

NEPAL

Paying Lip Service to Justice

**The Newly Adopted TRC Act Breaches International Law
and Flouts the Decision of the Supreme Court of Nepal**

Submitted by

Advocacy Forum - Nepal

TRIAL (Track Impunity Always)

REDRESS

to

**UN Special Rapporteur on the Promotion of Truth, Justice, Reparation
and Guarantees of Non-Recurrence**

UN Working Group on Enforced or Involuntary Disappearances

**UN Special Rapporteur on Extrajudicial, Summary or Arbitrary
Executions**

**UN Special Rapporteur on Torture and Other Cruel, Inhuman or
Degrading Treatment or Punishment**

**UN Special Rapporteur on Violence against Women, its Causes and
Consequences**

June 2014

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Executive Summary

After many years of repeated failed attempts¹ to establish a Truth and Reconciliation Commission (TRC) with the powers to grant amnesty even to those involved in serious human rights violations, the Nepalese parliament passed the TRC Act on 25 April 2014. The three major political parties issued a party whip forcing parliamentarians to withdraw their proposed amendments and to vote in favour of the Act to establish two commissions, a TRC and a Commission on Enforced Disappearances. The final text of the Act was not shared with the public, including the victims, human rights defenders and civil society. Upset at this move of the major parties and the whole process, a group of victims sought an audience with President Ram Baran Yadav. Unable to meet him, they submitted a memorandum containing their grievances on 29 April 2014 and requested him not to approve the Act until some of their key concerns had been addressed. However, on 11 May 2014, the President approved the Act without taking those concerns into account, and it came into effect immediately. The final text of the Act was only made public after the Act received presidential assent.

A number of victims' groups, lawyers and civil society organisations have raised a series of concerns in relation to the Act, which they say must be addressed before they will engage with the TRC process.² Among the concerns they raise, the following are considered to be the most pressing: (1) each commissions' excessive power to conduct mediation to reconcile victims and perpetrators even in cases of serious human rights violations (section 22) and the prohibition of any legal action in mediated cases (section 25 (2)(a)); (2) the commissions' discretionary power to recommend amnesties even for those involved in crimes under international law and gross human rights violations (section 26); (3) the lack of criminalization of offences that amount to crimes under international law and the grossly inadequate system of referral to prosecution mechanisms; and (4) the non-recognition of victims' right to reparation (section 2 (e) and 23).

As it currently stands, the TRC Act is in clear breach of international human rights law standards and the decision of the Supreme Court of Nepal of 2 January 2014. Unless the major flaws contained in the TRC Act are amended, the TRC and the Commission on Enforced Disappearances will not meet international standards and will promote impunity. The international community should not support these commissions, in line with an established UN policy not to condone or encourage peace processes that provide amnesty for crimes under international law and gross human rights violations.³ While the international community in the

¹ See Advocacy Forum, *Nepal: Transitional Justice at Crossroads*, January 2014, available at: advocacyforum.org/downloads/pdf/publications/tj/transitional-justice-at-crossroads-2014.pdf.

² See Accountability Watch Committee, 'Press Statement', 13 May 2014, available at: <http://www.awcnepal.org/index.php/component/content/article/80-news-and-events/89-trc-ordinance-unacceptable-rights-alliance>.

³ In his 2004 report on 'The rule of law and transitional justice in conflict and post-conflict societies' (UN doc. S/2004/616), the UN Secretary-General reaffirmed that "United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights". In 2007 the new Secretary-General expressed the same view: "...the Organization cannot endorse or condone amnesties for genocide, crimes against humanity, war crimes or gross violations of human rights, nor should it do anything that might foster them", Spokesperson for Secretary-General Ban Ki-moon, 24 July 2007. See also OHCHR, *OHCHR Comments on the Nepal Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance – 2069 (2013)*, 3 April 2013 ("OHCHR

past has made strong statements to this effect,⁴ it has so far remained silent in response to the TRC Act.

As stated by the former Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in 2005, “an ineffective commission can be more than just a waste of time and resources; it can contribute to impunity by deterring other initiatives, monopolizing available resources and making subsequent endeavours to prosecute difficult or impossible”.⁵ The Rapporteur added that: “[i]f a commission is not established in accordance with international standards, the international community should not adopt a ‘wait and see’ approach. Rather, it should promptly draw attention to the inadequacies and advocate implementation of necessary reforms”.⁶

Advocacy Forum, TRIAL and REDRESS call on the Special Rapporteur on 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 to join the victims of human rights abuses by all sides in the conflict and human rights defenders of the country who have been struggling to make justice accessible to all, in their demands for amendments to the Act to truly ensure the delivery of truth, justice, reparations and guarantees of non-recurrence in Nepal.

1. Introduction

1. The present submission follows through and complements the general allegation that TRIAL (Track Impunity Always) and Advocacy Forum submitted on 28 February 2014 to the Special Rapporteur on 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 concerning the Executive Ordinance of March 2013 establishing a Commission on Investigation into Disappeared Persons, Truth and Reconciliation.

Comments on TRC Ordinance”), available at http://www.ohchr.org/Documents/Countries/NP/OHCHRComments_TRC_Ordinance.docx, p. 4.

⁴ OHCHR, *Pillay says Nepal Commission must not grant amnesty for serious violations*, 20 March 2013, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13163&LangID=E> and Embassy of Denmark in Nepal, *Joint statement on Nepal at the Human Rights Council*, 27 September 2012, available at <http://nepal.um.dk/en/about-us/news-from-nepal/newsdisplaypage/?newsID=7C7DB179-8173-415C-928C-7B51D551A9A7>. See also, Kathmandu Post, *Donors against funding TRC under existing law*, 5 May 2013, available at <http://www.ekantipur.com/2013/05/05/capital/donors-against-funding-trc-under-existing-law/371104.html>.

⁵ Human Rights Council, *Report of the Special rapporteur on extrajudicial, summary or arbitrary executions*, Philip Alston, 2 May 2008, para. 51, available at <http://www.refworld.org/pdfid/4c07635c2.pdf>.

⁶ *Ibid.*, para. 54.

2. In light of the entry into force of the Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2071 (2014) (hereinafter TRC Act) on 11 May 2014, Advocacy Forum, TRIAL and REDRESS wish to submit the present document which provides an analysis of the conformity of the provisions of the TRC Act with international human rights law. We respectfully request the Special Rapporteur on 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 to call on Nepal to amend the TRC Act before the commissions are established under this Act and to offer their technical assistance or advisory services to this effect.

2. Background

3. This is not the first time that the Nepalese government has tried to establish transitional justice mechanisms, but each time it has done so, controversial amnesty provisions for gross human rights violations were included in the enabling legislation. At least three aborted attempts have already been made.
4. Back in January 2008, the then government attempted to establish a Truth and Reconciliation Commission (TRC) and a Commission for the Investigation of Disappearances via two separate ordinances but later retracted them in the face of strong criticism.
5. On 5 February 2009, during a parliamentary recess, the cabinet passed an ordinance, which was duly promulgated by the President, but could not be implemented due to tireless campaigning and lobbying by victims and human rights organizations.
6. On 14 March 2013, Nepal's President Ram Baran Yadav promulgated a new Ordinance to Investigate Disappeared Persons, Truth and Reconciliation Commission,⁷ which had been prepared without any consultation with victims or human rights institutions. The Ordinance came into force immediately but was quickly challenged by two writs before the Supreme Court arguing that it was unconstitutional and did not conform to international obligations.⁸ On 2 April 2013 the Supreme Court issued a stay order

⁷ Ordinance on Investigation of Disappeared Persons, Truth and Reconciliation Commission – 2069 (2013), available at: <http://www.simonrobins.com/missing/wp-content/uploads/2013/02/Nepal-TRC-Ordinance.pdf>.

⁸ The passing of the Executive Ordinance was swiftly met with strong criticism from local and international NGOs and the international community at large: on 20 March 2013, the UN High Commissioner for Human Rights, Navi Pillay condemned the passing of the Executive Ordinance and urged the government of Nepal to rectify the provisions that contravene

barring the operation of the Ordinance while the Court considered the matter. On 2 January 2014 the Supreme Court handed down its decision finding the Ordinance unconstitutional and requiring the government to amend its text in order to meet international standards.⁹

7. The key elements of the decision are the following:
 - In criticizing the government for its "insensitivity" and for taking a "perfunctory and blithe" attitude towards addressing the past via justice and reparations, the Supreme Court ruled that amnesties for crimes under international law and gross violations of human rights are impermissible (para 34).
 - The Supreme Court held that there must be two separate commissions: one focusing exclusively on "the investigation for the disappeared persons" and the other focusing on the "investigation of the facts about those involved in serious violations of human rights and crimes against humanity committed during the course of conflict, and to create an atmosphere of reconciliation in the society", and that these two commissions have to be established in line with prevailing human rights standards (para 20).
 - The Supreme Court ruled that the commissions should not encourage forced "reconciliation" between victims and perpetrators (para 56. A).
 - The Supreme Court made it clear that statutes of limitation cannot apply to serious crimes (para 56. C).
 - The Supreme Court acknowledged the need to amend Nepalese criminal law to allow private investigation and prosecution to ascertain victims' right to remedy lest the State's investigating and prosecuting mechanisms should fail to deliver (para 56).
 - The Supreme Court recognized 'victims' as principal actors, the centrality of their role in the amnesty and reconciliation process and emphasized their participation as mandatory in deciding all fundamental provisions to be included in the commissions' mandates (para 56.D).

8. In its recent concluding observations on Nepal, the UN Human Rights Committee stressed that "transitional justice mechanisms cannot serve to dispense with the criminal prosecution of serious human rights violations" and it recommended the State to "create, as a matter of priority and without further delay, a transitional justice mechanism in accordance with the Supreme Court writ of mandamus of 2 January 2014 and ensure its effective and independent functioning in accordance with international law and standards, including by prohibiting amnesties for gross violations of international human rights law and serious violations of international humanitarian law".¹⁰

international standards including the amnesty and reconciliation clauses as well as the fact that it could be used to delay criminal investigations and prosecutions of conflict-related cases.

⁹ Republica, *SC rejects TRC ordinance over blanket amnesty*, 3 January 2014, available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=67287.

¹⁰ Human Rights Committee, Concluding Observations on Nepal, UN Doc. CCPR/C/NPL/CO/2, 27 March 2014, para. 5 (c)".

9. On the same date, amid controversies about the founding text for the two commissions, the government formed an 11-member “Task Force”, including representatives of victims’ groups, to implement the Supreme Court’s decision and to make recommendations to the government on the legal framework within 10 days.¹¹ On 2 April 2014 the Task Force submitted three draft bills to the government: one for the establishment of a TRC, one for the establishment of a Commission on Enforced Disappearances and one whose aim was the criminalisation of serious human rights violations under Nepalese law.¹²
10. However, completely ignoring these drafts, on 5 April 2014 the government appointed a “high-level committee” chaired by Raju Man Singh Malla, Secretary within the Office of the Prime Minister, to draft the bills establishing the two commissions.¹³ After the Unified Communist Party of Nepal (Maoist), the main opposition party, objected to the government unilaterally drafting the bills, the government formed a 6-member committee composed of representatives of the three main parties with the mandate to finalise the bills.¹⁴
11. After the leaders of the three main parties considered the committee’s recommendations, on 18 April 2014 the government tabled the TRC Act, which provides for the establishment of two commissions, a TRC and a Commission on Enforced Disappearances. The TRC Act was adopted on 25 April 2014.¹⁵ The members of Parliament who had tabled 18 amendments on 119 points of the Act were forced to withdraw them by their respective party leaders.¹⁶
12. The TRC Act, at the time it was under consideration by the Parliament, was criticized by the UN Office of the High Commissioner for Human Rights (OHCHR) for its failure to abide by the decision of the Supreme Court of 2 January 2014 and minimum international standards considered mandatory in the formation of such commissions.¹⁷ Similarly, a group of international human rights organisations called

¹¹ Kantipur online, *Team to draft TRC, CED bills*, 28 March 2014, available at: <http://www.kantipuronline.com/2014/03/28/top-story/team-to-draft-trc-ced-bills/387378.html>.

¹² Republica, *Panel submits draft TRC, disappearance commission bills*, 3 April 2014, available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=72139.

¹³ Kantipur online, *Another panel to draft TRC bills in three days*, 5 April 2014, available at: <http://www.ekantipur.com/the-kathmandu-post/2014/04/05/nation/another-panel-to-draft-trc-bills-in-three-days/261323.html>.

¹⁴ Republica, *Big 3 form taskforce to draft bills on TRC, disappearance commission*, 6 April 2014, available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=72339.

¹⁵ Bill on Commission on Investigation of Missing Persons, Truth and Reconciliation 2070 (2014).

¹⁶ Nepalnews, *House passes bill on TRC and enforced disappearance commission*, 26 April 2014, available at: <http://www.nepalnews.com/index.php/politics-archive/33770-house-passes-bill-on-trc-and-enforced-disappearance-commission>.

¹⁷ Kathmandu Post, *Pillay urges gov't to uphold int'l law on TRC, disappearance bills*, 16 April 2014, available at: <http://www.ekantipur.com/2014/04/16/top-story/pillay-urges-govt-to-uphold-intl-law-on-trc-disappearance-bills/388333.html>.

for the amnesty provisions of the TRC Act to be rejected.¹⁸ Locally, a number of victims' groups and human rights organisations called on parties and members of parliamentarians to make necessary amendments before they passed it as law. None of these calls were heeded.

13. The final text of the adopted TRC Act was then signed by the President of Nepal on 11 May 2014, thus coming into force immediately. The actual text of the adopted Act was only made public after it received presidential assent.
14. After the promulgation of the TRC Act, the Accountability Watch Committee – a forum of victims, lawyers, human rights activists and civil society leaders – issued a statement on 13 May 2014 calling for a boycott of the commissions, unless the main areas of concern identified by the victims and human rights organisations are addressed and brought in line with international standards.¹⁹
15. The organisations submitting the present document regret that the TRC Act was enacted without duly implementing the directives contained in the Supreme Court's decision of 2 January 2014, without heeding the recommendations of the "Task Force" and without considering the voices of both national and international actors.
16. The subscribing organisations believe that the adopted TRC Act remains at odds with international human rights law and international standards related to transitional justice mechanisms. The major flaws contained in the TRC Act will be analysed in the next section.

3. Selected Issues of the TRC Act that Violate International Human Rights Law and the Supreme Court's Decision

A. Flawed Understanding of the Notion of Reconciliation and Related Excessive Powers of the Commissions

17. The preamble to the Act states that the TRC is to be established "to investigate the facts about those persons involved in serious violations of human rights and crimes against humanity committed during the course of conflict, and *to create an atmosphere of reconciliation in the society*" (emphasis added).

¹⁸ Nepalnews, *Intl human rights bodies say amnesty provision in Nepal TRC bill violate international law*, 17 April 2014, available at: <http://www.nepalnews.com/index.php/news/33450-Intl-human-rights-bodies-say-amnesty-provision-in-Nepal-TRC-bill-violate-international-la>.

¹⁹ Accountability Watch Committee, *Press Statement*, 13 May 2014, available at <http://www.awcnepal.org/index.php/component/content/article/80-news-and-events/89-trc-ordinance-unacceptable-rights-alliance>.

18. Throughout the text of the Act it is clear that the objective of “mak[ing] reconciliation between the perpetrator and the victim” takes precedence over the “recommendation for legal action against those involved in serious crimes”.²⁰
19. However, the Act adopts a very narrow understanding of what reconciliation is.²¹ Reconciliation is used and understood synonymously with mediation between individual victims and perpetrators rather than understanding reconciliation as the outcome of a societal process of acknowledging and addressing the past through the establishment of institutions that are trustworthy and that genuinely embody the idea that each individual is a rights holder.²²
20. Section 22 of the Act provides that “[i]f a perpetrator or a victim files an application before the Commission for mediation, the Commission may cause to reconcile between the perpetrator and the victim”.²³
21. The commissions may “encourage the perpetrator and the victim” to reconcile and can undertake a series of activities – mentioned in Section 22(4) of the Act – in this regard. The commissions *may* ask the perpetrator to apologise and pay compensation for damages caused to the victim. There is no necessity to seek the consent of the victim prior to mediation. The only limitation on the power to mediate is provided for by Section 22(6) of the Act according to which “the Commission may not initiate mediation between victims and perpetrator who is not recommended for amnesty pursuant to sub-section (2) of Section 26”. As analysed in the next paragraph, only the crime of rape cannot be subjected to amnesty. For all the other crimes mediation can be initiated.
22. One of the most remarkable consequences of this process is described in Section 25(2)(a) of the Act is that the commissions are barred from making any recommendation for prosecution in those cases where mediation is done.
23. The provisions on mediation contained in the Act are problematic in several respects.

²⁰ See, for instance, the wording of Section 3 of the TRC Act.

²¹ B. Harber & G. Kelly, *Reconciliation, a Working Definition*, Reconciliation can be defined as follows: “*is the process of addressing conflictual and fractured relationships, covering a range of activities such as: developing a shared vision of an interdependent and fair society; acknowledging and dealing with the past; building positive relationships significant cultural and attitudinal change and; substantial social, economic and political change*”, available at www.democraticdialogue.org.

²² Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff, Report to the Human Rights Council, UN doc. A/HRC/24/42, 28 August 2013, para. 49.

²³ Section 22(1) of the TRC Act.

24. The OHCHR described this provision, as it appeared in the 2013 Ordinance, as “highly problematic and inappropriate”.²⁴ While mediation can be used as part of restorative justice processes in criminal matters (usually involving property crimes and minor assaults), there are strong concerns about such processes being used in relation to crimes under international law, such as those under the jurisdiction of the commissions. UN human rights treaty bodies have stated that mediation should not be used in such cases.²⁵ The Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-Recurrence has already warned that the inclusion of victim-perpetrator pardon mechanisms in legislation to create truth and reconciliation commissions may “risk undermining the realization of international obligations to prosecute”.²⁶ In fact it is the duty of the State to investigate and prosecute those involved in crimes that are recognised as crimes under international law and gross human rights violations.²⁷ These include grave breaches of the Geneva Conventions, crimes against humanity, torture, rape and other forms of sexual violence of comparable gravity, enforced disappearance, and extrajudicial executions.²⁸ Nepal has accepted this duty by ratifying core international humanitarian law and human rights-related treaties.²⁹ It is also in the greater interest of the society to end the culture of impunity and maintain the rule of law, which is a prerequisite for a democratic society.
25. Even in minor criminal matters (usually involving property crimes and minor assaults) where mediation can be done, international human rights principles establish that mediation should never be used in criminal matters without the consent of both parties. The Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters make it clear that “[n]either the victim nor the offender should

²⁴ OHCHR Comments on TRC Ordinance, *supra* n. 3, p. 2.

²⁵ In relation to violence against women see, Committee on the Elimination of Discrimination Against Women, Concluding Observations on Côte d’Ivoire, CEDAW/C/COD/CO/6-7 (2013), para. 12; Angola, CEDAW/C/AGO/CO/6 (2013), para. 20; Lesotho, CEDAW/C/LSO/CO/1-4 (2011), para. 23; Finland, CEDAW/C/FIN/CO/6 (2008), para. 174; Czech Republic, CEDAW/C/CZE/CO/5 (2010), para. 23. In relation to violence against children see, e.g. Committee on the Rights of the Child, Concluding Observations on Costa Rica, CRC/C/CRI/CO/4 (2011), para. 54; Nicaragua, CRC/C/NIC/CO/4 (2010), paras. 58-59.

²⁶ Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of non-recurrence, Pablo de Greiff, *supra* n. 22, para. 48. This was recently confirmed, among others, by the European Court of Human Rights, Case *Margus v. Croatia*, Application No. 4455/10, Grand Chamber judgment, 27 May 2014, para. 126.

²⁷ See Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity - Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E.CN.4/2005/102/Add.1 (2005) (‘Updated Impunity Principles’), Principle 19. See also the four Geneva Conventions, UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), Articles 5-7; Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (2004), para. 18. See further OHCHR, ‘Rule of Law Tools for Post-Conflict States: Amnesties’, available at www.ohchr.org/Documents/Publications/Amnesties_en.pdf, pp. 11ff.

²⁸ Updated Impunity Principles, *ibid.*, Definitions, B; OHCHR, ‘Rule of Law Tools: Amnesties’, *ibid.*, p. 11.

²⁹ Including the Geneva Conventions (party since 1964), UNCAT (party since 1991), Arts. 5-7, and the International Covenant on Civil and Political Rights (ICCPR) (party since 1991), Arts. 2(3), 6 and 7.

be coerced, or induced by unfair means, to participate in restorative processes or to accept restorative outcomes”.³⁰ These concerns are heightened where there are power imbalances between the victim and the perpetrator, as are apparent in the Nepalese context (where alleged perpetrators are often members of the police, military, political parties, or are protected by them, and victims are often from vulnerable and marginalised communities).³¹ This provision will, given the power imbalances at play, almost certainly result in victims feeling under pressure (and being placed under pressure) to mediate with perpetrators. According to the Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-Recurrence, “these proposed pardon mechanisms, ostensibly an aspect of reconciliation, misunderstand its nature, especially when the procedures can be initiated without a request from victims. In circumstances of continuing significant power asymmetries between perpetrators and victims and the ongoing security concerns of the latter, forcing victims to participate in procedures that bring them face to face with those who are presumably responsible for the violations they suffered imposes huge burdens on them and exposes them to great risk. Additionally, it raises serious questions about the voluntary nature of the pardons that may flow from such procedures”.³² As the OHCHR noted in relation to the same provision as it appeared in the 2013 Ordinance, reconciliation “is more appropriately addressed at an inter-personal level and should not be forced upon people”.³³ The forced “reconciliation” between victims and perpetrators that was criticised by the Supreme Court’s decision in January 2014 has thus not been amended.

26. In the words of the Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-Recurrence, “there are no shortcuts to reconciliation, and in particular, that meaningful reconciliation requires, in addition to truth, the implementation of the remaining three elements: justice, reparation and guarantees of non-recurrence”.³⁴

Recommendations

- Remove Section 22 of the TRC Act that grants the power to the commissions to mediate between victims and perpetrators even in cases of crimes under international law and gross human rights violations.

³⁰ *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, adopted by Economic and Social Council 2002/12 (E/2002/INF/2/Add.2, Annex), Principle 13. See also Principle 7.

³¹ *Ibid.*, Principle 9 (‘Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case to, and in conducting, a restorative process.’)

³² Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of non-recurrence, Pablo de Greiff, *supra* n. 22, para. 48.

³³ OHCHR Comments on TRC Ordinance, *supra* n. 3, p. 6.

³⁴ Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of non-recurrence, Pablo de Greiff, *supra* n. 22, para. 47.

➤ Remove Section 25(2) of the TRC Act that bars the commissions from making any recommendation for prosecution in cases where reconciliation is undertaken.

B. Powers to Recommend Amnesty for Crimes under International Law and Gross Human Rights Violations

27. Under Section 26 of the TRC Act, the commissions have the power to recommend amnesty for individual perpetrators. This power is limited only by the following words: “the Commission shall not recommend for amnesty to the perpetrators involved in rape and other crimes of serious nature in which the Commission follows the investigation and does not find sufficient reasons and grounds for amnesty”.
28. It is therefore open to the commissions to recommend amnesty for all of the crimes under its jurisdiction, provided that there are sufficient reasons and grounds for doing so, except for rape. The criteria and condition on the basis of which the commissions may recommend amnesty – acknowledgment, regret and apologies of the perpetrator, consent or dissent of the victim³⁵ and the gravity of the incident – still give the commissions wide discretion and there is the clear potential for amnesty to be granted to many perpetrators of gross human rights violations in an arbitrary way.
29. The provision of amnesty for crimes under international law and gross violations of human rights is contrary to international law and incompatible with the duty of States to investigate, prosecute and punish the perpetrators of grave breaches of the Geneva Conventions, crimes against humanity, torture, rape and other forms of sexual violence of comparable gravity, enforced disappearance, and extrajudicial executions.³⁶ All of these fall within the commissions’ jurisdiction.

³⁵ In this respect, the consent of the victim is not even considered as a *conditio sine qua non* in order to recommend amnesty but it is simply mentioned as an element that the Commission can take into consideration.

³⁶ See, e.g., Article 4, *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*, A/RES/60/147, 16 December 2005 (‘UN Basic Principles on the Right to Remedy and Reparation’), available at <http://www2.ohchr.org/english/law/remedy.htm>: “In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him”. Principle 1, Nuremberg Principles on International Law (1946) available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_1_1950.pdf: “Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment”. On the duty to investigate crimes against humanity and war crimes: Article 1, Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity (1973) -

30. The position according to which amnesties for such serious crimes are unlawful is “drawn from customary rules of international humanitarian law, human rights treaties”³⁷ and consistently endorsed by the United Nations,³⁸ international treaty bodies³⁹ and regional human rights courts.⁴⁰ As the UN Human Rights Committee has recognised, “the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations”.⁴¹

<http://www2.ohchr.org/english/law/guilty.htm>: “War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment”. On the duty to investigate torture committed on the territory of a State: Article 12, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) - <http://www2.ohchr.org/english/law/cat.htm>: “Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction”. Article 13, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) - <http://www2.ohchr.org/english/law/cat.htm>. “Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given”. On the duty to investigate enforced disappearance: Articles 13 and 18, UN Declaration on the Protection of all Persons from Enforced Disappearance (1992) - [http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/A.RES.47.133.En](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/A.RES.47.133.En). “Each State shall ensure that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority. Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation” and “Persons who have or are alleged to have committed offences referred to in article 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction. In the exercise of the right of pardon, the extreme seriousness of acts of enforced disappearance shall be taken into account”. On the duty to investigate extrajudicial executions: Principle 9, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by the Economic and Social Council Resolution No. 1989/65 of 24 May 1989: “There shall be thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances. Governments shall maintain investigative offices and procedures to undertake such inquiries”. See also: Preamble, Rome Statute of the International Criminal Court (1998) - <http://untreaty.un.org/cod/icc/statute/romefra.htm>: “Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.

³⁷ European Court of Human Rights, *Case Margus v. Croatia*, *supra* n. 26, para. 130.

³⁸ See OHCHR Comments on TRC Ordinance, *supra* n. 3, p. 4.

³⁹ See, eg. Human Rights Committee, *General Comment No. 31*, *supra* n. 27, para. 18, Human Rights Committee, *General Comment No. 20: Article 7*, 44th session (1992), para. 15 and numerous concluding observations including eg. Uruguay, CCPR/C/79/Add.19 (1993); El Salvador, CCPR/C/79/Add.34 (1994). See further Committee Against Torture, *General Comment 2, Implementation of article 2 by States Parties*, CAT/C/GC/2/CRP.1/Rev.4 (2007), para. 5.

⁴⁰ See, eg. Inter-American Court of Human Rights, *Case of Barrio Altos v Peru*, Judgement of March 14, 2001, para. 41.

⁴¹ Human Rights Committee, *General Comment No. 31*, *supra* n. 27, para. 18.

31. Section 26(2) of the TRC Act is almost identical to Section 23(2) of the 2013 Ordinance, which has been explicitly rejected by the Supreme Court as unconstitutional and in breach of Nepal's international legal obligations. The Supreme Court has clearly stated that amnesties are not permissible in case of serious crimes under international law and gross human rights violations and directed the government to prevent this from happening.
32. Raising serious concerns on this matter, the United Nations High Commissioner for Human Rights Navi Pillay said on 14 April 2014, “[w]hile I welcome steps taken by the Government of Nepal to take the Transitional Justice process forward, I am extremely concerned by its new attempt to introduce amnesties for serious human rights violations. Such amnesties not only violate core principles under international law but would also weaken the foundation for a genuine and lasting peace in Nepal”.⁴²

Recommendations

- Section 26 of the TRC Act must be amended to prevent amnesties for crimes under international law and gross human rights violations. The criteria for determining which acts qualify for amnesty should be clearly specified and limited to crimes not amounting to crimes under international law and gross human rights violations including grave breaches of the Geneva Conventions, crimes against humanity, torture, rape and other forms of sexual violence of comparable gravity, enforced disappearance, and extrajudicial, summary or arbitrary executions.
- The TRC Act should have a section ensuring that even for lesser crimes, any decisions to grant amnesty should be made subject to judicial review.

C. Lack of Criminalisation of Crimes under International Law in line with International Standards and Inadequate Prosecution System

33. In light of the obligation of States to investigate and prosecute crimes under international law and gross violations of human rights, it is imperative that domestic criminal laws are appropriate for the task and in line with the definitions of these crimes under international law. For many years, expert bodies of the UN and many national and international organisations have urged the government of Nepal to criminalise such conduct. Most recently, the Human Rights Committee recommended that

⁴² Kathmandu Post, “TRC bill: Pillay warns against attempts to grant amnesties”, 15 April 2014, available at <http://www.kantipuronline.com/2014/04/15/top-story/trc-bill-pillay-warns-against-attempts-to-grant-amnesties/388315.html>.

Nepal should ensure that “all gross violations of international human rights law, including torture and enforced disappearances, are explicitly prohibited as criminal offences under domestic law”.⁴³

34. In spite of this, the government failed to use the opportunity of introducing the TRC Act in the Parliament to criminalise war crimes, crimes against humanity, torture or enforced disappearances, none of which are currently crimes under Nepalese law. Nor is there any indication that the government is taking measures to proceed with criminalization of torture or enforced disappearance through other means.
35. The only definition contained in the TRC Act is that of the “act of disappearing a person” in Section 2(k). First of all this definition is solely for the purpose of outlining the scope of the Commission’s mandate and it cannot be considered as the criminalization of enforced disappearance since it does not provide for any criminal sanction attached to the offence. Secondly, the definition is not in line with that contained in the 1992 Declaration on the Protection of All Persons from Enforced Disappearance and the International Convention for the Protection of All Persons from Enforced Disappearance.⁴⁴
36. The lack of effective criminalization of crimes under international law under Nepalese domestic legislation is all the more problematic in light of the weak and grossly inadequate procedure of referral to prosecution mechanisms for those cases where the alleged perpetrator is found to have been involved in such crimes.
37. First of all, according to Section 25(2), the commissions are barred from taking any legal action against an alleged perpetrator who has reconciled with victims according to Section 22 of the Act or who was recommended for amnesty according to Section 26.
38. For other cases, the adopted TRC Act envisions potential links between the commissions and subsequent prosecution. Section 29 provides that the Attorney General or a public prosecutor must decide whether a certain individual should be prosecuted in a Special Court if the Ministry writes to them on the basis of the recommendation of the commission to prosecute the person.
39. The mechanism is particularly convoluted, inadequate and not in line with international standards. First of all, the recommendation for prosecution issued by the commission does not automatically trigger

⁴³ Human Rights Committee, Concluding Observations on Nepal, *supra* n. 10, para. 10.

⁴⁴ TRIAL and Advocacy Forum, General Allegation concerning the Executive Ordinance of March 2013 establishing a Commission of Investigation into Disappeared Persons, Truth and Reconciliation, February 2014, para. 40-41.

the action of the Attorney General but requires the discretionary intervention of the Ministry writing to the Attorney General.

40. Second, Section 29 gives the power to the Attorney General to decide on prosecutions. The Attorney General lacks independence from the government of Nepal as he or she is politically appointed. Therefore, there is no guarantee that he or she will approve the prosecution of people who are accused of crimes under international law.⁴⁵ There is an urgent need for any decisions by the Attorney General not to prosecute to be explicitly made subject to judicial review.
41. Third, Section 29 (4) of the Act establishes that any cases recommended for prosecution will be tried in an as yet to be set up 'Special Court', likely under the Special Court Act, 2059 (2002). Under this Act, a special court has the powers to conduct trials and reach decisions in "special types of cases" by publishing a notice in the Nepal Gazette. It follows that the "special cases" under the jurisdiction of the Special Court referred to in the TRC Act will be conflict era crimes related to human rights violations.
42. The Act does not provide any further details about the Special Court or its composition. However, Section 3(2) of the Special Court Act provides that the government nominates the judges of this court.
43. If a Special Court is established, its judges must have expertise in international human rights law and international criminal law, the process of appointment must follow the same process followed for judges in the Supreme Court, and judges must have full guarantees of judicial independence. In addition, special attention must be paid to the rights of both defendants, the rights of victims to participate in the trial, and the protection of victims and witnesses. In this respect the provisions of the International Criminal Court statute should be followed as best practice.
44. Fourth, even if the Special Court were to be independent and competent, a number of issues of concern arise in relation to the relevant legislative framework and the possibility to effectively prosecute the perpetrators of crimes under international law committed during the conflict. The domestic criminal justice system currently poses a number of obstacles to accountability. These include the fact that violations such as torture and the practice of enforced disappearances are not specifically criminalized. Thus it is not clear under which law the prosecutor will prosecute persons involved in these crimes.⁴⁵ In addition, there are concerns about statutes of limitation for prosecution of rape and other violations such as murder, which remain in force despite the Supreme Court ordering the government to amend the law,⁴⁶ and recommendations from UN treaty bodies to repeal

⁴⁵ See Human Rights Committee, Concluding observations on Nepal, *supra* n. 10, para. 5(a).

⁴⁶ *Sapana Pradhan Malla v. Government of Nepal*, Nepal Law reporter 2065, volume 11, p. 1358-1366.

such provisions.⁴⁷ This provision is likely to bar investigation and prosecution of conflict-era rapes, even if cases are recommended for prosecution. Under international law, limitation periods should not apply to the prosecution of crimes against humanity and war crimes or certain gross violations of human rights including torture,⁴⁸ and treaty provisions impose further restrictions on the applicability of such limitations to other gross violations of human rights.⁴⁹ Necessary amendments should be made to the law to reflect this.

45. In addition, although Section 25 (1) gives the commissions the power to recommend for cases to be referred for “action as per the laws” when someone is found to have been involved in “crimes concerning gross human rights violations”, Section 25 (4) allows the commission to recommend disciplinary action to those public officials who have been found to have committed “gross violations of human rights”. As set out above, under international law disciplinary sanctions are not sufficient for alleged perpetrators of gross violations of human rights; investigation and criminal prosecution must ensue.
46. A further concern is that Section 13(3) provides that “[n]otwithstanding whatsoever mentioned in the prevailing laws, the Commission shall investigate the complaints under consideration in different bodies relating to incidents which occurred during the armed conflict”. Section 13(4) gives the commissions the power to decide whether an incident occurred during the armed conflict in the event of any dispute. There is a concern that the intention of this provision is to suspend ongoing investigations and prosecution by the courts and other agencies, including the National Human Rights Commission. As the OHCHR and the Human Rights Committee have stressed in relation to Nepal,⁵⁰ investigations by the commissions must be complementary and cannot be an alternative to investigations taking place in the normal criminal justice system.
47. Given Nepal’s practice of withdrawing criminal cases and past attempts to shield perpetrators within the security forces from criminal justice,⁵¹ the ambiguities, the complexities and the inadequacies in the referral to prosecution provisions contained in the TRC Act are concerning. Overall, Nepal’s

⁴⁷ See, eg. CEDAW, Concluding observations on Nepal, CEDAW/C/NPL/CO/4-5 (2011), para. 20; Human Rights Committee, Concluding observations on Nepal, CCPR/C/NPL/CO/2 (2014), para. 13.

⁴⁸ See further UN Basic Principles on the Right to Remedy and Reparation, *supra* n. 55, para. 6.

⁴⁹ See eg. Human Rights Committee, General Comment No. 31, *supra* n. 27.

⁵⁰ Human Rights Committee, Concluding observations on Nepal, *supra* n. 10, para. 5(b).

⁵¹ TRIAL et al., *Written information for the adoption of the List of Issues by the Human Rights Committee with regard to Nepal’s Second Periodic Report (CCPR/C/NPL/2)*, April 2013, available at http://www.trial-ch.org/fileadmin/user_upload/documents/CAJ/Nepal/NEPAL_REPORT_to_HRC_TRIAL.pdf, at paras. 63-66 and 77-89.

commissions appear to be designed to further entrench impunity rather than to seriously investigate and prosecute human rights violations.

Confidentiality of information

48. Section 17(5) of the TRC Act guarantees confidentiality for anyone who provides information to the commissions. When information is provided to a truth commission under a promise of confidentiality, the ability of a prosecutor and court to use this information can become problematic.⁵² For instance, in Peru, the Truth and Reconciliation Commission passed such information to the Special Investigations Unit, the Unit was designed to operate totally separately from the commission so it could carry out investigations confidentially.⁵³ In Sierra Leone, the criterion was based on the importance of the information. The TRC Act should clarify that information provided to the commissions can be shared with the police and prosecutor so that this is clear from the outset.

Recommendations

- Amend Section 29 of the TRC Act to explicitly state that decisions of the Attorney General or public prosecutor not to prosecute are subject to judicial review.
- The TRC Act should have a section ensuring special investigation and prosecution units in the police and Attorney General's office in the cases where criminal investigation and prosecution are to be initiated.
- The commissions' overlapping mandates with criminal trials and, in particular, their powers of information gathering, need to be carefully managed in order to minimize the potential for conflict.
- It is necessary to clarify the coordination between the commissions and pending or future criminal proceedings in terms of sharing of information which will be crucial to achieve justice. Especially in those cases where the Commission on Disappearances will conduct exhumations, it will be critical to ensure that physical evidence collected is fully shared with prosecuting authorities.
- In parallel with the establishment of the transitional justice mechanisms, a bill should be introduced without further delay to criminalize war crimes, crimes against humanity, torture, enforced disappearance and recruitment of children in armed forces as defined under international law.
- Fair trial guarantees, rights of victim participation, and protection measures should be included in the procedures of the Special Court.

⁵² See further A Bisset, L Moxham & J van Zyl Smit, *The Rule of Law and Transitional Justice in Nepal: Options for Coordinating a Truth Commission, Criminal Justice Mechanisms and Personnel Reforms* (Bingham Centre Working Paper 2014/02), Bingham Centre for the Rule of Law, BIICL, London, April 2014, pp. 16-18.

⁵³ 'Cooperation agreement between the Truth and Reconciliation Commission and ad hoc prosecutor's office', point 3.1, available at <http://www.cverdad.org.pe>.

- The Special Court should be constituted of judges with human rights expertise.
- Section 13(3) of the TRC Act should be amended to clarify that it does not curtail the jurisdiction of the courts and should not result in the suspension of on-going investigation and prosecution of cases of serious crimes under international law and gross violations of human rights.
- Rules on the exchange of information between the commissions and prosecution authorities, if any, must be planned and designed from the beginning to avoid conflict and legal challenge to any subsequent prosecutions.

D. Lack of Recognition of Victims' Right to Reparation in line with international standards

49. Sections 2(e) and 23 of the TRC Act deal with reparation to victims.
50. Section 2(e) provides that "Reparations' means the compensation, facility or concession made available to the victims as stipulated in Section 23". Section 23 adds that, after completing its investigation, "the Commission shall recommend to the Government of Nepal to provide compensation, to provide restitution or rehabilitation or any other appropriate arrangement to the victim". The section goes on to specify that the Commission may "if it deems appropriate" make recommendations for certain types of facilities to the victim or their family members, including education and medical treatment, "as per situation" of the victim.
51. Even considering the two provisions jointly, they fall short of the scope of full and effective reparation as set out in international standards, such as 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, adopted and proclaimed by the General Assembly in 2005. According to these Principles, reparation should consist of, as appropriate, measures of compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.⁵⁴
52. Moreover, the text of the TRC Act only envisages the possibility for the commissions to make recommendations concerning reparations "as per the victim's situation" but it does not recognize a

⁵⁴ See the measures laid out in Principles 19 to 23 of the Basic Principles on the Right to Remedy and Reparation, *supra* n. 36. The WGEID also considers the obligation to provide redress to victims of enforced disappearance is not limited to the right to monetary compensation but encompasses "[...] inter alia, medical and psychological care and rehabilitation for any form of physical or mental damage as well as legal and social rehabilitation, guarantees of non-repetition, restoration of personal liberty and similar forms of restitution, satisfaction and reparation that may remove the consequences of the enforced disappearance". As well as "the imprescriptible right to be informed of the fate and/or whereabouts of the disappeared person and, in the event of decease, that person's body must be returned to the family as soon as it has been identified, regardless of whether the perpetrators have been identified or prosecuted", WGEID, *2012 Annual Report to the Human Rights Council*, UN doc. A/HRC/22/45 of 28 January 2013, paras. 53-54.

clear right to reparations. Under international law, victims of serious violations of international humanitarian law and gross violations of human rights have the right to “full and effective reparation” for the harm they have suffered, as “appropriate and proportional to the gravity of the violation and the circumstances of each case”.⁵⁵ It is extremely important to many victims that the fact that reparation is their right, and not something to be granted at the government’s discretion, is explicitly recognized in the TRC Act and framed in such a way that they can make a claim in court if they are denied reparation through the commissions’ processes.

53. In addition, the definition of reparation contained in the TRC Act does not refer to guarantees of non-recurrence (such as legislative reform) and measures of satisfaction (such as memorials) to the victims as possible forms of reparation. It is regrettable that the Act does not explicitly mention non-recurrence and satisfaction among the commissions’ aims and it can only be hoped that the commissions will interpret “other appropriate arrangements” to include them. Under Section 22, some measures of satisfaction (such as the erection of memorials) are directly linked to reconciliation.⁵⁶ It is essential that the Act is amended to clarify the exact forms of reparations and ensure they include guarantees of non-repetition and satisfaction.

Recommendations

- Sections 2.E and 23 of the TRC Act should be amended to recognise reparation as a right of victims.
- The definition of reparations should be amended to explicitly allow the commissions to order measures of satisfaction and guarantees of non-repetition which are not tied to ‘reconciliation’ of the victim and perpetrator under Section 22.

E. Vague Delineation of the Mandate of both Commissions

54. The preamble of the 2014 TRC Act, with reference to Article 33 of the Interim Constitution, provides for the establishment of an “Investigation Commission constituted to investigate the cases of persons who were the subject of enforced disappearance during the course of the conflict; and [...] a high-level Truth and Reconciliation Commission [...] to investigate the facts about those persons involved in

⁵⁵ See UN Basic Principles on the Right to Remedy and Reparation, *supra* n. 36, para. 18. See further UNCAT, Art. 14 ; ICCPR, Art. 2(3); Committee Against Torture, *General Comment No. 3 : Implementation of Article 14 by States Parties*, CAT/C/GC/3, para. 6; Human Rights Committee, *General Comment No. 31, supra* n. 27, para. 16.

⁵⁶ Section 22(4) of the TRC states: ‘The Commission may [...] carry out or cause to be carried out the following activities in order to motivate the victim and the perpetrator: (b) To make arrangements of erection of statutes or memorials in memory of those who were killed during the armed conflict with the involvement of the perpetrator, victim and his/her family.’

serious violations of human rights and crimes against humanity committed during the course of conflict, and to create an atmosphere of reconciliation in the society”.

55. It is commendable that the adopted TRC Act foresees the establishment of two separate commissions to deal with, respectively, “enforced disappearances” and “truth and reconciliation”. But, without clearly defining the aims, powers and boundaries of the mandate of each commission, there is a serious risk of confusion and a real potential for disputes between the two mechanisms with the result that neither of them fulfil international standards. Both commissions will need to draw up detailed rules to ensure this does not happen.
56. The TRC should have wider powers and a broader range of crimes to consider with the authority to analyze the historical and political context, the patterns of violations and the root causes of the conflict. To the contrary, the Commission on Enforced Disappearances should be more technical and limited in scope. The delineation of their respective powers should be better designed.
57. While the title was amended at the last minute to avoid confusion between missing persons and disappearances,⁵⁷ a concern remains that the definition of “enforced disappearance” also covers those detained illegally. Anyone who has not been brought before a court or any other judicial authority within 24 hours as stipulated in the Constitution could come under the subject of this Commission. As thousands of people were detained illegally during the conflict, without being produced before any judicial authority, they all could potentially be defined as disappeared under this Act. In doing so, these cases could take all the resources and time of the Commission rather than finding out the truth of those whose whereabouts is still not known. Notwithstanding the need for transitional justice mechanisms to also consider the widespread practice of arbitrary arrest and detention, this matter would arguably fall under the wider issues to be considered by the TRC, rather than as part of the focus of the Commission on Enforced Disappearances.
58. The Commission on Enforced Disappearances’ stated aim is “investigate the cases of persons who were the subject of enforced disappearance during the course of the conflict”. This stated aim is not

⁵⁷ At the time of the debate in Parliament, there were concerns about the name of the bill, “*Bill on Commission on Investigation of Missing Persons, Truth and Reconciliation 2070 (2014)*”. It used the Nepalese word “*bepatta bhayaka*”, which means missing persons, i.e. it may confuse cases of people who have left the country without informing their relatives rather than use the definition as set out in the Convention on Enforced Disappearances

sufficient, because it does not address the duty to clarify the fate and whereabouts of all the disappeared persons and, where possible, to return the bodies of the victims to their families.⁵⁸

59. In spite of the fact that it is clear that the Commission on Enforced Disappearances is empowered to carry out exhumations and DNA testing, the Act does not make explicit provision for the Commission to have technical assistance from experts to conduct forensic exhumations, DNA tests and hand over the remains to the families.⁵⁹

Recommendations

- There must be a clearer definition and better delimitation of the mandate of both commissions.
- The Commission on Enforced Disappearances should be entrusted with the explicit mandate to clarify the fate and whereabouts of disappeared persons.
- It is paramount that the Commission on Enforced Disappearances adopts the notion of enforced disappearances as defined in Art. 2 and Art. 3 of the International Convention on the Protection of All Persons from Enforced Disappearance.
- There should be specific provisions on how the Commission on Enforced Disappearances' technical capacity and budget to conduct exhumations and return remains will be handled.

F. Lack of Independence of the Commissions

60. Under the text of the TRC Act, the two commissions suffer from a lack of independence. Addressing these two issues is crucial for their effective functioning.⁶⁰
61. It is Nepal's longstanding experience that Commissioners are nominated through political parties' horse-trading. As the Act stands, there is nothing to guard against this and no guarantees for the impartiality and independence of the commissions.

⁵⁸ The search for bodies and return of them is addressed in Section 14(7) but it is regrettable that it is not identified as an aim of the commission. See Updated Impunity Principles, *supra* n. 27, principle 34; Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/22/45, 28 January 2013, para. 54.

⁵⁹ In its January 2014 decision, the Supreme Court referred to its earlier ground-breaking 2007 decision on disappearances and ordered for a separate commission to be formed to investigate disappearances in compliance with the international criteria on such commissions of enquiry. In this respect see Art. 24, para. 3, of the International Convention on the Protection of All Persons from Enforced Disappearance, which requires that States take all measures to "locate, respect and return" mortal remains of disappeared persons.

⁶⁰ See Report of the Special Rapporteur on Torture, Juan Mendez, *Commissions of Inquiry*, A/HRC/19/61, 18 January 2012, paras. 58 and 60-63.

62. Section 3 of the TRC Act deals with the selection of Commissioners. A Recommendation Committee will recommend the members of the commissions for appointment. However, the majority of the members of the Recommendation Committee themselves are selected by the government. Section 3(3) of the TRC Act states that: “A Recommendation Committee shall consist of following members to recommend for the appointment of the Chairperson and Members of the Commission:- (a) Person designated by the Government of Nepal from among the former chief justices - Chairperson; (b) Chairperson of the National Human Rights Commission or a member of the said commission as designated by him – Member; (c) Three persons including one woman nominated by the Government of Nepal from among the Human Rights Activists, Psychologists, Jurists, Forensic Experts, conflict expert, Sociologists, Women Human Rights Activists, or any other persons involved in peace process - Member”.
63. One immediate difficulty which must be addressed is that, under Article 106(2) of the Interim Constitution, a former Chief Justice is not “eligible for appointment in any Government Service”, except to the National Human Rights Commission. Section 3(3)(a) of the TRC Act is therefore unconstitutional.
64. More generally, the appointment and selection process must be seen to be highly transparent and open to public input. Whereas the process of the Recommendation Committee appears to be consultative in nature, it does not apportion seats to representatives of all the different stakeholders which, as pointed out by the Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-Recurrence, would include “victims’ groups, non-governmental organizations (NGOs), professional associations, religious organizations, local leaders and even representatives of the international community”.⁶¹ The OHCHR has observed that the “selection of commissioners and the design of the selection process are often the first test for the level of public trust and support that a commission will receive”.⁶²
65. Furthermore, according to Section 10 of the TRC Act, the Secretary of each commission will be a civil servant appointed by the government, jeopardising the functional autonomy of the commission.

⁶¹ The Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-Recurrence has stated that the consultative model “[...] involves a selection panel with seats apportioned to the representatives of different stakeholders including victims’ groups, non-governmental organizations (NGOs), professional associations, religious organizations, local leaders and even representatives of the international community. The panel accepts submissions from the public, determines a shortlist of candidates, orders them by rank, and passes on the recommendation to an appointing authority. In some countries public hearings with those shortlisted were also required”, *Report to the Human Rights Council, supra* n. 22, para. 56.

⁶² OHCHR, *Comments TRC Ordinance, supra* n. 3, p. 8.

Section 11(1) of the Act provides that “[t]he Ministry shall make available personnel required for the Commission”. These provisions do not guarantee sufficient independence or impartiality to the commissions, particularly given the type of investigations of human rights violations that they would have to undertake.

66. Furthermore, Section 6(2) of the Act provides that “if it deems that the Chairperson or members lack competency or are involved in misbehavior the government of Nepal shall form a three member enquiry committee under the chairpersonship of former chief justice and may remove the Chairperson or members from the post on the recommendation of such committee”. “Competence” and “misbehavior” are not defined in the Act. Such a provision also undermines the independence of the commissioners, and has the potential to allow the government to exert pressure on them.

Recommendations

- Section 3 of the TRC Act must be amended to remove the conflict with Article 106(2) of the Interim Constitution.
- Sections 10 and 12 of the TRC Act should be amended to include provisions guaranteeing the Commissions’ full operational independence.
- Section 3 of the TRC Act should be amended to include a provision that ensures a fair and transparent selection process that aims to ensure the impartiality of the Commissions members. The appointment and selection process must be seen to be highly transparent and open to public input.
- Section 3 of the TRC Act should be amended to ensure fair representation for women and members of disadvantaged communities.

G. Absence of Witnesses’ and Victims’ Protection Mechanisms

67. Section 17 of the TRC Act sets out some provisions on witness protection though it does not clearly state how this would work in practice. While the commissions have powers to maintain confidentiality, and to seek the government’s assistance with providing protection,⁶³ it does not envisage an independent unit for witnesses’ and victims’ protection.
68. In this regard, the OHCHR states that “[...] the Commission should consider what form of protection can be provided to witnesses [...]” and “[...] be prepared to provide at least minimal protection, perhaps

⁶³ This provision defeats the purpose of the measures with regard to persons who were subjected to violations from members of the security forces during the conflict.

by temporarily relocating persons from their home community until the situation has improved. Where resources allow, a more sophisticated witness protection programme should be designed”.⁶⁴

Recommendations

- Section 17 of the TRC Act should be expanded to have special, independent units for witnesses’ and victims’ protection.
- The protection for victims and witnesses should be continuous, prior, during and after their appearance before the commissions and especially when cases will go on to trial. Any protection should include all the means to protect the victims such as physical protection, protection of identities and protection of their families.

H. Lack of Provisions Addressing the Needs of Marginalised or Vulnerable Groups

69. Section 13 (7) of the TRC Act provides for the commissions to make “separate arrangements” to create a conducive environment for children, senior citizens, differently abled people and victims of sexual violence to file a complaint. However, the Act is silent as to the type of assistance to be provided to these groups when they provide testimony.
70. During the conflict there were many victims of sexual violence. However Nepalese society is reticent to address such violations due to cultural factors. The OHCHR has highlighted that “[a] commission should consider procedures to facilitate and encourage women to provide information about these sometimes very difficult topics”.⁶⁵
71. In addition, during the conflict many children were abducted and recruited in armed forces. They were forced to work as spy, porters and messengers. The Act does not recognise the impacts of this conflict on children.

Recommendations

- The commissions should adopt detailed procedures on the special arrangements and support to be given to children, senior citizens, differently abled people and victims of sexual violence to assist them to file a complaint, to allow them to give evidence, and to support them while doing

⁶⁴ OHCHR, *Rule of Law Tools for Post-Conflict States: Truth Commissions*, 2006, p. 6, available at: <http://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf>.

⁶⁵ *Ibid.*

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- Those procedures should extend to special measures of support to other marginalised and vulnerable groups, taking into consideration their status, beliefs and customs.

I. Lack of Clarity on Vetting

72. The TRC Act does not set out any powers for the commissions to consider the vetting for public office of those whom it finds to have been involved in serious human rights violations. In a decision of 13 August 2012, the Supreme Court held that the government should in the future be extremely cautious about the transfer and promotions of officials implicated in human rights violations. The Supreme Court ordered the government to frame vetting laws that would regulate the promotion and transfer of government officials, including those from the security forces.⁶⁶ To date, the government has not acted to implement this decision. There does not appear to be any political appetite for a system of vetting of security forces and Maoist personnel for their conduct during the armed conflict but on the other hand politicians have continuously pointed to the commissions as the answer for any accountability processes relating to the conflict.
73. It is hoped that the commissions will be a vehicle to implement the Supreme Court's decision, by linking it to the implementation of the right to truth, i.e. for the TRC to address institutional responsibilities (as well as command responsibilities, where possible) and make general recommendations for the professionalization of these institutions. At the individual level, the commissions should consider making recommendations for individual suspected perpetrators of serious human rights violations to be relieved from their posts or banned from further promotions.

Recommendations

- Devise a system of continuous vetting of employees in public institutions at all levels of government and to ensure that public institutions act in compliance with the principles of professionalism, transparency and full accountability to citizens.

4. Conclusions

74. A detailed analysis of the TRC Act shows that the Government does not appear to have taken adequate consideration of the January 2014 Supreme Court's decision in amending the text. Instead,

⁶⁶ International Commission of Jurists, *Authority without accountability. The struggle for justice in Nepal*, May 2013, available at : <http://www.refworld.org/pdfid/530f04ce4.pdf>, p. 27.

it has paid lip service to the latter by narrowly amending the wording of certain provisions while maintaining the substance of the text of the 2013 Ordinance irrespective of the fact that it had been found unconstitutional and at variance with international standards.

75. The organisations submitting the present document believe that it is not too late to amend the TRC Act so that its provisions comply with Nepal's international obligations, this paving the way to the establishment of commissions that can effectively adopt a comprehensive approach to the transitional justice process by contributing to broad and meaningful societal reconciliation by providing truth and reparation and contributing to prosecution and institutional reforms.
76. In this regard, Advocacy Forum, TRIAL and REDRESS respectfully request the Special Rapporteur on 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:
- to request the government of Nepal to amend the TRC Act without further delay, ensuring that the two new commissions respect international standards and fully guarantee victims' rights, in accordance with the recommendations formulated in this document;
 - to engage in a regular dialogue with the government of Nepal and cooperate with it, making recommendations concerning their respective mandates and if feasible, providing technical assistance or advisory services in the amendment of the TRC Act and in the implementation of the transitional justice mechanisms on the issues pertaining to their mandates.

5. Information on Organisations Submitting the General Allegation

Advocacy Forum – Nepal

Advocacy Forum (AF) is a leading non-profit, non-governmental organization working to promote the rule of law and uphold international human rights standards. Since its establishment, AF has been actively confronting the culture of impunity by systematically documenting human rights abuses, monitoring government detention facilities, and litigation both nationally and internationally. The information is published and presented to national and international audiences and provides necessary evidence for the reform of the justice system. It regularly engages internationally recognized human rights mechanisms, including United Nations treaty bodies and special procedures, and work closely with international human rights organisations, such as Amnesty International, Human Rights Watch, and Asian Federation against Involuntary Disappearance, the International Commission of Jurists and the Asian Human Rights Commission. With the help of all these mechanisms and agencies, AF attempts to put Nepal at the forefront for significant human rights attention worldwide.

<http://www.advocacyforum.org>

TRIAL (Track Impunity Always)

Founded in 2002 TRIAL is an association under Swiss law based in Geneva. The main objective of the association is to put the law at the service of victims of international crimes (genocide, crimes against humanity, war crimes, torture and forced disappearances). TRIAL fights against the impunity of perpetrators and instigators of the most serious crimes under international law and their accomplices. The organization defends the interests of the victims before the Swiss courts and various international human rights bodies. TRIAL also raises awareness among the authorities and the general public regarding the necessity of an efficient national and international justice system for the prosecution of crimes under international law. To date TRIAL has defended more than 350 victims in the course of more than 140 international proceedings, submitted 40 reports to the United Nations and filed 15 criminal complaints in Switzerland.

www.trial-ch.org

REDRESS

REDRESS is an international human rights NGO based in the United Kingdom with a mandate to assist torture survivors to seek justice and other forms of reparation, hold accountable the governments and individuals who perpetrate torture, and develop the means of ensuring compliance with international standards and securing remedies for victims. REDRESS carries out its mandate through casework on behalf of individuals and groups before national and international courts and bodies, advocacy with governments, parliaments, international organisations and the media and by

working in partnership with like-minded organisations around the world to strengthen national legal systems. REDRESS has consultative status with ECOSOC.

www.redress.org

Annexes

Annex 1

Unofficial Translation into English of the Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2071 (2014) (11 May 2014)

(Please refer to separate document)