

Preliminary review and recommendations by civil society organizations on the draft bill on Transitional Justice

We the civil society organizations and human rights defenders welcome the effort of the Government to make the bill to amend the Act on Commission of Inquiry on Enforced Disappearances, Truth and Reconciliation public for consultation.

While presenting the bill before civil society organizations, human rights defenders and victims, the Minister for Law, Justice and Parliamentary Affairs had committed that 'this is the zero draft' and improvements will be made based on constructive feedback received to the extent possible within the current political context and the time pressure. We request the Government to pay attention to both the process and the contents of TJ to make it credible and acceptable to all actors. While we request a wider consultation among victim and civil society organisations and plan to prepare our detail analysis once we have opportunities to have wider discussion with the civil society organizations in different parts of the country and be able to participate in consultations in an informed manner, we present our preliminary observations and recommendations hoping to assist the Government to plan the process ahead, including the consultations. Our recommendations include:

- 1) Organise consultations with victims and civil society organisations, allowing them to have opportunities to have pre-consultations, so that they can have informed participation in formal consultations.
- 2) Make an operational plan public that include a clear timeline setting out how the government is taking the process forward, including the consultations, work that needs to be done in making all components of the TJ functions such as the setting up of the Special Court, amendments to the Penal Code and other relevant laws, designing structures for reparation, community service and open prison – if all these are going to be part of the legal framework.
- 3) Ensure constitution of new commissions under the new Act that ensures public and transparent process of appointment of the commissioners.

- 4) Design the current bill to provide the legal basis for all aspects of TJ, including the definition of crimes, penalty and sentencing regime. If this is not the case, all penalty and sentencing provisions should be removed from the TJ bill and the application of the Penal Code should be ensured and relevant provisions of the Penal Code should be amended to make it retroactively effective in relation to the crimes committed during the conflict, including war crime and crimes against humanity with the provision of command responsibility.
- 5) Ensure that the whole sentencing regime is properly explained to civil society and victims and ensure it is made proportionate to the gravity of the crimes.

Our major concerns and recommendations

The bill tries to address some of the concerns that we have been expressing repeatedly and attempts to address the decision of the Supreme Court. The proposed bill projects an integrated legal framework that deals with all the aspects of TJ including truth-seeking, reparation, prosecution, institutional reforms, amnesty and reconciliation by proposing to amend even the title of the Act from Commission of Inquiry on Enforced Disappearance, Truth and Reconciliation Commission Act (CIEDP) to the Transitional Justice Act. This gives the impression that the Government is trying to embrace a holistic notion of TJ, where all the major components are designed to complement each other to achieve the ultimate goal of TJ, an approach which we have been advocating for a long time.

Furthermore, it has improved the provisions for truth-seeking by including the possibility for the commissions to organise thematic and closed hearings with diverse groups. The bill also prevents the TRC from recommending amnesty and to conduct mediation/reconciliation in four categories of violations, defined as serious violation of human rights: extra-judicial killing, enforced disappearance, torture, rape and sexual violence. It does not make reparation contingent on the identification of perpetrators, victims' consent to amnesty and mediation in other categories of violations, other than those four categories of serious violations. It also requires gender experts in the TRC and having trained female staff while taking statements from women. The proposed bill also provides the legal framework for the TJ Special Court and envisions prosecution of those four categories of violation if the TRC recommends prosecution based on the evidence it collects.

Thus, some of the concerns that we have raised on the TRC Act, have been addressed in the proposed amendment bill. However, the proposed bill also projects a very complex framework of TJ law that requires a more detailed analysis, which we will do after a wider consultation, this document attempts to capture our preliminary observations and recommendations. Furthermore, we have concerns not only on content but also on process. Major recommendations include the following:

ON THE PROCESS

- Organise consultations among victims, civil society organizations at least at the regional level and in the most conflict-affected districts to solicit the widest possible inputs on the draft bill.
- Pay particular attention to bring women victims and organizations working on the issue of women' rights in the consultations.
- Allow victims and civil society time to have their own discussions at the provincial level to ensure they are informed about the process and the content of the bill and can prepare their written submission and participation in the government led consultations.
- Liaise with women's rights organizations to organize consultations with victims of gender based violence and organisations working on gender issues.
- Have a dedicated team of the government to work on this subject, make an operational plan; with a clear time line setting out how the government is taking the process forward, including the work that needs to be done in making all components of the TJ functions such as the setting up of the Special Court, amendments to the Penal Code and other relevant laws, designing structures for reparation, community service and open prison – if all these are going to be part of the legal framework.

ON THE CONTENT

As already highlighted, the current amendment bill proposes a comprehensive legal framework of TJ and presents a complex sentencing regime. We have serious concerns in a number of areas we have tried to club them mainly in three areas: a) overall framework of the bill and various units and mechanism and their interaction b) how violations are defined c) sentencing regime.

1. Various structures and their interaction and effectiveness

Link between and among different units: The proposed bill envisions different structures within the TRC and beyond as part of the TJ Act. It proposes to have a truth-seeking unit, inquiry unit, reparation unit, a unit for investigation on gross violations of human rights, and a report preparation unit within the TRC. It also proposes the Special Court to try those recommended by

the commission; Home Ministry for the purpose of implementing reparation related recommendations and the Ministry for Law and Justice for reforms and other recommendations of the truth commission.

We are concerned that there has been an inadequate level of thinking given to some of the structure and interaction between different units and structures. For example, TRC will have a unit for the purpose of criminal investigation and another for gathering evidence/information for the purpose of establishing truth. Although it may have been designed to protect individuals from providing self-incriminatory information for the purpose of truth-seeking from prosecution, it lacks clarity how it works with other incentives offered for revealing the truth. On the one hand the bill projects a concept of exchanging self-incriminating information in exchange for a reduced sentence; on the other hand it prevents the use of such information for the purpose of prosecution. Thus the way the current bill envisions the link between the works of these two units requires the person to provide testimonies twice, before the unit establishing the truth and the unit doing criminal investigation. This provision poses a risk of a person ending up giving their testimonies multiple times, including the possibility of contradictory evidence making it hard for the process to decide which one to rely on.

Effectiveness of different structure: Similarly, we also have concerns on the effectiveness of different structure. For example the commission is mandated to recommend reparation. However, section 2(i) identifies the Home Ministry being the sole agency for providing reparation. As reparation involves different elements such as restitution, rehabilitation, satisfaction and guarantee of non-repetition, it requires more comprehensive planning and dedicated institutional arrangement and resource allocation. Implementing reparation programs would require coordination between different entities of government both at national and provincial level. It also requires the involvement of victims' associations and civil society organisations to make it practical and effective.

Historically, the Home Ministry is the least accessible institution for victims. We are also concerned for a potential for political manipulation of the relief and reparation administered by the Home Ministry as we are also aware how victims of sexual violence and torture were

excluded from the interim relief programme, exposing the vulnerability of some victims in accessing reparation with the demand being for more inclusive structures for reparation. The TJ Act needs to elaborate on the detail of what is envisaged as an accessible structure in respect of all five components of reparation.

Reparation fund: The proposed bill also needs clarity on a proposed reparation fund. Section (30) (i) (12) proposes that the fine that the perpetrators of serious violations of human rights pay will be paid to the victim. Although this seems a good provision, as it stands it envisions only one victim victimized by the perpetrator. There are many cases where a perpetrator has committed several crimes and the victims could be many. There is no clarity on what should be done when there are more than one victim by a perpetrator who pays a fine. Thus, it is proposed that there is a provision for a reparation fund, where all those fines could be deposited and use for the purpose of reparation to all victims. Although section 23 (b) has the provision of a fund, the purpose of the fund is limited only to cover the transportation of victims coming to the commissions and to do activities promoting reconciliation and mediation.

What to be done with existing commissions: We are also seriously concerned about the effectiveness of the existing commissions and urgent need of reshuffling of them. In order to execute the mandates of the proposed bill an independent and capable commissions are essential. More than three years' experience with the existing commissions has left us with no hope that the existing commissions could even understand their mandates, let alone deliver on them. However, the proposed bill does not speak about restructuring and reorganising the commissions. Even if the law is very strong, if the commissioners are chosen because of their political loyalty to certain political parties than their professional integrity, credential, and if the commissions are kept under the shadow of the government and the political parties, they won't be able to deliver. Thus, a clear articulation of provisions ensuring the public appointment process together with the provisions of commission's autonomy in seeking fund and hiring its staffs and required expertise without the intervention of the government is needed.

Representation of women: We are also fearful about poor representation of women in the commission, judiciary and how that may impact the work of the commission and the TJ Special

Court that the bill envisions. We are also concerned about the potential for implementation the commission's recommendations. Thus, we recommend to have a provision in the Act that would require specific timelines for the implementation of the reparation and reforms related recommendations of the TRC. Currently there are no timeframe within which the Government will implement the recommendations. This poses a risk of non-implementation of commission's recommendations, as the case in the past. The following recommendations are provided to improve the structures:

Recommendation:

- Harmonise the work of different units such as the truth seeking, investigation with some conceptual clarity how they interact to each other,
- Define structure and process responsible in implementing reparation programmes,
- Have a new set of commissioners, chosen for their merits and their credentials in the field of human rights including women's right rather than their loyalty to certain political parties,
- Ensure the independence of the commission,
- Have a gender unit in the commission,
- Have sufficient trained female staff in the commission, Special Court and prosecutor's office,
- Have a provision in the Act to ensure implementation of various recommendations within a specific timeframe.

2) Defining the violations under the jurisdiction of the TJ bill

Categorisation of violation: The other major concerns that we have relate to the categorisation of violations and how they fall under the jurisdiction of the TJ process. The proposed bill categorises violations that come under the jurisdiction of the TRC into two categories: serious violations of human rights and other acts of human rights violations. As per section 9(j), a serious violation of human rights includes extra-judicial killings, enforced disappearances, torture, rape or other sexual violence. The acts of other violations of human rights include abduction, hostage taking, causing mutilation or disability, looting, possession, damage or arson

of private or public property, forceful eviction from house/land or any kind of displacement. The proposed TJ bill does not define war crime and crimes against humanity and this failure to offer a definition puts them outside the jurisdiction of the TJ bill.

This categorization is important to understand as it links with the system of accountability that the bill envisions. The TJ bill proposes prosecution only in the four categories of violations recognized as serious human rights violations. Although the Supreme Court of Nepal had specifically stated the obligation of the State to prosecute these four categories of violations, the Court has also stated the duty to prosecute war crimes and crimes against humanity. Some of those violations under the category of “other acts of human right violations” such as abduction, hostage taking, beating and mutilation, if committed in a widespread and systematic manner, would amount to war crimes and crimes against humanity, requiring the State to prosecute. It is believed that some of these violations were widespread and systematic during the conflict. But as they are currently defined among the “other acts of human right violations” they will not be prosecuted under the current vision of the TJ bill. Thus, those cases of war crimes and crimes against humanity will remain outside the jurisdiction of the TJ process.

Child soldiers: Furthermore, many children including girls were forcefully recruited by the Maoists. Recruitment of children in armed forces was a matter of concern during the conflict. The UN Security Council raised concerns about child soldiers, listing Nepal as a country of concern requiring monitoring of the situation of child soldiers.¹ After the end of the conflict, when the PLA went through the verification process under the supervision of the UN, 2973 soldiers were found to be minors.² Despite the prevalence of the problem during conflict, the TRC has no mandate to look into cases of child soldiers, the proposed bill also limits its mandate only to the study and to recommend measures non-reoccurrence. Putting this issue outside the subject of investigation mandate of the TRC leaves serious gap.

¹ Report of the Secretary-General on children and armed conflict in Nepal, S/2006/1007.

² Report of the Secretary-General on children and armed conflict in Nepal, S/2010/183
<http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20S2010%20183.pdf> accessed on 17 June 2018.

Transfer of cases: We are also concerned about the confusions that the bill creates on different laws to be applied. For example, the proposed bill provides that the Special Court will also try those cases transferred from other jurisdictions such as district and high courts, national human rights commission and different UN bodies. In such cases, if the accused discloses the truth, confess, apologises to the victims, agrees to pay reparation as prescribed by the Court, such accused would get a reduced sentence. However, section 30(8) provides that if an accused does not confess, provide the truth and meet other criteria for amnesty and mediation, then the sentence will be 'as per the existing law', not the TJ Act.

The use of term 'as per existing law' is important to unpack and clarify, otherwise this would result in impunity. For example, it is not clear what the existing legal provisions are in relations to some of the violations such a torture. It also contradicts with other provisions in the bill. For example, section 30 (i) (2) of the bill prevents the application of existing legal provisions of penalty and sentencing for serious violations of human rights that are under the jurisdiction of the Special Court. Thus, trying to use different standards and law creates confusion on the overall sentencing regime that the bill proposes.

Amnesty and mediation: There also remains lack of clarity how those cases not accepted for amnesty and mediation are supposed to be dealt with. For example, section 26 provides the possibility of recommending amnesty and section 22 provides mediation between victims and perpetrators when certain criteria such as disclosure of truth, apology to the victims among others are met in the category of “other acts of human rights violations”. The current bill has the provisions that the commission may deny amnesty or mediation for not fulfilling those criteria. However, there is no clarity in the bill about what will happen to those cases where amnesty and mediation are denied.

Although section 26 (9) provides that 'the procedure provided in section 29 (that relates to prosecution) may be followed to prosecute in such cases, there is no provision in section 29 to bring these cases under the jurisdiction of the Special Court. As a result, there is no prosecution for acts falling in the category of “other acts of human rights violations” including taking of hostages, beating and mutilation even if amnesty and mediation are denied. This will not only leave an impunity gap but also impact the truth-seeking process. Why would anyone who has

committed abduction, mutilation etc., come to the commission, disclosing everything, agreeing to pay reparation, apologizing and seeking amnesty and mediation if there is no legal implication for not doing that? Thus, such a provision in the bill would result in a more likely scenario that no one involved in other acts of human rights violations engages with the commission, not only making the whole amnesty/mediation process irrelevant but also negatively impacting the truth seeking.

Recommendation:

- 6) Design the current bill to provide the legal basis for all aspects of TJ, including the definition of crimes, penalty and sentencing regime. If this is not the case, all penalty and sentencing provisions should be removed from the TJ bill and the application of the Penal Code should be ensured and relevant provisions of the Penal Code should be amended to make it retroactively effective in relation to the crimes committed during the conflict.
- 7) Bring war crimes and crimes against humanity under the jurisdiction of the TJ law.
- 8) Prosecute those who do not receive amnesty and where mediation by adding language in section 29 (b) to the effect that 'those cases not recommended for mediation and amnesty'.

3) Sentencing regime and proportionality of sentences to the gravity of the crimes

Reduced sentences: There are serious problems how the sentencing and penalties applicable under the law are proposed in the bill. The sentencing proposal seem to be based on the idea of incentivizing alleged perpetrators to come to the TRC, confess and provide the truth in exchange for leniency in punishment. For example, section 30 (3) provides that if someone accused of serious violation comes to the commission and fulfills the criteria necessary to be eligible for lenient sentencing, this person would get a maximum of 3 years' community service, a maximum of 5 lakhs rupees as a fine and restriction to travel abroad for such a period of time.

Similarly, if the Special Court hears a case transferred from different jurisdictions or any alleged perpetrator does not provide truth in the TRC but cooperates in the Court by revealing the truth, apologizing to the victims and agreeing to pay compensation to the victims, such an accused would also get a reduced sentence. The maximum sentence in this category of case would be a maximum of 7 lakhs' fine, and reduction of up to 75% in the punishment. The remaining 25% of

sentence can be spent in an open prison. A 60% reduction is also proposed even in the categories of cases where the alleged perpetrator has not cooperated with the truth seeking and prosecution by revealing the truth.

The proposed sentences are not proportionate to the gravity of the crimes. For example, if a person confesses that he raped 20 women, disappeared 30 people and killed 90 children, he would get a maximum of 3 years' community service under the current bill. This will not help to promote non-repetition, one of the objectives of TJ. It will also not help to address the deep-rooted problem of discrimination in Nepal, which was one of the root causes of conflict. As no one in power could ever be brought to justice, people will be left with a deep sense of inequality. Those in power manipulate the law against the powerless. This proposal of punishment would reinforce the same feeling of inequality and fear among the citizen that contributed the conflict previously.

Although we accept the principle of reducing sentences for the cooperation of alleged perpetrators in truth seeking, prosecution, compensation and other, it is unacceptable if this is done without considering the punishment in similar crimes in a normal situation. Furthermore, the provision of section 30(10) offering a 60% reduction in sentence defeats the whole purpose of incentives that the bill tries to introduce to promote truth seeking as this provides reduced sentences even where the person refuses to provide the truth both before the TRC and the Court. The punishment should be proportionate to the gravity and nature of crimes. Even if some conditions are used as mitigating factors, this symbolic sentencing regime reinforces amnesty in different forms.

Command Responsibility: We are concerned about why the proposed bill is silent on command responsibility. Lack of legal provision in making those most responsible accountable would pose a risk of making some lower ranking alleged perpetrators scapegoats while those in higher up in command escape justice.

Case withdrawal: We are also concerned about the unfettered power to the government to withdraw cases, which is open to abuse. For example, section 30 (1) (1) of the proposed bill allows the government to withdraw cases of serious violations of human rights and other acts of

human rights violations, pending before the police and various Courts that were initiated by the police during the armed conflict. Although it could be possible that some cases were found to be filed because of political prejudice and without any evidence, that has to be assessed and established and empowering the government to unilaterally withdraw them appears a betrayal of process. The proposed bill does not even make those withdrawn cases subject to the jurisdiction of the TRC rendering impunity indirectly even in some serious violations. These cases could also be useful for the purpose of truth-seeking. This could in essence provide *de facto* amnesty to the perpetrators including those involved in rape and other sexual violence.

Recommendation:

- It is recommended that the whole sentencing regime is reconsidered to make it proportionate to the gravity of the crimes,
- Crimes and punishment need to be prescribed in the same Act,
- Although incentives are acceptable for those cooperating with the process, it should not be available to those not cooperating,
- Commanders are also held accountable in serious human rights violations,
- Amend section 30 (1) (1) to make those cases withdrawn subject of the TRC. If the TRC finds evidence, then prosecution should be initiated as with other cases of serious violation.

Name of human rights defenders and organizations signed

| S.N | Name | Organization |
|-----|------------------------|--|
| 1 | Jaya Luintel | The Story Kitchen |
| 2 | Rabina Shrestha | Advocate |
| 3 | Sabin Shrestha | Forum for Women, Law and Development (FWLD) |
| 4 | Mandira Sharma | Advocate and Human Rights Activist |
| 5 | Charan Prasai | Accountability Watch Committee (AWC) |
| 6 | Bhagiram Chaudhary | Conflict Victims Common Platform (CVCP) |
| 7 | Rameshwar Nepal | Human Rights Activist |
| 8 | Indra Prasad Aryal | Human Rights Organizing of Nepal, HURON) |
| 9 | Nirajan Thapaliya | Amnesty International- Nepal |
| 10 | Prof. Kapil Shrestha | Former Member of National Human Rights Commission and Senior Human Rights Activist |
| 11 | Dinesh Tripathi | Senior Advocate |
| 12 | Lenin Bista | D-PLAN |
| 13 | Basant Adhikari | Justice and Rights Institute (JuRi)- Nepal |
| 14 | Anita Neupane Thapalia | Legal Aid and Consultancy Centre (LACC) |
| 15 | Sushila Chaudhary | Conflict Victims Common Platform (CVCP) |
| 16 | Pooja Pant | Voices of Women Media (VOW) Director |
| 17 | Susan Risal | Nagarik Awaz |
| 18 | Ritu Limbu | World Vision Advocacy Forum(WVAF) |
| 19 | Salina Kafle | Human Rights and Justice Centre (HRJC) |
| 20 | Samjha Shrestha | Informal Sector Service Centre (INSEC) |
| 21 | Om Prakash Sen Thakuri | Advocacy Forum-Nepal |
| 22 | Bishnu Prasad Pokhrel | Media Advocacy Group |
| 23 | Badri Prasad Bhusal | Collective Campaign for Peace (COCAP) |
| 24 | Janak Bahadur Raut | Conflict Victims Society for Justice-(CVSJ Nepal) |

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| 25 | Suman Adhikari | Former Chairperson of CVCP |
| 26 | Kalyan Budhathoki | Conflict Victims Common Platform (CVCP) |
| 27 | Shiva Bisankhe | Democratic Freedom and Human Rights Institute (DFHRI) |
| 28 | Ashik Ram Karki | Civil Rights Association Nepal (CIRAN) |
| 29 | Maina Karki | Conflict Victims Common Platform (CVCP) |
| 30 | Pushparaj Poudel | Advocate |
| 31 | Shreejana Pokhrel | INHURED International |
| 32 | Sumera Shrestha | Women for Human Rights-WHR |
| 33 | Bikash Basnet | Advocate and Human Rights Activist |