

**A Brief Review of Nepal's
Transitional Justice (TJ) Law**
Donors and Supporters Must Be
Vigilant To Ensure Compliance With
Nepal's International Legal Obligations,
While Supporting Its Implementation

November 2024

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I. Introduction

In August 2024, both houses of Nepal's Parliament passed the Amendment Bill to the 'Commission of Inquiry on Enforced Disappearances, Truth and Reconciliation Act (TRC Act)'.¹ This amendment was long overdue. The predecessor of the TRC Act, the TRC Act of 2014, fell short of Nepal's Constitution, and the country's international law obligations. Responding to a writ filed by conflict victims, the Supreme Court (SC) in 2015 declared that some provisions of the 2014 legislation – including those allowing an amnesty for serious crimes; and those concerning mediation between victims and alleged perpetrators irrespective of the nature of crimes and without the victims' consent – undermined judicial independence and rendered the 2014 Act unconstitutional. In its 2015 ruling the SC confirmed that the abovementioned provisions of the 2014 Act violated both Nepal's international legal obligations and earlier rulings of the Court.²

Up until August this year, despite the urgency of the situation, several previous attempts to amend the 2014 TRC Act had failed over the years due to a lack of consensus among political parties. Nonetheless, victims and civil society groups continued to advocate for reforms to the Act, in line with the SC's ruling and international law and standards.

On 9 March 2023, the Ministry of Law, Justice and Parliamentary Affairs tabled a (Third Amendment) Bill to amend the 2014 TRC Act. The Parliamentary process required the Bill to be discussed in the Parliamentary Committee on Law, Justice and Human Rights. Victims and civil society organizations (CSOs) raised the following concerns about the Bill and recommended that they be addressed by amending the draft:

- Classification of violations excluded many violations from the jurisdiction of the Special Court, limiting the jurisdiction of the Special Court only to four categories of violations.³ As a result, there was a conflict with the State's legal obligations under international law to investigate and prosecute a wide range of violations.
- Violations of human rights⁴ that may constitute war crimes or crimes against humanity, if committed in a widespread or systematic manner, were not within the mandate of the TRC or Special Court, allowing the possibility of an amnesty even for those responsible for war crimes and crimes against humanity.
- The Bill was silent regarding the manner in which those perpetrators who did not qualify for an amnesty should be held accountable, creating a potential for a *de facto* amnesty across all cases of human rights violations.
- The process for appointing judges in the Special Court did not align with standards for judicial appointment mentioned in the Constitution, giving rise to the perception that the Court would be considered biased and lacking in independence.
- The Bill lacked provisions for enforcing sanctions, thus requiring either amendment of existing laws or the addition of some provisions to the TJ Bill.
- Limiting the role of the prosecutor's office and Special Court to do further investigation if required in any of the cases recommended by the TJ Commissions.⁵

The ICJ also raised similar concerns and recommended that the Government of Nepal should amend the Bill.⁶

In June 2023 the Parliamentary Committee on Law, Justice and Human Rights set up a sub-committee (Sub-Committee) to examine the concerns raised by victims and CSOs. It widened the definition of human rights violations to include 'any act against the prevailing domestic law, international human rights or humanitarian law committed during the armed conflict'. This formulation would allow most

¹ Adopted on 14 August 2024 and 22 August 2024 by the House of Representative and by the National Assembly respectively. The adopted bill available at: <http://rajpatra.dop.gov.np/welcome/book/?ref=25706>

² Suman Adhikari and Others vs Government of Nepal and Others, Date of Ruling: 2071.11.15 (27.02.2015), Nepal Law Journal 2071, Volume 12, Decision No. 9303

³ That included murder with cruelty or torture, rape, cruel and inhumane torture and enforced disappearances.

⁴ That included killings, sexual violence, physical or mental torture, abduction and hostage taking, illegal detention, beating, maiming and causing physical disability, looting, seizing, destruction or arson of private or public property, forced eviction from one's residence or displacement by any other means, or any inhuman act committed against international human rights or humanitarian law committed against unarmed individual/ civilians or the communities in a targeted or planned manner).

⁵ Concerns raised on definitions of "human rights violations" and "serious violations of human rights" as defined in the Bill, the Special Court's jurisdiction and right to appeal, the issue of statutory limitations, lack of clarity on applicable laws for prosecuting serious crimes, appointment of judges without the constitutionally mandated independent process and lack of a special unit to collect evidence, among others. See Nepal's Victims' Community, '42 conflict victim groups of Nepal raise objections to the faulty transitional justice bill' (21 March 2023), <https://www.nepallivetoday.com/2023/03/21/as-many-as-42-conflict-victim-groups-of-nepal-raise-objections-to-the-faulty-transitional-justice-bill/>

⁶ International Commissions of Jurists and Human Rights Watch "Nepal's proposed law disregards domestic and international legal standards" (23 March 2023), <https://www.icj.org/nepal-transitional-justice-bill-needs-to-protect-victims-not-abusers/>

violations perpetrated during the conflict to be considered as falling within the jurisdiction of the truth commission. In addition, the Sub-Committee made the following recommendations:

- Inclusion of the terminology of 'all parties to the conflict' in the definition to help to bring violations committed by all parties to the conflict under the purview of the TJ mechanisms.
- Inclusion of serious forms of sexual violence under the categories of serious violations requiring prosecution.
- Inclusion of provision enabling an appeal to the Special Court for those victims not satisfied with the reparation.
- Extending the tenure of the Commissions from two years to four years.
- Establishment of specialised units within the TRC to investigate cases involving sexual violence, among others.
- Adding sub-section (5) stating that 'any case filed pursuant to Section 29 of the Main Act shall be assumed to have been filed within the statutory limitation of existing law' to remedy the problem of statutory limitation.⁷

Although the sub-committee formulated recommendations to amend the draft bill in response to some of the concerns raised,⁸ it did not address all of the issues raised by victims and CSOs and some critical shortcomings endured.⁹ In October 2023, the sub-committee submitted its report, featuring its recommendations to amend the 2014 TRC ACT, and highlighted the following questions as issues for the the Parliamentary Committee on Law, Justice and Human Rights to consider.

- a) Would 'murder committed outside of crossfire' or 'murder with cruelty (arbitrary murder)' be included under the category of "serious violations of human rights"?
- b) How to address people who were connected with the conflict and those who have been affected by the armed conflict?
- c) What to do in instances where victims of human rights violations do not freely consent to reconcile?
- d) Whether to predetermine the percentage of reduction of sentence or to just allow for leniency in sentencing stating the grounds and reason?

In the views of members of the Committee, a boarder political consensus among major political parties was needed to address the questions raised by the Sub-Committee as attested by the fact that members of the Sub-Committee themselves could not reach consensus on those questions.

Eventually, in early July 2024, a political consensus was reached, leading to the formation of a Task Force comprising leaders from major political parties, such as the Nepali Congress (NC); the Communist Party of Nepal (Unified Marxist-Leninist), CPN (UML); and the Communist Party of Nepal (Maoist Centre). The Task Force was mandated to build consensus on the issues raised by the Sub-Committee.

On 7 August 2024, the Task Force submitted its recommendations to the top political leaders of major political parties, and the Bill was passed on 14 August 2024 by the House of Representatives, and eventually signed into law by the President on 29 August 2024.

The passing of the Amendment Bill marks a significant step, as the main political parties came together, after nearly 20 years, to move the transitional justice (TJ) process forward. The Amended TRC Act addresses several of the concerns expressed by the Supreme Court of Nepal, victims, and civil society. However, the Act still leaves certain critical issues unresolved. The failure to address these outstanding concerns may fall foul of Nepal's international legal obligations.

The objective of this briefing paper is:

- i. to provide insights on the **main provisions** in the Amended TRC Act;

⁷ Sub-Committee's Report on the Bill Prepared for the Amendment of the Investigation of Enforced Disappeared Persons, Truth and Reconciliation Commission Act 2014 (Third Amendment), number 9 (1).

⁸ Concerns raised on definitions of "human rights violations" and "serious violations of human rights" as defined in the bill, the Special Court's jurisdiction and right to appeal, the issue of statutory limitations, lack of clarity on applicable laws for prosecuting serious crimes, appointment of judges without the constitutionally mandated independent process and lack of a special unit to collect evidence, among others. See International Commission of Jurists, 'Nepal: Transitional Justice Bill needs to protect victims, not abusers' (24 March 2023), <https://www.icj.org/nepal-transitional-justice-bill-needs-to-protect-victims-not-abusers/>, accessed 10 October 2023.

⁹ Concerns raised on definitions of "human rights violations" and "serious violations of human rights" as defined in the bill, the Special Court's jurisdiction and right to appeal, the issue of statutory limitations, lack of clarity on applicable laws for prosecuting serious crimes, appointment of judges without the constitutionally mandated independent process and lack of a special unit to collect evidence, among others. See International Commission of Jurists, 'Nepal: Transitional Justice Bill needs to protect victims, not abusers' (24 March 2023), <https://www.icj.org/nepal-transitional-justice-bill-needs-to-protect-victims-not-abusers/>, accessed 10 October 2023.

- ii. to note **positive provisions** in the Amended TRC Act,
- iii. unpack critical **unresolved and enduring human rights concerns**; and
- iv. provide **recommendations** with a view to ensuring that the mechanisms mandated under the Amended TRC Act interpret and apply its provisions in a manner that complies with Nepal's international law obligations, the country's Constitution, and relevant Supreme Court rulings.

II. Main provisions in the amended TRC Act

i. Inclusion of major violations in the mandates of the TJ mechanisms

The Act tries to bring all major violations under the mandates of the Truth and Reconciliation Commission (TRC) and of the Commission of Investigation on Enforced Disappearances Persons (CIEDP). It classifies human rights violations that took place during the conflict into two categories: 'violations of human rights'¹⁰ and 'serious violations of human rights'.¹¹ This classification is crucial as it determines the legal pathway for seeking redress and the types of remedies that are available.

"Violations of human rights" are defined as "any act, except serious violations of human rights, committed in contravention of existing Nepali law, international human rights, or humanitarian law during the armed conflict by the parties involved, targeting unarmed individuals or communities, or committed in a planned manner."¹² "Serious violations of human rights" are defined as "rape or other forms of serious sexual violence, "intentional or arbitrary killing", "enforced disappearances (where the whereabouts of the person remain still unknown)" and "inhuman or cruel torture," targeting 'unarmed individuals or communities, or committed in a "planned manner".¹³ It is unclear whether the reference to "existing Nepali law" means the law at the time of the commission of an alleged crime or current law. It is widely assumed that since the law has come into force now, the reference to existing law means the law at present.

ii. Provision of amnesty

The Act prohibits the granting of an amnesty for "serious violations of human rights," but allows it under certain conditions in cases of "violations of human rights". With respect to amnesties for perpetrators of "violations of human rights", the Act sets out the following conditions that must be met for perpetrators to be eligible to an amnesty although it is unclear whether fulfilment of simply one or all of these conditions is required.¹⁴

- a) perpetrators' admission of guilt;¹⁵
- b) expression of regret and apologies to the victims to their satisfaction, before the Commission; and¹⁶
- c) a commitment not to repeat such acts in the future.¹⁷

iii. Prosecution for serious violations

Under the Amended TRC Act, if the TRC or CIEDP uncovers evidence of "serious violations of human rights", the case must be referred to the Attorney General for legal action, denoting prosecution.

In addition, the Amended TRC Act provides the establishment of a three-member Special Court to try and resolve¹⁸ cases involving "serious violations of human rights" referred to it by the Attorney General or public prosecutor authorized by the Attorney General.¹⁹ Under the Amended TRC Act, appeals against

¹⁰ Section 2(j) of the TRC (Third Amendment) Act, 2014

¹¹ Section 2(j1) of the TRC (Third Amendment) Act, 2014

¹² Section 2(j) of the TRC (Third Amendment) Act, 2014

¹³ Section 2(j1) of the TRC (Third Amendment) Act, 2014

¹⁴ Section 26 of the TRC (Third Amendment) Act, 2014

¹⁵ Section 26(4) (a) of the TRC (Third Amendment) Act, 2014

¹⁶ Section 26(4) (b) of the TRC (Third Amendment) Act, 2014

¹⁷ Section 26(4) (c) of the TRC (Third Amendment) Act, 2014

¹⁸ Section 29a(1) of the TRC (Third Amendment) Act, 2014

¹⁹ Section 29(3)(4) of the TRC (Third Amendment) Act, 2014

the Special Court's decisions, such as convictions and acquittals, will be heard by a designated joint bench of transitional justice in the Supreme Court, whose justices will be selected by the Chief Justice.²⁰

iv. Reparation for victims

The amended TRC Act also recognizes reparation as a victims' right,²¹ and states that the right to reparation is not negated by certain circumstances, such as:

- a) whether or not the identity of the perpetrator is known,²²
- b) whether or not mediation between the victim and the perpetrator takes place;²³
- c) whether or not a recommendation has or has not been made to grant an amnesty or, instead, to initiate legal proceedings against the perpetrator.²⁴

The Amended Act also provides that the family members of people who were killed, as well as those those who were injured, or disabled during the armed conflict - whether security personnel, their family members, or persons who had been previously excluded from relief programmer - will be granted necessary relief and assistance, including reparations. For the first time, the Amended Act acknowledges the reparative rights of those who became victims of landmines, explosive remnants of war (ERWs), or other explosive substances during or after the conflict.²⁵

The Amended Act emphasizes prioritizing victims of rape, sexual violence and torture when recommending reparations.²⁶ It also introduces provisions allowing the Commission to operate or bring into operation programs related to collective reparations for victims, where the community as a whole has been affected, their families depended on them, and communities affected by the armed conflict.²⁷ Importantly, if a victim is dissatisfied with the reparation granted, they can appeal to the Special Court, stating the reasons and grounds for their dissatisfaction.²⁸

v. Tenure of the Commission

The Act provides that the tenure of the TRC and the CIEDP members will be four years.²⁹ However, this initial term may be extended if the Commissions are unable to complete their work related to the peace process within the stipulated period, based on an assessment of progress by the Government of Nepal.³⁰ Nonetheless, if the Commissions declare the completion of their work related to the peace process before the set period, the Commissions' mandate will be considered concluded from the date of such declaration.³¹

vi. Complaints of conflict-related sexual violence

The Amended TRC Act requires that the victims of conflict-related sexual violence (CRSV), who have previously not registered their cases with the Commission will have a three-month window for a one-time to do so.³² The window to file the complaints begins once the Chairperson and members are appointed.

Although it is a welcomed provision, this is not sufficient (see discussions in section 3). The TRC and CIEDP, established under the TRC Act of 2014, had already collected complaints from victims (the TRC has recorded 60316 complaints while the CIEDP has registered 3288 cases).³³ However, many victims, especially of CRSV, had refused to register their case with the TRC. Their reluctance stemmed from multiple factors, including the stigma attached to sexual violence, concerns about confidentiality, and a deep mistrust of the Commissions, which were perceived to be operating under flawed provisions.

²⁰ Section 29e(2) of the TRC (Third Amendment) Act, 2014

²¹ Section 22a of the TRC (Third Amendment) Act, 2014

²² Section 22a(2)(a) of the TRC (Third Amendment) Act, 2014

²³ Section 22a(2)(b) of the TRC (Third Amendment) Act, 2014

²⁴ Section 22a(2)(c) of the TRC (Third Amendment) Act, 2014

²⁵ Section 22a(3) and 25a(c) of the TRC (Third Amendment) Act, 2014; Section 25a of the TRC (Third Amendment) Act, 2014

²⁶ Section 23(1)(1b) of the TRC (Third Amendment) Act, 2014

²⁷ Section 23(2)(2a) of the TRC (Third Amendment) Act, 2014

²⁸ Section 23(2) (2b) of the TRC (Third Amendment) Act, 2014

²⁹ Section 38(1) of the TRC (Third Amendment) Act, 2014

³⁰ Section 38(2) of the TRC (Third Amendment) Act, 2014

³¹ Section 38(3) of the TRC (Third Amendment) Act, 2014

³² The two commissions have already registered approximately 65,000 cases, and many victims opted out to register their complaints for lack of trust among others. Section 13(6a) of the TRC (Third Amendment) Act, 2014

³³ TRC and CIEDP remains without Office Bearer for a Year (Republica 17 August 2023) accessed <<https://myrepublica.nagariknetwork.com/news/trc-and-ciedp-remain-without-office-bearers-for-a-year/>>

Although the TRC officially recorded around 308 CRSV cases,³⁴ civil society organizations estimate thousands more have not been submitted due to fears of inadequate protection and insufficient confidentiality protocols.

vii. Mediation between victims and perpetrators

If the victim and the perpetrator submit a request for mediation to the Commission, the Amended Act mandates the Commission to facilitate mediation between them in cases of 'human rights violations'.³⁵ While facilitating such mediation, the Commission will require the perpetrator to express remorse for their actions and to apologize to the victim. Moreover, during the mediation process, the Commission may also ask the perpetrator to provide appropriate compensation to the victim for the harm caused. Furthermore, Commissions may promote mediation by organizing various activities. Mediation can also be done with the family members if the victim is deceased.³⁶

viii. Specialized units inside the commission

The Amended TRC Act also provides for the creation of several specialized units within the Commissions to aid in fulfilling their mandates effectively. These include the Truth Finding and Investigation Unit, Reparation Unit, Unit for Investigating Serious Violations of Human Rights, Unit for Investigating Rape and Sexual Violence and Victim Coordination Unit.³⁷

ix. Transitional justice basket fund

Another feature of the Amended Act is the establishment of a Trust Fund, the secretariat of which is to be housed at the Ministry of Law, Justice, and Parliamentary Affairs.³⁸ Contributions to this fund are to come from federal, provincial, and local governments; conflict parties; individual or organizational donations within Nepal; and foreign governments or international organizations.³⁹ However, the contribution to this fund from foreign governments or international organizations requires prior approval from the Ministry of Finance.⁴⁰ The fund is provisioned to support the Commissions' investigation efforts, providing relief and reparations, and fulfilling the broader objectives of the Act.⁴¹

x. Leniency in sentencing

The Amended Act allows the Attorney General, or public prosecutor authorized by Attorney General, to claim a reduction in sentencing, capping it at 25% of the punishment prescribed by prevailing law, for "serious violations of human rights" (excluding cases of rape and serious sexual violence), and for "violations of human rights" that are neither recommended for amnesty nor mediation.⁴²

III. Positive aspects in the amended TRC Act

The amended Act introduces a more comprehensive framework for TJ, trying to leverage different components of TJ for each other's benefit. Compared to the TRC Act passed in 2014 and different versions of the Bill introduced in the parliament, this Act marks the following positive changes:

- It tries to bring major violations of conflict period to the jurisdiction of TJ commissions,
- It prohibits amnesty for "serious violations of human rights";
- It prevents mediation between victims and perpetrators without victims informed consent,
- It makes the victim's consent mandatory for amnesty in cases categorized as "violations of human rights",
- It recognizes reparation as a victims' right, unaffected by the victim's identity, mediation status, or amnesty recommendations;
- It envisions different units in the TRC and CIEDP;
- It recognises the discrimination faced by CRSV victims and prioritise them for interim relief,

³⁴ Global Survivors Fund, 'Reparations For Survivors of Conflict-Related Sexual Violence' (June 2022) 2 < https://www.globalsurvivorsfund.org/fileadmin/uploads/gsf/Documents/Resources/Global_Reparation_Studies/GSF_Country_Sheet_Nepal_EN_June2022_WEB.pdf > accessed 10 October 2023.

³⁵ Section 22(1) of the TRC (Third Amendment) Act, 2014

³⁶ Section 22(5) of the TRC (Third Amendment) Act, 2014

³⁷ Section 31a(1) of the TRC (Third Amendment) Act, 2014

³⁸ Section 23a of the TRC (Third Amendment) Act

³⁹ Section 23a(1) (2) of the TRC (Third Amendment) Act, 2014

⁴⁰ Section 23a(3) of the TRC (Third Amendment) Act, 2014

⁴¹ Section 23a(4) of the TRC (Third Amendment) Act, 2014

⁴² Section 29(6) of the TRC (Third Amendment) Act, 2014

- It has provision for the TJ basket fund to support the work of the commissions.

IV. Unresolved concerns

Despite these positive changes, significant challenges and gaps remain, resulting in the Act's ultimate failure to comply with Nepal's obligations under international law. This is especially the case as a result of the Amended TRC Act's failure to address all crimes under international law, including war crimes and crimes against humanity, and to ensure that punishments be commensurate with the gravity of the offences for which they are imposed. The following section highlights problematic provisions, which have the potential to undermine international law and perpetuate impunity, and which, therefore, are key concerns that require further amendments and careful consideration by the TRC, CIEDP, prosecutors, and the Special Court to ensure that justice is not compromised.

i. Arbitrary Classification of Violations

One of the problems arises from the dual classification of the violations, as in "violations of human rights" and "serious violations of human rights". While the introduction of this classification system reflects some progress as it seems to bring major violations during the conflict under the jurisdiction of the TJ mechanisms, such as the TRC, the distinctions raise several concerns. First, it undermines international law obligations with respect to accountability and prevents victims from exercising the right to access justice and an effective remedy.⁴³ The category of 'serious violations of human rights' does not encompass all violations of human rights that States are duty-bound to investigate and prosecute under international law. The way torture, enforced disappearance and arbitrary killings are included in the Amended Act also creates a situation where some of these violations do not fit neatly into one category, leading to real risk of inconsistent and arbitrary treatment by the TRC.

As a State party to international humanitarian law and international human rights treaties, such as the Four Geneva Conventions, the International Covenant on Civil and Political Rights (ICCPR), and the Convention against Torture (CAT), Nepal is obligated to investigate, and when evidence so warrants, prosecute and punish those involved in *gross violations* of human rights and in crimes that are recognized as crimes under international law. These include extrajudicial executions, torture, enforced disappearance, rape, and other forms of sexual violence of comparable gravity. The United Nations Office of the High Commissioner for Human Rights (OHCHR) has also reiterated that such gross violations must be subject to investigation and prosecution.⁴⁴ However, under the Act, some of these violations have been characterized as 'violations of human rights', where amnesty may be granted, contravening international law. We will set out in detail below the different flaws in the text of the law allowing such interpretation.

Furthermore, the Amended TRC Act also fails to explicitly include war crimes and crimes against humanity within the definition of *serious violations of human rights*. Under the Four Geneva Conventions, which Nepal has ratified, the State is obligated to investigate war crimes. Violations, such as mutilation, looting, hostage-taking, use of child soldiers, may amount to war crimes and crimes against humanity. Similarly, certain violations of human rights, such as arbitrary deprivation of liberty or other severe deprivation of physical liberty, if committed as part of a widespread or systematic pattern, constitute crimes against humanity, which also require investigation and prosecution under international law. By excluding these crimes from the definition of *serious violations of human rights*, the Act limits the scope of criminal conduct that under international law must be prosecuted, and thus fails to comply with Nepal's international obligations and the decisions of the Supreme Court of Nepal.

ii. Problematic Thresholds to qualify violations

The Amended TRC Act includes thresholds of "unarmed," "civilian" and "targeted" remain in place for several violations, with exceptions only for rape and "serious sexual violence". The inclusion of these thresholds may result in denial of access to justice for some victims and/ to effective remedies, including reparation and other civil remedies for many who suffered violations during the conflict.

The requirement of "targeting unarmed" persons or "communities" could result in potential loopholes if perpetrators argue that their actions were directed at armed individuals or communities, even if civilians were affected. The ICJ is aware of many incidences where armed persons were apprehended, tortured and in some incidents subsequently being killed or disappeared. In some cases, members of the security forces dressed the bodies of the individuals they had killed putting them in combat uniforms

⁴³ Joint Press Statement, 'Nepal: New Transitional Justice Law a Flawed Step Forward' (20 August 2024) <https://www.icj.org/nepal-new-transitional-justice-law-a-flawed-step-forward/>, accessed on 11 October 2024.

⁴⁴ OHCHR: The Nepal Conflict Report: Available at: <https://www.ohchr.org/en/documents/country-reports/nepal-conflict-report>

and placed weapons in corpses' hands or next to the bodies, and then proceeded to take photographs in an effort to corroborate their version of such killings as of 'encounter' or 'cross firing', incidents. Thus, the criterion of 'targeted against unarmed civilians' may therefore be interpreted in such a way as to put many violations outside the ambit of the TJ mechanisms, leading to impunity.

The ICJ considers that, even if the person/victim was armed prior to being tortured, raped, or subject to enforced disappearance, those crimes could not have been committed without having placed the victim under the control of the perpetrator. Therefore, the victims of such human rights violations would always qualify as "unarmed persons". The same logic applies to killings of people who may have been armed but who were clearly *hors de combat* prior to being killed.

iii. Ambiguity in Defining Torture

The Amended Act introduces the term "inhuman or cruel torture" as a serious violation. This is problematic because torture, by its very nature, is inhuman and cruel. The prohibition of torture and the requirement that it be criminalized is absolute under international law.⁴⁵ No qualifier, such as "inhuman or cruel", should be used to diminish the gravity of torture or justify leniency in its classification.

iv. Narrow Definition of Enforced Disappearances

The Amended Act restricts the definition of enforced disappearances to cases where the whereabouts of the person remain unknown. This excludes individuals who were forcibly disappeared for months or years and later resurfaced, leaving them outside the jurisdiction of the CIEDP. The International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) defines enforced disappearance more broadly, including cases where the person was deprived of their liberty by the State, even if they reappeared later.⁴⁶

These concerns in classification and definition of violations require further amendments to the Act to ensure that gross violations, war crimes, and crimes against humanity are fully addressed and that the rights of victims to access to justice and effective remedies are protected without compromise.

In addition to the gaps and concerns created by the definition of violations, there are other concerns in the Amended TRC Act those includes following.

v. Problem relating to Amnesty

Although the Amended TRC Act prevents amnesty for "serious violations of human rights" it provides a path for amnesty for purportedly 'non-serious' violations, defined by the Act as "violations of human rights", if certain conditions are met. The arbitrary classification of violations could lead to inconsistent or unjust applications of the amnesty provision, even in cases that should properly be characterized under the Act as "serious violations of human rights violations", such as instances where the relevant conduct amounted to crimes under international law.

The Act allows for certain violations, which under international law would be characterized as serious, such as mutilation, prolonged arbitrary and incommunicado detention, to be categorized as "violations of human rights" and for them to be considered as less serious than "serious violations of human rights", and thus allows perpetrators to escape prosecution by providing them with the opportunity to apply for amnesties. This inconsistency would directly contravene Nepal's obligations under international law to hold those responsible for serious human rights violations accountable. This inconsistency also undermines Nepal's constitution and the decisions of the Supreme Court.

vi. The Jurisdiction of the Special Court and the Number of Judges

The Special Court is to consist of three judges.⁴⁷ However, the Court's jurisdiction now has been extended to include not only cases of serious violations of human rights, (the Bill presented in the

⁴⁵ Article 2, Article 3 of Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT) 1984; Article 7 of the International Covenant on Civil and Political Rights (ICCPR) 1966; Common Article 3 of Geneva Conventions.

⁴⁶ Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) 2006.

⁴⁷ Section 29a(1) of the of the TRC (Third Amendment) Act, 2014: For the purpose of adjudication and settlement of the cases related to the serious violations of human right committed during the conflict, the Government of Nepal shall form a three-member Special Court in consultation with the Judicial Council by publishing a notice in the National Gazette.

parliament in March 2023 envisioned the jurisdiction of the Court only for the adjudication of 'serious violations of human rights) but also "violations of human rights" that are not eligible for amnesty,⁴⁸ as well as complaints related to reparations.⁴⁹ The three-judge structure, initially designed for a more limited jurisdiction focused solely on "serious violations of human rights" will be insufficient to handle the volume and complexity of cases. Therefore, an amendment to the Act is necessary to allow for the appointment of more judges as deemed necessary by the Court to handle its broader responsibilities effectively.

vii. Proportionality of Sentencing

As noted earlier, the Amended Act permits the Attorney General or another authorized public prosecutor, in cases other than rape or other forms of "serious sexual violence", to request a 75% reduction in the punishment prescribed by existing national law for "serious violations of human rights". This reduction may be requested based on the circumstances at the time of the incident, the reasons for the violation, and the principles of transitional justice.⁵⁰

While human rights bodies have generally not found lenient sentences to violate treaty obligations, they have emphasized that, under international law, leniency must be consistent with the principle that criminal sanctions must be commensurate with the gravity of the crimes for which they are imposed, which is a cornerstone of justice under international law and a general principle of criminal law. Grounds for sentence mitigation may include the age, personality, level of participation, or health of the perpetrator. While transitional justice contexts allow some flexibility in sentencing policy, the legitimacy of reduced sentences depends on whether they meet broader justice and accountability goals.

This provision in the Amended Act, and the way in which it may be implemented, may give rise to concern about the failure of certain sanctions to be commensurate with the gravity of the crimes for which they are imposed. If lenient sentencing is applied too broadly, it may undermine efforts to combat impunity for gross violations of human rights and could compromise the independence of the judiciary. Sentencing and punishment mitigation should be the sole prerogative of the courts, based on their assessment of whether the circumstances calling for such mitigation are fulfilled.

viii. Removal of the Suspension Provision for Alleged Perpetrators

The suspension of alleged perpetrators of human rights violations from public duties pending investigation is crucial to ensure accountability, prevent interference with legal proceedings, and guarantee impartial investigations. The previous iteration of the Bill included a provision for the suspension of officials under investigation for human rights violations.⁵¹ This change is problematic. Article 2(3) of the ICCPR, to which Nepal is a party, guarantees the right to an effective remedy, including the right to a fair and impartial investigation. Jurisprudence from the Human Rights Committee (HRC), which monitors compliance with the ICCPR, stresses that investigations must be conducted free from undue influence, especially when the alleged perpetrator holds a position of power. In such cases, suspension from public office is often necessary to prevent interference with legal proceedings.

Other regional human rights bodies have also reiterated this principle. The "Basic Principles and Guidelines on the Right to a Remedy and Reparation" underscore the need for States to ensure investigations are free from interference, which includes suspending officials under investigation. In light of this, the removal of this provision weakens the Act's capacity to ensure impartial investigations and could undermine public confidence in the justice process.

⁴⁸ Section 25(1) of the of the TRC (Third Amendment) Act, 2014: The Commission should refer the cases to the Attorney General in which the Government of Nepal requires to be a plaintiff, concerning individuals involved in human rights violations where mediation has not been done in accordance with Section 22 or where they have not been recommended for amnesty as prescribed under Section 26 and in the other cases of human rights violations, the Commission should inform the concerned victim or their legal representative.

⁴⁹ Section 23(2) (2B) of the of the TRC (Third Amendment) Act, 2014: A victim may apply to the Special Court if they are not satisfied with the reparation recommended by the Commission by revealing the basis and reason behind such dissatisfaction. The Court may issue appropriate order if the basis and reason are deemed reasonable.

⁵⁰ Section 29(6) of the of the TRC (Third Amendment) Act, 2014: While filing case pursuant to this section, the Attorney General or the public prosecutor authorized by him/her, can make a claim for a twenty-five percent sentence for serious violation of human violations, except rape or serious sexual violence, in place of the sentence as provided for in the then prevailing laws taking into consideration of the situation as per sub-section (2), the circumstance and reason of the incident, and the principles of transitional justice.

⁵¹ Section 18 of the Bill introduced on 15 July 2022: If a case is filed, pursuant to this section, against a person occupying a public position, he/she shall be automatically deemed to have been suspended the position until such a case is decided.

ix. Management of Transitional Justice Basket Fund

The Act envisions a Transitional Justice (TJ) Basket Fund to support the work of the TJ commissions, drawing from multiple sources. These include resources from the Government of Nepal, contributions from foreign donors, payments made by perpetrators, and donations from individuals and national organizations. The fund is to be administered by a committee led by the Ministry of Law, Justice, and Parliamentary Affairs.⁵² While having a dedicated fund for the TJ mechanisms is positive, the law mandates that the Commissions have to seek prior approval from the Ministry of Finance of the Government of Nepal before accepting any foreign donor funding. This requirement, along with the Ministry of Law administering the fund, raises concerns about the Commissions' independence and autonomy in securing resources for their work. Furthermore, the law requires the establishment of a seven-member committee to provide policy advice for the fund's management but does not specify the composition of this committee. This ambiguity presents an opportunity for advocacy to ensure that the Commissions receiving required funding to carry out its mandate and the committee is inclusive, with representatives from victims' groups, civil society organizations (CSOs), and donors. Such representation would promote equitable allocation of the funds and help prevent manipulation or misuse.

x. Mainstreaming Gender in the Work of the Transitional Justice Bodies

Section 2(j1)(1) of the Amended TRC Act categorizes rape and other serious forms of sexual violence as "serious violations of human rights," making rape a crime for which perpetrators cannot be amnestied. The Act also provides three months for survivors to report their cases to the Commissions if they have not done so to the previous commission⁵³ and includes a provision for a separate unit within the Commission to handle cases of Conflict-Related Sexual Violence (CRSV).⁵⁴ However, the definition of rape in Nepal's Criminal Code is narrowly framed, recognizing only acts of rape perpetrated against women or girls.⁵⁵ This excludes men, boys, and possibly transgender women and men from seeking justice for rape and other forms of sexual violence committed against them. Although the Criminal Code does recognize certain forms of non-consensual sexual acts, such as anal and oral penetration, as sexual violence, it fails to address other forms of sexual violence, such as sexual slavery, enforced pregnancy, forced prostitution, forced sterilization, forced nudity, mutilation of genitals or breasts, and forced circumcision. No specific laws exist to address these issues.

The TRC Act also does not define what constitutes "serious forms of sexual violence," leaving room for amnesties for certain forms of sexual violence.

Furthermore, investigating cases of rape and other forms of sexual violence from the armed conflict period is particularly challenging, as gathering documents, medical examination reports and other corroborating evidence becomes difficult when the incidents occurred more than a decade ago. It is essential that the Special Court be empowered to develop policies and guidelines on the rules of evidence, allowing for the use of contemporaneous evidence and documentation from the United Nations and national and international human rights organizations when assessing these cases. As the Amended TRC Act fails to define rape and other forms of sexual violence as war crimes or crimes against humanity, in line with international law and standards, the TJ commissions have a critical responsibility to interpret their mandates in a way that recognizes the systemic nature and patterns of these crimes. They should assess whether such crimes occurred and make necessary recommendations for legal reforms to ensure justice for all victims.

It is important to ensure women's participation in all transitional justice processes. Representation of women does not include brining victims to participate or include their agenda and issues, but also as the Commissioners, staffs of the TJ bodies. It is important to integrate a gender-based criteria with other mandated qualifications and requirements in selecting commissioners and staff of the TJ Commissions and the Courts. Similarly, a gender balance must be maintained when recruiting staff and appointing experts, including statement-takers, researchers, investigators and legal and psychosocial counsellors to create an empowering environment for female victims to approach the commission and share their experiences.

The Human Rights Council has recognized 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.⁵⁶

⁵² Section 23a.(6) of the TRC (Third Amendment) Act, 2014

⁵³ Section 13(6a) of the TRC (Third Amendment) Act, 2014

⁵⁴ Section 31a(1)(d) of the TRC (Third Amendment) Act, 2014

⁵⁵ Section 219(2) of the National Criminal Code, 2017

⁵⁶ Human Rights Council Resolution on human rights and transitional justice, UN Doc. (A/HRC/RES/21/15 (2012)), para. 16.

The Amended TRC Act provides that there must be at least one female Commissioner among the five members of the Commission.⁵⁷ 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.⁵⁸ This constitutional stipulation must therefore be made use of during the appointment process of Commission's members as its scope is wider than the existing TRC legislation.

V. Recommendation

Considering the serious flaws in the Amended TRC Act, it is recommended to the Government of Nepal that:

- The TRC Act is further amended to bring necessary changes so that the Act fully complies with international standards considering the concerns raised above. Unless the Act is amended, Government and all TJ mechanisms should refrain from developing any policies, guideline and conduct any acts under the Amended Act that undermine international law.
- Create an enabling environment for the TRC Commissioners to be appointed following a transparent process, considering the merits and credentials of the Commissioners rather than their close ties to the leaders of political parties.
- Considering gender parity and inclusion in selection of Commissioners and staffs of the TJ mechanisms by including multiple female commissioners to address gender-specific issues and promote equitable decision-making in transitional justice,
- Request international community to accompany and monitor the process and seek technical assistance where required.
- Creation of a transparent platform to coordinate donor support to the TJ commissions, including the TJ basket fund. This is also to ensure that the fund is allocated proportionately across all components of TJ, including reparation and prosecution, rather than being disproportionately used for one aspect.

Donors and International Community play important role in Nepal. ICJ recommends to donors and international community to be mindful of flaws in the Amended Act and Nepal's failed history of Commissions and impunity and make a clear and coordinated policy to make their support conditional on the following:

- Appointment of independent, competent commissioners with gender parity, ensuring a diversity in the commissions.
- Presentation of the operational plan by the Government ensuring its full support to the Commissions to interpret their mandates in such a way that it does not undermine international law pending the amendment of the Act that aligns more effectively with international human rights standards, Nepal's international obligations, and transitional justice best practices.
- Making sure of existence of support system to victims and CSOs to ensure their full participation in the process.
- Having support mechanisms to initiatives, where victims, CSOs, international donors, TJ Commissions, and the concerned government entities meet regularly to assess the work of the Commissions and support each other to fulfil the mandates of TJ Commissions and the courts.
- Government's willingness to accept technical supports both from national and international organisations to improve quality of investigation, prosecution, adjudication, mediation, forensic, archiving among others.
- Ensuring gender-sensitive and gender-responsive working procedures of the commissions that are not limited to having women as commissioners but include training for staff on the gendered aspects of the TJ process, gender-friendly reparation programmes involving relevant stakeholders. This also includes supporting the commissions to develop gender-friendly, rules of evidence in cases of CRSVs.

⁵⁷ Section 3(2) of the TRC (Third Amendment) Act, 2014.

⁵⁸ Article 42 of the Constitution of Nepal 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.

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