University of Leuven

European Master's Degree in Human Rights and Democratisation

Academic Year 2016/2017

TRANSITIONAL JUSTICE IN ABSENT POLITICAL TRANSITIONS:

A CASE STUDY OF NEPAL

Author: Kevin Toro Sánchez

Supervisor: Prof. Dr. Stephan Parmentier

Abstract

Transitional justice, as a normative framework for post-conflict societies, is increasingly being applied to situations that differ from the traditional transitions from authoritarianism to democracy. Transitional theory presents the transitional goals of peace and democracy as universal and apolitical. However, these goals are deeply influenced by a Western liberal approach that might not work in post-conflict societies that hold other values. This thesis meets these twin research aims through an extensive study of the transitional process in Nepal.

The approach taken in the research is based on interviews with prominent actors representing the national and international community as well as comparative analysis of legal, political and historical literature. The perspectives presented in this analysis are through the lens of a foreign observer.

The main conclusion drawn from this research are: the shortcomings that the liberal approach to transitional justice has in absent political transitions and the instrumentalisation of the transitional process by political elites in order to serve their national agendas. Accordingly, this thesis argues for the amendment of the necessary transitional laws and national legislation that allows for a meaningful transition that meets not only the rights of victims but the pressing needs of historically marginalised groups.

Table of Contents

Acronyms

AMDC	Ante-Mortem Data Collection
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CIEDP	Commission on Investigation of Enforced Disappeared Persons
CPA	Comprehensive Peace Accord
CPN (MC)	Communist Party of Nepal (Maoist-Centre)
CPN (UM-L)	Communist Party of Nepal (Unified Marxist-Leninist)
CPR	Civil and political rights
CVCP	Conflict Victims' Common Platform
DDR	Disarmament, Demobilisation and Reintegration process
DFID	Department for International Development of the United Kingdom
ESCR	Economic, social and cultural rights
GoN	Government of Nepal
ICC	International Criminal Court
ICJ	International Commission of Jurists
ICPPED	International Convention on the Protection of all Persons from Enforced Disappearance
ICRC	International Committee of the Red Cross
ICTJ	International Center for Transitional Justice
INGO	International Non-Governmental Organisation
INSEC	Informal Sector Service Center
IRP	Interim Relief Programme
LPC	Local Peace Committee
MoPR	Ministry of Peace and Reconstruction
NC	Nepali Congress
NGO	Non-Governmental Organisation
NHRC	National Human Rights Commission
NPR	Nepalese Rupees
OHCHR-Nepal	The Office of the High Commissioner for Human Rights country office in Nepal (2005-2012)
PC	Personal communication

PIL	Public-Interest Litigation
PLA	People's Liberation Army
SC	Supreme Court of Nepal
SPA	Seven-Party Alliance
TJ	Transitional Justice
TRC	Truth and Reconciliation Commission
TRC Act	Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act
UN	United Nations
UNCERD	United Nations Committee on the Elimination of Racial Discrimination
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNESC	United Nations Economic and Social Council
UNHRC	United Nations Human Rights Committee
UNICEF	United Nations Children's Fund
UNMIN	United Nations Mission in Nepal (2007-2011)
UNS-G	United Nations Secretary-General
WB	World Bank

Preface

Origin of this research and personal motivations

The original idea for this thesis came as a result of my observations during my first trip to Nepal in January 2016. The country had been suffering from a blockade following the ratification of the much awaited Constitution and the shortage of food and medicine were causing severe problems within the already modest communities. I became rapidly engaged with the on-going crises and learned about the root causes that led to the armed conflict, the authoritarian ticks of the monarchy and the constant political turmoil that prevailed in the country since the return of democracy.

Research question and objectives of this study

The main question that this thesis aims to discuss is the effectiveness of the liberal approach to transitional justice in the Nepali transitional process. The thesis intends to provide the reader with the necessary historical, legal and political insight to become familiar with the on-going transitional process in Nepal.

Methodology

The methodology used combines theoretical innovations with findings derived from in-depth qualitative field-work in the form of interviews and a comparative analysis of legal, political and historical literature. The resources consulted range from governmental and non-governmental reports to international legislation and academic papers.

In order to facilitate the comprehension and coherence of the text, I use the official denomination of the political parties as of the local elections of 2017. Regarding the 13 interviews April and March 2017, I decided to integrate them in the thesis instead of attaching them as an appendix. The reason is twofold: first, the questionnaires used in every interview were customised according to the position and knowledge of the interviewee and each conversation evolved towards topics that I personally found most relevant; and second, I regard the information obtained through these interviews too important for being relegated to a secondary role in this thesis.

The research faces several limitations, one of them related to the fact that, as a foreign observer, there may be certain nuances that I miss and other. Moreover, this research pays perhaps minimal attention to the views of victims.

Structure

The thesis begins by laying out the theories related to the liberal approach to transitional justice and its relationship to national elites. Part II describes the development of the transitional process in Nepal and the situation of the transitional goals. Part III examines the views of prominent international and national actors in relation to the Nepali transitional process. This thesis concludes with Part IV which summarises the key topics of the research and includes the opinion and suggestions of the author.

Acknowledgments

My deepest gratitude goes to all the interviewees for their availability and generosity on sharing their time and views with me.

To my friend Richard Raber, for his inestimable support, be it overseas or during our short encounters.

Also, my most sincere appreciation for my supervisor from KU Leuven, Prof. Dr. Stephan Parmentier, whose counselling have always been incisive and illuminating.

Lastly, to my friend Munu for her loving affection. Nepal is a better country with you and your poetry.

PART I

CONCEIVING THE FRAMEWORK: TRANSITIONAL JUSTICE IN ABSENT POLITICAL TRANSITIONS

Chapter I
TRANSITIONAL WHAT?: A LIBERAL THEORY

"U*nrestrained liberalism only makes the strong stronger and the weak weaker and excludes the most excluded*"

(Pope Francis, 2013).

Introduction

Opening this master's thesis, section one briefly traces the origins and major developments that have contributed to the expansion and complexity of the field. Section two introduces the liberal assumptions that lie within the application of transitional justice. Section three identifies the four goals that guide any transitional process. Finally, sections four and five discuss the relationship between the transitional mechanisms and the liberal goals, outlining the risks of an unlimited expansion of the field.

1.1 Historical developments at a glance

While some scholars perceive transitional justice as a phenomenon that started occurring in the ancient Greece (Elser, 2004) and others often refer to the Nuremberg Trials and the International Military Tribunal for the Far East as the early roots of the concept (Teitel, 2003), the first extensive and conscious use of mechanisms profoundly related to transitional justice appeared during the 1980s in Latin America. This period has been referred to as 'third wave' of democratisation by Samuel Huntington (1999).

Since the 1990s, the field of transitional justice has experienced great changes and innovations: the judicial sphere witnessed the establishment of the International Criminal Court, international criminal tribunals like the International Criminal Tribunal for Rwanda or the International Tribunal for the former Yugoslavia, and several hybrid courts like the Special Court for Sierra Leone or the

Extraordinary Chambers in the Courts of Cambodia; the United Nations contributed to the normative developments of the 'right to remedy and reparation' (UNGA, 2005) and the 'right to truth'; the creation of international NGOs such as the International Center for Transitional Justice; and finally, the staggering expansion of the scholarship through the constitution of specialised centres attached to prestigious universities and the creation of specialised Series on Transitional Justice.

1.2 Liberal assumptions

The United Nations currently defines transitional justice as:

> *The full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing level of international involvement (or none at all), and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof* (UNS-G, 2004: para. 8).

Traditionalists believe that dealing with a legacy of human rights violations through the establishment of legal or quasi-legal processes will inherently help in the consolidation of liberal values of the future democratic state (McAdams, 1997; Loyle and Davenport, 2016: 127). In this sense, Hannah Franzki and Maria Carolina Olarte (2014: 203) argue that the mainstream approach to transitional justice relies in two assumptions: one based on the desirability of transitions towards liberal democracies and the other one based on the positive contribution of transitional justice mechanisms in supporting the implementation of the rule of law and promoting reconciliation among the society in transition. As stated by Noel Calhoun (2004: 29), liberal democracy provides transitional justice with four ideological elements that justify the process: the reparation of the social contract, the establishment of the rule of law, the promise of justice and the consolidation of liberal rights. These four elements, in conjunction with peace, which serves as a precondition upon which the rest are based, and democracy, which functions as an instrument to legitimise the system, form the core objectives of the traditional transitional justice theory.

The discourse and practice of transitional justice has been largely influenced by the implicit assumption surrounding the meaning of 'transition' and 'justice' present in the Western liberal thinking. In accordance, Buckley-Zistel et al. (2014: 7) perceive as a challenge to prove:

> "to what extent a norm that has been conceived in the so-called Western world is applicable beyond its contexts of origin. This norm often purports a particular view regarding justice, truth and reconciliation without taking into account that these concepts might mean different things to the people affected by violence in different places of the world".

1.3 The goals of transitional justice

The above-mentioned objectives are to be achieved primarily through the adoption of a comprehensive transitional law framework. Under this framework there shall be enough space to (re)generate the consensus around the Hobbesian liberal idea of the social contract through the amendment or establishment of a new constitution, the accomplishment of justice through the creation or enforcement of criminal law in the form of trials, the concession of reparations, amnesties etc., and, by designing other ways to "publicly construct new collective political understandings" (Teitel, 2014: 156).

Fionnuala Ní-Aoláin and Colm Campbell (2005: 184) have summarised the essential changes that must take place in order to identify the success of a paradigmatic transition.[1] The first fundamental difference between the pre-transitional and the post-transitional situations must be the end of generalised violence -in form of violations of human rights-. Once this prerequisite is met, the transitional justice process can facilitate the establishment of a legitimate government through a democratic system. The idea is that a democratically elected government would establish a system based on the rule of law that would deter wide-spread violations of human rights.

Since these goals are presented as ideal for any given society, it allows for the implementation of transitional justice mechanisms in situations that go beyond paradigmatic transitions (Aoláin and Campbell, 2005: 174). These alternative transitions are presented in chapter 2 of this dissertation.

1.3.1 Transitional law

The justice to be applied in a context of transition is limited in space and time to the wrongdoings committed during an agreed period of time. Transitional justice is conceived as a set of tools primarily aimed at resolving violent political disputes through the promotion of the transitional goals, which shall prevent violence from reoccurring. Consequently, some crimes can be left out of the equation, leaving the perpetrators to be tried and punished by ordinary criminal justice and thus possibly receiving a different punishment for the commission of the same crime. Most of the theories that attempt to deal with past wrongdoings depart from the assumption that a predecessor regime has collapsed. Accordingly, the notion of justice is framed under a 'punishment or impunity' debate in which the regime to be has to decide, while considering national circumstances and new priorities, whether the previous rulers should be tried punished, and by which special mechanisms

1 By paradigmatic transition, Ní-Aoláin and Campbell refer to the traditional way in which most of the scholarship has associated transitional justice with the violation of human rights by an authoritarian form of government.

such prosecution should occur. Individual accountability is the major expression of the liberal state. The individualisation of guilt is valuable in order to avoid the general stigmatisation of a group and yet, as Carlos Santiago Nino noted, it can also "create large impunity gaps, ignoring the political and legal framework in which these individual transgressions were allowed to occur" (Nino, 1999: 145).

In transitional justice theory, transitional law is perceived as a tool of the legal transitional process that contributes to the political and social transformation into a democratic society. The legal mechanisms of the transitional process have been conceived as a balance between the importance of criminal law and the political circumstances in the aftermath of the conflict. In the early stages of the process, transitional law plays a crucial role in finding the right balance between the different needs of the country, as a whole, and its population and victims in particular. Accordingly, transitional law necessarily serves an imperfect and partial justice, for it must preserve an equilibrium between the priorities of each actor, which are often conflicting. In essence, transitional law provides a structure with which to manage the past as a way to pursue a common future.

Transitional law has two inherent paradoxes. First, it is caught "between the past and the future, between backward-looking and forward-looking, between retrospective and prospective, between the individual and the collective (Teitel, 2000: 6). Second, it must ensure order in a society while enabling it to transform its old structures into a new legitimate regime. (Teitel, 2014: 96). Transitional law represents the materialisation of a non-ideal form of justice that arises from the conditions under which it is formed (Teitel, 2000: 227). Therefore, the extent to which transitional law can commit to justice ideals will be directly proportionate to the political gains associated with the preservation of peace.

Peace

The core element of liberal peace theory is that democracies do not fight among themselves nor they experience civil wars (Bellamy and Williams, 2010: 23).[2] In order to preserve peace, this theory relies on the positive values attached to democracy, economic interdependence and justice. Consequently, the best way to contribute to peace -particularly in post-conflict societies- is to encourage processes of democratisation, economic liberalisation, development, human rights and the rule of law (Kurtenbach, 2010: 95; Duffield, 2001: 11; Franks and Richmond, 2008: 82). According to Albert Schnabel, the liberal peace theory assumes that through the consecution of these elements a

2 This theory is built upon the writings of Immanuel Kant on 'perpetual peace'.

post-conflict society can access a 'market' of interdependent and interrelated democracies, and thus contributing to global peace (as cited in Tziarras, 2012).

However, the liberal peace theory seems to focus only on what Johan Galtung (1969: 183) coined as 'negative peace', namely, the absence of personal violence. The liberal theory does not reflect upon a wider understanding of peace that would include the absence of structural violence, or 'positive peace'. While the cessation of the violent conflict is a core element towards the consecution of peace, as maintained by Galtung, sustainable peace can only be truly achieved by tackling structural violence and achieving social justice.

Democracy

Transitional justice theory assumes the existence of a consensus around the idea that liberal democracy is desirable for any society. However, according to Wendy Brown: "no compelling argument can be made that democracy inherently entails representation, constitutions, deliberation, participation, free markets, rights, universality, or even equality" (Brown 2011: 45). On this topic, Hannah Franzki and Maria Carolina Olarte (2014: 212) stress that democracy, as a term, can have various meanings. Transitional justice has traditionally focused on the procedural elements of democracy: a multiparty system with regular, free and fair elections; secret and universal vote and the liberal rights that allow for the free creation and continuation of political parties (O'Donnell and Schmitter, 1986: 22; Linz 1996: 17). It is precisely this "uncritical embracing of the aim of liberal democracy speaks of the success of political liberalism to present itself as post-political, that is, as a political order that is acceptable to everyone" (Franzki and Olarte, 2014: 206).

The unequivocal commitment to the rule of law can be used as a tool of hope that embodies a promise to end wide-spread violations of human rights in a liberal state. Democracy does not bring substantial change *per se*, but rule of law does. They are complementary: democracy is a necessary precondition in order to legitimate the legal system, and, in turn, the law limits the powers of the democratic institutions in order to prevent authoritarian tendencies that would subvert the integrity of the democracy.

Rule of law

Peace, democracy and human rights share a common problem: their content and requirements for their fulfilment have not been clearly determined by the scholarship. Therefore, these goals can

present several degrees of compliance. This is different for the rule of law, which is a well-founded concept that has received great attention.

The essence of the rule of law is well described by Stephen Winter:

> "an action-guiding set of non-arbitrary principles, rules and rule-making that is prospective and clear, consistent and stable in terms of its content, and obligatory upon both the state and the citizenry. Violations are subject to adjudication and remedy. New laws must themselves be made according to law and the discretionary powers of officials legally defined and subject to legally enforceable oversight" (Winter, 2014: 63).

The rule of law is composed by the formal aspects of each norm -clarity, publicity, generality, stability and prospectivity- and the procedural principles related to the way in which these norms are adopted and administered (SEP, 2016).

As explained by Stephen Humphreys (2010: 7), the rule of law experienced its first expansion with the end of Communism, where it served as a tool for Eastern European countries to to evolve into free market democracies. The second expansion occurred after 9/11 and the subsequent invasions of Afghanistan and Iraq. The rule of law was used to reinforce order in fragile states. By the end of the twentieth century, transitional justice moved from being the exception to become the norm, with the rule of law as its archetypical element (Teitel, 2014: 51). These expansions were developed in parallel to the rise of legalism which was conceived as a mechanism for international engagement and which presents the law as neutral, universal and apolitical (Oomen, 2005: 893). For Ruti Teitel (2000: 224), the (re)introduction of legalism is an emblematic trait of the liberal state. Nevertheless, there is an increasing number of authors like Kerry Rittich or Brian Tamanaha who have questioned the neutrality of the rule of law and have identified its expansion with the proliferation of neoliberalism as a global economic project (as cited in Franzki and Olarte, 2014: 215). In this sense, Ivan Krastev has insisted that "it is rule of law and not democracy that brings foreign investors, (...) secures development and protects rights" (Krastev, 2005: 323).

The close relationship between transitional justice and the rule of law has been further strengthened by the UN (United Nations, 2010; United Nations, 2016: § 46) and by the international donor community (World Bank 2011: 125). Prominent scholars like Jeremy Sarkin (1999: 822) have expressed that the "best way to prevent future human rights abuses is by strengthening the rule of law and the corresponding independent judicial institutions and uncorrupted governmental bodies". However, authors like Brian Grodsky (2008) have demonstrated how the law can also be used as a

tool to restrict the consolidation of a democratic state. Similarly, others have required that, at least, there shall be a minimum awareness that legalism may be used to privilege elite interpretations and ignore fundamental topics of powerless groups (Bell, Campbell and Aoláin, 2007: 83).

Today, the rule of law is conflicted with the establishment of a global legalism that has redefined the relation between the international and the national legal orders. A prime example of this conflict was the establishment of the International Criminal Court (ICC). Even if the competences of the ICC are only exercised if the national legal system is either unwilling or unable to exercise its jurisdiction, it challenges traditional notions of territoriality and sovereignty. The imposition of criminal trials for perpetrators of human rights violations may undermine the existing rule of law; for example, related to the "retroactivity in the law, tampering with existing laws, a high degree of prosecutorial selectivity, and a compromised judiciary" (Teitel, 2014: 53). However, even though if most states in the world have adhered to the UN system and have willingly ratified several conventions that impose a different rule of law on top of their national laws, the exceptionality of the transitional process raises a question as to the prevalence of one rule of law over the other. Certainly, in cases where the international community has had a significant impact on putting to an end a period of conflict, the application of international law will is more inherent due to the presence of foreign forces. Depending on the jurisdiction, whether a domestic court, a hybrid tribunals or an international forum, each court will prioritise the distinctive values of the corresponding rule of law which may differ, and thus potentially generating divergent outcomes. Consequently, if the national authorities of a country embrace reconciliation as the ultimate goal of the transitional process, they will be keen to attract a rule of law that favours some kind of amnesties over exhaustive accountability.

In illiberal societies, the rule of law is often substituted by the rule by law. Under such circumstances, laws are seen as tools of the executive power to achieve its political interests. For Surendra Bhandari (2014: 21), illiberal governments will tend to instrumentalise the law, undermining its supremacy; equality before the law can be avoided if contrary to the interests of the rulers; and the judicial power suffers from a continuous disrespect for its decisions based on the law.

While the rule of law is perceived as a guarantor for human rights as a whole, Stephen Humphreys claimed that the protection offered by the rule of law does not extend beyond civil and politics rights (Humphreys 2010: 57).

Human rights

According to Thomas Carothers (1994: 106), the human rights movement made sure to insist on the impartiality of law amidst the fear to be regarded as a tool of the capitalists and liberal democrats of the West (as cited in Mukua, 2011: 43). The success of the global human rights discourse is very present in the transitional justice field. In this sense, Kenneth Abott et al. have suggested that this is a consequence of the expansion of liberalism as an ecumenical ideology, the escalation of legalism in the international sphere and the belief on the rule of law as "the appropriate model of State practice" (as cited in Subotić, 2014: 129).

The transitional justice field has assumed the liberal division between politics and economics are separated. However, in doing so, Franzki and Olarte interpreted that transitional justice has opted to consider the socioeconomic dimensions of conflict as an irrelevant element for the democratic legitimation of the new regime. Moreover, by solely focusing on civil and political violations of human rights, transitional justice centres its target on criminals and victims, excluding beneficiaries of crimes of their obligation to contribute to the restoration of justice (Franzki and Olarte, 2014: 203).[3] In this regard, Jane Alexander criticises transitional justice for being a narrow, normative approach that privileges civil and political over socioeconomic and cultural rights, and thus marginalising the needs of women and the poor (as cited in Roht-Arriaza, 2006: 2). In this sense, Vasuki Nesiah further claims that transitional justice has been protected from using the transitional mechanisms as emancipatory tools that could contest the monopoly that the "human rights discourse has claimed over struggles" (Nesiah, 2006: 801; Lundy and McGovern, 2008: 119). Similarly, Zinaida Miller argues that by neglecting the socioeconomic violence of the pre-transition period, "emerging democracies come to be marked by high social inequality" (Miller 2008: 267).

There is a general assumption that liberal states do not commit systematic violations of human rights. However, despite the presence of an internal human rights system that should prevent and correct these cases from occurring, the liberal states is often confronted with the existence of human rights violations. Therefore, it can be argued that if a given democracy fails to prevent wide-spread violations of human rights, the rule of law is compromised, and the very essence of the liberal state endangered.

3 According to Franzki and Olarte (2014: 203) other "revolutionary ideologies, mainly present in Marxist thought, have pictured beneficiaries of injustice as 'would-be perpetrators'. Their claims for historical justice consequently include all those who profited from the past regime".

1.4 The peril of expansion

Several authors are increasingly urging to expand the content of transitional in order to gradually include economic, social and cultural rights as an intrinsic components (Laplante, 2008; Miller 2008). In particular, it has been argued that, as far as the dominant liberal normative framework is limited to the redress of violations of civil and political rights, there is a growing need to address issues like gender discrimination and structural violence (Nagy, 2008: 287). If these factors are not corrected, the ideal of justice can hardly be achieved. There are also authors that have openly called for the inclusion of other transitional goals such as truth, healing or reconciliation (Clark, 2008: 193). However, insofar as the core content of transitional justice theory is ideologically defined by liberal ideas, the inclusion of new perspectives might threaten the consistency and roots of the field, by directly contradicting with the liberal priorities. In this sense, some authors defend that the field of transitional justice is at a crucial crossroad where the constant calls for expansion is slowly blurring the borders of the field, while leaving it open to criticism and manipulation due to its vagueness (Bell, 2009: 13; Buckley-Zistel *et al*., 2014: 3).

1.5 Conclusions

Transitional goals are presented as universal and apolitical. However, due to the influence of Western liberalism in the transitional justice discourse, these claims are false. Peace and democracy do not have a generally accepted content and are therefore subject to the ideology framed behind their promotion. The inherent limits of this approach have resulted in experts calling for the expansion of the field, a suggestion that might enter in contradiction with the liberal tenets of the normative framework.

Chapter II

TRANSITIONAL JUSTICE AND POLITICS: A DYNAMIC RELATIONSHIP

"*If voting could change anything, it would be made illegal*"

(Borden, 1976).

Introduction

The second chapter of this thesis deals with the relationship between the structure of the state and its choice to pursue a transitional justice process. Section one describes the role that national authorities can play during the transitional process and briefly addresses the increasing presence and influence that international actors have in shaping transitional processes. Sections two and three theorise about the different scenarios where transitional processes may develop.

2.1 The role of national elites

Transitional justice demands that political elites agree on a minimum core denominator regarding the violent events of the past and their involvement in them. The powers resulting after the agreement to establish a transitional justice process are usually in a predominant position to shape and influence the process according to their political priorities. According to Aaron Boesenecker and Leslie Vinjamuri (2011), domestic elites can be sorted in three different categories: justice resisters, justice instrumentalists and true believers. The adherence of the resulting winner of the domestic political dispute to any of these categories will "determine what approach to transitional justice elites undertake and to what policy effect" (Subotić, 2014: 128).

Transitional justice is no longer merely a set of mechanisms aimed at dealing with the unattended systematic human rights abuses of a society in its transition towards a liberal democracy. In accordance, as Thomas Hansen identified, it is important to devise who's interests does a particular

transitional process serves and what these interests are based upon (Hansen, 2011: 2). The first step to evaluating these questions is to determine the allegiance of those involved in the policy making and implementation of the transitional justice process. Brian Grodsky argues that transitional justice is a political commodity that can be traded for other goods rather than a process aimed at advancing the consecution of liberal goals. Political elites calculate "whether they can use the multidimensionality of the policy process to make otherwise unacceptable policies feasible and even advantageous" (Grodsky, 2010: 26). Accordingly, Cyanne Loyle and Christian Davenport assert that national governments may implement transitional justice without "maintaining an interest in truth, peace, or democracy but rather with the intention of promoting denial and forgetting, perpetuating violence, and legitimating authoritarianism" (Loyle and Davenport, 2016: 127).

The subversion of transitional justice goals has been coined by Loyle and Davenport (2016: 131-133) as 'transitional injustice'. In order to analyse if a case can fall under the concept of transitional injustice, they propose to examine three elements: the existence of a policy that promotes denial and forgetting, limiting access to justice or impeding public access to documents, the perpetuation of violence, and the consolidation of authoritarianism as a way for governing the state.

One of the problems of transitional justice theory is that it has traditionally assumed a very narrow conception of democracy, and thus participation of the civil society and other actors in the decision-making process has not been taken into account. Transitional justice was viewed as a process for the political elites, as legitimate representatives of the citizens in the international arena, to be imposed over its population without prior consultation with groups of victims human rights defenders, etc. This created tensions at the global and the local level, which are leading to the increasing inclusion of civil society organisations as legitimate actors in the decision-making process to influence on the creation of mechanisms that will address the challenges of the country in transition (Teitel, 2003: 88; Sharp, 2013: 155).

There is a general assumption that transitional justice and the values it embodies are intrinsically positive. For Hansen, the establishment of transitional justice mechanisms can also serve to limit to liberal values (Hansen, 2011: 16). On one hand, there must be a close examination of the intentions behind every decision, since the foundation of a liberal democracy is not self-explanatory of the means necessary for its achievement; while, on the other hand, transitional justice can be instrumentalised by local authorities in order to gain international support, in form of financial

contributions or recognition.[4]

Under specific circumstances, international actors might have a determinant role in the transitional justice process. Examples range from the impact on criminal prosecutions of top leaders by the International Criminal Court, the establishment of the UN ad hoc criminal tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) and the great influence that NATO and EULEX have had in Kosovo.[5] The development of human rights as a global discourse, as well as normative innovations such as the universal jurisdiction in the field of criminal law, have allowed certain powerful countries with a history of military interventions to shift, according to Gary Bass (as cited in Subotić, 2014: 129), to the promotion of transitional justice mechanisms, whether domestic, hybrid or international, to avoid the high costs of justifying the loss of its citizens in conflicts alien to their national security. These actors, ranging from intergovernmental organisations, to States and NGOs, have increasingly undermined the autonomy of the state in transition. The tactics used are diverse and include public statements on their preferences for particular transitional justice mechanisms, declarations of support on the process, the provision of funds to be dedicated on certain policies and other tangible and non-tangible sorts of pressure (Grodsky, 2010: 27).

2.2 Transitional mechanisms and their contribution to transitional goals

Transitional justice mechanisms are meant to secure the goals that shall ideally govern the future society: peace, and a democracy based on the rule of law and the protection human rights. Historically, depending on the circumstances of each post-conflict scenario, national elites have prioritised criminal trials over amnesties or vice versa. Accordingly, the scholarship has tried to elucidate to what extent the circumstantial implementation of transitional mechanisms contributes to the accomplishment of the transitional goals.

Tricia Olsen, Leigh Payne and Andrew Reiter (2010: 131-152) have divided the election of transitional mechanism into four concurring assumptions. First, a maximalist approach presupposes that trials will help improving the above-mentioned goals more than the use of amnesties. This approach suggests that prosecution of criminals increases the implementation of the rule of law, contributing to impart justice and ending the culture of impunity. Criminal accountability also serves as a tool to deter future criminals from committing human rights violations. On the contrary, granting

4 For example, Brian Grodsky (2008) affirms that the United States almost doubled its financial contribution to the Uzbekistan after Uzbek President Islam Karimov expressed his predisposition to deal with past abuses.

5 EULEX stands for 'European Union Rule of Law Mission in Kosovo'.

amnesties suggests -if not encourages- that certain individuals or crimes committed under particular circumstances are above the law, weakening the rule of law and supporting a culture of impunity. Second, a minimalist approach believes that amnesties contribute best to achieve the transitional goals because they are an incentive to powerful criminals not to endanger the development of a democratic system. A minimalist approach assumes that trials jeopardise democracy and human rights because they perpetuate the conflict and thus endanger the necessary stability of the country in order to carry out the required reforms. A third assumption is that a moderate approach contributes best to achieve the transitional goals. This approach argues in favour of the establishment of truth commissions, as they have accountability methods that can end with the culture of impunity. Moreover, truth commissions allow for the engagement of victims and perpetrators in the public process, paving the road towards reconciliation. Finally, the fourth assumption argues that a holistic approach -a combination of the transitional mechanisms- can better lead to achieve the transitional goals. A holistic approach argues that amnesties on their own do not achieve accountability but, in conjunction with truth commissions or selected trials, they might ensure enough stability to implement necessary reforms while guaranteeing certain degree of accountability that will serve to deter future violations of human rights.

2.3 Transitional justice in political transitions

2.3.1 Liberal transitions

The typical scenario for a liberal political transition to take place is when a non-democratic regime is substituted for a democratic regime governed by the rule of law. Such a situation was found in the transitions of southern and eastern Europe during the mid-1970s and 1990s respectively, and in the transitions in some Latin American countries in the 1980s. The public authorities of a country transitioning to a liberal state are likely to support transitional justice "to the extent that such processes do not conflict with other top priorities" (Hansen, 2014: 112). A prime example of this was South Africa and the decision of the leadership to prioritise truth and amnesties over criminal prosecution, a position far from being ideal under liberal ideals (Boraine, 2006).

The global discourse of transitional justice has been developed around these cases, failing to substantiate to what extent transitional justice mechanisms are effective in achieving the liberal goals of a democracy based on the rule of law and respect to human rights and the general

reassurance of securing sustainable peace.[6] Liberal transitions offer no guarantees of success. In fact, they are likely to fail in cases were the political and social circumstances are not sufficient to tolerate and support the values of a liberal state.[7]

2.3.2 Non-liberal transitions

There are several transitional justice processes that cannot be judged according to their allegiance to liberal ideals: they are considered to be non-liberal political transitions. In countries like Chad, Ethiopia, Haiti, Nicaragua, Nigeria, Rwanda or Uzbekistan, public authorities opted to prioritise other legitimate interests such as the construction of a common national identity after a period of civil war.[8] These alternative interests must be scrutinised with the same intensity to evaluate who's interests they serve. Such an evaluation is essential in order to assess the legitimacy of a given transitional justice process. For instance, one of the key elements to be evaluated is the suitability of particular transitional justice mechanisms to deal with legacies of wide-spread violations of human rights. The appropriateness of these mechanisms is going to be dependent on factors such as the degree of popular support and participation on the crimes committed; whether the state supported or provoked by the insurgency of rebel groups; the magnitude and duration of the hostilities, etc. The recognition of the present state of affairs also has a crucial role in deciding whether peace should be prioritised over justice in order to preserve the stability of the country and, accordingly, there must be an appraisal on whether the refusal to adopt liberal democratic values was a root cause that ignited violence (Hansen, 2011: 19-21). Under non-liberal transitions, transitional justice mechanisms tend to be instrumentalised to legitimise the continuation of old non-liberal practices stemming from non-democratic regimes such as flawed rules of law, lack of respect toward human rights, etc. Instead, other goals deemed crucial by the ruling public authorities are privileged.

2.4 Transitional justice in absent political transitions

Transitional justice scholarship has traditionally focused on what Fionnuala Ní-Aoláin and Colm Campbell refer to as 'paradigmatic transitions': the methodology used to manage human rights

6 For a detailed analysis of this issue, see: Pierre Hazan (2006). Measuring the Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional Justice. *International Review of the Red Cross*, Vol. 88, No. 861: 19-48.

7 See the cases of Libya, Egypt or Tunisia.

8 For a deeper comprehension of these cases, see: Thomas Obel Hansen (2011). Transitional Justice: Toward a Differentiated Theory. *Oregon Review of International Law*, Vol. 13, 1: pp: 8-22.

violations committed under a prior illegitimate regime. However, prolonged political violence can also occur under democratic states, leaving behind a legacy of gross and systematic human rights violations (Aoláin and Campbell, 2005: 172). To the extent that a political transition is not taking place, the goals to be achieved through the implementation of transitional justice mechanisms can be expected to be different than those in archetypical liberal transitions.

2.4.1 Well-established democracies

Some consolidated democracies adopted mechanisms similar to those used in political transitions in order to manage with past generalised situations of injustice that hadn't been handled according to the liberal democratic values of the country. These mechanisms primarily dealt with situations in which children belonging to aboriginal or indigenous communities were forcibly removed from their parents and placed in state institutions or foster parents where they were forced to assimilate the cultural values of the metropolis. In 1997, the Human Rights Commission of Australia issued a report on the stolen children of aboriginal communities. In 2008, Canada established a Truth and Reconciliation Commission to deal with the unfair treatment towards indigenous communities. Since the 1990s, commissions of inquiry or truth commissions were also formed in Denmark, Germany, Ireland, Norway, Sweden and the United Kingdom to deal with the abuse and neglect of children in institutions or foster homes (Sköld, 2013: 6).

2.4.2 Deeply conflicted societies

There are several cases of fragile or deeply conflicted societies where a political transition has either not taken place or remains highly disputed. Among these countries, one must differentiate between cases were the state is willing to pursue a transitional justice process and those were the state has objected to transitional justice (Hansen, 2011: 23). In accordance with Aoláin and Campbell, a deeply conflicted society must have a "deep seated and sharp division in the body politic, whether on ethnic, racial, religious, class, or ideological grounds" and such division should be "so acute as to have resulted in or threaten significant political violence" (Aoláin and Campbell, 2005: 176).[9] Examples of deeply conflicted democracies that have used, instrumentally or not, transitional mechanisms are: Burundi, Colombia, Kenya, Lebanon, Sri Lanka, Sudan, or Uganda.

9 While Fionnuala Aoláin and Joseph Campbell (2005) use the term 'conflicted democracy', I prefer to employ the term 'deeply conflicted society', coined by Thomas Hansen (2011), as it allows for a wider spectrum that may include cases of absent political transitions in illiberal societies.

Traditionally, transitional justice mechanisms are agreed upon during a truce between the conflicting parties. Once there is an initial compromise to end with the hostilities, negotiations regarding the mechanisms and conditions under which the process will be implemented may start. However, deeply conflicted societies might use transitional justice as a bargaining tool to achieve peace.[10] For Aoláin and Campbell (2005: 185), some kind of conflict is "an inevitable part of the human condition", which suggests that transitional justice should focus less on putting an end to the conflict and more on accommodating actors to move from a violent to a non-violent way of pursuing their political goals.

In the specific case of conflicted democracies, national authorities are likely to show resistance to institutional reforms. The inherent nature of the democratic state, according to Aoláin and Campbell (2005: 189) will be used to protect essential institutions that preserve the sovereignty of the country, primarily the security forces and the judiciary, from being criticised for being institutions with authoritarian traces. Also, the fact that conflicted democracies claim their adherence to democratic values will allow them to easily refuse the influence of external actors in the development of their transitional process. However, if a state has complicity with human rights violations, whether through the assistance of the crime or by failing to provide a legal remedy, it can "create a situation where communities at the sharp end of violent conflict, confidence in law and in legal institutions collapses (Aoláin and Campbell, 2005: 189). This results not only in a loss of the state's legitimacy under the social contract theory, but has the potential to push disadvantaged communities to assume political ideologies that comprises forms of violence as means to achieve their political goals.

2.5 Conclusions

National elites have the power to introduce a transitional process. However, these elites might not be morally bound or committed to the consecution of liberal goals and might actually instrumentalise transitional justice to achieve their own agendas. Depending on the circumstances under which the hostilities ended and the economic situation in the aftermath of conflict, international actors can have a higher or lower leverage in the design of the transitional process.

10 See the the cases un Uganda and Colombia.

PART II

TRANSITIONAL JUSTICE IN NEPAL: A DECADE ON HOLD

Chapter III

THE NEPALI TRANSITION

"*If there is no struggle there is no progress*"

(Douglass, 1857).

Introduction

Chapter three is dedicated to the on-going transitional process taking place in Nepal. Section one presents the most relevant events that happened prior as well as during the Maoist insurgency. Section two concentrates on the two major transitional laws: the peace agreement between the parties and the act regulating the transitional commissions. Lastly, section three introduces the contributions of the commissions to the transitional process.

3.1 The Maoist insurgency

3.1.1 Background

In 1990, the Nepali Congress, a prominent political party, together with the 'Alliance of Leftist Parties', itself formed by a diversity of communist political parties, launched a decisive agitational movement, the *Jana Andolan I,* in order to end with absolute monarchy in Nepal.[11] As a consequence, King Birendra reinstated the Parliament and Nepal adopted the 1990 Constitution that defines the country as "multiethnic, multilingual, democratic, independent, indivisible, sovereign, Hindu and Constitutional Monarchical Kingdom" (Constitution, 1990: art. 4.1). Also, the 1990 Constitution expressly banned any kind of discrimination on the grounds of caste (Constitution, 1990: art. 11). However, shortly after the adoption of the Constitution, experts raised concerns about the possibility of extremism developing in a country whose population has suffered at large from unfavourable socioeconomic conditions derived from situations of discrimination (UNCERD, 1999: §10; OHCHR, 2012: 14).

11 The expression '*Jana Andolan*' translates for 'people's movement'.

In March 1995, the Communist Party of Nepal (Maoist) began to strategise for an armed struggle against the state baptised under the name of *People's War*. Almost a year later, on 4 February 1996, the Maoists, presented a 40-point demand to the Government of Nepal (GoN) warning that a failure to comply with their demands would entail the start of a militant struggle (OHCHR, 2012: 14). The 40 points included measures such as the abolishment of the monarchy, the introduction of secularism, the end to gender and caste-based discrimination, and the introduction of unemployment allowances and minimum wages for workers (Thapa, 2003: 391).[12]

The Nepali society has traditionally been marked by stratification. Dating back to 1854, the *Muluki Ain* established a hierarchic system based on caste where even non-caste groups such as indigenous, *Janajati*, or Muslims were placed in specific catsegories (Hofer, 1979).[13] These members, together with the lowest Hindu caste, known as *Dalits*, have been systematically excluded from access to education, health care, property and other socioeconomic opportunities (WB, 2006). These sustained inequalities, based on ethnic and caste discrimination, played a central role in the reasoning behind the perpetuation of the armed conflict in Nepal (Murshed and Gates, 2005: 122). Simon Robins puts it best when asserting that the conflict in Nepal "conflict was the product of a society built upon the codified exclusion of a majority of its people" (Robins, 2012: 6).

3.1.2 The armed conflict (1996-2006)

On 13 February 1996, the Maoists made good on their threats, launching an armed insurgency against the GoN. Over the armed conflict, the Maoists executed their military operations through the military wing of the party, known as the People's Liberation Army (PLA). At first, the GoN employed the Nepal Police to contain the insurgency, as it was regarded merely as problem of order.[14] In November 2001, after the repeated Maoist gains of territory, especially in the western part of the country, the GoN declared a nationwide state of emergency and decided to make use of the Royal Nepal Army, together with the Nepal Police and the newly created Nepal Police Force, to defeat the Maoist rebels.

12 The author recommends to read the 40 demands. Available at: http://www.satp.org/satporgtp/countries/nepal/document/papers/40points.htm

13 The *Muluki Ain* is the equivalent of combined civil and criminal code.

14 Colm Campbell, Fionnuala Aoláin and Colin Harvey (2003) demonstrated that democratic states rarely apply international humanitarian law for internal armed conflicts in order avoid undermining both the internal and external legitimacy of the state.

According to Mansoob Murshed and Scott Gates, horizontal inequalities, income disparity, are determinant to interpret the level of intensity during the *People's War*, together with group differences based on caste and ethnicity (Murshed and Gates, 2005: 129-132). This hypothesis is complemented by Angelica Salvi del Pero, who found a 70% of income disparity between the high castes, *Newars*, *Brahmins* and *Chhetris,* and the rest of the population, which she attributed to some form of discrimination (as cited in Brown and Stewart, 2006: 27). This explains why the Maoist insurgency started in the poorest areas "where the state was largely absent" (Robins, 2012: 11). In fact, the Maoist movement used these injustices to gain most of their support in "regions and districts which combined relative socio-economic deprivation with particularly ethnic distinctiveness" (Brown, 2011: 288). The Maoists capitalised on the discontentment of marginalised populations by bringing light to the plight of *Dalits*, *Janajatis* and women in public fora (WB, 2016: 4).

In February 2005, King Gyanendra dismissed the Prime Minister and the rest of the cabinet to assume all executive powers himself (UNSC, 2007: §6). For the next year, security forces would further ignore civil and political rights, to the extent of that the state arbitrarily arrested over 3,000 journalists, students and politicians, including the senior leaders of NC and CPN (UM-L), who were put under house arrest and denied the ability to send or receive any kind of communication (HRW, 2006a). This situation propitiated the *12-point understanding*, a compromise between the seven-party alliance (SPA) and the Maoists in which they subscribed to "bringing the autocratic monarchy to an end and establishing full democracy" (*12-point understanding*, 2005). This understanding, reached in November 2005, called for civil society and other actors to participate in a peaceful people's movement, a second *Jana Andolan*. The movement succeeded in its aims and King Gyanendra reinstated the Parliament on 28 April 2006 (King Gyanendra, 2006). Months later, on 21 November 2006, the SPA and the Maoists consolidated their previous agreements and signed the *Comprehensive Peace Accord* (CPA), officially declaring the end of the conflict.

During the conflict, both the Maoists and the governmental security forces committed widespread abuses and violations of human rights. In fact, 73 out of the 75 districts of Nepal recorded conflict-related killings (OHCHR, 2012: 15). The most conservative figures of the *People's War* are: over 14,000 dead, more than 1,000 disappeared and thousands internally displaced (INSEC, 2017: 7). Both sides to the conflict have been accused of torture, unlawful killings, arbitrary arrests, and abductions. According to the UN Working Group on Enforced and Involuntary Disappearances, Nepal was home to the most disappearances in the world during 2003 and 2004 (HRW, 2005).

3.2 The transitional laws

3.2.1 The Comprehensive Peace Accord

On 8 November 2006, the leaders of the seven parties and CPN (Maoist) reached an agreement to formally end the armed conflict. As a consequence, the Comprehensive Peace Accord (CPA) was signed between the Government and the CPN (Maoist) on 21 November 2006. This compromise between the parties to the conflict in the CPA contained the commitment to establish a High-level Truth and Reconciliation Commission aimed at probing "those involved in serious violation of human rights and crimes against humanity in course of the armed conflict" in order to forge an "atmosphere for reconciliation in the society" (CPA, 2006: §5.2.5). This provision is notably important, as it conditions accountability to the higher goal: reconciliation. The CPA also introduces a formal invitation for the international community to collaborate in ensuring a "full-fledged democracy and lasting peace" in Nepal (CPA, 2006: §10.8), a specific note on the continuation of the monitoring task on human rights performed by the OHCHR (CPA, 2006: §9.1). This document also included the promise to hold free and fair elections to a Constituent Assembly and the adoption of a new Constitution by the Constituent Assembly to end "all forms of feudalism" and "discriminations based on class, ethnicity, language, gender, culture, religion and region" (CPA, 2006: §2b, §3.2, §3.4 and §3.5).

According to Christopher Decker, this accord is the product of two sides who realised neither was going to win: "because of that, we got an agreement which is a little bit 'wonky' in some places, as both parties were trying to demonstrate that they had won (Decker, PC, 22 May 2017).[15] In any case, the CPA is of crucial importance, as it served to develop other specific transitional laws and is the document upon which both the interim and the current Constitution are founded.

3.2.2 The legislative process to establish the transitional mechanisms

The interim Constitution of Nepal included the text of the CPA as an annex and provided that one of the obligations of the state was to "constitute a high level truth and reconciliation commission to investigate the facts about involved in gross violations of human rights" (Interim Constitution of Nepal, 2007: §33s).

The process to establish a Commission on Investigation of Enforced Disappeared Persons

Prior to signature the CPA, in 2004, the GoN formed a five-member 'Committee for the

15 Mr. Chris Decher is Project Manager of the joint National Human Rights Commission Strategic Plan Support Project with the United Nations Development Programme in Nepal.

Investigation of Alleged Disappearances of Persons by the State', which proved to be "neither effective nor independent" (Thapa, 2016). Following a report issued by the OHCHR-Nepal in 2006, the GoN established a one-person committee to find the truth of the disappeared.

In May 2007, the Ministry of Peace and Reconstruction (MoPR) drafted a bill for the establishment of a disappearance commission. On 1 June 2007, the Supreme Court of Nepal (SC) adopted a historical verdict regarding the need to implement a holistic approach to transitional justice while recommending the GoN form a commission of inquiry in accordance with international standards that would criminalise enforced disappearances and prosecute those found responsible (UN, 2007). However, the interim government decided to form a three-member commission, the 'High-level Probe Commission on Disappeared Persons', without enacting the required laws such as the criminalisation of enforced disappearances and entering in contradiction with the verdict given by the Supreme Court and with various international human rights obligations contained in international treaties to which Nepal is party (Forum-Asia, 2007).

The first elected government of the transition presented on November 2008 a 'Draft Bill on Enforced Disappearance (Crime and Punishment), which criminalised enforced disappearances and envisaged the creation of a Commission of Enquiry to tackle the war-era crimes. However, the "ordinance expired in May 2009 before it could be endorsed by Parliament" (Thapa, 2016). The following government introduced a similar project, which was registered in December 2009.

The process to establish a Truth and Reconciliation Commission

In July 2007, the Ministry of Peace and Reconstruction (MoPR) drafted a bill for the establishment of a TRC. This proposed bill granted the Commission with the powers to recommend amnesties to perpetrators of gross violations of human rights if proven that he/she did so following orders or were motivated by political reasons. The only exceptions to the general rule were "any kind of murder committed after taking under control or carried out in a inhumane manner"; "inhumane and cruel torture"; and rape (Amnesty International, 2007: 8). After two years of high criticised consultations with civil society groups and human rights organisations -very criticised-, the bill was registered in Parliament on February 2010.[16]

16 See: Human Rights Watch's World Report of 2008 on Nepal. Available at: https://www.hrw.org/world-report/2008/country-chapters/nepal

The Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act

As stated by Reshma Thapa, the main political parties were divided: the CPN (M-C) wanted to prioritise the Bill establishing the commission on enforced disappearances because a majority of the disappeared were either party members or Maoist sympathisers while NC pushed in favour of the bill to form a TRC, since their were members were largely affected by property rights violations. After major discussions between the above-mentioned parties and the CPN (UM-L), the MoPR proposed to withdraw the drafted bills and replace them for a consolidated text (Thapa, 2016).

In parallel, the Constituent Assembly failed to gather consensus around the adoption of a new Constitution, leading to its dissolution in July 2012. Amidst this situation, the Council of Ministers transmitted the merged *Ordinance on Investigation of Disappeared People, Truth and Reconciliation Commission, 2069 (2012)* to the President of Nepal for its promulgation on 28 August 2012. (OHCHR, 2012). One day before the interim Prime Minister took office, on 14 March 2013, the President of Nepal endorsed the ordinance. On 24 March 2013, several victim's groups challenged the ordinance in the Supreme Court for its provisions on amnesty, the definition of 'serious' human rights violations and the statute of limitations for certain crimes (Thapa, 2016). On 1 April 2013, a single bench of Justice Sushila Karki suspended the ordinance arguing that its implementation contradicted Nepal's Interim Constitution (Jurist, 2014). After the general elections to a second Constituent Assembly were celebrated in November 2013, the Supreme Court issued its 2 January 2014 verdict declaring the ordinance unconstitutional and ordered the government to amend it in line with the international obligations to which Nepal is bound.[17] However, on 27 January 2014 the GoN introduced a new ordinance without any amendments and the new Parliament, on 25 April 2014, passed the *Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act (2014)*, also know as TRC Act.[18] The approved TRC Act had not included the instructions of the SC verdicts and presented only one relevant novelty: the creation of two separate commissions. On 3 June 2014, a group of 234 victims of the armed conflict challenged the TRC Act for infringing international human rights law and contradicting the SC verdict of 2 January 2014 (Advocacy Forum, 2014a).

17 Advocacy Forum, TRIAL and REDRESS submitted to several UN agencies a summarised version of the SC's decision on the ordinance. Available at: http://advocacyforum.org/downloads/pdf/TRC-Act-UN-Submission-AF-TRIAL-REDRESS-June-2014.pdf

18 According to Prof. Bishnu Pathak, several members of the Constituent Assembly had presented 18 amendments affecting 119 different provisions of the Act, but were forced to withdraw them due to the pressure of their party leaders. See: Bishnu Pathak (2015). *Enforced Disappearance Commission: Truth, Justice and Reparation for Dignity*. Available at: https://www.transcend.org/tms/2015/08/enforced-disappearance-commission-truth-justice-and-reparation-for-dignity/#_ednref103

The international reactions to this decision are best expressed through the OHCHR's technical note of 21 May 2014 in which several provisions of the TRC Act were criticised for not complying with Nepal's obligations under international law. The main concern drawn by the OHCHR was the ability of the Commissions to "recommend amnesties for gross violations of international human rights law or serious violations of international humanitarian law" (OHCHR, 2014).

On 26 February 2015, the SC of Nepal issued its verdict and ruled in favour of 234 victims of the conflict. The judgment of the court upheld the primary role of the ordinary courts in delivering justice for criminal acts committed during the conflict. The Court held that any provisions of the Act that serve to compromise this judicial role are invalid, including the power to grant amnesties, powers to divert such cases from the courts or to otherwise interfere in such cases.

The contested provisions

The inconsistencies of the TRC Act with the three Supreme Court verdicts and with international human rights law are basically a flawed understanding of the notion of reconciliation, which does not take into account the victim's consent; the lack of criminalisation of offences that amount to crimes under international law; the power of the MoPR to decide whether or not to inform the Attorney General of a perpetrator found guilty by the Commission; the non-recognition of victims' right to reparation; and the lack of independence of the Commissions.[19] Nevertheless, the most controversial provision is the competence of the commission to grant amnesties. Sub-section 2 of Section 26 of the TRC Act states that "the Commission may not make recommendation for amnesty in the case of the perpetrator who was involved in rape and who was involved in other offence of grave nature". The problem with this provision is that the TRC Act does not clarify whether an 'offence of grave nature' amounts to a gross violation of human rights. Sub-section 4(a) declares that one of the conditions for the perpetrator to apply for amnesty is that he/she has accepted that he/she committed a gross violation of human rights in the course of armed conflict". Consequently, the TRC Act is indeed giving the possibility for perpetrators of gross violations of human rights to apply for and obtain amnesty, provided that they also fulfil other requirements.[20] This is best explained when sub-section 6 asserts that:

19 The powers granted to the MoPR are considered in Section 4.3 on the rule of law and the criminalisation of offences is discussed under Section 4.4 on human rights. The list does not reflect the full extension and complexity of the SC verdict of 26 February 2015, *Suman Adhikari et. al v. Prime Minister and Council of Ministers and others*, writ No. 070-WS-0050.

20 According to the interpretation of the author.

> "if it is found from the investigation that any perpetrator was involved in more than one offence of gross violation of human rights and if an amnesty may be granted to such a perpetrator only for any offences pursuant to this Section, the Commission may make recommendation for granting amnesty to the perpetrator only for those offences".

Sub-section 6 is therefore limiting the scope of the amnesty provision not based on the gravity of the crime, but on the disclosure of the crime before the Commission. In essence, it states that even if the whole truth is not disclosed by the perpetrator, he/she will enjoy from amnesty to those crimes which he/she had confessed.[21]

3.3 The transitional mechanisms

While the 234 victim case was *sub judice* before the Supreme Court, the GoN formed a recommendation committee on 16 June 2014. This committee was formed by a former Chief Justice of the SC, a representative of the National Human Rights Commission (NHRC), an academic, a human rights activist and a lawyer. In fact, the representative of the NHRC only attended with three conditions: "amendment of the provisions of the TRC Act on prosecution; formulation of victim-centric Commissions; and, guarantee of no amnesty for serious violations and abuses" (Centre for Legal Studies, 2016: 3).[22] Concerns previously raised as to the independence of the Commissions resurfaced during the process and eventual selection of the Commissioners, who appeared to have very close connections with the leaders of the three main political parties, especially in the case of the Commissioners designated to the TRC (Centre for Legal Studies, 2016: 4). On 10 February 2015, the GoN approved the recommendations of the committee and five commissioners were appointed to serve in each transitional mechanism.

As stated in Section 38 of the TRC Act, the Commissions were given two years -from the date of their formal constitution- to accomplish with their mandates, with the possibility of a one-year extension if the GoN considers that the request is well motivated. On February 2016, both transitional mechanism submitted their interims reports raising concerns about the need to criminalise certain offences, the lack of a law regulating the Commissions and the poor cooperation of the government in terms of sharing information, and allocating sufficient personnel and budget (Acharya, 2016). It would take more than a year since their constitution for the GoN to approve the Regulations of the Commissions, finally published in the Nepal Gazette on 13 March 2016.

21 According to the interpretation of the author.

22 As of 14 July 2017, these conditions are yet to be fulfilled.

Both Commissions opened their complaint registration process on April 2016. The process was meant to last for two months but was finally extended until 10 August 2016 as per request of victim's associations (Bishnu Pathak, PC, 28 May 2017).[23] Victims and relatives of victims could either file their complaints at the central offices of the commission in Kathmandu or through any of the Local Peace Committees around the country.[24]

3.3.1 The Truth and Reconciliation Commission

As of 1 June 2017, the TRC gathered more than 60,000 complaints. However, the Commission has received various requests for reopening the registration process and this possibility is set to become a reality for a period of fifteen days once the local elections are completed (Shree Krishna Subedi, PC, 26 May 2017).[25]

On July 2016, the TRC finalised the directive that shall govern the investigation process. According to Chairman Gurung, these rules have been developed taking as a reference the *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, also known as the Istanbul Protocol (as cited in The Himalayan Times, 2016). The TRC directive envisages to complete the investigation of the complaints in three phases: first, a preliminary investigation that will categorise the cases according to the crime committed; second, those cases with significant evidences will be prioritised; lastly, there will a detailed investigation for those cases without substantial evidences, including the recording of witnesses, victims and perpetrators. The preliminary investigation of the cases started on 5 June 2017 in the six provincial offices that the TRC has opened in each federal state of Nepal. According to Commissioner Subedi (PC, 26 May 2017), these offices are in charge of conducting the preliminary investigation of cases that allegedly took place in their territory. Each complaint counts with three people investigating: a senior officer of the attorney general office; and two experts, one with a legal background and the other one with a human rights background. During this first phase, the Commissioners of the TRC will be monitoring and supporting the job of the investigation units and there is a plan to expand the number of regional offices to thirty in order to covert the whole Nepali

23 Dr. Bishnu Pathak is the Spokesperson and Commissioner of the Commission on Investigation of Enforced Disappeared Persons of Nepal.

24 A Local Peace Committee (LPC) is the name given to structures formed at the level of a municipality or village with the goal to encourage and facilitate the consecution of a joint and inclusive peacemaking process. In Nepal, its members are often affiliated to one major political parties of the district, which raises serious questions of neutrality.

25 Mr. Shreekrishna Subedi is a Commissioner of the Truth and Reconciliation Commission of Nepal.

territory and divide the work efficiently.

The TRC has initiated the first phase of the investigation process with just nine months remaining to complete its mandate. As reported by Commissioner Subedi (PC, 26 May 2017), it is clear to all the members of the TRC that they will not be able to complete their assigned task within this short time period and there will be an eventual request to extend the mandate of the TRC.

3.3.2 The Commission on Investigation of Enforced Disappeared Persons

As of 1 June 2017, the CIEDP collected more than 3,000 complaints. Similarly to the TRC, this Commission received requests to reopen the registration process and did so during the month of March 2017, collecting around 50 complaints (Bishnu Pathak, PC, 28 May 2017).[26] Unlike the information provided by the TRC, the CIEDP has registered information pertaining to a couple of incidents that took place in the districts of Rolpa and in Biratnagar regarding threats that security forces have allegedly induced on complainants. These situations, according to Bishnu Pathak, are likely to increase in the future, once the investigations against alleged perpetrators are concluded.

The preliminary investigation of the cases was completed before the TRC's process had even started. On 25 June 2017, the CIEDP started to collect Ante-Mortem Data Collection (AMDC) from the relatives of the victims. The AMDC is a process used to collect detailed in the formation of the victim, including: physical appearance, clothes worn, possible location of the body, etc. The CIEDP, in consonance with the Peruvian Team of Forensic Anthropology, developed a 25 page-long questionnaire for the families of the victims to fill. The plan is to complete the AMDC in the Kathmandu valley within three weeks and send teams of investigators to the other 73 districts where victims had lodged complaints. Once the information is gathered, the CIEDP will use the AMDC to conduct a search of the declared gravesites, proceed with the exhumation of the bodies and find the right families. However, as Bishnu Pathak points out, there will be cases where identification of the body is not possible and DNA testing is required in order to identify the victim and its relatives: "Nepal does have the facilities to extract blood, but may not have the required technology to pursue DNA testing with samples of disintegrating bodies. Sending these samples abroad for DNA testing will extend the time-frame of the process" (Bishnu Pathak, PC, 28 May 2017).

26 During the armed conflict, the ICRC registered 3,237 cases of disappearances related to the Maoist insurgency. After the CPA, lots of people were released and about half the registered cases were clarified. As of 1 June 2017, the ICRC's list of the missing contains 1,336 cases (Saurav Shrestha, PC, 1 June 2017).

In the case of the CIEDP, the Commission had less than 8 months to accomplish its task when the AMDC process started. Commissioner Bishnu Pathak estimates that the CIEDP will need 10 years to complete its mandate properly: "but these 10 years might not even be enough to complete all the exhumations and DNA testings" (Bishnu Pathak, PC, 28 May 2017).

3.3.3 The Special Court

Both Commissions have started to carry out their pertinent investigations. This process can be, according to the Commissioners, completed without the enactment of new laws. However, once this job is completed -if it is-, the transitional mechanisms will require the criminalisation of the acts of torture and enforced disappearance in order to recommend action against the perpetrators.[27] These recommendations for prosecution will be presented to the Attorney General who, according to article 159.2 of the Constitution of 2015 and Section 29.2 of the TRC Act, shall decide whether the perpetrator shall or shall not be prosecuted. If decided positively, the government attorney appointed by the Attorney General will bring prosecution in the Special Court.

The TRC Act defines the Special Court as a special tribunal to be established by the GoN in order to try and settle the cases presented by the Attorney General or any of his/her subordinates. According to Commissioner Shree Krishna Subedi (PC, 26 May 2017), the bill to establish the Special Court has already been drafted and will be passed before the transitional mechanisms present their reports to the government.

3.4 Conclusions

The historical development of the transitional process proves the pledge that Nepali elites have taken on launching a transitional process fully controlled by the government and aimed at rapidly and quietly closing a chapter in the country's history. However, the insistence of victims' groups, the judiciary and the international community on serving justice has forced the executive to take steps towards that would appease their demands. Thus far, these steps have been clearly insufficient and, as the prorogued mandate of the transitional mechanisms approaches its end, political elites are faced with a crucial decision: meaningful extension or reproachable closure?

27 This topic will be addressed in Section 4.4 on human rights,

Chapter IV

TRANSITIONAL GOALS IN NEPAL

"*Let us make our future now, and let us make our dreams tomorrow's reality*"
(Yousafzai, 2013).

Introduction

Chapter four gathers relevant elements that permit to assess the situation of the transitional goals ten years after the signature of the CPA. This chapter follows the same structure presented in chapter one; hence each section will consider valuable landmarks and events related to the status of peace, democracy, and democracy's constitutive components of the rule of law and human rights.

4.1 Peace

In November 2015, section 3 of the *12-point understanding* stated an agreement to keep the Maoist armed forces and the Royal Army "under the United Nations or a reliable international supervision". In accordance, section 3 of the *8-point agreement* reached between the seven-party alliance and the Maoists in June 2006 requested "the United Nations to help in the monitoring and management of the armies and arms of both government and Maoist sides (…)". A month later, the leaders of NC, CPN (M-C) and CPN (UM-L) wrote separated letters to the UN Secretary-General requesting the United Nations to provide assistance to complete the Nepali peace process.[28] In this line, the CPA contained an agreement to facilitate the process of disarmament, demobilisation and reintegration (DDR) to the requested UN Mission in Nepal (CPA, 2006: §9.2).[29]

28 The letters were sent on 2 July 2006, 24 July 2006 and 2 August 2006 respectively. Their content can be found on the annexes of UNSC report, S/2006/920. Available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Nepal%20S2006920.pdf

29 See also the UNSC Report of the Secretary-General on the request of Nepal for United Nations assistance in support of its peace process, S/2007/7: para. 21-32 Available at: http://www.un.org/ga/search/view_doc.asp?symbol=S/2007/7

Established by UNSC Resolution 1740 (2007), the United Nations Mission in Nepal (UNMIN) was a special political mission whose main tasks was the monitoring of weapons and soldiers of both the Nepal Army and the Maoist Army (PLA) in the context of a DDR process and in line with the provisions of previous agreements. The UNMIN also performed an important task by assisting the GoN on the conduct of a free, fair and democratic election of a Constituent Assembly, the monitoring of the ceasefire agreements and the clearance of minefields through its mine action experts.

The DDR process officially started on 8 December 2006 when the parties to the conflict signed the *Agreement on the Monitoring of Arms and Armies*. Once the UNMIN was deployed in Nepal, the parties set up the *Joint Monitoring Coordinating Committee,* a body chaired by the UNMIN and with equal representation of the parties to the conflict. The first action taken by the UNMIN in early January 2007 consisted of the registration of Maoist arms and army personnel, through the storage of their weapons under 24-hour surveillance. At the same time, a similar amount of Nepal Army's weapons were stored under identical conditions. The results of these operation was the registration of 32,250 Maoist ex-combatants and the registry and storage of around 6,000 weapons. This task was performed with the assistance of UNDP members, UNICEF child protection personnel and the Interim Task Force established by the GoN (UNMIN, 2011).

The following months were dedicated to the verification of the Maoist soldiers that had been previously identified. In December 2007, the UNMIN reported that from the original 32,250 army personnel, 19,062 met the criteria for reintegration agreed by the parties, 8,640 did not attend the verification interviews and were subsequently disqualified for the process and 4,008 were to be discharged from the cantonments. From those 4,008 disqualified combatants, 1,035 were considered as late recruits and 2,973 were minors on 25 May 2006 (UNMIN, 2011), the date agreed between the GoN and the Maoists on the *Code of Conduct for Ceasefire*. These minors spent three years enclosed in Maoist cantonments until the signature of an action plan between the UNMIN, the GoN and the Maoists in December 2009. The plan included access to a "range of rehabilitation options developed by the UN Children's Fund, the UN Population Fund and the UN Development Programme, financed by the UN Peace Fund for Nepal" (UN News Centre, 2009). These options included "schooling, vocational training, education as health workers, and help with setting up small businesses" (UNICEF, 2010). The discharge process of the minors started on January 2010 and lasted for a month. Upon completion of the process, each minor received 10,000 Nepalese Rupees.

The arms monitors of the UNMIN had a 24-hour presence at all the seven main cantonments of the Maoist army and at the barracks of the Nepal Army. During their time in Nepal, the Monitors also visited the 21 satellite cantonments that the Maoist had, as well as several barracks of the Nepal Army. The mandate of the UNMIN was unanimously extended by periods of six months through UNSC Resolutions 1796 (2008), 1825 (2008), 1864 (2009), 1879 (2008), 1909 (2009), 1921 (2010) and a final period of four months by Resolution 1939 (2010). The political mission ended its operations on 15 January 2011.

The decision to take over the DDR process was political and "designated to circumvent any measures that could be resisted by the international community" (Bhandari, 2015: 64). After that, the GoN managed the reintegration of the Maoist armed personnel under the *Special Committee for Supervision, Integration and Rehabilitation of the Maoist Army Combatants*. The reintegration worked according to the *seven-point agreement* of 1 November 2011. The options given in that agreement were: integration into the Nepal Army, limited to 6,500 soldiers; voluntary retirement, obtaining cash-aid in consonance with the soldier's rank; and rehabilitation through the acquisition of alternative skills. Nevertheless, the provision to confer a financial package to the Maoist ex-combatants was not well received by the international donor community (Gautam, 2009). Consequently, the GoN "took the unprecedented decision of securing all the funds required through the national treasury" (Bhandari, 2015: 65). The Nepal Army, led by the *Special Committee*, assumed control over the Maoist Army, including its weaponry, on 10 April 2012 (Pandey, 2013: 192).

In May 2016, the GoN declared that, from the 1,420 Maoist ex-combatants that were reintegrated into the Nepal Army, 85 of them would be deployed in several UN Peacekeeping Missions (Kathmandu Post, 2016). As of 1 July 2017, the Nepalese Army is present across 16 missions around the world with a total contribution of 4497 blue helmets (Nepal Army, 2017).

4.2 Democracy

The *12-point understanding* of November 2005 established that the parties "have a clear opinion that the peace, progress and prosperity in the country is not possible until full democracy is established by bringing the absolute monarchy to an end" (12-point understanding, 2005: §1). When King Gyanendra reinstated the Parliament on 28 April 2006, the SPA resumed control of the government. On 16 June 2006, the government and the Maoists agreed to form an 'Interim

Constitution Drafting Committee' in order to develop a draft of the Interim Constitution (Bhandari, 2014: 13). In November 2006, the Comprehensive Peace Accord was reached, requesting for the endorsement of an interim constitution until the a new Constitutional text was adopted the Constituent Assembly (CPA, 2006: §2b). Following several extensions, the drafting committee presented the drafted version and the House of Representatives enacted the Interim Constitution on 15 January 2007. This action resulted in the dissolution of the House of Representatives, which was reconstituted into the 'legislature parliament' and include the Maoists (Bhandari, 2014: 15). On 28 December 2007, the Parliament amended the Interim Constitution turning Nepal into a Federal democratic republic, a decision which was to be enforced during the first meeting of the Constituent Assembly (Pandey. 2010: 24).

After being postponed several times, the elections to the Constituent Assembly took place on 10 April 2008. Following 240 years of monarchy, the Constituent Assembly abolished the royal rule on its first meeting held in Kathmandu on 28 May 2008. The CPN (M-C), who had secured a simple majority of the votes in the elections, managed to get their leader Pushpa Kamal Dahal, also known as 'Prachanda', elected as the first primer minister of the federal democratic republic of Nepal. The period of the Constituent Assembly was marked by the challenges of the DDR process; the difficulties to balance the new democratic power-sharing between political enemies; the complications in the establishment of the transitional mechanisms; the constant amendments of the Interim Constitution to accommodate the political tempos; and the lack of agreement on the adoption of a constitutional text, the main task entrusted to the Constituent Assembly. These events led to the dissolution of the Constituent Assembly, a decision contrary to the Interim Constitution which only allowed for the dissolution once a new Constitution was adopted (Bhandari, 2014: 55).[30]

On 19 November 2013, elections to a second Constituent Assembly were held. This legislature continued to face similar problems arising from the big differences between the political ideologies and the failures to reach consensual agreements. The constitutional deadlock came to an end following the terrible earthquakes that hit the country on 25 April and 12 May 2015. However, the Parliament drafted a Constitutional text without any genuine public consultation and without

30 Article 82 of the Interim Constitution reads: "On the day of the commencement of the Constitution promulgated by the Constituent Assembly, the task given to the Constituent Assembly shall come to an end. Provided that until the election of the Legislative-Parliament held in accordance with the Constitution promulgated by the Constituent Assembly, the proceedings of the Legislative–Parliament shall be conducted as specified in the Constitution promulgated by the Constituent Assembly".

addressing the historical demands of marginalised communities (HRW, 2006b). On 20 September 2015 the new Constitution was formally adopted and tensions between the political elites and the historically marginalised communities, especially Madhesi, of the southern region of Terai raised to the extreme of causing a virtual blockade on the border with India, leading to an acute humanitarian crisis. The main concerns of these communities are related to the discriminatory provision regarding the citizenship acquisition and the delineation of the newly created federal states.

One of the key features for the completion of the transitional process is the celebration of elections at the three different governmental levels: local, provincial and national. On 20 February 2017, Prime Minister Pushpa Kamal Dahal -serving in his second term in office- announced the celebration of local elections on 14 May 2017. According to a Supreme Court ruling on 22 February 2017, the three tiers of elections cannot be hold later than 21 January 2018, date when the Parliament will be automatically dissolved (as cited in MyRepública, 2017a).

Local elections are of vital importance, since Nepal had not held local elections in 20 years.[31] However, the celebration of local polls has not been without complications. The GoN failed to amend the Constitution and the main political forces representing the ethnic communities in the Terai region announced a boycott on the local elections if their demands were not met. Since the CPN (UM-L) has continuously refused to endorse any of the request raised by Madhesi-based groups, the legislature has been unable to obtain the necessary two-thirds majority for the constitutional amendment. This situation was solved with an unprecedented decision to hold local elections in provinces no. 3, 4 and 6 -they do not comprise any territory from the Terai- as planned and delay the local elections in provinces no. 1, 2, 5 and 7 until 14 June 2017 in order to allow the GoN to respond to the demands of Madhesi and other historically marginalised ethnic communities of the Terai.

The previous days to the first phase of the local elections in provinces no. 3, 4 and 6 were marked by incidents such as the political persecution against cadres of the Netra Bikram Chand 'Biplav', Maoist intellectual leader during the armed conflict who formed a new party and called for the boycott of the elections, the decision of India to temporarily close its borders with Nepal and several bomb explosions in headquarters of political parties. On election day, the GoN restricted traffic to authorised vehicles and several political cadres were killed in clashes occurring outside electoral colleges.

31 The last time Nepalis voted in local elections was in 1997. In 2002, polls were delayed due to the on-going Maoist insurgency. In 2006, King Gyanendra tried to hold local elections but these were boycotted by the political parties.

Due to the failure to amend the constitution and accommodate the demands of the Madhesi community, the plans for holding the second phase of the local elections was again delayed. This time, the GoN decided to delay the celebration of local elections on provinces no. 1, 5 and 7 to 28 June 2017 and, given the threats to obstruct the polls, province no. 2 is to hold elections on 18 September 2017.

4.2.1 Rule of law

This thesis has addressed the failure of the successive governments to implement the rule of law and the separation of powers within the transitional context. Since the establishment of the transitional mechanisms, this practice has continued to inspire the actions of the executive. A prime example of this is the *9-point agreement* of 5 May 2016 between the CPN (M-C) and CPN (UM-L), as Maoists vowed to support the government led by CPN (UM-L) in exchange for initiating a process to withdraw war-era cases (MyRepública, 2016a).[32]

Following every attempt to set up the transitional mechanisms, the Supreme Court has interpreted several provisions of the drafted laws to collide with international standards; and yet, the legislative power repeatedly insisted on passing similar laws. As of 1 July 2017, the successive governments of Nepal, led by different leaders of the three main political parties, have failed to amend the TRC Act in accordance with the three Supreme Court verdicts and international obligations to which Nepal is bound.[33][34] In particular, section 29 of the TRC Act was declared void by the SC in its verdict of 26 February 2015. The original provision required the MoPR to write to the Attorney General for the prosecution of perpetrators found guilty by the transitional mechanisms, but the SC ruled that governmental authorities are not to be given any margin of discretion to decide whether perpetrators of human rights violations shall be prosecuted or not. This decision is to be related with another judgment of the SC that ruled void section 17 (10) of the National Human Rights Act of 2012, which vested the Attorney General -personal advisor to the Primer Minister- with the prerogative of deciding whether or not to prosecute cases recommended by the National Human Rights

32 However, this agreement was substituted on 12 July 2016 by the *7-point agreement* between the CPN (M-C) and NC historical rivals during the armed conflict, where the Maoists withdrew their support from the government and obtained the backing of NC in order to form a coalition to govern the country until de 2018 national elections.

33 The GoN is bound by the decisions of the Supreme Court. See article 116 of the Interim Constitution and current article 133 of the Constitution of 2015.

34 The list of ratified international treaties by Nepal is available at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=122&Lang=EN

Commission (Geeta Sangroula, PC, 19 May 2017).[35]

One of the most emblematic cases is represented by Balkrishna Dhungel, a Maoist who had been convicted to life imprisonment by a district court in 2004. However, during the last days of the Constituent Assembly, Dhungel received pardon from the Maoist-led government, which was repealed by the Supreme Court in its judgment of 7 January of 2016. Despite the recurrent orders issued by the SC to arrest Dhungel, the Nepal Police has declined to do so in several occasions (MyRepública, 2017b).

Another example of the compromised statute of the rule of law in Nepal was the decision from the two coalition partners -CPN (M-C) and NC- on 20 April 2017 to file a motion to impeach the Chief Justice of the Supreme Court, Sushila Karki, on the allegations that she "had encroached on the prerogatives of the executive branch" after the Supreme Court revoked the designation of the new Inspector General of the police. (OHCHR, 2017). The impeachment motion drew the attention of the UN Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán, who sent a letter to the GoN on 5 May 2017 asking to withdraw the impeachment.[36] Following a threat of CPN (UM-L) to obstruct the upcoming budget session, the ruling parties withdrew their impeachment motion and Karki retired -due to her age- from the position as Chief Justice.[37]

In response to the demands of Madhesi-based political parties to participate in the local elections, Prime Minister Pushpa Kamal Dahal agreed, on 18 May 2017, to withdraw the cases against several Madhesi and Tharu. The cases against them were based upon their participation in one of the worst incidents in Nepal's recent history: the Tikapur massacre of 24 August 2015 resulted in the death by lynching of seven security personnel (Setopati, 2017).

4.2.2 Human rights

The TRC Act lists on Section 2(j) the nine types of criminal acts that the transitional mechanisms may investigate. These acts are: murder; abduction and taking of hostage; enforced disappearance;

35 Prof. Geeta Sangroula is Program Coordinator and Convener of the Master of Human Rights and Democratisation (Asia Pacific Program) at the Kathmandu Law School.

36 The GoN argued that the action was constitutionally justified. Their argument are available at: https://www.onwardnepal.com/current-affairs/nepal-response-un-special-rapporteu/

37 In an interview given to Nepali Times, Ms. Sushila Karki accused the executive branch to ask her for personal favours. Available at: http://nepalitimes.com/article/from-nepali-press/CJ-exposes-PM,3768

mutilation or caused disability; physical or mental torture; rape and sexual violence; looting, possession, damage or arson of private or public property; forceful eviction from house and land or any kind of displacement; and any kind of inhuman acts inconsistent with international human rights standards, humanitarian law or other crimes against humanity. In order to recommend for the prosecution of perpetrators of any of the above-mentioned crimes, the transitional mechanism requires a national law to found such recommendation. However, despite being a party to the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment since 1991, the Nepali law is yet to criminalise acts of torture, together with acts of enforced disappearance, and fix the statute of limitations applicable to cases of rape during the armed conflict.

In December 2014, the GoN registered the 'Bill to Control Torture, Inhuman, Brutal and Disrespectful Acts'. This Bill was introduced following the arrest of Nepal Army Colonel Kumar Lama by the authorities of the United Kingdom in 2013 for an alleged crime of torture.[38] On August 2016, the Bill finally entered the House of Representatives and has been hold since. The draft leaked to the press defined torture as the "physical and mental abuse by security forces of any person in their custody in the course of remand or criminal investigation" and the victim shall have up to 90 days to file his/her complaint at the district court (MyRepública, 2016b). The Bill criminalising acts of enforced disappearances followed a similar development and is also currently in the House of Representatives for discussion. In October 2015, the GoN passed the 'Bill to Amend Some Nepal Acts to Maintain Gender Equality and End Gender-Based Violence' which extended the statute of limitations for filing rape charges from 35 to 180 days (Sharma and Tamang, 2016).

In order to tackle the criminalisation of these acts, two different kind of laws have been drafted. According to Shree Krishna Subedi (PC, 26 May 2017), the Bills under discussion will serve to prosecute general cases while the amendment of the TRC Act will criminalise the commission of crimes committed during the war-era period, including the corresponding punishments for the perpetrators of such crimes which will be a necessary tool for the Special Court to try and convict. On 8 February 2017, the Kathmandu Post (2017) published some excerpts of the TRC Act amendment: the prohibition of recommending amnesties for perpetrators of murder, enforced disappearances, torture and rape; a proposal of 20 year imprisonment for perpetrators of murder, torture and enforced disappearance with a fine of 200,000 Nepali rupees; and a 15 year imprisonment for perpetrators of rape and a fine of 500,000 Nepali rupees.

38 This case served as a warning for the Nepali political elites to show that alleged perpetrators of human rights violations could be tried abroad under the application of the universal jurisdiction.

4.3 Conclusions

The Nepali peace process can be deemed a big success. There are former Maoists rebels that have moved from bearers of conflict to the promotion of peace under the blue helmets of the UN. However, there are questions regarding the institutionalisation of violence and the effective protection of human rights. Democracy has been advancing at a rapid rate: previous to the first *Jana Andolan* in 1990, Nepal was an authoritarian Hindu monarchy and twenty-five years it is a Federal Democratic Republic that upholds secular values. Nevertheless, the rule of law and the effective protection of human rights suffer from the politicisation of all the branches of the state.

PART III

MERGING THEORY AND PRACTICE

Chapter V
AUTHORITATIVE VIEWS ON THE NEPALI PROCESS

"*Opinions have vested interests just as men have*"

(Samuel Butler, 1912).

Introduction

Chapter five seeks to relate the theories outlined in chapter I with the political reality described in Part II. The following pages contain the opinions of several interviewees on the state of the transitional goals ten years after the signature of the CPA. These views are accompanied by the personal views of the author.

5.1 Peace

The liberal peace is a model of society which has been developed by Western liberal democracies which, in turn, intend to be seen as "benevolent models for the rest of the globe" (Robins, 2016: 3). Following Johan Galtung's theory of 'negative justice' (1969:183), the DDR process in Nepal is a success story, as there has not been any upheaval since the signature of the CPA.[39] In the words of Anup Sharma: "the Nepali peace process is an example for the world because the rebels, who controlled more than half of Nepal's territory, are now participants of the democratic system (Anup Sharma, PC, 26 May 2017).[40] However, Galtung's 'positive peace' can only be achieved through the realisation of social justice. Therefore, the emphasis of Nepali authorities in the establishment of liberal democratic institutions, privileging the celebration and completion of democratic elections, over the consecution of social justice places the Nepali transition under the paradigmatic model of

39 While not comparable to the severity of the human rights violations occurred during the Maoist insurgency, there have been several violent episodes in the recent history of Nepal, specially in the Terai region. This is further discussed under section 5.4 on human rights.

40 Mr. Anup Sharma is the Chairperson of the National Human Rights Commission and former Chief of Justice of the Supreme Court of Nepal.

liberal peace. In this sense, authors like Oliver Richmond argue that this option serves to "reinforce existing hierarchies of power and neglect the social, economic and political needs of those most affected by conflict and by histories of marginalisation" (as cited in Robins, 2016: 3).

A good example of neglected victims in the specific context of the DDR process is the case of child soldiers. These minors were disqualified from the reintegration process, which prevented them from obtaining a substantial compensation. In Christopher Decker's personal opinion (PC, 22 May 2017), these minors lost their whole education and don't have any opportunities to become professionals, thus doomed to a life of manual labour. The 'education' received by these children is not marketable (Shreejana Pokhrel, PC, 24 May 2017). Moreover, a massive amount of child soldiers have been sexually abused, it doesn't matter whether they are male or female, and also addicted to drugs. No support on these issues has been given in Nepal (Christopher Decker, PC, 22 May 2017).

Nevertheless, as Geeta Sangroula underlines (PC, 19 May 2017), international law allows the existence of child soldiers. Article 38.3 of the Convention on the Rights of the Child provides that "States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces", and the similar article 77 of the Additional Protocol to the Geneva Conventions of 1949.

5.2 Democracy

Liberal democracy is determined by the procedural elements around the electoral democratic cycle. The minimalist institutional design of liberal democracy has been referred to 'low-intensity democracy' by Barry Gills, Joel Rocamora and Richard Wilson, affirming that in the transitional context, new democracies adopting this design will "preserve the ossified political and economic structures" from their past (Gills, Rocamora and Wilson, 1993: 3). Accordingly, authors like Aoláin and Campbell (2005: 185) have stressed the importance of the substantive aspects of democracy over its mere procedural elements. In the this sense, an approach to substantive aspects of democracy would, especially in the context of deeply conflicted societies, call for the enactment of policies aimed at regaining a sense of community and solidarity among the society.

In the transitional context, the process towards a democratic system must be built upon the legitimacy provided not only by the rule of law, but especially by the support of historically marginalised groups and victim communities who suffered the consequences of the conflict.

Nonetheless, according to Hannah Franzki and Carolina Olarte, the "very notion of liberal democracy is political in that it reduces the problem of democratic legitimation to the realm of politics, thereby barring questions concerning democratic control of the economy from political debate and marginalising claims for social equality" (Franzki and Olarte, 2014: 206). The implications deriving from the validity of this argument amount to consider that the conventional use of transitional justice is fundamentally aimed at legitimising liberal democratic institutions.

5.2.1 Procedural democracy in Nepal

Electoral democracy has had a residual impact in terms of representation of the historically marginalised and poor (Robins, 2016: 6). In fact, as Deepak Thapa and Bandita Sijapati demonstrated (2003), the amount of civil servants representing the hierarchically stronger castes and ethnic groups increased since the arrival of democracy in the post 1990 *Jana Andolan*. The reason for this, as stated by Simon Robins (2016: 6) is that the liberal democratic approach upon which the state was built failed to dispute the existing horizontal inequalities, subsequently contributing to further exclude the poor and marginalised.

A reaction to the omission of addressing historical inequalities has been the fragmented celebrations of local elections in Nepal. Due to the discontentment of Madhesi-based parties and other ethnic communities in the Terai region, local elections are set to be held in three different phases. For the Nepali national authorities, the settlement of democracy is more important than addressing the legitimate grievances raised by historically discriminated minorities: "if the GoN fails to fully conduct the three tiers of elections, there will be a new constitutional crisis" (Anup Sharma, PC, 26 May 2017).[41] However, this failure to consider the interests of groups affected by the policies developed in Kathmandu is the major reason behind the increasing tensions in the Terai region. The Constitution of 2015 divided the country into seven federal states. This partition did not respect, nor accommodate, the existing ethnic minority groups of the Terai. This has led to increasingly chauvinist ethno-regional demands arising from within these concentrated groups of minorities, perhaps most visible through an unofficial blockade following the ratification of the Constitution and through their disdain towards the celebration of local elections.[42]

41 Mr. Anup Sharma refers here to the political fiasco of the first Constituent Assembly.

42 The unofficial blockade was lifted in February 2016. See: BBC (2016). Nepal border blockade: Ethnic groups lift roadblocks. Available at: http://www.bbc.com/news/world-asia-35525018

5.2.2 Substantive democracy in Nepal

For the legitimation of the transitional process, not only shall the government be democratically elected, but victims ought to be encouraged to participate in the design and development of the transitional mechanisms, reparation programmes, memory initiatives, etc. In an attempt to make transitional processes more inclusive, some governments decided to identify their transitional processes as 'victim-centred'. However, according to Simon Robins, "this term remains under-conceptualised" and transitional processes are essentially driven by the national government in conjunction with the assistance and guidance of the international community (Robins, 2006: 5).[43] This assertion is supported by the early emphasis on democracy placed by several scholars during the 1990s (Huntington 1991; Linz and Stepan 1996) that presented the newly elected political elites as the legitimate actors to implement the new policies in the country. Consequently, transitional justice theory has tended to present the government of a country as the only interlocutor and legitimate decision-maker regarding the transitional process, resulting in disregard towards the agenda of victims and civil society groups (Hansen, 2014: 106). In the case of Nepal, this failure to consult with victims and civil society has allowed political actors to "manipulate the process to serve their respective political agendas" (Centre for Legal Studies, 2016: 4).

5.2,3 Rule of law

The liberal rule of law is presented as neutral operation in the transitional context. Nevertheless, it emanates from a new regime, conceived as the natural agent to create and derogate norms, but whose legitimacy is still to be proven. Citizenry's participation in the process of defining the rules that will govern the relations between inhabitants and towards the national authorities are often relegated to the periodic ability to vote in elections. In exceptional occasions, citizens may participate in the ratification of decisions previously taken by the political elite through referendums, an instrument that only presents a binary option. Accordingly, Judith Shklar has argued that legalism "has led to the construction of rigid systems of formal definitions (…). This procedure has served to isolate law completely from the social context in which it exists" (Shklar, 1986: 2).

After the first *Jana Andolan* in 1990, a new Constitution was promulgated. Two days later, on 11 November 1990, the Treaty Act of 1990 was adopted. This law is in charge of regulating the implementation of international treaties following the signature, ratification, accession or acceptance

43 For a further study of this matter, see: Simon Robins (2011) Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Postconflict Nepal. Available at: https://www.cmu.edu/chrs/conferences/eppi/docs/IJTJ-2011-Robins.pdf

by the GoN.[44] The Treaty Act has been used in the verdicts of the Supreme Court on transitional cases in order criticise the missing criminalisation of the acts of torture and enforced disappearance (Geeta Sangroula, PC, 19 May 2017). In particular, the Court referred to article 9.1 of the Treaty Act, which states that all the international agreement to which Nepal is a contracting party have the same legal value as the Nepali law:

> "*In case of the provisions of a treaty, to which Nepal or Government of Nepal is a party upon its ratification accession, acceptance or approval by the Parliament, inconsistent with the provisions of prevailing laws, the inconsistent provision of the law shall be void for the purpose of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws*".

However, none of the governments in power since the entry into force of the TRC Act has respected the verdicts of the Supreme Court, omitting the inherent connection between the rule of law and the separation of powers (Anhang, 1990: 212; Meyerson, 2004: 2). Moreover, not only is the separation of power not respected, Indra Aryal affirms that judges are threatened not to take certain cases in Nepal: "I had several experiences in which judges who told me that they would be in big trouble if they were to prosecute certain people and crimes (Indra Aryal, PC, 25 May 2017).[45]

According to Christopher Decker, laws in Nepal are purposefully drafted with some kind of constructed ambiguity: "many laws have a definition section where terms are defined so when you read through the law, those terms are used in the prescribed sense" (Christopher Decker, PC, 22 May 2017).[46] This deliberate attempt to pass inconclusive bills collides with the clarity and prospectivity that norms ought have under the rule of law.

5.2.4 Human rights

Human rights have become a moral virus that captures everything, from the access to health care and education to a right to freedom from torture. Inherent to human rights is the right to free elections, making liberal democracy a key and necessary element required for the fulfilment of human rights, thus suggesting that there cannot be human rights in any alternative system of government (Aly, 2017).

44 Nepal has not ratified: the ICPPED, the Optional Protocol to the CAT, the Optional Protocols to the Geneva Conventions, the ICRMW, the Optional Protocol to the ICESCR and the third Optional Protocol to the CRC.

45 The names of the judges are kept confidential either because I could not corroborate the testimonies of Mr. Indra Aryal or because the affected judges preferred to remain anonymous.

46 Such is the case of the TRC Act regarding the provisions on amnesty. This case is explored under Section 6.5 of this thesis.

While the human rights discourse affirms to engage with all human rights equally, practice has demonstrated that civil and political rights (CPR) enjoy a distinguished preeminence over economic, social and cultural rights (ESCR), particularly in post-conflict situations (Arbour, 2007). In this sense, Rama Mani has affirmed that "the prevalent liberal-democratic ideal (…) tends to favour freedom and liberty over equality" (Mani, 2002: 51).

According to Jeremy Waldron:

> "what is distinctive about a right is that the benefit to the individual is seen as the ground of the duty, as a 'sufficient reason' for it. An individual has a right to G when the importance of his interest in G, considered on its own, is sufficient to justify others to be under a duty to promote G" (Waldron, 1993: 359).

This liberal approach to human rights explains why today ESCR are not ensured: there has not been a consensus within the West to consider the right to food of an individual as enough to hold the society with a duty to ensure that no citizen starves.

In the transitional context, Gaby Aguilar argues that ESCR remain subsidiary to violations of CPR. Accordingly, "there is a need to grant ESCR with the same status as other egregious crimes, and address ESCR specifically, not merely as a by-product or a component of redress measures for other international crimes" (Aguilar, 2011: 152). In this sense, former UN High Commissioner for Human Rights Louise Arbour encouraged the international community to expand the reach of international criminal law to include other gross violations of these rights, such as the deliberate denial of health care or education (UN Human Rights Council, 2011: §36).

During the past 15 years, transitional justice has changed a lot. In the opinion of Aileen Thomson, Head Office of the International Center for Transitional Justice in Nepal, "there has been a challenge to the liberal Western view of CPR being more important than ESCR" (Aileen Thomson, PC, 31 May 2017).

Economic, social and cultural rights are important for their inherent emancipatory potential. Only once these essential rights are realised can and individual -and a society- fully enjoy and exercise the potential provided by civil and political rights. The purposeful decision to systematically deny the realisation of ESCR amount to a recognition that the persistent inequalities in a given societies are just, thus acting to justify discrimination and promote the hegemonic position of economic and political elites. In this regard, Louise Arbour argued in favour of the inclusion of ESCR in

transitional societies insisting that:

> "transitional justice must have the ambition of assisting the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future. It must reach to, but also beyond the crimes and abuses committed during the conflict which led to the transition, into the human rights violations that pre-existed the conflict and caused, or contributed to it" (Arbour, 2007: 2).

Human rights' is a legal discourse which condemns certain acts of violence in order to preserve the status quo. In transitional societies with deeply rooted inequalities like Nepal, the appeal for ESCR must necessarily defy the current social and political order and the liberal discourse of rights that has traditionally conferred priority to CPR (Robins, 2016: 12). In Christopher Decker's opinion, victims in transitional situations often refer to the 1950s socialist tenet of "*what is the point of voting if you don't have bread?*". Deriving from his experience with victims of armed conflicts, Decker recognised that victims suffer from a 'double victimhood': "not only did the family lost their beloved one(s), but chances are that this person was also the breadwinner, specially here in Nepal, where nearly everyone is living hand-to-mouth" (Christopher Decker, PC, 22 May 2017). For Johan Galtung (1969), it is not enough to have a legal system in place if the same system fails to address structural inequalities that reinforce social injustice. Therefore, to break the cycle, efforts must be devoted to transform the institutional structure of the state in order to assist the citizenry, especially the victims and families, with the necessary socioeconomic rights.

For Shreejana Pokhrel, the Nepali political elites have made evident their lack of will to grant reparations or restitutions.[47] With regard to compensation, the *Interim Relief Programme* (IRP) is perceived as a pecuniary contribution of the state that avoids any attribution of responsibility or accountability on the perpetrator. As a matter of fact, many of those who committed the gross violations of human rights "are glorified and have received promotions and medals" (Shreejana Pokhrel, PC, 24 May 2017).[48]

In Nepal, there is a lack of implementation of existing laws, especially regarding issues that sparkled the conflict like caste-based discrimination and other forms of discrimination against traditionally marginalised groups. In accordance with a US Diplomat, there is not a definite commitment by the political parties to end this: "as an American I can understand this too, we also

47 Shreejana Pokhrel is the Executive Director of the International Institute for Human Rights, Environment and Development of Nepal.

48 The compensation system set by the GoN under the title of *Interim Relief Programme* is described on Appendix 2.

have caste but we simply call it race (US Diplomat, PC, 22 May 2017). The new Constitution brought many fundamental rights. Nevertheless, as Anup Sharma noted, it is not clear how these rights contained in the Constitution are going to be ensured. In fact, the Constitution sets on article 47 a three year framework to work on the bills that will guarantee the enforcement of the fundamental rights "and yet, many remain unaddressed" (Anup Sharma, PC, 26 May 2017).

The Maoist insurgency was a violent attempt to change the political, economical and social structure of Nepal. While their objectives were not achieved and they were involved in wide-spread violations of human rights, the Maoists managed to bring some change. For example, as specified by Tara Sapkota, Dean of the Faculty of Law at Tribhuvan University, Maoists freed many farmers from feudal relationships with their landowners and they destroyed large "crops of millets that were used to produce alcohol at home" (Tara Sapkota, PC, 18 May 2017).[49] While caste-based and gender-based discrimination were significantly reduced, these marginalised communities are "like Roma in Europe: even if there are some wealthy ones, they are still discriminated" (Christopher Decker, PC, 22 May 2017).

In Decker's view, by not addressing the root-causes of the conflict, Nepal is not consolidating a long-standing peace: "if the root-causes of the conflict are not addressed, they have a tendency to reappear" (Christopher Decker, PC, 22 May 2017). The latest demographic studies show that more than 50% of the population in Nepal is under the age of 25 (UN DESA, 2017: 20). These young generation is already being forced to leave the country due to a lack of opportunities, which has the potential to become a new root cause for a conflict.

In attempting to create a more fair society, it is important to focus not only on peace and democracy, but also on correcting the root causes of the conflict. In the case of Nepal, if there is not a significant advancement towards the access of fundamental ESCR, odds are that previous marginalised groups and victims of the conflict will seek ways to revert the situation, making a return to a violent conflict an open possibility.

5.3 Conclusions

The views of the different stakeholders on the current state of the transitional goals are critical towards the process. A common thread was the disregard that the political elites had towards the

49 Prof. Sapkota is referring to the home production of *Raksi*, a traditional distilled alcoholic beverage produced in Nepal and Tibet.

future of child soldiers. Regarding the stance of democracy, interviewees agree on the limited approach taken by the GoN, especially in terms of the absent will to consult with victim's groups in the design of the transitional process. Also, the transition has been framed human rights violations in terms of breaches of civil and political rights, thus excluding the crucial relevance that socioeconomic rights have in the Nepalese context.

Chapter VI
POLITICS IN THE NEPALI TRANSITION

"*Belief is always most desired, most pressingly needed, where there is a lack of will: for the will, as the affect of command, is the distinguishing characteristic of sovereignty and power*"
(Friedrich Nietzsche, 1882).

Introduction

Chapter six intends to apply the theories presented on chapter 2 with the political context in Nepal. Also discussed is the role of the UN, as well as the opinions of interviewees accompanied by comments of the author.

6.1 Categorising the Nepali elites

Depending on the the relationship that national elites take towards a transitional process, Aaron Boesenecker and Leslie Vinjamuri (2011) classified them into: justice resisters, justice instrumentalists and true believers. Some years later, Jelena Subotić (2014: 136-137) defined the elements of each group. The opposition to transitional justice is represented by justice resisters. These actors will use transitional justice in order to "further consolidate their rule instead of undertaking the social transformation transitional justice requires" (Subotić, 2014: 136). Meanwhile, justice instrumentalists favour transitional justice as a valid process to achieve the longed recognition of the international community, and thus have access to the economic or political incentives offered. Lastly, true believers represent those groups that recognise the appropriateness of the international transitional justice model.

The problems with these definitions applied to Nepal is manyfold. First of all, the differences

between justice resisters and justice instrumentalists are varied. The definitions provided by Jelena Subotić imply that both groups see transitional justice with skepticism and may only agree to a certain degree of application provided that there is some benefit from the international community. Secondly, the political elites in Nepal are very nationalistic and have shown to date little interest in gaining the support of the international community to their transitional process.[50] Finally, the constant political turmoil in the country makes it difficult to categorise the political parties in any of the two above-mentioned groups, as the instrumentalisation of the transitional process is seen as just another tool to differentiate themselves from other political competitors.

6.1.1 Transitional injustice?

Brian Grodsky has affirmed that transitional justice is "akin to a commodity that can be traded for other policies" (Grodsky, 2010: 26). In this sense, the term 'transitional injustice' coined by Cyanne Loyle and Christian Davenport refers to situations where national authorities instrumentalise the transitional process not to achieve the archetypical liberal goals of peace or democracy, but with the intention to promote denial, forgetting, perpetuating violence and legitimising some form of authoritarianism (Loyle and Davenport, 2016: 127). According to this theory, there are three elements that assist in the identifying whether the political elites of a country are pursuing opposite goals to those commonly desired: the promotion of denial and forgetting; the perpetuation of violence and armed conflict; and the legitimisation of authoritarianism and state repression.

In order to promote denial and forgetting, national elites may restrict the transitional process to a certain time period, focusing only on particular crimes and deliberately limit the participation from other agents in the design of the transitional process. In Nepal, the transitional mechanisms have an explicit mandate to investigate violations of rights during the armed conflict. Moreover, there is no provision excluding the possibility to file complaints through ordinary courts. However, the case of Nepal presents two inconveniences: first, acts of torture and enforced disappearance are yet to be criminalised and petty crimes that might have systematically occurred during the Maoist insurgency are not under the jurisdictions of the transitional mechanisms, thus restricting the types of crimes that can be sanctioned; and second, even if a particular person can file complaints to the ordinary courts, without a provision that excludes the statute of limitations for crimes committed during the armed conflict, the judge will have no option but to declare the prescription of crimes under the Nepali civil and criminal code (*Muluki Ain*) . Regarding the participation of other actors in the transitional

50 The international support to the transitional process in Nepal is further discussed under Section 6.3 of this thesis.

process, consultation with victim groups has been very limited and remains as a big challenge for the legitimation of the process.[51] Besides, the practice of Nepali authorities to limit public access to the content of the final reports submitted by transitional mechanisms argues against the will of Nepali authorities to allow for the monitoring of processes (Laxmi Pokharel, PC, 23 May 2017).[52]

The perpetuation of violence and armed conflict can happen through the institutionalisation of violence, expressed through the targeting of judges and witnesses of crimes (Loyle and Davenport, 2016: 133). In this sense, the impeachment of former Chief Justice Sushila Karki and the threats that, according to Indra Aryal (PC, 25 May 2017) certain judges have been subjected to, are elements to consider whether they amount to an intentional wish to perpetuate violence. Also, according to Jack Snyder and Leslie Vinjamuri (2003: 17), if certain groups or leaders are marked as alleged perpetrators of crimes, they might return to violence in order to avoid legal prosecution. This issue remains as an open question mark that will remain unknown until the transitional mechanisms submit their final reports.[53]

Lastly, transitional injustice is distinguished for deliberately eluding the advancement of democracy, consolidating an autocratic or authoritarian state (Loyle and Davenport, 2016: 133). Despite the fiasco of the first Constituent Assembly, political elites have unanimously worked in favour of democracy. However, it could be argued that the democracy pursued is merely procedural and lacks many of the substantive aspects of democracy.

6.2 Categorising the Nepali transitional process

Transitional mechanisms are used beyond the paradigmatic transitions from non-democratic regimes into democratic societies. Chapter two of this thesis compiled a list of categories under which a particular transitional process may fall: a political transition, liberal or non-liberal transitions; and an absent political transition in well-established democracies or deeply conflicted societies.

51 For more detailed information on see: Yvette Selim (2014). The Opportunities and Challenges of Participation in Transitional Justice: Examples from Nepal. Available at: http://onlinelibrary.wiley.com/store/10.1002/jid.3001/asset/jid3001.pdf?v=1&t=j50pkms0&s=964307b557f26ef9a96b0328ae392c216cd2e29c

52 Laxmi Pokharel is National Legal Adviser at the South East Asia Office of the International Commission of Jurists in Nepal.

53 This matter is further discussed under sub-section 6.4.2 of this thesis.

Traditional transitional processes are binary; they are composed by both a losing agent and the victor's leadership that will use transitional mechanisms to punish the wrongdoings of the old regime as a complementary source of its legitimacy. In Nepal, the only losers are King Gyanendra and the rest of the royal family since the Maoists have become a political party of the establishment and the other political parties involved during the armed conflict have achieved governmental positions ever since the CPA was reached.

Categorising Nepal under one of these limited groups is a difficult task. The use of transitional mechanisms in well-established democracies is restricted to situations related to abuses on aboriginal and indigenous communities in democratic countries with no wide-spread human rights violations. Consequently, even if indigenous groups suffered largely from the consequences of the armed conflict, Nepal cannot be considered a case of transition in a well-established democracy. Despite the seizure of executive powers by King Gyanendra, most of the human rights violations were committed by the Maoists and the state's security forces under a democratically elected government. Therefore, Nepal does not fall under the archetypical liberal transition. The Nepali transition presents some elements representative of non-liberal transitions: the undemocratic exercise of power coupled with armed conflict at the time of the CPA and a clear priority to secure security and stability through an immediate DDR process that was completed before the transitional mechanisms were established.

However, Nepal shares most of the inherent attributes of conflicted democracies identified by Fionnuala Aoláin and Colm Campbell (2005). First of all, democracy has been present in Nepal since the 1990s, following the first *Jana Andolan*. Secondly, the Himalayan country faced the inner contradiction that conflicted democracies with a legacy of human rights violations have: namely, the use of a set of mechanisms that materialise the recognition of a breakdown of the democratic values. In modern democracies, criminal law is conceived as the primary response of the state in order to maintain the democratic values it holds. Consequently, the failure to serve justice during prolonged periods of time, -10 years in the case of Nepal- is a good indicator of the dysfunctions of the democratic state. Thirdly, whereas transitions from undemocratic regimes require a transformation of its institutions, Nepal demands from a reform of the already established institutions and laws.[54] Lastly, another important attribute of conflicted democracies is their purposeful use of derogations of certain provisions of international treaties. In this sense, the Kingdom of Nepal duly informed the

54 This trait is not absolute, as it depends on the extent "to which the state has engaged, colluded, or acknowledged its involvement in the fraught issue of human rights abuses (Aoláin and Campbell, 2005: 187).

Secretary-General of the UN of several derogations affecting the International Covenant on Civil and Political Rights.[55]

6.3 The international community: the position of the UN

According to Leslie Vinjamuri and Jack Snyder (2004: 347), transitional justice has been influenced by the international legalist movement which aims to persuade elites to comply with international humanitarian norms. According to Makau Mutua, "to traditional legal minds, law is supposed to be the neutral arbiter of social conflict and the dispassionate source of the allocation of power and its uses (…) law is supposed to be impartial and objective whereas politics is partisan biased" (Mutua, 2014). However, the influence of liberal Western values on transitional justice "imprisons us in a false jail and makes it difficult for us to cultivate non-Western notions to enrich transitional justice ideas" (Mutua, 2011: 43). This liberal approach creates a tension in transitional contexts between international law and national law (Koskenniemi, 2001).

6.3.1 The position of the UN

On 8 October 2012, the OHCHR released the 'Nepal Conflict Report'. Beyond summarising its accomplishments, this report stated the position taken by the agency regarding the transitional process in Nepal:

> "amnesties for certain crimes, particularly genocide, crimes against humanity and war crimes, contravene principles under international law. For this reason, the United Nations has a policy that prevents it from supporting any national processes that run counter to its position on amnesties. Not only do amnesties contravene principles of international law by upholding impunity, they also weaken the foundation for a genuine and lasting peace" (OHCHR, 2012: 14).

On 21 May 2014, the OHCHR published a technical note on the TRC Act. This document expressed that, according to the UN policy against amnesties, the possibility to grant amnesties to perpetrators of gross human rights violations under the TRC Act is against the UN values. In accordance with the UN's general position on amnesties included in the Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies of August 2004, the Secretary-General's Note on the UN Approach to Transitional Justice of March 2010, and the OHCHR's technical note of May 2014, the OHCHR published in 2016 its inability to "provide support to the (transitional) institutions" (UN OHCHR, 2016: §10). Consequently, the United Nations have not supported financially or technically the Commissions.

55 The listed communications from the Kingdom of Nepal to the Secretary-General of the UN are available at: https://treaties.un.org/Pages/Declarations.aspx?index=Nepal&lang=_en&chapter=4&treaty=326.

Most of the diplomatic community present in Nepal has been looking up to the UN when deciding whether to support the Nepali transitional process or not. Accordingly, they have followed the UN's lead in not supporting the transitional mechanisms. However, as maintained by Christopher Decker, some of the embassies might be playing both sides: “while they follow our lead, they might be indirectly funding organisations that cooperate with the Commissions (Christopher Decker, PC, 22 May 2017).

Nevertheless, there are international organisations that have not backed the UN position. The International Committee for the Red Cross in Nepal has taken a different position than that from the OHCHR regarding the support of the Commissions. As stated by Saurav Shrestha, Head of Protection Programme at the International Committee of the Red Cross in Nepal, the ICRC carried out a session on international humanitarian law with each Commission, completed a 3-day session on psychosocial training for the staff of the CIEDP designated to conduct the interviews for the Ante-Mortem Data Collection and led a two-day session with the Commissioners of the TRC on how to address the needs needs of victims of sexual violence (Saurav Shrestha, PC, 1 June 2017). In his personal opinion, Saurav Shrestha believes that by refusing any collaboration with the Commissions, the UN is also neglecting the victims.

Another organisation that has taken a different stance than that of the UN is the International Center for Transitional Justice. According to its Head Office in Nepal, the international community ought to be able to support those aspects of the Commissions not related to amnesty and criminal justice (Aileen Thomson, PC, 31 May 2017).

Regarding the strict approach taken by the UN, Aileen Thomson considers that it should be interpreted as a product of its time, as part of the theoretical development of the transitional justice discourse: “in Kenya, the rule guiding the 'Truth, Justice and Reconciliation Commission' also contained amnesty provisions (…) however, no amnesties were granted, which is also a viable option in Nepal for the international actors to work with” (Aileen Thomson, PC, 31 May 2017). In line with this general development, Thomson believes that the UN might have taken this strict approach anticipating the transitional processes that may take place in the near future in conflicted societies such as Syria, Yemen or South Sudan.

Some interviewees went further and openly criticised the role of the United Nations. Prof. Tara Sapkota argued that UN missions always play a double role in post-conflict situations:

> "if a UN mission is deployed in a given country, they want to remain there. In order to retain their presence, they perform positive and negative actions. By positive actions I refer to recommendations and other activities that the UN mission does to promote principles and core human rights instruments. By negative actions, I mean the active encouragement and support to organisations and groups whose aim is to disturb the implementation of such policies. The UN mission's primary objective is to pretend that their presence is necessary" (Tara Sapkota, PC, 18 May 2017).

One of the strongest critical voices against the position taken by much of the international community towards the transitional process in Nepal is represented by Dr. Bishnu Pathak, Commissioner and Spokesperson of the CIEDP: "the international community should be lobbying together with us to amend the TRC Act, instead of remaining passive until the GoN decides to do so" (Bishnu Pathak, PC, 28 May 2017). For Pathak the international community does not have an interest in completing the transitional process through the established transitional mechanisms because "they are intending to form an international tribunal under Chapter VII of UN Charter" (Bishnu Pathak, PC, 28 May 2017). This accusation is, according to Pathak, supported by several reasons. The first argument of Pathak is that on 3 February 2016, he sent a letter to UN Secretary-General Ban Ki-Moon complaining about the role of the UN towards the transitional process in Nepal. In their answer, Nicholas Rosellini, Deputy Regional Director for Asia & the Pacific for the UN, and Subinay Nandy, Chief of the Political Affairs Department of the Asia and Pacific Division of the UN, Bishnu Pathak interpreted that the UN is leaving open the possibility taking over the transitional process in Nepal.[56]

The second reason raised by of Pathak is has to do with the geopolitical interest of the UN in Nepal:

> "when the UNMIN and the OHCHR-Nepal were present in Nepal, there was a big momentum in favour of Tibet. However, after they left Nepal, the international support for Tibetan self-determination decreased tremendously. The UN does not have an interest in restoring peace and harmony in Nepal so they can use it to monitor Tibet and India from here" (Bishnu Pathak, PC, 28 May 2017).

Finally, the constant rejection of the UNDP to contribute with the transitional mechanisms through financial or technical assistance is regarded by Pathak as a symptom that illustrates the hidden intentions of the UN: "who will will benefit from this lack of support to the transitional

56 A copy of this letter is available on Appendix 3 of this thesis.

bodies? Clearly not the victims" (Bishnu Pathak, PC, 28 May 2017).

While the possibility to establish a hybrid court in Nepal was an open possibility during the time when the OHCHR had an office in Nepal, the GoN always professed its reluctance (Tek Tamata, PC, 23 May 2017).[57] Moreover, in the view of Aileen Thomson (PC, 31 May 2017), there are no indicators to show that there is any appetite within the UN to make the this process fail so they can pursue the establishment of an international tribunal or a hybrid court.

6.3.2 The International Criminal Court

Nepal is not a state party to the Rome Statute of the International Criminal Court. This matter has been on the table ever since the end of the armed conflict. On July 2006, the House of Representatives ordered the GoN to become a party to the Rome Statute. During the first Constituent Assembly, on February 2009, the issue was again on the schedule when the Minister of Foreign Affairs "filed a proposal to Council of Ministers for the ratification of Rome Statute" (NCICC, 2012). However, none of these proposals have ever been voted in the Nepali Parliament. The access of Nepal to the ICC was also one of the recommendations that the OHCHR in Nepal discussed with the GoN during its stay in the country. Nevertheless, as recalled by Tek Tamata, the GoN "showed an attitude of reluctance towards this possibility" (Tek Tamata, PC, 23 May 2017). In addition, during the last Universal Period Review in 2015, Switzerland, Portugal, Germany, Ghana, Paraguay, Estonia, Costa Rica, Hungary, Czech Republic, Uruguay and Latvia suggested Nepal either to accede or both to accede and ratify the Rome Statue (UNGA, 2015).

As the organisation in charge of human rights in the country, the National Human Rights Commission has never suggested the GoN join the ICC. However, its current Chairperson contemplates the possibility to reevaluate this position in case the national criminal justice system fails to serve justice for, primarily, the victims of the armed conflict (Anup Sharma, PC, 26 May 2017).

The TRC Act grants the Commissions with a broad mandate regarding the content of their mandate. In fact, provision 27 states that the report may content "other matters as the Commission considers appropriate" (TRC Act, 2014: §27i). Regarding the possibility to include a recommendation to the GoN to access the ICC, Commissioner Subedi maintained that "it is a matter

57 Mr. Tek Tamata is Program Analyst for Access to Justice, Rule of Law and Human Rights at the United Nations Development Programme in Nepal.

that is yet to be discussed that may will be part of our recommendations" (Shreekrishna Subedi, PC, 26 May 2017).

A common opinion among most of the interviewees reflected their feeling that political elites ignore the complementarity system of the ICC and refuse to accede the Rome Statute because they are afraid of being prosecuted and brought in front of an alien tribunal in the Hague. Only Commissioner Shreekrishna Subedi (PC, 26 May 2017) offered another argument for the absence of this debate in the high spheres of Nepali politics: the intentions that several African countries have manifested to withdraw from the ICC. Regardless of the reason not to access the ICC, this could be a unique opportunity for the GoN to send a strong signal to the international community about Nepal's commitment to peace. By joining the ICC, the GoN could exhibit its commitment to end the very much criticised culture of impunity.

6.4 The transitional mechanisms

The comparative analysis presented in chapter 2 conducted by Tricia Olsen, Leigh Payne and Andrew Reiter (2010) regarding the choice of transitional mechanisms and their contribution to the transitional goals is problematic. First of all, Olsen et al. concluded that the maximalist and minimalist approaches are inconclusive when it comes to the improvement of democracy (Olsen *et al.*, 2010: 153). Secondly, the investigation fails to address the contribution of these mechanisms to peace and the deterrence of violence. Thirdly, the conclusions of the study are restricted to liberal transitions from authoritarianism to democracy, which excludes the application of their conclusions from transitional processes in illiberal or deeply conflicted societies.

The members of the Commissions have been politically appointed and yet, political elites do not support their mandate (Laxmi Pokharel, PC, 23 May 2017). Since their establishment, the Commissions have been formally requesting the amendment of TRC Act, the enactment of the required legislation to criminalise acts of torture, enforced disappearance and the revision of the statutory limitations on cases of sexual violence and rape. In addition, the Chairman of the TRC affirmed that "fearing that complaints may be filed against the leaders and workers of political parties, the ruling parties have not been providing information to let the Commission fulfil its task smoothly" (as cited in Acharya, 2016). Not only have the successive governments in Nepal failed to address these issues, they have neglected the transitional mechanisms from the necessary human and economic resources to accomplish their tasks. According to Commissioner Pathak, whereas the GoN

allowed the TRC to hire experts, it did not allow the CIEDP to do so. Moreover, the "GoN promised to provide the CIEDP with 70 officials (…) however, it never received more than 40 which demonstrates that the GoN does not want the CIEDP to accomplish its mandate" (Bishnu Pathak, PC, 28 May 2017).

The complaint registration process of the Commissions brought serious concerns regarding the insufficient publicity which resulted in a lack of awareness in many rural parts of Nepal and the use of the LPCs as sites to receive and register complaints. This raises questions of accessibility, confidentiality and security, given the nature of these bodies in Nepal.[58]

Another critique framed by several interviewees was the limited period covered under the transitional justice mechanisms -from 13 February 1996 to 21 November 2006- because it has been observed that violations of human rights politically motivated by the armed conflict continued to happen even after the signature of the CPA (Centre for Legal Studies, 2016: 18). While there is no provision forbidding victims of crimes to access ordinary justice for crimes committed after the Maoist insurgency and the transitional justice history speaks in favour of limiting the mandate of the transitional mechanisms to the crimes committed during the particular conflict, the case of Nepal is different. In Nepal, acts of torture and enforced disappearance are yet to be criminalised. If the Parliament is ever to pass laws criminalising these acts, it is likely that it will do so for general cases. According to Shree Krishna Subedi (PC, 26 May 2017), the amendment of the TRC Act will include a provision that shall allow the transitional commissions and later the Special Court to retroactively prosecute the commission of these crimes. However, since this provision is only to be applied on crimes committed during the armed conflict, victims of torture and relatives of enforced disappeared people will not be able to seek their right to an effective remedy.

As defended by Commissioner Subedi, the TRC is bound to the TRC Act and, subsequently, they are entitled to recommend for prosecution any of the 9 contemplated crimes even if there is not a law criminalising these acts. In relation to the possibility of the Special Court prosecuting these crimes, Subedi affirms that since Nepal is a party to the CAT, article 9 of the Treaty Act of 1990 provides that "international treaties are as good as national laws" (Shreekrishna Subedi, PC, 26 May 2017). A similar argument can be used to ensure prosecution of enforced disappearances. In this case, Nepal is

58 For example, a LPC office in Dang shares its building with members of the Armed Police Force. For an extensive description of the problems related to the filing of complaints in LPCs, see: Centre for Legal Studies (2016). Brief History of the Transitional Justice Process in Nepal. *NIRUPAN*, Issue 10, July 2016: 6-15.

not party to the ICPPED. Therefore, even if Nepal was to accede the ICPPED, the general principle of non-retroactivity of the criminal law would prevent its use on war-era cases. Nonetheless, according to Prof. Geeta Sangroula (PC, 19 May 2017), enforced disappearances can be considered as a violation to the right to life, which is non-derogable under the ICCPR to which Nepal is party since 1991. Notwithstanding the efforts to provide the future Special Court with tools to prosecute and judge in case that the GoN chooses not criminalise and allow for the retroactive application of these crimes, judges will face a big problem. None of the international conventions specify the adequate amount of compensation and the proportionate sentences for these crimes. In order to avoid a dangerous precedent of arbitrary sentencing, judges would still require from a national law providing the necessary mechanisms to declare a just punishment.

On 27 June 2017, Attorney General Raman Kumar Shrestha affirmed that the GoN would soon register the amended TRC Act in the Parliament. The revised draft of the law will propose "to remove amnesty for serious offences, (...) the statute of limitation for serious crimes (...), and the criminalisation of torture and enforced disappearances" (The Himalayan Times, 2017a). Nevertheless, these are empty promises that different individuals pertaining to the political apparatus of the state periodically use to justify the delay in applying the orders contained in the Supreme Court verdicts.

In the case of the leaked draft of the Bill to Control Torture, Inhuman, Brutal and Disrespectful Acts, torture is defined as a "physical and mental abuse by security forces of any person in their custody in the course of remand or criminal investigation" (MyRepública, 2016b). However, during the Maoist insurgency, torture was inflicted by both parties to the conflict. If this bill is passed without criminalising the torture committed by individuals, the law will fail to address not only the acts of torture committed by Maoists during the war era, but future commission of torture acts perpetrated by individuals outside the administrative control of the state.

6.5 Conclusions

Nepal is a case of an absent political transition, none of the political groups have achieved hegemonic position. The country experiences constant political turmoil resulting in implausible coalitions. Also, none of the power-sharing arrangements have facilitated the necessary amendment to allow the Commissions to complete their task in accordance with international standards.

Chapter VII
THE PATH TOWARDS RECONCILIATION

"*If there is to be reconciliation, first there must be truth*"

(Timothy B. Tyson).

Introduction

The content of chapter seven is entirely dedicated to the reconciliation approach taken by the Nepalese governments and the crucial importance that the amnesty provision in the TRC Act continues to have for the intentions of the political elites.

7.1 Reconciliation and amnesty: sustaining a culture of impunity?

The use of reconciliation has become a growing development in post-conflict situations, especially since the South African experience. According to Judith Renner, reconciliation is:

> "a vague yet powerful social ideal which is fundamentally political as it produces social reality and legitimises or delegitimises certain policies (…) it alludes to an absent and desirable state of society in contraposition with the state (in contraposition with the state of division anchored during the conflict)" (Renner, 2012: 52, 62).

The notion of reconciliation is tightly related to amnesty provisions. Contrary to retributive approaches, reconciliations seeks to permit perpetrators to "regain their membership and reintegrate into society" (Renner, 2012: 56). As an empty universal, its content might be subject to be filled with the meaning that the current political forces in government might prefer, it is a "discursive device that creates space for collective action and political creativity, whatever shape that might take" (Renner, 2012: 70). Nepali political elites have constructed their own ideal of reconciliation that attempts to negate any discussion on the amnesty provision as it would contravene their reconciliatory ideal.

Amnesties are “a legal promise to consign the memory of injustice into oblivion, and to leave without redress those who suffered the effects of the to-be-forgotten deeds” (Du Bois-Pedain, 2012: 462). Therefore, according to Antje du Bois-Pedain, an amnesty provision cannot function as a 'soft version of prosecution', as it prevents to hold perpetrators of crimes accountable for their deeds (Du Bois-Pedain, 2012: 481).

Amnesty provisions are not only found on national legislation. In fact, article 6.5 of the Additional Protocol II to the Geneva Conventions states that:

> “at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained” (ICRC, 1977: art. 6.5).

However, this provision is not absolute, as the first Geneva Convention of 1949 explicitly prohibits amnesties for cases of murder, torture and property appropriation, among others (ICRC, 1949a: arts. 49-50).

7.1.1 The use of reconciliation in Nepal

Since the start of the transitional process, national political elites have referred to South Africa as a model to achieve reconciliation in the country. In South-Africa, amnesty was condition to the disclosure of truth, which is supposed to “heal the individual and national psyche and to restore the moral consensus and order of the community” (Renner, 2012: 56). The problem with truth-telling is that it implies some degree of accountability, some kind of acknowledgement of responsibility, regardless of the posterior amnesty granted. Nepali political elites cannot afford a public admission of guilt because it would adversely affect their reputation and could potentially trigger prosecutorial mechanisms in third countries through the principle of universal jurisdiction beyond the case of Colonel Kumar Lama.

Nepali elites used a distorted meaning of the South African reconciliation process to justify amnesties: they equated the South African model “with a mechanism to provide amnesty” (Sharma, 2017, 34). Moreover, mirroring the transitional mechanisms taken in South Africa is premeditatedly perverse. As Hugo van der Merwe noted, South Africa failed to “pursue justice and accountability for un-amnestied cases and providing pardons for the limited number who were convicted”, which “raises serious questions about the longer term impact of the South African transitional justice model on the development of a human rights culture and the rule of law” (van der Merwe, 2012: 443).

7.1.2 A culture of impunity

Impunity is best described as the "pervasive failure of states to mobilise their law enforcement systems against human-rights violators, especially against those on the government's payroll" (Du Bois-Pedain, 2012: 460). According to a US Diplomat, Nepal has many very good laws on the books, but sometimes they are enforced and sometimes they are not. It is possible that, "if you have connections, money or simply know the right people, the law might not necessarily apply to you" (US Diplomat, PC, 22 May 2017).

Nepal has traditionally held a culture of impunity for human rights violations occurring in the country. As reported by Laxmi Pokharel, whenever there have been large political events or big social demonstrations, security forces have used excessive force resulting in the loss of lives:

> "Nepal has a law which states that security forces can open fire below the knee when they are unable to control the situation by other means. However, after these incidents happen, we have found bullets in the chest of the wounded and in the head of the killed. This keeps happening because the security forces are never made accountable for their excesses in the use of force" (Laxmi Pokharel, PC, 23 May 2017).

This culture of impunity has not only served to protect the branches of the state, but has also been used by political elites to achieve their political purposes. A prime example of that was the decision of the GoN to withdraw the cases of those involved in the Tikapur massacre in order facilitate the participation of Madhesi-based political parties in the second round of the local elections (Setopati, 2017). Another case that illustrates the culture of impunity was the decision of the Attorney General's Office to withdraw from prosecution in 2014 "five to six hundred war-era cases" (Geeta Sangroula, PC, 19 May 2017). This last decision was noted by Anup Sharma, Chairperson of the NHRC on the occasion of the 17 anniversary of the National Human Rights Commission on 27 May 2017. During his speech, facing the former Maoist Prime Minister 'Prachanda', Anup Sharma stated that "crime has been institutionalised due to the ill-practice of withdrawing cases bearing the nature of crime at the helm of politics".[59]

There are several representative cases that depict the on-going culture of impunity for war-era cases in Nepal. To date, there have only three convictions for war-era cases. In 2010, the Supreme Court confirmed the sentence against Maoist Bal Krishna Dhungel for the murder of Ujjan Shrestha in 1998 (Nepali Times, 2013). On 13 April 2017, Chief Justice Sushila Karki issued an order to

59 The original speech of Mr. Anup Sharma was in Nepali. This quote is extracted from a translation that was distributed to the attendants.

arrest Dhungel within a week. A week later, the parties in coalition in the government filed a motion to impeach Karki (OHCHR, 2017). Dhungel is yet to be arrested.

Another emblematic case involved Nepal Army Major Niranjan Basnet. While serving in a UN peacekeeping mission in Chad, Basnet got expelled and repatriated once the UN team became aware he had been facing charges since 2007 for the illegal detention, torture, and murder of 15-year-old Maina Sunuwar (HRW, 2009). From the four soldiers charged in absentia by the Kavre District Court in 2008, Basnet was as the only one still serving at the Nepal Army (Advocacy Forum, 2014b: 40). After being postponed for various years, the Kavre District Court reopened the case in January 2016 and issued its verdict on 16 April 2017: the first conviction of Nepal Army members for a crime committed during the insurgency ever to be decided.[60] The verdict of the Kavre District Court sentenced three of accused to twenty years of imprisonment while acquitting Major Basnet, the only one currently in the Nepal Army, from the charges as "he was just obeying the order of his seniors" (Adhikari, 2017). Despite the impunity enjoyed by Basnet, nobody expected ta verdict on this case: "in a common law system like Nepal, this case should persuade other district courts to deal with similar cases" (Christopher Decker, PC, 22 May 2017). Moreover, the case of Maina Sunuwar led to a n amendment on the Nepal Army Act "allowing army personnel to be prosecuted by ordinary courts" (Geeta Sangroula, PC, 19 May 2017). Before the amendment, every case involving army members had to be decided on a martial court.

Regarding the situation of political leaders, on 2 September 2013 the Maoist Central Committee urged the GoN to form a Truth and Reconciliation Commission arguing that "reviving insurgency-era cases (through the application of criminal law in ordinary courts) would be against the Comprehensive Peace Accord" (Advocacy Forum, 2013). This is very indicative example on the sort of reconciliation and use the Maoist want(ed) to make out of the TRC. In fact, that meeting is historic because the Maoist leader 'Prachanda' challenged the government to arrest him and Baburam Bhattarai, "openly admitting that they had instructed their activists to murder Adhikari" (Advocacy Forum, 2013).

Transitional mechanisms are not new institutions in Nepal. In 2012, the International Commission of Jurists in Nepal examined a total of thirty-eight commissions that had been formed in Nepal between 1990 and 2010. The recommendations of two of the most recent Commissions, the Mallik

60 After Dhungel's confirmed sentence in 2010, five Maoists were convicted to two years of imprisonment in 2014 for the murder of journalist Dekendra Thapa in 2004.

Commission' following the events after the first *Jana Andolan* and the 'Rayamajhi Commission', formed after the second *Jana Andolan*, were never implemented. In both cases, the government justified the non-implementation of the reports in order to favour peace and democracy, the same arguments used to substantiate the amnesty provision in the TRC Act (Sharma, 2014). The conclusions of the ICJ 2012 report suggest that "despite the number of ad hoc mechanisms that have been constituted in Nepal, inquiry commissions have been ineffective at best, and in many cases have promoted impunity rather than provided accountability (ICJ, 2012: 34).

The first time the United Nations declared that amnesties used as negotiation tools to end violent conflicts cannot include gross human rights violations was in relation to article IX of the 'Lomé Peace Agreement' for Sierra Leone. The Special Representative of the Secretary-General, one of the signatory parties of the agreement, added a provision in which he declared that the amnesty provision "should not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law" (UNSC, 2000: 446). Ever since that disclaimer was made, this has been increasingly become the standardised position in the UN.

In accordance with the UN's general position on amnesties included in the Guidance Note of the Secretary-General's report on the rule of law and transitional justice in conflict and postconflict societies of August 2004, the Secretary-General's Note on UN Approach to Transitional Justice of March 2010, and the OHCHR's technical note of May 2014, the OHCHR declared its inability to "provide support to the (transitional) institutions" in Nepal (OHCHR, 2014). This decision was primarily taken due to the amnesty provision in the TRC Act. Following this determination, most of the international actors working in Nepal decided to back the UN Position (Christopher Decker, PC, 22 May 2017).

7.2 Conclusions

Following the prevailing culture of impunity, Nepali elites imputed the term reconciliation with a meaning associated with amnesties. This chapter has proven how, since the signature of the CPA, the influence of politics has prevented the rule of law from effectively prosecuting and condemning high-profile citizens.

PART IV

CONCLUDING OBSERVATIONS

Chapter VIII
THE ROAD AHEAD

"o&8k 8') c [k 8k 8' UB"

"*Law is what is used against the poor, but freedom for the rich and powerful*"

(Nepali proverb).

Introduction

Chapter eight is aimed at summarising the key topics discussed throughout the thesis. It also includes critical statements of key interviewees and a set of personal opinions and recommendation made by the author.

8.1 Liberalism's stain on the rhetoric language of transitional justice

Transitional justice is nothing but the attempt to (re)write the social contract in a given society. But there is not such a thing as a social contract: "a baby is not born for society, no matter how hard society reclaims its ownership. A baby is born to be born, (...) demands its own existence without taking into account and without inquiring whether society reclaims him or not" (Eugène Ionesco, 1962: 126).

Transitional processes are no longer the exception; they have become the norm to deal with legacies of wide-spread violations of human rights (Teitel, 2005: 840). Transitional justice is presented as a teleological theory: its rightness is determined by a set of ends, transitional goals, that are presented as neutral and inherently positive.

Transitional justice scholarship has traditionally focused on the resolution of binary debates: peace vs. justice; punishment vs. reconciliation, etc. (Roht-Arriaza and Mariezcurrena 2006; Sriram

and Pillay, 2009). Today, these debates seem utterly outdated as there is a growing acceptance on the need to use a holistic approach that respects all goals of transitional justice that ignore, for instance, the Western liberal tradition on accountability, which has traditionally promoted a retributive approach to justice (Findlay and Henham, 2005). In this sense, Ellen Lutz affirms that the decision-makers of the XXIst Century have gradually assimilated that all transitional justice goals must be met and isolation is not an option (Lutz, 2006: 327). Even though national authorities can take license as to how and when to implement the transitional mechanisms, failing to recognise a holistic approach to transitional justice may pose unintended risks to the process. In the end, "the integration of various normative approaches that touch on the human condition is the only viable method" (Mutua, 2011: 44).

Liberal democracies in the West are the result of centuries of cultural, political and philosophical development starting with the Age of Enlightenment. As this process is unique to the societies that were involved or have been influenced by it during long periods of time, attempting to apply the moral values of centuries of intellectual transformation upon societies that have not undergone a similar process is either paternalistic or naïve. However, this is precisely the ideology behind the process of globalisation, which seems to have little patience for accommodating cultural sensitivities that may contravene with liberal values. As a normative framework deeply influenced by Western standards, transitional justice mechanisms might be "alien and distant to those who actually have to live together after atrocity" (Nagy, 2008: 275).

The ideological bias behind the transitional justice discourse is distinctive: while for Latin America and Africa there is a reference of transitions from military rule to democracy, Central European countries are alluded to as transitions from communism to democracy. In the first scenario, transitional justice seeks to delegitimise the authoritarian political rule of the military in favour of democracy while, in the second, it avoids dealing with democratic considerations in order to imply condemnation of an economic system. Consequently, it can be argued that transitional justice values and goals are not ends in themselves, rather means towards achieving a liberal approach to peace, democracy and economy. In this way, capitalism is granted hegemonic status as exclusive economic system in the globe. Today we are well aware of the great determinant influence that the 'Chicago Boys', led by Milton Friedman and his neoliberal recipes, had on the military rule in Chile and yet, the capitalist system is presented as irrelevant when dealing with the Chilean transition. In 1976, Orlando Letelier realised that the liberal experiment in the economic transformation and the

systematic use of terror were one and the same: "repression for the majorities and *economic freedom* for small privileged groups are in Chile two sides of the same coin" (Letelier, 1976).

Ultimately, the success of the transitional justice process and the stability of the post-conflict society hinged on the implicit agreement between the interests of the national elites and those of the victims and their families. Despite competing interests amongst different actors, the lack of appropriate funding, the timeframes and other limitations, a given transitional society can achieve peace, justice and stability if an overwhelming majority of those who suffered feel their rights recognised and efforts are placed to lessen the root causes of the conflict, be it tendencies towards authoritarianism, social discrimination, economic inequalities or other motivators. In this sense, participation of victims in the process is a crucial element to counter the deficiencies of representative democracies.

However, there is a question as to whether transitional justice as a global discourse influenced by liberal ideas is flexible enough to include ideas related to horizontal inequalities and substantive democracy. Any transitional justice process is necessarily country-specific. The idea that a normative framework created in the 1990s with a set of liberal measures that are universally valid is fallacious and can make the transitional justice process fail, as it may pose intolerable limits to the particular circumstances and challenges of a country, including the economic, cultural, social and religious sensitivities of its population. The prioritisation that traditional transitional justice theory places on liberal goals displaces the urgency to address horizontal inequalities which might be the ultimate roots of the conflict. If transitional frameworks fail to identify and solve the causes that led to the conflict, transitional justice is then used as a rather conservative process by which a given society is set to be deployed to the status quo prior to its violent disruption. Precisely because of these new tendencies to overcome the inherent limits of a liberal normative framework through the inclusion of socio-economic concerns, transitional justice theory is faced with "increased uncertainty concerning the main goals and actors of transitional justice" (Hansen, 2014: 120).

The use of transitional justice initiatives in deeply conflicted democracies is particularly challenging. In these cases, it can be argued that if a democracy with institutions and legal mechanisms designed to prevent widespread violations of human rights, develops structural injustices, the exceptionality of the transitional process might be insufficient to correct the fundamental deficiencies in the system. In this sense, Stephen Winter has claimed that the use of

transitional justice in absent political transitions “risks misleading survivors with shallow transitional rhetoric” (Winter, 2014: 6).

8.2. Understanding transitional justice in Nepal

Political elites in Nepal have traditionally conceived of transitional mechanisms as tools used to appease victims' demands of justice. As exposed in this thesis, Nepal has established many inquiry commissions but their reports were seldom made public for the monitoring of recommendation that, in practice, were rarely implemented. Therefore, once the Maoists and the seven-party alliance agreed to put an end to the war, the introduction of the transitional process in Nepal was the natural move for the conflicted parties of the armed conflict to settle old disputes and essentially continue the culture of impunity that is present after every historically violent political shift.

As an absent political transition, Nepal elites' resistance to comply with the recommendations from international bodies is explained by the fact that the victor's leadership never counted with sufficient power to punish their political opponents. Had the Maoists or the leaders of NC or CPN (UM-L) been overwhelming democratically elected, they would tried to reprove the wrongdoings of their political adversaries as fast as they removed King Gyanendra and the rest of the royal family from their privileged position of power.

The presumed process of democratisation in Nepal has further empowered the existing elites. Since the signature of the CPA, the ideological differences between the main political parties have blurred and parties are increasingly cooperating with the common goal of subverting the legislative and the judiciary powers. This argument is supported by the impeachment attempt against former Chief Justice Sushila Karki, but more importantly through the lack of abidance to Supreme Court verdicts on a long range of issues that surpass transitional justice related matters. Accordingly, taking into account the power-sharing circumstances in Nepal, it is unrealistic to expect the transitional process to accomplish rule of law.

8.2.1 The instrumentalisation of transitional justice

The TJ process has become a bargaining chip for everyone, not only for the political parties. Oone of the bitter truths in this country is that civil society organisations are also bargaining their agendas using the TRC and the CIEDP. Nepal has a vibrant civil society, but its role is sometimes questioned. In agreement with Mohna Ansari, there is a need to find new ways for civil society to “organise and

speak freely and neutrally about the rule of law, justice and democracy, without hidden political interests" (Mohna Ansari, PC, 25 May 2017).[61]

Transitional justice should represent the middle ground; a recognition that prosecution, in accordance with the amount of crimes committed during the conflict and the superior objective of reconciliation, will be limited. However, everyone seem to dislike this idea for opposite reasons. The stances in Nepal are very polarised: while political elites seek blanket amnesty, civil society organisations and victims' groups are pleading for the full prosecution of all perpetrators (Aileen Thomson, PC, 31 May 2017). These approaches do not leave any room for compromise not to search for a mutually beneficial outcome of the transitional process.

Nevertheless, all the voices actively around the transitional process seem to be benefiting from the current state of things. On one hand, political elites and security forces, reluctant to pursue any search for truth or prosecutions because of the potential endangerment of their privileged positions keep justifying amnesties as a necessary tool to achieve reconciliation. In this sense, Tara Sapkota affirms the "loopholes in the TRC Act were accurately designed to escape prosecution and punishment" (Tara Sapkota, PC, 18 May 2017). On the other hand, victims' leaders acting as representatives of the sacrificed have been using the collective suffering to further empower their prominent positions within the community.[62] Meanwhile, the international community, including the donor community, is stuck with their current position of neglecting support to the transitional mechanisms while not participating in solving the national deadlock.

8.2.2 The transitional mechanisms

The development of universal jurisdiction has contributed to making it more complicated for perpetrators of violations of human rights to escape indefinitely from accountability mechanisms (Arriaza, 2005). Whereas in the 20th century national amnesty laws allowed for a "comfortable retirement anywhere in the world, today travel abroad poses the hazard of arrest, trial, and punishment far from home (Lutz, 2006: 330). In this sense, the arrest and prosecution of Colonel Lama in the United Kingdom scared political elites, which "prevented Prime Ministers from travelling to several countries for the fear of being arrested" (Laxmi Pokharel, PC, 23 May 2017).

61 Ms. Mohna Ansari is a Commissioner at the National Human Rights Commission of Nepal.

62 According to Mr. Saurav Shretha (PC, 1 June 2017), several members of victims' groups have used their popularity to run in the local elections for political parties whom they were previously criticising.

The structure of the TRC is particularly problematic. Given the political appointment of the Commissioners and their loyalty towards a specific political party which can be easily traced, the Chairperson took the puerile decision to absent himself for a period of two months after a discussion with one of the Commissioners, affecting the normal performance of the transitional body (The Himalayan Times, 2017b). According to Commissioner Subedi, the TRC has received thousand of complaints wherein alleged victims accuse various leaders of the three major political parties and former King Gyanendra, as the persons responsible of the commission of human right violation:

> "if our investigations finds that the names provided in the complaint are proven to be guilty of serious violations of human rights, we will have no other choice but to recommend for their prosecution. However, this Commission is very serious about the peace process; we do not want to derail the peace process" (Shreekrishna Subedi, PC, 26 May 2017).

Consequently, another difficulty has to do with the nature of the transitional mechanisms: "the Commissions are based on three pillars: not to act against the peace process, the international human rights law and not against justice for the victims" (Shreekrishna Subedi, PC, 26 May 2017). Accordingly, there is a reasonable doubt in expecting the Commissions to recommend prosecution of high-profile cases, since the slightest threat to disrupt peace in Nepal could result in the Commissions detracting from recommending prosecution in order to prevent the relapse of violence. However, this debate is yet to be addressed: "the members of the TRC believe that we will receive some kind of threats in the near future once the investigations start pulling some threads" (Shreekrishna Subedi, PC, 26 May 2017).

Under the point of view of the Chairperson of the NHRC, the final report of the Commission "is likely suggest compensations for the victims and *de facto* grant a blanket amnesty to perpetrators of gross human rights violations" (Anup Sharma, PC, 26 May 2017). Meanwhile, Commissioner and Spokesperson of the CIEDP Bishnu Pathak affirms that if the transitional mechanisms are unable to succeed in their mandates, it will be solely because "this continues to be a perpetrator-controlled government" (Bishnu Pathak, PC, 28 May 2017).

8.2.3 Victims, human rights and the right to reparation

This thesis has attempted to bring attention to the fact that, in the transitional process, the recognition of economic, social and cultural rights on a previous violation of civil and political rights detracts legal relevance and subjugates ESCR to the existence of a CPR. If compensation is limited to victims of torture, enforced disappearance, property rights violations, etc., the right to compensation is connected solely with the breach of civil and political rights. By doing so, the liberal

transitional discourse recognises victims' needs in a way that aimed at bringing them to a position prior to the conflict. It seeks to solve the injustices committed through the conflict but fails to tackle the root causes of the conflict. However, addressing those issues is the only way to ensure non-recurrence.

The Nepali root causes of the armed conflict are principally related to the socioeconomic discrimination perpetrated against a large segment of the population. Bringing everyone to their prior position would further alienate thousands of traditionally marginalised people that, thanks to the Maoists, did not pay their abusive loans to their landlords and obtained a patch of land to harvest food and thus having emancipated from their previous feudal relationship. In terms of economic redistribution, though arbitrary, these expropriations contributed to improving the situation of many low class/caste families that saw in the Maoist ideology as a way out of their marginalisation. Even if, for the sake of the rule of law, the methods used for seizing land are to be deemed illegal, disempowering those who currently enjoy unlawfully obtained goods would only only seed the grains of renewed conflict. In this situation, the state should acknowledge the unlawful act committed and duly compensate the prior legitimate owner. Transitional justice, as a global discourse, must remain sufficiently open to the particularities of each process in order not to endanger the ethic value that holds the discourse together.

In terms of pecuniary compensation, former Maoists received money as part of the reintegration process. However, the procedure to assist civil victims with economic support, the *Interim Relief Programme*, remains largely criticised.[63]

8.3 Final remarks and recommendations

The transitional process in Nepal is guided by the three political parties which previously ordered, whether directly or indirectly, the rebels or the security forces of the state, to commit human rights violations. The transitional approach taken in Nepal has failed to remedy the deep-rooted feudal-based horizontal disparities that led to the armed conflict. This is explained by the fact that the liberal institutions of the state are occupied by those who benefited from the historical exclusion of others.

Political elites in Nepal want to resolve all the complaints lodged against the transitional mechanisms. Their initial idea was to make use of the vague wording of the TRC Act, the political

63 See Appendix 2.

appointed Commissioners and the close relationship with the Attorney General while promoting the prosecution of some lower cases, and granting amnesties to most of the perpetrators for the sake of reconciliation and their political interests. However, the strong opposition of the UN and most of the international community to support the transitional process as it is, in conjunction with the strong pulse that victims' organisation are holding against the state has forced the successive governments to delay the decision on whether receiving the support of the international community at the expenses of prosecution is worthier than risking international isolation and a permanent discontentment from part of civil society in exchange for securing political dominance.

If political elites decide to seek blessings and support from the international community, the GoN must facilitate the necessary tools for the transitional mechanisms to complete their mandate. The first necessary step is to finally amend the TRC Act in accordance with the Supreme Court verdicts and international standards, including the revision of the amnesty section and an explicit provision allowing for the elimination of statutory limitations for the crimes committed during the Maoist insurgency. Secondly, there must be an immediate enactment of the laws that criminalise acts of torture and enforced disappearances and their inclusion in the Nepali *Muluki Ain* or its successor.[64] In this sense, the signature of the International Convention for the Protection of All Persons from Enforced Disappearances and the Optional Protocol to the CAT would contribute to ensure the protection of basic civil rights. Thirdly, by accessing the Rome Statute, Nepal could send a strong message to the international community of commitment towards non-recurrence of gross violations of human rights. Another pivotal action to be taken is the establishment of the Special Court before the Commissions exhaust their mandates. Otherwise, Nepal would contravene the UN Secretary-General's Guidance Note on United Nations Approach to Transitional Justice of March 2010 which emphasises that while transitional mechanisms are an important part of the peace process, they should be complemented by criminal processes, not serve as an alternative. An additional response of the GoN should be the inclusion of a new section 28(2) in the TRC Act, in order to recognise a realistic timeframe to duly solve all complaints registered by the Commissions. International experience shows that there is no way a TRC can process close to 60,000 complaints in two years. It took almost 11 years for the TRC in South Africa to process 21,000 cases with a very limited amount of prosecutions. Lastly, there must be a commitment to implement the recommendations, including reconciliatory and reparation measures, but also recommendations for prosecution.

64 According to Prof. Geeta Sangroula (PC, 19 May 2017), the Muluki Ain is to be replaced by three laws: a civil procedural code, a criminal procedural code and a penal code, which will state the definition and sanctions for the commission of crimes.

Finally, concerns are that the conflict with Madhesi-based parties in the Terai might escalate in similar ways as the Maoist insurgency did. It has been proven that horizontal inequalities may escalate into violence when differences such as ethnicity are politicised to mobilised groups for political causes (World Bank, 2005: 20). If public authorities in Nepal are committed to democratic values, the majorities must refrain from continuously oppressing the minorities. The situation will not be settled by appeasing the agitators through the withdrawal of cases, which only contributes to further undermine the rule of law. The path forward rather requires from aa serious attempt to solve grievances through a dialogue based on mutual respect, compassion and sensitivity to each other's needs.

Bibliography

International legal instruments

INTERNATIONAL COMMITTEE OF THE RED CROSS (1949a). *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*. 12 August 1949, 75 UNTS 31

INTERNATIONAL COMMITTEE OF THE RED CROSS (1977). *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*. 8 June 1977, 1125 UNTS 60.

OHCHR (2014). *Technical Note: The Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (2014)*. Retrieved from: www.ohchr.org/Documents/Countries/NP/OHCHRTechnical_Note_Nepal_CIDP_TRC_Act2014.pdf [Accessed 10 May 2017]

UNITED NATIONS (2016). Report of national consultations concerning the design and implementation of transitional justice measures. Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence; A/71/40827, 24 October 2016. New York: United Nations.

UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (UNCERD) (1999). *Concluding observations: Nepal.* CERD/C/304/Add.61, 10 February 1999. Geneva: UN Committee on the Elimination of Racial Discrimination.

UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS (2017). *World Population Prospects: The 2017 Revision, Key Findings and Advance Tables*. Population Division, ESA/P/WP/248. New York: United Nations.

UNITED NATIONS GENERAL ASSEMBLY (1989). *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577: 3.

UNITED NATIONS GENERAL ASSEMBLY (2000). *Report of the Security Council: 16 June 1999- 15 June 2000*, A/55/2.

UNITED NATIONS GENERAL ASSEMBLY (2005). *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*. A/Res/60/147. 16 December 2005.

UNITED NATIONS HUMAN RIGHTS COUNCIL (2007). *UN Human Rights Council: Question of the Realization in All Countries of Economic, Social and Cultural Rights, Report of the Secretary-General.* A/HRC/4/62, 13 February 2007. New York: United Nations.

UNITED NATIONS SECRETARY-GENERAL (2004). *The rule of law and transitional justice in conflict and post-conflict societies. United Nations Secretary General*. S/2004/616, 23 August 2004. New York: United Nations.

UNITED NATIONS SECURITY COUNCIL (2006). *Letter dated 22 November 2006 from the Secretary-General to the President of the Security Council*, S/2006/920. New York: United Nations Security Council.

UNITED NATIONS SECURITY COUNCIL (2007). *Report of the Secretary-General on the request of Nepal for United Nations assistance in support of its peace process*, S/2007/7. New York: United Nations Security Council.

Nepalese legal instruments

12-point understanding between the SPA and the Maoists. Retrieved from: http://www.satp.org/satporgtp/countries/nepal/document/papers/12_Point_Understanding.pdf [Accessed 15 April 2017]

CONSTITUTION OF NEPAL (1990). Retrieved from: http://digitalcommons.macalester.edu/cgi/viewcontent.cgi?article=1272&context=himalaya [Accessed 12 April 2017]

COMPREHENSIVE PEACE ACCORD. Unofficial translation by the UN. Retrieved from: http://un.org.np/sites/default/files/report/tid_188/2006-11-29-peace_accord-MOFA.pdf [Accessed 2 April 2017]

INTERIM CONSTITUTION OF NEPAL (2007). Available at: http://www.wipo.int/edocs/lexdocs/laws/en/np/np006en.pdf

SUPREME COURT (2015). *Suman Adhikari et. al v. Prime Minister and Council of Ministers and others.* Order 069-WS-0057, 26 February 2015. Unofficial translation by the UN and the ICJ. Retrieved from: https://goo.gl/QAvS38 [Accessed 25 May 2017]

Social science doctrine (books, reports and articles)

ABBOTT, K., KEOHANE, R., MORAVCSIK, A., SLAUGHTER, A. and SNIDAL, D. (2000). The Concept of Legalization. *International Organization*, Vol. 54: 401-419.

AGUILAR, G. (2011). Asserting Women's Economic and Social Rights in Transitions, in AGUILAR, G. and GÓMEZ, F. *Rethinking Transitions: equality and social justice in societies emerging from conflict*. Cambridge: Intersentia, Series on Transitional Justice: 123-170.

AMNESTY INTERNATIONAL (2007). *Nepal: Reconciliation does not mean impunity- A Memorandum on the Truth and Reconciliation Commission Bill*. Kathmandu: Amnesty International.

ANDRIEU, K. (2014) Political liberalism after mass violence: John Rawls and a 'theory' of transitional justice, in BUCKLEY-ZISTEL, S., KOLOMA, T., BRAUN, C., and MIETH, F. (eds). *Transitional Justice Theories.* Oxford: Routledge: 85-104.

ANHANG, G. (1990) Separation of Powers and The Rule of Law: On The Role of Judicial Restraint in 'Secur[ing] the Blessings of Liberty'. *Akron Law Review*, Vol. 24, Issue 2: 211-226.

AOLÁIN, F. and CAMPBELL, C. (2005). The Paradox of Transition in Conflicted Democracies, *Human Rights Quarterly*, Vol. 27, No. 1: 172-213.

ARBOUR, L. (2007). Economic and Social Justice for Societies in Transition. *NYU Journal of International law and politics*, Vol. 40, Issue 1: 1-27.

BASS, G. (2000). *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals.* Princeton, NJ: Princeton University Press.

BELL, C., CAMPBELL, C. and AOLÁIN, F. (2007). Transitional justice: (re)conceptualising the field. *International Journal of Law in Context*, Vol. 3, No 2: 81-88.

BELL, C. (2009). Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field". *International Journal of Transitional Justice*, Vol. 3, Issue 1: 5-27.

BELLAMY, A. and Williams, P. (2010). *Understanding Peacekeeping*. Cambridge: Polity Press, 2nd edition.

BHANDARI, C. (2014). Reflection on the Role of Grassroots actors (Track III) in post-conflict peacebuilding in *Centre for Economic and Technical Studies*. National Seminar on 'Strengthening Peace Process through Track II Approaches in Nepal'. 14-15 December, 2014.

BHANDARI, C. (2015). The Reintegration of Maoist Ex-Combatants in Nepal. *Economic & Political Weekly,* vol L, No. 9: 64.

BHANDARI, S. (2014). *Self-Determination & Constitution Making in Nepal: Constituent Assembly, Inclusion and Ethnic Federalism*. Singapore: Springer.

BOESENECKER, A., and VINJAMURI, L. (2011). Lost in Translation? Civil Society, Faith-Based Organizations and the Negotiation of International Norms. *International Journal of Transitional Justice*, Vol. 5, Issue 3: 345-65.

BORAINE, A. (2006). Truth and Reconciliation Commission in South Africa: The Price of Peace, in Elster, J. (ed) Retribution and Reparations in the Transition to Democracy, Cambridge: Cambridge University Press: 299-316.

BORDEN, R. (1976). Voting is Dishonest and Fraudulent. *The Sun* (Lowell, Massachusetts), 24 September 1976: 7.

BROWN, G. and STEWART, F. (2006). *The Implications of Horizontal Inequality for Aid*. Paper prepared for the UNU-WIDER Conference on Aid Helsinki, Finland, 16-17 June 2006.

BROWN, G. (2011). Nepal: First Steps Towards Redressing HIs?, in STEWART, F., VENUGOPAL, R and LANGER, A. (eds). *Horizontal Inequalities and Post-Conflict Development*. Palgrave Macmillan: 275-296.

BROWN, W. (2011). We Are All Democrats Now, in AGAMBEN, G. *et al* (eds). *Democracy in What State?* New York, NY: Columbia University Press: 44-57.

BUCKLEY-ZISTEL, S., KOLOMA, T., BRAUN, C., and MIETH, F. (eds) (2014). *Transitional Justice Theories.* Oxford: Routledge.

CALHOUN, N. (2004). *Dilemmas of Justice in Eastern Europe's Democratic Transitions*. Palgrave Macmillan.

CAMPBELL, C., AOLÁIN, F., and HARVEY, C. (2003). The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland. *The Modern Law Review*, Vol. 66, Issue 3: 317-345.

CAROTHERS, T. (1994). Democracy and Human Rights: Policy Allies or Rivals?. *The Washington Quarterly*, Vol. 17, Issue 3: 109-120.

CENTRE FOR LEGAL STUDIES (2016). Brief History of the Transitional Justice Process in Nepal. *NIRUPAN*, Issue 10, July 2016.

CHAUDHARY, K. (2016). *Laiza: Sometimes the End is Only a Beginning*. Chennai: Notion Press.

CLARK, P. (2008). Establishing a Conceptual Framework: Six Key Transitional Justice Themes, in CLARK, P. and KAUFMAN, Z. (eds). *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (Hurst Publishers, 2008): 191-205.

DEPARTMENT FOR INTERNATIONAL DEVELOPMENT (DFID) (2005). *Fighting Poverty to Build a Safer World*. London: DFID.

DOUGLASS, F. (1857). *West India Emancipation*, speech delivered at Canandaigua, New York on 4 August 1857 as compiled in FONER, P. (1950). *The Life and Writings of Frederick Douglass*. New York: International Publishers, Vol. 2: 437.

DU BOIS-PEDAIN, A. (2012). Post-Conflict Accountability and the Demands of Justice: Can Conditional Amnesties Take the Place of Criminal Prosecutions?, , in PALMER, N., CLARK, P. and GRANVILLE, D. (eds). *Critical Perspectives in Transitional Justice.* Cambridge: Intersentia: 459-484.

DUFFIELD, M. (2001). *Global Governance and the New Wars*. London: Zed Books

ELSER, J. (2004). *Closing the Books: Transitional Justice in Historical Perspective.* Cambridge: Cambridge University Press.

FINDLAY, M. and HENHAM, R. (2005) *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process.* Uffculme: Willan Publishing.

FRANKS, J. and RICHMOND, O. (2008). Coopting Liberal Peace-Building: Untying the Gordian Knot in Kosovo. *Cooperation and Conflict,* Vol. 43, No. 1: 81-103.

FRANZKI, H, and OLARTE, M. (2014). Understanding the political economy of transitional justice: A critical theory perspective, in BUCKLEY-ZISTEL, S., KOLOMA, T., BRAUN, C., and MIETH, F. (eds). *Transitional Justice Theories.* Oxford: Routledge: 201-221.

GALTUNG, J. (1969). Violence, Peace and Peace Research. *Journal of Peace Research*, Vol. 6, No. 3: 167-191.

GAUTAM, C. (2009). Rehabilitation and Integration of Maoist Combatants as Part of Nepal's Security Sector Transformation. Seminar on Prospects and Challenges of Integration and Rehabilitation of Maoist Combatants. *Nepal Institute of Policy Studies* (NIPS), Kathmandu

GILLS, B., ROCAMORA, J. and WILSON, R. (1993). Low Intensity Democracy, in GILLS B., ROCAMORA, J. and WILSON, R. (eds). Low Intensity Democracy: Political Power in the New World Order. London: Pluto Press: 3-34.

GRODSKY, B. (2008). Justice without Transition: Truth Commissions in the Context of Repressive Rule. *Human Rights Review*, Vol. 9, Issue 3: 281-297.

GRODSKY, B. (2010). *The Costs of Justice: How New Leaders Respond to Previous Rights Abuses*. Notre Dame, IN: University of Notre Dame Press.

HANSEN, T. (2011). Transitional Justice: Toward a Differentiated Theory. *Oregon Review of International Law*, Vol. 13, Issue 1: 1-46.

HANSEN, T. (2014) The vertical and horizontal expansion of transitional justice: Explanations and implications for a contested field, in BUCKLEY-ZISTEL, S., KOLOMA, T., BRAUN, C., and MIETH, F. (eds). *Transitional Justice Theories.* Oxford: Routledge: 105-124.

HAZAN, P. (2006). Measuring the Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional Justice. *International Review of the Red Cross*, Vol. 88, No. 861: 19-48.

HOFER, A. (1979). *The Caste Hierarchy and the State in Nepal: A Study of the Muluki Ain of 1854.* Innsbruck, Universitätsverlag Wagner.

HUMPHREYS, S. (2010). *Theatre of the Rule of Law. Transnational Legal Intervention in Theory and Practice*. Cambridge: Cambridge University Press.

HUNTINGTON, S. (1999). *The Third Wave: Democratization in the Late Twentieth Century*. Norman: University of Oklahoma Press.

INFORMAL SECTOR SERVICE CENTER (INSEC) (2017). *Human Rights Year Book 2017*. Kathmandu: INSEC.

INTERNATIONAL COMMISSION OF JURISTS (2012). *Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity*. Kathmandu: ICJ.

IONESCO, E. (1962). *Communication pour une réunion d'écrivains français et allemands.* Paris: Gallimard, as cited in ORDINE, N. (2013). *L'utilità dell'inutile*. Milano: Bompiani: 19 (my translation).

JEFFERY, R. (2014). *Amnesties, Accountability, and Human Rights*. Pennsylvania: University of Pennsylvania Press.

KOSKENNIEMI, M. (2001). *The Gentle Civilizer of Nation: The Rise and Fall of International Law: 1870-1960*. Cambridge: Cambridge University Press.

KRASTEV, I. (2005). Corruption, Anti-Corruption Sentiments, and the Rule of Law, in Adam CZARNOTA, A., KRYGIER, M. and SADURSKI, W. (eds). *Rethinking the Rule of Law after Communism*. Central European University Press: 323-340.

KURTENBACH, S. (2010). Why is Liberal Peace-Building so Difficult? Some Lessons from Central America. *European Review of Latin American and Caribbean Studies*, Vol. 88: 95-110.

LAPLANTE, J. (2008). Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework. *International Journal of Transitional Justice*, Vol.2, Issue 3: 331–355.

LETELIER, O. (1976). The Chicago Boys in Chile: Economic Freedom's Awfull Toll. *The Nation*, 28 August 1976. Retrieved from: http://www.ditext.com/letelier/chicago.html [Accessed 18 June 2017]

LINZ, J. and STEPAN, A. (1996). *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe*. Baltimore, MD: Johns Hopkins University Press.

LINZ, J. (1996). *La Quiebra de las Democracias*, Madrid: Alianza Editorial.

LOYLE, C. and DAVENPORT, C. (2016). Transitional Injustice: Subverting Justice in Transition and Postconflict Societies. *Journal of Human Rights*, Vol. 15, Issue 1: 126-149.

LUNDY, P. and McGOVERN, M. (2008) The Role of Community in Participatory Transitional Justice, in McEVOY, K. and MCGREGOR, L. (eds). *Transitional justice from below. Grassroots activism and the struggle for change*. Oxford: Hart: 99-120.

LUTZ, E. (2006). Transitional justice: Lessons learned and the road ahead, in ROHT-ARRIAZA, N. and MARIEZCURRENA, J. (eds). *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*. Cambridge: Cambridge University Press: 325-341.

MANI, R. (2002). *Beyond Retribution: Seeking Justice in the Shadows of War*. Malden, MA: Polity.

McADAMS, A. (ed) (1997). *Transitional Justice and the Rule of Law in New Democracies*. Notre Dame: University of Notre Dame Press.

MEYERSON, D. (2004). The Rule of Law and the Separation of Powers. Macquire Law Journal, Vol. 4: 1-6.

MILLER, Z. (2008). Effects of Invisibility: In Search of the "Economic" in Transitional Justice. *International Journal of Transitional Justice*, Vol. 2, No 3: 266-291.

MURSHED, M. and GATES, S. (2005). Spatial-Horizontal Inequality and the Maoist Insurgency in Nepal. *Review of Development Economics*, Vol. 9, Issue 1: 121-134.

MUTUA, M. (2011). A Critique of Rights in Transitional Justice: The African Experience, in AGUILAR, G. and GÓMEZ, F. *Rethinking Transitions: equality and social justice in societies emerging from conflict*. Cambridge: Intersentia, Series on Transitional Justice: 31-45.

MUTUA, M. (2014). The Transformation of Africa: A Critique of Rights in Transitional Justice, in BUCHANAN, R. and ZUMBANSEN, P (eds). *Law in Transition: Human Rights, Development and Transitional Justice*. Portland, OR: Hart Publishing, Osgoode readers: Chapter 5.

NAFTALI, P. (2016). La fabrique d'un "droit à la vérité" en droit international: des mobilisations convergentes pour des agendas divergents?. *Champ Pénal*, Vol. XIII.

NAGY, R. (2008). Transitional Justice as Global Project: critical reflections. *Third World Quaterly*, Vol. 29, No. 2: 275-289.

NESIAH, V. (2006) Discussion Lines on Gender and Transitional Justice. *Columbia Journal of Gender and Law*, (15): 799-812.

NINO, C. (1996). *Radical Evil on Trial*. New Haven, CT: Yale University Press.

O'DONNELL, G. and SCHMITTER, P. (1986). *Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracie*s. Baltimore, MD: The Johns Hopkins University Press.

OLSEN, T., PAYNE, L. and REITER, A. (2010). *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*. Washington D.C.: United States Institute of Peace Press.

OOMEN, B. (2005). Donor-Driven Justice and its Discontents: The Case of Rwanda. *Development and Change*, Vol. 35, Issue 5: 887-910.

PANDEY, N. (2010). *New Nepal: The Fault Lines*. New Delhi: Sage.

PANDEY, N. (2013). Conflicts in South Asia, 2011-12: The Case of Nepal, in CHANDRAN, D. and CHARI, P. (eds). *Armed Conflicts in South Asia 2012: Uneasy Stasis and Fragile Peace*. New Delhi: Routledge: 189-203.

RENNER J. (2012). A Discourse Theoretic Approach to Transitional Justice Ideals: Conceptualising 'Reconciliation' as an Empty Universal in Times of Political Transition, in PALMER, N., CLARK, P. and GRANVILLE, D. (eds). *Critical Perspectives in Transitional Justice.* Cambridge: Intersentia: 51-71.

ROBINS, S. (2011). Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Postconflict Nepal. *The International Journal of Transitional Justice*, Vol. 5: 75–98.

ROBINS, S. (2012). Transitional justice as an elite discourse: Human rights practice between the global and the local in post-conflict Nepal. *Critical Asian Studies*, Vol. 44, Issue 1: 3-30.

ROBINS, S. (2016). Transition but not Transformation: How Nepal's liberal peace fails its citizens, in NTTP. *Nepal Transition to Peace: A decade of the Comprehensive Peace Accord*. Kathmandu: NTTP/ USAID.

ROHT-ARRIAZA, N. (2005). *The Pinochet Effect: Transnational Justice in the Age of Human Rights*. Pennsylvania, PA: University of Pennsylvania Press.

ROHT-ARRIAZA, N. (2006), The new landscape of transitional justice, in ROHT-ARRIAZA, N. and MARIEZCURRENA, J. (eds). *Transitional Justice in the Twenty-FirstCentury: Beyond Truth versus Justice.* Cambridge: Cambridge University Press: 1-16.

SALVI, A. (2005). Ethnic inequality in Nepal: A regression-based analysis. *Unpublished manuscript*. Milan: Dipartimento di Economia Politica e Aziendale.

SARKIN, J. (1999). The necessity and challenges of establishing a truth and reconciliation commission in Rwanda. *Human Rights Quarterly*, Vol. 21, Issue 3: 767-823.

SHARMA, M. and TAMANG, S. (2016). *A Difficult Transition: The Nepal Papers*. New Delhi: Zubaan.

SHARMA, M. (2017). Transitional Justice in Nepal, in Thapa, D. and RAMSBOTHAM, A. Two Steps Forward, One Step Back: The Nepal Peace Process. *Conciliation Resources*, Accord, Issue 26: 32-36

SHARP, D. (2013). Interrogating the Peripheries; The Preoccupations of Fourth Generation Transitional Justice', Harvard Human Rights Journal, Vol. 26: 149-178.

SHKLAR, J. (1986). *Legalism: Law, morals, and political trials*. Cambridge: Harvard University Press.

SKÖLD, J. (2013). Historical Abuse - A Contemporary Issue: Compiling Inquiries into Abuse and Neglect of Children in Out-of-Home Care Worldwide. Journal of Scandinavian Studies in Criminology and Crime Prevention, Vol. 14, No S.1: 5-23.

SNYDER, J. and VINJAMURI, L. (2003) .Trials and errors: Principles and pragmatism in strategies of international justice. *International Security*, Vol. 28, Issue 3: 5-44.

SRIRAM, C. and PILLAR, S (eds) (2009). *Peace versus Justice? The Dilemma of Transitional Justice in Africa*, Scottsville: University of Kwazulu Natal Press.

SUBOTIĆ, J. (2014) Bargaining justice: A theory of transitional justice compliance, in BUCKLEY-ZISTEL, S., KOLOMA, T., BRAUN, C., and MIETH, F. (eds). *Transitional Justice Theories.* Oxford: Routledge: 127-143.

TEITEL, R. (2000). *Transitional Justice.* Oxford: Oxford University Press.

TEITEL, R. (2002). Humanity's Law. Rule of Law in the New Global Politics. *Cornell International Law Journal,* Vol. 35, Issue 2: 355-387

TEITEL, R. (2003). Transitional Justice Genealogy. *Harvard Human Rights Journal*, Vol. 16: 69-94.

TEITEL, R. (2005). The Law and Politics of Contemporary Transitional Justice. *Cornell International Law Journal*, Vol 38, Issue 3: 837-862.

TEITEL, R. (2014) *Globalizing Transitional Justice*. Oxford: Oxford University Press.

THAPA, D. (2003). *Understanding the Maoist Movement of Nepal.* Kathmandu: Martin Chautari.

THAPA, D. and SIJAPATI, B. (2003). *A Kingdom under Siege: Nepal's Maoist Insurgency, 1996-2003*. Kathmandu: Zed books.

THAPA, R. (2016). After the War: Transitional Justice in Nepal, in SHARMA, M. and TAMANG, S. (eds). *A Difficult Transition: The Nepal Papers*. New Delhi: Zubaan.

TYSON, T. (2004). *Blood Done Sign My Name.* Westminster, MD: Crown Publishing Group: 10.

TZIARRAS, Z. (2012). Liberal Peace and Peace-Building: Another Critique. *The Globalized World Post*, Research Paper, June 2012.

VERDEJA, E. (2008). A Critical Theory of Reparative Justice. *Constellations*, Vol. 15, Issue 2: 208-222.

VINJAMURI, L. and SNYDER, J. (2004). Advocacy and scholarship in the study of international war crimes tribunals and transitional justice. *Annual Review of Political Science*, Issue 7: 345-362.

WALDRON, J. (1993). *Liberal Rights. Collected papers 1981-1991*. Cambridge: Cambridge University Press.

WINTER, S. (2014). Transitional Justice in Established Democracies: A Political Theory. Hampshire: Palgrave Macmillan.

WORLD BANK (2005). *Toward a Conflict-Sensitive Poverty Reduction Strategy*. Washington DC: World Bank Publication.

WORLD BANK (2006). *Unequal Citizens: Gender, Caste and Ethnic Exclusion in Nepal.* Washington, DC: World Bank Publication.

WORLD BANK (2011). *The World Development Report 2011: Conflict, Security, and Development*. Washington, DC: World Bank Publication.

On-line sources

ACHARYA P. (2016). TRC urges govt to solve war-era cases. *The Himalayan Times*, 8 February 2016. Retrieved from: https://thehimalayantimes.com/nepal/trc-urges-govt-to-solve-war-era-cases/ [Accessed 20 May 2017]

ADHIKARI, P., (2017). Maina Sunar murder: Three army officials sent to jail for life. *The Himalayan Times*. Retrieved from: https://thehimalayantimes.com/nepal/maina-sunar-murder-three-army-officials-sent-jail-life [Accessed 3 July 2017]

ADVOCACY FORUM (2013). *Krishna Adhikari*. Retrieved from: http://advocacyforum.org/emblematic-cases/2013/09/krishna-adhikari.php [Accessed 2 July 2017]

ADVOCACY FORUM (2014a). *Conflict victims again moved to Supreme Court Against the TRC Act.* Retrieved from: http://advocacyforum.org/news/2014/06/conflict-victims-again-moved-to-supreme-court.php [Accessed 20 May 2017]

ADVOCACY FORUM (2014b). *Vetting In Nepal: Challenges and Issues*. Retrieved from: http://www.achrweb.org/reports/DPKO-Nepal.pdf [Accessed 3 July 2017]

ADVOCACY FORUM, TRIAL and REDRESS (2014). Paying Lip Service to Justice: The Newly Adopted TRC Act Breaches International Law and Flouts the Decision of the Supreme Court of Nepal. Retrieved from: http://www.redress.org/downloads/publications/1407trc-act-un-submission-af-trial-redress(june2014).pdf [Accessed 18 May 2017]

ALY, W. (2017). The Minefield. Podcast of 3 May 2017. Retrieved from: http://www.abc.net.au/radionational/programs/theminefield/can-human-rights-survive-without-an-account-of-human-duties/8489500 [Accessed 4 May 2017]

BBC NEWS (2007). *Nepal deadlock delays elections.* 5 October 2007. Retrieved from: http://news.bbc.co.uk/2/hi/south_asia/7029251.stm [Accessed 12 April 2017]

BBC NEWS (2016). *Nepal border blockade: Ethnic groups lift roadblocks.* 8 February 2016. Retrieved from: http://www.bbc.com/news/world-asia-35525018 [Accessed 26 June 2017]

CARRANZA. R. (2012). Relief, Reparations, and the Root Causes of Conflict in Nepal. *International Commission of Jurists*. Retrieved from: https://www.ictj.org/sites/default/files/ICTJ-Nepal-Reparations-2012-English.pdf [Accessed 20 June 2017]

FORUM-ASIA (2007). *Nepal: Formation of Commission on Disappeared Persons Likely to Institutionalise Impunity.* 4 July 2007. Retrieved from: https://www.forum-asia.org/?p=7183 [Accessed 15 May 2017]

HUMAN RIGHTS WATCH (2005). *Nepal: Security Forces 'Disappear' Hundreds of Civilians*. Retrieved from: http://pantheon.hrw.org/legacy/english/docs/2005/03/01/nepal10224.htm [Accessed 10 March 2017]

HUMAN RIGHTS WATCH (2006a). *Nepal: Time for King to Relinquish Power. Wave of Repression in Year Since Coup.* Retrieved from: https://www.hrw.org/legacy/english/docs/2006/02/01/nepal12588.htm [Accessed 15 April 2017]

HUMAN RIGHTS WATCH (2006b). *Nepal: Events of 2015*. Retrieved from: https://www.hrw.org/world-report/2016/country-chapters/nepal [Accessed 19 April 2017]

HUMAN RIGHTS WATCH (2008). *World Report: Nepal*. Retrieved from: https://www.hrw.org/world-report/2008/country-chapters/nepal [Accessed 15 May 2017]

HUMAN RIGHTS WATCH (2009). *Nepal: Hand Over Murder Suspect to Police.* 14 December 2009. Retrieved from: https://www.hrw.org/news/2009/12/14/nepal-hand-over-murder-suspect-police [Accessed 3 July 2017]

INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE (2015) Podcast interview. 19 August 2015. Retrieved from: https://www.ictj.org/multimedia/audio/nepal-transitional-justice-process-back [Accessed 19 June 2017]

JURIST (2014). *Nepal top court rejects amnesty legislation.* 4 January 2014. Retrieved from: http://www.jurist.org/paperchase/2014/01/nepal-top-court-rejects-amnesty-legislation.php [Accessed 17 May 2017]

KATHMANDU POST (2016). *From Guerrilla Caps to Blue Helmets*. 13 March 2016. Retrieved from: http://kathmandupost.ekantipur.com/printedition/news/2016-03-13/from-guerilla-caps-to-bluehelmets [Accessed 13 May 2017]

KATHMANDU POST (2017). *20 year jail for guilty of murder and disappearance*. 8 February 2017. Retrieved from: http://kathmandupost.ekantipur.com/printedition/news/2017-02-08/20-year-jail-for-guilty-of-murder-disappearance.html [Accessed 24 May 2017]

KENYA NATIONAL DIALOGUE AND RECONCILIATION (2008a). *Public statement of 1 February 2008*. Retrieved from: http://peacemaker.un.org/sites/peacemaker.un.org/files/KE_080101_Public%20Statement%20for%20security%20reform.pdf [Accessed 10 April 2017].

KENYA NATIONAL DIALOGUE AND RECONCILIATION (2008b). *Statement of Principles on long-term issues and solutions of 23 May 2008*. Retrieved from: http://peacemaker.un.org/sites/peacemaker.un.org/files/KE_080523_Kenya%20National%20Dialogue%20and%20Reconciliation%2C%20Statement%20of%20Principles%20on%20Long-term%20Issues%20and%20Solutions.pdf [Accessed 10 April 2017].

KING GYANENDRA (2006). Speech translated by the *BBC*. Retrieved from: http://news.bbc.co.uk/2/hi/south_asia/4940876.stm [Accessed 15 April 2017]

KUMAR, R. (2016). AG proposes new Special Court to try conflict era cases. *The Himalayan Times*, 17 October 2017. Retrieved from: https://thehimalayantimes.com/nepal/attorney-general-raman-kumar-shrestha-proposes-new-special-court-try-conflict-era-cases/ [Accessed 25 June 2017]

MYREPÚBLICA (2016a). *Oli, Dahal sign 9-pt deal*. 6 May 2016. Retrieved from: http://admin.myrepublica.com/politics/story/41802/oli-dahal-sign-9-pt-deal.html [Accessed 15 February 2017]

MYREPÚBLICA (2016b). *Bill to criminalize torture tabled.* 30 August 2016. Retrieved from: http://www.myrepublica.com/news/4721/ [Accessed 2 June 2017]

MYREPÚBLICA (2017a). *All three elections must be held before January 21, 2018: SC*. 23 February 2017. Retrieved from: http://www.myrepublica.com/news/15373/ [Accessed 2 March 2017]

MYREPÚBLICA (2017b). *Murder-convict Dhungel felicitated in Okhaldhunga*. 14 March 2017. Retrieved from: http://www.myrepublica.com/news/16390/ [Accessed 15 April 2017]

NEPAL ARMY (2017). *The Nepalese Army in UN Peace Support Operations*. Retrieved from: http://www.nepalarmy.mil.np/na_un.php [Accessed 24 April 2017]

NEPAL CAMPAIGN ON THE INTERNATIONAL CRIMINAL COURT (NCICC) (2012). *Ratification Process*. Retrieved from: http://www.ncicc.org.np/content.php?id=80&pagename=menu [Accessed 7 May 2017]

NEPALI TIMES (2013). *Justice interrupted*. 15 March 2013. Retrieved from: http://www.nepalitimes.com/blogs/thebrief/2013/03/15/justice-interrupted [Accessed 3 June 2017]

NEPALI TIMES (2017). CJ exposes PM. 11 June 2017. Retrieved from: http://nepalitimes.com/article/from-nepali-press/CJ-exposes-PM,3768 [Accessed 20 June 2017]

OHCHR (2012). *An OHCHR Analysis of the Nepal Ordinance on Investigation of Disappeared People, Truth and Reconciliation Commission, 2012*. Retrieved from: *http://www.ohchr.org/Documents/Press/Nepal_OHCHR_Analysis_TJ_Ordinance_Dec_2012.pdf* [Accessed 18 May 2017]

OHCHR (2017). *Moves to impeach Nepal Chief Justice an assault on human rights*. 5 May 2017. Retrieved from: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21586&LangID=E [Accessed 17 May 2017]

ONWARD NEPAL (2017). *Nepal Government's Assertive Response to UN Special Rapporteur*. 23 May 2017. Retrieved from: https://www.onwardnepal.com/current-affairs/nepal-response-un-special-rapporteu/ [Accessed 25 May 2017]

PATHAK, B. (2015). *Enforced Disappearance Commission: Truth, Justice and Reparation for Dignity.* Transcend Media Service. Available at: https://www.transcend.org/tms/2015/08/enforced-disappearance-commission-truth-justice-and-reparation-for-dignity/#_ednref103 [Accessed 20 May 2017]

POPE FRANCIS (2013). Interview given to *La Repubblica*. Retrieved from: http://www.repubblica.it/cultura/2013/10/01/news/pope_s_conversation_with_scalfari_english-67643118/ [Accessed 20 May 2017]

ROBINS, S. (2013). Toward Victim-centered Transitional Justice: Nepal and Timor Leste. *Middle East Institute.* 4 December 2013. Retrieved from: http://www.mei.edu/content/toward-victim-centered-transitional-justice-nepal-and-timor-leste [Accessed 30 April 2017]

SELIM, Y. (2014). The Opportunities and Challenges of Participation in Transitional Justice: Examples from Nepal. *Journal of International Development.* Retrieved from: http://onlinelibrary.wiley.com/store/10.1002/jid.3001/asset/jid3001.pdf?v=1&t=j50pkms0&s=964307b557f26ef9a96b0328ae392c216cd2e29c [Accessed 1 July 2017]

SETOPATI (2017). *SC moved against withdrawal of cases related to Tikapur lynching*. 21 May 2017. Retrieved from: http://setopati.net/politics/23106/SC-moved-against-withdrawal-of-cases-related-to-Tikapur-lynching/ [Accessed 25 May 2017]

SHARMA, G. (2014). Commission on Disappearance in Nepal: will it deliver? *International Commission of Jurists*, 2 September 2014. Retrieved from: https://www.icj.org/commission-on-disappearance-in-nepal-will-it-deliver/ [Accessed 30 May 2017]

STANFORD ENCYCLOPEDIA of PHILOSOPHY (SEP) (2016). *The Rule of Law*. 22 June 2016. Retrieved from: https://plato.stanford.edu/entries/rule-of-law/ [Accessed 3 April 2017]

THE HIMALAYAN TIMES (2016). *TRC directive finalised at last.* 7 July 2016. Retrieved from: https://thehimalayantimes.com/kathmandu/trc-directive-finalised-last/ [Accessed 26 May 2017]

THE HIMALAYAN TIMES (2017a). *Justice not possible without amendment.* 27 June 2017. Retrieved from: https://thehimalayantimes.com/kathmandu/justice-not-possible-without-amendment/ [Accessed 1 July 2017]

THE HIMALAYAN TIMES (2017b). *TRC, a hostage to chairperson's prolonged absence*. 2 April 2017. Retrieved from: https://thehimalayantimes.com/nepal/truth-and-reconciliation-commission-hostage-chairperson-surya-kiran-gurung-prolonged-absence/ [Accessed 5 June 2017]

UNITED NATIONS (2007). *Nepal: UN presses Government to follow Court judgment on disappearances*. Opinion of Richard Bennett, Representative of the OHCHR-Nepal. Retrieved from: http://www.un.org/apps/news/story.asp?NewsID=30976#.WVP_MhOGORs [Accessed 15 May 2017]

UNITED NATIONS CHILDREN FUND (2015). *Nepal: Serious shortage of essential supplies threatens millions of children this winter*. Retrieved from: https://www.unicef.org/media/media_86394.html [Accessed 17 April 2017]

UNITED NATIONS HUMAN RIGHTS COUNCIL (2015). Report of the Working Group on The Universal Periodic Review of Nepal. Thirty-first session. Retrieved from: https://documentsdds-ny.un.org/doc/UNDOC/GEN/G15/290/92/PDF/G1529092.pdf?OpenElement [Accessed 20 June 2017]

UNITED NATIONS MISSION IN NEPAL (UNMIN) (2011). Data obtained from their

habilitated webpage. Retrieved from: https://web.archive.org/web/20110102025102/http://www.unmin.org.np:80/?d=activities&p=arms [Accessed 17 April 2017]

UNITED NATIONS NEWS CENTER (2009). *UN and Nepal sign action plan for release of nearly 3,000 Maoist child soldiers*. Retrieved from: http://www.un.org/apps/news/story.asp?NewsID=33280#.WSvk0xN96Rs [Accessed 17 April 2017]

UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (2016). *Nepal: OHCHR position on UN support to the Commission on Investigation of Disappeared Persons and the Truth and Reconciliation Commission*. 16 February 2016. Retrieved from: http://www.ohchr.org/Documents/Countries/NP/Nepal_UN%20osition_supportTRC_COIDP_Feb2016.pdf [Accessed 20 June 2017]

UNITED NATIONS SECRETARY-GENERAL (2010). *United Nations Approach to Transitional Justice*. March 2010. Retrieved from: https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf [Accessed 20 April 2017]

UNITED NATION TREATY COLLECTION (2002-2005). List of derogations on the ICCPR communicated to the UN. Retrieved from: https://treaties.un.org/Pages/Declarations.aspx?index=Nepal&lang=_en&chapter=4&treaty=326 [Accessed 3 June 2017]

YOUSAFZAI, M. (2013). *Speech in occasion of the 2013 Harvard University's Humanitarian of the Year, Cambridge, 27 September 2013*. Retrieved from: http://www.bostonglobe.com/metro/2013/09/27/malala-yousafzai-pakistani-teen-shot-taliban-tells-harvard-audience-that-education-right-for-all/6cZBan0M4J3cAnmRZLfUmI/story.html [Accessed 21 May 2017]

Appendix 1 – List of interviewees

Commissioners

1. Mr. Shree Krishna Subedi, Commissioner of the Truth and Reconciliation Commission of Nepal (TRC). Interviewed on 26 May 2017 in his office at the headquarters of the TRC in Kathmandu.
2. Dr. Bishnu Pathak, Spokesperson and Commissioner of the Commission on Investigation of Enforced Disappeared Persons of Nepal (CIEDP). Interviewed on 28 May 2017 in his office at the headquarters of the CIEDP in Kathmandu.

National Human Rights Commission of Nepal

3. Mr. Anup Raj Sharma, Chairperson of the National Human Rights Commission and former Chief of Justice of the Supreme Court of Nepal. Interviewed on 26 May 2017 in his office at the NHRC in Kathmandu.
4. Ms. Mohna Ansari, Member of the National Human Rights Commission. Interviewed on 25 May 2017 in her office at the NHRC in Kathmandu.

International Governmental Organisation

5. Mr. Christopher Decker, Project Manager of the joint National Human Rights Commission Strategic Plan Support Project with the United Nations Development Programme in Nepal. Interviewed on 22 May 2017 in his office at the NHRC in Kathmandu.
6. Mr. Tek Tamata, Program Analyst for Access to Justice, Rule of Law and Human Rights at the United Nations Development Programme in Nepal. Interviewed on-line on 23 May 2017.

International NGOs

7. Ms. Laxmi Pokharel, National Legal Adviser at the South East Asia Office of the International Commission of Jurists. Interviewed on 23 May 17 in her office at the headquarters of the ICJ in Kathmandu.
8. Ms. Aileen Thomson, Head Office of the International Center for Transitional Justice in Nepal. Interviewed on 31 May 2017 at Summit Hotel in Kathmandu.
9. Mr. Saurav Shrestha, Head of Protection Programme of the International Committee of the Red Cross in Nepal. Interviewed on 1 June 2017 in his office at the headquarters of the ICRC in Kathmandu.

National NGOs

10. Ms. Shreejana Pokhrel, Executive Director at the International Institute for Human Rights, Environment and Development (INHURED International). Interviewed on 24 May 2017 in her office at the headquarters of INHURED in Kathmandu.
11. Mr. Indra Prasad Aryal, President of the Human Rights Organization Nepal. Interviewed on 25 May 2017 in his office at the headquarters of HURON in Kathmandu.

National experts

12. Dr. Prof. Tara Prasad Sapkota, Dean of the Faculty of Law at Tribhuvan University. Interviewed on 18 May 2017 in his office at the Faculty of Law of Tribuvhan University.
13. Prof. Geeta Pathak Sangroula, Program Coordinator and Convener of the Master of Human Rights and Democratisation (Asia Pacific Program) at the Kathmandu Law School. Interviewed on 19 May 2017 in her office at the Faculty of Law of Kathmandu Law School.

Others

14. Diplomat of the U.S. Embassy in Nepal. Interviewed on 22 June 2017.

Appendix 2 – Reparations: the Interim Relief Programme

Reparations are, according to Ernesto Verdeja, a set of policies that pursue to repair victims' "sense of dignity and moral worth and eliminate the social disparagement and economic marginalisation that accompanied their targeting, with the goal of returning their status as citizens" (Verdeja 2008: 208). Internationally, the UN considers that "states must ensure the complementarity of judicial reparations adjudicated by the courts and administrative reparation programmes" (UNGA, 2005).

In the aftermath of the conflict, the Ministry of Peace and Reconstruction was created and it started collecting data in order to corroborate who the real victims were. Shortly after, the GoN came up with the *Interim Relief Programme*, developed by the Nepal Peace Trust Fund, a branch of the MoPR.[65] This programme offers the following benefits (as stated in Carranza, 2012: 3):

1. NPR 100,000 Nepalese rupees (approximately US $1,400 in 2008) to the nearest beneficiary of those who were killed, or who were forcibly disappeared by parties to the conflict.
2. NPR 25,000 each to the widows of men who died or the wives of those who were forcibly disappeared during the conflict (in addition to the NPR 100,000 above).
3. "Scholarships" for children of persons killed, forcibly disappeared, or seriously disabled during the conflict.
4. Reimbursement of medical expenses or treatment at a government hospital for a specified level of disability or injury resulting from the conflict.
5. Skills development training for eligible conflict victims.
6. Compensation for persons and institutions whose real or personal property was lost or damaged during the conflict.

During this process, the ICRC raised awareness of these schemes and aid families to prove their conditions of victims: "for example, giving away an attestation of detention according to ICRC's data" (Saurav Shrestha, PC, 1 June 2017). Also, the ICRC played a crucial rule in lobbying for the amendment of the scheme in order to favour the rights of all widows. In the beginning, the IRP guidelines foresaw a grant of NPR 100,000 to the wives of the killed, while families of enforced

65 For a detailed explanation of the IRM, see: Ruben Carranza (2012). Relief, Reparations, and the Root Causes in Nepal. Available at: https://www.ictj.org/sites/default/files/ICTJ-Nepal-Reparations-2012-English.pdf

disappeared persons were only offered NPR 25,000. As a consequence of that policy, many families were registering their beloved disappeared as killed, only so they could have access to a higher pecuniary assistance. This provision was later amended by the government.

The process to obtain the IRP

A family willing to obtain the assistance of the IRP would have to fill out a form, proving their condition as victims and take it to their District Administration Office. This office will forward the form to the Local Peace Committee, which, in Nepal, is mostly comprised by members of various political parties (Bhandari, 2014: 14). The LPC is in charge of deciding whether the request is admissible or not. If decided that a given applicant is entitled to receive an interim relief, they will forward the case to the Chief District Officer, who will send it to the Ministry of Peace and Reconstruction. Within the MoPR, the Relief and Rehabilitation Unit will perform a verification process of the information received and may authorise the assistance to the applicants.

Given the big influence of LPCs in the process, there have been notorious cases of misuse of this mechanisms. As explained by Saurav Shrestha (PC, 1 June 2017), a member of the LPC would suggest to someone close to present a fake request and he/she would make sure that the LPC forwards it to the Chief District Officer. In case the arguments presented convince the Relief and Rehabilitation Unit of the MoPR, the sum would be split between the fake applicants and the member of the LPC.

Moreover, the programme follows a priority scheme in order to determine the legitimate person of the assistance. The first legitimate is the victim himself or herself; second is their married partner; third are the children of the victim which, in case of being underaged the grant is placed in a bank account accessible to them after turning 18); and lastly, the parents of the victim. According to Saurav Shrestha (PC, 1 June 2017), this prioritisation scheme has provoked clashes among families in therms of parents of the victims not acknowledging their daughter or son in law, nor their grandchildren in order to receive money. Given the lack of birth and marriage certificates, specially in the hilly areas of Nepal, there was no way for the partner or the children of the victim to proof their legal bond.

According to Jan Borgen, former Head Office of the ICTJ in Nepal, the IRP is “a very basic compensation, cash payment, which does not provide any kind of rehabilitation or reparation” (ICTJ,

2015). Actually, these packages are closer to be a charitable gesture than a right-based compensation. As stated by Kora Andrieu, "reparations without truth-telling or punitive measures could therefore be construed by victims as an attempt by the State to 'buy' their silence" (Andrieu, 2014:95). An example of this ill-practice is Morocco, where victims received some compensation from the state will perpetrators of violations of human rights were not hold accountable. It is only a matter of time to find out whether Nepal will follow a similar path or not.

Appendix 3 – Answer from the United Nations to the letter sent by Dr. Bishnu Patkak

United Nations Nations Unies
HEADQUARTERS • SIEGE NEW YORK, NY 10017
TEL.: 1 (212) 963.1189 • FAX: 1 (212) 963.1395

26 February 2016

Dear Dr. Pathak,

Thank you for your email of 3 February in which you highlight the difficulties that the two transitional justice commissions in Nepal are facing. The United Nations is an institution that was itself created out of conflict, with the respect for human rights as one of its core values. Over the past 70 years numerous human rights conventions and treaties have further elucidated human rights standards.

One area that has received great attention over the past 20 years has been the issue of transitional justice. The United Nations has worked with many countries in developing mechanisms to accompany the path from conflict/post conflict to sustainable peace and development. Nepal is one case in point where both UNMIN and OHCHR Office worked closely with national and international stakeholders to support the country's peace process. The guiding principal of such support was national ownership and adherence to UN core values.

Your 3 February email refers to the Nepal Supreme Court decision of 26 February 2015, which ruled in favour of 234 conflict victims by upholding the primary role of the Courts in delivering justice for criminal acts committed during the conflict, and rendered any provisions of the Act that serve to compromise this role as invalid. However, no subsequent legislative or administrative actions have been taken to reflect this decision in the enabling law or procedures of the Commissions.

As you may recall, the United Nations had welcomed the Supreme Court decision, and the UN system will continue to encourage the Government of Nepal to undertake the necessary steps to enable a closer engagement with the Commissions (please see attached the February 2016 position paper by OHCHR).

Dr. Bishnu Pathak
Commissioner and Spokesperson
Commission of Investigation on Enforced Disappeared Persons Nepal
Lalitpur

On a separate but related issue, we are greatly concerned about the recent misinformation in the media that misrepresents UN's position and carries reputational risks. On 2 and 7 February, The Himalayan Times quoted you and members of the two Commissions stating that the United Nations may intend to "take over" the transitional justice process via an international tribunal. As you are aware, such scenario would only be possible at the request of the Government or if the Security Council authorize such action under Chapter VII of the UN Charter.

We would like to thank you and the Commission for your leadership and the commitment to propagate transition justice in Nepal. The United Nations looks forward to the day that an enabling environment will be in place for closer cooperation with the COIED and the TRC.

Nicholas Rosellini
Deputy Regional Director
for Asia & the Pacific
Director of Bangkok Regional Hub
United Nations Development Programme

Subinay Nandy
Chief
Asia and the Pacific Division
Department of Political Affairs