

Nepal: Transitional Justice Mechanisms with a Gender Perspective

A Briefing Paper
May 2021



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International Commission of Jurists
P.O. Box 1270
Rue des Buis 3
CH 1211 Geneva 1
Switzerland
t: +41 22 979 38 00
f +41 22 979 38 01
www.icj.org

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Introduction

During the armed conflict in Nepal from 1996 to 2006, gross human rights violations and abuses amounting to crimes under international law were committed both by the Government's then Royal Nepal Army and other security forces and the Communist Party of Nepal (Maoist). These atrocities included unlawful killings, enforced disappearances, torture and ill-treatment including rape and other sexual violence. The report released by the United Nations High Commissioner for Human Rights on 8 October 2012 stated that there is reason to suspect that up to 9,000 serious violations of international human rights law and international humanitarian law may have been committed during the decade-long conflict. It has been estimated that approximately 13,000 people were killed and at least 1,300 people were subjected to enforced disappearances. The fate or whereabouts of many of these persons remain unknown to this day.¹

The armed conflict came to an end with the signing of Comprehensive Peace Accord (CPA) on 21 November 2006, in which the conflicting parties expressed their commitment to seeking truth, addressing impunity and ensuring relief to the victims of the conflict. During the years that followed, various measures were introduced as part of the process of transitional justice. However, the process has been stalled, including by attempts to short circuit justice through mechanisms and processes that fail to comply with Nepal's own Supreme Court's decision and international standards, leaving the objectives of accountability and reparation elusive.²

Among the various deficiencies of the transitional justice mechanisms is their failure to deal adequately with the situation of women, particularly concerns of gender-based violations. Overall, these processes have served to replicate and reinforce the marginalized status of women that was a hallmark of the conflict itself.

Women, no less than men, played a crucial role during the conflict both as social and political actors. During the conflict, a substantial number of women were subjected to arbitrary arrest and detention, torture and ill-treatment, including rape and other sexual violence, and unlawful killing. Often these abuses were committed because of real or perceived associations with a party to the conflict or for being a member and/or family member of either the Maoist or the Government forces. Female family members of those killed, disappeared or tortured also endured suffering, as they were compelled to take on the burden of being the caregivers of the family, while often seeking truth and justice for their loved ones. Women were also involved in the conflict as combatants, in a departure from their traditional roles.

However, in Nepal, the participation of women was not meaningfully factored in during negotiations and ultimately in the terms of the CPA peace deal. After the signing of the CPA, even though the Government introduced several programs to provide relief to the conflict victims in order to address their immediate needs, victims of rape and other sexual violence who had suffered torture and ill-treatment were excluded from the Government's scheme.³ Further, the rehabilitation and reintegration of female combatants have been wholly ignored. Similarly, the participation of women in the law-making and policy formulation process has also not been achieved. Evidently, even though women played a crucial role during the conflict, they were heavily sidelined in its aftermath.

¹ United Nations Office of the High Commissioner for Human Rights, Nepal Conflict Report, October 2012, available at https://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf.

² Human Rights and the Rule of Law in a Federal Nepal: Recommendations from and ICJ High-Level Mission, July 2020, available at <https://www.icj.org/wp-content/uploads/2020/08/Nepal-High-level-mission-Publications-Reports-mission-reports-2020-ENG.pdf>; Nepal Transitional Justice Advocacy Analysis, Preliminary Comments on Draft Bill to Amend the Act on Commission on the Investigation of Disappeared Persons, Truth and Reconciliation 2014, June 2018, available at <https://www.icj.org/wp-content/uploads/2018/07/Nepal-Transitional-Justice-Advocacy-Analysis-brief-June-2018-ENG.pdf>; Achieving Justice for Human Rights Violations in Nepal, Baseline Study, October 2017, ICJ Global Redress and Accountability Initiative, available at <https://www.icj.org/wp-content/uploads/2017/10/Nepal-GRA-Baseline-Study-Publications-Reports-Thematic-reports-2017-ENG.pdf>; 'Justice Denied: The 2014 Commission on Investigation of Disappeared Persons, Truth and Reconciliation act', May 2014, at URL <https://www.icj.org/wp-content/uploads/2014/05/Nepal-TRC-Act-Briefing-Paper.pdf>.

³ The Government of Nepal introduced many guidelines, directives and other standards to provide interim relief to the conflict victims, but typically excluded victims of torture and rape and gender-based violence from the government programmes.

In light of the experiences that were unique to women during and in the aftermath of the conflict, it is imperative that a gender-sensitive approach is now integrated into Nepal's transitional justice processes. This is important both in order to understand the different causes and consequences of human rights violations and abuses and their distinctive impact on men and women, and to facilitate the design and implementation of gender-friendly transitional justice initiatives.

When the UN Human Rights Council established the mandate of the Special Rapporteur on truth, justice, reparation, and guarantees of non-recurrence in 2011, it made an explicit directive that the mandate integrate a gender perspective throughout its work.⁴ The Special Rapporteur's report on 17 July 2020 also emphasized that States that have suffered serious and gross violations of human rights are under the obligation to adopt gender-responsive transitional justice mechanisms.⁵ The Human Rights Council has itself repeatedly emphasized that a gender perspective must be fully integrated in all activities around the transitional justice process.⁶

The Government of Nepal (GoN) in 2015 established the Truth and Reconciliation Commission (TRC) and the Commission on Investigation of Disappeared Persons (CoID).⁷ The International Commission of Jurists (ICJ) has analysed the TRC Act as well as the TRC and CoID Regulation to assess compliance with international standards and has recommended that the GoN amend the legislation and regulations in order to meet Nepal's international legal obligations.⁸ In this briefing paper, the ICJ analyses the TRC Act of 2014 and the TRC and CoID Regulations of 2017 from a gender perspective with a view to promoting holistic and effective transitional justice measures that are responsive to the needs of victims and women victims seeking justice and reparation. These findings would prompt gender-sensitive remedies and reparation processes, as the recommendations would stem directly from the distinct experiences of women during and in the aftermath of the conflict.

Background

The Comprehensive Peace Accord (CPA), signed between the Government and then rebel group, the Nepal Communist Party (Maoist) promised to establish a Truth and Reconciliation Commission to investigate serious human rights violations and crimes against humanity committed during the conflict.⁹ The 2007 Interim Constitution also reinforced the need for the establishment of a high-level Truth and Reconciliation Commission by incorporating an Article in the Constitution stating that the establishment of a high level truth and reconciliation commission is the obligation of the State.¹⁰ The Supreme Court has also repeatedly issued orders requiring the Government to establish two

⁴ Human Rights Council, Eighteenth Session, Resolution on the Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence, A/HRC.RES/18/7 (2011), para. 1 (j), available at: <https://digitallibrary.un.org/record/713605>.

⁵ A/75/174, available at <https://digitallibrary.un.org/record/3883379?ln=en>.

⁶ Human Rights Council Resolution on human rights and transitional justice, A/HRC/RES/21/15 (2012), Preamble; Note by the Secretary General, Gender Perspective in Transitional Justice, Seventy-Fifth Session, A/75/174, 17 July 2020, available at <https://digitallibrary.un.org/record/736865>.

⁷ The TRC and CoID was established on 10 February 2015 with a two-year mandate. The mandate was extended in February 2017 for one year and on 20 January 2018, an Ordinance was promulgated to extend the mandate for another year and committed to the selection of new Commissioners by April 2019 (the term of the Commissioners was extended until 13 April 2019). The tenure of the Commissioners of both Commissions expired on 13 April 2019 and new Commissioners of the TRC and CoID were appointed in January 2020 and their mandate has again been extended until 15 July 2021.

⁸ Justice Denied: the 2014 Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act, Briefing Paper, ICJ, May 2014 available at: <https://www.icj.org/wp-content/uploads/2014/05/Nepal-TRC-Act-Briefing-Paper.pdf>; Analysis of TRC and CoID Regulations, 2016, Briefing Paper, ICJ, April 2017.

⁹ CPA, Article 5.2.5. states, "Both sides agree to set up a High-level Truth and Reconciliation Commission through mutual agreement in order to investigate truth about people seriously violating human rights and involved in crimes against humanity, and to create an environment of reconciliations in the society."

¹⁰ Article 33 (s), Interim Constitution of Nepal, 2007. Under the Obligations of state, the Article provides, "To constitute a high-level truth and reconciliation commission to investigate the facts about involved in gross violations of human rights and crimes against humanity during the course of armed conflict, and to create an environment for reconciliation in the society."

transitional justice mechanisms: i) Truth and Reconciliation Commission (TRC); and ii) Commission on Investigation of Disappeared Persons (CoID).¹¹

The GoN made a number of attempts to establish transitional justice mechanisms, but consistently failed to give due consideration to international standards and gender perspectives. Bills to institute a TRC and a CoID were tabled in the Parliament in February 2010, followed by several stakeholder consultations. These consultations provided some inputs as to how the gender perspectives could be included in the Bill. However, the Bills were never enacted because of the failure of the political parties to agree on the requirement of investigation and prosecution of gender-based violence, among other things.

As these two Bills were still pending, the Prime Minister decided to dissolve the House of Parliament in May 2012. The Ordinance on Truth and Reconciliation of 2013 was promulgated subsequently, removing the provision of the earlier versions of the Bill that required prosecution by preventing amnesty and mediation in rape and other sexual violence. Several provisions of the Ordinance, including the provision on amnesty and 'forced reconciliation', were challenged at the Supreme Court. The Court, on 2 January 2014, held that the 2013 TRC Ordinance was in contravention of the spirit of the Constitution, international human rights law and previous rulings of the Supreme Court.¹²

Subsequently, the Government enacted the Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act (TRC Act) in 2014. This Act mandates the Commissions to investigate incidents of gross human rights violations and crimes against humanity that occurred during the course of the armed conflict, to make recommendations for legal action against those who were involved in serious crimes, to create an environment of sustainable peace and reconciliation and to make recommendations on reparation for the victims.¹³

Nevertheless, the 2014 TRC Act has for the most part replicated the [2013 TRC Ordinance](#) and its major flaws, including allowing for amnesties for serious crimes, which were previously struck down by the Supreme Court on 2 January 2014. Although the Act prevents amnesty in cases involving rape and sexual violence, it continues to promote and provide opportunities for "mediation", at the expense of accountability, between victims and perpetrators even in the case involving rape and other gross violations. As a result, 234 conflict victims from around the country challenged the [TRC Act](#) at the Supreme Court. The Court declared some provisions of the Act to be unconstitutional and in contravention of international law and ordered the Government to amend the legislation in compliance with international standards and previous decisions of the Supreme Court.¹⁴

On 10 February 2015, in spite of the 2014 TRC Act being *sub-judice*, the Government went ahead and established both transitional justice mechanisms: i) Truth and Reconciliation Commission (TRC); and ii) Commission on Investigation of Disappeared Persons (CoID). The TRC and CoID have failed to meet international standards, both in constitution and operation. The failure of the Government to amend the TRC Act in line with the order of the Supreme Court of Nepal¹⁵ and the non-consultative and opaque approach of both Commissions have led to distrust among all major stakeholders, especially the conflict victims. It is particularly concerning that even after spending more than five years and collecting some 63,000 complaints of human rights violations and abuses,¹⁶ both Commissions have yet to effectively investigate a single case.

¹¹ Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal v. the Government of Nepal, Nepal Law Journal 2007, Issue 3, decision no 7817, Madhav Kumar Basnet et al v. Prime Minister and Council of Ministers, Nepal Law Journal 2014 Issue 9, Decision no 9061.

¹² Madhav Kumar Basnet et al v. Prime Minister and Council of Ministers, Nepal Law Journal 2014 Issue 9, Decision no 9061.

¹³ Preamble, TRC Act 2014.

¹⁴ Suman Adhikari et al v. Prime Minister and Council of Ministers, Nepal Law Journal 2016, Issue 6, Decision no 9612.

¹⁵ Suman Adhikari et al v. Prime Minister and Council of Ministers, Nepal Law Journal 2016, Issue 6, Decision no 9612.

¹⁶ According to the TRC and CoID data, the TRC has received around 60,000 complaint of human rights violation and the CoID has received around 3,000 complaint of incidents of enforced disappearances during the conflict.

Furthermore, gender perspectives are largely ignored in Nepal's transitional justice process. Explaining what applying a gender perspective in transitional justice work means, the Office of the Prosecutor of the International Criminal Court (ICC) states that, "gender perspective" for the purposes of its work, "requires an understanding of differences in status, power, roles, and needs between males and females, and the impact of gender on people's opportunities and interactions." The Office of the Prosecutor of the ICC believes that having this understanding will give it a better understanding of the crimes that were committed, as well as the experiences of the individuals and communities in a particular society.¹⁷

Mandate

One of the mandates of the TRC is to establish the truth. The inalienable right to the truth, recognized by the UN Human Rights Council¹⁸ has been defined under Principle 2 of the UN Updated Set of Principles for the protection and promotion of human rights through action to combat impunity (UN Impunity Principles) as follows:

"Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations."

Principle 4 affirms that "[i]rrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate."

The right to truth also has a social dimension. In this respect, Principle 5 asserts that: "Societies that have experienced heinous crimes perpetrated on a massive or systematic basis may benefit in particular from the creation of a truth commission or other commission of inquiry to establish the facts surrounding those violations so that the truth may be ascertained and to prevent the disappearance of evidence."

Often truth commissions are mandated to establish truth and to make recommendations on reparations, prosecutions and measures that the State can take to ensure non-recurrence of violations. Although the global experience suggests the lack of women's perspective in truth commissions in general, these mechanisms have been recognized by women's human rights defenders as an extraordinary window of opportunity to highlight neglected abuses, research the enabling conditions of gendered violations and provide a forum for female victims and survivors to recommend appropriate reparations.¹⁹

Over time, truth commissions have made significant progress both in design and process to include gender dimensions. For example, the commissions in Argentina and Chile were gender-neutral and did not address violations that uniquely affected women. Later however, the truth commissions of Guatemala, South Africa and Peru, despite having a gender-neutral mandate, interpreted the mandate in a manner that paid particular attention to the gender dimensions of the crimes committed. Further, the truth commissions that were established subsequently, such as those in Sierra Leone and Timor-Leste, expressly incorporated gender or sexual violence into their mandates.²⁰

Human rights abuses in their gendered dimensions can only be addressed effectively when both the enabling legislation of truth commissions and the commissioners and others who are administering the process make a conscious and institutional commitment and proactively act to prioritize concerns and interests of marginalized groups, particularly women, in the commission's mandate.

¹⁷ The Office of the Prosecutor, International Criminal Court, Policy Paper on Sexual and Gender-Based Crimes (June 2014).

¹⁸ UN Doc E/CN.4/2005/102/Add.1, recommended by the UN Human Rights Commission in Resolution 2005/81, available at: <https://undocs.org/E/CN.4/2005/102/Add.1>.

¹⁹ Truth Commissions and Gender: Principles, Policies and Procedures, International Center for Transitional Justice (ICTJ), July 2006.

²⁰ Note by the Secretary General, Gender Perspective in Transitional Justice, Seventy-Fifth Session, A/75/174, 17 July 2020, available at: <https://digitallibrary.un.org/record/3883379>.

Nepal's TRC Act includes the crimes of rape and sexual violence as serious human rights violations. Section 3 of the TRC Act mandates the Commission to investigate the truth about such crimes and make recommendations for legal action against those who were involved in these grave offences. The Act also requires the Commission to facilitate reparation with the ultimate goal of fostering reconciliation between perpetrators and victims.

However, the way the TRC Act defines serious violations of human rights, including rape and other sexual violence, is narrow. For example, the TRC Act defines many acts, including rape and sexual violence, as "serious human rights violations" which were committed in the course of armed conflict directed against unarmed persons or the civilian population or committed systematically.²¹ This definition limits the mandate of the TRC to investigate "rape and sexual violence" cases as "serious violations of human rights," targeting "unarmed persons" or the "civilian population", "in a systematic manner during the course of armed conflict".

The problem with this formulation is that it is too narrowly defined. Rape and sexual violence are serious crimes, irrespective of the status of those against whom they are committed and even when thresholds of "systematic and widespread" are not met. A person who is the victim or survivor of such abuses suffers the same harm whether or not they occurred in this kind of pattern. Hence, the limitation of the mandate to investigate serious human rights violation including rape and sexual violence can largely exclude women victims in accessing justice. In addition, this formulation also risks negating the abuses of rape or sexual violence that may have been experienced by female combatants by limiting its scope to the "civilian population".

Therefore, while the inclusion of rape and sexual violence in the TRC Act is an important step, the provision must be interpreted to include a broader category of victims. Moreover, the unearthing of truth in relation to sexual violence in particular must be used as an evidentiary basis in the formulation of recommendations in relation to the prosecution of perpetrators and reparation for victims. It is also important not to limit "women's experiences" during a conflict to the narrow evidence of bodily harm, but include the structural ways in which women were affected throughout this time period, as such gender biases are invariably far-reaching and long-lasting.

Participation

A critical means of guaranteeing the incorporation of gender perspectives in truth commissions is by ensuring the participation of women as commissioners and staff of the commission. Principle 6 of the UN Impunity Principles provides that:

"To the greatest extent possible, decisions to establish a truth commission, define its terms of reference and determine its composition should be based upon broad public consultations in which the views of victims and survivors especially are sought. Special efforts should be made to ensure that men and women participate in these deliberations on a basis of equality. In recognition of the dignity of victims and their families, investigations undertaken by truth commissions should be conducted with the object in particular of securing recognition of such parts of the truth as were formerly denied."²²

International human rights bodies, such as the Human Rights Council, recognize the important role of women in the prevention and resolution of conflicts and in peacebuilding, and emphasize the importance in transitional justice processes women's meaningful participation and the need to increase their role in decision-making with regard to conflict prevention and resolution.²³

It is therefore important to ensure women's participation in all transitional processes and to integrate a gender-based criteria in selecting commissioners with other mandated qualifications and requirements. Similarly, a gender balance must be maintained when recruiting staff and appointing experts, including statement-takers, researchers, investigators and legal and psychosocial counsellors.

²¹ Article 2 (j), TRC Act 2014.

²² Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1 8 February 2005, available at: <https://digitallibrary.un.org/record/541829>.

²³ Human Rights Council Resolution on human rights and transitional justice, UN Doc. (A/HRC/RES/21/15 (2012)), para. 16.

The appointment of female commissioners and staff would create an empowering environment for female victims to approach the commission and share their experiences.

The TRC Act provides that there must be at least one female Commissioner among the five members of the Commission.²⁴ It also provides that there should be at least one woman in the five-member Recommendation Committee. Mandating that only a single woman serve is insufficient, and there is risk of marginalization and tokenism in that regard. It is noteworthy that the Nepali Constitution guarantees participation of women in all State structures on the basis of principle of proportional inclusion.²⁵ This constitutional stipulation must therefore be made use of during the appointment process of Commission members as its scope is wider than the existing TRC legislation.

The TRC legislation is silent on recruitment of female staff to the TRC and CoID. In its five-year term, the recruitment of female staff at both Commissions has been grossly neglected. During the complaint registration process, it was reported that there was a lack of female staff in some of the Local Peace Committees (LPC),²⁶ creating an unfavourable environment for female victims who were compelled to share sensitive details of their gruesome experiences with male staff members.²⁷

Gender parity must be ensured at all levels of recruitment as far as possible. However, it is vital to note that gender parity alone will not necessarily ensure a gendered approach. Thus, in addition to evaluating other necessary qualifications of potential Commissioners and staff, the approach of such persons to gender issues must also be ascertained in order to assess their gender sensitivities.

Moreover, efforts are needed to prevent existing patriarchal attitudes and norms making their way into the internal power dynamics of the Commissioners, as this could effectively affect the issues that are prioritized. Therefore, it is the task of the Commissions to ensure that such tensions are consciously identified and addressed.

Investigation and prosecution of Sexual and Gender-Based Violence

While independent research has revealed that incidents of rape and sexual violence were committed by both parties during the decade-long armed conflict in Nepal, these incidents have remained significantly under-reported and under-documented.²⁸ Many reports suggest that prevailing social and cultural taboos make victims reluctant to share their stories due to the shame or fear of being blamed. The very few cases that have been reported have not been investigated, further discouraging women from reporting their cases.

Investigating cases of human rights violation suffered by women, particularly incidents of rape and other sexual violence during an armed conflict, can be challenging owing to difficulties in finding documentation and medical examination reports of such incidents. Similarly, the collection of corroborating evidence can also be a daunting task. For instance, producing a medical examination report of the victim and report of the crime scene situation, which are typically considered as critical evidence in rape cases, will be impossible in cases from the conflict where the abuse occurred more than a decade ago. Thus, fundamental reform of the existing TRC Act, Regulation and the criminal procedures is thus necessary to achieve accountability and reparations.

Under international law, States are under the obligation to investigate, prosecute and punish those responsible for gross violations including rape and sexual violence. This includes the obligation of

²⁴ Section 3, TRC Act 2014.

²⁵ Article 42 provides that the economically, socially or educationally disadvantaged women, Dalit, indigenous nationalities, *Madhesi*, *Tharu*, minorities, Muslims, "backward" classes, minorities, marginalized communities, persons with disabilities, gender and sexual minorities, farmers, labourers, oppressed or citizens of "backward" regions and indigent Khas Arya shall have the right to participate in the State bodies on the basis of principle of proportional inclusion.

²⁶ Local Peace Committees (LPC) were established in all 75 districts of the country. They were initially designed to sustain peace by providing a common forum for people to locally implement national peace agreements. When the TRC called for the application from the conflict victims about human rights violations during the conflict, the TRC used the LPC to collect cases of conflict from the various districts.

²⁷ *Nirupan* (Transitional justice newsletter), July 2016, Center for Legal Studies (CLS).

²⁸ *Across the Lines: The impacts of Nepal's Conflict on Women* (2010), Advocacy Forum and International Centre for Transitional Justice.

States to investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law and provide effective and equal access to justice to the victims.²⁹

The UN Security Council has adopted a number of resolutions in which it has required rape and sexual violence to be investigated and provided specific guidance towards that end.³⁰ For example, the Security Council Resolution 1820 on Women and Peace and Security condemns the use of sexual violence as a tool of war, and declares that “rape and other forms of sexual violence can constitute war crimes, crimes against humanity or a constitutive act with respect to genocide” and stresses the need for the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution process.³¹ This resolution has explicitly noted that sexual violence is often used or commissioned as a tactic of war against women and girls and may impede the restoration of peace and security.

The General Recommendation of the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) also emphasizes the obligation to prevent, investigate and punish all forms of gender-based violence, in particular sexual violence perpetrated by State and non-State actors, and implement a policy of zero tolerance.³²

Nepal’s TRC Act mandates the TRC to investigate allegations of rape and sexual violence during the conflict. Sections 13(a) and (e) of the Act also provide that upon its investigation it would recommend for prosecution. Section 29(4) of the Act has envisioned the special Court to try those prosecuted. The TRC regulations adopted in 13 March 2016 also states the Commission may conduct a preliminary investigation into a complaint or information registered in the Commission and if the Commission finds necessary it will conduct comprehensive investigations into those incidents.³³ If a recommendation is to be made for action against a person for the charge of committing a gross violation of human rights, the Commission shall write to the Attorney General for prosecution against the perpetrator found to be responsible for the crime of gross violation of human rights.³⁴ Moreover, Rule 14 of the Regulation has provision that the Commission may make arrangements to conduct investigations by giving priority to a complaint or information involving children, senior citizens, persons with disability and person subjected to sexual violence. A statement or testimony of a woman is to taken through a female employee to the extent that such an employee is available.

Despite these modest but insufficient provisions, the TRC Act and Regulation has largely failed to make special arrangements to overcome the challenges to find documents, medical examination reports and other corroboratory evidence in order to ensure justice to the victims of sexual and gender-based violence (SGBV) during the conflict.

Lack of clarity in using the criminal justice system

Complementarity between the transitional justice mechanisms and the criminal justice system in Nepal has been unclear. This lack of clarity has prevented the regular justice system to investigate crimes of sexual violence from the conflict. However, even if the criminal justice system were to be applied, there are gaps in law making it impossible for all victims of rape and sexual violence to meaningfully access justice.

²⁹ See ICJ Practitioners Guide number 7, International Law and the Fight against Impunity.

³⁰ UN Security Council Resolution 1325 (2000), 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010), 2106 (2013) and 2122 (2013).

³¹ United Nations Security Council Resolution 1820, Adopted by the Security Council at its 5916th meeting, UN DOC. S/RES/182, June 2008, available at: https://www.tjsl.edu/slomansonb/10.3_UNSC_1820.pdf.

³² General Recommendation No. 30 on Women in conflict prevention, conflict and post-conflict situations, Committee on the Elimination of Discrimination against Women, 1 November 2013, CEDAW/C/GC/30, available at <http://hrlibrary.umn.edu/gencomm/CEDAW%20Gen%20rec%2030.pdf>.

³³ Rule 10 and 11, TRC Regulation.

³⁴ Rule 29, TRC Regulation.

For example, according to Nepal's Criminal Code 2017,³⁵ the crime of rape can be perpetrated against a woman or minor girl where it includes sexual intercourse involving vaginal-penile penetration.³⁶ It may also include certain other forms of non-consensual sexual conduct, including anal and/or oral penetration.³⁷ However, no criminal provision exists in Nepal subjecting other forms of sexual assault to effective, dissuasive and proportionate criminal punishment.³⁸ Other specific forms of sexual violence that should be criminalized include sexual violence when committed as a war crime; sexual slavery; enforced pregnancy; forced prostitution; forced sterilization; forced nudity; mutilation of genitals and breasts; and forced circumcision.

Furthermore, the Criminal Code also has a one-year statutory limitation in reporting cases of rape and other sexual violence, making it effectively impossible for survivors of rape and sexual violence during the conflict to access justice, given the time lapse since the conflict.

Statute of Limitation

Prior to the present Criminal Code, the statutory limitation to report rape was a mere 35 days.³⁹ The Supreme Court of Nepal found the 35-days statute of limitation "unreasonable" and "unrealistic" and has asked the Government to amend the law in order to ensure access to justice for women victims.⁴⁰

The use of any kind of statutes of limitation for certain serious crimes under international law, for instance torture, include in the form of rape and serious sexual violence, is contrary to international law and standards. Principle 23 provides that, "Prescription - of prosecution or penalty - in criminal cases shall not run for such period as no effective remedy is available. Prescription shall not apply to crimes under international law that are by their nature imprescriptible. When it does apply, prescription shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries."

The UN Human Rights Committee, in *Purna Maya v. Nepal*, had previously found that the 35-day limitation in reporting cases of rape in detention prevented victims from the right to an effective remedy and recommended that Nepal abolish the 35-day limitation period for filing complaints of rape. The Committee also recommended removing obstacles that frustrate the filing of complaints and effective access to justice for victims.⁴¹

The Criminal Code has now increased the limitation period for filing incident of rape to one year from the date of commission of the crime of rape.⁴² However, this extension is insufficient and will not be able to deliver justice to the victims of the conflict as the time period concerned exceeds one year. The Government should therefore remove or substantially prolong all statutory limitations for filing cases of conflict-related sexual violence to ensure it covers the duration of the armed conflict. It must do so in line with international standards governing the commission of crimes under international law and

³⁵ The Country Criminal Code was promulgated in October 2017 which came into force from 17 August 2018.

³⁶ Section 219 (2) of the Criminal Code states that "Where a man has sexual intercourse with a woman without her consent or with a girl child below the age of eighteen years even with her consent, the man shall be considered to commit rape on such woman or girl child."

³⁷ Section 219 (2)(c) has included that "the penetration of penis into the anus or mouth, penetration of penis, to any extent, into the anus, mouth or vagina, insertion of any object other than the penis into the vagina shall also be considered to be rape."

³⁸ Although the legislation, 'Amending Some Nepal Acts to Maintain Gender Equality, 2063 (2006)' (Article 11) introduced a crime called 'sexual harassment' into Nepali criminal law which would appear to be applicable to such forms of sexual assault, the relevant penalty is limited imprisonment of up to one year and a fine. Meanwhile it does not encompass sexual violence against men and boys.

³⁹ Section 11 of Chapter on Rape, Country Code (*Muluki Ain*), states: "If a suit on the matter of rape is not filed within thirty-five days from the date of the cause of action, the suit shall not be entertained." Many victims are deferred in reporting due to fear, trauma, stigma or severe health consequences.

⁴⁰ *Sapana Pradhan Malla v. Prime Minister and Council of Minister et al.*, Writ. No. 3561 (2006).

⁴¹ *Purna Maya v Nepal*, Human Rights Committee, Views adopted by the Committee concerning Communication No 2245/2013, UN Doc CCPR/C/119/D/2245/2013 (23 June 2017).

⁴² Section 229, Country Criminal Code.

the jurisprudence of international authorities such the Human Rights Committee⁴³ and the CEDAW Committee with respect to Nepal.⁴⁴

This is also required under Nepal's domestic laws according to the decision of the Nepal's Supreme Court. The Court issued a ruling on 2 January 2014 on the TRC Ordinance, and issued an order pursuant to a mandamus writ that the Government of Nepal should enact legislation criminalizing certain serious human rights violations, including rape and other forms of sexual assault and sexual violence. The Court also mandated the Government to remove the statutory limitation to file cases of human rights violations.⁴⁵

The failure of the Government to investigate and prosecute rape and sexual violence from the conflict has given rise to gender-based violence even after the end of the conflict. The failure to prevent, investigate and punish all forms of gender-based violence, in addition to other factors such as ineffective disarmament, demobilization and reintegration processes, can also lead to further violence against women in post-conflict periods.⁴⁶ Hence, it is particularly urgent to make as a priority in transitional justice contexts the issue of addressing SGBV committed both during and after the conflict, in order to prevent further violations.

Amnesties

Section 26 of the TRC Act prohibits amnesties in cases of rape that were committed during the conflict. However, the prohibition does not extend to other forms of sexual violence which may be devastating to survivors but do not contain the elements of rape. Furthermore, it makes amnesty possible in indirect ways. Section 22 provides that the TRC can facilitate mediation between victims and perpetrators irrespective of the nature of violations, including rape and other sexual violence. Thus, it is possible to provide impunity for perpetrators even in cases involving rape and other sexual violence under the guise of reconciliation and mediation.

Under international law and standards, amnesties are not permissible to shield from accountability those involved in gross human rights violations including rape and sexual violence. Principle 24(a) of the UN Impunity Principles provides: "The perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations to which principle 19 refers or the perpetrators have been prosecuted before a court with jurisdiction - whether international, internationalized or national - outside the State in question." Principle 19 itself stipulates duties of States to undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.

Furthermore, Nepal's Supreme Court has also found that amnesties for those involved in gross violations are impermissible as it violates the victims' rights to effective remedies guaranteed by the Constitution of Nepal and the international treaties to which Nepal is party.⁴⁷ As the current provision in the Act violates both national and international law, it needs to be amended to make clear that neither the TRC nor any other transitional justice mechanism provide amnesty or conduct mediation between victims and perpetrators in the cases involving rape and other sexual violence.

⁴³ *Maya v Nepal* Communication No 2245/2013, UN Doc CCPR/C/119/D/2245/2013 (HRC, 23 June 2017).

⁴⁴ Concluding Observation on Sixth Periodic Report of Nepal, Committee on the Elimination of Discrimination against Women, Para 23, UN Doc. CEDAW/C/NPL/CO/6 (14 November 2018).

⁴⁵ Advocate Madhav Kumar Basnet et al v. the Government of Nepal and Others, (069-WS-0057), Nepal Law Journal 2014 Issue 9, Decision no 9061.

⁴⁶ Committee on the Elimination of Discrimination Against Women, General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, 2013, Para. 35, available at: <http://hrlibrary.umn.edu/gencomm/CEDAW%20Gen%20rec%2030.pdf>

⁴⁷ Suman Adhikari et al v. Prime Minister and Council of Ministers, Nepal Law Journal 2016, Issue 6, Decision no 9612, para 70.

Remedy and Reparation

Under international law, States have an obligation to provide for access to an effective remedy and reparations under general international law and the major international human rights treaties. Remedies must be effective, accessible, prompt and include full reparation.⁴⁸

Full and effective reparation includes compensation, rehabilitation, restitution, satisfaction and guarantees of non-repetition. An essential part of the reparative framework is the right to the truth.⁴⁹

Following up on the stipulations in the CPA and 2007 Interim Constitution, the Government of Nepal introduced the Interim Relief Program (IRP), which can be considered as an important step to addressing the immediate needs of the conflict victims and survivors. However, the scope of the IRP was limited to provide interim relief to certain categories of the victims and families, including the families of the deceased, forcibly disappeared, and persons with disabilities. However, it excluded certain categories of conflict victims, especially victims of torture and ill-treatment, including SGBV. Hence, these categories of victims were largely left out from the IRP scheme.

The UN Special Rapporteur on violence against women, on her visit to Nepal in 2019, has also emphasized that women affected by rape and sexual violence during the conflict have not been able to access interim relief packages, compensation, reparations and other support services.⁵⁰ The CEDAW Committee has urged the Government to take steps to guarantee access for women and girls who are victims of the armed conflict to interim relief and full and effective reparations, including restitution, compensation, rehabilitation and guarantees of non-recurrence.⁵¹ Furthermore, the Human Rights Committee has called on Nepal to adopt measures to provide interim relief to the victims of sexual violence that occurred during the conflict.⁵² Despite these calls, the Government has not taken any steps to include victims of SGBV into its IRP scheme.

Moreover, the reparation scheme of the TRC Act and Regulation, which came into force subsequently, has also failed to address specific needs of victims of SGBV, such as the provision of reproductive health care facilities and psychosocial counselling. Section 23(2)(a) of the Act provides for health care services to the victim and their family if the Commission considers it appropriate. In addition, Rule 33(1)(e) of the TRC Regulation provides that the Commission may recommend to the Government of Nepal to provide medical treatment through government hospitals not exceeding one hundred thousand rupees for those who are physically weak. Nonetheless, the TRC Act and Regulation has failed to incorporate specific health care facilities needed for female victims, especially victims of SGBV.

There seems to be an evident failure to recognize the gender dimension of human rights violations and the fundamental needs of female victims/survivors of the armed conflict. For instance, during the conflict, the majority of those who were subjected to enforced disappearances were male. As a result, women have typically been compelled to bear the responsibility of caring for their family while having to singularly demand for truth and justice in relation to them.

The pain and anguish caused by the uncertainty over the fate of their husbands make many women suffer psychologically. The women also encounter difficulties in claiming ownership over the property of their husbands due to a lack of proof of the death or the continuous missing status of their husbands. The existing exception to this legal conundrum is the so-called "12-year rule", whereby someone who has been continuously missing for 12 years is presumed dead.⁵³ However, this provision too is

⁴⁸ The Right to a Remedy and Reparation for Gross Human Rights Violation, ICJ Practitioners' Guide No 2, Revised Edition, 2018, available at <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>

⁴⁹ Ibid.

⁵⁰ Report of the Special Rapporteur on violence against women, its causes and consequences, Human Rights Council, forty-first session, 24 June–12 July 2019, A/HRC/41/42/Add.2.

⁵¹ Concluding Observation on Sixth Periodic Report of Nepal, Committee on the Elimination of Discrimination Against Women, Para 23, UN Doc. CEDAW/C/NPL/CO/6 (14 November 2018).

⁵² *Purni Maya v Nepal* Communication No 2245/2013, UN Doc CCPR/C/119/D/2245/2013 (HRC, 23 June 2017).

⁵³ Evidence Act (1974), section 32, "Burden of proving that a person is alive: Provided that, when the question is whether a person is alive or dead, it is proved that such person has not been heard of for a period of twelve years by those who would naturally have heard of him/her if he/she had been alive, the burden of proving that he/she is alive is shifted to the person who affirms it."

problematic where enforced disappearances are concerned, as a presumption of death is unacceptable to many spouses until the fate of the disappeared person is conclusively determined. The reparation measures should be duly reformed to allow the spouses of the disappeared to transfer their husbands' property without prior certification of their death.

Sensitization and training on gender issues

Issues specific to women, most especially those which are structural or indirect, will not come to light if the staff of the Commission are not sensitive to these unique problems. However, the TRC Act or regulations do not take into consideration the need to conduct specific trainings for Commissioners or the staffs of the TRC to sensitize them to gender issues.

It is important to ensure that these trainings should include specific information on gender patterns of human rights violation; gender sensitivities that needs to be taken into account during the taking of statements and other forms of data collection; hearings with women witnesses; and gender-sensitive report writing. Such measures are imperative in order to allow for the Commissioners and staff to be more gender-sensitive and better understand the gender dimension of the human rights violations. Such training would be instrumental to create a favourable environment for women victims to share their personal experiences. This would also be very useful for the Commissions to analyse gender patterns of human rights violations.

It is imperative to ensure that the trainings are not one-time sessions but are ongoing, taking into account the experiences of the Commission during the different stages of operationalization. These initiatives can also help establish an institutional culture that is cognizant and supportive of women's issues and self-reflective about how it addresses these issues in its operations.⁵⁴

The UN Secretary General on Gender Perspectives in Transitional Justice has highlighted the importance of conducting trainings for the teams collecting statements on techniques to safely, confidentially and sensitively identify and record the experiences of victims or survivors of sexual violence.⁵⁵ However, the TRC legislation has not incorporated the component of trainings on gender issues. Neither is there any report of any trainings for the officials on gender sensitivity, including for statement takers who are typically the first point of contact with the victims.

As reported during the complaint registration process, the lack of trained female staff in some of the Local Peace Committees (LPC)⁵⁶ has prevented many victims of sexual violence from reporting their cases to the TRC.⁵⁷

Report writing and dissemination

The final report of the Commission should incorporate the analysis of the human rights violations it has investigated, the pattern of human rights violations and recommendations for justice, reparation and reform. The report is the best opportunity to disseminate the truth in relation to gender patterns in human rights violations, experiences which women had undergone during the conflict and specific recommendations for reparations from a gendered perspective. The Commission can draw inspiration from a range of examples from around the world as some truth commissions have incorporated gender issues in a specific chapter, while others have had gender as a crosscutting issue in all sections.

Principle 13 of the UN Impunity Principles requires for the publication of a Truth Commission's report. It states: "For security reasons or to avoid pressure on witnesses and commission members, the commission's terms of reference may stipulate that relevant portions of its inquiry shall be kept

⁵⁴ Truth Commissions and Gender: Principles, Policies and Procedures, International Center for Transitional Justice (ICTJ), July 2006.

⁵⁵ Note by the Secretary General, Gender Perspective in Transitional Justice, Seventy-Fifth Session, A/75/174, 17 July 2020, available at <https://digitallibrary.un.org/record/3883379>.

⁵⁶ Local Peace Committees (LPC) were established in all 75 districts of the country. They were initially designed to sustain peace by providing a common forum for people to locally implement national peace agreements. When the TRC called for the application from the conflict victims about human rights violations during the conflict, the TRC used the LPC to collect cases of conflict from the various districts.

⁵⁷ *Nirupan* (Transitional justice newsletter), July 2016, Center for Legal Studies (CLS).

confidential. The commission's final report, on the other hand, shall be made public in full and shall be disseminated as widely as possible."

The TRC legislation has provided many of the necessary elements that should be included in the report in line with international standards.⁵⁸ For example, it provides that the report should incorporate details on the complaints investigated and proceedings suspended by the Commission, details on the truth and facts discovered from the investigation, the root causes of the armed conflict and matters on policy, legal, institutional, administrative and practical reforms required for non-recurrence of such incidents in the future. Special attention should also be paid to establishing the background, circumstances, factors and context that contributed to the range of human rights violations, including an analysis of institutions, structures, policies and practices and challenges it has faced.

The manner of dissemination of the report to the general public is not specifically mentioned in the TRC law. Nevertheless, the Commission should undertake to ensure wide dissemination of the final report, with appropriate edits to protect victims and survivors, which can enhance the public's access to the truth and generate public support for its implementation. Due care must be given to ensure access to those with special needs, disabilities, persons from marginalized groups, the illiterate and those who speak indigenous languages. A child-friendly version of the report should be made available: in Sierra Leone, for instance, many victims of sexual violence were teenage girls, and the Commission developed a child-friendly version of report.⁵⁹ Similarly, the Commission in Timor-Leste initiated a radio program and a separate video version of the report for wider dissemination.⁶⁰ These good practices should be adapted and modified according to the Nepali context.

Conclusion and Recommendation

The existing transitional justice legislation fails significantly to comply with international law, including in relation to questions around gender and women's human rights. The Government has also failed to amend critical aspects of the legislation, in defiance of the directives by the Supreme Court of Nepal. The Government must act to bring the transitional justice process on the right track by amending the TRC legislation in line with international standards and the Nepalese Supreme Court ruling. In particular, the process should be made more gender sensitive both through the amendment of the TRC Act 2014 as well as TRC and CoID Regulation and the adaption of a gendered approach in the operation and management of the TRC and CoID, as outlined above.

In light of the above analysis, the International Commissions of Jurists (ICJ) makes the following recommendations:

A) To the Government of Nepal:

- i) Amend the TRC Act in line with the Supreme Court's order and Nepal's international obligations;
- ii) Ensure participatory, consultative processes while amending the TRC Act;
- iii) Ensure the participation of women at all levels of recruitment, including in the formation of the recommendation committee, in the appointment of Commissioners of both the TRC and COID and at all levels of staffing with a view to ultimately achieving gender parity;
- iv) Provide gender-sensitivity trainings to the Commissioners and staff of the Commissions in order to enhance their capacity to address gender issues in the operation of the Commissions;
- v) Take all necessary steps to amend the Criminal Code to remove the statutory limitation for filing incidents of rape and other sexual violence, including in relation to acts committed during the armed conflict, in order to ensure justice for all victims;

⁵⁸ Section 27, TRC Act 2014.

⁵⁹ Truth and Reconciliation Commission Report for the Children of Sierra Leone, 2004, available at: <https://www.unicef.org/infobycountry/files/TRCCF9SeptFINAL.pdf>.

⁶⁰ Timor-Leste Commission for Reception, Truth and Reconciliation, Road to Peace, 2005.

- vi) Ensure that amnesties and mediation will not be used to replace criminal responsibility for gross violations of human rights, including rape and other sexual violence.

B) To the Commissions:

- vii) Incorporate a gender-responsive approach in all aspects of the Commissions' work, including in the interpretation and application of the mandate of the Commissions, prosecution of perpetrators and reparation to the victims;
- viii) Incorporate an approach in the Commissions' work that does not restrict women's experiences during the armed conflict only to bodily harm suffered, but also takes account of structural gender biases and its consequences during the period of a conflict;
- ix) Design and implement gender-friendly procedures for investigation, including statement taking, victim and witness protection and other activities of the Commissions;
- x) Design and implement specific reparation policy to address the unique needs of women victims;
- xi) Ensure that the gendered aspects of the armed conflict, including its causes and consequences will be included and analysed in the final report of the Commissions;
- xii) Take measures to ensure the widest possible dissemination of the final report of the Commissions in order to ensure that the wider population is made aware of the truth, most especially in relation to women.

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