

Submission to the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Special Rapporteur on violence against women, its causes and consequences

8 August 2022

Your Excellencies,

We, undersigned organisations, are writing to seek your urgent intervention in respect of recent developments in the field of transitional justice (TJ) in Nepal.

We recall the many communications sent by you to the Government of Nepal, in particular AL NPL 1/2020, of 20 March 2020, which raised concern about the lack of effective consultation with victims concerning the amendment of the Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2071 (2014) (hereafter, TRC Act) and OL NPL 1/2019, of 12 April 2019, concerning the reported lack of impartiality, independence and transparency in the procedure for the appointment of the members of the Truth and Reconciliation Commission (TRC) and Commission on the Investigation of Enforced Disappearance (CIEDP); the reported lack of progress in the work undertaken by both commissions; and the possible amendment of the TRC Act. We further refer to OL NPL 4/2017 of 27 July 2017, which expressed concern about the shortcomings of the TRC Act, and the lack of significant progress in the work of the TRC and the CIEDP.

Since April 2022, after the appointment of a new Minister of Law, Justice and Parliamentary Affairs, some momentum has been created to amend the law and bring it in line with international law and relevant Supreme Court rulings as repeatedly promised by successive Governments, especially in international forums, but not acted on for years.<sup>1</sup>

This raised hope and expectations among victims and CSOs that the TRC Act would be amended in line with the demands of the conflict victims, including those set out in the Kathmandu Declaration signed by 49 organizations of conflict victims.<sup>2</sup>

However, the bill (hereafter the TRC Act Amendment Bill) registered in the parliament on 15 July 2022 is found to contain major loopholes and remain incompatible with international law.

We list the main problems below, with a humble request for Your Excellencies to raise them with the Government of Nepal as a matter of urgency, as it is not excluded that the bill will be

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<sup>1</sup> These include *Suman Adhikari and Others vs the Office of Prime Minister and Council of Ministers and Others*, NKP 2071 (2015) Issue 12, Decision No 9303, 2069; *Government of Nepal v Suman Adhikari et al (decided on 2020) SC Writ No 072- RV-0005* and *Madhav Kumar Basnet et al v Office of the Prime Minister and Council of Ministers and Others*, Ne. Ka. Pa 2070 [2014] Issue No 9, Decision No 9051, 1101.

<sup>2</sup> See Kathmandu Declaration, 7 April 2022, available in Nepali at: [conflict-victims-kathmandu-declaration-2078-english-version.pdf \(advocacyforum.org\)](https://www.advocacyforum.org/conflict-victims-kathmandu-declaration-2078-english-version.pdf)

passed by the House of Representatives in the next few days or weeks (as elections are due in November 2022, and the parliament may be dissolved very soon):

**The definition of “serious violations” is not compatible with international standards, it allows amnesty for acts that may amount to crimes against humanity, war crimes and gross human rights violations**

In its briefing note of 16 February 2016, called “Nepal: OHCHR position on UN support to the Commission on Investigation of Disappeared Persons and the Truth and Reconciliation Commission”, OHCHR concluded that the provisions of the TRC Act were in violation of international law as it provided for amnesty to be granted in respect of serious human rights violations and violations of international humanitarian law (IHL).

Section 25(2) of the TRC Act excludes taking legal action against perpetrators “who have reconciled with victims pursuant to section 22” or “who are recommended for amnesty pursuant to section 26”. The Act provides certain requirements to be fulfilled before making such recommendations. For example, the perpetrator has to file an application disclosing detailed information on the case for which amnesty is requested, has to admit committing a gross violation of human rights in the course of the armed conflict, show regrets for such act, apologise and promise not to repeat such act in the future, etc.

The new TRC Act Amendment Bill, rather than amending the provisions in respect of amnesty and mediation, introduced a new classification, distinguishing between “serious violations of human rights” for which amnesties are prohibited and “human rights violations” for which amnesties are permitted.

“Serious violations of human rights” are defined as the following acts “committed during the armed conflict in a targeted or planned manner against an unarmed individual or community:

- (1) Killing of somebody after cruel torture or killing of somebody in a brutal manner,
- (2) Rape,
- (3) Enforced disappearance,
- (4) Cruel or inhuman torture.”<sup>3</sup>

The TRC Act Amendment Bill defines “human rights violations” as the “following acts committed during the armed conflict in a targeted or planned manner against an unarmed individual or community:

- (1) Murder,
  - (2) Sexual violence,
  - (3) Physical or mental torture,
  - (4) Abduction and hostage taking,
  - (5) Illegal detention,
  - (6) Beating, maiming and causing physical disability,
  - (7) Looting, capture, destruction or arson of private and public property,
  - (8) Forced eviction from one's residence or displacement by any other means,
- or

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<sup>3</sup> No 2 of the TRC Act Amendment Bill (See Annex 1 for the unofficial translation of the Bill).

(9) Any inhuman act that are against international human rights and humanitarian law."

Most of the acts listed as "human rights violations" are gross violations of international human rights law and serious violations of international humanitarian law, which may amount to crimes against humanity and war crimes. Amnesties for such crimes are prohibited by international law.

The distinctions drawn between the two categories of violations are arbitrary and inconsistent with international law. If implemented, they would likely result in impunity for crimes under international law. For example, by distinguishing between "murder after cruel torture or killing of somebody in a brutal manner" and "murder", the TRC Act Amendment Bill could open the door for persons accused of extrajudicial, summary or arbitrary executions to be granted amnesty in some cases. Amnesty would be possible also for cases of torture and sexual violence. All in all, impunity for gross human rights violations and crimes under international law would be fostered.

Furthermore, as the TRC Act Amendment Bill stands, "serious violations of human rights", including the crimes of rape, torture or enforced disappearance, that were not targeted or planned or which were committed against persons other than an unarmed individual or community would be eligible for amnesty. This is inconsistent with the definitions of many crimes under international law to which amnesties must not be applied.

We request Your Excellencies to recommend to the Government of Nepal to amend the definitions of "serious human rights violations" and "human rights violations" to ensure that they are fully in line with international law. Moreover, the TRC Act Amendment Bill must unequivocally and explicitly establish that persons who have or are alleged to have committed crimes under international law, irrespective of the circumstances of the victims, shall not benefit from any amnesty or similar measure that might have the effect of exempting them from any criminal proceedings or sanction.

### **War crimes and crimes against humanity do not fall under the jurisdiction of the Commissions and the Special Court**

The TRC Act Amendment Bill does not require the TRC and CIEDP to identify and investigate war crimes and crimes against humanity or to refer persons alleged to have committed them to the Special Court for prosecution. It neither provides for the possibility of these violations being investigated or prosecuted nor prohibits those accused of committing these crimes from being granted amnesty. Many of the acts listed as "human rights violations" could amount to crimes against humanity and/or war crimes.

We request Your Excellencies to recommend that war crimes and crimes against humanity are included in the TRC Act Amendment Bill, and are criminalized in accordance with definitions and principles of criminal responsibility in international law.

**The TRC Act Amendment Bill is silent on critical issues such as the prohibition of statutory limitations and retroactive effect of the prevailing law, thereby creating a potential legal lacuna that could result in impunity**

The TRC Act Amendment Bill states that punishments imposed by the Special Court will be as per the prevailing laws<sup>4</sup> without clarifying which prevailing laws it is referring to. Although the 2018 Penal Code criminalises and provides penalties for some of the crimes listed under ‘serious violations’ (including torture and enforced disappearance), it does not provide for retroactive effect.<sup>5</sup> The 2018 Penal Code also establishes statutes of limitation for criminal proceedings for certain crimes. For example, the statute of limitation for rape is two years from the time of its occurrence.<sup>6</sup> The 2018 Penal Code also does not criminalise and penalise crimes against humanity and war crimes and other crimes under international law.<sup>7</sup>

We request Your Excellencies to recommend to the Government of Nepal to ensure that the TRC Act Amendment Bill includes specific provisions that address critical issues such as prohibiting statutory limitations and providing for retrospective effect of law to cover crimes committed or commenced during the conflict period. The TRC Act Amendment Bill stands, could present barriers to prosecution in many instances.

### **No possibility of prosecution for crimes not qualified for amnesty**

As highlighted above, certain crimes, including forced displacement, arbitrary arrest and detention, destruction of private property, mutilation and hostage-taking have been categorized as “human rights violations” (as opposed to “serious human rights violations”) and by virtue of this categorization qualify for amnesty. In fact, this provision is included even though they may amount to war crimes and crimes against humanity if they were committed as part of a widespread or systematic policy. In addition, although a victim’s informed consent is required for the Commissions to recommend amnesty in those violations along with some conditions that the perpetrators should fulfil to get amnesty, no possibility exists for prosecution and punishment for those perpetrators who do not meet those conditions and where victims do not agree to amnesty. This is a clear gap in the new Bill.

We request Your Excellencies to recommend that crimes such as mutilation and hostage-taking are considered serious crimes. For other, less serious crimes, if they do not qualify for amnesty, should be made prosecutable, as it is an essential aspect to ensure the cooperation of the alleged perpetrators with the commissions.

### **A Special Court will have judges appointed by the Government**

The TRC Act Amendment Bill proposes the establishment of a Special Court to try those involved in the commission of serious violations as recommended by the TRC and the CIEDP and prosecuted by public prosecutors, working under the Attorney General.<sup>8</sup> The

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<sup>4</sup> TRC Act Amendment Bill, No 18 (5)

<sup>5</sup> Penal Code, s 1(2).

<sup>6</sup> Penal Code, s 229(2).

<sup>7</sup> Human Rights Watch and Advocacy Forum, ‘Waiting for Justice’ (n 59); Amnesty International, ‘Nepal. Make Torture a Crime’ (2001) ASA 31/002/2001, 4f; Advocacy Forum-Nepal and REDRESS, ‘Held to Account. Making the Law Work to Fight Impunity in Nepal’ (December 2011) 48-56; Advocacy Forum-Nepal and REDRESS, ‘UN Human Rights Committee: Nepal Responsible for Disappearance and Torture of Teacher, Urges Government to Prosecute Perpetrators & Change Laws’ (Press Release, 23 August 2012) <[https://nepalconflictreport.ohchr.org/files/docs/2012-08-23\\_press-release\\_af\\_eng.pdf](https://nepalconflictreport.ohchr.org/files/docs/2012-08-23_press-release_af_eng.pdf)>; ‘Criminalize conflict-era torture and enforced disappearances: NHRC’ *my República* (Kathmandu, 5 February 2018) <<https://myrepublica.nagariknetwork.com/news/criminalize-conflict-era-torture-and-enforced-disappearances-nhrc/>> accessed 5 August 2022.

<sup>8</sup> TRC Act Amendment Bill, No 18(3).

Special Court should consist of three judges appointed by the Government in consultation with the Judicial Council.<sup>9</sup>

We request Your Excellencies to recommend to the Government of Nepal that the Special Court should have judges appointed by the Judicial Council as are other judges, to ensure their independence and impartiality.

### **There will be no appeal to the Supreme Court**

Contrary to the Supreme Court ruling of 2017 and the right to appeal, as recognised in international standards on the right to a fair trial, the decisions of the Special Court will be final and no appeal can be made against them.<sup>10</sup>

We request Your Excellencies to recommend to the Government of Nepal that a right to appeal the decisions rendered by the Special Court to be Supreme Court is incorporated.

### **Lack of special investigation team in the prosecutor's office and the Special Court**

The TRC Act Amendment Bill is silent on critical resources that are essential to ensure the TJ process can lead to thorough, impartial, independent and effective investigations of crimes under international law and human rights violations and, where there is sufficient evidence, prosecutions of those suspected of responsibility. In particular, it does not envisage the creation of a special investigation team made up of investigators with substantial experience in investigating human rights violations and crimes under international law, including sexual and gender-based violence and violence against children. Without such expertise, the effectiveness of investigations may be severely compromised, resulting in impunity.

We request Your Excellencies to recommend to the Government of Nepal that the TRC Act Amendment Bill should be amended to set forth the creation of a special criminal investigation team in the public prosecutor's office and the Special Court.

In conclusion, we request Your Excellencies to issue a joint allegation letter as soon as possible and consider, in parallel, to reach out to the Government with a legal opinion on the TRC Act Amendment Bill, offering technical cooperation and assistance to ensure that it is brought in line with international standards.

We thank you in advance for your attention to this matter, which is so important for the future of our country.

Yours sincerely,

Accountability Watch Committee



Advocacy Forum-Nepal



<sup>9</sup> TRC Act Amendment Bill, No 19(2).

<sup>10</sup> TRC Act Amendment Bill, No 19(5).

Amnesty International



Human Rights Watch



International Commission of Jurists



TRIAL International



Conflict Victims' Women National Network



Conflict Victims' Common Platform



Conflict Victims' National Alliance



Conflict Victims' Society for Justice



National Network of Disabled Conflict Victims



National Network of Families of Disappeared



Collective Campaign For Peace



Democratic Freedom and Human Rights Institute



Forum For Women, Law Development



Human Rights and Justice Centre



Himalayan Human Rights Monitors (HimRights)



Informal Sector Service Centre



Justice and Rights Institute Nepal



Legal Aid and Consultancy Centre



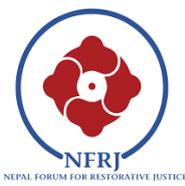
Nagarik Aawaz



National Alliance of Women Human Rights Defenders



Nepal Forum for Restorative Justice



Nepal Peacebuilding Initiative



Tarangini Foundation



The Story Kitchen



Voices of Women Media



Women's Rehabilitation Center

