



Index: ASA 31/8817/2018

Preliminary Comments

Draft Bill to Amend the Act on Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2018

Amnesty International, the International Commission of Jurists (ICJ) and TRIAL International welcome the opportunity to comment on the draft "Bill to Amend the Act on Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2018". These preliminary comments have been developed in response to a specific request by the government made at a closed-door consultative meeting on 21 June 2018 in Kathmandu.

In response to the government of Nepal's request, the undersigned organizations have conducted an initial review of the draft bill and prepared this note offering a preliminary analysis of the positive aspects as well as the shortcomings of the proposed amendment bill. The analysis is undertaken in light of international law and human rights standards applicable to Nepal, as well as domestic law and jurisprudence relevant to the bill.

I - Preliminary Considerations

Several preliminary issues deserve attention before consideration of the draft bill, which concern proper process and may affect the viability of its implementation. These issues are related to meaningful consultation (particularly with victims), the need to genuinely translate into practice the willingness of the government to establish an effective transitional justice process, and compliance with decisions of Nepal's Supreme Court.

Meaningful Consultation

We appreciate the effort made by the government to seek feedback from governmental and non-governmental members of the international community. We must express our concern, however, that the drafting process for the bill has not been adequately consultative and has lacked sufficient transparency. The bill in its current form fails to adequately address concerns that have been clearly and repeatedly raised by the victims of the conflict and civil society organizations, most recently in a set of common minimum demands set out by the Conflict Victim's Common Platform (CVCP) on 17 July.¹ Consultations to date have been more in the nature of an all or nothing offer,

¹ Preliminary comments of Conflict Victims' Common Platform (CVCP) on proposed TJ Act to amend Commission of Inquiry on Enforced Disappearances, Truth and Reconciliation Act, published by the Conflict Victims' Common

with the implicit message that aspects of the draft are not negotiable. A piecemeal approach to amendment, which has been the method of the consultations thus far, risks missing the relationship between provisions, which is potentially a decisive omission in determining the effectiveness of the transitional justice process.

We recall that in the past, the lack of consultative and participatory law-making processes has resulted in the enactment of flawed legislation which has led to effective revision through judicial review.² Only a genuine consultative process could avoid such outcomes by ensuring broad-based public acceptance of the law, which should be at the core of any sincere transitional justice (TJ) process. Indeed, the process needs to be more than consultative – it needs to be substantially responsive to the self-identified needs of victims. A genuine, transparent and inclusive consultation process will strengthen the legitimacy as well as the substance of the bill.

Political Will

A second consideration is the need for the government, including the political leadership at the highest levels, to strongly and publicly commit itself to engaging with the transitional justice process in its entirety. While members of the drafting team have assured victims and civil society that the government is committed, there has been little public evidence that political leadership and high-level Maoist and Nepal Army personnel are willing to submit themselves to any form of accountability. There have been few public pronouncements supporting accountability for past violations. Indeed, in recent weeks and months, the political leadership and Nepal Army have taken steps that appear contrary to such a commitment.

International experience suggests that without demonstrable and genuine willingness to establish an effective transitional justice process, clearly communicated to the public, such endeavours are unlikely to be successful and international support to them is unlikely to be effective.³ With this in mind, we call on the political leadership to take immediate steps through public statements and actions, that will illustrate their commitment to accountability and respect for the rule of law by complying with court decisions addressing conflict-era violations.

Compliance with Rulings of the Supreme Court of Nepal

The drafting team has expressed commitment to comply with decisions of Nepal's Supreme Court. This is a laudable and welcome commitment. However, it is essential that the bill not only complies with the "letter" of the Supreme Court's jurisprudence

Platform (17 July 2018); See also, the CVCP's briefing paper "Transitional Justice in Nepal: Way Forward, 2018", p. 5.

² See for example *Suman Adhikari et al. v. Government of Nepal*, (decision dated 26 February 2015), NKP 2071, p. 2071; *Madhav Kumar Basnet for JuRI-Nepal et al. v. Office of the prime minister et al. and Ram Kumar Bhandari et al. v. Government of Nepal et al.* (decision dated April 1, 2013) NKP 2070, P.1101;

³ Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, *Report to the General Assembly*, UN Doc. A/HRC/8/3 (2 May 2008) at para. 54: "If a commission is not established in accordance with international standards, the international community should not adopt a "wait and see" approach. Rather, it should promptly draw attention to the inadequacies and advocate implementation of necessary reforms. Where a Government appears to have a genuine will to establish an effective commission, but lacks the necessary expertise, funding or resources, international assistance will be appropriate" (emphasis added).

(‘no amnesties for serious human rights violations’), but also the “spirit” and effectiveness of those decisions (ensuring that the TJ process does not result in *de facto* amnesty).

The Supreme Court’s jurisprudence on issues around transitional justice is generally in accordance with and makes frequent reference to international law.⁴ The Court has set established judicial precedents for bringing relevant laws and procedures into line with international law and standards and the Court’s earlier decisions, among them:⁵

- (a) Prohibition on amnesty, pardon or case withdrawal for gross human rights violations such as extra-judicial killings, enforced disappearance, torture including rape and other acts of sexual violence;⁶
- (b) The abolition of the statute of limitations for gross human rights violations, including enforced disappearance;
- (c) A duty to investigate and prosecute crimes under international law;
- (d) Criminalization of serious crimes under international law as specific offences under domestic law, including war crimes, torture and enforced disappearance;
- (e) Preservation of victims’ rights to seek a remedy in the court for conflict-era human rights, notwithstanding the establishment of transitional justice bodies;
- (f) The need to guarantee appropriate reparations to victims;
- (g) A requirement that “reconciliation” proceeds only with the informed consent of victims;
- (h) The establishment of a system of vetting or institutional reform measures to ensure non-repetition of violations in future; and
- (i) Adequate victim and witness protection.⁷

4 For a review, see *Transitional Justice and Right to a Remedy: Supreme Court Jurisprudence in Nepal*, Nepal Bar Association and International Commission of Jurists, 2012.

5 See, the briefing paper “*Transitional Justice in Nepal: Way Forward, 2018*” published by the Conflict Victims Common Platform (CVCP), p. 12.

6 As a basis to draw this conclusion, the Supreme Court has referred to a number of international conventions: Convention on the Prevention and Punishment of the Crime of Genocide, 1948, International Covenant on Civil and Political Rights, 1966, International Convention for the Protection of All Persons from Enforced Disappearance, 2001, Convention on the Elimination of All Forms of Discrimination against Women, 1979, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Convention on the Rights of the Child, 1989, UN Charter and Universal Declaration of Human Rights. For instance, See, *Suman Adhikari v. Government of Nepal* (Decision dated 26 February 2015)

7 These criteria were drawn from a collective reading of three cases: *Suman Adhikari et al. v. Government of Nepal*, (decision dated 26 February 2015), NKP 2071, p. 2071; *Madhav Kumar Basnet for JuRI-Nepal et al. v. Office of the prime minister et al. and Ram Kumar Bhandari et al. v. Government of Nepal et al.* (decision dated April 1, 2013) NKP 2070, P.1101; *Govinda Prasad Sharma “Bandi” v. Attorney General Mukti Narayan Pradhan et al.* NKP 2070, P. 1484; *Rabindra Prasad Dhakal on behalf of Advocate Rajendra Prasad Dhakal v. Nepal Government, Council of Ministers et al.*, (decision dated 1st June 2007), NKP, Vol 49, No 2, P, 169; *Sunil Ranjan Singh et. al. v. Government of Nepal et. al*, Writ petition no 067-wo-1198 of the year 2067 (2010), decision dated 13 August

The Attorney General of Nepal has also acknowledged that his office has a constitutional duty to monitor whether the government complies with the principles and directives of the Supreme Court.⁸ These criteria must also be adhered to in the context of legislative enactment as these fulfil Nepal's obligations under international human rights law.

II - Main Substantive Areas of Concern

We commend the government for incorporating into the draft bill a number of directives issued by the Supreme Court, including direct referral of the cases to the Attorney General by the Commissions, inserting "consent of the victim" as a statutory requirement for reconciliation, recognizing reparation as a right and the inclusion of some elements of institutional reform in the Commissions' mandates.

However, we note that the draft bill continues to fall short of the Supreme Court's rulings and international law and standards, particularly in two broad areas: (i) provisions affecting criminal accountability, including legal definitions and sentencing; and (ii) structural weaknesses undermining the independence and effectiveness of existing and proposed transitional justice bodies.

Legal Accountability for Crimes under International law

Amnesty International, the ICJ and TRIAL International oppose any form of *de jure* or *de facto* amnesty in the context of crimes under international law, including gross human rights violations and serious violations of international humanitarian law. While there is no clause in the draft bill explicitly ruling out criminal prosecutions, the practical application of some of the provisions is likely to lead to effective impunity in violation of well-established international law standards.⁹

Identification of crimes under international law

Distinctions in the draft bill between "gross violations of human rights" and "other acts of human rights violation" are vague, but it is clear that "gross violations" includes, but is not limited to, crimes under international law. It is therefore indispensable to thoroughly review the definitions and crimes encompassed in the draft bill in order to avoid any exclusion or definitions that depart from international law and standards.

The Truth and Reconciliation Commission (TRC) and the Commission on Investigation of Enforced Disappearance of Persons (CIEDP) in Nepal are specifically mandated by the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2071 (2014) to investigate enforced disappearances both as a self-standing crime and as

2010.

⁸ Article 158(6)(b) reads, " (b) to monitor, or cause to be monitored, whether any interpretation given to a law or any legal principle laid down by the Supreme Court in the course of hearing of lawsuits has been implemented".

⁹ Most notably, the UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc E/CN.4/2005/102/Add.1

crimes against humanity, ascertain the truth, and communicate that truth to the public. Instead of strengthening the provisions of that law dealing with crimes against humanity, Sections 3 and 5 of the proposed draft appear to remove the reference to "crime against humanity" from the preamble, definition and substantive mandate of the TRC and CIEDP. The removal of the inclusion of crimes against humanity and the lack of an explicit reference to war crimes demonstrates a weakening commitment to stand against "crimes against humanity" and war crimes, principal crimes under the Rome Statute of International Criminal Court (ICC) and customary international law.

In the draft bill, the definition of an "enforced disappearance" has also been removed and, while there are provisions for criminalization of torture¹⁰ and enforced disappearances¹¹ expected to come into effect under a new Criminal Code of Nepal (due to come into force in August 2018), they also fall short in terms of the definition of the crimes¹² and in the penalties.

Notably, the draft bill also fails to incorporate the principles of command and superior responsibility. With respect to other superior and subordinate relationships, a superior is held criminally responsible for the criminal offence committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates.¹³ On the other hand, an order or instruction from any public authority, civilian, military or other, may be invoked to justify the criminal offence.¹⁴

Recommendations:

- Retain the reference to crimes against humanity as a specific category of crimes in the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act and define crimes against humanity and war crimes in line with international law.¹⁵

10 Section 167(1) of *Muluki Criminal (Code) Act, 2017*.

11 Section 206-210 of *Muluki Criminal (Code) Act, 2017*.

12 As defined under article 2 of the Convention for the Protection of All Persons from Enforced Disappearance and article 7 of the Rome Statute of the International Criminal Court, the elements of the criminal offence of enforced disappearance include: 1) the arrest, detention, abduction or any other form of deprivation of liberty of a person; 2) by agents of, or by persons or groups of persons acting with the authorization, support, or acquiescence of, the State or a political organization; 3) followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person; 4) which place such a person outside the protection of the law. Similarly, as defined under article 1 of the Convention against Torture, "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

13 See Article 6 of the International Convention for the Protection of All Persons from Enforced Disappearance; Article 28 of the Rome Statute of the ICC.

14 For instance, Article 2(3) of the Convention against Torture reads: An order from a superior officer or a public authority may not be invoked as a justification of torture.

15 Article 7(1) of the Rome Statute of the ICC reads: "For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy,

- While defining any crime as a crime against humanity, ensure the compatibility with the threshold of international law: “committed as part of a widespread or systematic attack directed against any civilian population.”
- Make enforced disappearances and torture specific crimes under national law in accordance with international human rights law. Insert a provision to incorporate the principle of command and superior responsibility, including the fact that a crime committed by a person pursuant to an order of a government or of a superior shall not relieve that person of criminal responsibility.

Withdrawal of cases, and a lack of proportionality in sentencing

Particularly problematic components of the draft bill are those providing for the withdrawal of cases, and a proposed sentencing scheme that violate the principle of proportionality.

Section 30L (inserted by Section 27 of the present bill) permits the government to withdraw prosecution of cases regardless of gravity and nature of crime, which goes against the Supreme Court’s ruling that bars the withdrawal of the criminal cases in the context of serious crimes.¹⁶ In view of the fact that in the past case withdrawals have served to protect politically connected individuals from criminal accountability,¹⁷ it is likely that the new Section will be used to undermine accountability, and could result in *de facto* amnesty.

Another problematic component of the draft bill is the sentencing and alternative punishment scheme, which is deficient in several aspects. First, the suspension of the prevailing penal provisions under criminal law in the context of the TJ process under the bill violates the principle of equality under international law and Nepal’s constitution.¹⁸ Second, the penal/sentencing provisions also do not correspond to the “gravity” and the “nature” of crimes.¹⁹ The proposed provision, if enacted, will result in the imposition of complete criminal punishment only in exceptional cases where

enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

16 For example, in *Sukdev Raya Yadhav v. Government of Nepal*, the Court stressed the need to take serious precaution to ensure that any case withdrawal is not misused to bypass criminal accountability and promote impunity in the context of serious crimes including crime against humanity, genocide, war crime, organized crimes, crimes against women and children and crimes against the state and public interest.

17 See, Legal Opinion ‘Remedies and Rights Revoked: Case Withdrawals for Serious Crimes in Nepal, June 2011’ jointly published by the NHRC and OHCHR-Nepal. Available at: https://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_1447.pdf

18 Section 30I of Chapter 4A inserted by Section 22 of the Bill.

19 For example, See Model Codes for Post-Conflict Criminal Justice, Volume I, Model Criminal Code (MCC), Section 12. Also, See, RECOMMENDATION No. R (92) 17 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES CONCERNING CONSISTENCY IN SENTENCING (Adopted by the Committee of Ministers on 19 October 1992 at the 482nd meeting of the Ministers’ Deputies).

aggravating factors exist.

Many of the accountability measures (such as a fine up to NRs 500,000 (approximately US 5000); disqualification from standing as a candidate in elections, nominations or appointments to public positions; freezing of passport validity; restrictions on going abroad; reduction by 75 percent of prison terms; and community service prescribed under the draft bill are oriented towards bypassing criminal accountability. The proposed penal and sentencing measures are lenient in comparison to the punishments prescribed for similar offences under Nepal's criminal law.²⁰ In other words, penalties established for crimes under international law, such as crimes against humanity and war crimes, as well as for torture and enforced disappearance, should be akin to those normally established in Nepal for serious, rather than minor crimes.²¹

Recommendations:

- Ensure that the penal/sentencing provisions correspond to the “gravity” and “nature of crime” and the judicial proceedings are not misused to bypass criminal accountability.
- Amend the draft bill to ensure that the withdrawal of cases will not be used as a measure to grant impunity by bypassing accountability for crimes under international law, including gross human rights violations, and serious violations of international humanitarian law.

Structural Integrity, Capacity, Credibility and Independence

A fundamental weakness in the current draft bill is its reliance upon, and the expansion of the power of, existing transitional justice institutions without addressing the already identified weaknesses of these institutions. For the transitional justice process to be effective and responsive to victim needs, the independence and capacity of the bodies must first be secured. In addition, however the transitional justice process unfolds, it should not curtail the rights of victims to seek a remedy and reparation through other mechanisms, such as the courts and before national and international rights bodies.

Credibility, impartiality and independence of the commissions

There have been consistent demands by the victims' groups and CSOs for making the TJ mechanisms credible, impartial and capable enough to carry out their mandate effectively.²² In their recent briefing paper "Transitional Justice in Nepal: The Ways Forward", a number of victims' groups and CSOs have collectively stated that “the

20 For example, the existing Muluki Ain (General Code) prescribes 20 years of imprisonment for homicide.

21 See for example, See par 6.7, *Urra Guridi v. Spain*, UNCAT Communication No. 212/2002, U.N. Doc. CAT/C/34/D/212/2002, 17 May 2005 ('the imposition of lighter penalties ... to the civil guards are incompatible with the duty to impose appropriate punishment').

22 For instance, on 28 December 2017, Accountability Watch Committee (AWC) issued a press statement calling upon the government to ensure a credible TJ process including through amending the law and reappointing the commissioners. Similarly, in recent consultations (including a meeting organized by AWC on 21 June 2018 and an Amnesty International Nepal meeting with CSOs and victims on 22 June 2018), representatives of the victims' groups and CSOs consistently expressed dissatisfactions over the failure of the Bill to address credibility and capability issues of the existing commissions.

credibility of the two commissions is secured either by reappointing the commissioners in a consultative and transparent manner or at a minimum adding a few commissioners from among the victims' groups and civil society...".²³ However, the draft bill does not make any amendments to the provision in the existing Act on the membership and formation of the Commissions under Section 3. Indeed, it completely fails to address victim groups' and CSOs' demands in this regard.

Similarly, there are no provisions to ensure that these bodies will have adequate investigative capacity. By virtue of their mandate, they must be enabled to map, preserve and conduct exhumations of mass graves and burial sites, as well as identifying and returning bodies and preserving evidence.

Recommendations:

- Amend the draft bill to include measures to enhance the credibility of the Commissioners as demanded by the victims' groups and CSOs – including through reform of the appointment process and membership of the Commissions.
- Insert adequate provisions in the draft bill towards enhancing the capacity of the TRC and CIEDP in terms of unveiling the truth including through effectively carrying out exhumations and preserving evidence.

Preserving the Right to a Remedy and Reparations

The draft legislation contains several problematic provisions, which threaten to undermine the ability of victims to seek a remedy in the court system, the National Human Rights Commission, and before international bodies.

Section 27 of the draft bill inserts a new section 40A in the Act²⁴ to provide for the exclusive jurisdiction of the Commissions over violations that occurred in the course of the armed conflict. No complaint or cases can be lodged or adjudicated by other courts or mechanisms. This provision fails to comply with the established standard that truth-seeking should not absolve States of their legal obligations with regard to criminal justice. This may constitute a violation of Nepal's legal obligations to ensure the right to effective remedy under international law, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture (CAT).²⁵

While the draft bill does clarify that those who have received “interim relief” will qualify for wider reparations, it remains unclear about the interplay between the “interim relief program” – that should be understood as a humanitarian ex-gratia payment – and the payment of compensation as part of reparations – which is correctly covered by the

²³ See, Conflict Victim Common Platform (CVCP), *Transitional Justice in Nepal: The Way Forward*, June 2018, p. 19.

²⁴ Section 40A reads: No complaint in relation to gross human rights violations and other acts of human rights violations may be filed in any other mechanism than in the commissions.

²⁵ ICCPR article 2(3) and UN Human Rights Committee General Comment 31; Committee against Torture article 14 and General Comment 3; see also, UN Basic Principles on Remedy and Reparation, articles 18 to 23.

draft bill as a victim's right.

Furthermore, the draft bill is silent about the basic guidelines to calculate compensation and the type of harms that should be taken into account. While the reference to "community projects" as a form of reparation is welcome, the notion remains vague and will benefit from additional regulation. Finally, the lack of inclusion of CSOs in a list of actors with whom the Commissions should collaborate in providing recommendations is problematic given the critical role that civil society plays in this whole process.

Recommendations:

- Clarify the relationship between "interim relief" and compensation
- Amend the draft bill to ensure that compensation encompasses both physical and mental harm, and is calculated duly taking into consideration the gravity of the violation;
- Amend the bill to ensure that compensation encompasses material damages (such as medical expenses and loss of earning) as well as moral damages (such as emotional distress of loss of loved ones)
- Guarantee the participation of CSOs as well as of victims' organizations in every stage of the reparation process

III - Concluding Observations

Amnesty International, the International Commission of Jurists and TRIAL International appreciate the invitation to comment on the draft bill. While acknowledging some positive changes, we remain concerned that the draft contains serious shortcomings when evaluated against international law and standards. Our organizations intend to provide a more in-depth legal analysis in the coming months and remain available and willing to engage in a constructive dialogue towards bringing the law in line with Nepal's international obligations.

To the government of Nepal, the undersigned urge attention to the preliminary considerations set out at the beginning of this report. The lack of a meaningful consultation process puts the legitimacy and viability of the amendment into question, even before entering into its legal provisions. The amendment, on its face, ignores longstanding conflict victims' demands, one of which relates to the need to strengthen the institutional independence of the commissions. The lack of an effective consultation process threatens the fundamental reparative principle of victim satisfaction, which relates to the integrated effectiveness of truth-telling, reparations, prosecutions, and measures to avoid a repetition of past harms.

We also urge the government to demonstrate a genuine willingness to establish an effective transitional justice process by complying with existing Supreme Court jurisprudence on the subject. There are critical flaws in the draft bill related to accountability for the most serious crimes under international law, including crimes against humanity; in relation to sentencing, which fails to respond to established

principles regarding the purposes of sentencing for the most serious crimes; and in relation to the overall architecture of the transitional justice process, which must attend to the relationship between the four pillars of truth, reparations, prosecutions, and non-repetition.

To the international community, we urge attention to the lessons of history regarding transitional justice. While ‘genuine willingness’ is a changing variable and difficult to measure in many contexts, experience demonstrates that there are objective elements that establish a threshold of credibility. These elements have been set out clearly in this report. If this threshold is not met, international assistance could result in reproducing impunity. To avoid this, there is a need for a coherent and coordinated response by the international community to support conflict victims in raising and collaboratively addressing these concerns with the government.