

# ALL VOICES HEARD?

## VICTIMS, CIVIL SOCIETY AND POLITICS IN NEPAL'S EFFORTS TOWARD VICTIM-CENTRIC TRANSITIONAL JUSTICE

By Caitlin Trent and Srijana Nepal

### INTRODUCTION

Transitional justice has “become an essential aspect of post-conflict transitions and peace-building interventions” since the 1980’s.<sup>1</sup> According to the United Nations’ official position, transitional justice is critical to address the legacy of human rights abuses, “ensure accountability, serve justice and achieve reconciliation” in post-conflict countries.<sup>2</sup>

In line with this position, on September 20, 2016 Nepal’s Foreign Minister stated at the 71st UN General Assembly that the Nepali government was committed to addressing “issues surrounding the transitional justice process in line with our international commitment...”<sup>3</sup> However, ten years after the civil war between the Nepali state and Maoist rebels ended, transitional justice remains elusive.

To ensure sustained peace, transitional justice guarantees were included in the 2006 Comprehensive Peace Agreement (CPA) between the Maoists and the Nepali government.<sup>4</sup> The CPA’s transitional justice provisions included the need for impartial investigation of war crimes and a guarantee to “the right to relief of the families of victims of conflict, torture and disappearance,” and “not to encourage impunity.” In order to create an “atmosphere of reconciliation,” the CPA also recognized the need for support and participation of all political parties, civil society and local organizations.<sup>5</sup>

However, despite the noble intentions on paper, these transitional justice provisions remained unfulfilled by mid-2017. With widely divergent agendas, transitional justice stakeholders such as civil society, victims, international actors and the Nepali government continue to disagree on what form “transitional justice” should take in Nepal.

Civil Society Organizations (CSOs) and the UN demand a transitional justice initiative that reflects international human rights standards and international humanitarian law. Many CSOs argue that prosecution of war criminals for egregious crimes should be at the forefront. They view the lack of prosecutorial justice as a potential cause of renewed violence, further human rights violations and impunity.<sup>6</sup>

Victims have their own priorities. Previously, victims were perceived as solely “victims” rather than agents of the transitional justice process. However, many are now capable and willing to seek truth and reparations on their own terms. They are demanding, and have been waiting for, justice, recognition and compensation from the government.<sup>7</sup> Nepal’s National Human Rights Commission Secretary, Bed Prasad Bhattarai, emphasized the serious implications of neglecting victims’ demands, arguing that, “justice for the victims is crucial to establish the rule of law in the country.”<sup>8</sup>

Conversely, the Nepali government, in whose hands transitional justice formally lies, would prefer to “forgive and forget.” As of June 2017, none of Nepal’s many governments since the end of the war have enacted the majority of transitional justice recommendations from civil society, the UN or Nepal’s Supreme Court.<sup>9</sup> Many politicians argue that Nepal’s process is distinct from other nations’ transitional justice experiences and should be treated as such, rather than held to international standards.<sup>10</sup> Most notably, political leaders have attempted to implement blanket amnesty for war criminals. This move is particularly understandable given that many politicians, including Prime Minister Pushpa Kamal Dahal, might otherwise be

subject to prosecution for war crimes.<sup>11</sup> The international community and CSOs have also viewed the government’s reconciliation efforts as “forced,” rather than consensual for society and victims.<sup>12</sup> Given these divergent conceptions of transitional justice, its outcome is precarious.

This paper examines Nepal’s transitional justice efforts through various lenses. It first provides background and describes Nepal’s civil war crimes and its victims. It then assesses Nepal’s governmental transitional justice efforts, its challenges and offers recommendations. The following section examines the UN and its role in Nepal’s transitional justice as well as suggestions for the UN to engender victim-centered justice. Similarly, transitional justice efforts by civil society organizations (CSOs) are explained with recommendations for a victim-centered justice. The final section focuses on victims, their challenges and strives towards transitional justice. The paper’s position and recommendations are based off of the input and viewpoints of interviewees, ranging from government officials, to victims, media and civil society representatives, as well as literature on the topic. The recommendations are in the hopes that an effective, holistic transitional justice will result and help ensure a long-term, sustained peace for the country.

## CONTEXT OF NEPAL’S TRANSITIONAL JUSTICE

The historical context of Nepal’s civil war and post-war political transition has unavoidably shaped the difficulties underlying the current transitional justice situation. Critical events are summarized in the figure below.

### War Crimes

The Maoist rebellion began in 1996 in the Mid-Western region of Nepal. While the original insurgence was limited to isolated pockets of rebel activity, violence eventually spread throughout the country. In 2001 violence significantly escalated when the Royal Nepal Army (RNA) engaged rebel groups. The increase of casualties after the Nepali army engaged formally shifted the insurgency to a civil war.

By 2006, when the Maoists and the state signed the CPA, the conflict resulted in the killing of Nepali citizens in all but two of the country’s 75 districts.<sup>13</sup> The war left an estimated 17,000 people dead, even more injured, hundreds of thousands internally displaced, and millions of dollars lost in infrastructure.<sup>14</sup> Both former Maoist rebels and State actors have been accused of perpetrating war crimes during the conflict.

### Timeline

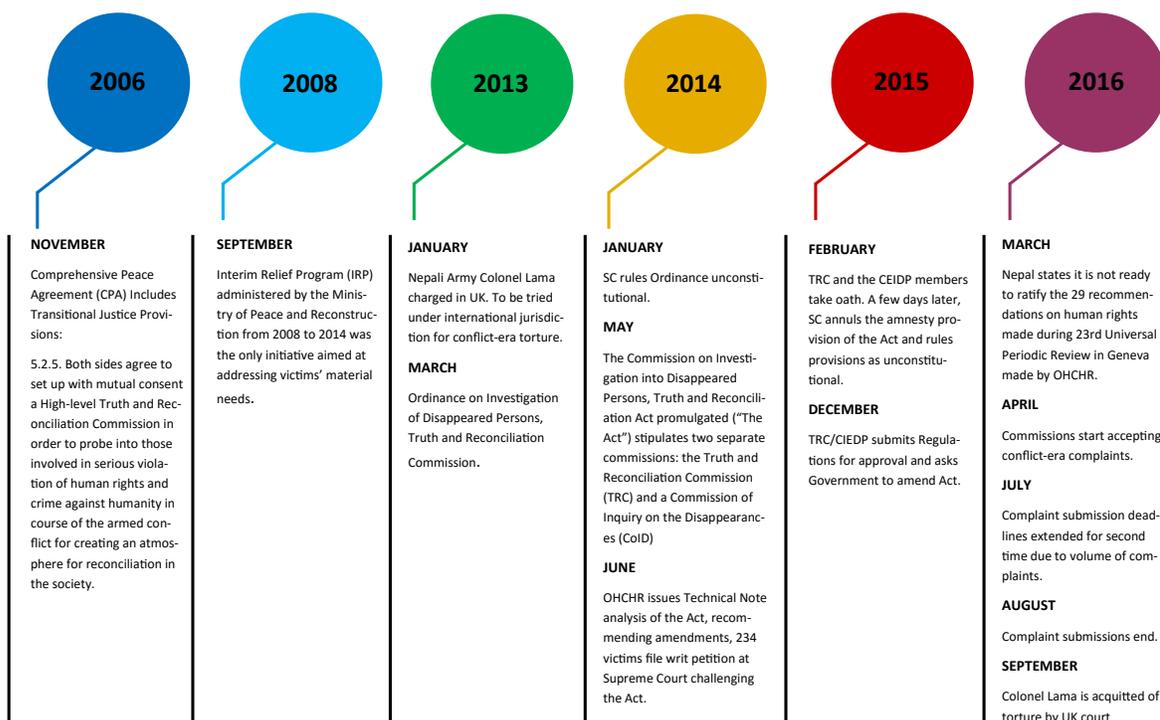


Figure 1. Transitional Justice Timeline

Ten years after the war, the government established the Truth and Reconciliation Commission (TRC), discussed below.<sup>15</sup> The TRC was entrusted to collect war crime petitions from April to August of 2016. During the four months of the collection process, victims filed some 58,000 petitions of alleged sexual violence, torture, extrajudicial killings and other human rights and humanitarian law violations.<sup>16</sup> An additional 3,000 petitions were filed regarding war-era forced disappearances under the second government-established commission, the Commission of Investigation of Enforced Disappearances (CIEDP), also discussed below.<sup>17</sup>

### *Victims of War Crimes*

The victims of Nepal's civil war, like its society, are extremely diverse. They are ethnically, politically and economically heterogeneous, and come from both the state and Maoist sides of the war. With diversity and political loyalties dividing victims, it is difficult for victims to formulate a universal position on grievances and priorities on the transitional justice process.<sup>18</sup>

The establishment of victim-based organizations, such as the Conflict Victims Common Platform (CVCP) and the Conflict Victims Society for Justice,<sup>19</sup> have attempted to overcome wartime divisions by seeking common goals of truth, justice, reparations and reconciliation. As one Maoist victim stated, although victims have alternate identities, often strong political ones, "on the agenda of justice, we are united. We share a similar pain."<sup>20</sup>

In Kathmandu there is a unified victim's front and it has been far easier for victims to gain the voice, means and legitimacy to their cause. Conversely, in rural areas and outer districts, some victims are still marginalized and excluded, particularly groups that tend to be re-victimized in other sectors of Nepali society.<sup>21</sup> The challenges of isolation, poverty, lack of education, cultural and language barriers have limited awareness of the issue, entry into mainstream dialogue, resources and access to justice.<sup>22</sup>

One such group is the indigenous Tharu community in the Tarai plains. The Tharu suffered some of the highest concentration of war crimes. Conflict-related violence occurred on top of an already longstanding history of marginalization, compounding Tharu victims' struggle to

obtain justice. As transitional justice expert Simon Robins writes in his study of Tharu victims, "the law has always either been a tool of power used against them or invisible to them through their lack of access to justice."<sup>23</sup>

Nevertheless, some victims in districts outside the capital have been able to form their own organizations. Some organizations have managed to mobilize awareness and build victim capacity. There is also some victim representation in the government-formed Local Peace Committees<sup>24</sup> in districts throughout the country, where conflict victims have been identified and provided some interim relief in the form of monetary compensation.<sup>25</sup> In 2016 many victims were involved in the TRC's collection of war crime petitions.

Despite the multiplicity of victims and their diverse priorities for transitional justice, whether victims are CVCP members in Kathmandu or belong to victim-led organizations in outer districts, a common thread is the distrust of the government's process and misgivings of the potential outcome.<sup>26</sup>

### *Transitional Justice in Context*

Transitional justice efforts in Nepal have taken place in a "perfect storm" of obstacles, including political turmoil and frequent government turnover.<sup>27</sup> This instability has had a significant impact on Nepal's transitional justice process, leading to significant delays in design and implementation.<sup>28</sup>

Various domestic pressures have significantly increased the delay. In April of 2015, a 7.9 earthquake destroyed the Kathmandu Valley, the country's economic and political center. It caused over 8,000 deaths and property damages equivalent to more than half of the country's GDP.<sup>29, 30</sup>

Additional diversions have come from within state institutions. Since ending Nepal's 240-year monarchy in 2006, Nepal's political leaders have struggled to determine the nature of Nepal's new political arrangements, particularly the provisions of the new constitution.<sup>31</sup> This struggle has detracted from transitional justice efforts for the last decade. Disagreements over key provisions in the new constitution led to the dissolution of Nepal's first Constituent Assembly, and necessitated another round of elections in 2013, further shifting the government's focus and resources away from transitional justice.<sup>32</sup> It was not until September 2015, nine years after the CPA, and after significant political

contention, that the second Constituent Assembly managed to finally pass a new constitution.<sup>33</sup>

Yet, this ignited a new wave of protest and demonstrations in the Terai districts.<sup>34</sup> Some protests turned violent in the Terai plains, where marginalized communities felt that the new constitution did not reflect equal representation or rights for all Nepali people.<sup>35</sup> The protests resulted in over 50 deaths and a blockade with India that prevented approximately 90% of the country's oil supply from entering the country.<sup>36</sup> The unrest and humanitarian crisis provided the state with formidable distractions from the transitional justice process.

Frequent government turnover has been another major issue in implementing transitional justice. There have been ten different governments in the span of ten years, none of which lasted more than two years. The coalition government that took their seats in August 2016 is led by Prime Minister Pushpa Kamal Dahal, Chairman of the Communist Party of Nepal (Maoist Centre). He has, like previous Prime Ministers and coalition leaders, promised justice for victims and a closure to the peace process.<sup>37</sup>

Before the government led by Pushpa Kamal Dahal took office, progress on transitional justice was slow but beginning to take effect. One transitional justice expert said that the approval process for TRC and CIEDP regulations, which permitted the commissions to form and operate, "could have been done in one afternoon."<sup>38</sup> However, it took the government thirteen months—over half the allotted time of the TRC and CIEDP mandates—to approve either Commission's regulations.<sup>39</sup> At long last, in April 2016 the Commission regulations were approved and the war crime complaint collection process commenced.

Before the 2016 coalition, the government had begun to respond to a Supreme Court verdict requiring the government to amend Nepal's transitional justice law, discussed below.<sup>40</sup> The Supreme Court determined that the Act did not comply with domestic or international human rights standards. In early 2016 a draft bill addressing the discrepancies between the Act and human rights standards was allegedly close to being agreed upon in response to the Supreme Court decision.<sup>41</sup> Recognizing the consequences of derogation from international human rights standards, the former Attorney General, Hari Phuyal, pushed for both

parties to consent to such standards.<sup>42</sup> However, the draft bill was not ratified before the Maoist Centre coalition came to power in July 2016. This placed an amendment in the hands of the new Prime Minister Pushpa Kamal Dahal and his government, virtually scraping any progress that had been made.

The Maoist Centre coalition government, including a newly appointed Attorney General, Raman Kumar Shrestha, promised action in favor of victims' needs, including much needed legislation that specifically criminalized the use of torture.<sup>43,44</sup> Attorney General Shrestha also put forward a draft bill for the formation of a Special Court, based on the Sierra Leone model and separate from the existing Nepali judiciary for war era crimes.<sup>45,46</sup> In opposition to the bill, some lawmakers believed that an amendment of existing domestic law would be sufficient,<sup>47</sup> and the Supreme Court expressed further concerns "related to jurisdiction and tenure of the proposed special court."<sup>48</sup>

Although political contention over transitional justice efforts has continued, political progress had also been made. Due to extensive pushback from CSOs, the international community and victims, politicians seemed to accept that blanket amnesty for all war crimes is unfeasible, and officially recognized that an amendment to the Act is necessary.<sup>49</sup>

Regardless, victims and CSOs remained skeptical that an amendment will truly reflect victim needs or international human rights standards.<sup>50</sup> A Nepali academic and lawyer agreed, stating that the most likely outcome of a government-approved amendment would be further impunity, subpar human rights standards, and continued forestalling of the process.<sup>51</sup> Despite the fact that the TRC and CIEDP, the National Human Rights Commission (NHRC), the UN and the Supreme Court demanded an amendment of the Act, the government had taken no concrete action by June of 2017.

So, as of June 2017, the question still remained: unlike past governments, would the 2016 coalition government between the Nepali Congress and CPN Maoist Centre—both of which have members accused of war-era human rights violations—or future governments be able to guarantee justice for victims?

## THE NEPALI GOVERNMENT’S TRANSITIONAL JUSTICE EFFORTS

The government’s first transitional justice effort was in the form of the Interim Relief Program. Although both the CPA and Interim Constitution of Nepal envisioned a variety of transitional justice mechanisms to provide legal justice, reconciliation, truth and reparations to victims, financial reparations became the primary focus immediately after the conflict. As one victim leader stated, “Their [the government] concept of reparation is very narrow, they only think of monetary relief.”<sup>52</sup> This can be explained in large part by the relative ease of cash distribution to victims in comparison to the challenges of bringing perpetrators to justice and forming truth-seeking and reconciliation commissions in the initial phases after the war.<sup>53</sup>

Interim Relief began in April 2007 when the government established the Ministry of Peace and Reconstruction (MoPR) with a mandate to carry out the peace process.<sup>54</sup> Its directive was to implement the CPA and Interim Constitution provisions that related to the post-conflict transition.<sup>55</sup> MoPR therefore created the Interim Relief and Rehabilitation Programme in 2008 to provide conflict victims with financial support. Family members of individuals who were disappeared, killed or injured in the conflict received between 100,000 and 200,000 Nepali rupees (approximately \$900-\$1864 USD) depending on the nature of the incident.<sup>56</sup>

The Interim Relief Program had significant weaknesses and was not meant to embody transitional justice as a whole.<sup>57</sup> Not only was compensation arguably inadequate, it excluded victims of torture due to lack of necessary legislation criminalizing torture.<sup>58</sup> Furthermore, sexual violence crimes were viewed as in the purview of the regular judicial system, rather than as a war crime. This assumption was highly problematic on a number of grounds, including a 60-day statute of limitations on rape cases, making prosecution of sexual violence during the conflict effectively impossible. The Interim Relief Program also lacked other forms of reparations such as job training, healthcare and education, as well as other components of international transitional justice norms, like truth and justice.<sup>60</sup>

### *The “Act”*

The ratification of Nepal’s transitional justice bill, the *Act on Commission on Investigation of Disappeared Persons and*

*Truth and Reconciliation (“The Act”)*, generated national and international backlash through each phase until its final promulgation in May 2014.<sup>61</sup> Already in 2013 the Supreme Court had ruled its amnesty provision unconstitutional when it was an “Ordinance,” before becoming an Act the following year.<sup>62</sup>

Once ratified, 234 victims brought a case to the Nepali Supreme Court challenging the Act’s constitutionality. The Supreme Court verdict declared several provisions of the Act unconstitutional, and ordered the government to enact necessary amendments.<sup>63</sup> The UN,<sup>64</sup> the TRC<sup>65</sup> and the NHRC,<sup>66</sup> all expressed support for the verdict and urged the government to comply.

The tables below outline the Act’s provisions that the Supreme Court and the UN have determined unconstitutional, or not in compliance with international human rights standards.

### NEPALI SUPREME COURT VERDICT: UNCONSTITUTIONAL PROVISIONS<sup>67</sup>

- Amnesty for gross human rights violations.
- Forced reconciliation with victims.
- Statute of limitations for sexual violence crimes.<sup>68</sup>
- No law criminalizing torture<sup>69</sup> or enforced disappearances.<sup>70</sup>
- Ability to divert and interfere with court cases.<sup>71</sup>
- No guarantee of follow through on Commissions’ recommendations.<sup>72</sup>

### 2014 UN REQUIREMENTS FOR INTERNATIONAL STANDARD COMPLIANCE<sup>73</sup>

- Must omit the ability to recommend amnesty for gross human rights and humanitarian law violations.
- Must prevent the avoidance or delay of criminal investigation/prosecution.
- Cannot allow truth-seeking in place of state legal/prosecutorial obligations.
- Must avoid vague legal definitions and inconsistencies.
- Must include guarantees for independent and impartial Commissions.
- Must address victim satisfaction and non-recurrence.

Without an amendment to the Act, neither the TRC nor the CIEDP will be able to provide a comprehensive and successful transitional justice process. Such an outcome could be monumental. Several human rights activists, CSOs and Chairmen of the TRC and CIEDP argued that if a well-formulated amendment, in line with the Supreme Court verdict and UN technical note, were not implemented, failed transitional justice could incite further violence and human rights violations.<sup>74</sup> Alternatively, a culture of impunity and set a precedent for further criminal activity and human rights abuse in the country.<sup>75</sup>

### *The Commissions*

Despite its deficiencies, the Act established two transitional justice mechanisms: the TRC and CIEDP, each with two-year terms and the ability to apply for a one-year term extension.<sup>76</sup> Both Commissions' mandate is to investigate "the facts about those involved in gross violations of human rights and crimes against humanity during the course of armed conflict, and to create an environment of reconciliation in the society."<sup>77</sup> CIEDP's objective is to investigate enforced disappearances while the TRC takes all other conflict-era cases. Both Commissions will publish their findings and make recommendations to the government once their investigations are completed.

### *Politicization of Commissions*

Due to their lack of transparency and failure to consult civil society and victims, the formation and composition of both the TRC and CIEDP proved controversial.<sup>78</sup> Moreover, the Commissions' members have limited expertise in transitional justice<sup>79</sup> and may be constrained by obligations to the political parties that appointed them.<sup>80</sup>

Since the establishment, subsequent phases such as: the formulation of Commission regulations, procedures, and the categorization of victim petitions, formulation of guidelines for indefinitely shelving certain cases,<sup>81</sup> have remained non-transparent and have not been informed by consultations with stakeholders.<sup>82</sup> This has caused extensive criticism from victims groups, CSOs and even one of the TRC's own members who argued that the Commissions' modus operandi would result in disregard for human rights and impunity, with "hundreds of victims" remaining unheard if the Commissions go forward as is.<sup>83</sup>

For their part, the Chairmen of both Commissions have maintained that regardless of the members' political affiliations, process of appointment, or procedures, the Commissions are genuinely committed to finding truth and pursuing justice. They asserted that ultimately their members will be able to provide unbiased investigations and recommendations with victim needs in mind.<sup>84</sup> A Nepali journalist who has followed the transitional justice process from the beginning agreed, arguing that the leaders of the two Commissions have integrity despite their political appointments.<sup>85</sup> The TRC's Chairman, Surya Gurung, stated repeatedly that the Commission's prerequisite is to be victim-centric, and that, "[i]f victims are satisfied, I will say the Commission was a success. If the victims are not satisfied, I will not say the Commission was a success."<sup>86</sup>

### *Resources and Time*

Success also depends on the Commissions' allotted resources and time. The chairmen of both Commissions have said that neither had been adequate.<sup>87</sup> In 2016 they faced the daunting task of investigating over 58,000 complaints and approximately 3,000 disappearance cases with less than six months left before their original deadline.<sup>88</sup> CIEDP Chairman Lokendra Mallick said that the Commission would need 100-150 employees to investigate, rather than their then 35 members.<sup>89</sup> Similarly, Chairman Surya Gurung stated that to properly investigate all petitions they would need 5,000 staff.<sup>90</sup> At the time they had 64 full-time employees, including support staff such as drivers and janitors.

The Act did include a one-year extension provision,<sup>91</sup> which both Commissions chose to utilize in February 2017.<sup>92</sup> However, it is likely that the additional time will still prove inadequate given the resources, case load and lack of substantive amendments.<sup>93</sup>

### *Petition Collection*

The lack of resources and employees also undermined the procedures for collecting war crime petitions from victims. With no existing independent accountable body to undertake petition collection, the Commissions relied on Local Peace Committees (LPCs) in districts outside Kathmandu to carry out the process. From the beginning, LPCs were not provided sufficient resources or time to communicate the purpose, timeframe or process of victim petition collection.<sup>94</sup> There

are significant challenges in reaching many of Nepal's most remote and diverse communities. This includes lack of education and poverty, which make dissemination of information difficult. According to interviewees, the difficulties were not adequately accommodated.<sup>95</sup> A Tharu community leader said that many Tharu did not have sufficient access to media (both Commissions' primary method of disseminating petition information) and did not speak Nepali to understand radio announcements even if they had access.<sup>96</sup> The community leader himself was unaware that the petition collection process had closed three weeks prior to the interview.<sup>97</sup>

Moreover, in many cases victims were not provided any privacy to file petitions, and in some cases were in close proximity to, sometimes within the same building as, security forces when filing petitions.<sup>98</sup> Female victims of sexual violence often had to report their cases to men. Victim petitions were not always secured after submission to prevent tampering and possible retaliation.<sup>99</sup> The Center for Legal Studies, which monitored and documented the petition collection process, reported cases where security forces asked LPCs for information regarding accused perpetrators and the nature of petitions.<sup>100</sup> Chairman Gurung admitted that some inquiries were made by security forces, but asserted that to his knowledge, once such incidents were addressed, the inquiries halted and the victims' anonymity and security were not at risk.<sup>101</sup>

Whether actual threats were consequential in the petition collection, the perception of threat and the politicization of the LPCs prevented some victims from submitting petitions. The fact that LPCs are "constituted of local party leaders that inflicted the harm done to victims" generated questions of legitimacy and conflict of interest for the very apparatus recording and collecting petitions.<sup>102</sup> While defending the intent of LPCs, an interviewed LPC member in the Tharu region affirmed this sentiment by saying that some victims "were not ready to submit a petition for fear of conflict."<sup>103</sup> A Tharu victim also confirmed this. Although the victim submitted a petition, she was warned that in doing so, it would create further conflict along party lines. Her grandson also said that since many older illiterate victims relied on LPC members to write their statements, he assumed that they were not writing the victim's true accounts, but rather statements "for their own political purpose."<sup>104</sup>

On August 10, 2016, both Commissions finished collecting conflict-era petitions and moved into the investigation phase, after which they would administer recommendations based on their findings.<sup>105</sup> Even if the Commissions manage to properly investigate all cases, their mandate remained vague regarding the outcome of such investigations.<sup>106</sup> Their success is largely dependent on the government passing an amendment to the Act, which should stipulate follow-through provisions for their recommendations to the Attorney General. As it stands, the Commissions' efficacy remains limited to fact-finding and does not ensure complete justice, truth or reparations for victims.

### *Recommendations for Government*

The Nepali government should quickly amend the Act to be in line with the Supreme Court verdict and UN Technical Note. This would encourage the UN and international CSOs to provide much needed resources and expertise in future stages of the process. An amendment must also stipulate follow-through mechanisms for the TRC and CIEDP recommendations. Without sufficient guarantees, the Commissions' recommendations could be derogated and the Commissions' efforts moot.

Appropriate follow-through mechanisms include the establishment of a Special Court. As suggested by Attorney General Raman Kumar Shrestha, a Special Court could be modeled after Sierra Leone's hybrid court for war-era cases.<sup>107</sup> This would allow a court to exclusively address war crimes while incorporating both international and domestic law.<sup>108, 109</sup>

The government should also extend the TRC and CIEDP's mandates past a one-year extension and provide both with sufficient resources to competently investigate and make informed, impartial recommendations to the Attorney General. Without sufficient resources and time, the Commissions are incapable of competently addressing the thousands of petitions they have received.

To obtain legitimacy and gain trust, the TRC and CIEDP must avoid favoritism and political exclusivity in their investigations and recommendations. This would be demonstrated by investigating and prosecuting cases regardless of obvious political affiliations associated with accused perpetrators. They must also consult victims and CSOs in subsequent phases and reflect consultations in their practices.

## THE UNITED NATION'S TRANSITIONAL JUSTICE EFFORTS

Transitional justice efforts have also been hampered by a lack of support from the United Nations and other international donors. UN funding in Nepal has largely been devoted to constitutional reform and earthquake relief and has fluctuated substantially throughout the post-war years.<sup>110</sup> Other global crises, such as the refugee crisis in the Middle East, have also taken precedence over transitional justice efforts in Nepal.<sup>111</sup>

Although the UN's primary focus has been on elections and democracy building, transitional justice had been a consistent priority of the Office of the High Commission for Human Rights (OHCHR).<sup>112</sup> In November 2011, OHCHR issued a press release expressing its concern of the government's transitional justice efforts to "pardon and promote alleged perpetrators of human rights violations."<sup>113</sup> The OHCHR's stated that the Act gave amnesty to political elites on both sides of the conflict for "gross violations of international human rights law and serious violations of international humanitarian law."<sup>114</sup> Its push for transitional justice had major political consequences: a month later, the Nepali government asked OHCHR to end its mission in Nepal.<sup>115</sup>

Transitional justice was then incorporated into the United Nations Development Program's (UNDP) "rule of law" project in 2012 while maintaining close ties to OHCHR headquarters.<sup>116</sup> Through UNDP, the transitional justice focus was on government institutional reform and formal transitional justice processes.<sup>117</sup>

Despite no longer being represented in country, in 2014 the OHCHR issued a Technical Note raising concerns that the Act did not adhere to international human rights standards and specified how and what provisions needed to be changed for the UN to support the government's transitional justice process.<sup>118</sup> In February 2015, after no revisions had been made, the UN (including the UNDP) completely disengaged from the official transitional justice process. The organization asserted that, until the law and commissions are "in compliance with international legal obligations, the United Nations is unable to provide support for these institutions."<sup>119</sup>

Some Nepali human rights activists and international

CSOs supported the UN's decision and acknowledged its prerogative to maintain international standards.<sup>120</sup> Other local organizations and particularly victims thought that the UN should have remained critically engaged. By disengaging, the UN no longer had direct leverage to further pressure the Nepali government. Many victims and local CSOs believe that the UN disengaged in favor of maintaining international norms at the expense of Nepal and its victims.<sup>121, 122</sup>

Although its official position had not changed, in November 2016, in response to a Nepali victim's hunger strike for judicial action, the UN resident coordinator for Nepal publicly restated its commitment and readiness to provide technical support to Nepal's transitional justice process if the government would promulgate an adequate amendment.<sup>123</sup>

### *Victim-Centric Justice and the UN*

From 2012 until at least the end of 2013, the UNDP's transitional justice project "staked their claim" to the issue. Despite the claim, according to victims and an international expert, UNDP (along with many CSOs) failed to engender a victim-centric methodology and took an approach described as "paternalistic to victims."<sup>124</sup>

Initially, it was difficult for the UN to be victim inclusive and remain involved in transitional justice outside official government channels. However, in early 2015, despite poor funding, the UNDP intentionally shifted to a specifically victim-centric approach. It established a separate transitional justice program by facilitating the formation of the Common Victims Common Platform (CVCP). It did so with the perspective that "10 years after the conflict, victims were in a position to have a voice."<sup>125</sup> Since its break with Nepal's governmental transitional justice, the UN has supported non-governmental avenues of transitional justice. This includes providing support and resources to the CVCP for its programs such as informal truth telling and memorialization.<sup>126</sup>

### *Recommendations for the UN*

In order to uphold a victim-centric approach, the UN should consider re-engaging Nepal's government to add international pressure to pass an amendment to the Act. Despite Nepal's derogation of certain international norms, the UN's disengagement from governmental transitional justice has left the process with no further guidance or support. One

international transitional justice expert concluded the UN had “thrown the baby out with the bathwater.”<sup>127</sup> If the UN re-engaged, while maintaining pressure for an amendment, the UN would be in a position to provide the Commissions with much needed technical expertise and advice in their investigation and recommendation processes.

Whether the UN officially re-engages with the government or not, it should continue to support and facilitate informal, victim-led organizations such as the CVCP. They should also endeavor to reach out to victims outside of Kathmandu and CVCP’s organizational base, particularly given the diversity and remoteness of victims around the country.

### **CIVIL SOCIETY TRANSITIONAL JUSTICE EFFORTS**<sup>128</sup>

In the years immediately after the civil war, Nepal’s civil society organizations were more actively involved in transitional justice compared to recent years. Despite the difficulties in bringing transitional justice to the forefront of the political agenda,<sup>129</sup> CSOs managed to (i) raise awareness of the needs of victims, (ii) report and document war-era human rights violations, (iii) file public interest litigation, (iv) provide counseling to victims and (v) educate those victims to understand transitional justice and use human rights mechanisms and the judicial process.

Through persistent lobbying and reporting, CSOs, UN agencies and activists persuaded the government to withdraw the blanket amnesty provision from the first transitional justice draft bill in 2007.<sup>130</sup> Both national and international CSOs have consistently protested impunity measures, attempts to halt criminal investigations, and continued government efforts to include contradictory amnesty provisions in the Act.<sup>131, 132</sup>

#### *Challenges*

Despite these initial efforts, both Commissions, along with victim-led organizations have criticized CSOs for their approach to transitional justice. Criticism has been rooted in CSOs’ recent passivity on the issue. They have also been accused of lacking universal victim inclusivity, where “token cases” receive the majority of CSO attention and support. This approach effectively excludes more marginalized and remote victims from the mainstream dialogue in Kathmandu. These factors have projected the perspective that CSO priorities are not necessarily synonymous with those of

victims.

According to interviewees, the ratification of the Act was the primary cause for CSO passivity.<sup>133, 134</sup> The Act placed CSOs at a crossroads: to support or withdraw from a government policy and process that did not comply with international human rights standards.<sup>135</sup> The fact that most rights-based organizations depend on international donors to function imposes a prerequisite to comply with international standards. This took general priority over victims’ decision to engage with the government’s process.<sup>136</sup>

Organizations also argued that even if CSOs provided direct support and resources, government policy would still deny victims justice. Many also expressed concern that new cycles of violence could result if the government failed to provide genuine justice to its victims, bolstering the argument to dissociate from the government’s transitional justice process.<sup>137, 138</sup>

CSOs’ stance to remain passive, while understandable in principle, confused and frustrated victims.<sup>139</sup> When the Commissions began taking victims’ war-era complaints, many human rights organizations requested that victims and victim groups not file petitions.<sup>140</sup> Despite the lack of trust in the government’s process, and regardless of the viability or quality of the Commissions, many victims wanted to file, feeling that it was their only opportunity to be heard and get their long-standing grievances on record.

Once it became apparent that victims would file with or without CSO support, many organizations changed their position, conceding that the complaint procedure was the only provision in place, and therefore the only chance for victims to achieve any kind of justice, however flawed.<sup>141</sup> Still, most organizations limited their role to monitoring the process rather than directly supporting the government-led process with resources and technical expertise.<sup>142, 143</sup>

The misalignment with victims’ needs also comes from CSOs’ general prioritization of truth and prosecution,<sup>144</sup> whereas many victims prioritized socio-economic support and reparations.<sup>145</sup> Victims often agree that they would like truth and justice, but their “financial suffering,” as a result of war crimes and the need for social services, such as access to education and health care, is significantly more urgent.<sup>146</sup> While some CSOs have attempted to shift their agenda to a victim articulated and victim-centric approach,<sup>147</sup> many

organizations are accused of being project and donor-driven.<sup>148</sup> The disparities between rights-groups and victims groups are striking and significantly undermine the prospect of a unified front on transitional justice.

Additional criticism of CSOs comes from Nepali politicians, lawyers and political analysts who invoke nationalist arguments. They claim that CSOs should not have raised a domestic issue to an international level. Doing so compromises sovereignty, Nepali autonomy, and they maintain that Nepal can manage transitional justice independent of the international community.<sup>149</sup> A member of a rule of law and human rights based organization stated plainly that, “the international community should take a backseat and not be front of the issue.”<sup>150</sup>

This view became particularly acute in 2013 when a Nepali army colonel was arrested in the UK under universal jurisdiction for torture during the civil war.<sup>151</sup> Although he was subsequently acquitted in 2016, a precedent was sent that the international community would intervene if Nepal failed to adequately address its own war-era crimes.<sup>152</sup> Establishment media in Nepal presented this as the international community commandeering Nepal’s justice process.<sup>153</sup>

Conversely, the Commissions and victims have recognized the continual need for support from CSOs. When asked about the role of CSOs in the TRC, Chairman Gurung stated, “We need economists, we need sociologists, we need anthropologists. We need people who are learned and who have already studied ethnicity of Nepal...we need experts.”<sup>154</sup>

#### *Recommendations for CSOs*

To achieve victim-centric justice, civil society should critically engage with the government process, regardless of its deficiencies. CSOs may simultaneously monitor and pressure the government to amend the Act, while also providing much needed resources and expertise to both Commissions. This approach would be more beneficial to victims, rather than leaving victims with no alternative to the official transitional justice process.

Furthermore, CSOs must continue to allow victim agency and promote victim articulated priorities in the process. Promoting victim agency includes reaching more marginalized groups

of victims outside of Kathmandu, particularly non-English and non-Nepali speaking, rural victims. CSOs should be aware of exclusively engaging “leaders” of victims groups and solely emblematic, sensational cases.<sup>155</sup>

There is also significant room for CSOs to fill informal transitional justice gaps, which the Commissions are not as equipped to manage. Recognizing and facilitating informal justice includes memorialization of victims, peer-to-peer dialogue, information and data collection, and informal recognition and truth-seeking programs at the smaller community level.

#### **VICTIMS’ TRANSITIONAL JUSTICE EFFORTS<sup>156</sup>**

Rather than focusing on the media’s political portrayal of transitional justice, or CSO agendas, a Nepali journalist emphasized the importance of focusing on victims’ role and agency. He argued that, “the correct narrative is that now the victims have started lobbying for themselves, this is the most important thing.” Conflict victims have become their own, newfound force in civil society. They have begun to engage directly with the government through lobbying and advocacy rather than relying on CSOs to speak and lobby on their behalf.<sup>157</sup> This is a critical and positive direction for transitional justice and civil society as a whole. Both the government and CSOs now recognize victims as a reputable group of stakeholders who will not go quietly, and need to be included.<sup>158</sup>

#### *Empowerment and Agency*

While some CSOs have followed in the UN’s footsteps and stepped back, the CVCP and other victims seem determined to hold the Commissions and government accountable. One of the most alarming examples is that of Ganga Maya, whose son was tortured to death during the war with no repercussions. She brought international attention to victims’ plights by engaging in a hunger strike that instigated the UN representative’s published letter on transitional justice,<sup>159</sup> as well as prompting a local court to take her statement after 31 days of fasting that resulted in hospitalization.<sup>160, 161</sup>

Formally, this empowerment can be attributed to the formation of various victims groups. One such group is the Conflict Victims Common Platform (CVCP), a “loose network of 17 victim organizations”<sup>162</sup> that speaks on behalf of both Maoist and State victims. The establishment of the CVCP,

facilitated by the UN and equipped with CSO imparted awareness and training programs, has propelled the group to the forefront of the transitional justice dialogue.<sup>163, 164</sup> As a result, the government which initially disregarding victim-articulated needs, has now, at least in rhetoric, recognized the importance of victim-centric justice.<sup>165</sup>

Victim agency is also discernable in the various lawsuits victims have filed against government actions, as well as their persistent lobbying for the cause. In September 2016, conflict victims filed a Supreme Court case against the TRC regarding its guidelines to shelve certain war-era petitions.<sup>166</sup> Victims argued that many of the guidelines perpetuate impunity. Concerning provisions included deferment of all anonymous petitions, “excluded those who were extorted, forced to leave their profession, child soldiers, and those who were used as human shields in crossfire,” and lacked definition as to what cases “do not have sufficient evidence” to investigate, among other concerns.<sup>167</sup>

The chairman of the CVCP, Suman Adhikari, stated that his organization had “serious reservations against the TRC’s procedure on shelving conflict-era rights violation cases.” Rather than victim-centric, he claimed the intent of the TRC guidelines has been “to ensure impunity to as many perpetrators as it desires.”<sup>168</sup> As a result, in November 2016 the Supreme Court again ruled in favor of victims, scrapping the shelving guidelines and stating that the TRC needed to address and investigate all complaints.<sup>169</sup>

In addition to court cases, the CVCP and other organizations have made clear demands from the government, asking for both Commissions to enforce transparency and consult with victims before moving forward on investigations and recommendations.<sup>170</sup> Specifically, they want to be consulted in the Commissions’ categorization of victims, reparation policy, and provide feedback on the weaknesses of the Commissions’ petition collection, as well as be included in the government’s amendment drafting process.<sup>171</sup>

Despite many victims’ steadfastness thus far, victim agency remains a phenomenon predominantly within Kathmandu rather than countrywide. Furthermore, many victims are experiencing issue fatigue with little confidence in the government to follow through with its promises after so many years.<sup>172</sup>

### *Distrust of Transitional Justice*

Victims express extremely low levels of trust in the Commission process. When asked about this question after the closing of the petition process in August 2016, CVCP Chairman Suman Adhikari said: “I have not seen a single victim that is trusting in the Commission.”<sup>173</sup> The general consensus among petition submitters was not that the Commissions had gained victims’ trust, but rather that victims wanted their cases officially recorded to prove their attempted engagement and compliance. As Adhikari stated, “Filing petitions is not an indicator that victims believe the commission.” TRC Chairman Gurung admitted, “We haven’t fully gained the trust of the victims and there is an environment of mistrust, but we are trying to assure the victims we will do what the victims tell us and what they desire.”<sup>174</sup>

The attitude that victims filed regardless of their confidence in the Commissions also stems from the fact that many victims and human rights activists referred to the petition collection as “this time.” The suggestion is that if and when the current Commissions fail, an additional round could be improved in the future.<sup>175</sup>

Regarding the relationship between CSOs and victims, victims recognize and are grateful for the capacity building and resources that CSOs provided in the past. However, there is also a sentiment that although CSOs share similar principles with victims, “in practice there is a difference” between the two groups of stakeholders.<sup>176</sup> While CSOs revolve around international norms, victims’ main concerns are the on-the-ground realities in Nepal.<sup>177</sup>

Whether CSO recent passivity has lessened victims’ capacity to act, or in contrast provided victims the space to act with independent agency, is debatable. Many victims see a preferable balance where victims take the lead by prescribing their needs and wants, while CSOs simultaneously provide necessary resources and expertise, and pressure the government and the international community to listen to victims.<sup>178</sup>

### *Recommendations for Victims*

In spite of issue fatigue, victims must maintain pressure on the government to pass an amendment and hold the government accountable in each phase of the transitional justice process. They must continue to publish clear recommendations for the

Commissions and pending amendment.

While lobbying the government, they should attempt to avoid political divisions when addressing transitional justice issues. Political identities should remain separate from victim-centered transitional justice in order to confront and engage the government in a more unified, coherent manner. This includes reaching out to more remote and excluded victims countrywide, regardless of geographic, ethnic or language background.

## CONCLUSION

Although the formal transitional justice processed has

continued to forestall, there has been progress, albeit slow and indeterminate at times. Both external (international CSOs, and the UN) and internal (local CSOs and victims) pressure on the government to make just and reasonable decisions is critical to the outcome of transitional justice in Nepal. Domestically, the Nepali Supreme Court has been able to make fair, non-politicized decisions in regards to transitional justice and war-era victims. It is time for the government to heed their rulings with the support and input from victims and civil society, which would then allow for the UN to re-commit to Nepal's own process. Whether political parties will be able to achieve this given the fear of culpability in their own ranks remains to be seen.

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- <sup>80</sup> Interview with the author, Subodh Raj Pyakurel (Chairperson, Informal Sector Service Center), Kathmandu, Nepal, August 11, 2016; Charan Prasai (Human Rights Activist), Kathmandu, Nepal, August 5, 2016; Interview with the author, Bikash Basnet (Program Coordinator, Advocacy Forum), Kathmandu, Nepal, August 8, 2016; ICJ pamphlet; Lekhanath Pandey, “Political Affinity Reflected in TRC Members’ Work,” *The Himalayan Times* (The Himalayan Times), February 14, 2016, <https://thehimalayantimes.com/nepal/political-affinity-reflected-trc-members-work/>.
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- <sup>145</sup> Interview with author, victim groups, Kathmandu, Nepal, August 2016; Interview with author, NHRC member, Kailali, Nepal, August 30, 2016; Interview with author, LPC member, Dhankuta, Nepal, September 6, 2016.
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## ABOUT THIS SERIES

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## ABOUT THE AUTHORS

Caitlin Trent has worked in Cambodia, Colombia, Peru, the Dominican Republic, and Sri Lanka at non-governmental agencies ranging from journalism, development, human rights and community policing. She received her Master’s Degree from the Josef Korbel School of International Studies, and a certificate in International Human Rights Law in conjunction with the Sturm College of Law, where she studied transitional justice, conflict and human rights. She currently is working at the Colorado Immigrant Rights Coalition in Denver after finishing her research in Nepal. She can be contacted at [caitlin@coloradoimmigrant.org](mailto:caitlin@coloradoimmigrant.org).

Srijana Nepal is a researcher and is currently working as a Programme Officer at The Asia Foundation\*, Nepal. She has worked as a lead researcher in several internationally funded research projects with a focus in women’s rights, human rights, governance, humanitarian issues and peacebuilding for the last several years. She was a Caux Scholar of Initiatives of Change, USA in 2015 and has also worked as a Fredkorspet (FK) Norway fellow in Thai Volunteer Service Foundation, Bangkok for a year. She can be contacted at [atnepalsrijana5@gmail.com](mailto:atnepalsrijana5@gmail.com).

*\*This research piece is an overview of the state of transitional justice in Nepal, based off of interviews from civil society organizations, victims, government officials, and United Nations representatives. It is an attempt to recognize the differing agendas and priorities for all of these groups, and how they can coalesce to create Nepal’s ultimate vision for transitional justice.*