

NEPAL'S FLAWED TRANSITIONAL JUSTICE PROCESS

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INTRODUCTION

Nepal's peace process included a high level Truth Commission along with other transitional justice measures so as to address the past human rights abuses. While two separate transitional justice commissions- a Truth and Reconciliation Commission (TRC) and a Commission on the Investigation of Disappeared Person (CIEDP), have been established in 2014, the inherent flaws in the laws, political interference in the selection of the members of commission, inadequate resources and non-cooperation of stakeholder have significantly impeded the work of the commission. Therefore, the promises for truth justice and reparation to the victim of armed conflict made by the peace process remains unfulfilled. This demands an urgent reform in the ongoing transitional justice process if Nepal is to achieve long lasting peace and sustainable development.

This essay examines the key causes for the failure of the transitional justice process in Nepal. In doing so, it primarily relies on the Supreme Court rulings and international standards which Nepal has committed to.

The first chapter gives a background of the conflict and the need for transitional justice mechanisms. The second chapter deals with the transitional justice initiatives that were enacted in the nation. The third chapter deals with the international standards of transitional justice and questions Nepal's compliance to international law standards and obligations. The fourth chapter points out the flaws in the Nepalese transitional justice system while the fifth, and final, chapter provides a recommendation on how to move ahead.

BACKGROUND: NEPAL AND TRANSITIONAL JUSTICE

On February 13, 2005, the then Communist Party of Nepal (Maoist), launched a 'people's war' with an aim to establish a Republican Nepal through guerrilla warfare. The idea of a 'people's war' comes from the origin of the communist movement in Nepal.¹ After the restoration of a multiparty democracy in 1990, the Constitution of the Kingdom of Nepal adopted a British model of parliamentary democracy with constitutional monarchy which substantially failed to address the social and economic issues of the nation. Issues such as poverty, inequality, landlessness, and unemployment etc. apparently became the causal factor for the emergence of the Maoist movement.

The armed conflict in Nepal, which occurred from Falgun 1, 2052 till Mangsir 5, 2063, claimed numerous lives as Human Rights Organizations, including the National Human Rights Commission (NHRC), documented about 13,000 deaths, nearly 1,300 enforced disappearances, thousands of abductions, torture, and ill-treatment, including sexual violence; and other abuses by both parties.²

To investigate into such incidents, to make the perpetrators liable for their crimes, to provide relief and justice to the victims and to create an atmosphere of reconciliation in the society are the main tasks for a shift from the conflict period into the post-conflict peace process.

TRANSITIONAL JUSTICE INITIATIVES

As stated above, the transitional justice measures have been negotiated during the peace process in order to address the past human rights abuses. Article 5.2.5 of the CPA specifically mentioned that gross human rights violations and crimes against humanity would be investigated, truth about such incidents would be established and an atmosphere of reconciliation would be created. The CPA further provided provisions for relief and reparation to the victim of conflict.³

¹ Deepak Thapa, *Understanding the Maoist Movement in Nepal*, Chautari Book Series #10, Available at https://books.google.com.np/books/about/Understanding_the_Maoist_Movement_of_Nep.html?id=7TZuAAAAMAAJ&redir_esc=y.

² OHCHR *Nepal Conflict Report* (2012), p 14, Available at <http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/NepalConflictReport.aspx>.

³ Article 5 of the CPA.

Similar provisions can also be found in Article 33 of the 2007 Interim Constitution. In order to implement the CPA and the provisions of the Interim Constitution, the Constituent Assembly passed a law on “Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act 2014” (TRC Act) in May 2014.

The TRC Act empowers both the commissions to enquire and investigate into the truth about the incidents of the gross violations of human rights and the crime against humanity in the course of the armed conflict and about those who were involved in those incidents, create an environment of sustainable peace and reconciliation by enhancing the spirit of mutual trust and tolerance upon bringing about reconciliation in the society, and to make recommendation for legal action against those who were involved in grave offences relating to those incidents including for reparation to the victims of those incidents⁴.

Section 26 of the TRC Act also empowered the TRC and CIEDP to recommend for amnesty for serious crime except rape. This had been challenged in the Supreme Court by the victims and human rights defenders. On February 26, 2015, the Supreme Court of Nepal struck down the provision and required serious crimes to be prosecuted. The Supreme Court further observed that many crimes such as torture, disappearance, war crime, crimes against humanity also needed to be criminalized under Nepali penal law.⁵ The Supreme Court of Nepal has also, from time to time, rendered decisions which has evolved victim-friendly judicial principles.⁶ However, the Government is yet to amend the TRC Act in line with Supreme Court ruling.

INTERNATIONAL STANDARDS ON TRANSITIONAL JUSTICE

Under international law, any transitional justice process requires to include four major component- truth, justice, reparation and guarantee of non-reoccurrence.⁷ The standards and principles on the prosecution and punishment of the perpetrators of human rights violations have recently been amended and developed through the common efforts of the international community. These standards and principles have helped shape the current human rights and humanitarian laws which makes the perpetrators individually responsible for his/her act. Under

⁴ Preamble and Section 10 of the TRC Act 2014.

⁵ *Madhav Kumar Basnet v. Govt. of Nepal*, Order 069-WS-0058.

⁶ *Suman Adhikari v. Govt. of Nepal*, Order 070-WS-0050.

⁷ Human Rights and Transitional Justice, E/CN.4/Res/2005/70, Available at http://ap.ohchr.org/documents/alldocs.aspx?doc_id=11160.

international law the State has a duty to investigate and prosecute perpetrators who have committed crimes of gross violation of human rights.⁸ However, the TRC Act has some major flaws which have been pointed out by organizations such as Amnesty International, the International Commission of Jurists and the Human Rights Watch.⁹

In the 2012 report made by the United Nations Office for the High Commissioner of Human Rights (UN OHCHR) they have documented hundreds of cases relating to sexual violence, with the actual number still unknown. With the enactment of the TRC and CIEDP a decade after the conflict could reopen wounds for some of the victims preventing them from filing a complaint against the perpetrators. For a majority of the victims the enactment of the TRC and CIEDP may have given them hope, but their hope was short lived due to the provisions that were added into the TRC Act.

“We live in a society where survivors don’t even tell their own family members when they’re raped.”¹⁰

Till date not a single wartime case relating to rape or sexual violence has been investigated.¹¹ With such an atmosphere around the TRC and CIEDP, no survivor feels safe enough to come and seek justice from them. Nepal has an obligation under international law to prosecute any person who has committed war crimes, crimes against humanity or human rights violations. With such provisions enacted by the Government it is in clear violation of its obligations under international law.¹²

⁸ OHCHR *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 16 December 2005) UN Doc A/RES/60/147, principle 4, Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

⁹ Nepal: Draft Bill on transitional justice falls short on international law and standards, Amnesty International, July 20, 2018, Available at <https://www.amnesty.org/en/latest/news/2018/07/nepal-draft-bill-on-transitional-justice-falls-short-of-international-law-and-standards/>.

¹⁰ Little hope of justice for Nepal’s war-time rape survivors, IRIN, Available at <http://www.irinnews.org/report/100423/little-hope-justice-nepal%E2%80%99s-war-time-rape-survivors>.

¹¹ Death of Justice, Nepali Times, 26 Sep – 2 Oct 2014, #726, Available at <http://nepalitimes.com/article/editorial/death-of-justice-war-victims-forgotten-nepal,1683>.

¹² OHCHR Technical Note, *The Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (2014)* – as Gazetted 21 May 2014, Available at http://www.ohchr.org/Documents/Countries/NP/OHCHRTechnical_Note_Nepal_CIDP_TRC_Act2014.pdf.

PROBLEMS IN THE TRANSITIONAL JUSTICE PROCESS

At the outset there is no provision for impunity in the CPA; however, Sections 13(2) and 13(3) of the TRC Act have been read together with Section 29 of the said Act to provide for impunity, if deemed reasonable, notwithstanding grave human rights violations and rape. The TRC Act does not even have a clearly defined definition for grave human rights violations in the Act, and it has been used inconsistently.¹³ The provisions of the Act are unclear and insufficient by themselves. This has been furthered dampened by the fact that hundreds of cases have already been shelved by the Committees.¹⁴ Some districts have the committee right next to, or even above, security posts where the perpetrators serve as guards and interrogate every person visiting the committee. The Commissions have to be aware of the constitution, the law, international human rights law and humanitarian law and the established principles of justice. The duty of the Commission is to look for grounds to punish the perpetrators and ensure justice. Any individual guilty of a violation of human rights cannot escape the responsibility of his actions.

Due to such factors the victims have put their belief on the judicial mechanisms which have been delivering justice through their verdicts. The Supreme Court of Nepal in numerous cases has challenged the validity of the TRC Ordinance and TRC Act and has deemed it to be unconstitutional.¹⁵ In addition to this, the Supreme Court in the case of *Madhav Kumar Basnet v. Govt. of Nepal*,¹⁶ stated that any provision of the TRC which compromises the delivery of justice to the victims should be deemed invalid and ruled in favour of the 234 victims. The Supreme Court has time and again ordered the Commissions established by law to commit to the standards of international law and not grant impunity. They also ordered the Government of Nepal to perform the orders, directives and interpretations given in the cases of *Rajendra Dhakal*, *Liladhar Bhandari* and *Madhav Kumar Basnet*.¹⁷ However, no legislative or

¹³ Nepal: OHCHR position on UN support to the Commission on Investigation of Disappeared Persons and the Truth and Reconciliation Commission, 16 February 2016, http://www.ohchr.org/Documents/Countries/NP/Nepal_UN%20osition_supportTRC_COIDP_Feb2016.pdf.

¹⁴ Lekhanath Pandey, TRC may shelve hundreds of war-era complaints, *The Himalayan Times*, 12 August, 2016, Available at <http://thehimalayantimes.com/nepal/truth-and-reconciliation-commission-may-shelve-hundreds-war-era-complaints/>.

¹⁵ Nepal: Government must implement landmark Supreme Court decision against impunity, International Commission of Jurists, 27 February, 2015, Available at <http://www.icj.org/nepal-government-must-implement-landmark-supreme-court-decision-against-impunity/>.

¹⁶ *Supra* 5.

¹⁷ *Supra* 6.

administrative action has been taken for the implementation of these decisions made by the Supreme Court.¹⁸

The government has begun consultations regarding amendments to the transitional justice mechanisms.¹⁹ The current draft law does not address several issues making it difficult to prosecute the perpetrators of crimes, especially them at senior levels. The lack of a meaningful consultation process puts the legitimacy and viability of the amendment into question, even before entering into its legal provisions. The government should demonstrate a genuine willingness to establish an effective transitional justice process by complying with existing Supreme Court jurisprudence on the subject.

The new government led by Prime Minister Khadga Prasad Oli has promised to bring the Nepalese transitional justice legislations under conformity with international law and standards as directed by the Supreme Court and the international community; however, there are critical flaws in the draft bill and they must be changed. The bill while is a positive step still does not address several issues.²⁰ Crimes such as torture, enforced disappearance, war crimes, crimes against humanity, etc. are yet to be incorporated into the Nepalese laws under the head of serious crimes. The bill also provides for community service as an alternative form of punishment for those convicted of serious crimes, which is neither adequate and also effectively constitutes impunity. These crimes are principal crimes under the Rome Statute of the International Criminal Court and Customary International Law. The bill does not also address the question of command and superior responsibility leaving doubt regarding the accountability of those who are at the senior levels. There shouldn't be any *de jure* or *de facto* amnesty in the context of crimes under international law. Such crimes should be termed as serious crimes as enshrined by the Rome Statute and customary international law.

The fight for justice became tougher with the 9 Point Agreement being made between the then Prime Minister, Khadga Prasad Sharma Oli, and the CPN-M.²¹ This Agreement came in lieu

¹⁸ *Supra* 12.

¹⁹ Nepal: Transitional Justice Reform an Urgent Need, Current Draft Law Does Not Meet International Standards on Prosecuting Worst Crimes, International Commission of Jurists, July 8, 2018, Available at <https://www.icj.org/wp-content/uploads/2018/07/Nepal-ICJ-HRW-Transnational-justice-reform-News-Press-releases-2018-ENG.pdf>.

²⁰ Preliminary Comments, Draft Bill to Amend the Act on Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2014, International Commission for Jurists, Available at <https://www.icj.org/wp-content/uploads/2018/07/Nepal-Transitional-Justice-Advocacy-Analysis-brief-June-2018-ENG.pdf>.

²¹ Oli, Dahal sign 9-pt deal, Republica, 06 May, 2016, Available at <http://admin.myrepublica.com/politics/story/41802/oli-dahal-sign-9-pt-deal.html>.

of the CPN-M threatening to topple the then Government by forming an alliance with the Nepali Congress (NC) and the United Democratic Madhesi Front (UDMF).²² This 9 Point Agreement included one point which dealt with providing impunity for all the perpetrators who committed crimes during the Nepalese civil war. This was seen as a conspiracy by the Maoists to absolve themselves from their war crimes. While this was challenged in front of the Court and a writ of mandamus was filed against this document, the Supreme Court of Nepal quashed the petition as this was a political document and judicial review could not be applied to quash such a document.²³

A concern for the perpetrators could be the application of universal jurisdiction, as has been used previously.²⁴ While this may not be of concern to all the perpetrators, this will concern the security forces who serve the peacekeeping forces of the United Nations.²⁵ While the domestic legislations protect the perpetrators, as of now, they will not be protected at the international level.

THE ROAD AHEAD

Keeping the spirit and the aspirations of the Interim Constitution of Nepal, 2063 and the Comprehensive Peace Agreement in mind the incidents relating to the gross human right violations and crimes against humanity and the information relating to those perpetrators should be explored. The truth about these incidents should be investigated and the actual facts should be brought in front of the society. An environment of peace and harmony should be created by reconciliation, mutual cooperation and tolerance building. The Commissions have a duty to look into the incidents, provide reparation to the victims and recommend legal action to the perpetrators.

²² NC, UPCN-M, UDMF join hands to topple Oli government in Nepal, NewsX, 05 May, 2016, Available at <http://www.newsx.com/world/27353-ncucpn-mudmf-join-hands-to-topple-oli-government-in-nepal>.

²³ SC quashes writ petition against 9-pt deal, Republica, 14 May, 2016, Available at <http://www.myrepublica.com/feature-article/story/42271/sc-boots-writ-petition-against-9-point-deal.html>.

²⁴ Michael Vurens van Es, A Nepal Army Colonel Fronts London's Old Bailey, The Diplomat, 15 March, 2015, Available at <http://thediplomat.com/2015/03/a-nepal-army-colonel-fronts-londons-old-bailey/>.

²⁵ Rajan Bhattarai, Peacekeeping Contributor Profile: Nepal, Providing For Peacekeeping, August 2013, Available at <http://www.providingforpeacekeeping.org/2014/04/03/contributor-profile-nepal/>.

Nepal is a country heavily dependent on foreign aid.²⁶ With it being a party to most of the Human Rights Conventions²⁷ the current pro-impunity stance could be short-lived. The international community would not support a country which has a pro-impunity stance. With the recurring earthquakes in 2015 and the “unofficial blockade” imposed by India the economy of Nepal has taken a serious blow.²⁸ Nepal cannot bare the financial burdens that would arise due to the monetary compensation that it has promised to the victims. As such the international community would have a huge role to play in dealing with the issue of monetary compensation, but they would not agree to a system that goes against their principles. There needs to be a coherent and coordinated response by the international community to support conflict victims in raising and collaboratively addressing these concerns with the government. Thus, international pressure could lead Nepal to complying with the International standards that it had agreed to.

²⁶Does it Work? Foreign Aid, Aid Management Platform, Available at <http://amis.mof.gov.np/portal/node/10>.

²⁷ Ratification Status for Nepal, United Nations Office of the High Commissioner, Available at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=122&Lang=EN.

²⁸ Nepal blockade: Six ways it affects the country, BBC NEWS, 12 December, 2015, Available at <http://www.bbc.com/news/world-asia-35041366>.