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RECOMMENDED AMENDMENTS TO THE TRUTH AND RECONCILIATION ACT AS THE GOVERNMENT OF NEPAL CONSIDERS PROSECUTING 65,411 HUMAN RIGHTS CASES FROM THE ARMED CONFLICT (1996-2006)

INTRODUCTION

After Nepal's bloody Armed Conflict (1996–2006) (the Conflict), the Truth and Reconciliation Act (TRC Act) established two commissions charged with investigating and prosecuting gross human rights violations and crimes against humanity that occurred during the Conflict.¹ The Conflict caused the death of around 16,729, the displacement of 78,689, and the enforced disappearance of 2,506 people.² The Commission on the Investigation of Enforced Disappeared Persons (CIEDP) was charged with finding 2,506 missing persons and returning remains to families.³ The Truth and Reconciliation Commission (TRC) was established to investigate and prosecute 62,905 complaints of human rights violations including murder, rape, torture, and mass execution.⁴ Seventeen years have passed since the Conflict ended and, of the 65,411 complaints lodged thus far, the TRC and CIEDP have not resolved a single one.⁵

1. See The Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2071 (Act. No. 1/2014) (Nepal) [hereinafter TRC Act].

2. See U.N. Hum. Rts. Comm., Consideration of reports submitted by States parties under article 40 of the Covenant, at 6, U.N. Doc. CCPR/C/NPL/2 (2012) [hereinafter Reports]. See also *Conflict victims lament govts apathy in their joint submission*, THE HIMALAYAN TIMES (July 11, 2020, 8:29 AM), <https://thehimalayantimes.com/nepal/conflict-victims-lament-governments-apaty-in-their-joint-submission>. It should be noted that these numbers may not be accurate as new complaints are consistently lodged and access issues in remote, mountainous regions, results in a trend of underreporting. These numbers reflect known deaths, missing persons, and displacements as of Oct. 18, 2022. *Id.*

3. See *2,506 persons disappeared during insurgency*, THE HIMALAYAN TIMES (Mar. 18, 2020, 11:45 AM), <https://thehimalayantimes.com/kathmandu/2506-persons-disappeared-during-insurgency>.

4. TRC Act, *supra* note 1, § 3(2)–(3)(a). See also HUM. RTS. WATCH, NO LAW, NO JUSTICE, NO STATE FOR VICTIMS: THE CULTURE OF IMPUNITY IN POST-CONFLICT NEPAL 29-30 (2020).

5. Reports *supra* note 2. See also *supra* note 4.

With a long history of political instability and failure of similar commissions, some members of the Nepal public, reeling from the trauma of conflict, doubted the success of these commissions.⁶ Their initial skepticism was well-founded. For seventeen years, the TRC and CIEDP were distractions the Government of Nepal used to quiet public outrage regarding the lack of persecutions while appearing somewhat progressive to the international community.⁷

This past summer, *The Kathmandu Post* reported rumors that the Government of Nepal may have taken a renewed interest in investigating and resolving complaints.⁸ In May 2022, in Biratnagar, Province 1, Minister for Law and Justice Govinda Sharma Bandi consulted with local victims about their concerns moving forward with the transitional justice process.⁹ This past spring, in April 2022, the Government of Nepal contacted human rights lawyers at Advocacy Forum, an impact litigation and public policy firm based in Kathmandu, Nepal, inquiring about how to proceed.¹⁰ In response, several memos were sent forth to clarify key aspects of a process that should have commenced seventeen years ago.¹¹ In addition to the problem of the TRC and CIEDP's inactivity, parts of the TRC Act itself are seriously

6. ADVOC. F., BRIEFING PAPER: THE STATE OF TRANSITIONAL JUSTICE IN NEPAL 6-7 (2019) (victims participated in Working Group reports submitted to the United Nations. Throughout these reports, victims reiterated concerns about the impunity enjoyed by the Government of Nepal). *See, e.g.*, U.N. Sec. Council, Working Group on Children and Armed Conflict, U.N. Doc. S/AC.5/2007/8 (June 17, 2007). *See also Nepal: Lack of Accountability Undermining the Rule of Law*, HUM. RTS. WATCH (Jan. 13, 2021), <https://www.hrw.org/news/2021/01/13/nepal-lack-accountability-undermining-rule-law>.

7. *See* ADVOC. F., *supra* note 6, at 6.

8. *See* Binod Ghimire, *Conflict victims have high hopes amid fresh bid to deliver transitional justice*, THE KATHMANDU POST (June 1, 2022), <https://kathmandupost.com/national/2022/06/01/conflict-victims-have-high-hopes-amid-fresh-bid-to-deliver-transitional-justice>.

9. *Id.*

10. E-mails from Government of Nepal to Mandira Sharma, Senior International Legal Advisor, South Asia and Myanmar at International Commission of Jurists and Co-Founder of Advocacy Forum (April-June 6, 2022) (on file with author).

11. Memoranda from Sophia Ottoni-Wilhelm, J.D. Candidate at Brooklyn Law School, prepared on behalf of Advocacy Forum in response to a request by the Government of Nepal (May 3-August 15, 2022) (on file with author).

flawed.¹² The amnesty provision provides impunity for perpetrators of gross human rights violations; this is inconsistent with customary international law, international human rights law, and several United Nations' policies.¹³ In addition, the provision forcing victims to accept the apologies of perpetrators, the provisions that fail to define reparations fully under international law, and the provisions making it nearly impossible to bring cases in the regular criminal justice system, must all be amended.

Part I of this Note begins with an examination of the destabilization of the Nepalese political system leading to the armed conflict. It explains the context in which the TRC and CIEDP bodies were formed to hear Armed Conflict complaints falling under the TRC Act. Finally, an exploration of a long history of failed commissions provides a backdrop for understanding the failures of these two bodies. Part II describes flawed provisions of the TRC Act. In particular, Section 26 on amnesty for gross violations of human rights; Section 22, which forces victims into the process of reconciliation and puts tremendous pressure on them to forgive perpetrators; the tenuous path to reach criminal court; and a quick overview of politicized commissioner appointments and nonexistent special court.

Part III explores attributes of the more successful truth and justice processes in South Africa following the horrors of the apartheid regime. Finally, in Part IV, solutions will be presented. The TRC Act must be amended immediately to remove the possibility of amnesty for perpetrators of gross human rights violations. Additionally, the provisions which effectively force victims and their families to forgive perpetrators must be struck from the Act. The definition of reparations contained in the Act must be changed to meet the threshold provided in international legal standards. Lastly, the mechanisms in the Act that place obstacles in the way of cases reaching criminal courts must also be removed. This final amendment is the most important. With 65,411 complaints and zero resolutions in seventeen years, the legal options for victims of the Armed Conflict should not be limited.

12. See Off. High Comm'r Hum. Rts., Technical Note: The Nepal Act on the *Commission on Investigation of Disappeared Persons, Truth and Reconciliation*, 2071 (2014), 2-3 (2014) [hereinafter Technical Note].

13. *Id.*

I. ARMED CONFLICT AND THE TRC ACT

The background of political instability and civil unrest described in the beginning of this section provides context to understanding the conditions which led to the armed conflict. This section also describes the troublesome process through which the two truth and reconciliation commissions were formed. In the final part of this section, the history of passed failed commissions will be explored to explain current public distrust in the TRC and CIEDP.

A. Political Turmoil Culminating in Armed Conflict

Since the seventh or eighth centuries BCE, areas around Nepal, including the Kathmandu Valley, were governed by a string of royal dynasties.¹⁴ In 1846, Jung Bahadur Rana successfully relegated the centuries-old Shah dynasty and become the first prime minister to hold absolute power in Nepal.¹⁵ During the Rana family's 104 year reign, Shah monarchs were little more than figureheads.¹⁶ A political movement supported by King Tribhuvan Shah and driven by his poor treatment ended the Rana's power in 1951 and established a system in which the monarchy ruled with input from political parties.¹⁷ In 1959, after the death of King Tribhuvan Shah, his son King Mahendra Shah Dev issued a constitution and held the first democratic elections.¹⁸ A year later, King Mahendra changed his mind, dismissed the political parties, dissolved parliament, and made himself an absolute monarch.¹⁹ This system prevailed for three decades.²⁰

In the early 1990s, the previously banned political parties gathered enough momentum to launch a series of disruptive

14. *History of Nepal*, GOV'T OF NEPAL - MINISTRY FOREIGN AFFS., <https://mofa.gov.np/about-nepal/history-of-nepal/> (last visited Aug. 23, 2022).

15. *Id.*

16. *Id.*

17. *Id.* See Chandra Prakash Singh, *Rise and Growth of the Anti-Rana Movement in Nepal*, 65 PROCEEDINGS OF THE INDIAN HIST. CONG. 992, 1000 (2004).

18. GOV'T OF NEPAL - MINISTRY FOREIGN AFFS., *supra* note 14. See *Tribhuvan Bir Bickrum Shah, King of Nepal, 1903-1955*, NAT'L ARCHIVES CATALOG, <https://catalog.archives.gov/id/78116292> (last visited Jan. 20, 2023).

19. GOV'T OF NEPAL - MINISTRY FOREIGN AFFS., *supra* note 14.

20. *See id.*

protests, called the *Jana Andolan I* (People's Movement).²¹ King Birenda accepted these groups into a multiparty parliament in which he was head of state.²² The Nepalese public, suffering under terrible economic conditions and a highly discriminatory caste system, was excited when reforms were promised.²³ Five years passed and the promises of equality were not fulfilled and conditions of extreme poverty persisted.²⁴

On February 4, 1996, the Communist Party of Nepal-Maoist (CPN-Maoist) took advantage of the moment of public discontent and submitted a forty point list of demands to the Government of Nepal.²⁵ The CPN-Maoists threatened armed insurgency should these conditions not be met promptly.²⁶ Just nine days later, on February 13, 1996, the CPN-Maoists attacked.²⁷ Over the course of the ensuing ten years (1996–2006), the small, mostly rural conflict escalated into a bloody civil war.²⁸ The United Nations (UN) estimated in 2012 that over 16,729 people were killed by the Government of Nepal and the CPN-Maoists over the course of the decade.²⁹ At least 78,689 people were displaced from their homes and 1,327 disappeared.³⁰ Reports of torture, rape, the installation of mines, mutilation, and the recruitment of child soldiers were all prevalent.³¹ The complete

21. Off. High Comm'r Hum. Rts., Nepal Conflict Rep.: An analysis of conflict-related violations of international human rights law and international humanitarian law between February 1996 and 21 November 2006, at 14 (2012) [hereinafter Nepal Conflict Report].

22. GOV'T OF NEPAL - MINISTRY FOREIGN AFFS, *supra* note 14.

23. Nepal Conflict Report, *supra* note 21, at 14-15.

24. *Id.* at 15. See also Nepal: At a glance, ASIA FOUND., <https://asiafoundation.org/wp-content/uploads/2017/10/Nepal-StateofConflictandViolence.pdf> (last visited Aug. 23, 2022).

25. Baburam Bhattarai, *Sub: Memorandum, 40 POINT DEMAND* (Feb. 4, 1996), <https://www.satp.org/satporgtp/countries/nepal/document/papers/40points.htm>.

26. *Id.* See also Nepal Conflict Report, *supra* note 21, at 15.

27. Brad Adams, *Nepal at the Precipice*, 84 No. 5 FOREIGN AFF. 121, 125 (2005).

28. Nepal Conflict Report, *supra* note 21, at 15.

29. See Reports, *supra* note 2. See also INT'L CTR. FOR TRANSITIONAL JUST., NOW IS A TIME TO LEAD: ADVANCING TRANSITIONAL JUSTICE INITIATIVES THROUGH LOCAL GOVERNMENTS IN NEPAL 12 (July 2018).

30. See UNHRC, Report CCPR/C/NPL/2 at 6. See also *Conflict and Internally Displaced Persons in Nepal*, INFORMAL SECTOR SERV. CTR., <https://www.insec.org.np/wp-content/uploads/2017/12/Armed-Conflict-and-Internally-Displaced-Persons-in-Nepal.pdf> (last visited Aug. 18, 2022).

31. See Nepal Conflict Report, *supra* note 21, at 15. See also *Ban Landmines Campaign Nepal (NCBL)*, PEACE INSIGHT (2017),

disregard of civilian life and well-being by both the Government of Nepal and the CPN-Maoist insurgents was deemed to violate standards followed in international customary law.³²

The Comprehensive Peace Accord (CPA) was an agreement reached between the Government of Nepal and the CPN-Maoists which formally ended the armed conflict on November 21, 2006.³³ Both sides agreed to release prisoners in their custody within fifteen days and make their statuses known to the public.³⁴ They agreed to reveal the location of persons who had disappeared and been killed during the armed conflict within sixty days of signing the CPA.³⁵ Finally, Clause 5.2.5 stated that both sides agreed to the formation of a “High-level Truth and Reconciliation Commission ... in order to investigate truth about people seriously violating human rights and involved in crimes against humanity, and to create an environment of reconciliations in the society.”³⁶ These aims were reiterated in the Interim Constitution of Nepal which was signed January 15, 2007.³⁷ Article 33(s) contains a commitment to establish a Truth and Reconciliation Commission to investigate facts of grave violations of human rights and crimes against humanity.³⁸

B. Formation of the TRC and CIEDP

In 2007, the newly reformed Government of Nepal created a commission to draft truth and justice laws in the aftermath of the armed conflict.³⁹ Members of the commission were picked by

<https://www.peaceinsight.org/en/organisations/ban-landmines-campaign-nepal-ncbl/?location=nepal&theme>. See also Tara Bhattarai, *Land Mines Continue to Claim Lives in Nepal*, GLOB. PRESS J. (September 10, 2012), <https://globalpressjournal.com/asia/nepal/landmines-continue-to-claim-lives-in-nepal/>. See also Vishal Arora, *Nepal's Ex-Child Soldier Shares Plight of His 3,000 Peers*, THE DIPLOMAT (April 24, 2017), <https://thediplomat.com/2017/04/nepals-ex-maoist-child-soldier-shares-plight-of-his-3000-peers/>.

32. See Nepal Conflict Report, *Supra* note 21, at 14, 61, 67-68.

33. ADVOC. F., *supra* note 6, at 5.

34. Comprehensive Peace Accord, Nepal Gov't – Communist Party of Nepal (Maoist), 5.2.2, Nov. 22, 2006.

35. *Id.* at 5.2.3.

36. *Id.* at 5.2.5.

37. NEPAL [INTERIM CONSTITUTION] 2007.

38. *Id.* at 33(s).

39. ADVOC. F., *supra* note 6, at 7.

the political parties.⁴⁰ The drafting process itself was kept completely confidential until a draft of the law was leaked.⁴¹ It stated that members from both sides who committed crimes “in the course of achieving political objectives” or “while performing their duty” could receive amnesty.⁴²

In response to the outcry from the public and human rights defenders who assumed that no one would be prosecuted for crimes committed in the course of the armed conflict if this draft were to become law, the Ministry for Peace and Reconstruction agreed to accept input on the bill.⁴³ In total, there were nineteen rounds of consultations in 2009.⁴⁴ These involved victims, civil society organizations, the United Nations Office of the High Commissioner of Human Rights, and the Government of Nepal.⁴⁵ During that process, it was agreed that amnesty would be allowed only for less serious crimes.⁴⁶ Commissions formed for truth and justice purposes would focus on facilitating fact-finding investigations and make recommendations for reparations and reform.⁴⁷ The bills that arose from these consultations were tabled in parliament in February 2010.⁴⁸ The bills then received over a hundred proposed amendments.⁴⁹ In May of 2012, while the bills were pending, the parliament was dissolved.⁵⁰ Dr. Baburam Bhattarai, leader of the Government of Nepal, adopted an ordinance to replace the bills on March 14, 2013.⁵¹ It was quickly discovered that, despite Dr. Bhattarai’s statements otherwise, the ordinance was substantially different from the original bills.⁵²

Supported by civil society organizations, victims submitted a challenge to the ordinance in the Supreme Court of Nepal on

40. *Id.*

41. *Id.*

42. Mandira Sharma, *Transitional Justice in Nepal: Low Priority, Partial Peace*, in *TWO STEPS FORWARD, ONE STEP BACK: THE NEPAL PEACE PROCESS* 32, 33 (Deepak Thapa and Alexander Ramsbotham, eds., 2017).

43. See *ADVOC. F.*, *supra* note 6, at 7.

44. *Id.*

45. *Id.*

46. *Id.* at 7-8.

47. *Id.*

48. *Id.* at 8.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

March 24, 2013.⁵³ The Supreme Court responded with a legal framework to guide the transitional justice process.⁵⁴ It stated that the Government of Nepal must: (1) draft the bill with the help of a team of experts; (2) establish the truth and reconciliation commission only after additional consultation with stakeholders and victims; (3) place limits on the availability of amnesty, pardon, and the withdrawal of cases involving gross violations of human rights; (4) pass legislation to criminalize gross human rights violations including torture, rape, and enforced disappearances; (5) offer reparations to victims; and (6) give victims the power of “mandatory consent in offering amnesty or conducting mediation in those cases where amnesty and mediation can be done.”⁵⁵

In the subsequent years, the recommendations by the Supreme Court regarding transitional justice were generally not followed.⁵⁶ Frustrated human rights lawyers turned to the criminal justice system because the truth and reconciliation mechanisms had yet to be established.⁵⁷ Although torture and enforced disappearance were not yet criminalized under Nepalese law, human rights lawyers were able to file some murder cases from the armed conflict in criminal courts.⁵⁸ The case of Maina Sunuwar was one such case.⁵⁹ At 6 a.m. on February 19, 2004, fifteen uniformed men from the Royal Nepal Army arrived at the home of Maina Sunuwar, a fifteen-year-old girl from Kavre District.⁶⁰ They were looking for her mother, Devi Sunuwar, an alleged associate of the Rebel Army.⁶¹ Because the Nepal Army could not find Devi Sunuwar, they took Maina in her place.⁶²

53. See ADVOC. F., *supra* note 6, at 8.

54. *Madhav Kumar Basnet and Ors. for JuRI-Nepal v. Government of Nepal*, Writ No 0058 of the Year 2069 B.S., Writ No 0057 of the Year 2069 B.S. See also Ben Schoveld, *Nepal's Supreme Court lays down the gauntlet*, INT'L COMM'N OF JURISTS (January 13, 2014), <https://www.icj.org/nepals-supreme-court-lays-down-the-gauntlet/>.

55. ADVOC. F., *supra* note 6, at 8.

56. See ADVOC. F., *supra* note 6, at 8-9.

57. *Id.*

58. *Id.* See also The Nat'l Penal (Code) Act, NPL-2017-L-106060 (2017). See also Crim. Proc. (Code) Act, NPL-2074-L-106061, §167 (entered into force August 2018) (Torture and enforced disappearance were not criminalized in Nepal until 2018).

59. See ADVOC. F., *supra* note 6, at 8-9.

60. See ADVOC. F. Maina Sunuwar: Victim Summary.

61. *Id.*

62. *Id.*

Once Maina arrived at the Army Barracks, the men forced her head underwater for a minute “six or seven” times, then applied electric shock to her wet feet and hands four or five times.⁶³ Maina began vomiting and foaming; she died after one and a half hours of torture.⁶⁴ After unlawfully detaining and then torturing Maina to death, the Nepal Army hid her remains in an undisclosed location.⁶⁵ Her mother filed the case to attempt to recover her daughter’s remains.⁶⁶ The location of Maina’s body was eventually disclosed and her remains were exhumed.⁶⁷ The prosecutor in Kavre District where the crimes occurred filed murder charges against four Royal Nepal Army officers.⁶⁸ The investigation into the alleged crime stalled, causing human rights lawyers to file a writ in the Supreme Court challenging the lack of progress made by law enforcement.⁶⁹ The Supreme Court responded by ordering police to complete investigations on a time-bound schedule and also provided guidance that helped conflict victims in the coming years.⁷⁰ The Court stated: (1) the military court did not have jurisdiction over cases involving the murder of civilians; (2) truth and justice cannot supersede the criminal justice system but must complement it; (3) victims cannot be denied justice on the grounds that the truth and justice commissions which have yet to be established will provide it; and (4) law enforcement and prosecutors have an obligation to investigate and prosecute conflict era cases involving human rights violations such as murder.⁷¹

In response to these instructions, other victims’ families filed First Information Reports (FIRs) to initiate criminal investigation of claims.⁷² None received justice.⁷³ The four Army officers involved in Maina Sunuwar’s murder were finally convicted *in absentia* after repeated attempts to have them arrested by law

63. See Off. High Comm’r Hum. Rts., The torture and death in custody of Maina Sunuwar: Summary of concerns, at 4 (December 1, 2006).

64. *Id.*

65. *Id.*

66. See ADVOC. F., *supra* note 6, at 8.

67. *Id.* at 9.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

enforcement who allegedly had Army cooperation failed.⁷⁴ Today, all four perpetrators walk free.⁷⁵ In 2018, the Army filed a petition to reverse the conviction.⁷⁶ The petition lacked legal foundations and nothing has come of it, but the case as a whole has become emblematic for the culture of Army, police, and Government impunity in Nepal.⁷⁷

After the Supreme Court order on the Maina Sunuwar case provided guidance for how to proceed with the truth and reconciliation process, conflict victims and civil society organizations hoped they would be consulted in the final drafting of the TRC Act.⁷⁸ The Government of Nepal formed an eleven member task force including some representatives of conflict victims in March 2014 through the Ministry for Peace and Reconciliation.⁷⁹ The task force was given ten days to draft a bill that respected the Supreme Court orders.⁸⁰ On April 2, 2014, the group handed over a bill with the expectation that consultations with a broader audience would occur in the months to come.⁸¹ Suddenly, a bill that was different than the one presented by the task force was tabled in Parliament.⁸² It was reported that the bill was drafted by consensus among the three leading political parties.⁸³ Parliamentarians, victims, and civil society organizations were not allowed to provide input.⁸⁴ Parties prevented opposition and used

74. *Id.*

75. *Id.*

76. See Frederick Rawski, *Nepal: army efforts to frustrate justice in the case of Maina Sunuwar killing lack legal foundation*, INT'L COMM'N OF JURISTS (November 20, 2018), <https://www.icj.org/nepal-army-efforts-to-frustrate-justice-in-case-of-maina-sunuwar-killing-lack-legal-foundation/>.

77. *Id.* See also *NA's petition lacks legal foundation, says ICJ*, THE HIMALAYAN TIMES (Nov. 21, 2018, 10:00 AM), <https://thehimalayan-times.com/kathmandu/nas-petition-lacks-legal-foundation-says-icj>.

78. See ADVOC. F., *supra* note 6, at 10.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. See *Paying Lip Service to Justice: The Newly Adopted TRC Act Breaches International Law and Flouts the Decision of the Supreme Court of Nepal*, ADVOCACY FORUM, TRIAL, REDRESS, submitted to UN Special Rapporteur on the Promotion of Truth, Justice, and Guarantees of Non-Recurrence, at 3 (June 2014), <https://www.refworld.org/pdfid/53d612164.pdf>.

84. *Id.*

fast-track procedures to adopt the bill at midnight on April 25, 2014.⁸⁵

Both the CPA and the Interim Constitution Article 33(s) were cited in the TRC Act.⁸⁶ The Act created two separate commissions—TRC and CIEDP—in February 2015.⁸⁷ Wary that the hasty establishment of these two commissions would not bring positive change, human rights defenders and victims filed a writ challenging several sections of the Act at the Supreme Court.⁸⁸ The United Nations Office of the High Commissioner of Human Rights (OHCHR) urged the Government to not form the two commissions until the Supreme Court rendered a decision on the challenged sections.⁸⁹ Citing international human rights commitments, Nepal had agreed to in adopting the ICCPR on this date, the OHCHR stated that the Act as it stood failed to abide by these standards.⁹⁰ Ignoring requests by the OHCHR, the Government established the TRC and CIEDP commissions in February of 2015.⁹¹ Later the same month, the Supreme Court ruled that several sections of the Act violated its prior rulings, the Constitution, and Nepal's international obligations.⁹²

C. History of Failed Commissions

Under the Commission of Inquiry Act, forty-eight commissions like the TRC and CIEDP have been created in the past to investigate instances of human rights violations.⁹³ Historically, the Government of Nepal created these commissions in response to public outrage when it has failed to investigate horrific acts.⁹⁴ The Government provides victims with monetary compensation in an amount dictated by the magnitude of public protests and

85. *Id.* See also ADVOC. F., *supra* note 6, at 10.

86. TRC Act, *supra* note 1, at Preamble (1).

87. ADVOC. F., *supra* note 6, at 4.

88. *Id.* at 10.

89. *Id.*

90. Technical Note, *supra* note 12, at 2-3, 5.

91. Dewan Rai, *Transitional justice: TRC, CIEDP have a lot on their plate*, THE KATHMANDU POST (Aug. 11, 2016), <https://kathmandupost.com/national/2016/08/11/transitional-justice-trc-ciedp-have-a-lot-on-their-plate>.

92. *Suman Adhikari et al. vs. Prime Minister and Cabinet of Minister et al.*, 070-WS-0050 (2015). Exerts translated by the United Nations, International Commission of Jurists, Asia-Pacific Human Rights Information Center.

93. ADVOC. F., *supra* note 6, at 6.

94. *Id.*

demonstrations in the streets.⁹⁵ According to human rights organizations, the commission's reports and recommendations are infrequently published or integrated into the Government's reactions to future claims of human rights violations.⁹⁶ The commissions are considered by the public to be a Government tactic to defuse public anger without taking the time or resources to conduct thorough investigation of claims.⁹⁷

Two previous commissions, the Rayamajhi Commission and the Mallik Commission, demonstrate this point.⁹⁸ The Mallik Commission was charged with investigating human rights abuses occurring during the *Jana Andolan I* (People's Movement).⁹⁹ It formed immediately after the movement ended the absolute monarchy and paved the way for a multiparty democratic system in 1990.¹⁰⁰ The recommendations of the Mallik Commission were not followed.¹⁰¹

The Rayamajhi Commission was charged with investigating human rights abuses that occurred during the *Jana Andolan II* (People's Movement II) between April 4 and April 24, 2006.¹⁰² The movement forced King Gyanendra to return political power in Nepal to the reinstated parliament.¹⁰³ During the protests, an estimated twenty-two people were killed and another estimated five thousand people were victims of police and Army brutality as well as "arbitrary arrest, detention and torture."¹⁰⁴ The movement, which mirrored the aims of the *Jana Andolan I* in 1990, has been credited with establishing an environment conducive

95. *Id.*

96. *Id.*

97. *Id.* See also Carles Fernandez Torne, *Submissive to the Political Will? Civil Society and Victims' Mobilization around Truth Commissions*, 97 COLOM. INT'L 57, 67-70 (2018).

98. *Id.*

99. *Supra* note 97.

100. ADVOC. F., *supra* note 6, at 6. See also *supra* note 97.

101. *Id.* See also INT'L COMM'N JURISTS, COMMISSIONS OF INQUIRY IN NEPAL: DENYING REMEDIES, ENTRENCHING IMPUNITY (2012).

102. ADVOC. F., *supra* note 6, at 6. See also BANDITA SIJAPATI, PEOPLE'S PARTICIPATION IN CONFLICT TRANSFORMATION: A CASE STUDY OF JANA ANDOLAN II IN NEPAL 5-6 (2009).

103. *Id.* See also INT'L CRISIS GROUP, NEPAL'S PEACE AGREEMENT: MAKING IT WORK ASIA REPORT NO. 126 1, 20-21 (2006), <https://icg-prod.s3.amazonaws.com/126-nepal-s-peace-agreement-making-it-work.pdf>.

104. See INT'L COMM'N JURISTS (2012), at 8. See also ADVOC. F., *supra* note 6, at 6.

to the signing of the CPA in November 2006.¹⁰⁵ The commission formed in the aftermath of the violence recommended that the Government of Nepal relieve guilty parties of their public positions and move forward with the prosecution of those responsible.¹⁰⁶ The Government failed to make these recommendations public and did not heed the advice.¹⁰⁷ According to a report by the International Commission of Jurists, some of the same individuals who violently suppressed protestors during the *Jana Andolan I* did the same during the *Jana Andolan II*.¹⁰⁸ Others who were active in similar roles during *Jana Andolan I* gained political power after the movement and have worked against holding those responsible accountable.¹⁰⁹

II. PROBLEMATIC SECTIONS OF THE TRC ACT

Six years after the formation of the TRC and CIEDP, millions of taxpayer's rupees have been spent on these bodies with zero resolutions.¹¹⁰ Many taxpayers supporting the failed bodies are conflict victims who have yet to receive justice.¹¹¹ The CIEDP commission, formed to bring justice to families of victims of enforced disappearance, has held zero trials and no remains have been recovered or restored to families.¹¹² It has received over three thousand complaints of enforced disappearance.¹¹³ Similarly, the TRC has resolved none of the over sixty thousand complaints of human rights violations it has received.¹¹⁴

Victims and human rights lawyers feel that, because of several problematic provisions in the Act, the two commissions it formed

105. BANDITA SIJAPATI, *supra* note 102.

106. ADVOC. F., *supra* note 6, at 6.

107. *Id.*

108. *Id.* at 7 (citing INT'L COMM'N JURISTS (2012), at 8).

109. *Id.*

110. ADVOC. F., *supra* note 6, at 6; Technical Note, *supra* note 12.

111. *Id.*

112. Julia Crawford, *Is There Still Hope for Nepal's Flawed Transitional Justice Process?*, JUSTICEINFO.NET (Mar. 16, 2021), <https://www.justiceinfo.net/en/74937-hope-nepal-flawed-transitional-justice-process.html>.

113. TRIAL INT'L & HUM. RTS. AND JUST. CTR, ALTERNATIVE REPORT ON NEPAL IN VIEW OF THE ADOPTION OF THE LIST OF ISSUES PRIOR TO REPORTING BY THE HUMAN RIGHTS COMMITTEE ¶ 20, at 8 (2020), https://trialinternational.org/wp-content/uploads/2021/01/Reports-and-Publications_Nepal_Third-HRC-Review_202101.pdf.

114. *Id.*

are like previous commissions.¹¹⁵ They appear to the international community like investigation, mediation, and resolution for conflict era human rights violations are under way but, in reality, they have brought no resolution or remedy to victims and their families.¹¹⁶ Since the formation of the TRC and CIEDP, each commission's two-year mandate has been extended multiple times.¹¹⁷ The second part of this Note will highlight sections of the Act that render it dysfunctional: (A) Section 26 which allows the Commissions to recommend amnesty for all crimes, including gross violations of human rights; (B) Section 22 which forces the process of reconciliation on victims and provides a space for them to be pressured to forgive perpetrators; (C) sections pertaining to the obstacles between victims and having their claims heard in the criminal justice system and nonexistent "Special Court" for conflict era claims; (D) a definition of reparations that does not encompass all the components required by international; and (E) politicized commissioner appointments.

A. Flawed Amnesty Provision

Section 26 of the TRC Act gives Commissions the power to recommend amnesty for perpetrators of conflict era crimes.¹¹⁸ Section 26(2) says that perpetrators of crimes of rape shall not be granted amnesty but for all other gross human rights violations, the Commission has the discretion to rule on whether amnesty is appropriate or not.¹¹⁹ If a perpetrator submits an application that states the facts of the crime they committed, accepts their role in commission of a gross violation of human rights, conveys regret, agrees to apologize and not repeat the crime in the future, Section 26(5) allows the Commission to recommend amnesty.¹²⁰ Section 25(2) disallows taking legal action against perpetrators who have reconciled with victims pursuant to Section 22 and who are recommended for amnesty pursuant to Section 26.¹²¹

115. ADVOC. F., *supra* note 6, at 6-7.

116. *Id.* See also *supra* note 5.

117. See Off. High Comm'r Hum. Rts., General allegations: Working Group on Enforced or Involuntary Disappearances, 124th Sess., 1 (May 17-21, 2021), <https://www.ohchr.org/sites/default/files/2022-03/124-Nepal.pdf>.

118. See TRC Act, *supra* note 1, § 26.

119. *Id.* § 26(2).

120. *Id.* § 26(3)-(5).

121. *Id.* §§ 22, 25(2), 26.

In response to the amnesty provision, the United Nations' Office of the High Commissioner of Human Rights stated, "Where the violations recommended for an amnesty amount to *gross violations of international human rights law or serious violations of international humanitarian law*, the amnesties are inconsistent with international law and the UN's policy against amnesties."¹²² Nepal ratified the International Covenant on Civil and Political Rights (ICCPR) in 1991, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) also in 1991, and the four Geneva Conventions in 1964.¹²³ These treaties assert a State's duty to "undertake investigations and, where sufficient evidence exists, to ensure prosecutions of gross violations of human rights and serious violations of international humanitarian law."¹²⁴ Article 8 of the Universal Declaration of Human Rights states that victims have the right to an effective remedy.¹²⁵ This right is similarly protected by Article 2(3)(a) of the ICCPR which states that violations of the Covenant must receive "an effective remedy."¹²⁶

Torture and similar inhumane and degrading treatment, summary and arbitrary killing, and enforced disappearance are examples of crimes which the United Nations' Human Rights Committee says State Parties to the Covenant have a duty to investigate and ensure that those responsible face justice.¹²⁷ Under

122. Technical Note, *supra* note 12, at 2.

123. See *Nepal: International Covenant on Civil and Political Rights, Shadow Report*, HUM. RTS. TREATY MONITORING COORDINATION CTR. (May 2013), https://nepalconflictreport.ohchr.org/files/docs/2013-05-16_report_hrtmcc_eng.pdf. See also Off. High Comm'r Hum. Rts., International Day in Support of Victims of Torture (June 26, 2008), <https://www.ohchr.org/en/statements/2009/10/joint-statement-occasion-un-international-day-support-victims-torture>; Krishna Chandra Chalisey, *The 1949 Geneva Conventions and Nepal*, THE KATHMANDU POST (Aug. 9, 2022), <https://kathmandupost.com/columns/2022/08/09/the-1949-geneva-conventions-and-nepal>.

124. *Id.*

125. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 8 (Dec. 10, 1948).

126. G.A. Res 2200A (XXI), International Covenant on Civil and Political Rights, at (3)(a) (Mar. 23, 1976).

127. Human Rights Committee General Comment No. 31 [80], Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, ¶¶15, 16, 18 (2004). See also General Comment No. 3 of the Committee against Torture, Implementation of article 14 by State

international law, there can be no amnesty for perpetrators of gross human rights violations.¹²⁸ Gross violations of human rights have not been formally defined but include: “(1) extrajudicial, summary or arbitrary executions; (2) torture and other cruel, inhuman or degrading treatment or punishment; ... (3) enforced disappearance; and (5) rape and other forms of sexual violence of comparable gravity.”¹²⁹ In addition to those mentioned above, it is generally accepted that slavery, the slave trade, genocide, murder, prolonged arbitrary detention, deportation or forcible transfer of a population, large-scale racial discrimination, and “deliberate and systematic deprivation” of food, primary care, and basic shelter are also considered gross violations of human rights.¹³⁰

Back in 2014, during the formation of the TRC Act, the Supreme Court promulgated an “anti-amnesty verdict” where it “directed the Government to ensure that any new laws unequivocally exclude the possibility of granting amnesties for human rights violations.”¹³¹ Similarly, the UN Human Rights Committee urged in its 2014 Concluding Observations on the Second Periodic Report of Nepal, that any transitional justice mechanisms Nepal created should have “effective and independent functioning in accordance with international law and standards, including by prohibiting amnesties for gross violations of international human rights law and serious violations of international humanitarian law.”¹³² In addition to amnesty for gross human rights violations contradicting the international human rights law which Nepal adopted, it also violates UN policy articulated in

parties, CAT/C/GC/3 (2012). *See also, e.g.,* Mukunda Sedhai v. Nepal, CCPR/C/108/D/1865/2009, ¶ 10.

128. *See* 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, Principle 24 (February 8, 2005), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>.

129. Technical Note, *supra* note 10, at 3.

130. *See* Off. of the High Comm’r for Hum. Rts., Rule-of-law tools for post-conflict States on Reparations Programmes, 1 (2008). *See also* Off. of the High Comm’r for Hum. Rts., Rule-of-law tools for post-conflict States on Amnesties, 21 (2008).

131. Madhav Kumar Basnet v. the Government of Nepal, Writ petition No 069-WS-0058.

132. *See* Human Rights Committee, Concluding observations on the second periodic report of Nepal, CCPR/C/NPL/CO/2, para 5 (c) (2014).

the 2010 Guidance Note of the Secretary-General on United Nations Approach to Transitional Justice.¹³³

In 2015, after the TRC Act was passed with the Section 26 amnesty provision, the Supreme Court of Nepal struck down that section as unconstitutional and contrary to international human rights law and UN policy.¹³⁴ Despite the recent rumors that the Government of Nepal is interested in moving forward on the 65,411 pending complaints, the law has not been amended to exclude gross human rights violations from the purview of the amnesty provision.¹³⁵ Continued inclusion of Section 26 as it stands violates Nepal's international obligations and the UN's policies on amnesty.¹³⁶

B. Forced Reconciliation Provision

Section 22 of the Act states that if the victim or the perpetrator applies to the Commission for reconciliation, and the perpetrator has been recommended for amnesty under Section 26(2), the Commission can bring about reconciliation between the two parties.¹³⁷ The Commission has the power to compel the perpetrator to "regret the wrongful act he/she committed" and apologize.¹³⁸ Nowhere in Section 22 mentions the right of victims to consent to or refuse the process of reconciliation.¹³⁹ The United Nations' Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters asserts the importance of the victim and perpetrator being able to "withdraw such consent at any time during the process."¹⁴⁰ It continues, "[a]greements should be arrived at voluntarily" and "[n]either the victim nor the offender should be coerced, or induced by unfair means, to participate in

133. Technical Note, *supra* note 12, at 3. See also U.N. Secretary-General, *Guidance Note of the Secretary-General on United Nations Approach to Transitional Justice*, U.N. Doc. ST/SG(09)/A652 (March 2010), <https://digitallibrary.un.org/record/682111?ln=en>.

134. Renee Jeffery, *Nepal's Truth and Justice Commission limps on*, THE LOWY INST. (Feb. 12, 2019), <http://southasiajournal.net/nepals-truth-and-reconciliation-commission-limps-on/>.

135. See TRC Act, *supra* note 1.

136. *Supra* note 133.

137. TRC Act, *supra* note 1, § 22(1)–(6).

138. *Id.* § 22(2).

139. See *id.* § 22(1)–(6).

140. United Nations and the Rule of Law, Basic principles on the use of restorative justice programmes in criminal matters, ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2, at II, 7 (2000).

restorative processes or to accept restorative outcomes.”¹⁴¹ According to the United Nations’ Office of the High Commissioner of Human Rights, “[e]ntrusting the Commission with a broad authority to facilitate reconciliation, including without the consent of the victim, is highly problematic and may be inappropriate.¹⁴² Reconciliation, by its nature, primarily takes places at an interpersonal level and should not be forced upon people by the Commission.”¹⁴³

Section 26(5) of the amnesty provision does not clearly state whether victims’ opinions will be taken into consideration in the recommendation for amnesty process.¹⁴⁴ The section states that the Commission must consider the “agreement or disagreement of the victim as well as the gravity of the incident” in recommending amnesty.¹⁴⁵ The Commissions must consider, but not rely on victims’ opinions for this section of the TRC Act as well.¹⁴⁶ Without guaranteed victim participation in the recommendation for amnesty or the process of reconciliation, the Act fails.¹⁴⁷ Respecting victims’ voices in the process of truth and justice, including the right to refuse to forgive, is what makes reconciliation effective and powerful.¹⁴⁸ Legal Theorist and Professor of Law at University of Chicago Martha Minow states that even by refusing to forgive or enter into a reconciliation process, a victim is able to assert their power in the traumatic experience.¹⁴⁹ Her studies of Sierra Leone and South Africa showed that victims report positive healing impact when exercising the right to forgive and by not forgiving.¹⁵⁰

In addition to these tangible aspects of victims’ powerlessness in the process of reconciliation outlined in the TRC Act, victims have also reported serious concerns about the authenticity of the process because of the power differential between themselves and perpetrators of conflict era crimes.¹⁵¹ Perpetrators enjoy positions of influence in the Government and other powerful

141. *Id.*

142. Technical Note, *supra* note 12, at 3, 5.

143. *Id.*

144. TRC Act, *supra* note 1, § 26(5)

145. *Id.*

146. *Id.*

147. *Id.*

148. See MARTHA MINOW, WHEN SHOULD THE LAW FORGIVE? 6-8, 10 (2019).

149. *Id.*

150. *Id.*

151. ADVOC. F., *supra* note 6, at 10.

institutions.¹⁵² On October 15, 2020, Nepal's National Human Rights Commission released a report detailing the Government's progress prosecuting 286 individuals who should face legal action.¹⁵³ Of those 286, ninety-eight are members of the police force, eighty-five are members of the Nepal Army, and sixteen are civil servants.¹⁵⁴

Section 25(2) of the Act states that if cases are reconciled pursuant to Section 22 and the perpetrator is recommended for amnesty pursuant to Section 26, the Commission will not recommend prosecution.¹⁵⁵ Victims view this as "encouragement to alleged perpetrators to pressurize victims into reconciliation."¹⁵⁶ Responding to victim concerns about the Act, the Supreme Court in *Suman Adhikari et al vs. Prime Minister and Cabinet of Minister et al* stated that "reconciliation cannot be imposed on victims and cannot be done without the willingness and consent of the victims."¹⁵⁷

C. Obstacle-Ridden Path to Prosecution

Two sections of the Act, Section 13 and Section 29, involve the link of the Commissions and criminal courts.¹⁵⁸ Section 13(2) asserts: "Notwithstanding whatsoever mentioned in the prevailing laws, the Commission, in consultation with concerned courts or bodies concerning the cases under consideration, shall investigate the cases relating to the incidents that occurred during the armed conflict."¹⁵⁹ Section 13(3) continues: "Notwithstanding whatsoever mentioned in the prevailing laws, the Commission shall investigate the complaints in different bodies relating to incidents that occurred during the armed conflict."¹⁶⁰ These two sections suggest that armed conflict cases can be averted from the criminal justice process to the Commissions.¹⁶¹ The United

152. See No Law, No Justice, No State for Victims: The Culture of Impunity in Post-Conflict Nepal, HUM. RTS. WATCH (Nov. 20, 2020), <https://www.hrw.org/report/2020/11/20/no-law-no-justice-no-state-victims/culture-impunity-post-conflict-nepal>.

153. *Id.*

154. *Id.*

155. TRC Act, *supra* note 1, § 25(2).

156. ADVOC. F., *supra* note 6, at 11.

157. *Id.*

158. TRC Act, *supra* note 1, §§ 13, 29.

159. *Id.* § 13(2).

160. *Id.* § 13(3).

161. Technical Note, *supra* note 12, at 4.

Nations Office of the High Commissioner of Human Rights (OHCHR) suggests that this may have the effect of delaying, preventing, and even denying proper investigations and prosecutions.¹⁶²

Section 29(1) asserts that if the Ministry of Peace and Reconstruction recommends that the Commission prosecute a person guilty of serious human rights violations, it remains the decision of the Attorney General or a Public Prosecutor designated by the Attorney General whether to prosecute the case or not.¹⁶³ More generally, Section 29(2) states that when the Ministry writes to the Commission as required by sub-section (1), the Attorney General or a Public Prosecutor designated by the Attorney General has the choice whether to prosecute a case or not.¹⁶⁴ Finally, section 29(4) states “if a decision is made pursuant to sub-section (2) to file a case against a perpetrator, the Public Prosecutor shall have to file a case at the Special Court.”¹⁶⁵ The Act clarifies that the Special Court is a court formed by the Government of Nepal “to hear and decide the cases decided by the Attorney General or a Public Prosecutor designated by him pursuant to the sub-section (2), on the basis of a recommendation made by the Commission.”¹⁶⁶

Section 29 only allows prosecutions if amnesty was not recommended.¹⁶⁷ It also creates an obstacle-ridden route to prosecution that involves the Ministry of Peace and Reconstruction making a written recommendation, the acceptance or denial of this recommendation by the Attorney General or a Public Prosecutor designated by the Attorney General, and the stipulation that cases must be prosecuted at a Special Court.¹⁶⁸ Every part of this process is unclear; it is unclear if a written recommendation by the Ministry of Peace and Reconstruction is required for the Attorney General to initiate prosecution or if the Attorney General may do so on their own.¹⁶⁹ It suggests that a victim may not initiate prosecution on their own and that similarly a court

162. *Id.*

163. TRC Act, *supra* note 1, § 29(1).

164. *Id.* § 29(2).

165. *Id.* § 29(4).

166. *Id.*

167. *Id.* § 29(4)(2).

168. *Id.* § 29.

169. *Id.*

may not initiate prosecution.¹⁷⁰ Finally, where prosecution is initiated, the Act states that these proceedings must occur in a Special Court.¹⁷¹ The Government of Nepal has yet to form this Special Court.¹⁷² Establishment of this Special Court will result in further to delays in justice to victims.¹⁷³ In response to this provision, the OHCHR asserted “The Act does not contain guarantees that the Special Court proceedings will be conducted impartially, objectively and in accordance with international standards of fair trial. Such guarantees should be explicitly provided.”¹⁷⁴

According to international human rights law and international humanitarian law, States have a duty to provide fair, effective, and prompt access to justice.¹⁷⁵ This includes a “prompt, thorough, independent and impartial criminal investigation of gross violations.”¹⁷⁶ Where sufficient evidence exists, alleged perpetrators must be prosecuted.¹⁷⁷ The OHCHR asserts that where under Sections 13 and 29 the Commissions have power to avoid or delay investigations and prosecutions, this violates Nepal’s legal obligations under: (1) the International Covenant on Civil and Political Rights (ratified by Nepal in 1991); (2) the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified by Nepal in 1991); and (3) the four Geneva Conventions (ratified by Nepal in 1964).¹⁷⁸ According to the UN, the work of the criminal justice system must be “reinforced” or complemented rather than replaced by the TRC and CIEDP.¹⁷⁹ The Commissions must not be used to avoid or delay criminal investigations and prosecutions.¹⁸⁰

170. *Id.*

171. *Id.* § 29(4)(2).

172. Technical Note, *supra* note 12, at 4.

173. *Id.*

174. *Id.*

175. *Id.* at 1.

176. *Id.*

177. *Id.*

178. G.A. Res. 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984); G.A. Res 2200A (XXI), International Covenant on Civil and Political Rights. (Mar. 23, 1976); G.A. Res. 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984).

179. Technical Note, *supra* note 12, at 1(4).

180. *Id.*

D. Reparations

In 2006, the General Assembly affirmed the definition of reparations enshrined in a multitude of international treaties.¹⁸¹ Full reparation and effective remedies include: compensation, restitution, guarantees of non-repetition, satisfaction, and rehabilitation.¹⁸² The TRC Act Section 2(e), however, defines reparations differently.¹⁸³ It states that reparation is “compensation, facility or concession made available to the victims as stipulated in section 23.”¹⁸⁴ Slightly broader, Section 23 defines reparation as “compensation, restitution or rehabilitation or any other appropriate arrangement to the victim.”¹⁸⁵ This definition is too narrow and does not encompass the standards promulgated by the OHCHR and other international legal bodies.¹⁸⁶ The definition of reparation in the TRC Act should include the guarantee of non-repetition and the right of satisfaction.¹⁸⁷ Finally, a victim’s right to reparation should be explicitly stated rather than alluded to as it is in the current version of the Act.¹⁸⁸

E. Politicized Commissioner Appointments

In addition to the lack of credibility stemming from all the flaws in the TRC Act, the sections detailing commissioner appointments has also given rise to skepticism and distrust in the

181. *See generally* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, principle 11(b). *See also* The Universal Declaration of Human Rights (Art. 8); the International Covenant on Civil and Political Rights (Arts. 2, 9); the Convention on the Elimination of All Forms of Racial Discrimination (Art. 6); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 14); the International Convention for the Protection of All Persons from Enforced Disappearance (Art. 24); the Convention on the Rights of the Child (Art. 39); The Hague Convention respecting the Laws and Customs of War on Land (Art. 3); the Protocol Additional to the Geneva Conventions of 12 August 1949; and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Art. 91); the Rome Statute of the International Criminal Court (Arts. 68 and 75).

182. E/CN.4/2005/102/Add.1, *supra* note 128, at principle 34.

183. TRC Act, *supra* note 1, § 2(e).

184. *Id.*

185. *Id.* § 23(1).

186. Technical Note, *supra* note 12, at 8. *See also* ADVOC. F., *supra* note 6, at 6-7.

187. *Id.*

188. *Id.*

truth and justice process.¹⁸⁹ Section 3(2) states that the Commission will be comprised of five members, at least one of whom must be a woman.¹⁹⁰ These appointees will be recommended by a committee which the Government of Nepal creates under Section 3(3).¹⁹¹ Section 3(5) mentions “public selection procedure” but provides no detail about how to actually involve public input in the process.¹⁹² Section 10 describes that the Government of Nepal will select the Secretary of the Commission and Section 11 states the Government will “make available personnel required for the Commission.”¹⁹³ Additionally, the Government provides resources for the infrastructure of the Commission and for its auditing.¹⁹⁴

The lack of impartiality and independent of the Commissions is troubling.¹⁹⁵ The role of the Government in appointing the Secretary of the Commission, selecting the committee which recommends and approves Commissioner appointees, and providing the financial support for the Commission all need to be amended so the process gains both real and perceived legitimacy.¹⁹⁶ When coupled with the lack of language articulating guarantees of impartiality, it becomes clear that the Act is structured, whether intentionally or not, to promote Government impunity.¹⁹⁷ The lack of independence of the Commissions from the Government in cases that often implicate state agents creates public distrust.¹⁹⁸ Since the TRC Act was passed, multiple Commission appointments have reaffirmed these suspicions.¹⁹⁹ In February of 2021, the Government decided to extend the current Commissioners tenure, despite countless outcries from victims’ groups and human rights defenders that the Act should first be

189. TRC Act, *supra* note 1, § 3.

190. *Id.*

191. *Id.* § 3(3).

192. *Id.* § 3(5).

193. TRC Act, *supra* note 1, §§ 10–11.

194. *Id.*

195. *Id.*

196. *Id.*

197. TRC Act, *supra* note 1.

198. *See Nepal: Transitional Justice Proving Elusive Term Extensions Do Not Cure Act's Fundamental Problems*, HUM. RTS. WATCH (Feb. 13, 2018, 12:00 PM), <https://www.hrw.org/news/2018/02/13/nepal-transitional-justice-proving-elusive>.

199. *Id.*

amended to improve the appointment process.²⁰⁰ These concerned parties seek to remind the Government of Nepal that the Supreme Court decision asserted that Act must be amended before proceeding with the truth and justice process.²⁰¹

III. SOUTH AFRICA COMPARISON

Between 1960 and 1994, in the period known as the Apartheid Regime, the Black population of South Africa experienced human rights violations on a massive scale.²⁰² In 1995, Nelson Mandela's Government legislated the establishment of the Truth and Justice Commission (TJC).²⁰³ Like the TRC and CIEDP in Nepal, the South African TJC was charged with investigating gross human rights violations, including murder and torture.²⁰⁴ It covered both State sanctioned criminal acts and those perpetuated by the liberation movement.²⁰⁵ Similarly, the TRC Act covers criminal acts perpetuated by the Government of Nepal and the Maoists.²⁰⁶ Both mandates encourage communities to come together in an environment conducive to forgiveness.²⁰⁷ Unlike in Nepal where all the perpetrators of Conflict crimes have never faced repercussions, 65 percent of those approved for amnesty in South Africa were already convicted and serving time.²⁰⁸ Scholars suggest that this is a reason that the South Africa model, touting the phrase "revealing is healing," should not be applied to Nepal.²⁰⁹

While imperfect, there are some valuable lessons that can be gleaned from South Africa's truth and reconciliation process. First, both the passing of the bill that formed the TJC and the process of appointment of commissioners were "democratic and

200. *Id.*

201. *Id.*

202. See Drew Cottle & Sunil Thapa, *The Role Of Truth and Reconciliation Commission in Peace Building: Nepal*, 3 INT'L J. OF SOCIAL SCIENCES 218, 226 (2017).

203. *Id.*

204. Govinda Sharma, *All wrong*, MYREPÚBLICA (DEC. 5, 2016, 12:35 AM), <https://myrepublica.nagariknetwork.com/news/10432/>.

205. *Id.*

206. TRC Act, *supra* note 1.

207. Sharma, *supra* note 204.

208. *Id.*

209. *Id.*

transparent.”²¹⁰ Nearly three hundred names were proffered from many “walks of life.”²¹¹ President Mandala appointed a “small representative committee” to consider each of these applicants²¹² during meetings that were open to the public.²¹³ Second, the efforts of the commission culminated in a twenty-seven hundred page volume that detailed atrocities from the Apartheid and the investigations into them.²¹⁴ Over twenty-one thousand victims came before the TJC and had an opportunity to have their experiences publicly heard and recorded.²¹⁵ The volume of reports, hearings, and investigations undertaken during the post-Apartheid years is something that Nepal should aspire to emulate. Lastly, there were five forms of reparations available to victims of Apartheid: (1) individual reparations; (2) symbolic/community reparations (to commemorate the pain of the past); (3) funds for community rehabilitation; (4) institutional reform; and (5) urgent interim funds.²¹⁶

While the aforementioned features of South Africa’s TJC were successful, there were some features that were less so.²¹⁷ These also provide valuable lessons for Nepal as it commences the process of truth and reconciliation. One such example is that while the amnesty rulings came quickly in the aftermath of Apartheid, reparations to victims arrived slowly.²¹⁸ Additionally, one of the greatest criticisms of South Africa’s TJC was that it provided amnesty for perpetrators of gross human rights violations.²¹⁹ Even though these amnesty grants stemmed from public rather than private hearings, there was massive public outcry at perpetrators receiving amnesty after committing gross violations of human rights.²²⁰

210. Sonny Onyegbula. *Seeking Truth and Justice: Lessons from the South Africa*, GSDRC, 1999, at 11.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 12.

215. *Id.* at 23.

216. *Id.* at 16.

217. *Id.* at 14.

218. *Id.*

219. *Id.*

220. *Id.* at 18.

IV. PROPOSED SOLUTIONS

The flawed sections of the TRC Act when coupled with the lack of credibility the Act faced because of the manner of its passing and the long history of failed commissions, has rendered the TRC and CIEDP utterly inept.²²¹ The Act must be amended to remove the amnesty provision as the Supreme Court of Nepal urged.²²² Allowing amnesty for perpetrators of gross violations of human rights including murder, torture, and rape, contradicts international law and UN policy.²²³ Additionally, all components which force victims to forgive perpetrators must be removed and the definition of reparation must be rewritten in accordance with international standards.²²⁴ As Legal Scholar Martha Minow points out, the power to not forgive someone who has harmed you or your family is itself restorative.²²⁵ In order for the truth and reconciliation process to proceed in an authentic way that is unencumbered by State manipulation, this option must be left open to victims and their families.²²⁶

Perhaps most importantly, if a victim or their family is unable to receive justice at the TRC or CIEDP, the regular Nepalese criminal justice system must be available.²²⁷ Less than a handful of crimes have been prosecuted through the criminal justice system and over sixty thousand claims are currently sitting in the hands of the Commissions.²²⁸ Very few have been investigated and zero have been resolved.²²⁹ Clearly there is an opportunity for justice in the criminal justice system which victims and their families have been denied by the TRC and CIEDP.²³⁰

The definition of reparations in the TRC Act must also be amended to replicate international legal standards and should include the guarantee of non-repetition and the right of satisfaction.²³¹ The right to reparation, not mentioned explicitly within

221. TRC Act, *supra* note 1.

222. *Supra* note 131.

223. *Supra* notes 128, 133.

224. TRC Act, *supra* note 1, § 22(1)–(6).

225. MINOW, *Supra* note 148.

226. *Id.*

227. TRC Act, *supra* note 1, § 29.

228. TRIAL INT'L & HUM. RTS. AND JUST. CTR., *supra* note 113, ¶ 65.

229. *Supra* notes 2, 4.

230. *Id.*

231. TRC Act, *supra* note 1, § 2(e).

the TRC Act, must also be stated in the amended version.²³² Lastly, the current politicized Chairs and Commissioners must be removed from office pending an improved appointment process and amendments to the Act.²³³

Until these recommendations are implemented, there will be no justice in Nepal for victims of the armed conflict through these bodies.²³⁴ As human rights lawyers pursue justice in criminal courts and hear time and time again that they must instead bring these cases in the defunct TRC and CIEDP, the state loses legitimacy in the eyes of the Nepalese public and international community.²³⁵ Making the aforementioned amendments to the TRC Act will pave a way forward for victims of the Armed Conflict who deserve closure after seventeen long years of waiting. Victims and their families deserve justice, and they deserve to have their stories told.

CONCLUSION

With 65,411 complaints filed and zero resolutions seventeen years after the end of the Armed Conflict in Nepal (1996-2006), the TRC Act which created the TRC and CIEDP Commissions must immediately be amended.²³⁶ The provisions granting amnesty for perpetrators of gross violations of human rights violate international law and must be eliminated. The Supreme Court handed down an anti-amnesty verdict in *Madhav Kumar Basnet v. the Government of Nepal*, where it stressed the importance of not allowing perpetrators of murder, torture, arbitrary detention, and other gross violations of human rights receive amnesty for the crimes they committed.²³⁷ The Government of Nepal must recognize this directive and amend Sections 26, 25, and 22 of the TRC Act accordingly. Additionally, Sections 2(e) and 23 which fail to explicitly state a victim's right to reparation and also fail to define it as broadly as it should be under international legal standards, must be amended. The provisions restricting victims from bringing claims outside of the TRC or CIEDP in the regular Nepalese criminal justice system must be eliminated immediately. It is the right of the victims of the

232. *Supra* note 181.

233. TRC Act, *supra* note 1, § 3.

234. TRC Act, *supra* note 1.

235. *Supra* note 40.

236. TRC Act, *supra* note 1.

237. *Supra* note 131.

Armed Conflict to pursue justice through other means if the Government of Nepal fails to make it available to them via the Commissions. Finally, the provisions forcing victims to forgive and perpetrators to apologize must be eliminated. The truth and reconciliation process must be free of coercion and pressure if there is any chance of healing. Until the aforementioned amendments are made to the TRC Act and all the harmful provisions are eliminated, Conflict victims and their families remain suspended in time and starved for justice.

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