stakeholders, which continue to apply to the Bill as passed (§86).



The Himalayan mountains.



- 196.** Questions remain as to the precise sources of law which will be relied upon to define the prohibited acts set out in the current Transitional Justice Bill. Acts listed as ‘human rights violations’ or ‘serious human rights violations’ within the Bill are more akin to international crimes. The blanket use of the term ‘human rights violations’ to define all acts for which the transitional justice process can examine seems to conflate distinct areas of international law – international human rights law with international criminal law or international humanitarian law. There is concern that this could result in complications with implementation of the Bill, particularly when these prohibited acts are raised and considered. Clarity on these foundational questions is vital to ensure successful implementation of the Bill as passed, and a predictable process for victims (§111).
- 197.** The delegation is concerned that the list of ‘human rights violations’ and ‘serious human rights violations’ set out in the Bill, will operate, in practice, as a potentially exhaustive list of prohibited acts which will be considered during the transitional justice process, which does not reflect the extent of human rights violations and/or international crimes requiring accountability under international law (§117).
- 198.** The Bill appears to exclude certain victims of gross human rights violations and/or international crimes from the transitional justice process, contrary to their right to equal and effective access to justice, remedy and truth (§123).
- 199.** The Bill appears to afford *de jure* and/or *de facto* amnesties from prosecution for offences amounting to gross human rights violations and/or international crimes, contrary to Nepal’s international obligations. Transitional justice should never be geared towards ensuring impunity for the most powerful (§130).
- 200.** The precise criteria applicable to sentencing for conflict-era crimes is still unclear. Current proposals for reduced sentences in the context of transitional justice are unduly broad and vague (§135).
- 201.** Much more needs to be done to meet the aims of NAP II, if it is not to fade into oblivion, and to address previous shortcomings in respect of conflict-related victims of sexual violence (§152).
- 202.** It is of the utmost importance that the transitional justice process has vulnerable victims, including victims of conflict-related sexual violence, former child soldiers, and those from historically marginalised groups, at its centre. That must involve sensitivity to the obstacles they face in accessing justice; effective measures to combat those obstacles and assisting victims to seek accountability and redress without delay. This must be a government priority (§152).



Representatives of Nepali civil society who met with delegates in Bardiya.

- 203.** The Bill appears to give unfettered discretion to the politically-appointed Attorney General to pursue prosecutions (§166).
- 204.** The politicisation of the judges and commissioners involved in the transitional justice process would threaten its independence and integrity, and the perception of its integrity by stakeholders, which is key to the viability of the process (§163).
- 205.** The practical, technical and legal shortcomings of the commissions must be remedied as a matter of urgency, because the efficacy of the transitional justice process hinges upon them (§51).
- 206.** There is still no clear plan for the practical implementation of the transitional justice process, including how it will be financed, what technical, expert, institutional and human resources will be necessary, and how it will be monitored and evaluated. International support will be key. That brings the ability of the process to meet Nepal's international obligations into sharp relief (§180).
- 207.** The investigation and prosecution of conflict-era cases should not be delayed behind the transitional justice process. Until that is effective, the doors to the regular justice system should not be closed to victims (§58).
- 208.** Guaranteeing effective mechanisms for independently safeguarding the preservation of, and ensuring the access of transitional justice mechanisms to, conflict-era archives, evidence and data is a crucial priority to ensuring truth, justice and accountability in the transitional justice process. That *must* involve urgently and safely extracting them from the control and access of parties to the conflict, including those in government, the military and the police, who should be presumed to have an interest in their concealment, and in the obfuscation of command responsibility (§175).
- 209.** The suspension of those suspected and/or convicted of gross human rights violations from holding public office prevents further abuses and ensures non-recurrence (§175).
- 210.** Civil society in Nepal has stepped in and provided a crucial source of support to conflict victims where the state has been unable to. It has also persistently advocated for transitional justice in midst of many hurdles. Its continued strength and diversity is crucial to ensuring the holistic efficacy of a transitional justice process that puts victims, and a human rights-based approach, at its centre. The country's free and independent media will also be key in maintaining public awareness as to transitional justice



The generous time which brave Nepali human rights defenders spent with members of the delegation helped make this report possible.





In discussions with Nepali parliamentarians, the legal delegation was able to discuss legislative proposals related to the rule of law and transitional justice.



developments. As such, the Nepali state must accompany its transitional justice process with effective efforts to comply with its international obligations as regards civic space, journalists and human rights defenders (§188).

- 211.** It is of the utmost importance that the international community *as a whole* encourages and supports the Nepali government to develop a transitional justice process that is *in line with international law*. The international community's role in this regard is a crucial bulwark against non-compliance with international human rights and the need for accountability, ultimately geared towards lasting peace and protecting the dignity of victims (§80).
- 212.** The delegation hopes that, while victims' trust in the state has waned, it *may* be rebuilt alongside concrete steps to achieve transitional justice (§74).



The delegates visited Bardiya Memorial Park to meet with civil society representatives and pay their respects to victims of the civil war.



# Final recommendations of the delegation

**213.** With all of the above in mind, the delegation makes the following recommendations:

## To the Nepali state

**214.** As regards transitional justice delay:

- a. Without further delay, effectively develop and implement a transitional justice process that is in line with Nepal's international obligations, international human rights standards, and the guidance of its Supreme Court (§45).
- b. Ensure swift access to justice for conflict victims, which must include truth-seeking, accountability and comprehensive reparations. Justice is already overdue, and should not be denied to victims any longer (§52).
- c. Cease stalling the access of conflict-era victims to ordinary justice behind transitional justice; instruct police to investigate first information reports relating to conflict-era crimes without delay (§59).
- d. Implement transitional justice in the context of a wider commitment to combat impunity and strengthen the rule of law (§75).

**215.** As regards textual concerns in the Transitional Justice Bill:

- a. Rectify definitional issues in the Bill that:
  - i. Conflate human rights violations and international crimes (§112).
  - ii. Appear to exclude from the definition of 'serious human rights violations' acts that may amount to gross violations of human rights and/or international crimes (§118).
  - iii. Appear to allow for amnesties for acts that may amount to gross violations of human rights and/or international crimes (§130).
  - iv. Appear to exclude certain victims from the transitional justice process (§124).
- b. Review the list of prohibited 'serious violations' with a view to incorporating the full scope of protections and obligations for Nepal under international law into the Bill's list. This is important to ensuring inclusivity in the process and the right to a remedy for all conflict victims, as well as to address the root causes of the conflict within the process (§118).
- c. Ensure that key historic crimes under the special court's jurisdiction are clearly criminalised with set penalties and clear criteria for the special court itself to calculate leniency, to guarantee legal certainty within the transitional justice process. These criteria should be guided to guarantee victims' rights (§136).

**216.** As regards amnesties, sentencing and interference:

- a. Ensure that all acts amounting to gross violations of human rights and/or international crimes are not the subject of amnesty (§131).
- b. Ensure that sentences, even with leniency applied, reflect the gravity of the crime (§136).
- c. Guarantee that the institutional transitional justice framework contains safeguards to ensure that prosecutions are recommended and pursued where the investigation warrants them, without political interference (§167).



Delegates were able to meet with legislators from a broad range of political parties in Kathmandu.



- 217.** As regards access to justice for victims from marginalised groups, former child soldiers, and victims of conflict-related sexual violence:
- Facilitate access to justice for historically marginalised groups, including women, former child soldiers, Dalit peoples, Indigenous communities, LGBTI persons and those with disabilities (§153).
  - Implement safeguards that protect the rights of conflict-era victims of sexual and gender-based violence, and facilitate their access to justice, including by extending the time period for complaints to be made, and being sensitive to the obstacles they face prior to and at disclosure, such as confidentiality (§153).
  - Ensure psychosocial support is available to victims during their engagement with transitional justice processes, and conduct trauma-informed investigations (§153).
- 218.** As regards the independence of judges and institutions:
- Ensure that the institutions at the heart of the transitional justice process, including the commissions and the courts, and the processes for their appointment, are not tainted by a lack of independence or impartiality, or a perception of the same (§164).
  - Judges and commissioners should be individuals with proven expertise in peace-building and victim-centred justice, and should be reflective of the gender, ethnic and regional makeup of the country. They should be selected through a transparent and public selection process, free from interference by political parties at any stage (§164).



Preparatory meeting of the delegation in Kathmandu, together with representatives of PBI, Advocacy Forum Nepal, and the UK Embassy.



- 219.** As regards resources and data:
- a. Ensure that the Commissions are given the funding, investigative capacity, infrastructure, technical knowledge, expertise and strategy necessary to conduct evidence-collecting for the purposes of safely investigating what happened, where the remains of disappeared persons are, who is responsible, and recommending prosecutions (§171).
  - b. Increase the number of judges in the Special Court as needed (§171).
  - c. Remove the conflict-era archives of the national security forces from the forces' and the governments' control. Ensure those archives are independently safeguarded, for the access and investigation of transitional justice investigative bodies (§176).
  - d. Develop mechanisms for the independent safeguarding of conflict-related data generally, including that emanating from the state, the Commissions, the NHRC, civil society and victims' groups (§176).
- 220.** As regards the timeline and practicalities for delivering transitional justice:
- a. Work up a clear road map for transitional justice, including working with international and national stakeholders to identify the technical expertise and financial resources necessary to implement a victim-centred process in line with international standards (§181).
- 221.** As regards ongoing state abuses and the need to ensure non-repetition:
- a. Implement the recommendations of the NHRC, particularly in respect of recommendations for investigation and prosecution of state abuses, and the vetting of those found by the NHRC to be responsible for human rights violations, without delay (§63).

- b. Provide for the suspension from public office of any person against whom a prosecution is filed, until the case is determined (§176).
- c. Make vetting available to the Special Court as a punishment (§176).
- d. Address cases of torture, extrajudicial killing and other abuses by the security services since the conflict. It is necessary to implement an independent expert mechanism to investigate such abuses, and ensure appropriate training and reform of the police and security services to ensure non-repetition. (§68)
- e. Nepal should take steps towards becoming a state party to the Rome Statute, the International Convention for the Protection of All Persons from Enforced Disappearance, and Additional Protocols I and II to the Geneva Conventions, as a measure for guaranteeing non-repetition (§105).

**222.** As regards civil society:

- a. Review and revise the legislation, policies and practices that are shrinking civic space in Nepal, and safeguard civil society and the rights of human rights defenders as required by international human rights law (§189).

### **To the international community**

- 223.** The international community *as a whole* should encourage and support Nepal to develop a transitional justice process *that is in line with international law* (§81).
- 224.** It should constructively support the Nepali transitional justice process, providing that it adheres to international standards (§81).
- 225.** The international donor community must be attuned to ensuring that its support to the transitional justice process demands adherence to international law and transparency on the use of resources (§181).

English to Nepali translator: Prasun Singh

Photos: Ben Leather, Haydée Dijkstal, Maria del Rosario Arango and Santosh Sigdel.

In carrying out their visit to Nepal and the production and launch of this report, the delegation has received direct and indirect financial and technical support from a range of individuals and institutions including Advocacy Forum-Nepal, Advocates for International Development's ROLE UK Programme, UKAid, Peace Brigades International (PBI), the Law Society Charity, the Evan Cornish Foundation and Doughty Street Chambers.







# Peace without Justice and Accountability?

**A caution against impunity  
in post-conflict Nepal**

Report by an Independent Delegation  
of International Lawyers to Nepal  
October 2024