

## **Position of the conflict victims' community on the TJ bill based on a comprehensive discussion among the victims on 29 January 2024 in Kathmandu**

The Government of Nepal has been unable to bring the transitional justice process to a logical conclusion even after 17 years of Comprehensive Peace Agreement between the government and the then-insurgent CPN-Maoists to end the decade-long armed conflict. Political parties have misused the transitional justice process as a bargaining tool for power games. This has deprived victims of justice.

Truth and Reconciliation Commission and Commission of Investigation on Enforced Disappeared Persons, said to be formed to provide justice to the victims, spent eight years and two tenures without any tangible outcomes. Since the commissioners chose to fulfil the interests of their appointers rather than provide justice to the victims, conflict victims' quest for justice has turned into bitter disappointment.

A bill to amend the Investigation of Disappeared Persons, Truth and Reconciliation Commission Act 2015 (third amendment) has been under consideration in the House of Representatives for the last 16 months. The sub-committee formed by the Law, Justice, and Human Rights Committee of the Parliament for deliberation on the amendment bill tried to frame an acceptable bill, but it was unable to bring the bill to a logical conclusion. It is not clear when and how this important bill will be amended. Members of the parliamentary committee are supposed to propose a solution to the impasse, but they have been waiting for the top brass of the major political parties to take a final decision. The amendment bill is held hostage to the indecision, insensitivity, and irresponsibility of the three top leaders of the country.

### **Report of the Subcommittee**

The subcommittee formed under the Law, Justice, and Human Rights Committee interacted with the stakeholders on the bill for around five months and finally submitted a report to the committee with additional points for discussion. The report contains some good and positive provisions. It also contains four points for further discussion.

The report of the subcommittee has removed the definition of human rights violations and incorporated "any other acts in contravention of Nepal's laws as well as international human rights and humanitarian laws." Instead of "killing after cruel torture" or "killing in a cruel manner," the report contains the phrase "arbitrarily killing an unarmed person in a cruel manner" or "killing of a person outside of crossfire" (to be further discussed).

The term "enforced" has been added to the act of disappearing a person. The report contains the same definition of disappearance as in the Act. Serious violations of human rights encompass rape as well as serious sexual violence in the report. The report provides for the act of inhuman or cruel torture.

The report contains a provision for securing the TJ Commissions' approval before transferring the commissions' staff. The subcommittee has suggested to publish a list of potential candidates and recommend their appointment on the basis of their background and public feedback before the appointment to the commission. The recommendation committee has to make a recommendation

within two months of its formation. The tenure of the Truth and Reconciliation Commission and the Commission for Investigation of Enforced Disappeared Persons has been extended to four years from the existing two years. The report has a provision allocating three months for the victims of sexual violence during armed conflict to file their complaints. It has a provision for the victims to file a case at the Special Court if the TJ Commissions fail to recommend reparation or make unsatisfactory recommendations.

The report has proposed that all cases filed by the public prosecutor under the Act will be within the statute of limitation, and conflict victims will be entitled to the rights provided by the Victim Protection Act 2018. The provision for a three-member special bench in the Supreme Court to hear the appeal petition against the Special Court's decision has been amended to a provision for a division bench. It is not clear why this provision was amended. Victims can file an appeal petition against the Special Court's decision within 35 days.

The report provides for sending all conflict-related complaints filed at the National Human Rights Commission, the Women's Commission, and other constitutional bodies to the TJ Commissions. It provides for assessing the damage to property and recommending compensation in tune with the current market price. The phrase "wounded and persons living with disability" has been amended to "wounded and persons living with disability or conflict-affected." The earlier amendment had removed the provision of suspending a public official during judicial custody but it has been restored. There is a provision for incorporating different units in the TJ commissions, including the Truth Seeking and Investigation Unit, the Reparation Unit, the Investigation of Serious Human Rights Violation Incidents Unit, the Investigation of the Incidents of Sexual Violence and Rape Unit, the Victims' Coordination Unit.

### **Our position on the four issues yet to be concluded:**

1. Should "cruel killing in an arbitrary manner" or "killing outside the context of crossfire" be included under serious human rights violations?

None of the options proposed by the subcommittee are justifiable. As provided by Common Article 3 of the Geneva Convention, persons taking no active part in hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat*, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. None of the persons responsible for violating the rules of war can be subjected to immunity. International humanitarian law has prohibited such killings, and they are known as "unlawful killings." Therefore, the criteria for serious human rights violations should include "unlawful killing," i.e., killing somebody after taking them into control.

It is not appropriate to mention that "arbitrary killing" needs to be "cruel killing" to fall under the definition of a serious violation. Arbitrary killing in itself is unlawful. Therefore, the Act can contain the term "arbitrary killing." But the precondition for "cruel" killing needs to be removed. Likewise, the phrase "targeted attacks against unarmed persons or communities" needs to be removed. It is not allowed to disappear, torture, or rape a person, even if they are part of the armed

forces. Any crime committed against these persons needs to be included under human rights violations.

## **2. How do you address any persons joining or affected by the armed conflict?**

What is the sub-committee trying to point out here by mentioning the phrases "joining" and "affected by"? This phrase seems to have tried to include conflict-affected security personnel and disqualified combatants. The state bears the responsibility to address the concerns of security personnel and disqualified combatants enduring pain, loss, and injustice due to the armed conflict. Rather than the transitional justice mechanism that is in place to take up incidents of human rights violations, a separate mechanism needs to address these concerns.

## **3. What can be done if there is no free consent of the victims for reconciliation in cases of human rights violations?**

The Supreme Court of Nepal has already established the necessity of independent consent for reconciliation. Therefore, if there is no reconciliation due to the lack of consent, a provision should be made that the case can be prosecuted based on the availability of evidence. Amnesty can also be considered for those who have contributed to finding the truth and have fulfilled the conditions set by law in cases other than serious violations of human rights. Likewise, punishment, compensation, or a fine should be imposed in case anyone fails to fulfil the condition and does not even apply for amnesty. The use of the terms "unarmed persons" and "targeted" has narrowed the scope of the transitional justice mechanism, which causes a risk of many victims being excluded from the process of justice and reparation.

## **4. Will revealing the underlying reason reduce the punishment, or will a fixed percentage be set?**

Directing the court to reduce punishment by specifying a percentage goes against the principle of an independent judiciary. The discretion to reduce the sentence by considering the nature and severity of the crime should be left to the court.

### **Concerns of the Victim Community on the Amendment of the Act**

1. From the top political level to the grassroots level, the common consensus is that the transitional justice process should be victim-centric. However, a concrete roadmap for victim-centred transitional justice has not been formed yet. Therefore, a solid blueprint for victim-centred transitional justice must be prepared so that victims of serious human rights violations can receive effective justice. A clear roadmap and concrete action plan for the transitional justice process should be made.

2. Killing outside the mandate of humanitarian law is cruel and inhumane in and of itself. Terms that correspond to the values and terminologies of international law should be identified and used in the bill. Removing the term "in a cruel manner" while describing any arbitrary killing would be acceptable. Likewise, arbitrary and extrajudicial killings, the killing of unarmed

civilians, concerns of which have been raised many times, can also be included in the bill. Moreover, mutilation or maiming and severe physical and mental torture should be classified as serious violations of human rights.

3. According to Article 5.2.5 of the Comprehensive Peace Accord, “Both sides agree to set up a high-level Truth and Reconciliation Commission through mutual agreement in order to investigate the truth about people seriously violating human rights and involved in crimes against humanity and to create an environment of reconciliation in the society.” Therefore, crimes against humanity and war crimes should be included as punishable crimes in the bill.

4. The independence of the selection process of the officers of the commission and the autonomy of the commission should be ensured. In addition to the chairperson or representative of the National Human Rights Commission in the five-member committee formed under the coordination of the former Chief Justice, arrangements should be made to nominate the rest of the members, including former justices of the Supreme Court. Moreover, forming a three-member recommendation committee under the coordination of the former Chief Justice, with one chairperson or representative of the National Human Rights Commission and one appointed by the government, could also be an option.

5. An impartial, independent, reliable, and autonomous Commission should be formed by appointing people with clear plans and standards to bring the transitional justice process to a successful conclusion based on their qualifications, through a transparent and public selection process.

6. A sufficient amount of time must be provided to bring the transitional justice process to a successful conclusion. If the work to be carried out by the Commission is not completed within four years, provision should be made to extend the term of the Commission.

7. Victims of crimes of other nature who may have missed filing complaints should also be given the opportunity to file so. A period of at least six months should be provided for the filing of these missed complaints.

8. With regard to conducting additional investigations or gathering evidence, there should be an arrangement to do so, including within the public prosecutor's office. Additional investigations or gathering evidences must be done in accordance with the recommendations set forth by the

Commission. If there is a situation where the case cannot be tried within one year, there should be arrangements so that it can be tried later with the permission of the court.

9. The perpetrators who do not cooperate and coordinate in establishing the truth, in providing reparation to the victim, in uncovering the truth, and in such other processes should be provided with appropriate punishment.

10. The Commission should have the authority to take action against bodies or individuals who do not cooperate in the work of the Commission.

11. Adequate homework should be done on what is required to complete the work within the stipulated four years. The government must demonstrate a genuine and strong willpower towards it. The necessary resources, cooperation, preparation, personnel, experts, budget, etc., should be secured. The Commission should be given the autonomy to manage the necessary resources to fulfil its mandate.

12. The relevant experts should be appointed in every unit provisioned by the commission. The incidents should be investigated by the experts. There should be investigation experts and not ordinary employees in the investigation units.

13. To ensure accessibility to the Commission for victims, an effective, victim-centred and accessible structure should be arranged at the provincial level, with particular consideration given to areas most affected by conflict.

14. From the formation of laws aimed at uncovering the truth about who is responsible, who caused the incident, for what reasons, and in what way, as well as the formation of laws of reparations, to the formation of the commission's policies, guidelines, structure, etc., meaningful participation of the victim community should be ensured throughout the entire process.

15. In the past, the Commission's complaint collection process and truth-discovering process were not in line with the concepts of victim-friendliness, gender sensitivity, and transitional justice. The Commission failed to investigate adequately and burdened the victims with the responsibility of providing evidence and witnesses, thereby further victimizing them. The Commission's working process should be made victim-friendly and gender-sensitive in accordance with the concept of transitional justice. The working process of the Commission should be reliable, confidential, and secure.

16. Previously, the Commission's officials had no credibility. It should now be ensured that there is no leakage of evidence. Reliable measures should be adopted for the confidentiality and protection of victims and witnesses, as well as for the security of evidence.

17. Provisions for the protection, confidentiality, and treatment of individuals subjected to sexual violence should be made.

18. Acknowledging the pain and feelings of the victim community, the Commission should incorporate sensitivity in its behaviour, gain the trust and support of the victims on an emotional level, and arrange for psychosocial counselling.

19. More than 65,000 complaints have been registered with the commission. The modality for classification, investigation, and resolution of cases and realization of justice for the victims should be determined. The complaints registered should be investigated impartially, ensuring the rights of the victims.

20. In cases where family members are practically forced to register the death of an enforced disappeared person due to the lack of truth regarding the person's status, the commission should investigate and publicize the truth.

21. Forcing reconciliation with a powerful perpetrator is not acceptable. A credible process of voluntary reconciliation should be established which can truly satisfy the victims.

22. The damage caused to victims' lives due to injury, disability, and incapacitation resulting from the conflict should be evaluated. Interim relief, determination of percentage, and arrangements for living should be provided accordingly.

23. The Commission should be given significant authority to take action in contempt cases against bodies, parties, institutions, and individuals who do not cooperate with the Commission.

24. Immediate arrangements should be made for the urgent needs of victims, including relief, medical treatment, social security, supporting materials, and other essential supplies. This includes identifying and protecting victims as well as providing immediate relief and medical care, particularly but not limited to those conflict victims subjected to torture and sexual violence.

25. Victims should have easy access to reparations as per their necessities.

26. Individuals affected by the remnants of the conflict, such as bomb blasts and landmines, following the peace process should be recognized as victims, and reparations should be ensured for them.

27. In collaboration with victims, taking into account the nature and severity of the harm and the needs of the victim, a comprehensive reparation policy and program should be developed to address the common and special needs and rights of the victim community. This should be implemented in cooperation with victims and other stakeholders as a shared responsibility of both the central and provincial governments. Arrangements should be made to provide reparation at the local level through an easy, hassle-free, non-discriminatory process for the victim community.

The sovereign parliament should take ownership of this bill and ensure justice and reparation for the victim community, sending a clear message that crimes of this nature will not be tolerated in the future. We are clear that this is only possible through honest adherence to the constitution, international treaties, and standards related to human rights, as well as precedents and principles set by the Supreme Court. Therefore, considering the gravity of the matter, we once again strongly appeal to the Justice, Law and Human Rights Committee and its members, the three main parties, their top leaders, and the entire government apparatus to comply with the minimum standards mentioned to achieve a legitimate outcome in transitional justice.

## **Participating Conflict Victims**

1. Devi Sunuwar, Kavre
2. Janak Raut, Kapilbastu
3. Gita Rasaili, Kavre
4. Sushila Chaudhary, Dang
5. Gopal Bahadur Shah, Bardiya
6. Niranjan Kumar Chaudhary, Bardiya
7. Surendra Khatri, Myagdi
8. Sunita Ghale, Lamjung
9. Ramchandra B.K, Kaski
10. Dev Bahadur Maharjan, Kathmandu
11. Udaya Kumar Sah, Siraha
12. Rupesh Sah, Sunsari
13. Nawaraj Dhungana, Sunsari
14. Suman Adhikari, Lamjung
15. Somariya Devi Paswan, Rautahat
16. Chandrakala Uprety, Banke
17. Shankar Budhathoki, Ramechhap
18. Shital Singh Rathod, Surkhet
19. Ramila Joshi, Lalitpur
20. Radha Bhattarai, Tanahu
21. Sabitri Chiluwal, Lamjung
22. Kalyan Budhathoki, Ramechhap
23. Srijana Shrestha, Kathmandu