The Complexities of Delivering Justice and Truth Simultaneously in Transitional Justice Processes with a Special Focus on Nepal

Thesis by

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Abstract

This thesis investigates the complexities of delivering truth and justice simultaneously in countries undergoing transitions. It argues that designing truth and justice mechanisms as part of a holistic TJ system offers an opportunity for truth and justice to incentivise each other and alleviate some of the challenges and complexities their simultaneous existence creates.

The TJ landscape has changed significantly in recent years, embracing a holistic notion entailing the systematic coexistence of its four main components: truth, justice, reparation and guarantee of non-recurrence. However, a gap exists in literature explaining how those different components work as a system, how they coexist, complement each other, and how to address the complexities and tensions they create, and how to overcome them in practice.

To fill this gap, this thesis starts by analysing the development and normative content of the obligation to investigate, prosecute and punish gross violations of human rights and international crimes as well as the right to know the truth. It then turns to existing experiences including Sierra Leone, Argentina, South Korea and Colombia. The thesis gives particular attention to Nepal, where a struggle to deliver truth and justice as part of its TJ process has continued for more than a decade resulting in the enactment of a legal framework, providing some prospects for both truth and justice to co-exist. The thesis identifies what needs to be done to design truth and justice as part of holistic TJ system, how they provide incentives to each other when they are designed as part of a holistic system.

This thesis fills a gap in TJ literature and provides reflections that are of relevance to Nepal and other countries, such as Colombia, that are immersed in holistic transitional justice processes.

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Chapter 1

Introduction

1.1. Background

This thesis investigates the complexities of simultaneously delivering truth and justice in countries undergoing transition, focusing on the experience of Nepal. It also explores how some of the associated complexities could be addressed to make both truth and justice possible on the ground.

Although scholars debate about the meaning and origin of transitional justice (TJ),[1] it is widely argued that TJ as understood today was conceptualised as a justice measure beyond criminal justice, considering the accountability dilemmas faced by countries undergoing democratic transition (mostly in Latin America) in the late 1980s - early 1990s.[2] As many of these transitions were hinged upon amnesty and remained fragile in pursuing prosecution, truth was considered to be the best alternative. As many atrocities by authoritarian regimes were committed in secrecy and denial, truth about what happened, who were responsible and how the institutions involved worked were found to be helpful not only to provide a sense of justice to victims but also to give legitimacy to a transition to liberal democracy.[3] Recognising the difficulties those countries

[1] Ruti G Teitel, 'Transitional Justice Genealogy' (2003) 16 Harv Hum Rts J 69-70; Jon Elster, 'Coming to the Terms with the Past: A Framework for the Study of Justice in the Transition to Democracy' (1998) 39(1) European Journal of Sociology 7, 21; Eric A Posner and Adrian Vermeule, 'Transitional Justice as Ordinary Justice' (2004) 117(3) Harvard Law Review 761, 768.

[2] Ruti G Teitel, *Transitional Justice* (OUP 2000) 31, 39-40; Teitel 'Transitional Justice Genealogy' (n 1) 70; Elster (n 1) 21; Paige Arthur, 'How Transitions Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31(2) Hum Rts Q 321, 324.

[3] Aryeh Neier, 'What Should be Done About the Guilty?' in Neil J Kritz (ed), *Transitional Justice. How Emerging Democracies Reckon with Former Regimes. Volume I. General*

undergoing transition faced, it was argued that justice in transition is alternatively constructed and 'ordinary intuitions and predicts' about law simply do not apply in such contexts.[4]

Although conceptualised in the context of democratic transition, by the 1990s, the use of TJ could no longer be limited to those contexts as countries undergoing transition from conflict to peace (such as Guatemala, El Salvador and Haiti) also found it difficult to pursue prosecution. These difficulties arose not only because of amnesty provisions included in peace agreements but also other factors (such as competing interests at stake, volume of cases, capacity and resources), making TJ equally important in such contexts. Because of this historical context, truth and justice were considered to be mutually exclusive concepts, one having a restorative goal while the other retributive, and overall TJ as a discipline at that stage was inclined to embrace restorative justice,[5] resulting in novel dilemmas, known as *truth v justice, peace v justice.*[6]

However, the TJ landscape has changed in recent years, with international law having moved to require States to investigate, prosecute and punish international crimes, gross violations of human rights, and serious violations of humanitarian law.[7] Blanket amnesties, which were widely used in the context of transition and accepted some years back, are now condemned for promoting

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Considerations (United States Institute of Peace Press 1995) 180; Juan E Méndez, 'The Human Right to Truth: Lessons Learned from Latin American Experiences with Truth Telling in Tristan Anne Borer (ed) *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies* (Notre Dame Press 2006) 120, 142; Lawrence Weschler, 'A Miracle, A Universe: Settling Accounts with Torturers' in Neil J Kritz (ed), *Transitional Justice. How Emerging Democracies Reckon with Former Regimes. Volume I. General Considerations* (United States Institute of Peace Press 1995) 492.

[4] Teitel 'Transitional Justice' (n 2) 70.

[5] Martha Minow, 'Facing History' in Martha Minow (ed), *Between vengeance and forgiveness* (Beacon Press 1998) 91.

[6] Chandra Lekha Sriram, *Confronting Past Human Rights Violations. Justice vs Peace in Times of Transition* (Frank Cass 2004) 2.

[7] See ch 2.

impunity and violating victims' rights to effective remedies. They are found to be impermissible in those categories of violations where States are duty-bound to prosecute.[8] Truth that was found to be the best alternative where prosecution was found to be difficult is now recognised as an equally important component of TJ and a victim's right.[9] Continuous struggle of victims and civil society challenging impunity has contributed not only to the consolidation of victims' right to effective remedies but also the emergence of the notion of universal jurisdiction (UJ). The use of UJ to prosecute those involved in past serious human rights violations, prosecution through the adoption of ad hoc international tribunals and the establishment of the International Criminal Court (ICC) to prosecute individuals who have committed international crimes, have further contributed to changing landscape of TJ.[10]

These developments at international level impact the design of TJ processes at national level, as victims and civil society organisations increasingly rely on international jurisprudence seeking both truth and justice.[11] National courts have started to embrace these changes, recognising victims' right to effective remedies, requiring gross violations of human rights to be investigated and prosecuted irrespective of the contexts.[12]

However, countries in transition continue to face different practical challenges as transitions often involve mass atrocities with large numbers of victims and perpetrators, requiring State to balance different interests at stake and making prosecution practically not possible for all violations where States are under an obligation to prosecute. Thus, the normative requirements on the one

[8] See ch 2, s 2.4.5.
[9] See ch 3, s 3.4.
[10] See ch 2, s 2.6.
[11] See ch 4, s 4.3.2; ch 5, s 5.3.2.
[12] See ch 4, s 4.3.2; ch 5, s 3.2.

hand and practical realities on the other have forced TJ to embrace a holistic approach, requiring different and complementary measures including truth, justice, reparation and guarantee of non-recurrence.[13]

While providing a framework for a holistic approach to TJ, the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantee of Non-recurrence Pablo de Greiff argues that these four mechanisms of TJ aim to achieve two immediate goals (recognition and trust) and two longer-term goals (reconciliation and rule of law).[14] As countries in transition often need to deal with thousands of victims and perpetrators involved in a myriad of violations, having any one of these mechanism would fall short.[15] He argues different TJ mechanisms need to be conceived, designed and implemented considering their interdependence and interconnectedness.[16]

The interconnectedness of various mechanisms of TJ is also reinforced by the UN Secretary-General, stating that '[e]effective transitional justice programmes utilise coherent and comprehensive approaches that integrate the full range of judicial and non-judicial process and measures, including prosecution initiatives, truth-seeking, reparation programmes, institutional

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[13] UNGA, Human Rights Council, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation, and Guarantee of Non-recurrence, Pablo de Greiff' (9 August 2012) UN Doc A/HRC/21/46; Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century. Beyond Truth versus Justice* (CUP 2006) 2; Clara Sandoval Villalba, 'Transitional Justice: Key Concepts, Processes and Challenges' (Briefing Paper 07/11, ISCR 2011) 11 <http://repository.essex.ac.uk/4482/1/07_11.pdf> accessed 20 May 2018; Phil Clark, 'Hybridity, Holism and Traditional Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda' (2007) 39(4) Geo Wash Intl L Rev 765.
[14] UNGA (n 13) paras 29-44.
[15] ibid, paras 23-24.
[16] ibid.

reform including vetting processes, or an appropriately conceived combination thereof.'[17] Phil Clark argues that only a holistic approach to TJ caters to the 'various physical, psychological, and psychosocial needs of individuals and groups during, as well as after conflict' as it provides multiple political, social and legal institutions, operating concurrently in a system maximising the capabilities of each.[18] Scholarly research has also shown the impact of these different TJ mechanisms deployed in combination having a higher chance to contribute to the consolidation of democracy and restoring peace than when they are deployed in isolation.[19]

However, the holistic approach to TJ that advocates for a set of goals and mechanisms has also been criticised for not recognising different preconditions that exist in countries undergoing transition, impacting the design of these mechanisms.[20] It is also criticised for focusing on violations related to civil and political rights, ignoring violations of social and economic rights, which remain as root causes for conflicts in many countries.[21]

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[17] UN 'Guidance Note of the Secretary-General. United Nations Approach to Transitional Justice' (March 2010) guiding principle 8.

[18] Phil Clark, 'Hybridity, Holism and Traditional Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda' (2007) 39(4) Geo Wash Intl L Rev 765.

[19] For further discussions, see Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies. The Impact on Human Rights and Democracy* (Routledge 2009) 20-21; Tricia D Olsen, Leigh A Payne and Andrew G Reiter, *Transitional Justice in Balance. Comparing Processes, Weighing Efficacy* (United States Institute of Peace Press 2010); Tricia D Olsen and others, 'When Truth Commissions Improve Human Rights' (2010) 4(3) IJTJ 980, 996; Geoff Dancy and Eric Wiebelhaus-Brahm, 'Timing, Sequencing, and Transitional Justice Impact: A Quantitative Comparative Analysis of Latin America' (2015) 16 Human Rts Rev 321.

[20] Lars Waldorf, 'Institutional Gardening in Unsettled Times: Transitional Justice and Institutional Contexts' in Roger Duthie and Paul Seils, *Justice Mosaics. How Context Shapes Transitional Justice in Fractured Societies* (ICTJ 2017) 63; For more discussion, see Roger Duthie, 'Introduction' in Roger Duthie and Paul Seils, *Justice Mosaics. How Context Shapes Transitional Justice in Fractured Societies* (ICTJ 2017) 12-28.

[21] Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8(3) IJTJ 345; Rama Mani, *Beyond Retribution. Seeking Justice in the Shadows of War* (Polity 2002) 17.

Paul Gready and Simon Robins argue for a need to have a shift in the approach to TJ, calling for a more 'transformative' approach that focuses on changing power relations in countries in transition.[22] They argue that the current holistic approach is 'top down' as it focuses on law and legal institutions and a set of goals and outcomes,[23] without providing any guidance as to how the decision for the selection, prioritization or sequencing of mechanisms in the context of finite resources and delicate political dynamics are to be made.[24]

Whether TJ, inherently a temporary approach is well suited to address economic and social power relations continues to be debated.[25] While making different claims, it is also important to note countries in transition continue to face challenges in designing TJ mechanisms on the ground even to address gross violations of human rights and humanitarian law, let alone structural violence.There is a gap in the literature and in practice showing what a transformative or holistic approach looks like on the ground. This gap exists not only at a practical level but also in academic literature. Although Pablo de Greiff has been consistently articulating the need for a holistic approach to TJ, also presenting a theoretical grounding for it,[26] no academic research could be found explaining how these different TJ mechanisms coexist, how they complement each other, the tensions and synergies this creates and how to overcome them. The Colombian Peace Accord has envisioned a TJ process holistically, but it started to work only at the time of

[22] Gready and Robins (n 21) 340-341.
[23] ibid.
[24] ibid 342, 345.
[25] Lars Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs' (2012) 21(2) Socio & Legal Studies 171; Clara Sandoval Villalba, 'Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change in Times of Transition' in Roger Duthie and Paul Seils, *Justice Mosaics. How Context Shapes Transitional Justice in Fractured Societies* (ICTJ 2017) 191.
[26] Pablo de Greiff, 'A Normative Conception of Transitional Justice' (2010) 50(3) Politorbis 17-30; Pablo de Greiff, 'Theorizing Transitional Justice' in Melissa S Williams, Rosemary Nagy and Jon Elster (eds), *Transitional Justice* (New York University Press 2012) 37; UNGA (n 13).

this research and its lessons were yet to be drawn. Although a wider research gap exists on how different components of TJ coexist, interact, influence, complement each other when they coexist as a holistic TJ system and how they transform social relations, the scope of this research is limited to the study of the coexistence of truth and prosecution. This focus is chosen considering the dilemma that Nepal has been facing in designing TJ process where both truth and justice coexist as TJ mechanisms.

For example, Nepal, where I worked as a human rights activist for many years, saw the possibility of a TJ process when the 10-year-long (1996-2006) internal armed conflict ended with the signing of a Comprehensive Peace Agreement (CPA). The CPA promised not only to protect and promote human rights but also to address impunity and to establish a Truth and Reconciliation Commission (TRC) to address the legacies of the past. However, the country continues to struggle to find an acceptable framework even after nearly a decade and a half of the CPA.

Victims and civil society organisations continue to advocate for a TJ process that is different from those previously practiced in Nepal, where a commission of inquiry will normally be established by the executive branch of the State, making ex-gratia monetary payments to victims but having no contribution to justice and guarantees of non-occurrence.[27] They argue such an approach has helped to entrench impunity and weaken the rule of law in the country and calling for a Truth Commission, under an Act of Parliament that sets out its mandate, powers and assurance of implementation of its recommendations, stating that Commissions established in the

[27] See ch 5, s 5.3.

past under the COIA in Nepal were not independent and could not deliver truth, justice and reparation to victims.[28]

The attempts of the Government to include granting amnesty as part of the mandate of the TRC have also been legally challenged.[29] Victims and civil society organisations have filed a number of petitions seeking investigation and prosecution in conflict-related cases,[30] demanding compensation and reparation,[31] vetting and institutional reforms,[32] and calling for a more consultative law-making process.[33] Embracing the jurisprudence developed at international level, Nepal's Supreme Court has also made a number of decisions requiring the State to deploy different mechanisms of TJ to address the legacies of past human rights violations.[34] The Court has also required such Commission to be established by a law developed through a consultative process, ensuring its independence, embracing best practices.[35]

Challenging the failure of the State to provide effective remedies to victims, a number of petitions have also been filed before the Human Rights Committee (HRC) of the United Nations

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[28] Ibid.
[29] See ch 5, s 5.4.2.2.
[30] See ch 5, s. 5.3.2.
[31] *Liladhar Bhandari v Office of the Prime Minister and Council of Ministers et al* (2009) Issue No 9 Decision No 8012 Ne Ka Pa 2065 [2009] 1086.
[32] *Sunil Ranjan Singh et al v Office of the Prime Minister and Council of Ministers and Others* (2013) Issue 12 Decision No 8933 Ne Ka Pa 2069 [2013] 1826.
[33] *Madhav Kumar Basnet et al v Office of the Prime Minister and Others* (2014) Issue No 9 Decision No 9051 Ne Ka Pa 2070 [2014] 1101.
[34] *Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal v Government of Nepal, Ministry of Home Affairs and Others (2007)* Issue No 2 Decision No 7817 Ne Ka Pa 2064 [2007] 169.
[35] *Suman Adhikari et al v Office of the Prime Minister and Council of Ministers and Others* (2015) Issue 12 Decision No. 9303 Ne Ka Pa 2071 [2015] 2069.

(UN),[36] where the HRC has found Nepal violating its treaty obligations and has recommended Nepal to ensure victims' right to truth and effective remedy, including through investigation and prosecution of perpetrators.[37] It has also recommended amending laws and policies that are putting barriers to victims' rights to effective remedies.[38]

The use of Universal Jurisdiction (UJ) to arrest a serving Colonel of Nepal Army by the UK in 2013 for his alleged involvement in torture during the armed conflict has exposed the political actors to the long arms of international justice, making them feel vulnerable to international justice. All these factors have contributed to make political parties in Nepal agree to the establishment of the TRC under the TRC Act, passed by the parliament.

The TRC Act was passed in early 2014, and the TRC was established under it in early 2015. The TRC Act mandated the TRC to establish the truth and also to contribute to prosecution, while also providing discretionary powers to the TRC to recommend amnesty where it does not recommend prosecution.[39] The unique feature of the Act is that it empowers the TRC with a mandate to work as the sole investigatory arm of prosecution and the TRC to enjoy powers

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[36] (real right) *Sharma v Nepal* Communication No 1469/2006, UN Doc CCPR/C/94/D/1469/2006 (HRC, 28 October 2008) <https://realrightsnow.org/en/surya-prasad-sharma/> accessed 8 May 2020; *Chaulagain v Nepal* Communication No 2018/2010, UN Doc CCPR/C/112/D/2018/2010 (HRC, 28 October 2014) <https://realrightsnow.org/en/subhadra-chaulagain/> accessed 8 May 2020; *Sedhai v Nepal* Committee Communication No 1865/2009, UN Doc CCPR/C/108/D/1865/2009 (HRC, 19 July 2013) <Mukunda Sedhai – Real Rights Now> accessed 8 May 2020.

[37] See ch 6 s 1.1..

[38] Ibid.

[39] "..the Commission shall not make recommendation for action against the following perpetrators:.. (b) Who were recommended for amnesty pursuant to Section 26." Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2014 (TRC Act), s 25 (2)(b).

equivalent to a Court in the investigation of gross violations.[40] The Act also States that a Special Court will be established to try those recommended for prosecution by the TRC.[41]

This research started soon after the TRC was established with this unique mandate of working as the investigatory arm of prosecution. The aim was to assess how the TRC delivers both truth and contributes to justice as it was unique to Nepal and not tested in other TJ contexts. It also aimed to critically examine how these two mechanisms, traditionally conceived as mutually exclusive processes would work in tandem, complementing each other in practice in the context of a negotiated political transition where those involved in past human rights violations continue to remain in power.

However, despite having such unique powers and mandates, apart from registering more than 60,000 complaints submitted by victims, the TRC has failed to deliver on its mandate. Over a four-year period (its two-year mandate were extended twice, each time by a year), the TRC could neither uncover any truth nor recommend any prosecution.

This failure of the TRC was compounded by a number of factors, particularly the nature of the transition and how that impacted the balance of power in national politics and the legitimacy of the TRC. As the conflict ended in negotiations, all major parties (except the King) who had been involved in the conflict and had an interest to avoid both truth and justice, emerged as powerful

[40] Ibid s 14(1).
[41] Ibid s 29(4).

political actors in post-conflict Nepal. Thus, there was no genuine political will to let the TRC succeed in establishing the truth and contributing to any prosecutions.[42]

Legitimacy of the TRC was also questioned as the victims challenged a number of sections of the TRC Act including the one related to amnesty even for those involved in gross violations, demanding amendments to such provision.[43] The Supreme Court subsequently ruled in the victims' favour, requiring the Government to amend the TRC Act including the provision of amnesty.[44] Civil society and the UN decided not to engage with the TRC pending the amendment of the TRC Act as per the decision of the Supreme Court.[45]

Having both truth and justice coexist, particularly in the context of a negotiated transition is difficult as negotiated transitions result in diffuse of powers among the parties, including among those responsible for past atrocities, resulting in either both sides having interests to avoid prosecution or in one side being more willing to pursue prosecution, but lacking sufficient power to push for prosecution against the other.[46] In such context, a Truth Commission has been agreed

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[42] See ch 5, s 5.4.1.
[43] See ch 5, s 5.4.2.
[44] See ch 5, s 5.3.2.
[45] Accountability Watch Committee, 'Position of AWC Regarding the Appointment of the Members of Truth and Reconciliation Commission and the Commission of Investigation on Enforced Disappeared Persons' (Press Statement, 19 January 2020) <http://www.advocacyforum.org/downloads/pdf/press-statement/2020/awc-press-statement-on-recommendatio-of-officials-19-January-2020-english-version.pdf> accessed 28 July 2020; Conflict Victims' Common Platform, 'Advancing Transitional Justice Process without amending the Act, or completely disregarding victims' concerns will not give a sustainable solution. Rather than ensuring victims dignity and their rights to truth, justice, and reparation, these type of controlled and imposed process is merely the waste of time and abuse of the State's resources' (Press Statement, 13 February 2020); OHCHR, 'Nepal: OHCHR position on UN support to the Commission on Investigation of Disappeared Persons and the Truth and Reconciliation Commission: 16 February 2016' (2016).
[46] Alexander Dukalskis, 'Interaction in Transition: How Truth Commission and Trials Complement or Constrain Each Other' (2011) 13(3) International Studies Review 432.

as a compromised outcome as parties see a TRC as a non-binding mechanism helping them to defuse pressures for accountability.[47]

Scholars also highlight different TJ mechanisms having different contextual and institutional preconditions and argue for sequencing of different TJ mechanisms, especially truth and justice.[48] In such context, TJ processes could be started by legitimate amnesties or Truth Commissions that have fewer conditions which could gradually pave the ground and create conditions for other mechanisms such as prosecution to come.[49] Experiences of more than 40 countries where TJ measures have been established to address the legacies of past human rights violations in recent decades,[50] expose different experiences with regard to the types of TJ mechanisms and the order in which they were created. In the majority of countries, mechanisms have been established in different sequence.[51] Only in very few countries truth and justice mechanisms were established to work simultaneously as TJ mechanisms, yet exposing different challenges and dilemmas.[52]

These experiences of countries where TJ mechanisms have come in different sequence and the developments in international law and how that has empowered victims and civil society on the ground to demand holistic responses seem to provide different grounds for negotiating TJ processes today. For example, in Nepal, despite all those challenges, the prospect for developing a TJ process with coexisting different mechanisms continues to exist. Victims and civil society

[47] Dancy and Wiebelhaus-Brahm (n 19) 321.
[48] Waldorf (n 20) 61.
[49] Dancy and Wiebelhaus-Brahm (n 19) 340–41; Guillermo O'Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule. Tentative Conclusions about Uncertain Democracies* (The Johns Hopkins University Press 1986) 39.
[50] Priscilla B Heyner, *Unspeakable Truths. Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2010) 256.
[51] See ch 4, s 4.4.
[52] See ch 4, s 4.5.

continue to put pressure demanding a holistic TJ process. Court rulings also provide strong grounds for it. The Government of Nepal continues to pledge both nationally and internationally that it will reinvigorate the TJ process considering Nepal's international obligation, the decisions of the Supreme Court and the context of conflict and its transition in Nepal.[53]

Consequently, in mid-2018, the Government of Nepal presented a draft Bill to amend the TRC Act. Although the proposal of sequencing TJ mechanisms was also floated for discussion, the Government drafted the Bill proposing a holistic approach to TJ where different mechanisms of TJ could coexist with the provision of incentives of leniency in sentences for truth, justice, reparation and guarantees of non-recurrence.[54]

Although the draft Bill has received wider criticisms for its failure to adopt a consultative process and not articulating clearly how such a scheme of leniency in sentencing could contribute to truth and justice in real term, it nevertheless provides prospects for reinvigoration of the TJ process in Nepal where both truth and justice coexist as part of a holistic TJ process.

Although TJ has been a most vibrant subject, drawing extensive literature and scholarship, very little has been researched, written and known about Nepal's ongoing TJ process. The little that has been written has been written by western researchers, missing nuances and lived experiences. Thus this thesis aims to fill that gap to some extent by analysing factors that contributed to the design of the TJ process in Nepal which envisions both truth and justice to work in tandem, why it failed to deliver its mandate to date, by unpacking the complexities in implementing truth and

[53] See ch 4, s 4.5.1.
[54] See ch 6, s 6.2.

justice simultaneously in such a negotiated transition. The research further aims to contribute to the thinking and design of TJ processes in Nepal and beyond where truth and prosecution mechanisms coexist, complementing each other as part of a holistic TJ system while also addressing some of the tensions and challenges that countries in transition face.

1.2. Research questions

With the aim of contributing to the design of TJ process in Nepal and beyond, where truth and justice mechanisms could be established as coexisting, the thesis undertakes to research the following four research questions:

1. Why are States undergoing processes of TJ, designing TJ processes where TRC and prosecution mechanisms co-exist?
2. What can we learn from experiences to date on coexistence of truth and justice mechanisms?
3. What tensions and challenges does such coexistence create?
4. Could these tensions and challenges be addressed in the future? And if so, how?

The first research question marks the contours of chapters 2 and 3 of this thesis. Critically analysing the developments in the field of International Human Rights Law (IHRL), International Humanitarian Law (IHL) and International Criminal Law (ICL) (which will be presented in chapter 2) and the literature in the field of TJ (which will be presented in chapter 3), the first research question tries to find out why countries undergoing transition in recent years are developing TJ processes considering coexisting truth and justice mechanisms.

The important composite human rights treaties, both at the global and regional level, such as the International Covenant on Civil and Political Rights (ICCPR), the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) and the American Convention on Human Rights (American Convention), do not explicitly include a duty to prosecute. However, supervisory bodies (hereafter, human rights bodies) established under these composite treaties to oversee the compliance and observance of the treaty, have articulated States' duty to investigate, prosecute and punish certain categories of violations.

The research will analyse the work of these human rights bodies to understand how they have interpreted States' duty to prosecute in relation to violations of certain rights enumerated in the composite human rights treaties. It will further analyse the work of the treaty bodies to understand what investigation and prosecution really entail. As amnesty has played important roles in many transitions, the thesis will further dwell on how developments in IHRL limit the scope of amnesty.

Furthermore, many countries where a TJ process is underway, including Nepal, involve contexts of internal armed conflict. As the Geneva Conventions also do not explicitly mention the duty of States to prosecute crimes conducted in the context of non-international armed conflict, the research briefly studies States' obligations to prosecute certain conducts committed in the context of non-international armed conflict and how that understanding has evolved. It will consider the range of violations (involving both violations of IHRL and violations of IHL) codified in the ICC Statute, requiring States to investigate and prosecute.

Why countries undergoing transitions are designing truth and justice to coexist will be further investigated by analysing how the understanding of TJ is expanding from its traditional origins. By critically reviewing the early literature where TJ was argued to be a distinct form of justice, allowing measures beyond criminal justice, the research will analyse how that understanding of TJ is changing to a holistic approach entailing both truth and prosecution mechanisms.

The second research question about what experiences to-date exist on coexistence of truth and justice mechanisms will delve into learning from experiences of countries where truth and justice mechanisms coexisted, making the contours of chapters 4. As many scholars give examples of Latin America, where the prosecution was found to be difficult in the beginning of transitions, resulting in sequencing of TJ mechanisms (having the Truth Commission first, prosecution later),[55] experiences of Argentina, where a Truth Commission was established first and prosecution followed later will be examined as the first case in hand. Factors that influenced this sequencing and learning it offers will be analysed. South Korea is one of the rare countries where prosecution came first in sequence before the Truth Commission. Its experience will also be analysed to understand the conditions that led to such sequencing, how truth and prosecution mechanisms interacted in such sequencing and the learning it offers.

Experiences of countries having truth and justice mechanisms in tandem will be examined by studying the experience of Sierra Leone. Very few other countries apart from Timor Leste and Sierra Leone have had truth and justice mechanisms working simultaneously as TJ mechanisms. As the transition in Timor Leste was related to its transition from Indonesian occupation to an independent State, where most of the atrocities were committed by the Indonesian army that had

[55] See ch 4.

already left Timor Leste and the TJ process was designed and implemented when the country was under total administrative control of the UN (a context which is different from the majority of contexts where TJ mechanisms are currently discussed), the research will seek to learn from the experience of Sierra Leone.

Although Colombia has also designed a TJ system, where both truth and justice coexist (as well as other TJ mechanisms), complementing each-other, the mechanisms have only began their work. When this research started, the peace agreement, containing a holistic system of TJ, was still being negotiated and it could not yet offer any lessons. As the focus of the thesis is on Nepal, the Colombian case will only be considered from the point of view of the incentives it has established to try and trigger a harmonic co-existence of truth and justice mechanisms, an approach under active consideration in Nepal.

The complexities and tensions involved in the simultaneous delivery of truth and justice which the third research question seeks to answer will be further pursued examining Nepal's experience in chapter 5. Critically analysing the context, the thesis will analyse factors contributing to the design of the truth and justice mechanisms in the first place. It will critically analyse the work of the TRC and analyse complexities in delivering truth and justice simultaneously in the context of the negotiated political transition, where alleged perpetrators have been established as important political actors during the transition. Then the research further delves into the learning to establish how Nepal could reinvigorate its TJ process, where both truth and justice mechanisms coexist, delivering truth and justice simultaneously, while also catering to the demands of political actors and respecting victims' right to effective remedies in chapter 6.

Learning from the findings of these research questions, the conclusion will be drawn (chapter 7) presenting the key challenges and complexities in delivering truth and justice simultaneously. It will also shed light on how some of these challenges and complexities could be addressed by designing a TJ process where these two mechanisms coexist, incentivising each other.

1.3. Methodology

The research questions of this thesis are answered using qualitative research methods. It combines doctrinal research (desk-based) and a socio-legal analysis.

The first question of this thesis on why countries undergoing transition are designing a TJ process having both TRC and prosecution is pursued using doctrinal research methods and literature review. Doctrinal methods allow critical examination of legislation and case law to establish a correct and complete statement of the law on the matter at hand.[56] Analysing the provisions of composite treaties, views adopted by the human rights bodies under the composite treaties (under the consideration of individual communication procedures and Concluding Observations, Recommendations and country specific reports of these bodies) and the decisions of regional human rights mechanisms, the research is pursued to understand the changes in international law requiring States to investigate, prosecute and punish certain human rights violations.

Furthermore, reviewing and analysing expert academic literature in journal articles and books, as well as primary sources of the work of different Truth Commissions and other TJ bodies, reports of different institutions working in the field of TJ and different UN bodies, the thesis maps how

[56] Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 10.

the TJ landscape has been changing. Such mapping helps not only to understand the evolving terrain of TJ but also to identify experiences of countries relevant for this research.

As the thesis focuses on Nepal to understand the complexities of delivering truth and justice, and to find ways to address some of the complexities, socio-legal research methods were used to collect primary data in Nepal. When this research started, the TRC was collecting evidence and victims had registered their complaints. I collected primary data to understand how the TRC was fulfilling its truth-seeking and investigation for prosecution related mandates, the challenges it was facing through 22 in-depth interviews with people such as a Commissioners of the TRC, investigators of the TRC, the Attorney General, leaders of different political parties, civil society activists, lawyers and victims' leaders, among others.[57] As in-depth interviews help to explore the understanding of various actors informed by discourse, assumption or ideas on the subject,[58] these interviews provided important data to understand the challenges the TRC was facing in establishing truth and its potential contribution to prosecution. My prior networks and experiences provided access to a diverse set of interviewees, enriching data and shaping the analysis of this research.

I also conducted five Focus Group Discussions (FGDs)[59] with victims and civil society members. Out of the five FGDs, three were with victims. The objective was to find out victims' experiences when engaging with the TRC, getting their perspectives on how the TRC was uncovering truth

[57] See bibliography for the profile of people interviewed.
[58] Ceryn Evans, 'Analysing Semi-Structured Interviews Using Thematic Analysis: Exploring Voluntary Civic Participation Among Adults' in 'Sage Research Methods Datasets' (Sage 2018) <https://pdfs.semanticscholar.org/e925/d9c92780a1d56af25fc01c8f2cdbf14d6c6e.pdf> accessed 20 August 2020.
[59] Three FGDs were conducted with victims, two with civil society activists.

and contributing to prosecution. As the relationship that participants have with the subject and among each-other are important factors in choosing FGD participants,[60] to allow real interaction,[61] the FGDs with victims having submitted their complaints to the TRC and those in leadership position were held separately.

The first FGD was with victims in leadership position of different victims' organisations. They were selected because of their leadership roles in the victims' movement as they were the most informed victims concerning the work of the TRC and could represent the majority of victims' concerns.[62] The second FGD was conducted in province 4, where victims are active and organised pursuing truth and justice.[63] As FGDs help seeking enriching data through group interaction,[64] allowing 'sharing and comparing',[65] the next one was held in Kathmandu, with nine victims from different provinces of Nepal, who had submitted their complaints to the TRC.[66] It was aimed at finding out whether victims' experiences with the TRC and its investigation in different provinces were different. These victims were identified through various victims' networks.

Furthermore, two FGDs (one in Kathmandu and one Nepalgunj) were also organised with civil society activists (including human rights defenders), lawyers, academics and media.[67]

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[60] David L Morgan and Kim Hoffman, 'Focus Groups' in Uwe Flick (ed), *The Sage Handbook of Qualitative Data Collection* (Sage 2018) 254.
[61] ibid.
[62] See bibliography for the profile of the victims participated in FGDs.
[63] ibid.
[64] Morgan and Hoffman (n 60) 250-63.
[65] David L Morgan, 'Focus Groups and Social Interaction' in Jaber F Gubrium and James A Holstein (eds) *Handbook of Interview Research* (2nd edn, Sage 2012) 162.
[66] See bibliography for the profile of participants.
[67] ibid.

Participants were selected because of their individual and institutional engagement on TJ issues. The objective was to find out how civil society assessed the work of the TRC, its investigation and potential link to prosecution. It also aimed to establish whether the experiences and concerns of civil society in the capital and in the provinces are different.

During the course of this research, the Government presented a new legal framework (in mid-2018) intending to redesign the TJ process, also ending the tenure of the Commissioners (early 2019). As the Bill proposed incentives of lenient sentence for truth and reparation, it affected the discourse significantly. Further data were collected on this, including through consultations organised by NGOs. I was invited to observe 'consultations' on the Bill organised by a national NGO, Advocacy Forum (AF),[68] in 6 out of 7 provinces of Nepal,[69] and 2 further consultations organised by the Accountability Watch Committee (AWC),[70] discussing various aspects of the Bill and possible ways forward. As the data collected through these consultations inform my analysis of the proposed Bill and my presentation of a possible way forward for Nepal, the following section briefly explains the consultations.

1.3.1. NGO consultations with victims

Consultations with victims were organised in all 7 provinces of Nepal by AF.[71] The participants were invited by AF, using two major victims' networks, Conflict Victims Common Platform

[68] Leading national NGO that is also working on TJ issues. See also Advocacy Forum - Nepal <advocacyforum.org> accessed 13 June 2021.
[69] AF conducted consultations in all seven provinces, but I could observe only six.
[70] It is a network of different prominent human rights activists and victims, concerned about accountability issues.
[71] As I observed only six, I have used the data from only six of those consultations.

(CVCP)[72] and Conflict Victim's Society for Justice (CVSJ).[73] The number of participants varied from 30 to 45, with different experiences of violence during the conflict. These consultations lasted for 3-4 hours.

The organizers used the 'participatory approach' in capturing victims' perspectives on the Bill and their expectation from the TJ process by allowing participants to discuss among themselves and to identify their concerns and possible ways to address them. They started with a presentation on truth, prosecution, reparation and reform related provisions of the TJ Bill. Then the presentation concentrated on various forms of sentencing provisions in the Bill. The participants were subsequently randomly divided into 6 groups (asking them to count one to six, making all ones form the first group, two's the second group, etc). Each group was asked to discuss and record their concerns and their recommendations using meta-cards provided. Each group was also asked to choose a facilitator and a note-taker to take down any agreed recommendations. Members from the organisation went to a different table to clarify any concerns/questions groups had and also to encourage everyone to participate in the discussions.

All groups were given one and a half hour (an hour to discuss and half an hour to finalise their recommendations). After group discussions, there was an hour-long lunch break. After the lunch, each group presented their recommendations using meta-card (small piece of paper), taking about 10-15 minutes each.[74] The organisers documented all recommendations. I observed the entire process. The organisers later provided a detailed report of the consultations. These consultations

[72] Conflict Victim's Common Platform (CVCP) is a network of 12 victim's organisations.
[73] Conflict Victim's Society of Justice (CVSJ) is one of the victim's organisations active in many districts, see 'Conflict Victims Society for Justice (CVSJ) – Nepal' <cvsjnepal.org> accessed 2 October 2020.
[74] Meta-cards (piece of paper) were posted on the wall of the meeting room for easy reference.

provided enriching information about the concerns of victims, their expectations from the process and their views about the different elements in the new legal framework, which informs the analysis that is presented in section 6. 3.1 to 6.3.6 of chapter 6.

1.3.2. Consultation with civil society

I was also invited to participate in 2 consultations on various themes relevant to my research organised by AWC.[75] The discussions were very useful for my research as they were on different themes such as existing challenges in TJ and modality of consultation (aiming at developing a common civil society position on consultation).[76] The organisers have shared the outcome report for the purpose of my research.[77] These reports have provided further enriching data about the main concerns of civil society, proposals on how the process and the content of the Bill can be revisited, shaping the analysis presented in section 6.3 of chapter 6.

1.3.3. Informal meetings

I had 10 informal meetings with politicians, bureaucrats, diplomats and others involved in the law drafting process, who did not want to be named or be quoted but gave insights about the difficulties in negotiating the prosecution and punishment aspects of TJ, the positions of different actors and why the political parties wanted truth and justice mechanisms to work simultaneously rather than in sequence, among others. All of these helped me to understand the complexities and challenges that the country was facing in terms of implementing a TJ process where both truth and justice could be delivered simultaneously, informing the analyses in this thesis.

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[75] This is a network of different prominent human rights activists and victims, concerned about accountability issues.
[76] CON CS 02, 9 January 2020, Kathmandu.
[77] Report on file.

1.3.4. Data analysis

The data collected from the field is analysed using thematic analysis (TA) method informed by Jodi Aronson[78] and Braun and Clarke.[79] It helps to capture 'themes' across a qualitative dataset.[80] TA was found to be particular useful to the analysis of the data that I gathered in the field as I could analyse it clustering it into different themes. Although this method has also been criticised for the flexibility it offers to the researcher and for potentially leading to a lack of coherence in developing themes derived from the data,[81] it provides systematic engagement with data to develop a robust analysis.[82] I followed the five steps recommended by a number of TA scholars: 1) familiarising yourself with data, 2) generating initial codes, 3) searching for themes, 4) reviewing themes, defining and naming themes, and 5) producing the report.[83] The data gathered were first clustered into two categories: firstly the concerns regarding the work of the TRC and challenges it was facing (see annex 4A); and secondly, the concerns on the proposed Bill, how it has to be amended and the way forward, largely drawing from NGOs consultations (see annex 4B).

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[78] Jodi Aronson, 'A Pragmatic View of Thematic Analysis' (1995) 2(1) Qualitative Report 1-3.
[79] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 79; Virginia Braun, Victoria Clarke and Gareth Terry, 'Thematic Analysis' in Paul Rohleder and Antonia Lyons (eds), *Qualitative Research in Clinical and Health Psychology* (Palgrave MacMillan 2015) 95-113.
[80] Virginia Braun and others, 'Thematic Analysis' in Pranee Liamputtong (ed), *Handbook of Research Methods in Health Social Science* (Springer 2018) 1.
[81] Immy Holloway and Les Todres, 'The Status of Methods: Flexibility, Consistency and Coherence' (2003) 3(3) Qualitative Research 251.
[82] Richard E Boyatzis, *Transforming Qualitative Information. Thematic Analysis and Code Development* (Sage 1998) 5; Gareth Terry and others, 'Thematic Analysis' in Carla Willing and Wendy Stainton Rogers (eds), *The Sage Handbook on Qualitative Research in Psychology* (2nd edn, Sage 2017) 19-20.
[83] Braun and Clarke (n 79) 77, 87, 96; Boyatzis (n 82) 11.

From each cluster of data corpus, codes were generated, based on 'frequently mentioned'[84] concerns and their relevancy to the research question. A total 27 codes were generated, under the first cluster of data, ranging from concerns of various stakeholders on the work of the TRC to victims' expectation from the TRC. Going through the codes, 5 themes were identified, relevant to the research questions including the legitimacy of the TRC, political power balance, lack of sufficient laws, absence of the Special Court and the investigatory capacity of the TRC which will be presented in section 5.4.2, 5.5 -5.8 of chapter 5.

Similarly, data collected through consultations were separately analysed, generating 24 codes, based on 'frequently mentioned' concerns and also considering their relevancy to the research questions. Out of these codes, 6 themes were identified: incentive for making truth and prosecution possible on the ground, promoting fair trial, situating truth and justice in a holistic TJ system and consultations with victims, which are analysed and presented in section 6.3.1.- 6.3.6. of chapter 6.

1.4. Ethical consideration

Ethical approval was taken from Essex University's Ethics Committee. Although victims who suffered gross violations participated in this research, they were not asked to share the violations they suffer as such. Because of the nature of the research questions, their participation was limited to sharing their experiences with the TRC, their expectation from the TJ process, particularly the truth and justice elements, in light of the new bill. Nevertheless, I used previously gained knowledge and experience in applying the do no harm principle and used my networks in

[84] Such concerns appeared in a number of interviews, FGDs and Consultations.

the country to arrange psycho-social support for the victims taking part in this research (in case they felt a need). However, no victims sought such help during the field work.

Furthermore, all participants were informed about the research before the FGDs and interviews.[85] Their informed consent was obtained.[86] It was also explained that their participation is voluntary and they could leave at any time if they want. They were informed that their identity will be anonymised.

Accordingly, the data is analysed after anonymising the identity of those taking part in the research. FGDs with victims are labelled as FGDV, FGDs with civil society are labelled as FGD SC, NGO Consultation as CON, followed by province number, date and place. Interviews are labelled as SI if the interviewees are from a State Institution, the rest as CS followed by number, date and place of interview.

1.5. Limitation and potential biases

At the time of the first field visits in Nepal (March – November 2017), the TRC was working. However, in mid-2018, the Government brought a new Bill proposing a redesigned TJ process. It also ended the tenure of the Commissioners in February 2019 after they were not able to deliver on the TRC's mandate. Although the data collected helped to understand the complexities in delivering truth and justice simultaneously in the present context of Nepal, the analysis on how courts may examine and use the evidence collected by the TRC and the practical tensions or synergies this may create in implementing the TJ process where the TRC collects evidence for

[85] See annex 1 for information sheet used.
[86] See annex 2 for the consent form used.

prosecution, which was the original intention of this research, was limited. This required some changes and adaptation in the research questions and methods of data collection. There are therefore some limitations and potential biases, shaping the research questions and analysis of this thesis.

Firstly, the government presented the Bill in mid-2018, proposing changes in the TJ process' legal framework. I have used this June 2018 Bill, as formally presented by the government to civil society and victims as the basis for the analysis.[87] As the negotiation process between the political parties still is ongoing, the content of the Bill may change going forward.

Secondly, the balance of power in the countries is also changing. The merger of the two main political parties in Nepal, the Nepal Communist Party of Nepal, United Marxists Leninist (CPN-UML) and the Nepal Communist Party Maoist – Centre (NCPNM-Centre) to form the Government was found to be an enabling environment for the reinvigoration of the TJ process in Nepal (discussed in chapter 6) as they had an interest to avoid future prosecution and to take the TJ process forward while they were in power, having more control over the process. However, this has changed at the time of revising the thesis after the final comments from the examiners. Although some of my analysis and the possible way forward presented are still very relevant, the thesis includes the political analysis of the context only until December 2020, noting that the possible scenario may change if the equation of political parties gets changes in the country.

Thirdly, I did not conduct any interviews with any senior officers from the Nepal Army (NA). I have represented many victims who had filed cases against high-ranking army officials, including

[87] I was present in the meeting.

one under universal jurisdiction,[88] which ended in mid-2016. As it was considered as attacks against the military, I did not feel comfortable to approach any military officers for an interview. Thus, the thesis lacks data representing the perspectives of the army as an institution, which could have been gathered through in-depth interviews.

However, I have interviewed the chairperson and founder of an organisation that works in the interest of families of security forces victimised during the conflict to understand their views on and experiences with the TRC and the current TJ process. I have also interviewed people working on drafting the Bill, who have shared the perspectives of different actors, including the NA, on the Bill, which helps to mitigate this gap to some extent.

Finally, during the course of this research, I was able to access important documents explaining the positions of different actors on the Special Court and how the political actors view the relationship between the regular justice system and the TJ mechanisms. I also had 'informal meetings' with some key people involved in the negotiations, but they wanted neither to be quoted nor to be acknowledged in the research. Some important documents were shared confidentially. Although, this helped inform my analysis, it also raises some methodological challenges about analysing and presenting data gathered without implicitly identifying the sources for the details presented.

[88] I represented victims of the case involving Kumar Lama, who was arrested in the UK under the UJ (Write it out) in early 2013. 'Nepal's Colonel Kumar Lama charged in UK with torture' *BBC* (5 January 2013) <http://www.bbc.co.uk/news/world-asia-20914282> accessed 13 January 2020; Ingrid Massage and Mandira Sharma 'Regina v. Lama: Lessons Learned in Preparing a Universal Jurisdiction Case' (2018) 10(2) Journal of Human Rights Practice 327–45.

1.6. Chapter plan

The thesis is divided into 7 chapters. This chapter is the first chapter which serves as the introduction, presenting the thesis, the research questions, methodologies, the research limitations and the outline of the rest of the chapters.

Chapter 2 will focus on the State duty to investigate, prosecute and punish under international law. It will analyse how international law has evolved to require States to investigate, prosecute and punish certain categories of violations, limiting amnesty in respect of some violations and to show how that impacts the design of TJ processes on the ground. It also aims to provide understanding of normative standards applicable in TJ processes. The chapter is divided into three main sections, studying States' obligations to prosecute under IHRL, IHL and ICL respectively.

Chapter 3 will be on understanding the TJ landscape. The objective of this chapter is to analyse how the understanding of TJ is expanding to a holistic approach that includes truth, justice, reparation and guarantee of non-recurrence and to situate the truth and justice components in the TJ discourse. As Colombia is also designing the TJ process considering holistic approach to TJ, the chapter draws some analysis from the ongoing discussion on TJ in Colombia to understand how truth and justice components are envisioned to contribute to each other in Colombia.

Chapter 4 of the thesis will be on understanding different countries experiences on sequencing of TJ mechanisms and of those where these mechanisms coexisted. The objective of this chapter is to help the thesis unpack experiences of different countries where truth and justice mechanisms were sequenced to understand the factors resulting into such sequencing and the lessons they

offer. It will analyse two types of sequencing; Truth Commission first, prosecution later by analysing the experience of Argentina; and prosecution first, truth later by analysing the experience of South Korea.

Analysing the experience of Sierra Leone, where the truth and justice mechanisms worked in tandem, this chapter also studies the experiences of countries where truth and justice mechanisms coexisted as TJ mechanisms. The objective of the chapter is to identify tensions and challenges that truth and justice mechanisms working in tandem face and to draw lessons from such experiences.

Chapter 5 will be on the background of the TJ process in Nepal. It will explore the complexities and challenges in designing truth and justice mechanisms on the ground, especially after a negotiated end of an armed conflict. Analysing the work of the TRC established in 2015 in Nepal, the chapter will first analyse the difficulties that the TRC faced in investigating cases for prosecution while also investigating to establish truth. It will also analyse the difficulties in implementing simultaneous delivery of truth and justice in the context of a transition where political actors with links to past human rights violations remain in power. Analysing different factors, including the normative development in international law, it will also highlight the role that different actors such as the victims, civil society and the courts have played to have a more holistic approach to TJ, where truth and prosecution mechanisms coexist, complementing each other.

Chapter 6 will then move onto analysing the changing legal, political landscape to argue how a possibility of coexistence of truth and justice exists in Nepal. Then it provides possible way

forwards as Nepal attempts to redesign its TJ process with truth and justice working simultaneously as part of a holistic TJ system.

Chapter 7 concludes the thesis by arguing how the development in international law and the increased experience in the field of TJ have paved the ground for both truth and justice mechanisms to coexist, complementing each other. As simultaneous delivery of truth and justice is complex and may create many tensions, the thesis argues that if these two mechanisms are designed with built-in incentives for each-other's benefits and situating them as part of a holistic TJ system, they could alleviate some of the challenges that contexts of transition pose in delivering truth and justice. As the impact of such design is yet to be assessed against how it contributes to achieve the goal of TJ, the chapter also indicates possible research pathways for further research on this subject.

Chapter 2

The State duty to investigate, prosecute and punish under international law

2.1. Introduction

International law has evolved requiring States to investigate, prosecute and punish certain violations of human rights. This has changed the TJ landscape significantly from its original conception. Relying on principles developed at international level, national courts have ruled against amnesty, ordered prosecution of those involved in serious violations irrespective of the context of conflict or transition. Truth Commissions alone are found to be insufficient to replace States' duty to investigate and prosecute. National TJ processes offering amnesty to some violations have been caught into controversies as their legitimacy gets questioned.

As none of the main composite human rights treaties, both at the global and regional level, such as the International Covenant on Civil and Political Rights (ICCPR),[1] the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[2] and the American Convention on Human Rights (ACHR),[3] explicitly include a duty of a State to prosecute, States continues to argue about the scope of investigation, prosecution and punishment. Thus, the scope of a State's duty to investigate, prosecute and punish and categories of violations triggering such duty continues to be primary concern, central to the TJ process in countries that are designing a

[1] International Covenant on Civil and Political Rights (adopted 16 December1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[2] European Convention for the Protection of Human Rights and Fundamental Freedoms (amended) [1950] ETS 5.
[3] American Convention on Human Rights (entered into force 18 July 1978) OAS Treaty Series No 36 (1967) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 25 (1992) (American Convention).

TJ process today. Is investigation and prosecution enough to fulfil the duty of States under international law? Does it require criminal sanction? What does that look like? All these questions continue to be debated in countries undergoing transition such as Nepal, Colombia and Sri Lanka, impacting the design of these countries' TJ processes.

Nepal, which this thesis focuses on, where the law to account for the past is still being negotiated after the Supreme Court found the existing law not being compatible with Nepal's international obligations, continue to struggle to design a TJ process that does not undermine international law, while also addressing the need and demands of victims and perpetrators. This chapter aims to provide how international jurisprudence has evolved in relation to States' duty to investigate prosecute and punish, the obligations it entails and the permissible limits of amnesty. The objective of this chapter is also to provide a principle and theoretical understanding on States' duty in relation to the past violations to countries such as Nepal that are designing TJ processes today, so they could design their TJ process without undermining international law.

Although none of the important composite human rights treaties, both at the global and regional level, explicitly include a duty of a State to prosecute, the human rights bodies, established under these treaties have interpreted and elaborated the concept of an effective remedy to include the obligation to investigate, prosecute and punish violations of certain rights enumerated in those treaties.[4] They have also indicated that although all violations require investigation, not all

[4] UN Committee on International Covenant on Civil and Political Rights, 'General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add. 13; Diane F Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100(8) The Yale Law Journal 2537; Michael Scharf 'The Letter of the Law: The Scope of the International Legal

violations may require prosecution and punishment. In the context of TJ, it is important to understand which violations require investigation and the nature of the investigation required, and where the States are obliged to prosecute and punish and what this entails, as this would significantly impact the design of a TJ process and the mandates of any TJ mechanisms.

Furthermore, States' duty to prosecute has been elaborated and consolidated not only under International Human Rights Law (IHRL) but also through interpretation of International Humanitarian Law (IHL) and codification of International Criminal Law (ICL). Countries such as Nepal, where TJ mechanisms are discussed today involve the context of conflict also implicating non-state armed groups. TJ in these contexts intersects different branches of international law such as IHRL, IHL and ICL. Thus, it is important to study States' duty to investigate, prosecute and punish under these schemes of law to develop a TJ system that does not violate international law. Divided in 3 major sections, this chapter analyses States' duty to prosecute under IHRL, IHL and ICL respectively.

2.2. The duty to investigate, prosecute and punish under IHRL

The State's duty to prosecute under international human rights law (IHRL) has evolved gradually. Traditionally how States should treat their citizen was not a matter of concern of

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Obligation to Prosecute Human Rights Crimes' (1996) 59(4) LCP 41; Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (OUP 2009); Angelo Gitti, 'Impunity under National Law and Accountability under International Human Rights Law: Has the Time of a Duty to Prosecute Come' in Benedetto Conforti and others (eds), *The Italian Yearbook of International Law* (vol IX, Kluwer International Law 1999) 64.

international law.[5] The Nuremberg Tribunal established the principle of making certain treatment by the State to its citizens a matter of international concern, especially when that treatment is egregious.[6] The development of IHRL since then has aimed to protect citizens against State power.[7]

Although some of the important composite human rights treaties, both at the global and regional level, such as the ICCPR, ECHR and the ACHR do not explicitly include a duty to prosecute; these treaties however include the obligation of States to provide an effective remedy. For example, Article 2 of the ICCPR requires States to *respect* and *ensure* the rights of individuals to have an effective remedy for the rights enumerated in the Covenant. It also requires States to take legislative or other measures necessary to give effect to these rights and provide an effective remedy, enforceable by competent judicial, administrative or legislative authorities, to those affected by such violations.[8] Similarly, Article 13 of the ECHR provides the right to an effective remedy, stating that 'everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the

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[5] Orentlicher (n 4); Denise Plattner, 'The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts' (1990) 30(278) International Review of the Red Cross 409.

[6] Naomi Roht-Arriaza, 'Sources in International Treaties of an Obligation to Investigate, Prosecute and Provide Redress' in Naomi Roht-Arriaza (ed), *Impunity and Human rights in International Law and Practice* (OUP 1995) 24.

[7] Nigel Rodley, 'Impunity and Human Rights' in Christopher C Joyner and M Cherif Bassiouni, Reining in impunity for international crimes and serious violations of fundamental human rights: proceedings of the Siracusa Conference 17-21 September (érès 1998) 72.

[8] Article 2.3(a) of the ICCPR states (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity, (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy, (c) to ensure that the competent authorities shall enforce such remedies when granted. ICCPR, art 2.3(a).

violation has been committed by persons acting in an official capacity.' Similarly, Article 1 of the ACHR also requires States to *respect* and *ensure* the rights and freedoms enshrined in the American Convention.[9] In addition to Article 1, Article 8 (1)[10] of the ACHR guarantees the right to fair trial and Article 25 (1)[11] provides judicial protection. Both have been used by the Inter-American Court to expand the understanding of the State obligation to provide effective remedies.[12]

Highlighting the drafting history of Article 2 of the ICCPR, where the proposal to have the provision of punishment explicitly incorporated in Article 2 in breach of certain rights enshrined in the Covenant had not receive much support,[13] some scholars contest whether the effective remedies that composite treaties envisioned entail criminal measures such as prosecution and

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[9] Article 1(1) of the Convention provides 'the State parties to the Convention undertake to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other societal condition.' American Convention, art 1(1).

[10] Article 8(1) of the Convention provides: 'Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature.' ibid, art 8(1).

[11] Article 25(1) Convention provides: 'Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.' ibid, art 25(1).

[12] Annelen Micus, *The Inter-American Human Rights System as a Safeguard for Justice in National Transitions. From Amnesty Laws to Accountability in Argentina, Chile and Peru* (Brill - Nijhoff 2015) 41; Seibert-Fohr (n 4) 55-67; Roht-Arriaza (n 6) 34, 36.

[13] Michael P Scharf, 'Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti' (1996) 31(1) Tex Int'l LJ 1, 26; UN Commission on Human Rights, 'Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the Proposed Additional Articles' (22 March 1950) UN Doc E/CN.4/365 (Philippines) and A/C.3/L.1166 (Japan).

punishment.[14] Early jurisprudence form the HRC was also not clear on whether criminal measures such as prosecution and punishment were needed as part of the right to an effective remedy under these treaties,[15] as the Committee called on States to take both judicial and administrative measures 'as appropriate.'[16] For example, the HRC found that steps such as dismissing the perpetrator from the military, cancelling his/her government pension, banning him/her from public office, and/or requiring him/her to pay damages through administrative fines or civil proceedings being sufficient to satisfy the obligation to provide effective remedies in certain violations.[17] The ECtHR has also stated that effective remedies under Article 13 do not always necessarily consist of criminal measures.[18] A similar argument can be found in the early jurisprudence of the IACtHR.[19]

However, over the years, the human rights bodies have reached an authoritative interpretation that a State's duty to provide effective remedy includes criminal justice measures, such as prosecution and punishment for some violations, arguing that only administrative measures was not a sufficient response to provide effective remedies to victims in all cases.[20]

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[14] Scharf (n 13); Louise Mallinder, 'Can Amnesties and International Justice be Reconciled?' (2007) 1(2) IJTJ 208; 218.
[15] Scharf (n 13) 26.
[16] *Thomas v Jamaica* Communication No 321/1988, UN Doc CCPR/C/49/D/321/1988 (HRC, 19 October 1993) para 11; *Herrera Rubio v Colombia* Communication No 161/1983, UN Doc CCPR/C/31/D/161/1983 (HRC, 2 November 1987) [12].
[17] *Arhuacos v Colombia* Communication No 612/1995, UN Doc CCPR/C/56/D/612/1995 (HRC, 14 March 1996); Carla Edelenbos, 'Human Rights Violations: A Duty to Prosecute?' (1994) 7(2) LJIL 5.
[18] *Calvelli and Ciglio v Italy* App no 32967/96 (ECtHR, 17 January 2002) para 51; Scharf (n 4).
[19] *Caracazo v Venezuela* (Reparations and Costs) IACtHR Series C No 95 (29 August 2002) para 118; *Garay Hermosilla and others v Chile*, Case 10.843, Report No 36/96, IACHR, OEA/Ser.L/V/II.95 Doc 7 rev (15 October 1996) paras 157, 63, 66, 77.
[20] *Bautista de Arellana v Colombia* Communication No 563/1993, UN Doc CCPR/C/55/D/563/1993 (HRC, 27 October 1995); *Coronel v Colombia* Communication No

Scholars argue this development in IHRL being informed and influenced by the experiences of impunity in many countries undergoing transition, especially in Latin America.[21] For example, in the late 1980s and early 1990s many democratic transitions in Latin America experienced amnesty, making criminal investigation and prosecution difficult.[22] In the absence of effective remedies, many victims from these countries knocked the door of supranational and regional human rights bodies seeking remedies, making these bodies closely involved in scrutinising remedies available at the national level. For example, analysing the situation of some countries, the Inter-American Commission stated that a lack of punishment created a situation of impunity, involving a vicious circle, which tends to increase the occurrence of those crimes.[23] It found a correlation between impunity and the commission of serious human rights abuses,[24] as the countries in the region where massive and systematic human rights violations have taken place have a tendency for such crimes to go unpunished.[25] It further argued that the absence of deterrence results in people taking justice into their own hands and gives rise to further human

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778/1997, UN Doc CCPR/C/76/D/778/1997 (HRC, 24 October 2002); *Aksoy v Turkey* App no 21987/93 (ECtHR, 18 December 1996) para 98; *Öneryildiz v Turkey* App no 48939/99 (ECtHR, 30 November 2004) para 91; *Kaya v Turkey* App no 158/1996/777/978 (ECtHR, 19 February 1998) para 107; *Osorio Rivera and family members v Peru* (Preliminary objections, merits, reparations and costs) IACtHR Series C No 274 (26 November 2013) para 178; *González et al ('Cotton Field') v Mexico* (Preliminary Objection, Merits, Reparations, and Costs) IACtHR Series C No 205 (16 November 2009) para 246.

[21] Paige Arthur, 'How Transitions Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31(2) Hum Rts Q 321.

[22] See ch 3, s 3.2.

[23] 'Third Report on the Situation of Human Rights in Paraguay', IACHR, OEA/Ser.L/V/II.110 Doc 52 (9 March 2001), ch III, para 9.

[24] ibid.

[25] 'Second Periodic Report the Situation of Human Rights in Peru', IACHR, OEA/Ser.L/V/II.106 Doc 59 rev (2 June 2000), para 206.

rights violations.[26] The UN reached a similar conclusion, stating that impunity was a major reason for continuing human rights violations throughout the world.[27]

Prosecution is found to be necessary not only for the prevention of future crimes and deterring people from committing future crimes, but also for the protection of individual victims' right.[28] The IACtHR argues that investigation, prosecution and punishment are important measures aiming at securing the victims' right to life and liberty.[29] Although there are nuanced differences in the way regional and supranational human rights bodies have approached victims' right to investigation, prosecution and punishment (which subsequent sections will analyse), all these bodies have argued that investigations are the first step towards ensuring effective remedies for victims.

However, the nature of investigation could be different depending on the nature of violations committed. Depending on the nature of violations investigation or inquiry could be done by quasi-judicial or administrative body or the criminal justice system. Similarly not all violations require prosecution and punishment.[30] For example, the HRC states that criminal justice measures are necessary when the violations are grave in nature.[31] The ECtHR clarifies that the requirement of criminal prosecution under the ECHR depends on the *gravity* of the crimes and

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[26] 'Third Report on the Situation of Human Rights in Paraguay' (n 23).
[27] UN Commission on Human Rights, 'Report on the Consequences of Impunity' (24 January 1990) UN Doc E/CN.4/1990/13 in Neil J Kritz (ed), *Transitional Justice. How Emerging Democracies Reckon with Former Regimes. Volume I. General Considerations* (United States Institute of Peace Press 1995) 18-19.
[28] *Velásquez Rodríguez v Honduras* (Reparations and Costs) IACtHR Series C No 4 (29 July 1988).
[29] ibid.
[30] Orentlicher (n 4).
[31] *Thomas* (n 16).

the *mens rea* of the perpetrators.[32] The human rights bodies have used terminologies such as *'serious violation'*, *'grave violations' or 'gross violations'* requiring investigation, prosecution and punishment.

As discussed in the beginning of this chapter, in the context of TJ, it is important to understand which violations require investigation and the nature of investigation required, and where the States are obliged to prosecute and punish and what this entails as this would significantly impact the design of the mandates of TJ mechanisms and the TJ process. The following sections discuss the investigation, nature of investigation and the prosecution and punishment required in cases related to serious human rights violations, analysing the jurisprudence from human rights bodies such as the UN Human Rights system and the European and Inter-American Human Rights System.

2.3. Duty to investigate

Both global and regional human rights bodies have considered investigation as the first step to fulfil the duty to provide effective remedies to individuals whose rights have been violated. They have also recognised it is primarily a duty of means and not of results.[33] It is also recognised as a procedural right of the victims, the denial of which may impact the enjoyment of substantive rights. For example, the HRC has found a violation of article 2 together with other substantive

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[32] *Öneryildiz* (n 20).

[33] *Aslakhanova and Others v Russia* App Nos 2944/06, 8300/07, 50184/07, 332/08, 42509/10 (ECtHR, 18 December 2012) para 144; *Paul and Audrey Edwards v United Kingdom* App no 46477/99 (ECtHR, 14 June 2002) para 71; *Velásquez* (n 28) [166], [174], [177]; *Anzualdo Castro v Peru* (Preliminary objection, merits, reparations and costs) IACtHR Series C 202 (22 September 2009) para 123; *González* (n 20) [289]; *Garibaldi v Brazil* (Preliminary objections, merits, reparations and costs) IACtHR Series C No 203 (23 September 2009) para 113.

rights such as right to life (article 6), right against torture (article 7) and rights to individual liberty (in regards to the cases of enforced disappearances (article 10 (1)).[34] Similarly, the IACtHR has clarified that the obligation to investigate cases of serious human rights violations arises from the general obligation to guarantee different substantive rights such as the rights to life, personal integrity and personal liberty.[35] The ECtHR has found certain rights enumerated in the ECHR to entail procedural obligations that include the obligation to investigate.[36]

However, as discussed earlier, the nature of investigation could be different depending on the nature of the violation. In cases related to gross violations, States are required to have judicial investigation that entails different constituent elements.[37] The following section discusses those essential elements of investigation required in cases involving gross violations.

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[34] *Dev Bahadur Maharjan v Nepal* Communication No 1863/2009, UN Doc CCPR/C/105/D/1863/2009 (HRC, 19 July 2012); *Giri v Nepal* Communication No 1761/2008, UN Doc CCPR/C/101/D/1761/2008 (HRC, 24 March 2011); *Sharma v Nepal* Communication No1469/2006, UN Doc CCPR/C/94/D/1469/2006 (HRC, 28 October 2008); *Herrera* (n 16) [11-12].

[35] *Castillo Páez v Peru* (Merits) IACtHR Series C No 34 (3 November 1997); *Velásquez* (n 28); *Godínez Cruz v Honduras* (Reparations and Costs) IACtHR Series C No 8 (21 July 1989); *Caballero Delgado and Santana v Colombia* (Merits) IACtHR Series C No 22 (8 December 1995); *El Amparo v Venezuela* (Reparations and Costs) IACtHR Series C No 28 (14 September 1996); *Suárez Rosero v Ecuador* (Merits) IACtHR Series C No 35 (12 November 1997); *Blake v Guatemala* (Reparations and Costs) IACtHR Series C No 36 (24 January 1998).

[36] *Kaya* (n 20).

[37] Philip Leach, Rachel Murray and Clara Sandoval, 'The Duty to Investigate Right to Life Violations across Three Regional Systems: Harmonisation or Fragmentation of International Human Rights Law?' in Carla M Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law Approaches of Regional and International Systems. Approaches of Regional and International Systems* (Brill-Nijhoff 2017) 32.

2.3.1. Investigation has to be prompt and exhaustive

Investigations in cases of gross violations have to be *prompt*.[38] What promptness means may vary depending on the nature of cases and circumstances of the incidents. For example, in cases involving torture, where the risk of continuous torture exists if not prevented or in cases of enforced disappearance where it is important to locate the whereabouts of the person arrested/ abducted, it is required to have an investigation immediately after the authority becomes aware of the incident or the likelihood of the incident.[39] Prompt investigation is found to be important not only to protect life, prevent torture and enforced disappearances but also to maintain public confidence in the authorities and adherence to the rule of law.[40] It is also important to prevent any collusion in, or tolerance of, unlawful acts.[41]

The human rights bodies have also articulated that investigation has to be '*thorough'* and *'exhaustive'*. The IACtHR recognises the complexities in the investigation of violations of human rights involving the policies of the States and the need to make efforts to investigate and

[38] *Contreras et al v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No 232 (31 August 2011) para 128; IAHR, 'Case 10.480. Report No 1/99. *Lucio Parada Cea and others v El Salvador*, Case 10.473, Report No 1/94, IACHR, OEA/Ser.L/V/II.95 Doc 7 rev (27 January 1999), para 148; *Orgur v Turkey* App no 21954/93 (ECtHR, 1 November 1999) paras 91-92; *Opuz v Turkey* App no 33401/02 (ECtHR, 9 September 2009); OHCHR, HRC, 'General Comment No 20. Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment) (Replaces general comment No. 7)' (10 March 1992) 44th session UN Doc HRI/Gen/1/Rev.9 (Vol 1), para 14.

[39] *García and family members v Guatemala* (Merits, reparations and costs) IACtHR Series C No 258 (29 November 2012) para 138; *Anzualdo* (n 33) [134]; *Narciso González Medina and family v Dominican Republic* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 240 (27 February 2012) paras 204, 209, 218.

[40] *Ramsahai and Others v The Netherlands* App no 52391/99 (ECtHR, 15 May 2007) para 326.

[41] ibid.

clarify the patterns of violations, the operational structures that allowed violations, reasons for them, causes, consequences and beneficiaries so the applicable punishment can be imposed.[42]

The ECtHR uses the term *'thorough'* to explain the requirement of exhaustive investigation and states it entails an analysis of the facts, evidence and scrutiny of all material circumstances to establish the crime.[43] The HRC also suggests in cases of serious human rights violations such as massacres, torture, rape and disappearances a 'thorough and exhaustive investigation' needs to be done by the competent judicial authorities.[44]

2.3.2. Investigation needs to be initiated ex-officio

In cases of serious human rights violations, human rights bodies also require States to initiate investigation *ex-officio*, meaning they cannot wait for victims or their families to file complaints before initiating the investigation. This obligation is independent from the filing of a complaint.[45]

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[42] *Manuel Cepeda Vargas v Colombia* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 213 (26 May 2010) paras 118-19; *González* (n 20) [454].
[43] *Nachova and Others v Bulgaria* App no 43577/98 and 43579/98 (ECtHR, 6 July 2005) para 114; *Zelilof v Greece* App no 17060/03 (ECtHR, 24 August 2007) para 56.
[44] UNCCPR, Human Rights Committee, UNCCPR, Human Rights Committee, 'Consideration of Reports submitted by States Parties under Article 40 of the Covenant. Concluding observations of the Human Rights Committee. Algeria' (12 December 2007) UN Doc CCPR/C/DZA/CO/3, para 7.
[45] UNCCPR, Human Rights Committee, 'Considerations of Reports submitted by States Parties under Article 40 of the Covenant. Preliminary Observations of the Human Rights Committee. Dominican Republic' (19 April 2012) UN Doc CCPR/C/DOM/CO/5, para 14; *Anzualdo* (n 33) [65]; *Velásquez* (n 28) [177]; *Manuel* (n 42) [117]; *García Lucero et al v Chile* (Preliminary Objection, Merit and Reparation) ICAtHR Series C No 267 (28 August 2013) para 122; *Ilhan v Turkey* App no 22277/93 (ECtHR, 27 June 2000) para 63.

The HRC states that in gross violations such as death in custody, enforced disappearances, murder, rape and torture, investigation has to be started *ex-officio* and without delay as soon as the State authorities are aware of the act. The ECtHR recognises the same.[46]

2.3.3. Investigation has to be independent and impartial

Investigation in cases involving gross violations has to be official, impartial, and independent.[47] An impartial and independent investigation includes several components such as the assurance that there is no influence of any alleged perpetrators in the investigation,[48] investigators have no records of being involved in violations etc.[49]

The impartiality and independence has to be reflected not only in law (*de jure)* but also in practice *(de facto)*.[50] The impartiality and independence of an investigation cannot be achieved only through having a legal provision ensuring it but translating that into practice, which may in some cases require taking temporary measures such as temporarily removing the alleged perpetrator from a State function pending the investigation.[51] For example, in *Abdulsamet Yaman*

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[46] *Garibaldi* (n 33) [114].
[47] OHCHR, 'General Comment No 20' (n 38) 14.
[48] Leach (n 37) 38.
[49] *Güleç v Turkey* App no 54/1997/838/1044 (ECtHR, 27 July 1998) paras 81-82.
[50] *Baldeón García v Peru* (Merits, Reparations and Costs) IACtHR Series C No 147 (6 April 2006) para 95.
[51] UNCCPR, Human Rights Committee, 'Considerations of Reports submitted by States Parties under Article 40 of the Covenant. Concluding Observations of the Human Rights Committee. Brazil' (24 July 1996) UN Doc CCPR/C/79/Add.66, para 20; UNCCPR, Human Rights Committee, 'Considerations of Reports submitted by States Parties under Article 40 of the Covenant. Concluding Observations of the Human Rights Committee. Colombia' (3 May 1997) UN Doc CCPR/C/79/Add.76, para 32; UNCCPR, Human Rights Committee, 'Considerations of Reports submitted by States Parties under Article 40 of the Covenant. Preliminary Observations of the Human Rights Committee. Serbia and Montenegro' (12 August 2004) UN Doc CCPR/CO/81/SEMO, para 9.

v Turkey, the European Court required the suspension of a public official pending the investigation involving gross violations.[52] Such a removal can also be done by transferring an alleged perpetrator from one job to another so that there is no risk of him/her influencing the investigation.[53]

2.3.4. Investigation has to be carried out in good faith and with due diligence

Human rights bodies require States to do investigation of serious violations with good faith and due diligence. The State has to use necessary resources and means for the investigation. The IACtHR articulates that States have a duty 'to use the means at [their] disposal to carry out a serious investigation of violations committed within its jurisdiction to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation'.[54] All the relevant State authorities are obliged to collaborate in gathering evidence and they are obliged to provide the judge, prosecutor or other judicial authorities with all the information required.[55] Those hampering an investigation, causing undue delay and tampering with evidence, whether they are public officials or private citizens, must be investigated and held to account.[56]

Furthermore, the State duty to investigate is not limited to violations of human rights committed by State agents.[57] Although States are not held directly responsible for violating the substantive

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[52] *Abdülsamet Yaman v Turkey* App no 32446/96 (ECtHR, 2 November 2004) para 85.
[53] UNCCPR, Human Rights Committee, 'Considerations of Reports submitted by States Parties under Article 40 of the Covenant. Concluding Observations of the Human Rights Committee. Brazil' (1 December 2005) UN Doc CCPR/C/BRA/CO/2, para 12.
[54] *Velásquez* (n 28) [179].
[55] *Osorio* (n 20) [244].
[56] *Caracazo* (n 19) [119].
[57] *González* (n 20) [291]; *Narciso* (n 39) [206]; *Kawas Fernandez v Honduras* (Merits, Reparations and Costs) IACtHR Series C No 196 (3 April 2009) para 78; UNCCPR, Human

rights when the crimes are committed by private non-state actors, they need to apply due diligence to have these crimes investigated.[58] States are held responsible for their failure to investigate and to provide effective remedies.[59] In some situations, a State's refusal to intervene could be characterised as acquiescence.[60]

2.3.5. Investigation has to include victims' participation

Human rights bodies have articulated that effective investigation requires States to respect a victim's right to participate in the investigation process. For example, in *Anguelova v Bulgaria*, the ECtHR has stated that victims or their next of kin have a right to participate in the investigation process to safeguard their legitimate interest.[61] IACtHR also articulates that this right of victims or their next of kin include rights to access information relevant to the investigation, to present evidence, request forensic expert testimony and cross-examine the evidence.[62]

Rights Committee, 'Considerations of Reports submitted by States Parties under Article 40 of the Covenant. Preliminary Observations of the Human Rights Committee. Yemen' (7 April 1995) UN Doc CCPR/C/79/Add 51, para 11; ICCPR (n 4) para 8.

[58] ICCPR (n 4) para 8; UNCCPR, 'Yemen' (n 57); *Velásquez* (n 28) [172]; Seibert-Fohr (n 4) 23.

[59] ICCPR (n 4) para 8.

[60] Seibert-Fohr (n 4) 23.

[61] *Anguelova v Bulgaria* App no 38361/97 (ECtHR, 13 June 2002) paras 140, 324; *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010) para 239.

[62] *Ximenes-Lopes v Brazil* (Merits, Reparations and Costs) IACtHR Series C No 149 (4 July 2006) para 193; *Ituango Massacres v Colombia* (Preliminary Objection, Merits, Reparations, and Costs) IACtHR Series C No 148 (1 July 2006) para 296; *Sánchez v Honduras* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 99 (7 June 2003) para 186; *Caracazo* (n 19).

Although, this obligation does not obligate a State authority to satisfy every request of the victims[63] as an ongoing investigation may contain sensitive issues and could rightfully restrict full access of victims but the investigating authority however has to inform the victims of the progress in the investigation.[64]

Thus, it appears across the human rights bodies, that consensus exist that States have an obligation to investigate to ensure effective remedies. Investigation in cases related to gross violations has to be effective, which entails an independent, impartial and exhaustive investigation, initiated ex-officio, promptly and in good faith to establish truth, collect all evidence capable of leading to the prosecution and punishment of alleged perpetrators.

These developments of the human rights bodies have also been reflected in the thematic treaties such as the Convention against Torture and other Cruel, Inhuman and Degrading Treatment (CAT),[65] the Convention for the Protection of All Persons from Enforced Disappearances (ICPED)[66] and the regional treaties related to torture, enforced disappearances and violence against women that include clear provisions requiring investigation.[67]

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[63] *Ramsahai* (n 40) [347].
[64] ibid; *Charalambous and Others v Turkey* App no 46744/07 (ECtHR, 3 April 2012) para 65; *Valle Jaramillo and others v Colombia* (Merits, Reparations and Costs) IACtHR Series C No 192 (27 November 2008) para 233.
[65] Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 6.
[66] International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICPPED) art 12.
[67] ICPPED art 12; Inter-American Convention on the Forced Disappearance of Persons (entered into force 28 March 1996) OAS Treaty Series No 68 (1994) (IACFDP) art VI; CAT art 6; Inter-American Convention to Prevent and Punish Torture (entered into force 28 February 1987) OAS Treaty Series No 67 (1985) (IACPPT) art 8.

2.4. Duty to prosecute and punish

The human rights bodies have also used the obligation to provide effective remedy to require States to prosecute and punish certain violations. Although the human rights bodies have articulated that all violations require investigation, they have clarified that prosecution and punishment is required only for serious violations.[68] They have used terminologies such as *'bring those responsible to justice'*, and *'take appropriate measures'*[69] when they found violations. Scholars argue that by requiring States to *'take appropriate measures'* the human rights bodies allowed a margin of appreciation to States in deciding the means through which they deal with cases of human rights violations.[70] Thus, criminal prosecution and punishment were not necessarily required in all cases of human rights violations if States would decide to otherwise deal with these cases.[71]

However, subsequent jurisprudence has clarified that administrative measures are not sufficient to fulfil States' obligation to prosecute and punish gross violation.[72] The HRC argues that States are required to launch criminal investigation, prosecution and punishment in cases involving gross human rights violations such as murder, enforced disappearances, torture and rape.[73] The

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[68] *Arhuacos* (n 17) [8.8]; *Bautista* (n 20) [8.2]. See also Orentlicher (n 4) 2537.
[69] *Thomas* (n 16); *Herrera* (n 16).
[70] José Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations' (1992) 43(6) Hastings LJ 1425; Michael P Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 32(3) Cornell Int'l LJ 507.
[71] Scharf, 'Amnesty Exception to the Jurisdiction' (n 70).
[72] *Bautista* (n 20); *Coronel v Colombia* Communication No 778/1997, UN Doc CCPR/C/76/D/778/1997 (HRC, 24 October 2002); *Aksoy* (n 20); *Öneryildiz* (n 20); *Kaya* (n 20) [107]; *Osorio* (n 20); *González* (n 20).
[73] UNCCPR, Human Rights Committee, 'Considerations of Reports submitted by States Parties under Article 40 of the Covenant. Concluding observations by the Human Rights Committee. Peru' (15 November 2000) UN Doc CCPR/CO/70/PER, para 9; UNCCPR, Human Rights

Inter-American system has further developed the requirement of prosecution and punishment of gross violations by recognising a victim's 'right to justice'. For example, the IACtHR argues that Article 8(1) of the American Convention[74] in connection with Article 25(1)[75] provides a uniform right to criminal prosecution,[76] which is now recognised as a victim's '*right to justice*.'[77] Accordingly, under the Inter-American system, victims and their relatives have not only a right to an investigation but also a right to seek prosecution and punishment of those responsible under the right to justice.

Committee, 'Considerations of Reports submitted by States Parties under Article 40 of the Covenant. Preliminary Observations of the Human Rights Committee. Uruguay' (5 May 1993) UN Doc CCPR/C/79/Add.19, para 7; UNCCPR, Human Rights Committee, 'Considerations of Reports submitted by States Parties under Article 40 of the Covenant. Concluding Observations of the Human Rights Committee. Chile' (30 March 1999) UN Doc CCPR/C/79/Add. 104, para 7; UNCCPR, Human Rights Committee, 'Considerations of Reports submitted by States Parties under Article 40 of the Covenant. Preliminary Observations of the Human Rights Committee. Lebanon' (5 May 1997) UN Doc CCPR/C/79/Add.78, para 12; UNCCPR, Human Rights Committee, 'Consideration of Reports submitted by States Parties under Article 40 of the Covenant. Concluding observations of the Human Rights Committee. Argentina' (15 November 2000) UN Doc CCPR/CO/70/ARG, para 9; UNCCPR, Human Rights Committee, 'Considerations of Reports submitted by States Parties under Article 40 of the Covenant. Preliminary Observations of the Human Rights Committee. Republic of Guatemala' (27 August 2001) UN Doc CCPR/CO/72/GTM, para 12.

[74] 'Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.' American Convention, art 8(1).

[75] Article 25(1) states that 'everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.' Similarly, article 25(2) provides that 'the States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state, b. to develop the possibilities of judicial remedy, and c. to ensure that the competent authorities shall enforce such remedies when granted. ibid, art 25(1)-(2).

[76] *Villagrán Morales et al v Guatemala* ('Street Children Case') (Merits) IACtHR Series C No 63 (19 November 1999) para 199.

[77] ibid; *La Cantuta v Perú* (Merits, Reparations and Costs) IACtHR Series C No 162 (19 November 2006) para 149.

Although the ECtHR has been less proactive in scrutinising the remedies offered at national level when compared to the Inter-American system, in serious cases it has also ordered prosecution.[78] Initially, it started to articulate such State obligation when the right to life had been violated.[79] It has expanded the obligation to cases involving allegations of torture.[80] In *Aydin v Turkey (*where the victim alleged that there was a lack of effective investigation into her complaint of torture and sexual abuse in detention), the Court held that the investigation must be capable of leading to the 'punishment' of the criminal.[81] Similar views were held in other cases too. [82] The ECtHR now consistently articulates the obligation to prosecute and punish relating to gross violations.[83] Similar understanding could be found in the jurisprudence of the HRC. [84]

Along with this understanding, a body of jurisprudence has developed explaining different requirements that States have to fulfil to comply with the duty to prosecute and punish. The following sub-sections discuss some of these requirements, as they are important for the debate of prosecution and punishment in the context of TJ that subsequent chapters will study.

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[78] *Gül v Turkey* App No 22676/93 (ECtHR, 14 December 2000) para 100.
[79] *Öneryildiz* (n 20) [91], [96], [111].
[80] *Aksoy* (n 20); *Öneryildiz* (n 20).
[81] *Aydin v Turkey* App no 23178/94 (ECtHR, 25 September 1997) para 103.
[82] *Anguelova* (n 61) [140]; *Ramsahai* (n 40) [321].
[83] *Aksoy* (n 20); *Öneryildiz* (n 20); *Kiliç v Turkey* App no 22492/93 (ECtHR, 18 January 2000) para 62; *Mahmut Kaya v Turkey* App no 22535/93 (ECtHR, 28 March 2000) para 85; *Mastromatteo v Italy* App no 37703/97 (ECtHR, 24 October 2002) para 67.
[84] OHCHR, Human Rights Committee, 'General Comment no 6: Right to Life (Art 6)' (30 April 1982) para 3; *Njaru v Cameroon* Communication No 1353/2005, UN Doc CCPR/C/89/D/1353/2005 (HRC, 19 March 2007) para 8; *Saker v Algeria* Communication No 992/2001, UN Doc CCPR/C/86/D/992/2001 (HRC, 30 March 2006) para 11.

2.4.1. To criminalise gross violations

In order to make gross violations prosecutable, States are obliged to criminalise certain conducts amounting to gross violations. In many countries these conducts are not criminalised, making it difficult to prosecute them. For example, noting the lack of criminal law defining torture and enforced disappearances in Nepal that left victims of torture and enforced disappearances with no effective remedies, the HRC argued that this not only denied victims access to effective remedies but also promoted impunity.[85] In *Maharjan v. Nepal* the victim was subjected to torture and enforced disappearances (for some time) but had no legal remedies as the police would not even register a complaint and start investigation, not knowing under which law they would register and investigate this conduct and what punishment these crimes would claim. The HRC finding a violation stated that States' obligation under the treaty requires them to have a criminal law in place criminalising all acts amounting to torture and enforced disappearances.[86] The human rights bodies, both at global and regional level, have found a lack of criminal law criminalising gross violations constituting a violation of the treaty obligation to provide effective remedy.[87]

However, States need to address two major issues while criminalising these violations. Firstly, the principle of legality, that requires States to respect the principle of protection against retroactive effect of the law, known as *nullum crimen sine lege*. Secondly, the definition of crimes needs to comply with the definition in international treaties.

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[85] *Dev Bahadur* (n 34); *Giri* (n 34); *Sharma* (n 34).
[86] *Dev Bahadur* (n 34) [9].
[87] *Gómez Palomino v Peru* (Merits, Reparations and Costs) IACtHR Series C No 136 (22 November 2005) para 102; *Osorio* (n 20) [206]; *X and Y v The Netherlands* App no 16/1983/72110 (ECtHR, 26 March 1985) para 27; *Mahmut* (n 83) [62]; *Necati Zontul v Greece* App no 12294/07 (EctHR, 17 January 2012); *Dev Bahadur* (n 34) [9].

Nullum crimen sine lege or no crime without pre-established law is a principle that composite treaties require States to respect.[88] However, human rights bodies have developed jurisprudence clarifying that States can and should enact legislation having retroactive effect when such conducts are already crimes according to the laws recognised by the community of nations when they were committed.[89] Human rights bodies have dealt with cases concerning the retroactive effect of the law where some violations were criminalised retroactively and the alleged perpetrators were punished. For example, the Human Rights Committee looked into this issue in *Klaus Dieter Baumgarten v Germany.*[90] In this case, the head of the Border Troops of the former German Democratic Republic (GDR) was prosecuted for murders and attempted murders that were committed by border guards in preventing people to cross the border between the former GDR and the Federal Republic of Germany (FRG) before the unification of the two Germanys. The German Court had convicted Klaus Baumgarten in 1996 for murder. However, these murders were not considered as crimes when committed as the guards were required to prevent such border crossing and allowed to use lethal force.[91] Mr. Baumgarten filed a communication

[88] ICCPR (n 4) art 15; American Convention (n 3) art 9; ECHR art 7. Article 15(1) of the ICCPR states 'no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed…Similarly, Article 9 of the American Convention provides that 'No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed…' Article 7 of the European Convention provides 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.' ICCPR (n 4) art 15(1).

[89] ICCPR (n 4) art 15(1); American Convention (n 3) art 9; *Baumgarten v Germany,* Communication No 960/2000, UN Doc CCPR/C/78/D/960/2000 (HRC, 31 July 2003); UNCCPR, 'Argentina' (n 73).

[90] *Baumgarten* (n 89).

[91] ibid.

before the Human Rights Committee, arguing that there was a breach of article 15 of the ICCPR. He was punished for an act which was not a crime when he committed it.[92] However, the Human Rights Committee found no violation arguing that these murders constituted a 'disproportionate use of lethal force that was criminal according to the general principles of law recognized by the community of nations already at the time when the author committed his acts.'[93]

The HRC clarifies those crimes where this principle constitutes no bar would include gross human rights violations such as slavery, torture, enforced disappearance and extrajudicial execution.[94] The Inter-American and the European systems have developed similar jurisprudence.[95]

In addition to the criminalisation of conduct of human rights violation as a crime, the definition of violations should also comply with the definition provided by international treaties. For example, if a national law defines torture narrowly, not having a definition compatible with the definition in international law, and does not prosecute certain conducts amounting to torture because the acts fall outside of a narrow definition of torture in domestic law, then such States would also violate the obligation to prosecute. The ECtHR case of *Necati Zontul v Greece* is a good example.

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[92] ibid, para 5.6.
[93] ibid, para 9.4.
[94] UNCCPR, 'Argentina' (n 73).
[95] *Streletz, Kessler and Krenz v Germany* App nos 34044/96, 35532/97 and 44801/98 (ECtHR, 22 March 2001); *Kolk and Kislyiy v Estonia* App nos 23052/04 and 24018/04 (ECtHR, 17 January 2006); *Almonacid-Arellano et al v Chile* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 154 (26 September 2006) [90].

Necati was arrested by the coastguard when he was going to Italy in a boat with hundreds of other migrants. In Greece they were intercepted and kept in poor, overcrowded detention facilities. A coastguard trapped Necati in a toilet and forced him to be naked, then raped him using a truncheon. The Greek authorities investigated the case but the incident was not investigated as torture as this kind of violence would not be considered as torture under the domestic law of Greece. The perpetrator was given a minimum suspended sentence. [96]

Finding a violation, the ECtHR took note that the Greek definition of torture was not compatible with international law and as a result the Greek criminal justice system neither had deterrent effect to prevent the torture that Necati suffered nor provided him with adequate redress.[97]

However, it is important to note that the definition in international instruments is considered to be a minimum requirement; it does not exclude the possibility of having wider protection, if a wider definition would do so.[98] For example, the Colombian national law defines enforced disappearances broadly, also to include non-state actors as possible perpetrators, which is

[96] *Necati* (n 87); see also 'Necati Zontul v. Greece' (*Redress* 2008) <https://redress.org/casework/necati-zontul-v-greece/> accessed 15 June 2020.
[97] ibid.
[98] If it provides lessor protection, then it will be found a violation but if the national law provides wider protection, that is not found to be a violation. For example, the Colombian national law defines enforced disappearances broadly, also to include non-state actors. The Constitutional Court of Colombia considered that 'the definition of article 2 of the Inter-American Convention on Forced Disappearance of Persons establishes a minimum that must be protected by the States parties, without prejudice to their ability to adopt broader definitions within their domestic legal order.' IACFDP (n 67) art 2. The human rights bodies have found this view to be compatible with international law. *Guiburu et al v Paraguay* (Merits, Reparation and Costs) IACtHR Series C No 153 (22 September 2006) para 92; Constitutional Court, Judgment C-580/02 (3 July 2002). See International Commission of Jurists, 'International Law and the Fight Against Impunity. A Practitioners Guide' (2015) 204.

different from the definition in the Convention. This was nevertheless found to not violate the treaty obligation.[99]

2.4.2. Initiating criminal proceedings before a competent civilian court

Many countries in transition have established Special Courts or tribunals to prosecute and try cases of human rights violations. Under the composite human rights treaties, there is no prohibition in prosecuting and punishing human rights violations before Special Courts or other specialised judicial bodies. However, reasonable grounds and objectives need to be articulated for these bodies to have legitimacy under international law.[100] It is important to assess whether such specialised courts meet conditions such as independence, competence and impartiality and whether they guarantee due process for them to satisfy requirements under international law as these principles are considered as fundamental in the administration of justice.[101] IACtHR finds trials of those involved in gross violations of human rights in military courts inconsistent with treaty obligations,[102] although the jurisprudence of the European Court recognises trials in military courts as fulfilling the obligation to prosecute as long as they fulfil other requirements of fair and impartial trial.[103]

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[99] Constitutional Court (n 98).
[100] *Kavanagh v Ireland* Communication No 819/1998, UN Doc CCPR/C/71/D/819/1998 (HRC, 4 April 2001); *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica,* Advisory Opinion OC-4/84, IACtHR Series A No 4 (19 January 1984), paras 56-57.
[101] UNESC, Human Rights Commission, 'Question of the Human Rights of all Persons subjected to any form of Detention or Imprisonment' (6 February 1995) UN Doc E/CN.4/1995/39, para 55.
[102] *Rochela Massacre v Colombia* (Merits, Reparations and Costs) Series C No 163 (11 May 2007) para 200; *Osorio* (n 20) [189-190]; *Rosendo Cantú and others v Mexico* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No 216 (31 August 2010) para 161.
[103] International Commission of Jurists (n 98) 329.

2.4.3. To remove statutes of limitation and other legal hurdles impeding prosecution

Both global and regional human rights bodies have articulated that short statutory limitations barring prosecution and punishment of gross violations are inadmissible under the composite human rights treaties.[104]

In general, criminal laws have a provision of statutory limitation to prevent unjust delays between the commission of the crimes and prosecution or punishment.[105] It prevents prosecution of crimes after a lapse of a certain amount of time. The rationale behind the statutory limitations is that with a big time gap between the commission of a criminal offence and the investigation/trial, it becomes difficult to conduct investigation and find reliable evidence, that the passage of a long time may have led to the act losing its harmful effect and that punishment would not have the same deterrent effects.[106] This is also based on the principle of certainty as it aims to provide certainty and finality to potential defendants.[107]

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[104] *Maya v Nepal* Communication No 2245/2013, UN Doc CCPR/C/119/D/2245/2013 (HRC, 17 March 2017) para 15; UNCCPR, Human Rights Committee, 'Considerations of Reports submitted by States Parties under Article 40 of the Covenant. Preliminary Observations of the Human Rights Committee. Panama' (17 April 2008) UN Doc CCPR/C/PAN/CO/3, para 7; ICCPR (n 4) para 18; *Abdülsamet* (n 52) [55]; *Barrios Altos v Peru* (Merits) IACtHR Series C No 75 (14 March 2001) para 41; *Trujillo-Oroza v Bolivia* (Reparations and Costs) IACtHR Series C No 92 (27 February 2002).

[105] Robert Cryer, Darryl Robinson, Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (2nd edn, CUP 2010) 77.

[106] ibid.

[107] ibid.

However, unlike other general criminal offences, crimes of human rights violations are primarily committed by those in power and evidence often can be found only after the passing of time. [108] For example, when alleged perpetrators are still in power they can obstruct proper investigation and prosecution. It may take time for witnesses and victims to speak out because of fear. In some contexts, a country may not have the capacity to deal with the cases committed for various reasons such as resources, training and infrastructure. Furthermore, cases of human rights violations committed as part of States' policies, often in a clandestine manner, may take time to be investigated.[109] Thus, if a statutory limitation is imposed on these categories of crimes, these cases could not be prosecuted.[110] Thus, unlike other general offences, deterrent effects of international criminal law will be improved and enhanced where perpetrators have to fear that the long arm of justice can reach them for the rest of their life.[111]

Considering all those factors, the human rights bodies have developed the principle of non-applicability of statutory limitation in certain crimes of human rights violations. For example, the HRC has urged several States not to apply any statute of limitations to serious human rights violations.[112] Lately, the HRC has recommended abolishing statutes of limitation on offences involving serious human rights violations.[113]

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[108] Ricardo Gil Lavedra, 'The Possibility of Criminal Justice: The Argentinean Experiences' in Jessica Almquvist and Carlos Esposito (eds), *The Roles of Courts in Transitional Justice: Voices from Latin America and Spain* (Routledge 2012) 70.
[109] ibid; Human Rights Watch, *Truth and Partial Justice in Argentina: An Update* (1991) 6.
[110] Jan Arno Hessbruegge, 'Justice Delayed, Not Denied: Statutory Limitations and Human Rights Crimes' (2012) 43(2) GJIL 335.
[111] ibid; M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn, Brill 1999) 226.
[112] UNCCPR, 'Argentina' (n 73); UNCCPR, Human Rights Committee, 'Consideration of Reports submitted by States Parties under Article 40 of the Covenant. Comments of the Human Rights Committee. El Salvador' (18 November 2010) UN Doc CCPR/C/SLV/CO/6, para 6;

The IACtHR argues that provisions regarding statutes of limitations and the establishments of any other measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearances.[114] Similarly, the ECtHR has held that it is of utmost importance for the purposes of an effective remedy that criminal proceedings relating to crimes such as torture, involving serious human rights violations, not be subject to statutes of limitation.[115]

2.4.4. Punishment should be proportionate to the gravity of the crime committed

The human rights bodies have also articulated the requirement of an appropriate sanction for those involved in gross violations. Although the composite human right treaties do not have an article explicitly explaining the types of punishment that should be applied, human rights bodies have pronounced that punishment should be proportionate to the gravity of the crimes committed.[116] It has to be grave enough to effectively deter future violations.[117] Punishments

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UNCCPR, Human Rights Committee, 'Concluding observations on the fifth periodic report of Uruguay*' (2 December 2013) UN Doc CCPR/C/URY/CO/5, para 19; UNCCPR, 'Panama' (n 104) para 7.

[113] *Maya* (n 104); UNCCPR, 'Panama' (n 104) para 7.

[114] *Barrios* (n 104); *Trujillo* (n 104); *Caracazo* (n 19) [119]; *La Cantuta* (n 77) [152]; *Anzualdo* (n 33) [182].

[115] *Abdülsamet* (n 52) [55].

[116] *Bautista* (n 20) [8.2]; *Arhuacos* (n 17) [8.8]; UNCCPR, Human Rights Committee, 'Consideration of Reports submitted by States Parties under Article 40 of the Covenant. Comments of the Human Rights Committee. Romania' (5 November 1993) UN Doc CCPR/C/79/Add.30, para 10; *Rochela Massacre v Colombia* (Merits, Reparations and Costs) Series C No 163 (11 May 2007); *Öneryildiz* (n 20) [116]; *Nikolova and Velichkova v Bulgaria* App no 7888/03 (ECtHR, 20 December 2007) para 62; *Necati* (n 87).

[117] UNCCPR, Human Rights Committee, 'Consideration of Reports submitted by States Parties under Article 40 of the Covenant. Comments of the Human Rights Committee. Dominican

needs to be prescribed by law and cannot be arbitrary.[118] It should not give a sense of impunity for perpetrators.[119]

Human rights bodies have not found the lenient sentencing *per say* violating the treaty obligations but have stressed that measures States take in offering lenient sentences need to be harmonised with the principle of proportionality of punishment to ensure that criminal justice does not become illusionary[120] and does not disproportionately favour perpetrators and provide the sense of impunity for them.[121]

2.4.5. Limiting the scope for amnesty in gross violations of human rights

Amnesty, as a legal tool, has been in used for a long time.[122] Although different forms of amnesty have been adopted in a variety of contexts,[123] all amnesty provisions share similar characteristics, such as being *ad hoc,* used to extinguish criminal liability for specific crimes committed by an individual or a group, applied retroactively and used as extraordinary measures enacted beyond existing legislation.[124]

Republic' (5 May 1993) UN Doc CCPR/C/79/Add.18, para 10; *Nikolova* (n 116) para 61; *Rochela* (n 102).

[118] Seibert-Fohr (n 4) 77; International Commission of Jurist (n 98) 220.

[119] *Nikolova* (n 116) paras 63-64.

[120] *Rochela* (n 102) [196].

[121] *Nikolova* (n 116).

[122] Louise Mallinder, 'Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment' in Francesca Lessa and Leigh A Payne, *Amnesty in the Age of Human Rights Accountability. Comparative and International Perspectives* (CUP 2012) 71; Andreas O'Shea, *Amnesty for Crime in International Law and Practice* (Kluwer Law International 2002) 5.

[123] OHCHR, 'Rule-of-Law Tools for Post-Conflict States. Amnesties' (2009).

[124] Mark Freeman, *Necessary Evils. Amnesties and the Search for Justice* (CUP 2009) 12-14.

Many transitions (both from dictatorship to democracy and conflict to peace) have been secured offering amnesty.[125] Transitions including those facilitated and mediated even by international actors, including the UN, have also contained amnesty, irrespective of the nature of violations.[126] Peace negotiators argue that no one involved in armed conflict would agree to lay down arms if doing so would risk them being prosecuted.[127] Even countries recently transitioning to democracy are considering amnesty laws to 'prevent threats' to the political transition.[128] Thus, scholars argue amnesty being a 'necessary evil' unavoidable in certain contexts of transition.[129]

Arguments, both in favour and against amnesty are complex and scholars argue about the limits put by IHRL on use of amnesty. [130] As amnesty has been one of the central issues in many transitions and TJ processes today, including in Nepal, this section analyses jurisprudence from the human rights bodies to understand the exact limit IHRL puts on the use of amnesty.

As the previous sections analysed, as human rights bodies started to expand understanding on States' duty to investigate, prosecute and punish in certain violations, amnesty was found to be impeding the fulfilment of such obligation of States. As discussed earlier, many countries in

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[125] Tonya Putnam, 'Human Rights and Sustainable Peace' in Stephen J Stedman, Donald Rothchild and Elizabeth M Cousens (eds), *Ending Civil Wars. The Implementation of Peace Agreements* (Lynne Rienner Pub 2002) 240-41; O'Shea (n 122) 22.
[126] Scharf (n 13); Michael P Scharf, 'From the eXile Files: An Essay on Trading Justice for Peace' (2006) 63 (1) Wash & Lee L Rev 339, 342.
[127] Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: principle and Pragmatism in Strategies of International Justice' (2003/2004) 28(3) International Security 5.
[128] Renee Jeffery, *Amnesty, Accountability, and Human Rights* (University of Pennsylvania Press 2014) 201.
[129] Freeman (n 124).
[130] Naomi Roht-Arriaza, 'After Amnesties Are Gone: Latin American National Courts and the New Contours of the Fight against Impunity' (2015) 37(2) Hum Rts Q 341; Louise Mallinder, 'The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws (2016) 65(3) ICLQ 645; Scharf, 'Amnesty Exception to the Jurisdiction' (n 70).

Latin America had adopted amnesty laws in the context of democratic transition.[131] It has forced victims from the region to approach to the Inter-American System seeking remedies, making the regional mechanism into dealing with the issue of amnesty the most and producing an enriching body of jurisprudence, influencing other jurisdictions.

Initially, the Inter-American system found self-amnesty[132] and blanket amnesty[133] problematic and not compatible with the ACHR, finding that self-amnesty was self-judging, and used to help perpetrators cover up their crimes with no social benefits or gain.[134] Blanket amnesty would prevent a victim's right to investigation and compensation.[135] Commenting on self and blanket amnesty, the IACtHR also argued that both promote impunity and make victims defenceless, preventing any investigation into the allegation of cases of human rights violations.[136]

Amnesty, adopted through the democratic process to secure transition and to end human rights violations accompanied by accountability measures such as a Truth Commission and compensation for victims were considered to be legitimate.[137]

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[131] Lorena Balardini, 'Argentina: Regional Protagonist of Transitional Justice' in Elin Skaar, Jemima Garcia-Godos and Cath Collins (eds), *Transitional Justice in Latin America: The Uneven Road from Impunity Towards Accountability* (Routledge 2016) 57-60; Roht-Arriaza, 'After Amnesties Are Gone' (n 130).

[132] Amnesty was imposed by those committing human rights violations to protect themselves from any accountability such as in Chile, Guatemala, Peru.

[133] Offering amnesty to a broad categories of violations without any investigation or having any preconditioned fulfilled such as in El Salvador, Peru, Chile, Guatemala); OHCHR, 'Rule-of-Law Tools for Post-Conflict States: Amnesties' (2009) 8.

[134] Mallinder (n 130).

[135] IACHR, Annual Report 1985-1986, OEA/Ser.L/V/II.68 Doc.8rev.1 (1986) chapter 5.

[136] *Castillo Páez v Peru* (Reparations and Costs) IACtHR Series C No 43 (27 November 1998) para 107; IACHR Annual Report, OEA/Ser L/V/II 68V (1986) para 192.

[137]Annual Report of the Inter-American Commission on Human Rights, 1985-1986, OEA/Ser.L/V/II.68, doc.8 rev.1, chapter 5 (1986) <http://www.cidh.oas.orglannualrep/

Similarly, the European Commission also accepted the objective of reconciliation, giving the State a margin of appreciation in enacting amnesty law.[138] For example, in *Dujardin v France,*[139] it recognised the exceptional character of the 1989 amnesty law enacted by France to end the conflict in New Caledonia.[140] The Human Rights Committee had also articulated that amnesty is *'generally'* incompatible with the ICCPR when it intends to prevent upholding the States' duty to investigate and victims' rights to compensation in cases like torture[141] and enforced disappearances.[142] Thus, countries have passed amnesty laws, established Truth Commissions and offered compensation to victims while offering amnesty to perpetrators.[143] South Africa is a classic example, where amnesty was offered in return for full disclosure of truth.[144]

However, as the human rights bodies started expanding their understanding on victims' rights to effective remedies, including investigation, prosecution and punishment, amnesty is found to be undermining such rights of victims. Even if truth is established and reparation is provided,

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85.86eng/toc.htm> accessed 10 October 2019; Douglass Cassel, 'Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities' (1996) 59(4) LCP 197; Ellen Lutz, 'Responses to Amnesties by the Inter-American System for the Protection of Human Rights' in David J Harris and Stephen Livingstone (eds), *The Inter-American System of Human Rights* (OUP 1998) 345.

[138] *Dujardin v France* App no 16734/90 (ECtHR, 2 September 1991).

[139] ibid.

[140] ibid.

[141] OHCHR, 'General Comment No 20 (n 38).

[142] *Valentini de Bazzano v Uruguay* Communication No 5/1977, UN Doc CCPR/C/7/D/5/1977 (HRC, 15 August 1979) para 81.

[143] Louise Mallinder, 'Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment' in Francesca Lessa and Leigh A Payne, *Amnesty in the Age of Human Rights Accountability. Comparative and International Perspectives* (CUP 2012) 94.

[144] Antje du Bois-Pedain, 'Accountability through Conditional Amnesty: The case of South Africa' in Francesca Lessa and Leigh A Payne, *Amnesty in the Age of Human Rights Accountability. Comparative and International Perspectives* (CUP 2012) 257.

amnesty will still be violating victims' rights by preventing prosecution and punishment.[145] In the view of the IACHR, amnesty laws by preventing prosecution and punishment removes the most effective measures to protect human rights,[146] undermines the rule of law and respect for the law, does not contribute to the protection of human rights but encourages their violations.[147] The IACtHR has also started to argue that amnesty or any other measures that prevents investigation, prosecution and punishment of those involved in serious violations are not compatible with the American Convention.[148] The *Barrios Altos* case is a landmark in this regard; where the IACtHR made an important finding that all amnesty provisions that prevent criminal responsibility in cases involving serious human rights violations are inadmissible under the Inter-American Convention.[149] This finding of the Court influenced not only the subsequent cases before the IACtHR[150] but paved the ground for several countries in the region to retroactively nullify their amnesty laws.[151]

As most of those amnesty laws that the Inter-American system was dealing with (including in respect of *Barrios Altos*) were related to self-amnesty not adopted through a democratic process,

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[145] *Carmelo Soria Espinoza v Chile,* IACHR Report no 133/99 OEA/Ser L/V/II 106 (1999) para 2.
[146] ibid [104].
[147] IACHR, second Report on the Situation of Human Rights in Peru, OEA/Ser.L/VII.106, Doc.59/Rev (2000) para 230.
[148] *Castillo* (n 136).
[149] *Barrios Altos* (n 104) [41-42].
[150] *Barrios Altos* (n 104); *Almonacid-Arellano et al v Chile* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 154 (26 September 2006); *La Cantuta* (n 77); *Gomes Lund et al ('Guerrilha do Araguaia') v Brazil* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No 219 (24 November 2010); *Gelman v Uruguay* (Merit and Reparations) IACtHR Series C No 221 (24 February 2011); *Massacres of El Mozote and Nearby Places v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No 252 (25 October 2012).
[151] Clara Sandoval-Villalba, 'The Challenge of Impunity in Peru: The Significance of the Inter-American Court of Human Rights' (2008) 5(1) Essex Human Rights Review 1.

it was still not clear whether the decision of the Court in Barrios Altos eliminated the possibility of all amnesty or it still left open some possibility for some democratically enacted amnesty that is accompanied by other accountability measures.[152] However, in *Gelman v Uruguay,*[153] the IACtHR had to deal with the issue as to whether an amnesty law enacted by a democratically elected Government, approved by the population through popular referendums (the amnesty law in Uruguay was approved by two referendums, in 1989 and in 2009), is compatible under the ACHR.[154]

However, the IACtHR found that the amnesty law of Uruguay, even though approved by two referenda still violated the ACHR as it still violated States' duty to investigate, prosecute and punish gross human rights violations and uphold victims' rights to justice.[155] The Court argued that the duty to investigate, prosecute and punish is subjected to the gravity of the acts committed, not necessarily the manner in which they were approved. This was further strengthened in *Gomes Lund v Brazil*.[156] In this case, the IACtHR further clarified that incompatibility of amnesty law with the ACHR is not based only on the process through which

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[152] Nelson Camilo Sánchez and Rodrigo Uprimny, 'The Challenges of Negotiated Transitions in the Era of International Criminal Law' in Nelson Camilo Sánchez and others, *Beyond the Binary. Securing Peace and Promoting Justice After Conflict* (Dejusticia 2019) 18-71; Oscar Parra-Vera, 'Inter-American Jurisprudence and the Construction of Transitional Justice Standards: Some Debates and Challenges' in Nelson Camilo Sánchez and others, *Beyond the Binary. Securing Peace and Promoting Justice After Conflict* (Dejusticia 2019) 154-73; Fernando Travesí and Henry Rivera 'Political Crime, Amnesties and Pardons (ICTJ Briefing, March 2016); Paul Seils 'Squaring Colombia's Circle. The Objectives of Punishment and the Pursuit of Peace' (ICTJ Briefing, June 2015).

[153] *Gelman* (n 150).

[154] Francesca Lessa and Elin Skaar, 'Uruguay: Halfway Towards Accountability' in Elin Skaar, Jemima García-Godos and Cath Collins (eds), *Transitional Justice in Latin America. The Uneven Road from Impunity Towards Accountability* (Routledge 2016) 81.

[155] Courtney Hillebrecht, Alexandra Huneeus and Sandra Borda, 'The Judicialization of Peace' (2018) 59(2) Harv ILJ 279.

[156] *Gomes Lund* (n 150) [175]. See also Micus (n 12) 131-37.

the amnesty law was adopted but the assessment whether it provided impunity for serious human rights violations or not.[157]

These decisions of the IACtHR on amnesty have significant implications on how countries undergoing transition negotiate the terms of TJ. Although the decision in *Gelman* and beyond are hailed by victims and civil society for paving the way to end impunity by ultimately repealing the amnesty law and opening the possibility of investigation for past crimes,[158] the decision of the IACtHR on *Gelman* has also been subjected to some criticisms. Roberto Gargarella argues that this decision of the IACtHR impinged upon the sovereign power of States,[159] eliminating State parties' margin of appreciation and exceptional situations that may require exceptional measures for the public good.[160] It is also criticised for increasing the Court's 'interference' in democratic decision-making process, where States are obliged to strike balances between different obligations such as securing peace and providing justice.[161] Roberto Gargarella argues those amnesties that the IACtHR had dealt in the past, had different historical contexts. For example, the amnesty law of Guatemala, Chile and Peru were self-amnesty, adopted by dictatorship, having no public support. However, the case of Uruguay was different as this was

[157] ibid.
[158] Francesca Lessa and Elin Skaar, 'Uruguay: Halfway Towards Accountability' in Elin Skaar, Jemima García-Godos and Cath Collins (eds), *Transitional Justice in Latin America. The Uneven Road from Impunity Towards Accountability* (Routledge 2016) 93-5.
[159] Roberto Gargarella, 'No Place for Popular Sovereignty? Democracy, Rights and Punishment in Gelman v. Uruguay' (2013) <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1123&context=yls_sela> accessed 20 June 2020.
[160] ibid.
[161] ibid.

the result of a democratic process and collective reflection made by the society. Thus, he criticised the Court for its failure to recognised nuances needed on this issue.[162]

Scholars argue that contexts of amnesty laws and the process (whether they are adopted weighing different obligations of States) need to be taken into consideration while assessing their compatibility with international law.[163] This was also highlighted by Judge Garcia Sayan of the IACtHR in his concurring opinion in *El Mozote,* another land-mark case relating to the amnesty law of El Salvador.[164] Although the Court found the amnesty law of El Salvador as incompatible with the ACHR as it prevented investigation, prosecution and punishment (of the massacre of civilians, mostly children in *El Mozote* and nearby villages during the internal conflict in El Salvador),[165] Judge García-Sayan issued a concurring opinion. [166] He argued for a specific look into contexts of amnesty measures, stating that in some contexts such as internal armed conflict, an amnesty could be the only option to end violence through negotiated treaties.[167] Recalling that all the cases that the IACtHR had dealt with up to that point were related to self-amnesty and blanket amnesty adopted in the context of democratic transitions, he agreed that self-amnesty and blanket amnesty were manifestly incompatible with the ACHR and lacked legal effect. However, an amnesty law adopted by a democratically elected Government to prevent conflict and ongoing violations ensuring victims' right to truth and justice through other innovative ways should be

[162] Roberto Gargarella, 'Some Reservations Concerning the Judicialization of Peace' (2019) 59 Harvard International Law Journal Comment 1.
[163] Sánchez and Uprimny (n 152); Travesí and Rivera (n 152); Seils (n 152).
[164] *Massacres* (n 150).
[165] ibid.
[166] Concurring Opinion of Judge Diego García-Sayán*, Massacres* (n 150) [20-26].
[167] ibid.

treated differently.[168] In his view, some situations of armed conflict[169] pose unique challenges that cannot be addressed only through strict rules on States' duty to investigate and prosecute.[170] He agrees that the right to justice for victims include investigation, prosecution and punishment and that serious crimes cannot enjoy impunity, but argues that alternative solutions can be explored to fulfil the obligation to provide justice. Although this is a concurring opinion of the judge where a violation was found, it nevertheless highlights the potential tensions and dilemmas in restricting the use of amnesty altogether in the context of some transitions.

Compared to the IACtHR, other jurisdictions have fewer opportunities. The ECtHR has dealt with some cases involving issues of amnesty in recent years.[171] For example, in *Margus v Croatia,*[172] the ECtHR rejected the argument of amnesty protecting the accused committing crimes during the conflict. In this case, a Croatian military officer was accused of murdering civilians during the Croatian conflict. He was first investigated and charged for murder. However, later the charges were dropped because the country passed an amnesty law to provide amnesty to all crimes committed in connection with the conflict. However, war crimes and genocide were excluded.[173] Again, later, he was charged for war crimes (including some of the same charges), for which the Court in Croatia had found him guilty.[174] He challenged the trial, arguing he was tried twice for the same offense. However, the ECtHR found no violation in the

[168] ibid.
[169] The judge might be considering situation of Colombia in mind, where efforts were ongoing to end a 52 years long war.
[170] Concurring Opinion of Judge Diego García-Sayán, *Massacres* (n 150) [37-38].
[171] *Ould Dah v France* App no 13113/03 (ECtHR, 17 March 2009); *Marguš v Croatia* App no 4455/10 (ECtHR, 17 May 2014).
[172] *Marguš* (n 171).
[173] ibid, para 10.
[174] ibid, paras 16-17.

decision of Croatia to try the person accused of acts amounting to war crimes, despite the person receiving amnesty for such crimes.[175] It argued the granting of an amnesty or pardon for those involved in the 'killing and ill-treatment of civilians would run contrary to the State's obligations under Articles 2 and 3 of the Convention since it would hamper the investigation of such acts and necessarily lead to impunity for those responsible'.[176]

As this case also involved the issue of internal armed conflict and the provision of amnesty in such context, the Court also heard the arguments of an intervenor (which was the ICRC). The ICRC requested for a more nuanced approach into this issue arguing in favor of 'possibility of the granting of amnesties' where amnesty becomes the only way to come out of violent dictatorships or conflicts.[177] The Court however, stated that 'even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any of such circumstances.'[178] Although this language of the Court could be read as Court's willingness to analyse those contexts where amnesty remains the only option to end violations, it did not find those conditions/ contexts present in this case. It is not clear whether the Court would have taken a different position if the amnesty was accompanied by other TJ mechanisms and designed to facilitate the end of the conflict. However, the Court's ruling so far is based on the nature of

[175] ibid, para 78.
[176] ibid, paras 126-127.
[177] ibid, para 113.
[178] ibid, para 139.

violations that certain crimes require investigation and prosecution, no amnesty permissible in those cases.[179]

In recent years, the HRC has also consistently argued that 'amnesties, pardons or other analogous measures contribute to creating an atmosphere of impunity for the perpetrators of human rights violations, undermine efforts to re-establish respect for human rights and the rule of law, situations that run contrary to the obligations of the States under the ICCPR.'[180] It has also rejected the argument of amnesty being a necessary condition for reconciliation and the re-establishment of respect for human rights.[181] In cases where the States parties have used the argument that amnesty was necessary for consolidation of democracy, peace and reconciliation, the HRC has argued that respect for human rights need to be re-established after a civil war and dictatorship, and that amnesty promotes impunity and impunity weakens the establishment of peace, respect for human rights, democracy and the rule of law.[182] It argues that amnesty relieves perpetrators of gross human rights violations from 'personal responsibility' and is inadmissible under the ICCPR.[183]

[179] Miles Jackson, 'Amnesties in Strasbourg' (2018) 38(3) OJLS 451.
[180] UNCCPR, Human Rights Committee, 'Considerations of Reports submitted by States Parties under Article 40 of the Covenant. Preliminary Observations of the Human Rights Committee. Peru' (25 July 1996) 57th session UN Doc CCPR/C/79/Add.67, paras 9-10, 20.
[181] *Rodríguez v Uruguay* Communication No 322/1988, UN Doc CCPR/C/51/D/322/1988 (HRC, 19 July 1994) para 8.
[182] UNCCPR, Human Rights Committee, 'Consideration of Reports submitted by States Parties under Article 40 of the Covenant. Comments of the Human Rights Committee. El Salvador' (18 April 1994) 55th session UN Doc CCPR/C/79/Add.34, paras 7, 12.
[183] ICCPR (n 4) para 18.

Although scholars arguments about the exact limit that IHRL puts on amnesty is still not clear and settled,[184] it is hard to find any jurisprudence where these bodies have accepted amnesty for gross violations of human rights in recent years. Unlike in the past, the UN has taken a clear position that it cannot support any peace process that grants amnesty to those involved in gross violations of human rights and international crimes.[185] This position also impacts the legitimacy of the TJ process on the ground as it is experienced in Nepal.[186] Thus, it can be safely argued that amnesty for those involved in gross violations, where States are duty bound to investigate, prosecute and punish, is impermissible under the IHRL.

These developments at international level have informed and influence national processes. They also empower victims and civil society. For example, although no regional human rights mechanisms exist in Asia as in the case of Latin America and Europe, referencing on jurisprudence developed by the latter regional mechanisms, victims and civil society organizations in Nepal have brought a number of petitions in the Supreme Court demanding

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[184] Mark Freeman and Max Pensky, 'The Amnesty Controversy in International Law' in Francesca Lessa and Leigh A Payne, *Amnesty in the Age of Human Rights Accountability. Comparative and International Perspectives* (CUP 2012) 64; Anja Seibert-Fohr, 'Human Rights as Guiding Principles in the Context of Post Conflict Justice' (2005) 13 Michigan State Journal of International Law 179.

[185] UNSC, 'The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General' (23 August 2004) UN Doc S/2004/616*. See also statement of the spokesperson for Secretary-General Ban Ki-moon on the 24 July 2007: '…the Organization cannot endorse or condone amnesties for genocide, crimes against humanity, war crimes or gross violations of human rights, nor should it do anything that might foster them.' OHCHR, 'Nepal: OHCHR position on UN support to the Commission on Investigation of Disappeared Persons and the Truth and Reconciliation Commission: 16 February 2016' (2016) 1.

[186] OHCHR, 'Nepal: OHCHR position on UN support to the Commission on Investigation of Disappeared Persons and the Truth and Reconciliation Commission: 16 February 2016' <https://www.ohchr.org/Documents/Countries/NP/Nepal_UN%20osition_supportTRC_COIDP_Feb2016.pdf> accessed 14 June 2020.

investigation and prosecution of those involved in gross violations,[187] and challenging amnesty[188] and pardon.[189] They have also demanded reparation[190] and reforms of laws, policies and institutions.[191]

The national judiciaries have also referred to these jurisprudence to conclude that States are under an obligation to investigate and prosecute cases involving gross violations.[192] For example, referencing the jurisprudence developed by the Inter-American Court on *Barrios Altos v Peru,*[193] the Supreme Court of Nepal has reasoned that amnesty is impermissible in cases of gross violations where a duty to prosecute exists[194] as it impairs the rights of victims to have effective remedies.[195] Similarly, the Supreme Court has also articulated such investigation needs to be impartial and independent.[196] It has rejected military courts' jurisdiction in some of these

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[187] *Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal v Government of Nepal, Ministry of Home Affairs and Others* (2007) Issue No 2 Decision No 7817 Ne Ka Pa 2064 [2007] 169.
[188] *Madhav Kumar Basnet et al v Office of the Prime Minister and Others* (2014) Issue No 9 Decision No 9051 Ne Ka Pa 2070 [2014] 1101.
[189] *Sabitri Shrestha v Office of the Prime Minister and Council of Ministers et al* (2016) SC Writ No 068-WS-0029.
[190] *Liladhar Bhandari v Office of the Prime Minister and Council of Ministers et al* (2009) Issue No 9 Decision No 8012 Ne Ka Pa 2065 [2009] 1086.
[191] *Sunil Ranjan Singh et al v Office of the Prime Minister and Council of Ministers and Others* (2013) Issue 12 Decision No 8933 Ne Ka Pa 2069 [2013]1826; *Rajendra Ghimire and Others v Office of the Prime Minister and Council of Ministers et al* (2007) Writ No 3219 of Year 2005; *Raja Ram Dhakal v Office of the Prime Minister and Others* (2004) SC Writ No 2942 of Year 2002.
[192] *Sunil Ranjan Singh v Nepal Government, Office of the Prime Minister and Council of Ministers et al* (2020) SC Writ No 067-WO-1043, para 34-37.
[193] *Barrios Altos* (n 104) [41].
[194] *Suman Adhikari et al v Office of the Prime Minister and Council of Ministers and Others* (2015) Issue 12 Decision No 9303 Ne Ka Pa 2071 [2015] 2069, paras 69-70.
[195] *Adhikari* (n 194) para 68; *Héctor Pérez Salazar v Peru* , Case 10.562, Report Nº 43/97, IACHR, OEA/Ser.L/V/II.95 Doc. 7 rev. at 771 (19 February 1998); *Singh* (n 192) para 36.
[196] *Singh* (n 192) para 59.

violations[197] requiring investigation to be independent that includes experts.[198] Non-applicability of short period of statutory limitations[199] and the need to have violations of certain rights to be criminalised to bring those responsible to justice have been highlighted[200] contributing to expand such standards at the national level, impacting the TJ discourse significantly.[201]

Although the use of amnesty for categories of violations (other than gross violations and international crimes) seems to be permissible, it is recognized that it cannot be a blanket amnesty but need to be accompanied by other accountability measures and adopted through a democratic process. Arguably, the clear position of IHRL, not accepting amnesty for those involved in gross violations empowers victims on the ground and forces political actors to develop an accountability process for crimes committed in the past, paving the way for a TJ process that includes both investigation and prosecution.

2.5. International Humanitarian Law and duty to prosecute war crimes

States are also under an obligation to investigate, prosecute and punish war crimes under International Humanitarian Law (IHL), codified in the four Geneva Conventions and its additional protocols.[202] As the situations in the majority of countries that are currently designing

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[197] *Devi Sunuwar v District Police Office, Kavrepalanchowk* (2007) Writ No 0641 of Year 2007.
[198] Concurring Opinion of Justice Kumar Regmi, *Singh* (n 192) para 28.
[199] *Dhakal* (n 187) 246.
[200] ibid.
[201] See ch 5, s 5.3.2.
[202] For example, four Geneva Conventions include: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (First Geneva Convention); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Second Geneva Convention); Geneva Convention Relative to the Treatment of Prisoners of

TJ processes, including Nepal, involve a context of armed conflict, an understanding of the duties of States under IHL would inform the analysis in subsequent chapters. This section briefly studies the duty to prosecute under IHL.

The Geneva Conventions categorise conflicts into two categories: non-international armed conflict (NIAC) and international armed conflict (IAC) and impose duties on States in both contexts. The duty to prosecute certain conducts of violating humanitarian law comes from both treaty and customary international law.[203] As many countries where TJ is currently being discussed are countries emerging from NIAC, having had a conflict between the State and an armed group, this section only analyses the State duty to prosecute and punish IHL violations that take place in the context of NIAC.

2.5.1. War crimes in the context of non-international armed conflict and duty to prosecute

Common Article 3 to all four Geneva Conventions[204] and Additional Protocol II[205] to the Geneva Conventions are the most relevant documents to NIAC, as they prohibit certain conducts and impose certain obligation on States.

War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention); Geneva Convention Relative to the Protection of Civilian Persons in the Time of War (adopted 12 August 1949, entered into force 21 October 2050) 75 UNTS 287 (Fourth Geneva Convention). See also Willem-Jan Van Der Wolf, *War Crimes and International Criminal Law* (International Courts Association 2010) 23.

[203] Noam Lubell, Jelena Pejic and Claire Simmons, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* (The Geneva Academy of International Humanitarian Law and Human Rights and International Committee of Red Cross 2019) para 13.

[204] The paragraph 1 of the Article 3 provides 'persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause shall in all circumstances be treated

Common Article 3 prohibits crimes such as (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples and are committed against civilians not participating in hostilities, including soldiers who have not taken part in hostilities due to sickness, injury or surrender, or being in captivity.[206]

Article 4(2) of the Additional Protocol II provides 'fundamental guarantees' against the following acts: a) violence to the life, health and physical or mental well-being of persons, in particular, murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; b) collective punishments; c) taking of hostages; d) acts of terrorism; e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; f) slavery and the slave trade in all their forms; g) pillage; and h) threats to commit any of the foregoing acts.

There are some overlaps between Common Article 3 and the fundamental guarantees in Article 4 of Additional Protocol II. However, none of the Articles explicitly impose a duty to prosecute

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humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth or any other similar criteria.

[205] Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Protocol II).

[206] Common Article 3 to all four Geneva Conventions, art 3.1.

breaches of Common Article 3 and violations of the fundamental guarantees provided in Article 4 of Additional Protocol II.

IHL uses the terminologies of 'grave breaches of the Geneva Convention' and 'other serious violations of the laws and custom of war' to denote the crimes that are prohibited under IHL. The grave breaches take place in the context of IAC and other serious violations of the laws and custom of war in the context of NIAC. For example, Article 50 of Geneva Conventions of 1949 clearly spells out the State obligation to prosecute and punish grave breaches, which include 'wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.'[207] States are obliged to enact legislation to impose penal sanction on those involved in 'grave breaches.'[208] It also requires States to exercise extra-territorial jurisdiction to effectively punish those responsible for grave breaches.[209]

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[207] Article 50 of the First Geneva Convention provides 'grave breaches' to which the preceding articles relates shall be those involving any of the following acts, if committed against persons or property protected by the convention: (a) wilful killing, (b) torture or inhuman treatment, including biological experiments, (c) wilfully causing great suffering or serious injury to body or health, (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power, (f) willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial, (g) unlawful deportation or transfer or unlawful confinement of a civilian, (h) taking civilians as hostages..' First Geneva Convention (n 202), art 50.

[208] ibid, art 49.

[209] The First Geneva Convention also provides that each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a 'prima facie' case. ibid, art 49.

However, similar provisions do not exist in relation to breaches of Common Article 3 and serious violations listed in Additional Protocol II. It is also not clear from these Articles of the Geneva Convention whether a breach of Common Article 3 and Article 4 of the Additional Protocol would require States to prosecute. On the contrary, Article 6(5) of Additional Protocol II urges States to grant the broadest possible amnesty to those involved in armed conflict, stating 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.[210] 'Scholars argue that the amnesty measures that many peace agreements have considered originate from this.[211]

However, in 1987, the ICRC issued a commentary, explaining the underlying principles of each of these Articles, and requirement of criminal accountability for violations of Common Article 3. It stated that 'the acts referred to under items (a) to (d) are prohibited absolutely and permanently, no exception or excuse being tolerated...'[212] The ICRC has also clarified that the purpose of the provision of amnesty in Additional Protocol II is to encourage amnesty for those who were detained or punished merely for having participated in the hostilities as members of

[210] Additional Protocol II, s 6 (5).
[211] Louise Mallinder, *Amnesty, Human Rights and Political Transitions. Bridging the Peace and Political Transition* (Hart Publishing 2008) 203-46; Scharf (n 13).
[212] ICRC, Treaties, States Parties and Commentaries, '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; ICRC, 'Commentary of 1987 Fundamental Guarantees', recital 4531 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=5CBB47A6753A2B77C12563CD0043A10B> accessed on 24 September 2016.

any parties taking part in the conflict. It does not seek to be an amnesty for those suspected of, accused of or sentenced for war crimes.[213]

The establishment of two international tribunals, the International Tribunal for former Yugoslavia (ICTY), [214] and the International Tribunal for Rwanda (ICTR) and their work have helped to clarify the understanding of war crimes and State's obligation to prosecute certain violations under the common article 3.

For example, the ICTY was mandated to investigate, prosecute and punish not only grave breaches of the Geneva Convention, but also the war crimes committed in the context of IAC,[215] and other war crimes that were against the laws or customs of war.[216] The tribunal expanded the understanding further in its case laws. For example, in *Dusko Tadic*,[217] the appellant had challenged the jurisdiction of the Court to prosecute Tadic for crimes committed in the context of the NIAC arguing that prohibition of Common Article 3 does not entail individual criminal responsibility when breaches are committed in the context of NIAC.[218] However, the ICTY upheld the breach of Common Article 3 amounting to war crimes arguing that 'what is inhumane

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[213] Letter from the International Committee of the Red Cross (ICRC) directed to the Prosecutor of the International Tribunal for the Former Yugoslavia, in 1995. The ICRC reiterated this interpretation in another communication dated on 15 April 1997. ICRC, IHL Database, Customary IHL, 'Rule 159. Amnesty' <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule 159> accessed 20 February 2019.
[214] Statute of the International Criminal Tribunal for the former Yugoslavia (adopted 25 May 1993) (ICTY Statute); UNSC, 'Resolution 827 (1993). Adopted by the Security Council at its 3217th meeting, on 25 May 1993' (25 May 1993) UN Doc S/RES/827.
[215] ICTY Statute, art 2.
[216] ibid, art 3.
[217] *Prosecutor v Dusko Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1AR72 (2 October 1995).
[218] ibid, paras 128-129.

and consequently proscribed in international war, cannot but be inhuman and inadmissible in civil strife.'[219] The tribunal held that merely the context (that is, whether it is an international or a non-international armed conflict) does not make the crimes serious or less serious or possessing a different legal obligation. The thrust of the grave breaches and serious violations is not to let those responsible for committing such heinous crimes go unpunished.[220] The tribunal relied on customary international law to conclude the existence of the States' obligation to prosecute conducts prohibited by Common Article 3 and the Optional Protocols to the Geneva Conventions.[221]

This decision of the tribunal was a stepping-stone not only for the future work of the tribunal but also to help expand the understanding of what IHL prevents is the nature of the crimes, irrespective of the context, whether it is an international or non-international conflict.[222] The jurisprudence of *Tadic* was used in other cases to expand accountability for certain conducts committed in the context of NIAC.[223]

The understanding of war crimes in the context of NIAC was further expanded by the ICTR.[224] The Statute of the ICTR defined serious violations of Common Article 3 of the four Geneva

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[219] ibid, para 119.
[220] ibid.
[221] Sandesh Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict' (2011) 22(1) EJIL 219.
[222] ibid.
[223] This jurisprudence was also used in other cases such as *Prosecutor v Limaj et al.* (Judgement) IT-03-66-T (30 November 2005) para 176; *Prosecutor v Naletilić & Martinović* (Judgement) IT-98-34-T (31 March 2003) para 228.
[224] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations

Conventions and the violations of fundamental freedom of Additional Protocol II as war crimes.[225] The Statute of the International Criminal Court (ICC) cemented this later. It makes no explicit reference to 'grave breaches', but rather provides the Court jurisdiction over violations of Common Article 3 of the Geneva Conventions and Additional Protocol II by collating all the violations listed in both.[226] In a similar way, the requirement of universal jurisdiction is no longer confined to crimes committed during IAC. War crimes, crimes against humanity, genocide, and torture committed even in the context of NIAC trigger universal jurisdiction and are considered as war crimes requiring States to prosecute.[227]

Although not all violations of IHL trigger a State's duty to prosecute, the duty to investigate and prosecute relates to the violations of humanitarian law that amount to war crimes. War crimes is

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Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, Adopted by Security Council resolution 955 (1994) of 8 November 1994 amended by Security Council resolutions 1165 (1998) of 30 April 1998 , 1329 (2000) of 30 November 2000, 1411 (2002) of 17 May 2002 and 1431 (2002) of 14 August 2002.

[225] Article 4**:** Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II**, '**The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to: (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment, (b) Collective punishments, (c) Taking of hostages, (d) Acts of terrorism, (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault, (f) Pillage, (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples, (h) Threats to commit any of the foregoing acts'. Statute of the International Criminal Tribunal for Rwanda (Security Council Resolution 995 91994) last amended by Security Council Resolution 1717 (2006) of 13 October 2006 (8 November 1994) (ICTR Statute) art 4.

[226] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (ICC Statute) art 8(2).

[227] Paragraph 6 of the preamble of the Statute of the International Criminal Court. James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 303-04.

the broad terminology this encompasses both grave breaches of the 1949 Geneva Conventions and of Additional Protocol I, and other serious violations of the laws and customs of war, that may be committed in NIAC and IAC.[228] In violations of IHL, States have an obligation to criminally repress all war crimes (that includes, investigation and prosecution) and an obligation to suppress all violations of IHL (this could include investigation but can also include other means such as administrative investigation and disciplinary measures).[229]

As previous sections analysed, like gross violations of human rights, the investigation of violations of war crimes also needs to be 'effective', that entails being independent, impartial, thorough, prompt and transparent. Although these requirements are largely discussed in the context of criminal investigation, 'effective' investigation is also required in administrative investigations[230] that are capable of establishing possible non-criminal responsibility in respect of some violations of IHL.[231]

2.6. The ICC and codification of international crimes requiring prosecution

The Statute of the ICC now helps to cement individual criminal responsibility in cases involving human rights violations and violations of humanitarian law amounting to war crimes and bridges human rights and humanitarian law with international criminal law. Embracing much of the jurisprudence discussed above, the ICC provides a catalogue of acts amounting to international

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[228] A list of such serious violations (wider than the grave breaches) is provided in the Rome Statute of the International Criminal Court in Article 8(2). Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (ICC Statute) art 8(2).
[229] Lubell (n 203) para 59.
[230] ibid, para 162.
[231] ibid, para 159(1).

crimes. It makes no distinction between wars, whether national or international. It incorporates 'grave breaches', Common Article 3 and Article 4 of the Additional Protocol II while expanding the catalogue of violations of humanitarian law amounting to war crimes.[232] Similarly, many of the human rights violations discussed in previous sections, such as torture, rape and other sexual violence, enforced disappearances and extra-judicial killings, if committed on a widespread or in a systematic manner, are defined as crimes against humanity,[233] amounting to international crimes, requiring investigation, prosecution and punishment. Furthermore, it makes it the responsibility of States to cooperate with the Court in the arrest and surrender of alleged perpetrators found in their territory.[234]

Furthermore, the ICC Statute has cemented the understanding that the human rights bodies were developing in relation to immunity, statute of limitation, jurisdiction and retroactive effects of the law, in international crimes. For example, it provides protection against the retroactive application of the Statute,[235] but excludes crimes under the Statute of the ICC and also other crimes under international law, independent from the ICC crimes, from this principle.[236] It recognises individual criminal responsibility,[237] removes immunity and makes official capacity inapplicable for crimes under the jurisdiction of the Court.[238] It also establishes these crimes as

[232] ICC Statute, art 7.
[233] ibid, art 8.
[234] ibid, arts 86-87, 89.
[235] ibid, art 22(1).
[236] ibid, art 22(3).
[237] ibid, art 25(2).
[238] ibid, art 27.

not being subject to any statutory limitation, although the Court will only have jurisdiction in relation to crimes committed after the State concerned becomes party to the ICC.[239]

However, the Statute of the ICC is also silent on the issue of amnesty. Michael Scharf terms this silence as a 'creative ambiguity', stating that it will leave the prosecutors and judges of the ICC to determine it, considering the situation at hand.[240] Some argue this being the result of States not being able to have consensus on amnesty when the Statute was drafted.[241] During the drafting process, some countries had argued for the necessity of amnesty to allow peace negotiations on the basis that swapping amnesty for peace in certain conditions may serve the interest of both peace and justice, while others had opposed such arguments.[242]

So far, the ICC has not dealt with the context of TJ and the issue of amnesty in relation to crimes under its jurisdiction. Although arguments have been made that the ICC should consider the complex realities of TJ contexts and provide some margin of appreciation to TJ context,[243] it can be argued that it is unlikely that the ICC would accept amnesty for the crimes under its jurisdiction as the very objective of the ICC is to ensure that 'most serious crimes of concern to the international community as a whole must not go unpunished and that their effective

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[239] ibid, art 11.
[240] Scharf, 'Amnesty Exception to the Jurisdiction' (n 70).
[241] Mallinder (n 14); Darryl Robinson, 'Serving the Interest of Justice: Amnesties, Truth Commissions and International Criminal Court' (2003) 14(3) EJIL 481; Seibert-Fohr (n 184) 181.
[242] Freeman (n 124) 76; Gerhard Hafner and others, 'A Response to the American View as Presented by Ruth Wedgwood' (1999) 10 EJIL108.
[243] Payam Akhavan, 'Complementarity Conundrums: The ICC Clock in Transitional Times' (2016) 14(5) JICJ 1043; Robinson (n 241).

prosecution must be ensured'[244] and the ICC Statute imposes a duty on States 'to exercise its criminal jurisdiction over those responsible for international crimes,'[245]

Nevertheless, it is important to note that contexts of transition do pose genuine challenges not only to undertake prosecution but also that prosecution alone will fall short in the context of transition considering the volume and scale of cases. This has already been recognised by the prosecutor of the ICC.[246] This issue has appeared in the context of Colombia, where the ICC has started 'preliminary investigation'.[247] How Colombia manages to balance the justice and peace dilemma and how the ICC recognises it might influence future jurisprudence on this subject.

However, in the context of Colombia, the peace agreement provides amnesty only to those involved in political crimes (such as rebellion, sedition and violent rioting, as well as the illegal carrying of firearms, killings in combat when compatible with international humanitarian law, criminal conspiracy for the purposes of rebellion and other politically motivated crimes, making the State security forces disqualified for this).[248] However, it provides reduced and alternative sentencing to balance some of the challenges.[249] The issue of amnesty and the leniency in sentencing are two different things. Whether lenient sentencing (applicable also for ICC crimes)

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[244] ICC Statute, Preamble.
[245] ibid.
[246] International Criminal Court, The Office of the Prosecutor, 'Policy Paper on the Interests of Justice' (September 2007) <https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf> accessed 13 September 2018.
[247] International Criminal Court, 'Preliminary Examination. Colombia' <https://www.icc-cpi.int/colombia> accessed 20 February 2020.
[248] 'Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace' (24 November 2016), s 5.1.2.60; <http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf> 30 August 2020
[249] ibid.

are compatible with international obligations, including under the Statute of the ICC, is yet to be seen.

2.7. Conclusion

Global and regional human right bodies have developed a consistent body of jurisprudence to establish that there is a State obligation to investigate, prosecute and punish under the composite human rights treaties. Although *all* violations of rights enshrined in the composite treaties require investigation, in cases involving gross violations such as extra-judicial killings, torture, enforced disappearances, rape and sexual assault including the violations of personal integrity investigation needs to be criminal in nature, leading to prosecution and punishment. The human rights bodies have also expressed that such investigation has to be prompt, impartial and exhaustive, and needs to allow victims' participation and be initiated *ex-officio* to make it effective.

The understanding of war crimes is also changing to include non-international armed conflict as a context where war crimes could also be committed and that it too holds States to an obligation to investigate and prosecute. The Statute of the ICC has codified these developments in IHRL and IHL such as war crimes and crimes against humanity as international crimes, requiring States to investigate and prosecute.

In order to materialise the obligation to prosecute and punish, the State has to criminalise gross violations and international crimes, prescribe penalties, and eliminate statutory limitations and other hurdles such as amnesty preventing prosecution and punishment. Although the human

rights bodies have not described what punishment should looks like, they have articulated that the punishment needs to be proportionate to the gravity of the crimes committed. These developments in international law have influenced the decisions of national courts, empowering victims and requiring States to design TJ processes that include investigation, prosecution and punishment.

Chapter 3

Truth and Justice in TJ Landscape

3.1. Introduction

Chapter 2 outlined how international law has evolved to a point where States are now required to investigate, prosecute and punish certain violations of human rights and international crimes. It also analysed how these developments in international law limit the scope of amnesty for gross violations of human rights, serious breaches of humanitarian law and international crimes, where States are duty bound to prosecute.

This chapter will examine how this development in international law shapes the TJ landscape. It will show how TJ which was conceptualised as a justice approach, aiming to help States undergoing transition, but where prosecution was found to be difficult for variety of reasons, has been transformed to embrace a holistic approach to TJ, that includes truth, justice, reparation and guarantee of non-recurrence, among other. It will also show how these developments in TJ have contributed to the institutional design of various TJ mechanisms, focusing on truth and justice mechanisms.

This chapter is divided into four sections. It first analyses how TJ has evolved from an approach to justice to be applied in contexts of democratic transition where prosecution was found to be difficult for various reasons, to one applied in various contexts of transitions embracing a holistic concept requiring truth, justice, reparation and guarantee of non-recurrence.

Then it will analyse the normative requirements of truth in the context of transition. Although in the early stages of TJ, truth was considered as the best possible alternative to prosecution, the section will argue how this understanding has changed to the recognition of truth as an equally important right of victims, standing irrespective of the possibility/ impossibility of prosecution. The section will also briefly analyse jurisprudence from human rights bodies, recognizing a social dimension of truth in countries undergoing transition and how that strengthens truth-seeking processes in the context of TJ.

While chapter 2 outlined normative standards for prosecution, this chapter will critically analyse how countries undergoing transition have been conducting trials. It will critically analyse the difficulties, challenges and limitations trials pose in the context of TJ. The chapter will then discuss how amid these challenges in conducting trials in the context of transition, normative requirements for both truth and justice have contributed to the holistic design of TJ where different mechanisms can complement each other by offering incentives to each other by briefly studying the approach that Colombia has taken into consideration.

3.2. Concept, evolution and definition of TJ

Scholars have been debating how the notion of TJ emerged and at what point in time. Some trace the concept back to the Nuremberg trials following the Second World War,[1] some go back to

[1] Ruti G Teitel, *Transitional Justice* (OUP 2000) 31, 39-40; Ruti G Teitel, 'Transitional Justice Genealogy' (2003) 16 Harv Hum Rts J 69-70; Jon Elster, 'Coming to the Terms with the Past: A Framework for the Study of Justice in the Transition to Democracy' (1998) 39(1) European Journal of Sociology 7, 21.

Ancient Greece,[2] while others argue that it originated in discussions over how new democracies emerging from authoritarian rules in mid- and late-1980s (particularly in Latin America, Eastern Europe and to a lesser extent Africa) recon to the atrocities committed by the previous regime.[3]

Arthur Paige recalls how the experience of Latin America, Argentina in particular, influenced the early debates on TJ. [4] In late 1980s - early 1990s, many countries in Latin America were undergoing transition to democracy from authoritarian regimes. When Argentina (as one of the first countries undergoing transition from a military regime) started trials of those involved in the atrocious crimes of the past, it faced serious threats to the stability and legitimacy of the Government, posed by a series of military rebellions. This raised serious dilemmas about the possibility of prosecution; insisting on it would result not only in a risk to the transition, but the continuation of the worst abuses.[5]

Many other countries in Latin America, such as Uruguay, Brazil, Chile, Guatemala, were also facing comparable challenges. Before handing over power to the civilian governments, military regimes in these countries had adopted a number of legal measures to shield them from

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[2] Eric A Posner and Adrian Vermeule, 'Transitional Justice as Ordinary Justice' (2004) 117 (3) Harvard Law Review 761, 768.
[3] Paige Arthur, 'How Transitions Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31(2) Hum Rts Q 321, 324.
[4] ibid.
[5] Carlos S Nino, 'The Duty to Punish Past Abuses of Human Rights put into Context: The Case of Argentina' (1991) 100 (8) Yale L J 2619-20; José Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations' (1992) 43(6) Hastings L J 1425, 432; Jaime Malamud-Goti, 'Transitional Government in the Breach: Why Punish State Criminals?' in Neil J Kritz (ed), *Transitional Justice. How Emerging Democracies Reckon with Former Regimes. Volume I. General Considerations* (United States Institute of Peace Press 1995)189, 190-91.

prosecution.[6] For example, in Chile, before agreeing to a democratic election, Chilean Dictator General Augusto Pinochet had made a number of constitutional amendments that would ensure that he remained commander in chief of the army until 1998 and a senator for life thereafter.[7] Having legal measures ensuring impunity for Junta members, having a monopoly over weapons, wielding power, united and strong in resisting any efforts to prosecute, the Junta left no possibility for prosecution after transition.[8] Because of the erosion of the rule of law during the dictatorship and a lack of independence of the judiciary and separation of powers (both compromised during the dictatorship),[9] insistence on prosecution was considered to be counter-productive.[10]

Considering those challenges, a well-known Chilean human rights scholar, Jose Zalaquett stated that on the one hand there were hopes because of the democratic opening but on the other hand there were severe constraints to justice because of the fragility of the transition, posing serious dilemmas for human rights advocates which they had never experienced before.[11] He argued that although the Nuremburg trial had established that individuals committing atrocious crimes be held individually criminally responsible, unlike the context of Nuremburg trial, where justice was done by the victors, justice measures in these Latin American countries had to be negotiated

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[6] José Zalaquett, 'Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Constraints' (1990) 13(3) Hamline L Rev 623.
[7] Priscilla B Hayner, *Unspeakable Truths. Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2010) 47.
[8] Zalaquett (n 5) 1425-26.
[9] Zalaquett, 'Confronting Human Rights Violations' (n 6) 623, 646; Human Rights Watch, *Truth and Partial Justice in Argentina: An Update* (1991) 15.
[10] UNSC, 'Annex. United Nations Commission on the Truth for El Salvador, 'From Madness to Hope. The 12-year war in El Salvador' (1 April 1993) UN Doc S/25500, paras 179, 192.
[11] Zalaquett (n 5) 1425, 1427.

with perpetrators involved in human rights violations, or designed while they were still wielding considerable military and political power.[12]

When Latin America was grappling with these issues, many countries in other regions such as the Philippines, Haiti, Poland, Hungary, Czechoslovakia were also going through democratic transitions. Although contexts were different, all these countries faced similar dilemmas as to how to respond to past crimes.[13] Paige Arthur argues that TJ was conceptualized as the result of a 'set of interactions among human rights activists, lawyers, legal scholars, policy-makers, journalists, donors and comparative political experts concerned with human rights' [14] and the dynamics of 'transitions to democracy' in late 1980s.[15] It was conceptualized in these contexts where prosecution was found to be difficult but with an understanding that victims thrust for justice can be addressed in some other ways.[16] Aryeh Neier argued that as atrocities were committed in secrecy, unearthing the truth about past crimes, identifying those responsible and showing what they did could leave the perpetrator with a public stigma which would be a punishment in itself.[17] Acknowledging the past, uncovering the truth about what happened,

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[12] ibid 1425, 1429.
[13] ibid.
[14] Arthur (n 3).
[15] ibid.
[16] ibid 354-56; Zalaquett, 'Confronting Human Rights Violations' (n 6) 623; Ruti G Teitel, 'How are the New Democracies of the Southern Cone Dealing with Legacy of the Past Human Rights Abuses?' in Neil J Kritz (ed), *Transitional Justice. How Emerging Democracies Reckon with Former Regimes. Volume I. General Considerations* (United States Institute of Peace Press 1995)146, 151-52.
[17] Aryeh Neier, 'What Should be Done About the Guilty?' in Neil J Kritz (ed), *Transitional Justice. How Emerging Democracies Reckon with Former Regimes. Volume I. General Considerations* (United States Institute of Peace Press 1995) 172, 180. See also Juan E Méndez, 'The Human Right to Truth: Lessons Learned from Latin American Experiences with Truth Telling in Tristan Anne Borer (ed), *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies* (Notre Dame Press 2006) 115-50; Naomi Roht-Arriaza and Javier

providing compensation to victims were found to be helpful to build the confidence of victims in the new democratic regime and help societies to move forward.

Ruti Teitel, who claims to have coined the term 'Transitional Justice' in 1991 argues that a period of transition is extraordinary so the conception of justice in a period of transition is also extraordinary.[18] In her view, TJ is the outcome of political negotiations, contingent to the nature of transition and the power balance among the actors involved in transition.[19] Martha Minow argues where a regime has allowed atrocities to happen, looking narrowly at individual accountability in the way that criminal justice commonly does may not provide an adequate path forward for the community suffering from such violations.[20] She further argued punishment of individual perpetrators to fall short of addressing the problem of institutional involvement in crimes in the aftermath of mass atrocities, where whole communities get negatively affected and require assistance to repair.[21] Thus, it was argued justice in the context of transition needs to embrace a restorative goal aiming to repair the harms caused by criminal behaviour beyond the formal processes of the traditional criminal justice system, giving birth to the notion of TJ. [22]

Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century. Beyond Truth versus Justice* (CUP 2006).

[18] Teitel, *Transitional Justice* (n 1) 213.

[19] ibid 70-72.

[20] Martha Minow, 'Facing History' in Martha Minow (ed), *Between vengeance and forgiveness* (Beacon Press 1998) 118-47.

[21] ibid.

[22] Martha Minow, 'Between Vengeance and Forgiveness: South Africa's Truth and Reconciliation Commission' (1998) 14 Negotiation Journal 319, 323, 329; Teitel, *Transitional Justice* (n 1) 31, 39-40; Teitel, 'Transitional Justice Genealogy' (n 1) 69-70; Andrew Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 42(3) The British Journal of Criminology 578-95; Minow, 'Facing History' (n 20) 91.

Although TJ was originally conceptualised in the context of democratic transitions, countries emerging from internal armed conflict also found prosecution difficult, requiring TJ process to deal with the legacies of past human rights violations.[23] As many peace agreements, resulting in transitions were hinged upon amnesty,[24] prosecution was equally difficult in these contexts. Scholars argued that contexts of transition from conflict to peace bring different challenges, such as how to bridge the sharp divides in society; how to deal with the involvement of non-state groups with different interests; creating a blurred line between victims and perpetrators and requiring measures beyond prosecution.[25]

These contexts of transitions posed a 'set of moral, legal, and political dilemmas',[26] on how best to respond to mass atrocities committed in the past.[27] They are often labelled as *truth v justice,* or *peace v justice* dilemmas.[28] Explaining the contexts of Latin American transition in the early 1990s, Jose Zalaquett described the *truth v justice* debate as 'qualifying the tension between

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[23] Fionnuala Ní Aoláin and Colm Campbell, 'The Paradox of Transition in Conflicted Democracies' (2005) 27(1) Hum Rts Q 172, 212; Christine Bell, 'Transitional Justice, Interdisciplinary and the State of the 'Field' or 'Non-Field' (2009) 3 (1) IJTJ 5.

[24] Michael P Scharf, 'Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti' (1996) 31(1) Tex Int'l LJ 1, 8; Louise Mallinder, *Amnesty, Human Rights and Political Transitions. Bridging the Peace and Political Transition* (Hart Publishing 2008) 27-32.

[25] Lisa Denney and Pilar Domingo, 'Local Transitional Justice: How Changes in Conflict, Political Settlements, and Institutional Development Are Reshaping the Field' in Roger Duthie and Paul Seils, *Justice Mosaics. How Context Shapes Transitional Justice in Fractured Societies* (ICTJ 2017) 202, 223; Christine Bell, 'Contending with the Past: Transitional Justice and Political Settlement Processes' in Roger Duthie and Paul Seils, *Justice Mosaics. How Context Shapes Transitional Justice in Fractured Societies* (ICTJ 2017) 84-115.

[26] Dustin N Sharp, 'Addressing Dilemmas of the Global and the Local in Transitional Justice' (2014) 29(1) Emory Int'l L Rev 71, 76.

[27] Chandra Lekha Sriram, 'Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice' (2007) 21(4) Global Society 579, 582-83, 591; Rosemary Nagy, 'Transitional Justice as a Global Project: Critical Reflections' (2008) 29(2) TWQ 275, 277-78; Sharp (n 26) 71, 76.

[28] Chandra Lekha Sriram, *Confronting Past Human Rights Violations. Justice vs Peace in Times of Transition* (Frank Cass 2004) 2.

principles and pragmatic concerns'.[29] Although criminal prosecution was found to be important and morally superior to any other forms of transitional justice, it was found important to limit it where perpetrators retained a monopoly on State coercion and were united against trials, posing a threat to the transition.[30]

Thus, depending on the contexts and nature of transitions different countries undergoing transition in mid-1980s and early-1990s explored different mechanisms and processes attempting to confront the past under the rubric of TJ. Some countries offered compensation for victims as justice measures, while others adopted a policy of amnesty.[31] In some countries, especially in Eastern Europe, vetting and lustration programmes were adopted, removing public officials working closely with the previous regimes from public posts and barring them from holding public posts as a way to account for the past.[32] However, the most commonly deployed process was truth-seeking by establishing Truth Commissions.

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[29] Zalaquett (n 5) 1425, 1429.

[30] Nino (n 5) 2619-20; Mark J Osiel, 'Why Prosecute - Critics of Punishment for Mass Atrocity' (2000) 22 Hum Rts Q 118-20, 128, 147; Stephan Landsman, 'Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commission' (1996) 59(4) LCP 81-92.

[31] Neil J Kritz, 'The Dilemmas of Transitional Justice' in Neil J Kritz (ed), *Transitional Justice. How Emerging Democracies Reckon with Former Regimes. Volume I. General Considerations* (United States Institute of Peace Press 1995) XXIV-XXVII.

[32] ibid; Roger Duthie, 'Introduction' in Alexander Mayer-Rieckh and Pablo de Greiff, *Justice as Prevention. Vetting Public Employees in Transitional Societies* (Social Science Research Council 2007)16, 17; Alexander Mayer-Rieckh, 'Vetting to Prevent Future Abuses. Reforming Police, Courts, and Prosecutor's Offices in Bosnia and Herzegovina' in Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention. Vetting Public Employees in Transitional Societies* (Social Science Research Council 2007)18, 182; Adam Czarnota, 'The Politics of the Lustration Law in Poland' in Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention. Vetting Public Employees in Transitional Societies* (Social Science Research Council 2007)222, 232; Elizabeth Barrett, Peter Hack and Agnes Munkacsi, 'Lustration as Political Competition: Vetting in Hungary' in Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention. Vetting Public Employees in Transitional Societies* (Social Science Research Council 2007) 260-307.

However, as chapter 2 analysed the absence of prosecution for those involved in the worst crimes contributed to entrench impunity and forced victims to continue to suffer, resulting in victims (specially from Latin America) knocking the doors of international mechanisms,[33] influencing and informing the work of human rights bodies. As chapter 2 highlighted these bodies started to pronounce justice being important to end impunity and cycles of violence.[34] They started to question the legality of amnesty laws adopted during transition.[35] Over the years, international law started to consolidate States' obligations under international law and victims' right to effective remedies that include investigation, prosecution and punishment, among others.[36]

The establishment of *ad hoc* international tribunals in Yugoslavia (in 1993) and Rwanda (in 1994) and a number of hybrid tribunals also highlighted the importance of prosecution for restoration of peace and reconciliation in countries undergoing transition.[37] Scholars and practitioners alike have started to argue that justice is a precondition for peace to sustain.[38] This

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[33] UNESC, Human Rights Committee, 'Question of the impunity of perpetrators of human rights violations (civil and political). Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119' (2 October 1997) UN DOCE/CN.4/Sub.2/1997/20 Rev 1, paras 1-6; Louise Mallinder, 'Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment' in Francesca Lessa and Leigh A Payne (eds), *Amnesty in the Age of Human Rights Accountability. Comparative and International Perspectives* (CUP 2012) 69-96; Louise Mallinder, 'The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws (2016) 65(3) ICLQ 645; *Castillo Páez v Peru* (Reparations and Costs) IACtHR Series C No 43 (27 November 1998), para 192; see ch 2, s 2.2.

[34] See ch 2, s 2.2.

[35] See ch 2, s 2.4.5.

[36] See ch 2.

[37] UNSC, 'Resolution 827 (1993). Adopted by the Security Council at its 3217th meeting, on 25 May 1993' (25 May 1993) UN Doc S/RES/827, Preamble; UNSC, 'Resolution 955 (1994). Adopted by the Security Council at its 3453rd meeting on 8 November 1994' (8 November 1994) UN Doc S/RES/955 (1994)*.

[38] Cherif M Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights* (Transnational Publishers 2000) 9; see ch 2, s 2.4.5.

has also been reflected in comments of government leaders and inter-governmental bodies stressing that 'justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives'[39] and lasting peace not being achieved without making individuals involved in most serious crimes accountable.[40] Such developments have impacted later approaches to TJ, transforming the landscape as scholars are increasingly challenging the conception of TJ as a distinct and extra-ordinary form of justice arguing that it is not a distinct form of justice rather a justice process adapted by societies in unique contexts.[41] Naomi Roht-Arriaza argues TJ as a 'set of practices, mechanisms and concerns that arises following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law.'[42] The UN Secretary General's reports presents TJ as 'full range of judicial and non-judicial process and measures, including truth-seeking, prosecution, reparation, institution reform including vetting process.'[43]

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[39] UNSC, 'The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General' (23 August 2004) UN Doc S/2004/616*.

[40] European Council, 'Declaration by the Presidency on behalf of the EU to mark the 10th anniversary of the Rome Statute of the International Criminal Court' (11900/08 (Presse 214), P81, 16 July 2008) <https://www.consilium.europa.eu/uedocs/cms_Data/ docs/pressdata/en/cfsp/ 101858.pdf> 18 September 2020.

[41] Pablo de Greiff, 'Theorizing Transitional Justice' in Melissa S Williams, Rosemary Nagy and Jon Elster (eds), *Transitional Justice* (New York University Press 2012) 59, 64.

[42] Naomi Roht-Arriaza, 'The new landscape of transitional justice' in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century. Beyond Truth versus Justice* (CUP 2006) 1, 2.

[43] UN 'Guidance Note of the Secretary-General. United Nations Approach to Transitional Justice' (March 2010) para 8.

Lately, it is widely argued that TJ is a holistic concept that entails a minimum of four components: truth-seeking, justice, reparation and guarantees of non-recurrence, complementing each other to achieve the goal of TJ.[44]

3.3. TJ as a holistic concept

The holistic notion of TJ is explained by unpacking the goals, objective, and context in which TJ comes into play and what it ought to be. Scholars have argued that the holistic approach to TJ caters to the various needs of individuals and groups during as well as after conflict as it provides multiple political, social and legal institutions, operating concurrently in a system maximising the capabilities of each.[45] Similarly, scholarly research has also shown the impact of these different TJ mechanisms deployed in combination having a higher chance to contribute to the consolidation of democracy and restoring peace than when they are deployed in isolation.[46] The UN Secretary General has reinforced the need and importance of a holistic approach to TJ by stressing that 'effective TJ programmes utilize coherent and comprehensive approaches that

[44] UNGA, Human Rights Council, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation, and Guarantee of Non-reoccurrence, Pablo de Greiff' (9 August 2012) UN Doc A/HRC/21/46, paras 22, 38; Roht-Arriaza, 'The new landscape of transitional justice' (n 42) 1-16; de Greiff (n 41) 31-77; Clara Sandoval-Villalba, 'Transitional Justice: Key Concepts, Processes and Challenges' (Briefing Paper 07/11, ISCR 2011).

[45] Phil Clark, 'Hybridity, Holism and Traditional Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda' (2007) 39(4) Geo Wash Intl L Rev 765; Wendy Lambourne, 'Transitional Justice and Peacebuilding after Mass Violence' (2009) 3(1) IJTJ 28; Alexander L Boraine, 'Transitional Justice: A Holistic Interpretation' (2006) 60(1) Journal of International Affairs 17.

[46] For more discussions, see Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies. The Impact on Human Rights and Democracy* (Routledge 2009) 20-21; Tricia D Olsen, Leigh A Payne and Andrew G Reiter, *Transitional Justice in Balance. Comparing Processes, Weighing Efficacy* (United States Institute of Peace Press 2010); Tricia D Olsen and others, 'When Truth Commissions Improve Human Rights' (2010) 4(3) IJTJ 980, 996; Geoff Dancy and Eric Wiebelhaus-Brahm, 'Timing, Sequencing, and Transitional Justice Impact: A Quantitative Comparative Analysis of Latin America' (2015) 16 Human Rts Rev 321.

integrate the full range of judicial and non-judicial process and measures, including truth-seeking, prosecution, reparation, institution reform including vetting process.'[47]

Providing a framework for an holistic approach to TJ, the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantee of Non-recurrence Pablo de Greiff argues that TJ measures seek to achieve two immediate goals (recognition and trust) and two longer-term goals (reconciliation and rule of law).[48] The holistic approach provides a framework that puts victims at the centre of the TJ process by recognizing them as rights holders. As Pablo de Greiff argues, one of the goals of TJ mechanisms is to provide recognition to victims, which includes not only recognising victims' suffering by providing them the forum of a Truth Commission to share their stories but also to recognise them as rights holders so they could seek and demand redress and remedies for the harms they suffered. It would require States to respond to the truth revealed.[49] Thus, recognising victims' rights would also mean allowing them to have rights to seek avenues of redress that can assuage suffering but also to restore the rights that were violated.[50] It also affirms her or his standing as someone who is entitled to make claims, on the basis of rights, and not simply as a matter of empathy, or any other consideration,[51] including the whim and discretion of the Government as we see in many contexts, including in Nepal. Recognising victims' rights would not allow State to consider different mechanisms of TJ as a menu from which they could pick and choose as they like but require them to conceive and

[47] UN 'Guidance Note of the Secretary-General. United Nations Approach to Transitional Justice' (March 2010), para 8.
[48] UNGA, 'Special Rapporteur on the Promotion of Truth, Justice, Reparation, and Guarantee of Non-recurrence' (n 44) paras 29-44.
[49] ibid, para 64.
[50] ibid, paras 23-24.
[51] ibid.

develop these different mechanisms considering their complementarity and interdependence to each other.[52]

As countries in transition often need to deal with thousands of victims and perpetrators involved in a myriad of violations, having one or two mechanisms such as having a Truth Commission alone or a few prosecutions would not fulfill the justice demands of victims. Pablo de Greiff argues that even if a country in transition has a very thorough truth-seeking process it cannot be considered as justice and satisfy the victims. Similarly, he argues prosecution alone neither addresses the need of countries in transition as it is practically not possible to prosecute every single person involved in the atrocious crimes nor provides direct relief and support to victims and change their circumstances of living other than in a sense of vindication. He further argues in a similar vein that reparation also inherently calls for justice and truth for the satisfaction and guarantee of non-recurrence.[53] Thus, only when different measures such as truth-seeking, prosecution, reparation and institutional reforms coexist, complementing each other, they can address the diverse needs of society in transition and help to achieve these goals of TJ.[54]

Although TJ in general is criticised for ignoring violations of social and economic rights, which remain as root causes for conflicts in many countries,[55] it is important to acknowledge that TJ approaches have been transformed significantly and continue to do so in recent years from their traditional origin. For example, TRCs are increasingly focusing on violations not only related to

[52] ibid, paras 22-27.
[53] ibid, paras 23-24.
[54] ibid, paras 22-27.
[55] Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8(3) IJTJ 339, 345; Rama Mani, *Beyond Retribution. Seeking Justice in the Shadows of War* (Polity 2002) 17.

civil and political but also economic, social, cultural rights. They often now encourage society- and community-led informal processes in truth-seeking, memorialisation and reconciliations.[56] Understanding of reparation is also being expanded. Lately, scholars have also argued that the holistic notion of TJ goes beyond those four pillars, reinforcing memory processes constituting the fifth pillar of TJ.[57]

Nevertheless, a holistic approach to TJ that advocates for four mutually reinforcing components to work concurrently to achieve specific goals has been criticised for not recognising different pre-conditions that exist in countries in transition, impacting the design of these mechanisms. Scholars argue that institutional capacity, the nature of the conflict, the political context and social, economic and structural problems all impact the design of TJ mechanisms,[58] and different TJ mechanisms may need to come in different sequence considered different institutional preconditions in the given context of transition. In some contexts, letting measures such as amnesty and Truth Commission, which have fewer preconditions to come first in the sequence could help to pave the ground for other mechanisms to come in the future and better serve the interest of victims.[59]

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[56] UNGA, 'Special Rapporteur on the Promotion of Truth, Justice, Reparation, and Guarantee of Non-recurrence' (n 44) para 29.

[57] UNGA, Human Rights Council, 'Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice. Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' (9 July 2020) UN Doc A/HRC/45/45, para 101.

[58] Lars Waldorf, 'Institutional Gardening in Unsettled Times: Transitional Justice and Institutional Contexts' in Roger Duthie and Paul Seils, *Justice Mosaics. How Context Shapes Transitional Justice in Fractured Societies* (ICTJ 2017) 40, 63; for further discussion, see Roger Duthie, 'Introduction' in Roger Duthie and Paul Seils, *Justice Mosaics. How Context Shapes Transitional Justice in Fractured Societies* (ICTJ 2017) 8, 12-28.

[59] Matiangai V S Sirleaf, 'The Truth About Truth Commissions: Why They Do Not Function Optimally in Post-Conflict Societies' (2014) 35 Cardozo L Rev 2263, 2292–96.

Paul Gready and Simon Robins argue for a 'transformative' approach to TJ, calling for a shift in TJ from a State-based approach focusing on laws and legal institutions and a set of goals and outcomes, which they consider a 'top-down' approach to more social, political and community-led processes.[60] In their view, some of the problems of current holistic approaches to TJ involve its continuous focus on civil and political rights violations, ignoring structural violence and unequal social relations.[61] They argue that how the goals of TJ are set, how decisions for the selection, prioritization or sequencing of mechanisms are made are important questions to ask in the context of finite resources and delicate political dynamics and need to be questioned, which the holistic approach in its current form does not provide any guidance to.[62]

Whether TJ, inherently a temporary approach is well suited to address the violation of economic, social and cultural rights violations and alter social and political power relations continues to be debated.[63] It is important to acknowledge that normative development at international level has significantly empowered victims to claim their rights and the holistic approach provides a framework in dealing with gross violations of human rights, which TJ promised to address from its inception. For that matter, the thesis uses this framework while advancing the debate in the context of this thesis.

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[60] Gready and Robins (n 55) 339-41.
[61] ibid 345.
[62] ibid 342, 345.
[63] Lars Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs' (2012) 21(2) Socio & Legal Studies 171; Clara Sandoval-Villalba, 'Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change in Times of Transition' in Roger Duthie and Paul Seils, *Justice Mosaics. How Context Shapes Transitional Justice in Fractured Societies* (ICTJ 2017) 166, 191.

However, as chapter 1 highlighted, country experiences still remain thin where these different mechanisms are designed to coexist, complementing each other as TJ mechanisms. In practice, countries in transition continue to face dilemmas as to how different components of TJ could be designed complementing each other, without compromising normative standards.

As chapter 1 highlighted, although the thesis recognises all different components of TJ being equally important for a holistic TJ process to succeed, considering the continuous dilemmas that countries in transition such as Nepal face in designing in particular truth and justice mechanisms to coexist in practice, the focus of the thesis is to study how truth and justice mechanisms, traditionally considered as mutually exclusive concepts can work together in practice. Thus, as chapter 2 already studied the normative requirement for States to prosecute, the following sections focus on the analysis of whether such requirement exists for truth, and how countries undergoing transitions have undertaken truth and prosecution and study challenges and difficulties they have faced to draw lessons for Nepal.

3.4. Truth-seeking

As discussed earlier, when prosecution was found to be difficult, truth-seeking was conceived as the best possible alternative to it believing that establishing truth about past atrocities could also provide a sense of justice to victims, help to recognise victims' suffering,[64] and give legitimacy

[64] Carlos Santiago Nino, *Radical Evil on Trial* (Yale University1996) 146; Margaret Popkin and Naomi Roht-Arriaza 'Truth as Justice: Investigatory Commissions in Latin America' (1995) 20(1) Law and Social Inquiry 79; Minow, 'Facing History' (n 20) 50.

to a transition to liberal democracy.[65] It was argued only 'by knowing what happened, a nation is able to debate honestly why and how dreadful crimes came to be committed'.[66]

It was further argued that there is a difference between knowledge and acknowledgment and that the latter signifies the importance of official, public recognition of truths about past crimes.[67] When States acknowledge past crimes they also recognise victims and their suffering which could have a healing effect on those traumatised by such violations.[68] Increasingly, it is argued that truth empowers victims, fosters reconciliation in societies affected by violations,[69] provides a sense of reparation and helps to take measures for non-recurrence, [70] although some ague these claims being based on faith than on facts, driven more by principles than by proof.[71]

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[65] Méndez (n 17); Roht-Arriaza and Mariezcurrena (n 17) 3-8.
[66] Neier (n 17) 180.
[67] Lawrence Weschler, 'A Miracle, A Universe: Settling Accounts with Torturers' in Neil J Kritz (ed), *Transitional Justice. How Emerging Democracies Reckon with Former Regimes. Volume I. General Considerations* (United States Institute of Peace Press 1995) 491, 492.
[68] Julie Mertus, 'Truth in a Box: The Limits of Justice Through Judicial Mechanisms' in Ifi Amadiume and Abdullahi A An-Na'im (eds) *The Politics of Memory. Truth, Healing, and Social Justice* (Zed Books 2000)142,158-59.
[69] ibid.
[70] UNGA, 'Resolution adopted by the General Assembly on 16 December 2005. 60/147. 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, resolution adopted and proclaimed by General Assembly' (21 March 2006) UN Doc A/RES/60/147 (UN Principles on Remedy and Reparation), Principle 22(b).
[71] Gearoid Millar, 'Assessing Local Experiences of Truth-Telling in Sierra Leone: Getting to 'Why' through a Qualitative Case Study Analysis' (2010) 4(3) IJTJ 477; Eric Brahm, 'Uncovering the Truth: Examining Truth Commission Success and Impact,' (2007) 8(1) International Studies Perspectives 16-35; Oskar N T Thoms, James Ron and Roland Paris, 'The Effects of Transitional Justice Mechanisms. A Summary of Empirical Research Findings And Implications For Analysts And Practitioners' (Centre for International Policy Studies, University of Ottawa 2008); David Mendeloff, 'Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice' (2009) 31 (3) Hum Rts Q 592.

Many countries undergoing a transition have established Truth Commissions to seek truth. Although initially largely used in Latin American countries, it is no longer limited to that region. They have spread over different continents. More than 40 countries going through transition in recent years have established Truth Commissions as TJ mechanisms.[72]

These countries' experiences over the years have also helped to develop the understanding that truth alone could not provide a sense of justice to victims and help to address the problems of impunity in countries undergoing transition. As chapter 2 studied in many of the countries where Truth Commissions were established and truth was revealed; victims continued to struggle, seeking actions on the truth revealed, [73] resulting in the human rights bodies recognising victims' right to effective remedies that include investigation, prosecution and punishment. However, truth is also found to be equally important for victims. Recognising the importance of truth for victims, these human rights bodies have also pronounced truth as a victims' right and States' obligation, which could no longer be considered the choice of a State in the absence of prosecution but an obligation of the State in addition to prosecution. Thus, there is not only a practical need but also a normative requirement exists for truth in countries undergoing transition.

Initially, victims' right to truth was recognised in cases involving enforced disappearances, based on the provisions of the Geneva Conventions. Specifically, Additional Protocol I to the Geneva Conventions established the right of relatives of the missing to know the fate and whereabouts of

[72] Hayner (n 7) XIV.
[73] de Greiff (n 41) 65.

their loved one.[74] However, the human rights bodies have further expanded this by developing jurisprudence that the uncertainty about the fate of a loved one, created by not knowing the truth would constitute a violation of the right not to be subjected to torture and cruel or inhuman treatment under the composite human rights treaties.[75] For example, in *Quintero v Uruguay* a mother had brought a complaint before the HRC challenging the denial of truth about the whereabouts of her disappeared daughter. Finding a violation, the HRC stated that the mother has the right to know what has happened to her daughter.[76] Similar findings have been made by the IACtHR[77] and the ECtHR.[78]

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[74] For example, Additional Protocol I to the Geneva Conventions establishes the right of the relatives of the missing to know the fate and whereabouts of their loved one. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of Victim of International Armed Conflicts (Protocol I) of 8 June 1977, art 32; Resolution XIII on obtaining and transmitting personal data as a means of protection and of preventing disappearances, adopted by 25th International Conference of the Red Cross and Red Crescent, Geneva 1986.

[75] *Katombe L Tshishimbi v Zaire* Communication No 542/1993, UN Doc CCPR/C/53/D/542/1993 (HRC, 25 March 1996) para 5.5; *Ana Rosario Celis Laureano v Peru* Communication No 540/1993, UN Doc CCPR/C/56/D/540/1993 (HRC, 25 March 1996) para 8.5; *Sarma v Sri Lanka* Communication No 950/2000, UN Doc CCPR/C/78/D/950/2000 (HRC, 16 July 2003) para 9.5; *Kurt v Turkey* App no 24276/94 (ECtHR, 25 May 1998) para 174; *Street Children (Villagrán Morales et al.) v Guatemala* (Merits) IACtHR Series C No 63 (19 November 1999) paras 177, 253.4.

[76] *Maria del Carmen Almeida de Quintero et al v Uruguay* Communication No 107/1981, UN Doc CCPR/C/19/D/107/1981 (HRC, 21 July 1983) para 14.

[77] *Street Children* (n 75); *Bámaca Velásquez v Guatemala* (Merits) IACtHR Series C No 70 (25 November 2000) paras 159-166, 230; *Mapiripán Massacre v Colombia* (Merits, Reparations and Costs) IACtHR Series C No 134 (15 September 2005) paras 140-146, 335.1; *Pueblo Bello Massacre v Columbia* (Merits, Reparations and Costs) IACtHR Series C No 140 (31 January 2006) paras 163, 296.3; *Baldeón García v Peru* (Merits, Reparations and Costs) IACtHR Series C No 147 (6 April 2006) paras 127-130, 218.4; *Ximenes-Lopes v Brazil* (Merits, Reparations and Costs) IACtHR Series C No 149 (4 July 2006) paras 155-63, 262.3; *Montero-Aranguren et al. v Venezuela* (Detention Center of Catia) (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No 150 (5 July 2006) paras 53, 160.2.

[78] *Kurt v Turkey* App no 24276/94 (ECtHR, 25 May 1998) para 174.

Although no uniform understanding among human rights bodies exists, clarifying whether this right extends to other serious violations of human rights or whether it is just limited to enforced disappearances, the human rights bodies' jurisprudence shows growing tendencies to expand the right to truth not only to victims of enforced disappearances but also to cover victims of other gross violations of human rights. For example, the HRC has started to expand the same principle that it developed in cases of enforced disappearance to cases involving secret executions, where families were not informed about the date and place of the execution and the place of the burial.[79] The Inter-American human rights system has increasingly articulated that the right to truth is not limited to cases of enforced disappearances, stating that it also applies to other human rights violations.[80]

Although in comparison to the IACtHR and HRC, the ECtHR has had less opportunities to deal with cases involving such issues, in recent years it also seems to be willing to expand this right beyond cases of enforced disappearances. For example, in *El-Masri v The Former Yugoslav Republic of Macedonia*,[81] the right to truth is recognised in a case involving an extra-ordinary

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[79] *Sankara et al. v Burkina Faso* Communication No 1159/2003, UN Doc CCPR/C/86/D/1159/2003 (HRC, 28 March 2006); *Staselovich v Belarus* Communication No 887/1999, UN Doc CCPR/C/77/D/887/1999 (HRC, 3 April 2003); *Khalilova v Tajikistan* Communication No 973/2001, UN Doc CCPR/C/83/D/973/2001 (HRC, 30 March 2005).

[80] UNCCPR, Human Rights Committee, 'Consideration of Reports submitted by States Parties under Article 40 of the Covenant. Comments of the Human Rights Committee. Concluding observations of the Human Rights Committee. Guatemala' (3 April 1996) UN Doc CCPR/C/79/Add.63, para 25; *Rodríguez v Uruguay* Communication No 322/1988, UN Doc CCPR/C/51/D/322/1988 (HRC, 19 July 1994) paras 12(3), 14; *Blake v Guatemala* (Reparations and Costs) IACtHR Series C No 36 (24 January 1998) para 97; *Mapiripán Massacre* (n 77) paras 140-146; *La Cantuta v Peru* (Merits, Reparations and Costs) IACtHR Series C No 162 (29 November 2006) paras 81-98.

[81] *El-Masri v The Former Yugoslav Republic Of Macedonia* App no 39630/09 (ECtHR, 13 December 2012) para 191.

rendition, finding a lack of investigation negatively impacting the right to the truth.[82] The UN study on the right to truth finds that this right includes cases involving gross violations such as enforced disappearances, torture and extra-judicial execution and serious breaches of humanitarian law.[83]

3.4.1. Truth as the right of societies facing gross violations

The human rights bodies have also started to pronounce on a social dimension of the right to truth, articulating that the right to truth does not belong only to the victims and their families but also to societies suffering from gross violations.[84] They have articulated that the social dimension of truth is important to combat impunity, prevent future violations and promote reconciliation.[85]

Although cautious approach has been suggested, not to have a very expansive contour of the social dimension of truth and not to dilute the effectiveness of this right,[86] the jurisprudence from the Inter-American system states that in a democratic society the truth about grave human rights

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[82] ibid.
[83] UNESC, Commission on Human Rights, 'Study on the right to the truth' (8 February 2006) UN Doc E/CN.4/2006/91, para 34.
[84] *Myrna Mack Chang v Guatemala* (Merits, Reparations and Costs) IACtHR Series C No 101 (25 November 2003) paras 274-275; *Caballero Delgado and Santana v Colombia* (Merits) IACtHR Series C No 22 (8 December 1995) para 58; *Trujillo Oroza v Bolivia* (Reparations and Costs) IACtHR Series C No 92 (27 February 2002) paras 99-111; *Gómez Paquiyauri Brothers v Peru* (Merits, Reparations and Costs) IACHR Series C No 110 (8 July 2004); *Massacres of El Mozote and Nearby Places v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No 252 (25 October 2012) para 198; UNCCPR, Human Rights Committee, 'Consideration of Reports submitted by States Parties under Article 40 of the Covenant. Comments of the Human Rights Committee. Concluding observations of the Human Rights Committee. Guatemala' (3 April 1996) UN Doc CCPR/C/79/Add.63, para. 25.
[85] *Myrna Mack Chang* (n 84); *Bámaca Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No 91 (22 February 2002); *Massacres of El Mozote* (n 84), para 298.
[86] Dermot Groome, 'Principle 2: the Inalienable Right to Truth' in Frank Haldemann and Thomas Unger (eds), *The United Nations Principles to Combat Impunity*. *A Commentary* (OUP 2018) 59.

violations must be known, which the State must satisfy, on the one hand, through the obligation to investigate human rights violations, and on the other hand, through the public disclosure of the results of criminal and investigation processes.[87]

The ECtHR still has to consolidate its jurisprudence on this issue, however, in *El-Masri*[88] it has also highlighted the importance of truth not only to the victims but also to the public, stating that the right to truth is important not just for the victims and their families but also to 'other victims of similar crimes and the general public, who had the right to know what had happened'. [89] Furthermore, the ECtHR has recognised victims and social right to truth in the important *Katyn Massacre* case. [90] In this case the families of those killed during the war in 1940 (by the order of Stalin in the process of Russia's invasion of Poland) alleged that because there was no effective investigation leading up to prosecution, Russia violated the procedural requirement under Article 2 (right to life) and Article 3 (prohibition of torture) under the ACHR.[91] Although the Court did not find a violation of Article 2 because of a jurisdictional issue (as the incident took place long before Russia ratified the European Convention), it found a violation of Article 3 for the pain and suffering that family members and relatives have been facing continually for not knowing the truth about the incident.[92]

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[87] *Bámaca Velásquez* (n 85); *Massacres of El Mozote* (n 84); *Gudiel Álvarez et al. ('Diario Militar') v Guatemala* (Merits, Reparations and Costs) IACtHR Series C No 253 (20 November 2012).
[88] *El-Masri v The Former Yugoslav Republic Of Macedonia* App no 39630/09 (ECtHR, 13 December 2012) para 191.
[89] ibid.
[90] *Janowiec and Others v Russia* App nos 55508/07 and 29520/09 (ECtHR, 16 April 2012).
[91] ibid [112], [143].
[92] ibid [142], [162-164], [173].

Although the human rights bodies have pronounced on a societal right to truth, its precise scope and how it will be enforced is not yet clear. There are no cases before the human rights bodies where an individual or individuals not directly victimised by a violation but being part of the society where grave human rights violations occurred, have invoked such rights. Thus, the exact obligation of the States and the content of truth a society is entitled to know are not clear yet. Clarity also needs to evolve on how a society is defined for the purpose of truth and how such State obligation is fulfilled, which are important to materialise the social dimension of the right to truth. However, in a number of cases, where human rights bodies have recognised a social dimension of truth, they have recommended establishing a Truth Commission to determine the patterns of violations, the people and manner in which they participated in said violations and their responsibility, making Truth Commission an important vehicle in the realisation of the right to truth.

3.4.2. Truth Commissions

Truth Commissions now are an important vehicle for ensuring victims' and society's right to truth and how they are established and what mandates they have carried important weight. As previous section discussed, traditionally, Truth Commissions were conceived as mechanisms to be set up instead of prosecutions, and they were given certain mandates that would prevent them from contributing to prosecutions,[93] this is difficult today as the mandates and powers of the TRCs are now increasingly scrutinised, also by Courts (see chapter 5 and 6).

[93] For example, the truth commission in Guatemala had the explicit provision to prevent to have any judicial link. 'Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that have Caused the Guatemalan Population to Suffer' (23 June 1994), Operation III <http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/

Although there is no uniform definition of a Truth Commission, it is widely argued that Truth Commissions are State-sanctioned temporary, non-judicial bodies set up to investigate the pattern of abuses over a period in the past, that engage directly and broadly with the affected population, gathering information on its members' experiences, with the aim of concluding with a public report.[94]

There is no international standard providing a legal framework for establishing Truth Commissions. As the nature of the violations and transitions are context specific, 'national choice' and 'country specific models' have also been recognised as the core principles in the operation of Truth Commissions.[95] However, as the legal landscape is changing requiring States to provide both truth and justice in cases involving gross violations, truth-seeking bodies like Truth Commissions are expected to follow certain minimum standards and to have a complementarity role with other components of TJ such as justice.[96]

The UN updated set of principles to combat impunity contains some minimum standards for Truth Commissions.[97] It requires such Commissions to be established after broad public

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guat9.pdf> accessed 23 April 2020 (Agreement on the Establishment of the Commission for Historical Clarification).

[94] Hayner (n 7) 11; Mark Freeman, *Truth Commissions and Procedural Fairness* (CUP 2006) 48-56.

[95] OHCHR, 'Rule-of-Law Tools for Post-Conflict States. Truth Commissions' (2006).

[96] OHCHR, 'Technical Note. The Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071' (2014).

[97] UNESC, Commission on Human Rights, 'Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher*. Addendum. Updated Set of principles for the protection and promotion of human rights through action to combat impunity' (8 February 2005) UN Doc E/CN.4/2005/102/Add.1 (Principle against impunity).

consultations,[98] and to follow a process to ensure the independence of the Commission.[99] State should guarantee independence, impartiality and competence of the Commission.[100] Commissions should also clarify the conditions for confidentiality, disclosure and public access to their information and archives.[101] Persons implicated need to be given an opportunity to provide his/her version.[102] Victims and affected communities need to be allowed to testify in an environment where they feel comfortable,[103] the Commission's report needs to be public and necessary measures need to be taken to protect and preserve archives.[104] Standards also highlight the need to protect evidence gathered by the truth-seeking mechanisms for the future administration of justice,[105] establishing Truth Commissions as an important complement to the justice process.

The legitimacy of Truth Commissions is important for the success of a TJ process.[106] Thus a Commission should be perceived as an objective body capable of delivering its mandates,[107] its

[98] ibid, principle 6.
[99] OHCHR, 'Rule-of-Law Tools for Post-Conflict States. Truth Commissions' (2006).
[100] UNESC (n 97), principle 7.
[101] ibid, principle 13.
[102] ibid, principle 9.
[103] ibid, principle 10.
[104] ibid, principle 13.
[105] ibid, principle 8; see also Alison Bisset, 'Principle 8: Definition of a Commission's Terms of Reference' in Frank Haldemann and Thomas Unger (eds), *The United Nations Principles to Combat Impunity. A Commentary* (OUP 2018)116, 121.
[106] James L Gibson 'On legitimacy Theory and the Effectiveness of Truth Commissions' (2009) 72 LCP 123.
[107] Jeremy Sarkin, 'The Interrelationship and Interconnectness of Transitional Justice and the Rule of Law in Uganda: Pursuing Justice, Truth, Guarantees of Non-Repetition, Reconciliation and Reparations for Past Crimes and Human Rights Violations' (2015) 7 HJRL 111, 126.

Commissioners need to be appointed following an open and transparent process,[108] having an inclusive and well-balanced Commission consisting of highly respected people.[109]

To respect this right, State authorities have to provide access to information in its custody to the truth-seeking bodies like Truth Commissions. Denial of such access may deprive victims and society the right to truth and could be found to be a violation. For example, in *Diario Militar,*[110] the IACtHR has made an important finding that concealing and withholding information from the Truth Commission impacted the victim's right to truth.[111] In this case, the Court recognised the victims' right to truth and also the social dimension of it. Although, it limited the findings of violation of right to truth in relation to the family members of those disappeared but made important observations that the refusal of the State agencies to provide the information to the Truth Commission impaired victims' right to truth.[112]

In a number of cases human rights bodies have also pronounced limitation on State's discretion to withhold documents or information (on State security or any other reasons),[113] making them subject to review by an entity other than the originating agency.[114] These developments could significantly strengthen the mandates and powers of Truth Commissions in the future.

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[108] Mark C Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20(3) The Academy of Management Review 571.
[109] Sarkin (n 107).
[110] *Gudiel Álvarez* (n 87).
[111] ibid [302].
[112] ibid [269].
[113] *Gomes Lund et al ('Guerrilha do Araguaia') v Brazil* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No 219 (24 November 2010) para 202.
[114] ibid [202]; *Janowiec* (n 90) [213-216].

3.5. Prosecution in the context of transition

The need to have prosecution in countries undergoing transition is well covered ground in TJ literature. It is argued that prosecution in TJ has multiple goals, including preventing impunity, promoting rule of law, preventing future crimes, punishing the wrongdoers, and promoting reconciliation.[115] It further reduces the collective guilt[116] and vigilante justice.[117] Scholars have also argued that trials have a psychologically therapeutic impact on victims by giving them a sense of justice, providing formal, public recognition of the harms they have suffered, and giving assurance to victims that transgressions will not be repeated.[118] It is also recognized as important component to ensure effective remedies for victims.[119]

As chapter 2 has already analysed the normative requirement of prosecution in cases involving gross violations of human rights and other international crimes, without recapping the normative requirements already set out in chapter 2, this section analyses the challenges that countries in transition face in pursuing prosecution and how TJ approaches today attempt to address them,

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[115] David A Crocker, 'Punishment, Reconciliation, and Democratic Deliberation' (2002) 5(2) Buff Crim L R 509, 538; Ronald C Slye, 'The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is Legitimate Amnesty Possible?' (2002) 43 (2002) 43 Va J Int'l L 173, 197-98; Michael P Scharf and Nigel Rodley, 'International Law Principles on Accountability' in M Cherif Bassiouni (ed), *Post Conflict Justice* (Brill-Nijhoff 2002)89, 90-91.

[116] Neil J Kritz, 'Coming to the Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights' (1996) 59(4) LCP 127-28.

[117] Lorna McGregor, 'Individual Accountability in South Africa: Cultural Optimum or Political Façade? (2001) 95(1) AJIL 32; Brian Grodsky, 'Re-Ordering Justice: Towards a New Methodological Approach to Studying Transitional Justice' (2009) 46(6) JPR 819, 829.

[118] Kritz, 'Coming to the Terms with Atrocities' (n 116) 128.

[119] ibid 127.

Although the normative requirement and importance of prosecution are well documented, contexts of transitions pose a myriad of challenges in pursuing prosecution. Nevertheless, different countries in transitions have pursued prosecution as it is found to be important not only to respect victims' rights but also to prevent future violations and restore the rule of law. Global experiences so far show three different ways in which countries undergoing transition (since TJ was coined) have undertaken prosecution. Firstly, by establishing *ad hoc* international tribunals, such as in the case of Rwanda and Yugoslavia. As chapter 2 discussed, the UN Security Council passed a resolution to establish such tribunals in the aftermath of the conflicts in those countries.[120] Secondly, by establishing hybrid tribunals, with the support of the UN, bringing both national and international judges and prosecutors and relying on both national and international law. Countries such as Sierra Leone,[121] Timor Leste,[122] Cambodia,[123] and Lebanon,[124] have established hybrid tribunals to try those responsible for atrocious crimes committed in the past. Thirdly, by prosecution at national level.

However, trials, conducted even through the involvement of the UN, have also shown some limitations and gaps. Even if resources and political will exist (which is extremely difficult in many contexts), trials of everyone involved in past crimes is difficult. For example, in Rwanda,

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[120] UNSC, 'Resolution 827' (n 37); UNSC, 'Resolution 955' (n 37).
[121] UNSC, 'Resolution 1315 (2000). Adopted by the Security Council at its 4186th meeting, on 14 August 2000' (14 August 2000) UN Doc S/RES/1315.
[122] UNSC, 'Resolution 1272 (1999). Adopted by the Security Council at its 4057th meeting, on 25 October 1999' (25 October 1999) UN Doc S/RES/1272.
[123] Agreement of 6 June 2003 between the Royal Government of Cambodia and the United Nations. The UN General Assembly approved the draft Agreement by its resolution 57/228(B) of 13 May 2003. UNGA, 'Resolution adopted by the General Assembly [on the report of the Third Committee (A/57/806)]57/228. Khmer Rouge trials B' (22 May 2003) UN Doc A/RES/57/228 B.
[124] UNSC, 'Resolution 1757 (2007). Adopted by the Security Council at its 5685th meeting, on 30 May 2007' (30 May 2007) UN Doc S/RES/1757.

when the ethnic conflict erupted in 1994, between 500,000 – 800,000 people were killed in less than 100 days, leaving thousands of perpetrators.[125] Although this resulted in the UN deciding to have the Intentional Criminal Tribunal for Rwanda (ICTR),[126] the tribunal could try only a handful of people.[127] Similar experiences could be found in other *ad hoc* and hybrid tribunals.[128] National judicial systems were expected to deal with the rest.

Trials at the national level play important roles in providing effective TJ to victims, but prosecution at that level seems uncommon and not that easy. Domestic trials are often hampered by the credibility, capability, and resource constraints faced almost inevitably by justice sectors in the aftermath of repressions and/or conflict, particularly in weakly institutionalised contexts.[129] If we leave aside the involvement of international actors such as the UN to set up hybrid trials, it is being done mostly in two situations. Firstly, when the transition has left one side of the conflict stronger than the other, such as in Iraq and Rwanda. Secondly, after the passage of time, such as in Argentina, Guatemala, or Chile. However, these too are not without criticism. In the first situation, trials were seen as victor's justice. In the second, victims have to suffer and struggle for many years.

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[125] Clark (n 45).
[126] UNSC, 'Resolution 955' (n 37).
[127] Over the period of 10 years, it has indicted only 93 persons, convicting 62 of them. International Criminal Tribunal for Rwanda, 'The ICTR in Brief' <https://unictr.irmct.org/en/tribunal> accessed 13 July 2020.
[128] UNGA, 'Promotion of truth, justice, reparation and guarantees of non-recurrence. Note by the Secretary-General' (13 September 2012) UN Doc A/67/368, paras 48-57.
[129] UNGA, Human Rights Council, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff*' (27 August 2014) UN Doc A/HRC/27/56, para 33.

Apart from these two contexts, prosecution at country level in the immediate aftermath of a transition is still very difficult. These difficulties arise from a variety of contextual realities, where TJ mechanisms need to be negotiated, established and executed.[130] As Priscilla Hayner highlights, despite all the normative development at international level, when the Colombian Government started peace negotiations with one of the main rebel groups, the Revolutionary Armed Forces of Colombia (FARC), the justice aspect of the peace agreement was the most difficult issue to negotiate, taking a lengthy amount of time to reach an agreement.[131] Armed group would not agree to have any provision that requires them to serve a prison sentence, 'even a day.'[132]

However, it can be argued that over the years, the faces of the *truth v justice* and *peace v justice dilemmas* are changing because of developments in international law requiring both truth and prosecution. As Chapter 2 analysed, International Law has developed intolerance towards amnesty offered to certain egregious crimes even if it is used to end conflict or a repressive regime. Unlike in the past, having amnesty, Truth Commissions or any other mechanisms in place of prosecution can no longer sustain legal challenges today. Although no consensus exists about the scope of amnesty, experiences of many countries shows amnesty laws having to be nullified retroactively to pursue prosecution even years after the transition. This has made those

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[130] Kai Ambos, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC' in Kai Ambos, Judith Large and Marieke Wierda (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Springer 2009) 19, 23.
[131] Priscilla Hayner, *The Peacemakers Paradox. Pursuing Justice in the Shadow of Conflict* (Routledge 2018) 202.
[132] ibid 204.

sitting at negotiation tables today aware that amnesty offered in peace agreement may not protect them from eventual prosecution.[133]

These changes have provided different grounds for peace negotiators and the people involved in past atrocities, as they want legal certainty that they will not be subject to future prosecution. Thus, the dilemma today is what incentives (that are not against international law) could be offered to those willing to lay down arms, commit to a peace process and continue their lives without the fear of future prosecution. The ongoing debates on TJ in Colombia and Nepal reflect this with various degrees of nuance. Arguably, the holistic approach to TJ allows a process that provides some solution to these new dilemmas of TJ. Although the process has just started to work, Colombia has approached truth and justice as part of the holistic TJ system providing some prospects for designing coexistence of truth and justice as part of the holistic TJ system, incentivising each other.

3.6. Holistic design offering incentives

Colombia has been struggling to find the balance between the need to end the ongoing violence to protect people from continuous violations of human rights[134] and address the crimes committed in the past by all sides of these conflicts using a TJ framework, yet not undermining international law by finding a holistic design of the TJ process addressing some of these dilemmas. The approach that Colombia is taking also shows how the contour of the peace

[133] Naomi Roht-Arriaza, 'After Amnesties Are Gone: Latin American National Courts and the New Contours of the Fight against Impunity' (2015) 37 Human Rights Quarterly 341; Hayner (n 131) 21.
[134] Priscilla Hayner notes until the talk begin in 2012, average of 1500 would lose their life every day as a result of frequent clashes between the forces. Hayner (n 131) 195.

negotiations and justice has been changing as international law gets solidified in articulating States' obligations and victims' rights.

For example, there have been many peace negotiations in the past in Colombia with different armed groups where amnesty was promised.[135] For example, in 2002 the Government started demobilisation of paramilitaries offering amnesty to those willing to confess their crimes.[136] The Government argued that ending a decades-long conflict that has affected the lives of millions of people was important, even to the extent of paying the price of amnesty.[137] However, this scheme of the Government was criticised as an 'impunity deal',[138] and successfully challenged by victims and civil society with the Colombian judiciary overturning such agreement.[139] The Court upheld the jurisprudence established by the IACtHR and held that international law does not allow amnesty to those involved in serious violations and amnesty would prevent victims having effective remedies.[140]

In its continuous efforts, the Parliament adopted the Justice and Peace Law in 2005 with the proposal that those who are willing to be demobilised fully and confess their crimes, would receive suspended sentences of 5-8 years' imprisonment.[141] Although the victims and civil society organisations had also challenged the constitutionality of this Justice and Peace Law

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[135] Hayner (n 131) 197.
[136] ibid 196.
[137] ibid.
[138] Maria Paula Saffon and Rodrigo Uprimny, 'Uses and Abuses of Transitional Justice in Colombia' (Dejusticia 2007) 9-10 < https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_59.pdf > accessed 21 November 2019.
[139] Saffon and Uprimny (n 138).
[140] ibid.
[141] Justice and Peace Law 2005, s 9.

arguing that it violated victims' rights to truth, justice and reparation,[142] the Constitutional Court of Colombia recognised that the imperative for peace justifies suspended sentences.[143] However, it ruled that this had to be balanced with victims' rights, finding a number of sections in the Act violating the Constitution, requiring amendments to the Act.[144]

As many procedural aspects related to the implementation of the Act were not clear, the Court also provided a detailed guideline on how the Act needs to be amended. For example, the Court stated that those willing to be demobilised and to receive the benefits of suspended sentence need to disclose the full truth and that hiding of any truth about their participation and knowledge about crimes of gross violations needs to result in them facing trial in the normal criminal justice system.[145] The Court also required full investigation of the crimes following standards and procedures of criminal law[146] and those convicted needing to serve their prison sentences in ordinary prisons.[147] The Court also required the law to be amended to ensure victims participation in all stages of the proceedings,[148] and also to make perpetrators contribute to victims' reparation.[149]

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[142] Ruling C-370 of 2006 of the Constitutional Court contains a summary of the arguments of the organizations that presented the first action of unconstitutionality against the law. For more detail analysis, see Saffon and Uprimny (n 138) 10-11.
[143] *Gustavo Gallón Giraldo y Others v Colombia*, Judgement No C-370/2006 (Constitutional Court, 18 May 2006).
[144] ibid.
[145] *Gallón Giraldo* (n 143), paras 6.2.2.1.7.27-6.2.2.1.7.28.
[146] ibid, para. 6.2.3.1.6.4.
[147] ibid, paras 6.2.3.3.4.8- 6.2.3.3.4.9.
[148] ibid, paras 6.2.3.2.1.10, 6.2.3.2.2.8.
[149] ibid, para. 6.2.4.1.16-18.

The issue of leniency in sentences was raised again in the IACtHR in the case of *La Rochela Massacre v Colombia.*[150] Although this case was not primarily about the Justice and Peace Law, the petitioners had argued that the Act could potentially impact the case arguing that these forms of leniency constituted a 'concealed amnesty'.[151] Although the Inter-American Commission argued for the necessity for the Court to rule on the reduced sentences as this could render the punishment illusionary, the IACtHR did not speak about the compatibility of the Justice and Peace Law with the American Convention on Human Rights but provided some principles that needed to be observed in the implementation of this law.[152] Those principles included the observance of due process, guarantee of principles of expeditious justice, adversarial defence, effective recourse, implementation of the judgment, and the proportionality of punishment,[153] paving a strong ground for negotiators to find a legal framework for TJ framework subsequent peace processes.

For example, in 2010, when the Government started peace negotiations with the FARC, one of the main armed groups, the justice aspect of the peace agreement was the most difficult issue to negotiate, taking a lengthy amount of time to reach an agreement.[154] Commentators note meetings being postponed and delayed several times and for long because the parties were not able to find the best possible solutions.[155] On the one hand, the armed groups would not agree to

[150] *Rochela Massacre v Colombia* (Merits, Reparations and Costs) IACtHR Series C No 163 (11 May 2007).
[151] ibid, para 185.
[152] ibid, para 192.
[153] ibid, para 193.
[154] Hayner (n 131) 202.
[155] ibid.

have any provision that require them to serve prison sentences, 'even a day'.[156] On the other hand, jurisprudence was clear that without investigation, prosecution and punishment, the framework would not sustain legal challenges. However, legal interventions and the active involvement of the ICC also made actors take justice issues seriously in the peace process.

The ICC had informed the Colombian Government in 2005 that it has opened a preliminary investigation on the allegation of crimes under ICC's jurisdiction being committed in Colombia.[157] All actors had an interest to avoid the ICC. Obviously, the Colombian Government did not want to be seen as incapable of investigating and prosecuting those involved in international crimes. For the FARC leaders, the ICC's involvement was risky as it would target the top leadership and they would not have any concession in the sentencing regime. In addition, all these actors have fought far too long and must have realised that it is not possible to have one side winning the war.[158] All these factors contributed to the peace process, that ultimately found a holistic approach to TJ where both truth and justice mechanisms coexist, complementing each other as the solution to the problem. As indicated earlier, although the process has just started and its learnings are yet to be drawn, the Colombian TJ process seems to be designed taking into consideration all pillars of TJ, aiming to achieve both peace and justice.

For example, the Peace Accord signed between the Government and the FARC contains a comprehensive framework for TJ, known as the 'Comprehensive System for Truth, Justice,

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[156] Hayner (n 131) 204.
[157] The ICC opened preliminary investigation on Colombia since June 2005 <https://www.icc-cpi.int/colombia> accessed 10 March 2020; Courtney Hillebrecht, Alexandra Huneeus and Sandra Borda, 'The Judicialisation of Peace' (2018) 59 Harv ILJ 279.
[158] Hillebrecht, Huneeus and Borda (n 157).

Reparation and Non-Recurrence', which embraces a comprehensive approach to TJ including Truth Commission,[159] reparation,[160] special mechanisms for criminal justice,[161] a mechanism to investigate disappearances and measures to prevent future violations.[162]

The special mechanism for criminal justice, known as 'Special Jurisdiction for Peace' (JEP), has been set up with different tribunals, including 'Peace Tribunals' and 'Judicial Panels', to ascertain the content, genuineness of confessions, the nature of crimes and impose sanctions on those involved in crimes to be prosecuted.[163] Although the design of the Colombian TJ process is very complex and comprehensive, the thrust of the justice part of the Peace Agreement is to offer alternative and suspended sentences to those submitting to the peace and justice system by laying down their arms, disclosing the truth, and respecting the conditions set by the tribunal. It also aims to ensure victims' participation in all processes and their right to reparation.

Although, there are different aspects of the Colombian TJ process that merit more detailed discussions, but for the interest of this chapter, the discussion is focused on three key issues: how the TJ process selects the cases that need to be prosecuted in a context where the universe of victims and violence is so immense, the sentencing regime, which in the view of many commentators was the key to bringing all actors to agree to the deal and the link between the truth and justice mechanisms, and how truth and justice mechanisms cooperate and complement

[159] 'Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace' (24 November 2016) (hereafter Colombia Peace Accord), s 5.1.1.1.
[160] ibid, s 5.1.3.
[161] ibid, s 5.1.2.
[162] ibid, s 5.1.4.
[163] ibid, s 5.1.

each other. As some of these issues have been critical also in the context of Nepal, the discussion here will provide important foundations for the discussions in chapter 6.

3.6.1. Selection of cases when the universe of cases is large

In a context of transition, where millions of violations involving hundreds of thousands of victims and perpetrators exist, who to prosecute using which criteria becomes an issue, which Colombia has to deal with. It is estimated that there are 9 million cases, most of them involving gross violations.[164]

As discussed earlier, during the course of the demobilisation process, different attempts were made to enact a legal framework for peace that did not undermine the orders and views from the Colombian Courts and international bodies such as the Inter-American human rights system and the ICC. As the universe of the victims and cases is big, the 'Legal Framework for Peace' that was presented in Congress in 2011 had proposed a selective approach to prosecution. This law intended to establish criteria for selecting cases requiring criminal investigation. The Congress had passed the law in July 2012 with the provision of selective approach to prosecution. It intended to establish criteria for selecting cases that were going to be subject of criminal investigation.[165]

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[164] Rodrigo Uprimny Yepes and Nelson Camilo Sánchez, 'Transitional Justice in Conflict: Reflections on the Colombian Experience' in Roger Duthie and Paul Seils, *Justice Mosaics. How Context Shapes Transitional Justice in Fractured Societies* (ICTJ 2017) 258, 264.

[165] IACHR, 'Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia' (31 December 2013) OEA/Ser.L/V/II. Doc 49/13, para 333.

However, a number of human rights organisations raised concerns over such proposal.[166] Although they agreed that some form of prioritisation was needed, they were concerned about the narrow focus on 'those most responsible,' as if cases were not selected, they would enjoy amnesty, thus creating the situation of impunity even to those involved in international crimes.[167] The International Commission of Jurists (ICJ) wrote to the Colombian Senate raising concerns that those cases of grave violations not selected for investigation and prosecution would enjoy total impunity as the State would be able to waive criminal prosecution all together.[168] Human Rights Watch raised a similar concern.[169]

The selective approach to prosecution was also challenged in the Colombian Constitutional Court (CCC), arguing that such a 'selective' approach to prosecution provides avenues for those involved even in crimes against humanity and war crimes, opportunities to escape justice.[170] When the case was still under consideration of the CCC, the ICC wrote a confidential letter to the CCC (the letter somehow got leaked to the public), stating that the policy of selectivity of

[166] Human Rights Watch, 'Colombia: Agreeing to Impunity. Government, FARC Deal Sacrifices Victims' Right to Justice' (22 December 2015) <https://www.hrw.org/news/2015/12/22/colombia-agreeing-impunity> accessed 27 February 2020; Amnesty International, *Amnesty International Report 2017/18. The State of the World's Human Rights* (2018) 130-34.
[167] Inter-American Commission on Human Rights, 'Hearing on the Right to Effective Recourse for the Investigation of Grave Human Rights Violations in Colombia' 144 Period of Sessions (26 March 2012) <http://www.cidh.org/audiencias/144/18.mp3> accessed 20 March 2020.
[168] The Colombian Commission of Jurists, Comments on the bill for a 'legal framework for peace' sent to the Senate of the Republic, November 23, 2011. For more discussion, see IACHR, 'Truth, Justice and Reparation' (n 165) para 334.
[169] IACHR, 'Truth, Justice and Reparation' (n 165) para 334.
[170] For example, the Colombian Commission of Jurists, a Human Rights NGO filed the case, For more discussion, see Roht-Arriaza, 'After Amnesties Are Gone' (n 133).

cases may provide impunity to those cases under the jurisdiction of the ICC and potentially trigger the ICC's jurisdiction.[171]

Although the ICC also has a policy of targeting the most responsible, it also states that unlike the ICC, States have an obligation to investigate, prosecute and punish all those involved in gross violations.[172] Furthermore, although the policy is to target the most responsible, sometimes the ICC also prosecutes lower ranking officials, considering their roles on the ground.[173] The Inter-American Commission also provided an analysis on the proposed justice framework and stated that a 'selective' approach to prosecution could violate the obligation States have under the American Convention and recommended that prioritization would include to ensure investigation and prosecution of serious human rights violations and breaches of international humanitarian law such as enforced disappearances, torture, sexual violence and recruitment of children.[174] In 2013, the CCC provided detailed guidelines on how any selection or prioritization needs to be done. For example, the Court stated that prioritization had to be transparent, impartial, effective, subject to review and respectful of the rights of victims to reparation and truth. It also required that not only a handful of cases but also all those cases involving violations of human rights law or humanitarian law have to be investigated and then only the decision is made on prosecution. The focus on prosecution of only the most responsible is acceptable only on condition that it allows to focus on the most responsible, considering the role that person played in the crimes,

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[171] *Marco Jurídico para la Paz,* Judgement No C-579/13 (Colombian Constitutional Court, 23 August 2013) para 3.16.1 citing the letters from the ICC.
[172] International Criminal Court, The Office of the Prosecutor, 'Paper on some policy issues before the Office of the Prosecutor' (September 2003) <https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf> accessed 12 March 2020.
[173] ibid.
[174] IACHR, 'Truth, Justice and Reparation' (n 165) para 460(9).

whether it allowed the effective dismantling of criminal structures and facilitated the uncovering of patterns of massive human rights violations.[175]

As the JEP started its work, it has developed criteria prioritising which cases it will be investigating first. Informed by all previous discussions and court rulings, it uses three different criteria. Firstly, subjective impact criteria, that include vulnerability of victims, impacts on ethnic groups and their territories, impact on other collective subjects, representativeness of alleged perpetrators etc. Secondly, the objective impact criteria, looking at the gravity of the crime and representativeness of the crime, and thirdly the complementarity criteria looking at the availability of the information/evidence in the case.[176]

Arguably, having a prior agreement among the actors on whom to prosecute (selecting cases) and to have transparent criteria for prioritization of investigations and prosecutions are two different things. Thus, although the international bodies have found the selective approach to prosecution problematic, developing criteria for prioritizing cases for investigation, prosecution and punishment is considered to be an important step for judicial mechanisms.[177] Although much may depend on how these criteria are designed, cases are prioritized and the overall impact, unlike the selective approach to prosecution; prosecutorial priorities have been welcomed by international organizations. For example, in a recent report, the ICJ has praised the JEP for developing criteria for prioritisation of its investigation and commended this as a positive

[175] Roht-Arriaza, 'After Amnesties Are Gone' (n 133).
[176] Presentation made by Alejandro Jimenez Ospina and Andres Contreras Fonseca, Visiting Fellows, Human Rights Centre, University of Essex (4 February 2020).
[177] UNGA, 'Pablo de Greiff' (n 129).

development, which will help JEP to be more organised and improve transparency when it begins its investigation.[178]

The previous UN Special Rapporteur on Truth, Justice, Reparation and Guarantee of non-Reoccurrence, Pablo de Greiff, has also discussed the issue of selectivity and prioritisation of the cases in the context of a TJ process.[179] He also argues that strategies of prioritising some cases are important. He argues that this allows the scarcest resources to be spent in a focused way in some cases that could have higher impact and to improve the performances of investigatory and prosecutorial bodies.[180] It allows investigatory bodies to understand the linkages between different crimes, looking more to the systematic nature of crimes, patterns and structures, which is difficult if investigation is done on a case-by-case basis.[181] However, he also maintains that it is important not to rely on a few criteria but develop them considering the nature of the violations that country has suffered, the availability of evidence, vulnerability of certain groups, cases having paradigmatic impacts,[182] targeting most serious violations,[183] and the most responsible,[184] among others. Although the focus generally is to target the most responsible, he also warns against targeting only the topmost as sometimes, the most notorious in the field could be the lowest ones. He also highlights the risk of not having such strategies. The risks would involve duplication of investigation, adding caseloads, consuming resources and taking more time. It also risks rendering poor investigation and weak indictment, ultimately resulting in the

[178] International Commission of Jurist, 'Colombia: The Special Jurisdiction for Peace, Analysis one Year and Half After its Entry into Operation' (Executive Summary, September 2019) 2.
[179] UNGA, 'Pablo de Greiff' (n 129) para 34.
[180] ibid, para 35.
[181] ibid, para 36.
[182] ibid, para 51.
[183] ibid, para 54.
[184] ibid, para 59.

acquittal of perpetrators.[185] This may further raise the issue of trustworthiness of the justice system that is important for any countries in transition.[186] The ICC's deputy prosecutor has also stressed this,[187] arguing that prioritisation also needs to be done considering the goal of sentencing.[188] For that matter, sometimes as a matter of prosecutorial strategy, the ICC also investigates and prosecutes mid-level perpetrators, or people at the lower level if he/she is known to be notorious although the policy of the ICC is to target the most responsible.[189]

It is not clear yet what will happen to those cases that are not prioritised for investigation by the JEP, how the JEP ensures victims' rights in non-prioritised cases and addresses the potential impunity gap is also an important task that the JEP needs to focus on as it start progressing its work. This was the problem raised in the TJ process in some other countries such as Timor Leste (Chapter 5 will study this). The current mandate (not having a policy of selectivity of cases) allows flexibility to the JEP and it should be open to assess the situation and develop further strategies in addressing the impunity gaps in cases not selected for prosecution so the victims and society at large do not see this as rendering impunity.

3.6.2. Link between truth and justice

As both justice and truth mechanisms of the Colombian TJ process have just began to operate, it is too early to set out details about how these mechanisms cooperate and complement each other

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[185] ibid, para 36.
[186] ibid.
[187] James Stewart, 'Transitional Justice in Colombia and the Role of International Criminal Court' ('Transitional Justice in Colombia and the Role of International Criminal Court' conference, Bogotá, 13 May 2015) <https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf> accessed 12 October 2019.
[188] ibid.
[189] ibid.

as part of the holistic TJ system. As discussed earlier, as the whole thrust of the justice component of the TJ process is to leverage sentencing for truth, reparation, demobilisation and guarantee of non-recurrence, one could argue truth and justice mechanisms are inherently interlinked.

However, the Colombian peace accord restricts the Truth Commission handing over its information to any judicial bodies 'for the purposes of attributing liability in judicial processes'.[190] It also prevents judicial bodies to seek information from the Truth Commission.[191]

TJ literature argues a provision to strengthen a Truth Commission's unhindered access to information and to keep it confidential can provide opportunities for parties (including perpetrators) to provide information to a Truth Commission without any fear of prosecution.[192] It is believed that it protects a TRC from being subject to summons of the Court to disclose evidence it collected as this could be a problem for the TRC. This was a critical issue in some TJ processes, such as Sierra Leone. Chapter 4 will analyse those problems further.[193]

However, in the context of Colombia, the design of the TJ framework is different. The JEP enjoys the sole power to investigate, prosecute, sentence and adjudicate the cases related to the conflict. As the thrust of the holistic notion of TJ in Colombia is to incentivise punishment for other components of TJ such as truth, preventing the Truth Commission from sharing

[190] Colombia Peace Accord (n 159) s 5.1.1.1.1.
[191] ibid, s 5.1.1.1.1.
[192] Marieke Wierda, Priscilla Hayner and Paul van Zyl, 'Exploring the Relationship Between the Special Court and the Truth and Reconciliation Commission of Sierra Leone' (ICTJ, 24 June 2002).
[193] See ch 4, s 4.4 for more discussion.

information with the JEP would mean defeating the very rationale of the holistic TJ process. On the one hand, it requires perpetrators to cooperate with the truth-seeking process, disclosing the truth in order to get the benefit of pardon, amnesty, reduced and alternative sentences; on the other hand, it cannot limit the Truth Commission sharing its information with the JEP. If a person participating in conflict has to go to two different entities to provide the same statement, this would just create an utterly bizarre and inefficient system, just consuming time and resources. Making a person disclose truth in different places could also sometime raise technical issues. For example, if a perpetrator provides one version of the truth to the Truth Commission but a different or even contradicting version to the chambers of the JEP, it may impact the credibility of information in the Truth Commission and the benefits that the person supposed to be getting from the JEP based on his/her confession.

Although making a TRC share its information with judicial bodies can create both practical and legal tensions in some situations (Sierra Leone is one example, this will be studied at length in chapter 5), this largely depends on the design of the TJ process, mandates and power of these mechanisms. The design of the TJ process in Colombia is completely different than in Sierra Leone.

As there is a chamber on truth and reconciliation in JEP, having a detailed record of the truth in that chamber and the chamber sharing that record with the Truth Commission would save not only resources but also promote close coordination between these two institutions at least in connection with the truth disclosed by the defendants. It could also prevent a situation where alleged perpetrators provide different versions of truth to different institutions, raising questions

about the truthfulness and trustworthiness of the information provided, which could impact both the individual perpetrators (as it could impact the benefits that they would receive) and the TJ bodies (raising the quality of information provided and requiring more thorough scrutiny and investigation of the statements).

Although many aspects of the TJ process are still evolving in Colombia and much depends on the working modality that these two institutions of truth and justice develop, observers comment that some of these challenges could be addressed once these mechanisms start working.[194] It is also observed that these two bodies have already been doing joint investigations in several countries, reaching out to Colombians living aboard.[195] Furthermore, both the Truth Commission and the JEP have been taking statements of victims and witnesses together in a number of places to avoid the re-traumatisation of victims and witnesses.[196] Thus, it has a huge potential to be more innovative in devising a tighter relationship between the two institutions, complementing each other.

Nevertheless, it is important to note that some protection might be required for some people, who may not be the subject of JEP but could provide insights about how the system functioned. For example, any retired public, military officers could provide important information and insights about how the system functioned. Thus, the protection the peace accord provided could be used to protect these categories of people but not alleged perpetrators who seek to benefit from the sentencing regime.

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[194] Hayner (n 131) 213.
[195] Informal discussion with the representative of Truth Commission (London, 7 March 2020).
[196] ibid.

3.6.3. Sentencing and incentives

The Colombian Peace Agreement has set up different forms of penalties, depending on the nature of violations and level of collaboration and engagement of the alleged perpetrators in the peace and justice process.

Firstly, those who have not committed grave violations of human rights but only political crimes (such as rebellion, sedition and violent rioting, as well as the illegal carrying of firearms, killings in combat when compatible with international humanitarian law, criminal conspiracy for the purposes of rebellion and other politically motivated crimes) will receive amnesty.[197] State security forces will not qualify for this. This benefits mostly the FARC members. A confession about the crime and those crimes being political and the perpetrators volunteering to lay down their arms would suffice for them to qualify for such amnesty. Amnesty is prevented for serious crimes such as crimes against humanity, genocide, grave war crimes, torture, enforced disappearances, forced displacement and common crimes that were not related to the rebellions.[198]

Secondly, those perpetrators (members of armed groups), who have committed serious crimes but agree to lay down their arms and be demobilized, disclose the truth about the crimes they committed and provide a guarantee of non-repetition by not returning to war, will receive 5-8

[197] Colombia Peace Accord (n 159) para 38.
[198] Serious war crimes include 'any violation of international humanitarian law committed as part of a systematic attack – hostage taking or other serious deprivations of freedom, torture, extrajudicial executions, forced disappearances, rape and other forms of sexual violence, child abduction, forced displacement and the recruitment of minors will all be ineligible for an amnesty or pardon'. Colombia Peace Accord (n 159) para 40.

years of alternative sentences.[199] This mean, they will not go to prison but serve their sentences in the community, doing community service. It is stated that these conditions entail 'effectively restriction of their liberty',[200] although it is still to be worked what that looks like exactly.

Thirdly, those perpetrators who did not disclose the truth in the beginning (at the investigation stage) but do so at the trial stage and agree to fulfil the conditions set by the tribunal can get 5-8 years of imprisonment.[201] This will entail a prison sentence.

Fourthly, perpetrators who committed serious crimes who decline to disclose the truth or who make only partial confessions, not full disclosure, will face the regular criminal justice system and can be sentenced to 15-20 years of imprisonment.[202] And, fifthly, perpetrators who benefited from the sentencing regime provided by the JEP but fail to comply with the conditions ordered by the Tribunals (such as by going back to an armed group or breaking the terms of community service) will also have to face the regular criminal justice system as their benefits will be revoked.[203]

The sentencing regime of Colombia has drawn a considerable interest among academics and practitioners alike. The discussions and arguments are centred on whether such a sentencing regime would meet the international obligation that Colombia has to investigate, prosecute and

[199] ibid, II (2).
[200] ibid, para 60.
[201] ibid, II (2).
[202] ibid, III.
[203] ibid.

punish those involved in gross violations and apply sentences that are proportionate to the gravity of the crimes committed.

Although the sentencing regime of Colombia seems to be designed considering the contexts, paying attention to the needs and demands of different objectives and actors, it is not without criticism. Those opposing this sentencing regime argue that it disproportionately favours FARC leaders and gives them impunity.[204] The alternative sentence together with the guarantee of political participation of the FARC leaders (the Peace Accord also provides 5 guaranteed seats for FARC leaders in both the chambers for a period of 8 years) may results in a situation with war criminals sitting in the senate while serving their sentences.[205] Different petitions have also been filed before the ICC arguing how the current sentencing regime falls short of compliance with the obligation Colombia has under the ICC Statute.[206] The main opposition comes from the political party in the Government today (Central Democratic) and President Ivan Duque himself.[207] For example, President Duque, who was elected in 2018, pledged that he would amend the Peace Agreement if he got elected as president. After he was elected, his party proposed an amendment to the Constitution that would restrict all TJ bodies, including the JEP, to access confidential information impacting national security. Many argued that this would attack the very basic objective of establishing truth of the TJ bodies.[208] Although the proposal

[204] Human Rights Watch, 'Colombia: Agreeing to Impunity' (n 166); Amnesty International, *Amnesty International Report 2017-2018* (n 166).
[205] Kai Ambos and Susann Aboueldahab, 'Colombia: Time for the ICC Prosecutor Act?' (*EJIL: Talk!*, 2 April 2019) <https://www.ejiltalk.org/colombia-time-for-the-icc-prosecutor-to-act/> accessed 12 March 2020.
[206] ibid.
[207] ibid.
[208] Kai Ambos, 'Transitional Justice Without Truth?' (*EJIL: Talk!*, 27 August 2018) <https://www.ejiltalk.org/transitional-justice-without-truth/> accessed 12 March 2020.

was not passed because it failed to get the required votes, this indicates the political will in the country to making the TJ bodies succeed. It is not only the right wing political parties; legal scholars have also worried about the potential risk of alternative sentences being used as a new form of amnesty. Naomi Roht-Ariaza sees a risk of alternative sentencing being the new avatar of amnesty[209] and argues such sentencing may undermine the standards set by international law on proportionality of the sentences, making the penalty illusionary.[210]

However, those who see the need to strike a balance between the need to prevent the ongoing and future violence and to address past violations in Colombia argue that the TJ framework which the parties have been able to forge addresses the false dichotomy between truth and justice and achieves both.[211] Paul Sheils argues that in contexts like Colombia where there have been mass atrocities, ranging from murder, torture, disappearance, rape, forced displacement, war crimes and crimes against humanity, any punishment would fall short and no amount of punishment can undo or equate the crimes given the situation's 'radical evil'.[212]

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[209] Roht-Arriaza, 'After Amnesties Are Gone' (n 133).
[210] ibid.
[211] Kristian Herbolzheimer, 'Innovations in the Colombian Peace Process' (Norwegian Peacebuilding Resource Centre Report, June 2016) <https://ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/resources/docs/ 0e5206132095b3f2bdb7c3877690a538.pdf> accessed 29 October 2019.
[212] Paul Seils 'Squaring Colombia's Circle. The Objectives of Punishment and the Pursuit of Peace' (ICTJ Briefing, June 2015) <https://www.ictj.org/publication/squaring-colombia-circle-objectives-punishment-peace> accessed 27 February 2020; Carlos S Nino, *Radical Evil on Trial* (Yale University Press 1998) 135–37.

Scholars also argue that proportionality is not the only criteria while assessing the fulfilment of States obligations under international law,[213] that other obligations and interests of States also need to be weighed while implementing competing obligations of the States.[214] As the previous chapter discussed, international law does not define what proportionality really means and the forms and length of punishment required,[215] States enjoy a wide discretion in designing a sentencing regime, which was also reaffirmed by the ICC.[216] Sentences, however, needs to serve 'appropriate sentencing goals, such as public condemnation of the criminal conduct, recognition of victims' suffering, and deterrence of further criminal conduct.'[217] Thus, scholars argue compatibility of a sentencing regime should be seen in the context of how it fulfils the objectives and goals of punishment, while also producing other values in society.[218]

As chapter 2 highlighted there are different objectives and goals of punishment, one of them being general and specific deterrent of crimes.[219] Providing a penalty according to the nature and severity of the crimes is believed to have both general and specific deterrent value as it deters people from committing such crimes and also the person repeating such crimes.[220] However, this is not the only theory and objective of punishment. Scholars argue that punishment also has a

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[213] Oscar Parra-Vera, 'Inter-American Jurisprudence and the Construction of Transitional Justice Standards: Some Debates and Challenges' in Nelson Camilo Sánchez and others (eds), *Beyond the Binary. Securing Peace and Promoting Justice After Conflict* (Dejusticia, 2019); Seils (n 212).
[214] Nelson Camilo Sánchez and others (eds), *Beyond the Binary. Securing Peace and Promoting Justice After Conflict* (Dejusticia, 2019); Seils (n 212).
[215] Claudio Nash, 'Transitional Justice and the Limits of the Punishable: Reflections from a Latin – American Perspectives' in Nelson Camilo Sánchez and others (eds), *Beyond the Binary. Securing Peace and Promoting Justice After Conflict* (Dejusticia, 2019) 108-129.
[216] Stewart (n 187).
[217] ibid.
[218] ibid.
[219] See ch 2.
[220] Ibid.

restorative theory and that States are required to enable the offenders to reflect upon the crimes he/she committed and get an opportunity to correct themselves and be part of the society as a law-abiding citizen.[221] The sentencing regime that the human rights treaties envision is also more rehabilitative and requires States designing a sentencing regime that facilitate the reformation and social rehabilitation of offenders.[222] It recognises the wrong but also allows opportunities for the offender to correct.[223]

As no agreement could be found among scholars around the appropriate balance between the pursuits of peace and justice, States are nevertheless required to maintain an equilibrium between the prevention of violence and addressing the past by designing different sentencing regimes with different objectives.[224] This was also highlighted by judge Diego Garcia-Sayan in the case of El Mozote.[225] Although the case of El Mozote related to the lack of investigation, prosecution and punishment caused by the sweeping amnesty law of El Salvador, where the Court had found a violation, judge Garcia-Sayan, had a concurring opinion (which was joined by four others judges), where he stated that 'armed conflict and negotiated solutions give rise to various issues and introduce enormous legal and ethical requirements in the search to harmonise criminal

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[221] Seils (n 212).
[222] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 10(3); American Convention on Human Rights (entered into force 18 July 1978) OAS Treaty Series No 36 (1967) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 25 (1992) (American Convention) art 5(6).
[223] Seils (n 212).
[224] Nelson Camilo Sánchez and Rodrigo Uprimny, 'The Challenge of Negotiated Transitions in the Era of International Criminal Law' in Nelson Camilo Sánchez and others (eds), *Beyond the Binary. Securing Peace and Promoting Justice After Conflict* (Dejusticia, 2019) 18-71; Ambos and Aboueldahab (n 205).
[225] Concurring Opinion of Judge Diego García-Sayán, *Massacres of El Mozote and Nearby Places v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No 252 (25 October 2012).

justice and negotiated peace.'[226] Thus, in the difficult exercise of the complex search for this equilibrium (such as to prevent ongoing violations, establishing peace and addressing the past), 'routes towards alternative or suspended sentences could be designed and implemented but without losing sight of the fact that this may vary substantially according to both the degree of responsibility for serious crimes and the extent to which responsibility is acknowledge and information is provided about what happened.'[227]

Scholars argue that TJ is not just about responding to human rights but also about the context of those responses.[228] The demand for absolute prosecution is as bad as advocating for absolute blanket amnesty, that both are equally extreme. In between these two extremes models can be found within the parameters of international law.[229]

The use of reduced sentences for accused cooperating with the justice process is a long-established concept in criminal law[230] and has also been recognised in international human rights treaties. For example, the ICPPED allows suspended sentences for information and truth provided for the establishment of the fate of the missing.[231] This has also been recognised by the UN Principles to Combat Impunity,[232] international criminal tribunals[233] and the ICC.[234]

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[226] ibid, para 30.
[227] ibid.
[228] Duthie (n 58).
[229] Sánchez and Uprimny, 'The Challenge of Negotiated Transitions' (n 224).
[230] For further discussion on this issue, see ch 5.
[231] International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICPPED).
[232] The Principle foresees the role of confessions, disclosure and repentance as a legitimate justification for reduction of sentence, but not an exemption from criminal or other responsibility. UNESC, Commission on Human Rights, 'Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher*. Addendum. Updated Set of

For example, the ICC can impose a maximum of 30 years of imprisonment for the crimes under its jurisdiction and life sentences in cases of extreme gravity of the crime committed.[235] However, it also has powers for sentencing mitigation considering different factors. Rule 223 of the Rules of Procedure and Evidence of the ICC states that if there is a 'genuine dissociation' of a sentenced person from their crime, the prospects of them being re-socialised or successfully resettled back into their society among others could be used in mitigating the sentences.[236] A perpetrator's contribution to reparation or paying compensation are also considered as factors mitigating sentences.[237] Expressing remorse, apologies are also considered to be important factors in making decisions to mitigate sentences,[238] although they have to be genuine by their commitment for ensuring non-repetition.

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principles for the protection and promotion of human rights through action to combat impunity' (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, principle 28.

[233] *Prosecutor v Vidoje Blagojević and Dragan Jokić* (Judgement) IT-02-60-T (17 January 2005) paras 858-860; *Prosecutor v Biljana Plavšić* (Sentencing Judgement) IT-00-39&40/1-S (27 February 2003) paras 85-94, 110; *Prosecutor v Moinina Fofana, Allieu Kondewa* (Judgement) SCSL-04-14-T (2 August 2007) paras 94-96.

[234] For example, the rules of evidence of the ICC have a provision for early release taking into account different factors such as the 'genuine dissociation' of a sentenced person from their crime, the prospects of them being socialised or successful resettlement back into society, whether their release would give rise to 'significant social instability', any 'significant' action by the sentenced person for the benefit of victims and the impact of their release on victims and their families, and their individual circumstances, such as worsening health or advanced age. International Criminal Court, *Rules of Procedure and Evidence* (2nd edn, 2013) r 223.

[235] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (ICC Statute) art 77(1).

[236] International Criminal Court (n 234) r 223.

[237] *The Prosecutor v Jean-Pierre Bemba Gombo* (Decision on Sentence pursuant to Article 76 of the Statute) ICC-01/05-01/08-3399 (21 June 2016) para 72.

[238] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15-171 (27 September 2016) para 105.

A similar experience could be found in the work of the ICTR and ICTY. For example, in *Omar Serushago,*[239] the ICTR analysed a number of factors such as the perpetrator's cooperation with the prosecutor,[240] his voluntary surrender to the Court,[241] confessing to crimes and pleading guilty,[242] his family and social background,[243] individual circumstances such as him being father of six children and two of them being young,[244] and the possibility of rehabilitation[245] and seeking apologies and remorse if they are genuine[246] as mitigating factors. Similar factors have been considered by the ICTY in other cases.[247]

Although reduced sentences are well accepted in the criminal justice system, alternative sentencing has not been tested yet in cases involving gross violations. Generally, it is being used only in less serious crimes and only in those cases where part of the sentence has already been served in prison. Thus, whether it will be found compatible under international law is yet to be seen. It is also important to note that the ICC and the Colombian Constitutional Court have already signalled that not having any prison sentences and having total suspension of sentence could be a violation of the Constitution of Colombia[248] and not serve the objective of sentences,[249] although arguments have also been made that such signals came while the parties were still negotiating the sentencing schemes and that the conditions attached to such sentences

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[239] *The Prosecutor v Omar Serushago* (Sentence) ICTR – 98-39-S (5 February 1999).
[240] ibid, para 31.
[241] ibid, para 34.
[242] ibid, para 35.
[243] ibid, para 36.
[244] ibid, para 39.
[245] ibid.
[246] ibid, para 40.
[247] *Prosecutor v Tihomir Blaškić* (Judgement) IT-95-14-A (29 July 2004) para 705.
[248] Seils (n 212).
[249] Stewart (n 187).

have since been changed significantly to make them more stringent in upholding victims' right to truth, reparation and non-recurrence.[250] Now the alternative sentence also includes 'deprivation of liberty' in addition to other conditions, which was not the case in earlier version.

Thus, it appears that how 'deprivation of liberty' is going to be defined and implemented, avoiding the situation of a person convicted of crimes against humanity and war crimes siting in the Colombian Senate, enacting the laws and speaking about rule of law may determine the legitimacy of the alternative sentence. Although the deterrence of crimes may not necessarily come with the severity of the punishment but the certainty of it, compatibility of this sentencing regime with international standards might also depend on how rigorously the justice component of the peace accord is implemented and how it ensures victims participations in proceedings, and establishes truth, justice and deterrence while also securing peace.

3.7. Conclusion

This chapter analysed how the TJ landscape is changing from its conception as an alternative to prosecution consisting of justice measures adopted by countries in transition to address diverse needs of society undergoing transition. There exist both normative and practical requirements today for truth and justice mechanisms not being able to replace the other.

Although changes in international law may not necessarily change the contexts of transition and alter the challenges that countries undergoing transition face, they help to design a TJ process in such a way that could address both the truth and justice demands of victims and societies

[250] Hillebrecht, Huneeus and Borda (n 157); Hayner (n 131) 211.

suffering from mass atrocities. Developments in international law and practical experiences now require those negotiating transitions to be more creative in devising TJ solutions that respect both truth and justice, without undermining international law. TJ could also be an instrument securing peace as we have seen in the context of Colombia. The Colombian process also provides an example of how a holistic design could address the interest of different actors and help a country to balance competing interest at stake. It also shows how designing a TJ process holistically, different components could offer incentives to each other. These country experiences and normative developments and how they interact at national level, empowering victims and civil society make a holistic approach a possible reality, providing important insights for countries developing TJ process today such as Nepal.

Chapter 4

Co-existence of Truth and Justice Mechanisms: Different Experiences

4.1. Introduction

Chapter 3 highlighted how the TJ landscape is changing to embrace a holistic notion, promoting different TJ mechanisms to coexist and complement each other, addressing the needs of societies undergoing transition, this chapter focuses on experiences of different countries to study how truth and justice mechanisms are designed as TJ mechanisms. Country experiences vary as to how they approached truth and justice mechanisms in addressing past atrocities. In many countries, Truth Commissions were established first and prosecution followed later. However, in a few countries perpetrators were prosecuted first and Truth Commissions were established later.

Considering different contexts and experiences of countries, scholars argue for sequencing of TJ mechanisms. Sequencing of TJ mechanisms involves designing TJ mechanisms in a specific order to create a continuum of TJ processes.[1] Scholars also argue that contexts, timing and sequencing play important roles in implementing TJ mechanisms as different mechanisms have different contextual preconditions.[2] Competing aims at stake, including political power balances,

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[1] Alexander Dukalskis, 'Interaction in Transition: How Truth Commission and Trials Complement or Constrain Each Other' (2011) 13(3) International Studies Review 432.

[2] Laurel E Fletcher and Harvey M Weinstein and Jamie Rowen, 'Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective' (2009) 31 Hum Rts Q 163; Roger Duthie, 'Introduction' in Roger Duthie and Paul Seils, *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (ICTJ 2017) 9; Thomas Obel Hansel, 'The Time and Space of Transitional Justice' in Cheryl Lawther, Dov Jacobs, Luke Moffett (eds), *Research Handbook on Transitional Justice* (Elgar Publishing 2017) 1-15; Renee Jeffery, 'Sequencing of Transitional Justice Mechanisms: Lessons from the Solomon Islands' (*Middle East Institute*, 4 March 2014) <https://www.mei.edu/publications/sequencing-transitional-justice-mechanisms-lessons-solomon-islands> accessed 17 July 2020.

resources and legal and institutional infrastructure, impact the country's choice for how they design different TJ mechanisms.[3] The nature of the transition and the political settlement also impact the choices countries make in choosing TJ mechanisms and their sequence.[4] The UN Secretary General has also reinforced the importance of sequencing when he articulated that advancing justice, peace and democracy in fragile post-conflict settings requires 'strategic planning, careful integration and sensible sequencing of activities'.[5]

As indicated earlier, country experiences vary as to how they have approached truth and justice in their transition. South Korea is one example where prosecution came before the TRC as the TJ mechanism to deal with the legacies of human rights violations that occurred during the military dictatorship. Although it is not common for countries undergoing transition to have prosecution before a Truth Commission, it is nevertheless important to understand contextual realities contributing to such sequence and how these two mechanisms interact in such a sequence. Similarly, in some countries, especially in Latin America, a Truth Commission was established before prosecution. Taking Argentina as the first case in hand, the chapter analyses experiences of countries where a Truth Commission was established first and prosecution followed later. The chapter will explore contexts for such sequencing, how truth and justice mechanisms interact when they are sequenced and what pitfalls and benefits they offer, so countries such as Nepal

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[3] Ibid.

[4] Christine Bell, 'Contending with the Past: Transitional Justice and Political Settlement Processes' in Roger Duthie and Paul Seils, *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (ICTJ 2017)84, 95; Lars Waldorf 'Institutional Gardening in Unsettled Times: Transitional Justice and Institutional Contexts' in Roger Duthie and Paul Seils, *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (ICTJ 2017)40, 49-54; Dukalskis (n 1) 432.

[5] UNSC, 'The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General (23 August 2004) UN Doc S/2004/616.

designing TJ mechanisms today can make informed decisions while designing their TJ processes.

While TJ mechanisms came in sequence in some countries, in other countries, such as Sierra Leone and Timor Leste, truth and prosecution mechanisms coexisted as TJ mechanisms. The chapter will analyse the experience of Sierra Leone, as it presents a context of transition both from authoritarian regime and conflict to democracy and peace and provides insightful lessons in relation to the challenges and difficulties that the coexistence of a TRC and prosecution could pose when these two mechanisms are set up to work simultaneously. It will delve deep, not only to find the tensions and challenges that the coexistence of truth and justice mechanisms creates but also to study how those tensions and challenges could be addressed in future TJ processes such as in Nepal, where truth and justice are being designed to coexist as TJ mechanisms.

The chapter has 3 major sections. The first section will study prosecution first then truth type of sequencing by analysing the experience of South Korea. The second section will study the experience of countries having truth first prosecution later by analysing the experience of Argentina. Then the third section will focus on experiences of countries with coexisting truth and justice mechanisms to understand the benefits and pitfalls it involves by analysing the experience of Sierra Leone.

4.2. Prosecution before Truth Commissions

In addition to all the benefits that trials generally have in TJ context,[6] having trials first enables countries in transition to reinforce the rule of law, limits the power of perpetrators to stall the TJ process and increases prospects for a successful transition.[7] It neutralises the spoilers and allows wider access to the truth established through trials,[8] encouraging victims and witnesses to participate in truth-seeking without the fear of reprisal or intimidation by perpetrators.[9]

However, not all contexts of transition would be conducive for trial to come before the TRC. South Korea is one of the rare cases where trials were conducted before establishing the Truth Commission. Prosecution before the Truth Commission was made possible because of the weakening legitimacy of the military in the immediate aftermath of the transition.

For example, when South Korea was transitioning from military dictatorship to democracy in 1987, the call for accountability of military leaders who had staged a coup in 1979 to suppress democratic activists started to surge.[10] Although South Korea suffered human rights violations during different regimes throughout a complex political history,[11] incidents after the 1979 coup

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[6] See ch 3, s 3.5.

[7] Indumini Randany and Isabelle Lassee, *The Politics of Sequencing: A Threat to Justice?* (SACLS 2016) 15; 'Seductions of "Sequencing" The Risks of Putting Justice Aside for Peace' (Human Rights Watch 2011) <https://www.hrw.org/news/2011/03/18/seductions-sequencing> accessed 4 January 2017.

[8] Dukalskis (n 1) 432, 439.

[9] ibid.

[10] Jae-Jung Suh, 'Truth Commission in South Korea: Confronting War, Colonialism, and Intervention in the Asia Pacific' in Jae-Jung Suh (ed), *Truth and Reconciliation in South Korea: Between the Present and Future of the Korean Wars* (Routledge 2013) 504.

[11] Such as the Japanese occupation (1910-1945), Korean War (1950-1953) and an authoritarian military regime (1979-1987); Jae-Jung Suh, 'Introduction. Truth Commission in South Korea: Confronting War, Colonialism, and Intervention in the Asia Pacific' in Jae-Jung Suh (ed), *Truth*

were still very vivid and fresh in people's minds when the country was transitioning to democracy in the early 1990s.[12]

The coup of 1979 was staged by Military General Chun Doo-Hwan, who later became President with the support of several military officers including Roh Tae-Woo. It was followed by a series of emergency measures, including declaration of nationwide martial law, prohibition of political activities, dissolution of the National Assembly and total censorship to curb emerging democratic movements.[13] In May 1980, the citizens in Gwangju[14] rose up against martial law and demanded the resignation of Chun, but were met with brutal suppression resulting in nearly 600 deaths.[15] The incidence of Gwangju did not silence the activists but culminated in a movement known as the 'June Struggle' of 1987, forcing the military regime to agree to a general election allowing all political parties to participate.[16] However, in the 1987 general election, Roh was elected as president, leaving no prospect for TJ.

Nevertheless, perhaps hoping to subside increasing call for prosecution, the president agreed to a Parliamentary hearing allowing a dozen of witnesses to testify over a period of 3 months. Former

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and Reconciliation in South Korea: Between the Present and Future of the Korean Wars (Routledge 2013) 504.

[12] Cho Hee-Yeon, 'Sacrifices Caused by State Violence Under Military Authoritarianism and the Dynamics of Settling the Past during the Democratic Transition' (2002) 42(3) Korea Journal 163, 174.

[13] In Sup Han, 'Kwangju and Beyond: Coping with Past State Atrocities in South Korea' (2005) 27(3) Hum Rts Q 1008; James M West, 'Martial Lawlessness: The Legal Aftermath of Kwangju' (1997) 6(1) Pac Rim L & Pol'y J 85, 90.

[14] A city in the Southern region of Honam.

[15] David M Waters, 'Korean Constitutionalism and Special Act to Prosecute Former Presidents Chun Doo-Hwan and Roh Tae-Woo' (1996) 10(2) Col J Asian L 461.

[16] Although the growing nationwide protest against the Chun regime made Chun agree to direct elections, he appointed Roh as his successor. Roh was elected as the president in 1987. Thus, even during the democratic system of early transition, the military continued to control power.

President Chun Doo-Hwan also testified and apologised to the victims for the harm they suffered.[17] A law providing compensation for victims of the Gwangju killings was adopted, offering monetary compensation to victims.[18]

However, the victims did not accept this as a proper response and continued demanding criminal investigations, leading to one district prosecutor to open an investigation,[19] but later deciding to drop the case fearing political, social and legal tensions.[20] More than 300 victims challenged this decision in the Constitutional Court but the latter did not find the prosecutor's decision to be unconstitutional arguing that it was the prerogative of the prosecutor to decide whether to prosecute or not.[21]

However, things started to change when Kim Young–Sam was elected in 1992 as the first civilian President in over 30 years. Fearing a potential threat to democracy by a still politically active military and the strong presence of a right wing political party in the parliament, the early response of the President was to take some measures of reforms by removing or relocating military leaders closely linked to the deposed authoritarian regime.[22] However, continuous

[17] Hee-Yeon (n 12) 163, 174.
[18] The law was passed, providing 2224 victims compensation, which included those injured and families of the dead and missing, to receive monitory compensation. See also Ahn Jong-Cheol, 'The Significance of Settling the Past of the December 12 Coup and the May 18 Gwangju Uprising' (2002) 42(3) Korea Journal 112.
[19] Hun Joon Kim, 'Trial and Error in Transitional Justice: Learning from South Korea's Truth Commissions' (2012) 19 Buff Hum Rts L Rev 125; see also Kuk Cho, 'Transitional Justice in Korea: Legally Coping with Past Wrongs after Democratisation' (2007) 16(3) Pac Rim L & Pol'y J 579.
[20] ibid.
[21] Kim (n 19).
[22] Jong-Cheol (n 18) 125, 128.

pressure from the victims and civil society demanding criminal investigations coupled with the public exposure of corruption in the military junta created the ground for prosecution.

4.2.1. Prosecution of Junta

When corruption involving ex-presidents was exposed in October 1995, it provided an enabling environment for opening an investigation and prosecution of junta members. The public exposure of the corruption and the public funds that the military leaders amassed exposed the military leaders, weakening their public support and giving rise to a political environment for prosecution to take place. [23] Roh confessed his involvement in accumulating more than 650 million USD.[24] Former President Chun was accused of taking even greater amounts in bribes.[25] The President, who was initially against the trials of the past presidents fearing a potential backlash, now became interested in prosecuting them, ceasing the opportunity of their weakening public support.

Accordingly, the Gwangju Special Law was enacted to allowing prosecution of those military leaders that were responsible for the killings in Gwangju.[26] Although the political grounds for the prosecution were strong, many legal and practical challenges remained. As norms of international law in relation to the prohibition of amnesty, statutory limitation, retroactive effect of law, command responsibility and other elements required under the duty to prosecute had not

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[23] Waters (n 15) 461, 486.
[24] ibid 461, 466; Sheryl Nudunn 'Ex-President is sentenced to Death in Seoul' *New York Times* (26 August 1996) <http://www.nytimes.com/1996/08/26/world/ex-president-is-sentenced-to-death-in-seoul.html> accessed 13 December 2013.
[25] Waters (n 15) 461, 466.
[26] Special Act Concerning the May 18 Democratisation Movement, Act No 5029 of 1995 (amended).

fully developed into what they are today, the Court in South Korea had to grapple with these issues as it was not able to rely on clearly defined international norms. The constitutionality of this Special Law was challenged in the Constitutional Court. It was argued that the Special Law was adopted to punish only specific people and groups; therefore it was arbitrary and violated the Constitutional principle of equal protection of the law. It was further argued that the law was applied retroactively violating the constitutional protection against ex-post facto laws. [27]

In a context where many atrocities are committed on a large scale, involving many perpetrators, who to prosecute and how to prioritise cases for prosecution became issues. The first issue that the South Korean prosecutor and the Court had to grapple with was who should be held accountable for the Gwangju massacre, those who ordered it, and/or those who pulled the trigger. [28]If only the military leaders are prosecuted how to prevent the perception and the risk of victor's justice and ensure fair trials to the accused also started to emerge.

However, the Constitutional Court did not find the law violating the Constitution. It reasoned that although the Act was created for a particular situation, the unlawfulness of the coup was grave and the need existed to rectify past wrongs to establish legitimate constitutionalism, letting the prosecution go on with these cases.[29]

The prosecutors analysed different factors while deciding to prosecute those in the top echelon of the military hierarchy. It was reasoned that in individual crime, if the person is proximate to the

[27] Cho (n 19).
[28] Han (n 13) 998, 1016.
[29] 8-1 KCCR [Korean Constitutional Court Report] 51, 96 Hun-Ka 2, 16 Feb 1996.

crime, they could be held more liable. However, in organisational crimes committed in a hierarchical setting such as the army proximity to the crime makes the person less involved in the crime, as those on the ground have to carry out orders sent from those above and may not be able to function independently. Based on this theory, the Appeal Court in South Korea found that two former Presidents could be held accountable for the massacre even though they had not been physically present when the Gwangju massacre happened. [30] The Court held that their positions enabled them to give orders and played substantial roles in designing and supporting the operation.[31] The Supreme Court upheld this Appeal Court decision.[32]

Accordingly, both ex-presidents, masterminds of the coup and the suppression, were charged with corruption, treason and homicide. Although the public had testified how ruthless the soldiers on the ground were, they were not prosecuted considering that they were just following orders.[33] The Supreme Court upheld the conviction of two ex-presidents. Chun Doo-Hwan was sentenced to life imprisonment and Roh Tae-woo sentenced to 22 and half years' imprisonment.[34] Along with these two ex-presidents, more than 20 people were also prosecuted and convicted to between three and eight years for aiding, abetting and benefiting from the crimes committed.[35]

[30] Han (n 13) 998, 1018-19.
[31] Seoul High Court [Seoul High Ct] 96 No 1892, 16 Dec 1996.
[32] Han (n 13) 998, 1018-19.
[33] ibid.
[34] Supreme Court [S Ct] 96 Do3376, 17 Apr 1997.
[35] Han (n 13) 1009f.

Although all those convicted did not serve more than 2 years in prison as they were pardoned by the subsequent President, scholars argued such pardons in no way invalidated the sentences themselves and constituted a break from the past.[36]

The successful trials of former Presidents opened space for many victims of human rights violations to bring complaints demanding accountability as many victims remained yet to be heard. The trial also exposed its limitations, not being able to reach hundreds of victims and perpetrators.[37] The narrow focus of evidence in trials could not necessarily explain how the system had functioned, hence victims and civil society continued to agitate,[38] paving the ground for the Truth Commission.

4.2.2. Clearing up past incidents for Truth and Reconciliation Commission

In 2005, the Government decided to establish a Commission known as Clearing up Past Incidents for Truth and Reconciliation Commission (known as SKTRC) to fulfil the gap that the trials left not being able to reach out to a larger number of victims and perpetrators and to understand the impact of violence that South Korean society faced during different times, including the Japanese occupation, (1910-1945), the Korean war (1950 - 1953) and the authoritarian military regime (1979-1987).[39]

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[36] ibid 1030.
[37] ibid 998, 1024.
[38] Andrew Wolman, 'Looking Back While Moving Forward: The Evolution of Truth Commissions in Korea' (2013) 14(3) Pac Rim L & Pol'y J 27, 43.
[39] Kim Dong-Choon, 'Korea's Truth and Reconciliation Commission: An Overview and Assessment' (2012) 19 Buff Hum Rts L Rev 97f.

Before this Commission, two other Commissions, the Presidential Commission on Suspicious Death[40] and the Jeju[41] Commission had been established in 2002. They were tasked to look into specific past cases. The experiences of these Commissions and the increasing demands for accountability by victims from different eras made the Government decide to set up a Commission to look into past issues in a more comprehensive way in order to properly document what happened, restore memories, promote reconciliation and provide proper closure to past grievances.[42]

The SKTRC was tasked to receive petitions by individuals, investigate and verify cases, and recommend measures to help establish truth and reconciliation.[43] From the outset it was made clear that the Commission will not recommend prosecution, arguing that many of the collaborators of Japanese occupation and those involved in the Korean wars had already died or were of very old age and those most responsible from the military regime had already been prosecuted. Therefore, the objective of the Commission was to recognise and honour those who participated in the anti-Japanese as well as the anti-authoritarian movements to promote national reconciliation and encourage national unity.[44]

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[40] The Commission on Suspicious Deaths had a mandate to investigate the death of citizens in South Korea between 1975 and 1987.
[41] Jeju Commission was established in 2000 to investigate the massacres and to restore the dignity of victims and their family members of Jeju that suffered between 1948 and 1954.
[42] Kim Dong-Choon, 'The Long Road Towards Truth and Reconciliation: Unwavering Attempts to Achieve Justice in South Korea' in Suh (n 10) 536.
[43] Framework Act on Clearing up Past Incidents for Truth and Reconciliation, Act No 7542 of 2005 (Framework Act).
[44] ibid.

The Commission had a 5 years' period to complete its work, finishing in 2010. It received 11,031 complaints and investigated and verified 8,229.[45] It presented its report in 2010 recommending measures for memorialisation, reparation and an opportunity for those who were falsely charged and falsely convicted by the regime in the past to have a re-trial.[46]

Although having prosecution first then truth helped to restrict the hold of spoilers to prevent the future course of TJ, the SKTRC could not maximise the benefit of such context to obtain truth that had not been possible to obtain through the trials. Observers argue that the SKTRC suffered from 'built in' limitations that hindered its ability to dwell and expose the truth.[47] It had weak powers and mandate.[48] Furthermore, the Commission had a narrow interpretation of its mandate, confining it to determine whether or not the petitioner's claim actually occurred, and not to look into the structure of how the victimization occurred or the cause and background into why it happened. This also impacted its work.[49]

In terms of powers, the Commission did not have any power to search and seize evidence, nor could it compel witnesses to provide information or initiate contempt.[50] Although it had the power to impose a small fine for providing false information and for refusing to accompany the

[45] Dong-Choon (n 42) 546.
[46] 'Truth Commission: South Korea 2005' (*United States Institute of Peace*, 18 April 2012) <https://www.usip.org/publications/2012/04/truth-commission-south-korea-2005> accessed 20 December 2017.
[47] Dong-Choon (n 42) 97, 105, 124; Tara J Melish, 'Implementing Truth and Reconciliation: Comparative Lessons for the Republic of Korea' (2012-2013) 19 Buff Hum Rts L Rev 1, 11.
[48] Dong-Choon (n 42) 124.
[49] Wolman (n 38) 27, 53.
[50] ibid, 27.

Commissions' field investigations,[51] its requests to provide information were not respected by Government authorities and the Commission had no power to hold them accountable.[52] Public authorities could deny information to the TRC on public security grounds.[53] As there was no fear of prosecutions, there were no incentives for engaging with the TRC either.

These experiences have certainly informed future TJ processes. Reflecting retroactively, it can be argued that the decision on whether or not to prosecute lower or mid-ranking officials involved in human rights violations could have been made contingent on their engagement with the TRC and reparation programmes. Many mid- and lower-ranking officers who, in the eyes of victims, were most responsible (during the trial, many victims had testified how ruthless the soldiers were on the ground) remained outside the accountability process as they were neither prosecuted nor reached out by the TRC.[54] The TRC did not provide forums for victims for vindication, recognising their version of truth. Many South Koreans believed that the US supported the coup and the actions in its aftermath.[55] This had on a couple of occasions resulted in anti-US protests and vandalism in the US cultural centres in South Korea.[56] However, the TRC did not look at any of these issues leaving victims and civil society to feel that they did not know the full truth.

[51] Framework Act (n 43) art 47.
[52] Hun Joon Kim, 'Truth Commissions in South Korea: Lessons Learned' (*Middle East Institute*, 20 December 2013) <http://www.mei.edu/content/truth-commissions-south-korea-lessons-learned> accessed 4 January 2017.
[53] Dong-Choon (n 42) 546.
[54] Kim, 'Truth Commissions in South Korea' (n 52).
[55] Han (n 13) 998, 1024.
[56] Wolman (n 38) 27, 43; Melish (n 47) 1, 12.

The sense of not having full truth made victims and civil society continue their agitation, forcing the Government to announce another Commission.[57] As a result, in May 2020, marking the 40th anniversary of the Gwangju killing, the Government decided to establish another Commission, namely the May 18 Democratisation Movement Truth Commission, acknowledging that 'it is necessary not only to legally punish the perpetrators but also to know the full truth for the path towards reconciliation and unity'.[58] This Commission is due to start work from December 2020.

4.3. TRC first, then prosecution

This is the most common form of sequencing in countries undergoing transition. In many countries, especially in Latin and Central America (including Guatemala, Chile and Argentina), TRCs were established first and prosecutions followed later. As chapter 3 discussed, the post-authoritarian contexts of those countries were so politically fragile and difficult that prosecutions were not an option, and therefore Truth Commissions were established first. Taking the example of Argentina, this section analyses the experience of countries where Truth Commissions have come first in the sequence of TJ process and the challenges and opportunities such a sequence presents in realising TJ.

Argentina suffered from nearly a decade-long military dictatorship that started in 1976. A coup brought General Jorge Videla to power on the pretext of the 'terrorism' the country was facing

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[57] Sarah Kim, 'Moon wants full truth about Gwangju massacre' *Korea JoongAng Daily* (17 May 2020) <https://koreajoongangdaily.joins.com/2020/05/17/politics/democratization-movement-Moon-Jaein-May-18-Democratization-Movement/ 20200517190500204.html> accessed 29 June 2020; Jung Da-min, 'Moon calls for truth finding of massacre during Gwangju movement' *The Korean Times* (17 May 2020) <https://koreatimes.co.kr/www/nation/2020/ 05/356_289649.html> accessed 29 June 2020.

[58] ibid.

by a guerrilla movement and the endemic corruption within the previous Government.[59] After taking power, the junta suspended a number of constitutional guarantees[60] and engaged in a brutal suppression of political opposition marked by disappearances, killings, torture, arbitrary arrest and detention.[61]

However, the defeat of the army in the 1982 Malvinas war was a turning point as it forced the junta to hand over power to a civilian Government as the war had created an economic crisis in the country.[62] As chapter 3 highlighted, before leaving power, the junta enacted a number of legal measures to protect them from any legal accountability, including a self-amnesty law to immune themselves from prosecution for any criminal offenses committed by them during the 'war against subversion'.[63]

However, unlike many other countries in the region such as Chile, Guatemala and El Salvador, where democratic leaders had to agree to such measures to secure a transition, the situation in Argentina was slightly different as the political parties had not consented to the amnesty laws and other measures adopted by the junta.[64] Thus, amnesty laws preventing investigation of past violations became the central subject of the democratic election campaign, with all presidential

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[59] Kathryn Sikkink and Carrie Booth Walling, 'Argentina's contribution to global trends in transitional justice' in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century. Beyond Truth versus Justice* (CUP 2006) 302-05.
[60] Ian Guest, *Behind the Disappearances. Argentina's Dirty War Against Human Rights and the United Nations* (University of Pennsylvania Press 1990) 13; Human Rights Watch, *Truth and Partial Justice in Argentina: An Update* (1991) 5.
[61] ibid 6.
[62] ibid 11.
[63] The law was known as Ley de Pacificación Nacional, for more discussion. ibid.
[64] José Zalaquett, 'Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Constraints' (1990) 13(3) Hamline L Rev 623.

candidates denouncing it although different parties perceived it differently in relation to its legal effect.[65] However, Raul Alfonsín from the Left Party promised to nullify the law and to hold those responsible to account.[66] Once he came to power as president, he was under pressure to deliver his electoral promise.[67] Carlos Nino argues that dealing with past gross violations was the priority for the Alfonsin Government,[68] resulting in the decision to establish the Commission to first look into cases of enforced disappearances along with some legal reforms.[69]

4.3.1. National Commission on the Disappearance of Persons (CONADEP)

The National Commission on the Disappearance of Persons (known as CONADEP) was established with the mandate to investigate disappearances of people between 1976 and 1983 and to uncover details of those cases, including the locations of the bodies.[70] The Government supported the Commission and ordered the security forces to cooperate with its investigations. It interviewed more than 1,500 victims and witnesses who had survived torture and detention, giving insights into clandestine torture centres operated by the regime.[71] Although civil society

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[65] The candidate for President Italo Lúder (leader of a right-wing party), for example, condemned it but also accepted that it would have binding effects.
[66] Zalaquett (n 64).
[67] Mark Osiel, 'The Making of Human Rights Policy in Argentina: The Impact of Ideas and Interests on a Legal Conflict' (1986) 18(1) J Lat Am Stud 142; Alison Brysk, *The Politics of Human Rights in Argentina. Protest, Change and Democratisation* (SUP 1994) 65-67.
[68] Carlos S Nino 'The Duty to Punish Past Abuses of Human Rights Put into Contest: The case of Argentina' (1991) 100(8) Yale L J 2619, 2627-28; Zalaquett (n 64).
[69] Nino, 'The Duty to Punish Past Abuses of Human Rights Put into Contest' (n 68) 2627-28.
[70] Zalaquett (n 64).
[71] National Commission on the Disappearance of Persons (CONADEP), 'Núnca Más (Never Again)' (1984) <http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_001.htm> accessed 20 June 2020; Argentine National Commission on the Disappeared, *Núnca Más. Report of The Argentine Commission of The Disappeared* (Farrar Straus & Giroux 1986) in Neil J Kritz (ed), *Transitional Justice. How Emerging Democracies Reckon with Former Regimes. Volume III. Laws, Rulings, and Reports* (United States Institute of Peace Press 1995).

estimated that the number of enforced disappearances ranged from 10,000 to 30,000, the Commission documented 8,960 cases of disappearances between 1976 and 1983,[72] and acknowledged this not being an exhaustive list of victims,[73] stating that many families have not reported cases because of continuous fear.[74] After nine months, the Commission released a report titled *'Núnca Más'* (Never Again), detailing the systematic practice of enforced disappearances, torture, secret detention and the disposal of bodies of those disappeared in unknown places by the military regime.[75]

Despite the demand of victims, the Commission was not tasked to carry out an in-depth investigation and establish the responsibility of specific perpetrators, as that was considered the responsibility of judicial bodies. It did however uncover how the system functioned. The Commission did not consider itself as having the mandate to publish names of any perpetrators but provided a sealed copy of a list with names of more than 1,300 military officers implicated by witnesses and victims to the prosecutor's office, recommending their prosecution and taking measures to prevent them from escaping the country.[76] The files containing the testimonies of the victims and witnesses were also sent to the prosecutor's office.[77] When the Commission ended its work in September 1984, the Government formed a new unit within the Ministry of Interior to

[72] ibid 8-9, 21.
[73] ibid 21.
[74] ibid 6.
[75] Zalaquett (n 64).
[76] Priscilla B Heyner, *Unspeakable Truths. Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2010) 46, 122.
[77] Heyner (n 76) 46.

continue gathering evidence about disappearances, including the search for the children of disappeared people who were stolen by military officers, for the purpose of prosecution.[78]

Continuous demands of victims seeking prosecution of those responsible for enforced disappearances forced the Government to take measures to nullify the amnesty that the military had offered themselves, reform the military code of justice and the military's justice system to bring the military under the jurisdiction of the civilian courts.[79] For example, it gave military courts the jurisdiction to try those responsible for human rights violations during the anti-subversive operations since 1973 but required a mandatory appeal to the civilian Federal Court of Appeal, establishing civilian scrutiny of the military justice system.[80] Decree 157/83 was passed allowing investigation of abuses, including by insurgents, so it could be seen as not only targeting the military but also the insurgents who were involved in committing atrocities, signalling that the democratic Government was equally condemning the violence committed by the armed groups and to avoid any perception of victor's justice.[81]

Two years after the CONADEP report, nine senior military generals from the upper echelon of the hierarchy were put on trial, resulting in the Supreme Court convicting five army generals for serious human rights violations ranging from aggravated homicide and torture to robbery.[82]

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[78] Zalaquett (n 64).
[79] Ricardo Gil Lavedra, 'The Possibility of Criminal Justice: The Argentinean Experiences' in Jessica Almqvist and Carlos Esposito (eds), *The Roles of Courts in Transitional Justice: Voices from Latin America and Spain* (Routledge 2012) 59; Zalaquett (n 64) 623, 649ff.
[80] Lavedra (n 79).
[81] Zalaquett (n 64) 623, 650.
[82] Heyner (n 76) 94; Mark Gibney, 'The Implementation of Human Rights as an International Concern: The Case of Argentine General Suarez-Mason and Lessons for the World Community' (1992) 24 Case W Res J Int'l L 165, 170f.

Although the Government wanted to try those most responsible for the worst atrocities,[83] once the investigations and prosecutions started, things took a different course as hundreds of victims filed complaints seeking criminal investigations and prosecutions. This resulted in opening of investigations in hundreds of cases including mid- and lower ranking military personnel.[84]

The issue of authorship of crimes and who to hold accountable as discussed in the context of South Korea also arose in Argentina. As previously discussed, the Court in South Korea ruled that only those on the top bear the most responsibility and should be prosecuted for the crimes committed in the military structure as those in the lower ranks had to just obey superior orders. However, in the context of Argentina this was interpreted differently. The Federal Appeal Court of Buenos Aires, while recognising that due obedience in the military structure protected those following orders against legal action, reasoned that it did not extend to those persons who followed anti-judicial orders.[85] It refused to accept the claim that obedience is 'blind' in the military.[86] It argued that subordinates also need to maintain some degree of inspection over the legitimacy of the order.[87] Thus, prosecutions had to be opened, not only against the top echelon of the junta but also against middle-ranking officers, opening the space for prosecution of all ranks.

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[83] Carlos S Nino, 'Response: The Duty to Punish Past Abuses of Human Rights Put into context: The Case of Argentina' in Neil J Kritz (ed), *Transitional Justice. How Emerging Democracies Reckon with Former Regimes. Volume I. General Considerations* (United States Institute of Peace Press 1995) 421; Andrew S Brown, 'Adios Amnesty: Prosecutorial Discretion and Military Trials in Argentina' (2002) 37(1) Tex Int'l LJ 203, 212.
[84] Zalaquett (n 64); Brown (n 83).
[85] Lavedra (n 79) 67.
[86] ibid.
[87] ibid.

However, this could not last long. It was revealed that evidence was destroyed by the military and that a coup had been plotted against President Alfonsín. Witnesses in many cases under consideration of the prosecution and the Court were harassed.[88] A series of military revolts were organised in different parts of the country, other army units refused the Government's order to be mobilised against such revolts, exposing a serious breakdown of the internal discipline and chain of command, posing a serious security threat to the country's civilian authority. [89] The demands of those rebelling were to find political solutions to the war they had fought against subversion, as they saw it, and to prevent criminal prosecution against them.[90] Important institutions, such the church and the judiciary, were also against such trials advocating for reconciliation, and a number of judges threatening to resign.[91]

This posed dilemmas in pursuing trials. The protection of democratic transition was equally important for the respect of human rights, which was threatened by such trials.[92] This hostile environment led the Government to avert the policy of prosecution, adopting legislations known as *Punto Final* (full stop law) and *Obedience Debida* (Due Obedience Law), limiting further trials. It also ensured those following superior orders not being criminally liable for any offenses

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[88] Brysk (n 67) 77; Chandra Lekha Sriram, *Confronting Past Human Rights Violations. Justice vs Peace in Times of Transition* (Frank Cass 2004) 111f.
[89] ibid.
[90] Laura Tedesco, 'The Argentine Armed Forces under President Alfonsin' (1996) 61 European Review of Latin American and Caribbean Studies 21,28-29; Jaime Malamud-Goti, *Game Without End: State Terror and the Politics of Justice* (University of Oklahoma Press 1996) 60ff, 66.
[91] Tedesco (n 90); Alejandro M Garro and Henry Dahl, 'Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Back' (1987) 8 Human Rights Law Journal 283, 333f; Zalaquett (n 64).
[92] Nino, 'Response: The Duty to Punish Past Abuses of Human Rights Put into context' (n 83) 418.

of human rights violations.[93] Military generals who were already convicted were subsequently pardoned.[94]

However, despite the decision to avert the policy of prosecution and the adoption of amnesty laws, prosecution resumed in Argentina nearly two decades after the Truth Commission. The Supreme Court of Argentina nullified those amnesty laws in early 2000 and Argentina now has more than 1,500 trials, with many perpetrators convicted and trials ongoing.[95] Similar experiences could be found in other countries such as Chile and Guatemala where Truth Commissions were established first, finding prosecution difficult in the past but trials have followed later.

4.3.2. Sequencing of truth and justice: lessons to be learned

Considering these experiences of Argentina and many other countries in Latin America, scholars argue that contexts of transition are often fragile and may not provide opportunities for prosecution in all cases in the immediate aftermath of transition, having a Truth Commission first in sequence would help in such situations.[96] This would allow securing the transition (to peace or democracy), secure political stability from potential spoilers,[97] and create time for necessary reforms, paving the ground for future prosecutions.[98] Some even argue for letting TJ

[93] Sikkink and Walling (n 59) 307.
[94] Zalaquett (n 64).
[95] UNGA, 'Promotion of truth, justice, reparation and guarantees of non-recurrence. Note by the Secretary-General' (13 September 2012) UN Doc A/67/368, para 53; Lavedra (n 79) 78.
[96] Duthie (n 2); Jeffery (n 2).
[97] Tricia D Olsen, Leigh A Payne and Andrew G Reiter, 'Conclusion: Amnesty in the Age of Accountability' in Francesca Lessa and Leigh A Payne (eds), *Amnesty in the Age of Human Rights Accountability. Comparative and International Perspectives* (CUP 2012) 344.
[98] Jeffery (n 2).

mechanisms happen organically in sequence stating that it helps not only to balance competing obligations and interests at stake but also organically paves the ground for eventual prosecution even when prosecution is found to be difficult in the immediate aftermath of a transition.[99] For example, despite the decision to avert the policy of prosecution and the adoption of amnesty laws, prosecution resumed in Argentina nearly two decades after the Truth Commission and more than 1,500 trials have been conducted since, with many perpetrators convicted and trials ongoing.[100]

However, it is important to note that many factors played a role in Argentina to bring about the re-opening of prosecution many years after the Truth Commission. The resilience of victims and civil society, legal reforms, efforts of both regional and international human rights bodies all have paved the ground to generate the political will and to make conditions favourable making prosecution possible in Argentina.

For example, when prosecution was not possible because of the amnesty laws, victims and civil society in Argentina devised different strategies, engaging with national, regional and supranational bodies, seeking truth and justice. Using the loophole in the Due Obedience Law of 1987 (the law did not have jurisdiction on child abduction, rape, sexual abuse and theft), they demanded investigation in cases of child abductions, resulting in some trials, building a

[99] ibid.
[100] UNGA, 'Promotion of truth, justice, reparation and guarantees of non-recurrence' (n 95) para 53; Lavedra (n 79) 78; Lorena Balardini, 'Argentina: Regional protagonist of Transitional Justice' in Elin Skaar, Jemima García-Godos and Cath Collins (eds), *Transitional Justice in Latin America* (Routledge 2016) 62-66.

momentum.[101] Investigative journalism also played a role. Having no fear of prosecution, perpetrators would also confess to the crimes they committed. For example, a retired navy captains, Adolfo Scilingo had disclosed to a journalist on how detainees were 'drugged, stripped and thrown alive from planes into the Atlantic Ocean' between 1976 and 1977.[102] As he had admitted the existence of records of detainees and their transfer, victims and civil society developed a litigation strategy demanding recovery of those records, which was not prevented by the amnesty laws.[103] Although the military refused to cooperate with the judiciary and submit the records, arguing the order of the Court violated their right against self-incrimination,[104] the cases reached to the Inter-American Commission, providing it an opportunity to have a friendly settlement with the Government, opening the possibility of initiating truth trials.[105] These trials were unique in that they would not determine individual criminal guilt, or impose criminal sanction but the Court could summon people, including military officers, to provide truth about cases of gross human rights violations, mainly disappearances.[106] Although truth trials were criticised for their failure to ensure fair trial for perpetrators, they provided opportunities for

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[101] Balardini (n 100) 61; David Weissbrodt and Maria Luisa Bartolomei, 'The Effectiveness of International Human Rights Pressures: The Case of Argentina, 1976-1983' (1991) 75 Minn L Rev 1009; Daniel W Schwartz, 'Rectifying Twenty-Five Year of Material Breach: Argentina and the Legacy of the 'Dirty War' in International Law' (2004) 18(1) Emory Int'l L Rev 317, 322-24.

[102] Leigh A Payne, 'Confession of Torturers: Reflections from Argentina' (TRC: Commissioning the Past Conference, University of the Witwatersrand, June 1999); Schwartz (n 101) 317, 337; Sang Wook Daniel Han, 'Transitional Justice: When Justice Strikes Back-Case Studies of Delayed Justice in Argentina and South Korea' (2008) 30(3) Hous J Int'l L 653, 661.

[103] Those cases involved the case of *Emilio Mignona* and *Carmen Aguiar de Lapacó*. See also Elena Maculan, 'Prosecuting Internal Crimes at National Level: Lessons from the Argentine Truth-Finding Trials' (2012) 8(1) Utrecht Law Review 109.

[104] Human Rights Watch 'Argentina. Reluctant Partner. The Argentine Government's Failure to Back Trials of Human Rights Violators' (December 2001) <https://www.hrw.org/legacy/reports/2001/argentina/index.html> accessed 13 September 2020.

[105] *Carmen Aguiar de Lapacó*, Case 12.059, Report No 70/99, IACHR, OEA/Ser.L/V/II.106 Doc 6 rev (4 May 1999); Balardini (n 100).

[106] Maculan (n 103) 107.

victims to record their testimonies and also for military officers to tell what they know, helping to build the momentum for greater accountability.[107]

Family members and civil society also resorted different international avenues, including filing cases under universal jurisdiction, forcing different countries to open criminal investigation and seeking extradition of military officers from Argentina.[108] The Inter-American Commission and the Court have played important roles. As chapter 2 analysed, gradually building from their work through country visits and individual cases receiving from these countries undergoing transition,[109] they consolidated victims' rights to justice and found amnesty hampering victims' rights to effective remedies under the ACHR.[110] The Court also found other restrictions such as statutory limitation, immunity and amnesty being incompatible with the ACHR,[111] paving the ground for civil society to successfully challenge the amnesty laws of Argentina,[112] and making reopening prosecution in Argentina possible.

These experiences of these countries provide a number of interesting learnings that have informed the future TJ processes. Firstly, the unpredictability of future courses in TJ process.

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[107] ibid 106; Sikkink and Walling (n 59) 316.
[108] Elin Skaar, Jemima García-Godos and Cath Collins, 'Introduction: The Accountability Challenge' in Elin Skaar, Jemima García-Godos and Cath Collins, *Transitional Justice in Latin America* (Routledge 2016) 7.
[109] Leonardo G Filippini, 'Argentina' in Due Process of Law Foundation, *Victims Unsilenced. The Inter-American Human Rights System and Transitional Justice in Latin America* (2007) 71, 74f; 'Report of the Situation of Human Rights in Argentina', IACHR, OEA/Ser.L/V/II.49 Doc 19 corr.1 (11 April 1980); Keith M Slack, 'Operation Condor and Human Rights: A Report from Paraguay's Archive of Terror' (1996) 18(2) Hum Rts Q 492.
[110] See ch 2, s 2.4.5.
[111] See ch 2, s 2.4.3, 2.4.5.
[112] Christine A E Bakker, 'A Full Stop to Amnesty in Argentina: The Simon's Case' (2005) 3(5) JICJ 1106; Causa No 17.768, Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, S 1767 XXXVIII, Corte Suprema de Justicia, 14 junio 2005.

Experiences (South Korea and Argentina) show although truth and justice mechanisms came in a different sequence that was not necessarily a planned design when mandates of these mechanisms were designed. They happened to be in that sequence because of the events that developed after having one mechanism as an alternative to the other, exposing the possibility of a TJ process taking a different course and direction not planned originally, depending on a number of factors along the way.[113] Thus, scholars argue that TJ mechanisms are path-dependent,[114] involving 'ongoing contestation over its nature and direction'[115] that the work of one mechanism impacting the other.[116]

However, it is equally important to underscore many factors have played roles in these countries to make such sequencing possible. Just having one mechanism, anticipating the other to come in sequence may not produce the same result in all contexts, rather delay and eventually deny justice.[117] For example, in Uganda, the Government decided to establish the Truth Commission first, arguing that the political environment was hostile to pursue prosecution. The TRC was established but it received no support from the Government, its report was never published let alone its recommendations implemented.[118] This led to loss of interest in the process, generating no pressure on the government to hold trials or implement the recommendations of the

[113] Heyner (n 76) 103-106; Bell (n 4) 95-110.
[114] UNHRC, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantee of Non-Recurrence. Note by the Secretariat' (21 August 2017) UN Doc A/HRC/36/50, para 82; Bell (n 4) 95; Waldorf (n 4) 43.
[115] Bell (n 4) 95.
[116] Isabelle Lassee, '"Criminal" and "Humanitarian" Approaches to Investigations into the Fate of Missing persons: A False Dichotomy' (SACLS 2016).
[117] Human Rights Watch (n 104).
[118] Joanna R Quinn, 'Dealing with a legacy of mass atrocity: Truth Commissions in Uganda and Chile' (2001) 19(4) NQHR 393.

Commission.[119] Such a strategy demoralizes those engaged in the truth-seeking process and diminishes public interest in the TJ project.[120] Similar experiences could be found with a number of Commissions that have been established in Sri Lanka and Nepal in the past.[121]

Secondly, these experience also expose the need not only to pay more attention to local contexts and understanding of different preconditions that exist impacting the design of TJ mechanisms but also how local transitional justice practices are informed by and interact with international discourses of transitional justice in ways that are also 'iterative and mutually constitutive, creating an evolving and unpredictable dialogue over time'.[122]

Thirdly, as these mechanisms came into the sequence despite the original plan also provides an important knowledge base that these mechanisms can come in different sequence. As it is hard to expect all contexts to provide an enabling environment for truth and justice in particular to work simultaneously, sequencing could be the strategy and could be designed more consciously than in the past, considering both truth and justice as part of TJ mechanisms, where work of one eventually contributes/complements the other. If a Truth Commission is established before the

[119] ibid.
[120] Considering the situation of Sri Lanka, similar observation is made, see Randany and Lassee (n 7) 18; Joanna R Quinn, 'Chicken and Egg? Sequencing in Transitional Justice: The Case of Uganda' (2009) 14(2) International Journal of Peace Studies 29.
[121] Randany and Lassee (n 7).
[122] Lisa Denney and Pilar Domingo, 'Local Transitional Justice: How Changes in Conflict, Political Settlements, and Institutional Development Are Reshaping the Field' in Roger Duthie and Paul Seils, *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (ICTJ 2017)211.

judicial process, measures need to be put in place to protect all necessary evidence for future judicial processes.[123]

Importantly, these experiences of countries where TJ mechanisms have come in different sequence, despite the original plan, have also provided salient lessons and have informed the subsequent approach of TJ processes on the ground such as in Nepal (discussed in chapter 5 and 6). Experiences of those countries where Truth Commissions were established with the hope of preventing prosecution, also offering amnesty laws (adopted in the past as part of a deal to prevent prosecution) are being repealed retroactively to initiate prosecution. Truth Commissions are found to be insufficient to prevent prosecution, providing learning that amnesty could not necessarily prevent future prosecution. A Truth Commission could also not prevent and replace prosecution as in the case of Argentina and many other countries in Latin America where Truth Commissions were established in place of prosecution. Similarly, having prosecution alone, as in the case of South Korea, also was found to be an insufficient measure to address the need of victims, requiring a Truth Commission. Thus, these experiences provide important grounds for coexistence for truth and justice mechanisms.

[123] UNESC, Commission on Human Rights, 'Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher*. Addendum. Updated Set of principles for the protection and promotion of human rights through action to combat impunity' (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, principle 8; See also Alison Bisset, 'Principle 8: Definition of a Commission's Terms of Reference' in Frank Haldemann and Thomas Unger (eds), *The United Nations Principles to Combat Impunity. A Commentary* (OUP 2018) 121; Paul Van Zyl, 'Justice Without Punishment: Guaranteeing Human Rights in Transitional Societies' in András Sajó (ed), *Out of and Into Authoritarian Law* (Springer 2003) 57.

4.4. Truth and justice mechanisms: working in tandem

Although it is not very common, in some countries such as Timor Leste and Sierra Leone, truth and prosecution mechanisms were established to work in tandem. This section will analyse the experience of Sierra Leone, as it presents insightful lessons in relation to the challenges and difficulties that the coexistence of a TRC and prosecution could pose when these two mechanisms are set up to work simultaneously.

Sierra Leone suffered under the dictatorial regime of Joseph Saidu Momoh who ruled the country following independence from British occupation in 1961. An armed group, the Revolutionary United Front (RUF), began an armed insurgency in 1991 to overthrow the government.[124] The conflict cost more than 70,000 lives,[125] rendered nearly 5 million people internally displaced or refugee.[126] People suffered indiscriminate attacks, including amputations, abductions of women and children, recruitment of children as combatants, rape, sexual slavery, cannibalism and wanton destruction of villages and towns.[127] Widespread rape and sexual violence resulted in an increase of HIV/AIDS.[128]

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[124] David Harris, *Sierra Leone. A Political History* (C Hurst & Company 2013) 85.

[125] Government of Sierra Leone, Ministry of Development and Economic Planning, 'Sierra Leone Vision 2025: "Sweet Salone". Strategies for National Transformation (August 2003) 32 <http://www.operationspaix.net/DATA/DOCUMENT/1322~v~Sierra_Leone_Vision_2025_-__Sweet_Salone___United_People_Progressive_Nation_Attractive_Country.pdf> accessed 10 September 2020; Sigall Horovitz, 'Transitional Criminal Justice in Sierra Leone' in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century. Beyond Truth versus Justice* (CUP 2006) 45.

[126] ibid.

[127] Truth & Reconciliation Commission, *Witness to Truth: Report of the Truth & Reconciliation Commission Sierra Leone* (vol 3b, 2004) ch 6, para 2; A B Zack-Williams, 'Child Soldiers in the Civil War in Sierra Leone' (2001) 28(87) Review of African Political Economy 80.

[128] Horovitz (n 125); Michael A Corriero, 'The Involvement and Protection of Children in Truth and Justice-Seeking Processes: The Special Court for Sierra Leone' (2002) 18(3) NYL Sch J Hum Rts 337-38; Nicole Fritz and Alison Smith, 'Current Apathy for Coming Anarchy: Building

After national and international pressure, the first election for multiparty democracy took place in 1996, electing Ahmad Tejan Kabbah of the Sierra Leone People's Party (SLPP) as the President. However, conflict continued. Even on election day, the RUF attacked many central towns in the country.[129] Various small armed groups, including community hunters, united as Civil Defence Forces (CDF)[130] to retaliate against the attacks of the RUF, worked alongside Sierra Leone's security forces. Sam Hinga Norman, the CDF coordinator, later joined the government of President Kabbah as Deputy Minister for Defence.[131]

A peace agreement was brokered between the government of Sierra Leone and the RUF in Abidjan, Ivory Coast (known as the Abidjan Peace Agreement), in November 1996, with the support of the international community, including the UN.[132] Despite criticism from human rights groups,[133] the Agreement offered a blanket amnesty to everyone involved in past

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the Special Court for Sierra Leone' (2001) 25 Fordham Int'l L J 391, 393-400; Celina Schocken, 'The Special Court for Sierra Leone: Overview and Recommendations' (2002) 20 Berk J Int'l L 436; Ismene Zarifis, 'Sierra Leone's Search for Justice and Accountability of Child Soldiers' (2002) 9(3) Human Rights Brief 18.

[129] Harris (n 124) 85-90; Schocken (n 128) 438ff; Human Rights Watch, 'Getting Away with Murder' (1996) <http://www.hrw.org/reports/1999/sierra/SIERLE99.htm> accessed 23 January 2020.

[130] The Group was led by Sam Hinga Norman, who was later indicted by the SCSL.

[131] Elizabeth M Evenson, 'Truth and Justice in Sierra Leone: Coordination between Commission and Court' (2004) 104(3) CLR 730, 736.

[132] UNSC, 'Annex. Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, signed at Abidjan on 30 November 1996' (11 December 1996) UN Doc S/1996/1034 (hereafter Abidjan Peace Agreement).

[133] Human Rights Committee, coalition of international and national NGO is Sierra Leone expressed reservation with regard to certain articles in the Abidjan Peace Accord, particularly Article 14, which appeared to confer blanket immunity on all perpetrators of human rights violations in Sierra Leone. See also Truth & Reconciliation Commission (n 127) vol 1, ch 1, para 15; Karen Gallagher, 'No Justice, No Peace: The Legalities and Realities in Sierra Leone' (2000) (2000) 23(1) T Jefferson L Rev 149f; Daniel J Macaluso, 'Absolute and Free Pardon: The Effect

atrocities.[134] It was argued that amnesty was the price to pay for peace.[135] However, despite the blanket amnesty, the ceasefire broke down. Subsequently, both the RUF and a splinter group of the army, namely the Armed Forces Revolutionary Council (AFRC), led by Jonny Paul Koroma, overthrew the government of President Kabah and conflict continued.[136]

Nevertheless, the efforts to bring peace in Sierra Leone continued, leading up to the signing of the peace agreement between the government of Sierra Leone and the RUF in July 1999 in Lomé, Togo (known as the Lomé Peace Agreement). Although the representative of the UN had annexed some reservation,[137] the Lomé Peace Agreement also offered amnesty and pardon to everyone involved in past crimes,[138] and offered important political positions to the leaders of the armed groups.[139] It prevented prosecution but promised a TRC as a means to establish

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of the Amnesty Provision in the Lome Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone' (2001) 27 Brook Journal of International Law 347, 357; See also 'UN Must Clarify Position on Sierra Leonean Amnesty' (*Human Rights Watch*, 12 July 1999) <https://www.hrw.org/news/1999/07/12/un-must-clarify-position-sierra-leonean-amnesty> accessed 23 January 2020; Amnesty International, 'Sierra Leone: a peace agreement but no justice' (12 July 1999) AI Index AFR 51/07/99.

[134] The law provided 'To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL in respect of anything done by them in pursuit of their objectives as members of that organization up to the time of the signing of this Agreement. In addition, legislative and other measures necessary to guarantee former RUF/SL combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.' Abidjan Peace Agreement (n 132) art 14.

[135] Gallagher (n 133) 149-51; UNSC, 'Resolution 1260 (1999). Adopted by the Security Council at its 4035th meeting, on 20 August 1999' (20 August 1999) UN Doc S/RES/1260 (1999).

[136] Harris (n 124) 85-90.

[137] Macaluso (n 133) 347.

[138] UNSC, 'Annex. Peace Agreement between the Government of Sierra Leone and the Revolutionary Front of Sierra Leone' (12 July 1999) UN Doc S/1999/777, art IX (hereafter Lome Peace Agreement).

[139] Foday Sankoh, for example, the leader of RUF was provided with the chairmanship of the Commission for the management of Strategic Resources, National Reconstruction and

accountability and reconciliation in the country.[140] In February 2000, the Parliament adopted the TRC Act offering amnesty to everyone while undertaking a truth and reconciliation process.

However, despite this, peace was not assured. In May 2000 the RUF resumed violence, abducting nearly 500 UN Peacekeepers and keeping them hostage.[141] Following this, the call for criminal trials of those responsible for the violence increased. The UN Secretary General publicly announced that the RUF leader should be held responsible for the crisis in Sierra Leone.[142] This was supported by the UK[143] and the US Governments,[144] despite these countries earlier supporting the Agreement with the provision of amnesty and pardon.[145]

For the President, who suffered a coup by some of these groups, an international tribunal was the best option to dismantle these armed groups, limiting their capacity to pose a threat to his Government. Without international support, prosecution would not have been possible for any of the members of these groups who also had links with external governments. For example, the

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Development and the Status of Vice-President. Furthermore, four additional cabinet posts, four Deputy Minister posts were awarded to RUF. Johnny Paul Koroma, the leader of the AFRC received chairmanship of the Government's Commission for the Consolidation of Peace. See Lome Peace Agreement (n 138) art IV (2)-(4).

[140] Lome Peace Agreement (n 138) art XXVI; also see Abdul Tejan-Cole, 'Painful Peace: Amnesty Under the Lome Peace Agreement in Sierra Leone' (1999) 3(2) Law, Democracy & Development 239-51.

[141] William A Schabas, 'A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' in William A Schabas and Shane Darcy (eds), *Truth Commissions and Courts. The Tension Between Criminal Justice and the Search for Truth* (Kluwer Academic Publishers 2004) 3-54.

[142] Horovitz (n 125).

[143] ibid.

[144] ibid.

[145] Schocken (n 128) 440.

RUF was supported by Liberian President, Charles Taylor.[146] In these contexts, the President requested the UN to establish a Special Court to try the members of the RUF who had committed violence.[147] In his letter to the UN, he highlighted the lack of capacity and resources in Sierra Leone to try those responsible for such heinous crimes. [148] He also highlighted the gap in the national legal system, where many of those atrocities committed were not even defined as crimes.[149]

The UN Security Council responded positively to the President's request, adopting resolution 1315, instructing the Secretary-General to negotiate an agreement with the Government of Sierra Leone in order to establish the Special Court in Sierra Leone.[150] The agreement between the Government of Sierra Leone and the UN to establish the Special Court was signed in January 2002 and passed into legislation by the Parliament of Sierra Leone as the Special Court Agreement (Ratification) Act 2002 (hereafter the Statute of the Special Court) in March 2002.[151]

Thus, a situation arose in such a way that both the TRC and prosecution had to co-exist. Many were of the view that the TRC and prosecution are mutually exclusive mechanisms, having competing mandates, having difficulties to coexist.[152] The President of Sierra Leone himself

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[146] ibid 438.
[147] UNSC, 'Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council' (10 August 2000) UN Doc S/2000/786, Annex.
[148] ibid.
[149] ibid.
[150] UNSC, 'Resolution 1315 (2000). Adopted by the Security Council at its 4186th meeting, on 14 August 2000' (14 August 2000) UN Doc S/RES/1315 (2000).
[151] Special Court Agreement, 2002 (Ratification) Act, 2002.
[152] William A Schabas, 'Conjoined Twins of Transitional Justice - The Sierra Leone Truth and Reconciliation Commission and the Special Court' (2004) 2(4) JICJ 1082.

questioned the relevance of the TRC in a context where the decision to establish the Special Court was made.[153] Similarly, some members of the TRC were also sceptical about the idea of having these two mechanisms together.[154] They were of the view that this would create tensions and argued for sequencing these two mechanisms, having the TRC first then prosecution.[155]

The UN Secretary General stated that the Commission and the Court were mutually reinforcing mechanisms to end impunity,[156] and that they would operate in a complementary and mutually supportive manner, fully respectful of their distinct but related functions'.[157] How they could operate towards that goal on the ground was however unclear.

Reflecting the work of these mechanisms some argue that both the TRC and the SCSL had synergetic relation and worked to fulfil their mandates,[158] others contest that highlighting the tense relationship between the two as the TRC feared the Court prosecuting those revealing the truth before the TRC, hampering its truths seeking mandates, and the Court seeing itself as having legal superiority over the TRC.[159] As scholars and practitioners alike continue to debate

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[153] Horovitz (n 125) 55.
[154] ibid.
[155] ibid 56.
[156] UNSC, 'Eleventh report of the Secretary-General on the United Nationals Mission in Sierra' (7 September 2001) UN Doc S/2001/857, para 86.
[157] UNSC, 'Letter dated 12 January 2001 from the Secretary-General President of the Security Council' (12 January 2001) UN Doc S/2001/40, para 9.
[158] William A Schabas 'The Sierra Leone Truth and Reconciliation Commission' in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century. Beyond Truth versus Justice* (CUP 2006) 21, 39.
[159] Sierra Leone Truth and Reconciliation Commission, 'Special Court Denies Hinga Norman's Right (and that of the other Detainees) to appear publicly before the TRC' (Freetown, 1 December 2003) <http://www.sierraleonetrc.org/images/docs/hinganorman/2003-12-01_FINAL_TRC_PRESS_RELEASE.pdf> accessed on 12 November 2019.

whether these mechanisms were able to achieve their stated goals creating synergies,[160] it is important to highlight some of the tensions that Sierra Leone experienced where these mechanisms worked in tandem. Although some of these tensions could be specific to Sierra Leone, some could arise in any other country like Nepal, where the TRC and prosecution are envisioned to coexist as TJ mechanisms. The following sub-sections study some of the tensions that arose in Sierra Leone in relation to the work of the TRC and the SCSL as they offer important learning while designing a TJ process where both truth and justice mechanisms coexist as TJ mechanisms.

4.4.1. Tensions and challenges

The tensions started to emerge from overlapping mandates and powers of the TRC. The Special Court for Sierra Leone (SCSL) was established in August 2002 to try those 'bearing greatest responsibility', meaning those who were in a leadership position who designed the violence by committing such crimes and 'threatened the establishment of and implementation of the peace process in Sierra Leone.'[161] The SCSL had jurisdiction over international crimes such as crimes

[160] Kristen Ainley 'Evaluating the success of transitional justice in Sierra Leone and beyond' in Kirsten Ailney, Rebekka Friedman and Chris Mahony (eds), *Evaluating Transitional Justice: Accountability and Peacebuilding in Post-Conflict Sierra Leone* (Palgrave Macmillan, 2015) 241, 250-251; Brenda J. Hollis, 'Evaluating the Legacy of the Special Court for Sierra Leone' in Kirsten Ailney, Rebekka Friedman and Chris Mahony (eds), *Evaluating Transitional Justice: Accountability and Peacebuilding in Post-Conflict Sierra Leone* (Palgrave Macmillan, 2015) 19, 24-25; Rosalind Shaw, 'Memory Frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone' (2007) 1 IJTJ 183, 184; T. M. Clark 'Assessing the Special Court's Contribution to Achieving Transitional Justice', in C. C. Jalloh (ed.), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press, 2014) 746, 765.

[161] Statute of the Special Court for Sierra Leone, art 1.

against humanity,[162] violations of Article 3, common to the Geneva Conventions and of Additional Protocol II,[163] and other serious violations of international humanitarian law,[164] as well as some domestic crimes such as sexual assault of young girls and arson.[165] The authority of

[162] Article 2 defines crimes against humanity. It states 'the Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population: a. Murder; b. Extermination; c. Enslavement; d. Deportation; e. Imprisonment; f. Torture; g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; h. Persecution on political, racial, ethnic or religious grounds; i. Other inhumane acts. ibid, art 2.

[163] 'The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include: a. Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; b. Collective punishments; c. Taking of hostages; d. Acts of terrorism; e. Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; f. Pillage; g. The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; h. Threats to commit any of the foregoing acts.' ibid, art 3.

[164] 'The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law: a. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; b. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; c. Conscripting or enlisting children under the 15 years into armed forces or groups or causing them to participate actively in hostilities.' ibid, art 4.

[165] 'The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law: a. Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31): i. Abusing a girl under 13 years of age, contrary to section 6; ii. Abusing a girl between 13 and 14 years of age, contrary to section 7; iii. Abduction of a girl for immoral purposes, contrary to section 12. b. Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861: i. Setting fire to dwelling - houses, any person being therein, contrary to section 2; ii. Setting fire to public buildings, contrary to sections 5 and 6; iii. Setting fire to other buildings, contrary to section 6.' ibid, art 6.

the Court was mixed (combining both national and international law) and both national and international judges, appointed by the UN and the Government of Sierra Leone.[166]

The TRC Act was passed in 2000,[167] before the decision to establish the Court was made. The main mandate of the TRC included creating an impartial historical record of violations and abuses, addressing impunity, responding to the needs of the victims, promoting healing and reconciliation and preventing a repeat of the violations and abuses suffered.[168] Its functions were further elaborated in the Act to promote reconciliation by providing an opportunity for victims to give an account of the violations and abuses they suffered as well as for perpetrators to relate their experiences and fostering a constructive exchange between victims and perpetrators, among others.[169] The Commission also had both national and international Commissioners, appointed by the Government of Sierra Leone and the UN.[170]

The TRC had powers equivalent to the Court when doing its investigation. It could access any information and documents from any sources that it deemed relevant to its work, compel the production of the information from any source,[171] visit any place without giving prior notice and make copies of the documents it required.[172] At its discretion, the Commission could interview

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[166] Out of the five trial court judges, the UN nominated three international judges and the Government of Sierra Leone nominated two nationals. Similarly, out of seven judges of the Appeal Court, the UN nominated four and the Government of Sierra Leone three. See also Abdul Tejan-Cole, 'The Special Court for Sierra Leone: Conceptual Concerns and Alternatives (2000) 1AHRLJ 107.
[167] Truth and Reconciliation Commission Act 2000 (hereafter TRC Act 2000).
[168] ibid, part III, s 6(1).
[169] ibid, s 6(2)(b).
[170] ibid, part II, s 3(1); Schedule (Subsection (1) of section 3) a (i).
[171] ibid, s 8(1)(b)
[172] ibid.

any individual, group or members of organisations or institutions.[173] It could also issue summons and subpoenas, as it deemed necessary to fulfil its mandate.[174] Failure to respond to a summons or subpoena issued by the Commission, failure to truly or faithfully answer questions of the Commission after responding to a summons or subpoena, or intentionally providing misleading or false information to the Commission were considered equivalent to contempt of court, liable to punishment.[175]

As the TRC and the SCSL started their work, the Attorney General and Ministry of Justice of Sierra Leone prepared a discussion paper on the roles and mandates of these mechanisms.[176] One of the issues it discussed was the overlapping mandates of these mechanisms as both of them had investigative mandates and access to sources of evidence and information. It stated that the Special Court, being an international judicial body, had primacy over all national bodies, including the TRC requiring complying requests and orders from the Court.[177] Although this was not a binding document, it was read as an indication of how the Government's institutions had placed the Commission and the Court in a hierarchy, triggering concerns from the TRC and civil society organisations supporting a strong TRC.

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[173] ibid, s 8(1)(c).
[174] ibid, s 8(1)(g).
[175] ibid, s 8(2).
[176] Office of the Attorney General and Ministry of Justice Special Task Force, 'Briefing Paper on Relationship Between the Special Court and the Truth and Reconciliation Commission: Legal Analysis and Policy Considerations of the Government of Sierra Leone for the Special Court Planning Mission' (Planning Mission Briefing Series, 7-18 January 2002) cited in Truth & Reconciliation Commission (n 127) para 62.
[177] Office of the Attorney General and Ministry of Justice Special Court Task Force (n 176); Abdul Rahman Lamin, 'Building Peace Through Accountability in Sierra Leone: The Truth and Reconciliation Commission and the Special Court' (2003) 38(2-3) Journal of Asian and African Studies 296, 310.

For example, the TRC was sceptical about any suggestion to make the TRC subordinate to the Court, arguing that such a situation would undermine its work.[178] There were no previous experiences where truth and prosecution mechanisms coexisted; complementing each other, and therefore no practical experiences could be drawn from. Thus, the UNOHCHR organised an expert meeting to seek some clarity on how these two mechanisms should work complementing each other. The meeting concluded that, although the Special Court had primacy over the national mechanism, the relationship between these two bodies should not be discussed on the basis of hierarchy as both mechanisms had distinct yet complementary roles to play. [179]

It was argued that making the TRC subordinate to the Court may hamper the unique role that the TRC had to play.[180] Some international organisations such as the ICTJ and Human Rights Watch recommended that both institutions sign a memorandum of understanding to facilitate their relationship.[181] However, no such agreement was reached between these two mechanisms, resulting in conflicts between the TRC and the Court as they proceeded. Some of those tensions and conflicts included the Commission's access to detainees under the custody of the SCSL, sharing of information, the Court's power to subpoena and the obligation of the TRC to disclose information to the Court, among others. As some of these tensions and challenges provide important lessons as to how mandates and powers of these two mechanisms need to be designed

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[178] Horovitz (n 125) 55; Truth & Reconciliation Commission (n 127) ch 6, para 66.
[179] UNSC, 'Annex. Report of the planning mission on the establishment of the Special Court for Sierra Leone' (8 March 2002) UN Doc S/2002/246, paras 49, 53.
[180] Marieke Wierda, Priscilla Hayner and Paul van Zyl, 'Exploring the Relationship Between the Special Court and the Truth and Reconciliation Commission of Sierra Leone' (ICTJ 2002) 2.
[181] ibid, 20; 'The Interrelationship between the Sierra Leone Special Court and Truth and Reconciliation Commission' (*Human Rights Watch*, 18 April 2002) <https://www.hrw.org/news/2002/04/18/interrelationship-between-sierra-leone-special-court-and-truth-and-reconciliation> accessed 30 May 2019.

when they coexist, which is critically important for contexts like Nepal, where truth and justice mechanisms are being designed to coexist. The following sub-sections analyse some of these challenges.

4.4.1.1. Accessing information and evidence

One area of tension between the TRC and the Special Court in Sierra Leone related to the question of TRC's power to access evidence, including detainees under the custody of the Special Court. The TRC Act allowed the TRC to interview people in private.[182] After the TRC wrote to the Special Court asking to allow it to interview some of those indicted under the custody of SCSL in private, including Chief Samuel Hinga Norman (hereafter Norman), the coordinator of the CDF, [183] tensions started to arise.

Upon receipt of the request, the Court developed a Practice Directive to regulate how the TRC or any other legal bodies could interview persons under the custody of the Special Court. It stipulated that those entities wanting to interview the detainees must make an application to a judge of the Court, setting out the specific questions that they are going to ask, [184] the legal officer of the Court, having authority to intervene in specific questions would supervise the interview and even to bring the interview to an end if the situation required it. The Directive also

[182] TRC Act 2000 (n 167) s 8(1)(c).
[183] Truth & Reconciliation Commission (n 127) ch 6, paras 81-87.
[184] This was adopted according to the Rule 33(D) of the special Court's Rules of Procedures and Evidences that authorizes the Registrar.
'Practice Direction on the procedure following a request by a National Authority or Truth and Reconciliation Commission to take a statement from a person in the custody of the Special Court for Sierra Leone' (9 September 2003) para 5 (hereafter Practice Direction).

provided that all the interviews needed to be recorded and transcribed, and a copy would go to the prosecutor and could be used in the trial.[185]

However, the TRC argued that the procedure required by the Directive infringed on the Commission's right to take statements on a confidential basis as witnesses appearing before the TRC may incriminate themselves as they are expected to contribute towards truth-telling which in turns forms the basis of healing and reconciliation.[186] The TRC requested to review the Directive, threatening that it would not follow it if it were not reviewed respecting the confidentiality mandate of the TRC.[187] The TRC argued it was important for the truth-seeking process to have unhindered access to evidence and information, including access to alleged perpetrators under the custody of the Special Court.[188]

This made the Court revise the Directive, removing the requirement of sending interview transcripts automatically to the prosecutor but to file in the Case Management Section of the Court, only the presiding judge making the decision as to whether to share them with any party, including the prosecutor.[189] However, in the Commission's view, this still did not fully respect the power of the Commission to interview people in private and protect the Commission from

[185] ibid, s 4 (b)-(c).
[186] Truth & Reconciliation Commission (n 127) ch 6, para 87.
[187] Letter 'Objections of the TRC to the Revised Practice Direction' of the Truth and Reconciliation Commission to Robin Vincent (Registrar of the Special Court) (4 October 2003) para 4(b) (c) in Truth & Reconciliation Commission (n 127) ch 6, para 90.
[188] ibid.
[189] 'Revised Practice Direction on the Procedure Following a Request by a State, the Truth and Reconciliation Commission, or Other Legitimate Authority to Take a Statement from a Person in the Custody of the Special Court for Sierra Leone' (4 October 2003).

non-disclosure of such information.[190] Not satisfied, the TRC requested the Court to allow Norman to appear before a TRC's public hearing, which further complicated the relationship between these mechanisms.

4.4.1.2. Public hearings of TRC with detainees indicted by the Court

It is widely argued that public hearings that the TRCs conduct provide important forums for victims to share their version of truth and considered to be one of the important functions of the TRC.[191] It is also considered to be important to help to engage public as audience in the truth-seeking process.[192] The TRC Act allowed the TRC to conduct public hearings.[193] Some of the indictees of the SCSL had requested the TRC to allow them to testify publicly through the Commission's public hearing, one of them being Norman.[194] In his request, he stated that he wanted to share his story with the people of Sierra Leone,[195] resulting in the TRC writing to the Special Court allowing Norman to participate in a TRC public hearing.[196]

[190] Michael Nesbitt, 'Lessons from the Sam Hinga Norman Decision of the Special Court for Sierra Leone: How Trial and Truth Commission Could Coexist' (2007) 8(10) German Law Journal 977, 996.
[191] OHCHR, 'Rule-of-Law Tools for Post-Conflict States. Truth Commissions' (2006) 18.
[192] ibid.
[193] TRC Act 2000 (n 167) s 7(1)(b).
[194] Nesbitt (n 190) 996-97.
[195] Letter from Samuel Hinga Norman to Truth and Reconciliation Commission (26 August 2003) in Truth & Reconciliation Commission (n 127) ch 6, para 104.
[196] Request by the Truth and Reconciliation Commission for Sierra Leone to Conduct a Public Hearing with Chief Samuel Hinga Norman JP (7 October 2003) in Truth & Reconciliation Commission (no 127) ch 6, para 96 (hereafter Request of TRC to hold public hearing).

Norman's arrest had already raised fears and speculations of civil unrest, because of the role of the CDF, where Norman was the leader, protecting people against rebel attacks.[197] The prosecutor refused the request, stating that it was not in the interests of justice as he was awaiting trial and his case was *sub-judice* in the Court and might upset Sierra Leone's fragile equilibrium.[198] However, the TRC appealed against the decision of the prosecutor arguing that the *sub-judice* rule would not apply in this case as it was designed to prevent the publication of matters directly affecting the outcome of the pending trial.[199] It further argued that in post-conflict societies, victims have the right to know the truth, and that, given the role Norman played in Sierra Leone, victims and society have the right to know his version of the truth.[200]

However, the appeal against the decision of the prosecutor was rejected by the Court on the ground that this would affect the fair trial rights of the accused, including the presumption of innocence. [201] As the TRC's request before the Court stated that it wanted to have Norman's public hearing because he had 'played a central role' in the conflict, the judge argued that the TRC pre-judged his role in the conflict thereby violating Norman's presumption of innocence.[202]

However, in the view of the TRC the Court misread the TRC's application and failed to properly analyse competing interests at stake, resulting in an appeal from the TRC to the President of the

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[197] The phone call where Norman was indicating of inciting civil unrest was intercepted, which had made the Special Court to take extra-security measures, see Evenson (n 131) 743.
[198] *Prosecutor v Samuel Hinga Norman (Decision)* SCSL-2003-O8-PT (29 October 2003), para 5.
[199] *Chief Samuel Hinga Norman JP, Re Application by the Truth and Reconciliation Commission for Sierra Leone* (Response) SCSL 2003-09-1 (24 October 2003).
[200] ibid.
[201] *Prosecutor v Samuel Hinga Norman* (n 198) paras 5-8, 10.
[202] *Prosecutor v Samuel Hinga Norman* (n 198).

Court.[203] The judgement was criticised for not being persuasive in its reasoning for restricting the TRC's access.[204] The TRC argued that the Court and the TRC play distinct roles. While making the decision to put limitations, the Court should analyse different interests at stake and balance them. In this case the interests were Norman's right to testify before the TRC, his freedom of expression, the victims' rights to know the truth and the public interest in ensuring and fulfilling the TRC's mandate to create impartial historical records.[205]

However, the Court expressed fear of the potential implications of such hearing, considering the role of Norman, as the chief of the CDF, who fought against the RUF and was considered a hero by many in Sierra Leone's society. He could potentially use the public hearing as a forum to appeal to citizens, including former CDF members, which could threaten the security of the Special Court, victims, witnesses and stability of the entire country.[206]

Different organisations offered different options considering the concerns and fears of both institutions. It was proposed that Norman provides his statement in the hearing with the advice of

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[203] *Heads of Argument in the Appeal by the Truth and Reconciliation Commission for Sierra Leone and Chief Samuel Hinga Norman JP against the Decision of His Lordship Judge Bankole Thompson* delivered on 29 October 2003, presented on 5 November 2003 (hereafter TRC Heads of Argument in the Appeal against the Thompson Decision) in Truth & Reconciliation Commission (n 127) para 139.

[204] Neil Boister, 'Failing to get to the Heart of the Matter in Sierra Leone? The Truth Commission is Denied Unrestricted Access to Chief Hinga Norman' (2004) 2(4) JICJ 1100, 1116; Nesbitt (n 190) 977, 1006.

[205] The Grounds of Appeal by the Truth and Reconciliation Commission for Sierra Leone and Chief Samuel Hinga Norman JP against the Decision of His Lordship Judge Bankole Thompson delivered on 29 October 2003 to deny the TRC's Request to Conduct a Public Hearing with Chief Samuel Hinga Norman JP; filed before Judge Geoffrey Robertson, the President of the Special Court on 4 November 2003. See Truth & Reconciliation Commission (n 127) ch 6, para 139.

[206] Truth & Reconciliation Commission (n 127) ch 6, para 164.

his legal counsel, which would be recorded, but not broadcasted live to allow deletion of anything that would create security threats to witnesses and the Court.[207] The President of the SCSL tried to resolve the issue having a discussion with the Commission's representative. [208] As William Schabas notes perhaps the Court was also cautious about the subsequent political and legal implications considering Norman's role in the Government and the potential implication for President Kabbah. As the CDF worked alongside the Government, Norman's public hearing could bring a situation requiring the president to stand in a witness box, which the Court wanted to avoid.[209]

In the end, although the presiding judge recognised that the TRC can take statements from indictees of the SCSL if the person is willing to provide such statement and is prepared to take the risk of volunteering it,[210] it refused the request of the TRC and Norman to have a public hearing.[211] The Court also tried to distinguish the role of the TRC, stating that the TRC's main function is to establish truth and conduct reconciliation but reconciliation with those who bore the greatest responsibility for the crimes under the jurisdiction of the Court not being permissible.[212] The TRC could facilitate reconciliation by inviting the victims only in those cases outside the jurisdiction of the Court.[213]

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[207] ibid, ch 6, para 186.
[208] Schabas, 'Conjoined Twins of Transitional Justice' (n 152) 1082-96.
[209] ibid.
[210] The Decision of Justice Robertson on Appeal, 28 November 2003, para 19.
[211] Truth & Reconciliation Commission (n 127) ch 6, para 185.
[212] ibid, ch 6, para 189.
[213] ibid.

The TRC considered this as a serious blow to its work.[214] Issuing a press statement, it stated that as a citizen of Sierra Leone and as a key role-player in Sierra Leone's recent history, Norman had a right to appear before the TRC to tell his story, and that all other key actors who had played roles in the conflict have appeared before the TRC.[215] It further concluded that the decision of the SCSL rejecting the right of indictees to testify before the TRC, denied them their freedom of expression to appear openly and publicly before the TRC, and denied the right of the Sierra Leonean people to see the process of truth and reconciliation done in relation to them.[216]

Whether the TRC's public hearing in Sierra Leone contributed to truth, reconciliation and healing is contested as some found it contributed to it while others did not.[217] Lower participation of victims in the TRC's public hearing was raised as matter of concerns.[218] It was argued that it was partly because of the narrative of forgive and forget that was created in the aftermath of the war, telling truth was considered to be disturbing the peace and reconciliation,[219] where amnesty was promoted for peace. Some studies have also shown that those victims who engaged did so with the expectation of receiving economic benefits rather than contributing to the process of

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[214] Sierra Leone Truth and Reconciliation Commission (n 159).
[215] Truth & Reconciliation Commission (n 127) ch 6, para 173.
[216] ibid.
[217] Shaw (n 160) 184; Erin Daly, 'Truth Scepticism: An Inquiry into the Value of Truth in Times of Transition' (2008) 2 IJTJ 23; Gearoid Millar, 'Assessing Local Experiences of Truth-Telling in Sierra Leone: Getting to 'Why' through a Qualitative Case Study Analysis' (2010) 4 (3) IJTJ 477, 490; Kristen Ainley 'Evaluating the success of transitional justice in Sierra Leone and beyond' in Kirsten Ailney, Rebekka Friedman and Chris Mahony (eds), *Evaluating Transitional Justice: Accountability and Peacebuilding in Post-Conflict Sierra Leone* (Palgrave Macmillan, 2015) 241, 250-251.
[218] International Crisis Group (ICG), 'Sierra Leone: The State of Security and Governance' (2003) 1, 12.
[219] For more information see Jennifer Cole, *Forget Colonialism? Sacrifice and the Art of Memory in Madagascar* (University of California Press 2001)

uncovering the truth and to be healed.[220] Participation of ex-combatants was significant in Sierra Leone's TRC. They participated mostly because their testimony was tied to their societal reintegration and they had an interest both to restore their images in order to return to their former communities and secure their futures.[221]

Although it is not clear whether the coexistence of these two mechanisms impacted the participation of victims in the truth-seeking process, it is nevertheless important to note that public hearing with detainees of the Court could raise tensions, constraining both mechanisms. Thus, when these two mechanisms coexist in future TJ processes such as in Nepal, a careful attention need to be paid while designing the mandates and powers of these mechanisms in relation to public hearings.

4.4.1.3. Sharing information

Other tensions that arose in Sierra Leone relate to the power of the SCSL to access the TRC's information. For example, section 7(3) of the TRC Act of Sierra Leone provided power to the Commission to permit any person to provide information on a confidential basis.[222] The Act also provided that the Commission will not be compelled to disclose such information.[223] However, the Statute of the SCSL also had a provision obliging all individuals and institutions to abide by

[220] Shaw (n 160) 184.
[221] Rebekka Clara Friedman, 'Hybrid TRCs and national reconciliation in Sierra Leone and Peru' (DPhil thesis, London School of Economics 2012)208.
[222] For example, firstly, the section 7(3) of the TRC Act grants power to the Commission that 'at the discretion of the Commission, any person shall be permitted to provide information to the Commission on a confidential basis and the Commission shall not be compelled to disclose any information given to it in confidence.' TRC Act 2000 (n 167) s 7(3).
[223] ibid.

its orders.[224] As the Statute made no exception to the TRC, there was speculation that the TRC needed to provide information and evidence to the SCSL if the Court ordered it to do so.[225]

From the beginning, the TRC argued that the powers it had in getting information on a confidential basis was important for the TRC and that the Court could not compel it to share information collected using such power.[226] In general, TRC's power to obtain information on a confidential basis is believed to allow the TRC to reach out to different sources of information, which it could not otherwise do.[227] The TRC argued that forcing it to disclose such information to the Court would deter people from providing information to the TRC, severely undermining its mandate.[228] Such fear was also highlighted by a local NGO working with ex-combatants arguing that many ex-combatants, who wanted to appear before the TRC, changed their minds because of rumours that the information provided to the TRC would be shared with the Special Court.[229] It also highlighted that forcing the TRC to disclose such information to the Court would deter people from providing information to the TRC as it could no longer assure its sources that the information will remain confidential. [230]

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[224] The SCSL provided that 'notwithstanding any other law, every natural person, corporation, or other body created by or under Sierra Leone law shall comply with any direction specified in an order of the Special Court.' SCSL, art 21(2).
[225] Office of the Attorney General and Ministry of Justice Special Task Force (n 176).
[226] Horovitz (n 125) 55.
[227] Priscilla B Hayner, *Unspeakable Truth. Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2010) 7-26.
[228] Abdul Tejan-Cole, 'The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission' (2003) 6(1) Yale Human Rights and Development Law Journal 139, 154.
[229] Letter from PRIDE to ICTJ (2 February 2002) in Wierda, Hayner, and van Zyl (n 180) 8.
[230] Letter from PRIDE (n 229) 8-9.

Considering the TRC's concerns and the overlapping mandates and powers of these bodies, some suggested that the TRC's information should be provided some privilege against disclosure. [231] Providing privilege to certain information against disclosure is a long-established practice in criminal law. Many national jurisdictions provide privilege to information received in relation to lawyers and clients, doctors and patients.[232] The ICC also provides privilege to the ICRC's information.[233]

However, whether a TRC enjoys privilege against disclosure has never been tested in a Court and no jurisprudence exists to guide on this. In one of its cases, the ICTY had dealt with the question of privilege of information obtained by a journalist. For example, in Randal,[234] the ICTY had dealt with the question of privilege of information obtained by a journalist. In this case, a retired Washington Post reporter was subpoenaed to reveal the source of his news reporting. He appealed against the subpoena, arguing that as a journalist he should be granted privilege against such subpoena, claiming that if such a privilege does not exist, then journalists, especially those covering war reporting, may be seen as the source of information for prospective trials, which may hamper the news-gathering role of the journalists.[235] However, the Appeal Chamber decided against such a claim, stating that the rationale for journalistic privilege is to allow a journalist to protect his or her sources. In this case, the information was already

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[231] Wierda, Hayner and van Zyl (n 180) 11.
[232] John Henry Wigmore, Peter Tillers, James Harmon Chadbourn, *Evidence in trials at common law* (vol 3, Little Brown 1961) in Mark Freeman, *Truth Commission and Procedural Fairness* (CUP 2006) 248.
[233] International Criminal Court, *Rules of Procedure and Evidence* (2nd edn, 2013) r 73(6).
[234] UNICTY, 'The Prosecutor v. Radoslav Brdjanin & Momir Talic "Randal Case": Appeals Chamber Defines a Legal Test for the Issuance of Subpoenas for War Correspondents to Testify at the Tribunal' (11 December 2002) <http://www.icty.org/en/press/prosecutor-v-radoslav-brdjanin-momir-talic> accessed 30 November 2019.
[235] ibid.

published with the source being revealed. Hence, privilege against the subpoena to appear before the Court could not be claimed.[236] The ICTJ argued that although his claim was denied, the Court recognised journalistic privilege, providing some reference for the issue at hand. Using these as references, the ICTJ argued that similar protection, offering some privilege to information obtained from the TRC is provided.[237]

However, it is important to note that privilege is not an absolute right of a person or institution holding information or evidence and many jurisdictions grant powers to the courts to make decisions on whether to protect such information from disclosure, balancing different interests. For example, although the ICC offers some privilege to the ICRCs information, that is also not absolute and subject to some limitations.[238] Those limitations are balanced considering the importance of the particular information for a particular case, the circumstances of the case, the relevance of the evidence sought, whether the evidence could be obtained from a source other than the ICRC, the interests of justice and of victims, the performance of the courts and the ICRC's functions,[239] requiring a case by case analysis while making decisions about disclosure.

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[236] ibid.
[237] Report of the planning mission on the establishment of the Special Court for Sierra Leone (n 179) para 55; The ICTJ also proposed such privilege and propose some grounds for exception. Wierda, Hayner and van Zyl (n 180) 11-12.
[238] Rule 73(6) provides 'if the Court determines that ICRC information, documents or other evidence are of great importance for a particular case, consultations shall be held between the Court and ICRC in order to seek to resolve the matter by cooperative means, bearing in mind the circumstances of the case, the relevance of the evidence sought, whether the evidence could be obtained from a source other than ICRC, the interests of justice and of victims, and the performance of Court's and ICR's function.' International Criminal Court (n 233).
[239] ibid.

Arguably, claiming protection of the TRC's information, similar to that received in the context of lawyers and clients or from the ICRC in general terms would be problematic in the context of TJ.[240] Firstly, TRCs are given diverse mandates. For example, in some places like Nepal, the TRC is the main investigatory arm of the prosecution. Its information and evidence are bound to be disclosed to the courts. Secondly, in many countries, TRCs have provided information to prosecution, facilitating prosecution. For example, the Peruvian TRC also had provision allowing it to obtain information confidentially.[241] However, it interpreted its mandate so that all evidence and information it received were considered to have been received voluntarily and could be shared with and submitted as evidence to the prosecution.[242]

As both the TRC and prosecution work towards achieving the same goal of TJ, a TRC not sharing information with a prosecution may also undermine the role of the prosecution defeating the purpose of TJ. Thus, in the context of TJ, a TRC's power to obtain information on a confidential basis should not be used to limit the sharing of information between these mechanisms if that is important to each. However, it is also important to underscore that the work of prosecution does not undermine the work of the TRC. Prosecution issuing subpoenas, forcing a TRC to disclose its information may undermine the TRC's work. Thus, it is important to balance the interest of both institutions, which can also be done by providing some flexibility

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[240] See also Alison Bisset, 'Rethinking the Powers of Truth Commissions in Light of the ICC Statute' (2009) 7(5) JICJ 963-82.

[241] Eduardo Gonzalez Cueva, 'The Contribution of the Peruvian Truth and Reconciliation Commission to Prosecutions' in William A Schabas and Shane Darcy (eds), *Truth Commissions and Courts. The Tension Between Criminal Justice and the Search for Truth* (Kluwer Academic Publishers 2004) 61-62.

[242] ibid.

to the TRC in making decisions regarding sharing of information it has obtained. Some examples already exist.

For example, in Peru also, tension arose when the prosecutor's office issued a subpoena to the Commission to have access to some case files which were still under the Commission's investigation.[243] Although the Commission did have the intent to share the files with the prosecutor to facilitate prosecution, when it received the subpoena from the Office of the Prosecutor General it was not in a position to send those files as they were still under investigation. The matter reached the Court, where the Court recognised the discretion of the Commission as to when to share such information. The Court stated that the Commission being one of the executive branches could retain the confidentiality privilege and could wait to share such information.[244] Thus, the Court did not prevent the prosecution accessing the TRC's information but allowed flexibility to the TRC in making a decision on when to share such information.

The case of Sierra Leone was somehow different as the TRC was first envisioned as an alternative to prosecution and mandates and powers of the TRC were designed to work as an alternative to prosecution. The decision to establish the Special Court was made after the TRC's Act was already passed by the parliament. Perhaps some of those powers and mandates that the TRC was given were considered to be important when the TRC was expected to work as the only

[243] This was one of the cases that Commission was investigating that involved the murder of more than a hundred detainees and prisoners accused or sentenced for terrorism in one of the prisons in 1986.

[244] Eduardo Gonzalez Cueva, 'The Peruvian Truth and Reconciliation Commission and the Challenge of Impunity' in Naomi Roht-Arriaza and Javier Mariezcurrena (ed), *Transitional Justice in the Twenty-First Century. Beyond Truth versus Justice* (CUP 2006) 70, 84.

accountability mechanism. However, such mandates and powers of the TRC create tension when it has to coexist with prosecution. As chapter 2 and 3 highlighted, the TJ landscape is changing. It is no longer possible to have a TRC as an alternative to prosecution. Thus, the mandates and powers of both truth and prosecution mechanisms need to design considering such changes. For example, sharing TRC's information with the prosecution (depending on the powers used by the TRC in getting such information and whether the information is self-incriminatory) creates serious legal tensions, including the risk of violating international law. As country experiences where these two mechanisms work in tandem continue to emerge such as in Nepal where the Truth Commission is envisioned to collect evidence also for prosecution, the following section analyses those tensions to find possible ways to mitigate them.

4.4.1.3.1. Sharing self-incriminatory information

The TRC in Sierra Leone had the power to hold individuals liable for contempt for failure to truthfully or faithfully answer questions or intentionally providing misleading or false information,[245] allowing it to compel a person to provide information including self-incriminatory to the TRC. Similarly, the TRC's power to obtain information on a confidential basis could also involve self-incriminatory information. Sharing self-incriminatory information to prosecution obtained through such powers would create genuine legal tensions.

Under international human rights law, it is the right of the accused not to be compelled to provide self-incriminatory evidence. Both the ICCPR and IACHR recognise the right of the

[245] TRC Act 2000 (n 167) s 8(2).

accused persons to a fair trial, which includes a right against self-incrimination.[246] Although the ECHR does not have a specific provision to protect the accused against self-incrimination, it has elaborated this in case laws. For example, in *John Murray v UK*[247] and *Saunders v UK*[248], the ECtHR has linked the right against self-incrimination to the fair trial guarantees provided by Article 6 of the ECHR. The Court stated that the privilege against self-incrimination lies at the heart of the notions of the right to remain silent, the presumption of innocence and fair procedure under Article 6 of the ECHR.[249] Thus, international law is concerned when a person is *compelled* to provide self-incriminatory information and that is used in *criminal proceedings* against the person providing such information.

However, not all compelled information may create problems as certain laws give power to the authority to compel information, such as relating to financial or company affairs, that may amount to self-incriminatory information but may not amount to a violation.[250] Only the use of a *compelled* self-incriminatory statement in criminal *proceedings* against the person providing such information is found to be a violation.[251]

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[246] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 14(3)(G) art 14; American Convention on Human Rights (entered into force 18 July 1978) OAS Treaty Series No 36 (1967) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 25 (1992) (American Convention) art 8; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6.
[247] *John Murray v UK* App no 18731/91 (ECtHR, 8 February 1996) para 49.
[248] *Saunders v UK* App no 19187/91 (ECtHR, 17 December 1996) para 68.
[249] *Murray* (n 247) para 45.
[250] *Weh v Austria* (2005) 40 EHRR 37, para 44; *Allen v UK* (2002) 35 EHRR CD289.
[251] *Weh* (n 250).

However, what compulsion means is not defined under international law. The power under which information is obtained and how it is used would largely determine that. For example, the HRC provides that if the information is 'coerced' by any means of direct or indirect physical or psychological pressure, it is considered to have been compelled and this amounts to a violation.[252] The HRC has mostly dealt with this issue considering whether there is a presence of any physical or psychological torture or ill-treatment in receiving self-incriminatory information and has found a violation where States have failed to show the statement being obtained through free will.[253] A similar view was adopted by the IACtHR in C*astillo Petruzzi and others v. Peru.* In this case, the IACtHR did not find a violation of the right against self-incrimination in the absence of any evidence of coercion. It states that in the absence of any threat of punishment or other adverse legal consequence, urging to tell the truth could not be considered as coercion.[254]

However, ECtHR jurisprudence does not require the presence of physical or psychological pressure. For the ECtHR, the presence of 'improper' compulsion is sufficient to trigger the right against self-incrimination. For example, resorting to subterfuge in obtaining self-incriminatory information, and use of it against the person in a criminal trial was found to be improper compulsion amounting to a violation.[255] Similarly, the threats of contempt and criminal sanctions resulting in self-incriminatory information have also been held to be improper compulsion and

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[252] *Berry v Jamaica* Communication No 330/1988, UN Doc CCPR/C/50/D/330/1998 (HRC, 26 April 1994), para 11.7.
[253] *Singarasa v Sri Lanka* Communication No 1033/2001, UN Doc CCPR/C/81/D/1033/2001 (HRC, 21 July 2004) para 7.4; *Dunaev v Tajikistan* Communication No 1195/2003, UN Doc CCPR/C/95/D/1195/2003 (HRC, 30 March 2009) para 7.3.
[254] *Castillo Petruzzi and others v Peru* (Merits, Reparations and Costs) IACtHR Series C No 52 (30 May 1999) paras 163-168.
[255] Alison Bisset, 'The Privilege Against Self-Incrimination in Truth Commission Administered Accountability Initiatives' (2017) 30(1) LJIL 155, 168.

their subsequent use in criminal cases to constitute a violation.[256] Analysing the jurisprudence on the subject, some scholars argue that when a suspect is placed under a legal duty to provide incriminating information such as through the use of a fine or contempt of court, then a violation occurs.[257]

Jurisprudence also exists to suggest that if a person is compelled to provide self-incriminatory evidence even in an administrative inquiry, but if such information is used in criminal proceedings against the person providing such information, this would amount to a violation.[258] Thus, self-incriminatory evidence obtained by a TRC, if used in a criminal trial as evidence against the person providing such information, may risk posing a violation of international law.

As sharing of information became one of the main tensions impacting the relationship between the TRC and the SCSL, the prosecutor of the SLSC publicly declared that it would not rely on the TRC's materials in any of its cases[259] and it never asked information from the TRC in the TRC's lifetime. Similarly, considering the risk of subpoena of the Court, the TRC also did not use its contempt powers to compel anyone to provide a confession that would contain self-incriminatory information. So, we do not really know how the SLSC would have responded to this issue of having TRC's information obtained through some of its powers and the ways how it would mitigate the risk of violating international law. However, learning from Sierra Leone's experience, the UN tried to improvise the mandates of the TRC and its relation to the prosecution and the Court in Timor Leste.

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[256] *Heaney v Ireland* [1994] 3 IR 593; *Quinn v Ireland* (2001) 33 EHRR 264; *Funke v France* (1993) 16 EHRR 279.
[257] Mike Redmayne, 'Rethinking the Privilege Against Self-Incrimination' (2007) 27(2) OJLS 209.
[258] *Saunders* (n 248) para 74**.**
[259] Schabas (n 158) 36; Horovitz (n 125) 55.

It also tried mitigating the risk self-incriminatory evidence could pose by incentivising confessions through community reconciliation processes (CRPs) in less serious crimes.

For example, the Serious Crime Investigation Unit (SCU) and the Special Panel for Serious Crimes (SPSC) were established in the mid-2000s to prosecute and try those involved in serious crimes between January 1999 and October 1999.[260] The Commission for Reception, Truth and Reconciliation (CAVR) was established with the objective of establishing truth, covering a broader temporal jurisdiction and reaching out to those who would fall outside the ambit of the Special Panel.[261] The Commission had the power to facilitate community reconciliation for those falling outside the jurisdiction of the Special Court. The process of community reconciliation would require the person to confess to crimes in writing for which community reconciliation was requested. It had no jurisdiction to facilitate reconciliation in those categories of crimes under CSU jurisdiction and had to send every single statement from the perpetrator applying for community reconciliation to the SCU to verify it would not fall under the jurisdiction of the unit.[262] This allowed a more coordinated relationship between the TRC and prosecution.

However, it created some tensions too as the Office of the General Prosecutor (OGP) would review those statements and would retain if any case falling under the jurisdiction of the Special

[260] Serious crimes were defined war crimes, crimes against humanity, genocide, torture, murder and sexual offense that took place in the territory of East Timor between 1 January and 25 October 1999.
[261] UNTAET, 'Regulation No. 2001/10 on the establishment of the Commission for Reception, truth and Reconciliation in East Timor' (13 July 2001) UN Doc UNTAET/REG/2001/10.
[262] ibid, s 3(1)(e).

Panel.[263] Thus, there were risks of criminal prosecution in these cases that the OGP retained, where these self-incriminatory statements could be used. Although it is not clear whether and how the OGP used those statements, the risk of violating the rights of the accused was minimised not only by restricting the power of the TRC to compel testimonies but also by forcing it to inform everyone providing a statement before the CAVR that their statement is going to be reviewed by the OGP.[264] It was also informed that there was a possibility of the statement provided for the community reconciliation process being used against them if the case comes under the jurisdiction of the Special Panel. Community reconciliation was offered for such voluntary self-incriminatory information in less serious crimes.

In some countries where the TRC is given a mandate to compel testimonies, some protection is also offered against the use of such testimonies in criminal trials against the person providing such information. For example, the South African TRC also had the power to compel testimonies.[265] However, the TRC Act protected the person from subsequent prosecution based on compelled evidence provided to the Commission by offering use immunity. Use immunity prohibits the use of compelled self-incriminatory information in a criminal prosecution against

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[263] Out of the 1,541 statements sent to the Office of the General Prosecutor (OGP) by the Commission, it retained 111 of them, see Commission for Reception, Truth, and Reconciliation Timor-Leste, 'Chega! The Report of the Commission for Reception, Truth, and Reconciliation Timor-Leste. Executive Summary' (2005) <http://etan.org/etanpdf/2006/CAVR/Chega!-Report-Executive-Summary.pdf> accessed 8 January 2020.

[264] Patrick Burgess, 'Justice and Reconciliation in East Timor. The Relationship between the Commission for Reception, Truth and Reconciliation and the Courts' in William A Schabas and Shane Darcy, *Truth Commissions and Courts. The Tension Between Criminal Justice and the Search for Truth* (Kluwer Academic Publishers 2004) 155; David Cohen, '"Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future' (2007) 43(1) Stan J Int'l L 16.

[265] Promotion of National Unity and Reconciliation Act 34 of 1995, s 3(1) b.

the person providing such information.[266] The TRC in Ghana[267] and Kenya[268] had similar protection offered to the TRC's self-incriminatory information. Arguments were made the information obtained by Sierra Leone's TRC also enjoyed similar protection.[269]

Although some scholars argue that use immunity may not fully protect the right of the accused against self-incrimination,[270] it is considered a compromise in many legal systems.[271] This would allow the prosecution to use the information gathered by the TRC; however, they would have to find other (additional) evidence to prove the case in the Court in order to convict the person. Thus, it appears that restricting a TRC's power to compel testimonies in cases involving gross violations where States are duty bound to prosecute and offering use immunity to self-incriminatory information gathered by the TRC are some options used to address these tensions in some contexts.

However, I would argue in a TJ context, this may constrain both mechanisms. Why deprive a TRC from having access to wider truth if the power of subpoena and contempt allows a Court to do so? A similar argument could be made about preventing the prosecution from having access to information obtained by a TRC if that is important for the fair examination of evidence while

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[266] Andrew L-T Choo, *The Privilege Against Self-Incrimination and Criminal Justice* (Hart Publishing 2013) 52.
[267] National Reconciliation Commission Act 611 of 2002, s 15(2).
[268] The Truth and Reconciliation Commission Act 6 of 2008 provides that 'no person who appears before the Commission shall, whether such appearance is in pursuance of any summons by the Commission under this Act or not, be liable to any criminal or civil proceedings, or to any penalty or forfeiture whatsoever in respect of any evidence or information given to the Commission by such person.' Truth and Reconciliation Commission Act 6 of 2008, s 24(3).
[269] Truth & Reconciliation Commission (n 127) ch 6, para 71.
[270] See also Bisset, 'Principle 8' (n 123) 155-76.
[271] Choo (n 266).

determining criminal guilt. As both of these mechanisms are equally important for a TJ process, other options need to be explored.

As international law does not prevent the use of self-incriminatory evidence provided voluntarily and the criminal justice systems in many countries also exchange it for a reduced sentence under plea-bargaining,[272] this could be an option. A plea bargain is 'a negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offence or to one of multiple charges in exchange for some concession by the prosecutor, usually a more lenient sentence or a dismissal of the charges.'[273] Although the principal justification for plea bargains in the criminal justice system lies on the notion of judicial economy that plea bargains avoid the time and expense of a trial, freeing up the courts to hear other cases, its value in TJ could also be seen for establishing truth and ensure reparation for victims and society affected by conflict and to achieve closure. This has already been used in the context of TJ. For example, Peruvian law allows prosecutors a wider discretionary power to exchange a lower sentence for those cooperating with the prosecution.[274] Thus, the TRC in Peru recommended access to such benefits for those providing truth that contained self-incriminatory information.[275] It has also

[272] See also Maximo Langer, 'From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure' (2004) 45(1) Harv ILJ 1-64; Andrew Ashworth, 'Self-Incrimination in European Human Rights Law – A Pregnant Pragmatism' (2008) 30 Cardozo L Rev 751; Mark Berger, 'Self-Incrimination and the European Court of Human Rights: Procedural Issues in the Enforcement of the Right to Silence' (2007) 5 EHRLR 514-33; David Dolinco, 'Is There a Rattionale for the Privilege Against Self-Incrimination?' (1986) 33 UCLA Law Review 1063-48.
[273] Bryan A Gamer (ed), *Black's Law Dictionary* (7th edn, West Publishing Company 1999) 1173.
[274] See also H H A Cooper, 'Plea –Bargaining: A Comparative Analysis' (1972) 5 NYUJ Int'l Law & Pol 427, 448.
[275] Cueva (n 241) 61.

been used by the international criminal tribunals.[276] The new international treaties have also started to recognise it, recognising its value in the TJ context to promote truth, justice, reparation. For example, the International Convention on Protection from Enforced Disappearances (ICPED) allows suspended sentences in return for information and truth provided for the establishment of the fate of the missing.[277] This has also been recognised by the UN Principles to Combat Impunity,[278] international criminal tribunals[279] and the ICC.[280]

Thus, countries in transition could explore different ways to incentivise truth and justice for each-others' benefits, including the exchange of voluntary self-incriminatory

[276] For example, the rules of evidence of the ICC have a provision for early release taking into account different factors such as the 'genuine dissociation' of a sentenced person from their crime, the prospects of them being socialised or successful resettlement back into society, whether their release would give rise to 'significant social instability', any 'significant' action by the sentenced person for the benefit of victims and the impact of their release on victims and their families, and their individual circumstances, such as worsening health or advanced age. International Criminal Court (n 233) r 223; see also Nancy Amoury Combs, *Guilty Pleas in International Criminal Law. Constructing a Restorative Justice Approach* (Stanford University Press 2007).

[277] International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICPPED).

[278] The Principle foresee the role of confessions, disclosure and repentance as a legitimate justification for reduction of sentence, but not an exemption from criminal or other responsibility. UN Commission on Human Rights, 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity' (8 February 2005) 61st session UN Doc E/CN.4/2005/102/Add.1, principle 28.

[279] *Prosecutor v Vidoje Blagojević and Dragan Jokić* (Judgement) IT-02-60-T (17 January 2005) paras 858-860; *Prosecutor v Biljana Plavšić* (Sentencing Judgement) IT-00-39&40/1-S (27 February 2003) paras 85-94, 110; *Prosecutor v Moinina Fofana, Allieu Kondewa* (Judgement) SCSL-04-14-T (2 August 2007) paras 94-96.

[280] For example, the rules of evidence of the ICC have a provision for early release taking into account different factors such as the 'genuine dissociation' of a sentenced person from their crime, the prospects of them being socialised or successful resettlement back into society, whether their release would give rise to 'significant social instability', any 'significant' action by the sentenced person for the benefit of victims and the impact of their release on victims and their families, and their individual circumstances, such as worsening health or advanced age. International Criminal Court (n 233) r 223.

information/evidence. Once TJ mechanisms are designed holistically, having different mechanisms working in tandem, it could be exchanged for reduced and alternative sentences, reparation and reforms as the Colombian TJ processes has designed.

4.5. Conclusion

This chapter analysed the experience of different countries where truth and justice mechanisms have come in different sequence and where they have worked in tandem. Experiences of these countries show different factors contributing to the design of TJ mechanisms and their order. The experience of some countries where truth and justice mechanisms have come in different sequence show that although they seem to be designed in sequence, they were not designed to be in that sequence. This provides learning not only to show that one mechanism cannot necessary replace the other but also to help to think about the design of TJ processes where even if in some situations require sequencing of truth and justice mechanisms, they could be planned and designed considering both TJ mechanisms and ensuring one contributing to the eventual work of the other.

This chapter also highlighted the experience of countries where truth and prosecution have come to coexist and uncovered how such coexistence could also pose challenges if they are not designed while considering them as part of a holistic TJ system. For example, although truth and justice mechanisms coexisted in Sierra Leone, but this was just the outcome of a particular situation which arose after the TRC's mandate and powers had already been designed as an alternative to prosecution. As a result, it created many tensions. Sierra Leone's experience however provides important lessons that mandates and power of these mechanisms need to be

different when they work in isolation or in sequence than when these two mechanisms work in tandem. These two mechanisms, their powers and mandates, need to be designed considering them as integral parts of a TJ system, complementing each other. Otherwise, they create tensions and constrain each other rather than facilitate each other.

The chapter analysed that although some of those tensions and experiences in Sierra Leone were context-specific, arising from the lack of clarity while the truth and justice mechanisms were designed, some could transcend beyond to arise in any contexts where truth and justice mechanisms work in tandem as TJ mechanisms. Thus, it is important to acknowledge that truth and justice mechanisms when designed to work in tandem tensions and challenges could arises so measures to mitigate them is put in place. One of these challenges involves the sharing of a TRC's information and the potential risks to its truth-seeking mandate and the sharing of self-incriminatory information and its risk to international law. Learning from these experiences, the chapter argued some of these tensions and challenges could be addressed by designing these two mechanisms as part of holistic TJ system, offering incentives to each-other, including the sharing of self-incriminatory information and strengthening both truth-seeking and prosecution, which chapter 6 will further analyse.

Chapter 5

Co-existence of truth and justice mechanisms: the experience from Nepal

5.1. Introduction

For more than 15 years, Nepal has been struggling to devise a TJ process to address the legacies of the human rights violations that took place during the 10-year-long (1996-2006) armed conflict. In April 2014, Nepal's Parliament passed the 'Enforced Disappearances Inquiry, Truth and Reconciliation Commission Act, 2071 (2014)'. The Act creates two Commissions: the Truth and Reconciliation Commission (TRC) and the Commission of Enquiry on Enforced Disappearances (CIEDP). The CIEDP's sole responsibility is to investigate cases of enforced disappearances. The TRC is mandated to look into other cases of gross violations. These Commissions are empowered with a unique mandate to work as the main investigatory arm of prosecution and to deliver truth and facilitate justice. The Special Court was due to be set up to try those recommended by the TRC.

Both Commissions were established in 2015. However, despite registering nearly 60,000 complaints by the TRC and 3,000 by the CIEDP, the Commissions have failed to deliver on their mandates.

This chapter analyses the context and different factors that played a role for the country to establish these Commissions and the factors contributing to the failure of the Commissions to deliver on their mandates.

It will start by presenting the context of conflict and the transition in Nepal followed by setting out the roles different actors and factors played to have a TRC Act that envisions truth and justice to coexist as TJ mechanisms, providing a unique relation between truth and prosecution. It will also critically analyse the work of the TRC and the challenges Nepal faces to put such a mandate into practice to provide the context where the re-designing of the TJ process is ongoing considering a holistic approach to TJ where both truth and justice coexist, incentivising each other.

5.1.1. Conflict as context for TJ in Nepal

The armed conflict in Nepal started in 1996, soon after Nepal had established democracy in 1990, after a decades-long autocratic royal regime.[1] It is difficult to summarise the complex and multiple factors that resulted in Nepal's armed conflict. Many observers agree that the newly-established democratic system was neither able to address deeply-rooted discrimination based on caste, gender, ethnicity, region (among others) nor socio-economic conditions, corruption and human rights violations.[2] Many argue that these socio-political factors together with a strong

[1] After its unification in 1967, Nepal was ruled by Rana oligarchy and the Monarchy until 1951. In 1951 the attempt was made to introduce multiparty democracy but it did not live long as the Monarch took-over the executive power, dismissing the elected PM and the parliament in 1960 and imposed party less *Panchayat* system as the 'home grown' political framework in governing the society. The *Panchayat* refused political parties, freedom of speech, assembly, and organisations among others.

[2] R Andrew Nickson, 'Democratization and the Growth of Communism in Nepal: A Peruvian Scenario in the Making? (1992) 30(3) Journal of Commonwealth and Comparative Politics 358; Deepak Thapa with Bandita Sijapati, *A Kingdom Under Siege. Nepal's Maoist Insurgency, 1996-2004* (updated, The Print House Kathmandu 2004) 52-80; Mandira Sharma and Dinesh Prasain, 'Gender Dimensions of the People's War: Some Reflections on the Experiences of Rural Women' in Michael Hutt (ed), *Himalayan 'People's War'. Nepal's Maoist Rebellion* (C Hurst & Co 2004) 152-65; Do Quy-Toan and Iyer Lakshmi, 'Poverty, Social Divisions and Conflict in Nepal' (2007) World Bank Policy Research Working Paper No 4228; Magnus Hatlebakk, 'Explaining Maoist Control and Level of Civil Conflict in Nepal' (2009) Chr Michelsen Institute,

communist tendency among the rural population provided grounds for the Communist Party of Nepal –Maoist (CPN-M) to take up arms against the State in February 1996.[3] Repression against villagers by the police in some of the districts of the mid-western region where the CPN-Maoist had a stronghold was argued to be the tipping point convincing the population to support the call to arms of the Maoists.[4]

The Maoist "people's war" began by Maoist cadres attacking a number of police posts in some remote districts. Because of their remoteness and inaccessibility these districts in the mid-western region had been isolated and neglected from the centre for too long.[5] The Maoists were largely successful in removing poorly-equipped police posts by killing their police personnel or forcing them to surrender and handing over their weapons. Displacing police from the villages along with other governmental offices such as Village Development Committee (VDC) offices, telecommunication offices, agricultural banks, etc created a power vacuum for the Maoist "People's Government" to fill.[6] The Maoists then established political, economic and socio-cultural committees to run the

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CMI Working Paper No 10; Deepak Thapa, 'The Making of the Maoist Insurgency' in Sebastian von Einsiedel, David M Malone and Suman Pradhan (eds), *Nepal in Transition. From People's War to Fragile Peace* (CUP 2012) 42-54; Sujeev Shakya, 'Unleashing Nepal's Economic Potential: A Business Perspectives' in Sebastian von Einsiedel, David M Malone and Suman Pradhan (eds), *Nepal in Transition. From People's War to Fragile Peace* (CUP 2012) 116-19.

[3] Prashant Jha, *Battles of the New Republic. A Contemporary History of* Nepal (C Hurst & Co 2014) 19; Sudheer Sharma, 'The Maoist Movement: Evolutionary Perspective' in Michael Hutt (ed), *Himalayan 'People's War' Nepal's Maoist Rebellion* (C Hurst & Co 2004) 50.

[4] Sharma, 'The Maoist Movement' (n 3) 45; Thapa, *A Kingdom Under Siege* (n 2) 68.

[5] Thapa, *A Kingdom Under Siege* (n 2) 52-80.

[6] Sharma, 'The Maoist Movement' (n 3) 50.

villages, collect tax and run cooperatives. They had “people's courts” in villages that would hear cases, pass judgements and implement punishment, mostly physical.[7]

The insurgency impacted 73 out of 75 districts of Nepal. The Government could not hold local elections after 1997 until 2017. By 2005, the presence of the government was limited only to the district headquarters; most of the rural areas were effectively under the control of the Maoists.[8] Started by a very small group of people and with home-made weaponry from the very remote villages in the mid-western region, the insurgency expanded to a fully-fledged guerrilla warfare, posing a serious security threat to the State.[9]

5.1.2. Human rights violations and violations of humanitarian law

Both the security forces and the Maoists committed serious human rights and humanitarian law violations during the conflict. In addition, in the later part, civilians also took up arms against the Maoists in certain areas, committing serious crimes.[10]

Human rights violations intensified after 2001 when the Maoist attacked the Western Division Headquarters of the Royal Nepal Army (RNA) and successfully looted modern weaponry.[11] This

[7] OHCHR, ‘Nepal Conflict Report. An Analysis of Conflict Related Violations of International Human Rights Law and International Humanitarian Law between February 1996 and 2 November 2006’ (October 2012) 90-92.
[8] Sharma, ‘The Maoist Movement’ (n 3) 50-56.
[9] International Crisis Group, ‘Nepal’s Maoist: Their Aims, Structure and Strategy’ (Asia Report No 104, 2005).
[10] Human Rights Watch, ‘Nepal’s Civil War: The Conflict Resumes’ (Briefing Paper, March 2006) <https://www.hrw.org/report/2006/03/28/nepals-civil-war-conflict-resumes/human-rights-watch-briefing-paper-march-2006> accessed 18 June 2017.

resulted in the declaration of a state of emergency and the deployment of the then Royal Nepal Army (RNA). Anti-terrorist legislation was promulgated, formerly declaring the Maoists as terrorists and providing wider powers to the security forces to arrest and detain people suspected of terrorist activities.[12] It defined terrorist activities very broadly,[13] and allowed preventive detention to pre-empt terrorist acts.[14] This resulted in detention of thousands of people who have not committed any crime,[15] for prolonged periods of time without judicial scrutiny, exposing detainees to torture, ill-treatment, disappearance, rape, sexual abuse and extrajudicial execution.[16] Those who suffered torture also included women and children.[17]

The global political context after 9/11 favoured the Nepali government as it received both technical and financial support from western States such as the US and the UK. As western

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[11] Shiva Gaunle, 'In Dang, everyone is on edge. There is fear, Bewilderment and Silence' Nepali Times (Issue 72, 14-21 December 2001) <http://nepalitimes.com/news.php?id=7339#.WmjhsK5l-> accessed 24 January 2018.

[12] Terrorist and Disruptive Activities (Prevention and Punishment) Act, 2058 (2002) Date of Royal Seal and Publication 28th Chaitra 2058 (10 April 2002) (TADA). First an ordinance was promulgated, later it was changed to an Act by the parliament.

[13] Terrorist and Disruptive Activities (Control and Punishment) Ordinance provides that '…any act to cause loss of, or damage to, or destruction of, the property' '…any act such as to gather people, give trainings' for carrying out terrorist such activities'. Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) 2001, s 3.

[14] TADA (n 12) s 9.

[15] Public Security Act (PSA) 1989 allowed for preventive detention for 90 days by order of an administrative officer. It can be extended for 6 months with further authorization from the Home Ministry and another 6 months subject to approval of an Advisory Board; similarly, TADO provides for preventive detention for up to 12 months. For a legal review of TADO and TADA and other security legislation, see International Commission of Jurist, 'Nepal: National Security Laws and Human Rights Implications' (August 2009) 13 <https://www.icj.org/wp-content/uploads/2012/04/Nepal_National-Security-Laws-Report_Themetic-Report_20091.pdf> accessed 10 January 2020.

[16] UNESC, Commission on Human Rights, 'Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Mission to Nepal*' (9 January 2006) UN Doc E/CN.4/2006/6/Add.5, para 22; OHCHR, 'Nepal Conflict Report' (n 7) 23.

[17] OHCHR, 'Nepal Conflict Report' (n 7) 158.

support started to increase, Nepal's immediate neighbour India also increased its military support to Nepal.[18] Nepal's army received not only materials but also technical and intelligence support, enabling it to develop a wider counter-terrorism strategy, developing a unified command bringing all three organs of the security forces: the Nepal Police,[19] Armed Police Force (APF)[20] under the RNA.[21]

The security forces were implicated in human rights violations throughout the conflict. According to the 2011 OHCHR conflict report, the police were held responsible for arbitrary arrest, detention, torture, including sexual abuse,[22] especially during the earlier phases and the APF for their involvement in extra-judicial killings and illegal detention.[23] The army after its deployment in late 2001 was accused of illegal detention, enforced disappearances, torture, extra-judicial killings, rape and sexual abuse.[24]

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[18] Amnesty International, 'Nepal: New Report shows Foreign Arms Fueling Conflict and Human Rights Abuses' (Press Release, 15 June 2005) <https://www.amnesty.org.uk/press-releases/nepal-new-report-shows-foreign-arms-fuelling-conflict-and-human-rights-abuse> accessed 17 May 2020; International Crisis Group (n 9).

[19] The NP falls under the Ministry of Home Affairs and operates under the Nepal Police Act 1955. It is headed by an Inspector General of Police.

[20] The Armed Police Force (APF) is a paramilitary police force, established in January 2001 to counter Maoist insurgency. The APF falls under the Ministry of Home Affairs also headed by an Inspector General of Police.

[21] Army functions under the Army Act 1959. It is headed by the Commander in Chief, appointed by the king on the recommendation of the Prime Minister. The decision of the use of the army is made by the king on the recommendation made by the Defence Council, chaired by the Prime Minister.

[22] OHCHR, 'Nepal Conflict Report' (n 7) 171-72.

[23] ibid 23, 36, 73.

[24] ibid 36, 96, 118; OHCHR, 'Conflict-Related Disappearances in Bardiya District' (December 2008); OHCHR, 'Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu, in 2003–2004' (May 2006).

The Maoists also employed brutal methods of punishment to terrorise people and spread fear in the community to maintain the party's hold.[25] People opposing Maoist ideology were often labelled as 'people's enemies'[26] exposing them to brutal acts such as cutting off arms, hands, legs or feet,[27] breaking limbs with an axe, a hammer, or crushing them with stones.[28] The 'people's courts' established in villages under Maoist control rendered severe punishment entailing beatings, fines, forced labour, public humiliation and execution.[29] Hundreds of children were abducted and recruited into the Maoist forces,[30] putting villagers under constant fear and forcing many to leave their homes. It was estimated that nearly 200,000 people were forcefully displaced during the conflict.[31]

In addition to the security forces and the Maoists, in some parts of the country, civilians organised as 'village defence forces' committed atrocities including murder, burning of houses, physical assault and looting.[32] Although these appeared to be acts of spontaneous retaliation by civilians against Maoist abductions, extortion and killings, evidence exists to show these groups receiving support from the State, mainly the army.[33]

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[25] Human Rights Watch, 'Between a Rock and Hard Place: Civilians Struggle to Survive in Nepal's Civil War' (Vol 16 No 12(C), October 2004).
[26] The 'people's enemy' would include those spying against them, providing information to the security forces and breaching Maoist rules.
[27] OHCHR (n 24) 138.
[28] ibid 140.
[29] ibid 140-42.
[30] Human Rights Watch, 'Children in the Ranks. The Maoist's Use of Child Soldiers in Nepal' (February 2007).
[31] Sonal Singh and others, 'Conflict induced internal displacement in Nepal' (2007) 23(2) Medicine, Conflict and Survival 103.
[32] Amnesty International, 'Nepal Fractured Country, Shattered Lives' (2005) ASA 31/063/2005.
[33] Human Rights Watch, 'Nepal's Civil War' (n 10).

Thus, Nepal's conflict involved different actors, including civilians, making the violence pervasive and requiring any TJ process to address this diverse nature of violations involving different actors.[34]

5.2. The political transition and the Peace Agreement

Until 2005, the conflict was between the government (mostly led by the Nepali Congress party)[35] and the Maoists. Several rounds of ceasefires and peace talks took place but without tangible result. Under the pretext of the political parties' failure to address 'Maoist terrorism', with the RNA's backing, King Gyanendra staged a coup in February 2005,[36] putting many political parties' leaders and activists under house arrest.[37] However, as the legitimacy of the monarchy was already eroded after the royal massacre of June 2001,[38] the coup became a catalyst uniting the main political parties and Maoists against the monarchy. India, which had traditionally been supportive of multiparty democracy with constitutional monarch,[39] increasingly started to side with the main political parties and their efforts to bring the Maoists into the mainstream political process.[40] Increasing Maoist links with separatists' movements in India and Nepal's reliance on other countries for arms and ammunition were matters of concern for India. Increasing alliances among the main political parties, including the Maoists, against the monarchy made India shift

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[34] ibid.
[35] For the period of 9 months, the Nepal Communist Party United Marxist Leninist (CPN-UML), was in the Government.
[36] 'Royal Proclamation of 1 February 2005' <http://www.nepalroyal.com/proclamations feb012005/> accessed 23 January 2018.
[37] Amnesty International, 'Nepal Human rights abuses escalate under the state of emergency' (2005) ASA 31/036/2005.
[38] Ten royal family members were massacred in a private family gathering in the palace on 1st June 2001.
[39] Sudheer Sharma, *The Nepal Nexus. An Inside Account of the Maoists, the Durbar and New Delhi* (Penguin Random House 2019) 124.
[40] ibid 221-24.

its position, making it possible for Nepal's mainstream political parties to have many meetings with Maoist leaders in India, where the latter had taken shelter.[41] This eventually led to an agreement between an alliance of 7 political parties and the Maoists to launch a joint protest to overthrow the monarchy, re-establish multiparty democracy, and for the Maoists to join peaceful democratic politics. [42]

Working with a number of international human rights organisations, Human Rights Organizations (HROs) in Nepal were galvanising international support in favour of Nepal finding a political solution to the conflict. They advocated for support in favour of a resolution in the UN Human Rights Commission (HRC)[43] to establish a field presence for the UN Office of the High Commissioner for Human Rights (UNOHCHR), with an investigatory and monitoring mandate.[44] The call of Nepal's human rights defenders to establish an Office of UNOHCHR was supported by the political parties,[45] and many members of the HRC. The Swiss-led resolution in the HRC was also supported by influential States like the US and the UK.[46] The political parties also agreed to a ceasefire to make the environment conducive for nationwide protests known as the *Jana-Andolan II* in April 2006 when hundreds of thousands of people took the streets for 19

[41] Sharma, *The Nepal Nexus* (n 39) 106, 161-162.
[42] Ibid.
[43] It was still the Human Rights Commission at that time.
[44] Frederick Rawski and Mandira Sharma, 'A Comprehensive Peace? Lessons from Human Rights Monitoring in Nepal' in Sebastian von Einsiedel, David M Malone and Suman Pradhan (ed), *Nepal in Transition: From People's War to Fragile Peace* (CUP 2012)175, 181-82.
[45] OHCHR, 'Human Rights Resolution 2005/78. Technical Cooperation and Advisory Services in Nepal' (25 April 2005) UN Doc E/CN.4/RES/2005/78.
[46] Rawski and Sharma (n 44) 182.

days.[47] In the end, these protests reinstated the parliament, ended 240 years of monarchy, and prepared the ground for a social and political transition in the country.

The Comprehensive Peace Agreement (CPA) was signed between the government and the Maoists in November 2006. [48] It did not only end the decade-long armed conflict but also promised an overhaul of the Nepali State by recognizing that social, political, economic and structural violence had given rise to the conflict. It also promised to draft a new Constitution by an elected constituent assembly, respect and protection of human rights and international humanitarian law,[49] not to encourage impunity,[50] establish a High-Level Truth and Reconciliation Commission (TRC)[51] and to make public the whereabouts of those disappeared within 60 days of the signing of the CPA.[52] The Maoists agreed to keep their army in different cantonments supervised by the UN until an agreement was reached for their reintegration and rehabilitation.[53] Thus, in addition to UNOHCHR monitoring violations of human rights, the political parties agreed to establish a United Nations Monitoring Mission in Nepal (UNMIN) [54] to extend support for the monitoring of arms and armed personnel of both sides and providing

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[47] 19 people lost their lives, and hundreds were injured during the protests. See OHCHR, 'The April Protests Democratic Rights and the Excessive Use of Force. Findings of OHCHR-Nepal's Monitoring and Investigations' (September 2006).

[48] 'Comprehensive Peace Accord Signed between Nepal Government And the Communist Party of Nepal (Maoist). 22 November 2006' (21 November 2006) s 3.1 <https://peacemaker.un.org/sites/peacemaker.un.org/files/NP_061122_Comprehensive%20Peace%20Agreement% 20between%20the%20Government%20and%20the%20CPN%20%28Maoist%29.pdf> accessed 20 June 2017 (hereafter CPA).

[49] ibid, s 7.1.1.

[50] ibid, s 7.1.3.

[51] ibid, s 5.2.5.

[52] ibid, s 5.2.3.

[53] ibid, s 4.1-4.4.

[54] UNSC, 'Resolution 1740 (2007). Adopted by the Security Council at its 5622nd meeting, on 23 January 2007' (23 January 2007) UN Doc S/RES/1740 (2007).

technical support for the planning, preparation and conduct of elections for the Constituent Assembly while also assisting in monitoring ceasefire agreement.[55]

5.3. Road to transitional justice in Nepal

Although the international community played a role behind the scene, helping the parties in negotiations, the CPA was mainly negotiated among the elites/political parties.[56] However, no process existed for input from civil society, no women could be found on the negotiation teams. Many aspects of the CPA including the provisions related to TJ remained vague and subject to different interpretation.[57]

In the absence of documentation of the process and content of the negotiations among the parties, it is difficult to ascertain what factors influenced the inclusion of a TRC in the CPA and what parties were envisioning to do to address impunity. However, during the conflict, Human Rights Defenders (HRDs) were active documenting and exposing atrocities committed by both sides of the conflict.[58] Taking enormous personal risks, they were also bringing many writs of *habeas corpus* in the courts challenging illegal detention and enforced disappearances practiced by the security forces.[59] Organising a number of protests in Kathmandu, family members of the disappeared had also exposed the problem of enforced disappearances, forcing the Government

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[55] ibid.
[56] Teresa Whitfield, 'Nepal's Masala Peacemaking' in Sebastian von Einsiedel, David M Malone and Suman Pradhan (eds), *Nepal in Transition. From People's War to Fragile Peace* (CUP 2012) 155-66; Prashant Jha, 'A Nepali Perspective on International Involvement in Nepal' in Sebastian von Einsiedel, David M Malone and Suman Pradhan (eds), *Nepal in Transition. From People's War to Fragile Peace* (CUP 2012)332, 333, 348, 355.
[57] Warisha Farasat and Priscilla Hayner, 'Negotiating Peace in Nepal. Implications for Justice' (ICTJ and IFP 2009) 22.
[58] Rawski and Sharma (n 44) 178-79.
[59] Farasat and Hayner (n 57)16.

to make the whereabouts of their loved ones public, resulting in the establishment of a Commission of Inquiry to investigate cases of enforced disappearances.[60] Working with a number of international human rights organisations[61] and the UN Human Rights mechanisms (such as the UN Working Group on Enforced Involuntary Disappearances (WGIED), UN Special Rapporteur on Torture), HRDs had prepared strong grounds for international support for human rights monitoring in Nepal.[62] Some countries had designated advisors to support the peace negotiations.[63] All these efforts were not only in favour of a peaceful resolution to the conflict but also to address issues that gave rise to the conflict including the issue of human rights violations. All these could be argued being factors which contributed to the human rights language in the CPA and political parties being receptive to have some mechanism like the TRC to address the legacies of past human rights violations.

After signing the CPA, the parties reinstated the Parliament, which adopted an Interim Constitution of Nepal in 2007. The Constitution did not only annex the peace agreement to the Constitution providing it a constitutional status, but also incorporated explicit provisions for

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[60] International Commission of Jurists, 'Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity' (June 2012) 11-12.

[61] A number of human rights organizations such as the Amnesty International (AI), Human Rights Watch (HRW), and International Commission of Jurists (ICJ) were working closely with the local human rights activists to amplify the voices of victims and to do international advocacy.

[62] Because of the cases that the HRDs submitted before the UN mechanisms, such as the UNWGIED, in 2004, the UNGIED had come with the report that he had recorded the highest number of new cases of enforced disappearances from Nepal. Also see UNESC, Commission on Human Rights, 'Civil and Political Rights, Including the Questions of: Disappearances And Summary Executions. Question of enforced or involuntary disappearances Report of the Working Group on Enforced or Involuntary Disappearances' (23 December 2004) UN Doc E/CN.4/2005/65.

[63] Farasat and Hayner (n 57) 21.

effective implementation of international treaties and agreements to which the State is a party,[64] repealed all discriminatory laws,[65] and made arrangements for appropriate relief, recognition and rehabilitation of the families of those who died and made disabled after sustaining injury during the armed conflict.[66] It also had provisions for relief to the families of victims of disappeared based on the report of the Investigation Commission constituted to investigate the cases of enforced disappearance during the course of the conflict,[67] rehabilitating displaced persons,[68] constituting a high-level Truth and Reconciliation Commission to investigate the facts about those persons involved in serious violations of human rights and crimes against humanity committed during the course of conflict, and to create an atmosphere of reconciliation in society.[69] All these provided important grounds for the TJ process in the country.

Soon after the end of conflict, victims and civil society organisations started to galvanise their efforts to demand a comprehensive TJ process.[70] The UNOHCHR also shifted its focus from monitoring and investigation to more towards demanding accountability for the past crimes.[71] The early approach of the political parties to establish a TRC through the Commission of Inquiry Act, was rejected by victims and civil society as Commissions of Inquiry (CoIs) had a poor record in Nepal, failing to uncover truth and facilitate justice.

[64] Interim Constitution of Nepal 2007 (Interim Constitution) art 33(m).
[65] ibid, art 33 (n).
[66] ibid, art 33 (p).
[67] ibid, art 33 (q).
[68] ibid, art 33 (r).
[69] ibid, art 33 (s).
[70] Rawski and Sharma (n 44) 198.
[71] ibid.

For example, in recent decades Nepal established more than 40 different Commissions of inquiry to investigate cases involving human rights violations under this Act, but hardly any recommendations of these Commissions have been implemented.[72] Reports of many of these Commissions were not even made public despite repeated public calls.[73] Even in 2006, immediately after the political change, a Commission known as the *Rayamajhi Commission* (named after the chair of the Commission) was established to investigate cases of human rights violations during the *Jana Andolan II*, which had resulted in the death of 24 people and injuries to many. However, this Commission did not have the mandate to look into cases of the conflict era which was kept for the TRC. The Commission provided a report to the Government recommending to suspend certain individuals from their public posts for their roles in the atrocities, to conduct criminal investigation and prosecution against those who were directly involved in the atrocities, including excessive use of force.[74] As these were cases where the political parties in the Government did not have direct responsibility, as they dated solely from the period of the royal regime, many had hoped that the recommendations of the Commission would be implemented. However, as had happened before, the report of the Commission was not made public and the recommendations were not implemented.

Many compared the *Rayamajhi Commission* with the *Mallik Commission,* which was established immediately after the restoration of multiparty democracy in 1990. The *Mallik Commission* investigated allegations of human rights violations during the *Jana Andolan I* in 1990 and

[72] International Commission of Jurists (n 60) 7.
[73] ibid.
[74] ibid.

recommended legal action against those involved in those violations, among others.[75] However, its recommendations were never implemented. The very same people who were active in suppressing the movement in 1990 later came to power, preventing any efforts towards accountability, some even suppressing the *Jana Andolan II.*[76]

It is important to note here that four Commissions were already set up to investigate enforced disappearances during the conflict: the Malego Committee; the Neupane Committee; the Detainee Investigation Taskforce; and the High-Level Investigation on Disappeared Persons.[77] However, these committees or Commissions could not properly investigate cases of enforced disappearances and make their fate or whereabouts public.[78]

Because of these experiences and contexts, victims and civil society demanded the TRC to be established through an Act of parliament ensuring the mandates and powers of the TRC to establish truth and to contribute to justice.[79] In the meantime, the Supreme Court had also issued a landmark decision ordering the Government to establish a Commission of Inquiry on enforced disappearances to investigate those cases of enforced disappearances. It had also ordered the Government to enact legislation criminalising enforced disappearances. This decision of the

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[75] ibid, 7-8.
[76] For example, Kamal Thapa was the Minister in 1990 and named by the Mallik Commission as one of the person to be prosecuted. However, the Commission's report was not implemented. He again came as the Home Minister in the Kings cabinet, also involved in the suppression of protestors. 'Gyanendra's men to be tried for atrocities' *DNA* (Kathmandu, 5 May 2006) <https://www.dnaindia.com/world/report-gyanendra-s-men-to-be-tried-for-atrocities-1027918> accessed 12 June 2021.
[77] International Commission of Jurists (n 60) 11.
[78] ibid.
[79] Mandira Sharma, 'Transitional justice in Nepal: Low Priority, Partial Peace' in Deepak Thapa and Alexander Ramsbotham, *Two steps forward, one step back. The Nepal peace process* (2017) 26 Accord 2017) 33; Farasat and Hayner (n 57) 24.

Court had come in response to dozens of writs of habeas corpus that were filed on behalf of those disappeared during the conflict.

However, as the demand for a comprehensive process started to take some ground, different parties expressed different concerns as they seemed to have different ideas and understanding in mind in relation to the work of the TRC when they signed the CPA. Since 2006, different parties have continued to express different interpretations of the 'spirit of the CPA.[80] This was also expressed through the draft legal framework that the representatives of different political parties prepared for the TRC. For example, in 2007, the Government formed a drafting committee to draft the legal framework for the TRC, with representatives of different political parties. The draft prepared by the committee proposed amnesty to those who committed crimes 'while performing their duty' or 'achieving their political objectives.'[81] However, the draft was widely criticised, arguing that it would promote impunity, offering *de facto* blanket amnesty to those involved in the past crimes. It was feared that all the crimes committed by the security forces could be considered as being committed 'while performing their duty' and the Maoists' in 'achieving political objectives'.[82]

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[80] Sharma (n 79) 32-36; Farasat and Hayner (n 57) 20.
[81] Sharma (n 79) 33.
[82] Rawski and Sharma (n 44) 198-99; Amnesty International, 'Nepal draft Truth and Reconciliation Commission Bill risks undermining justice' (Press release, 14 August 2007) ASA 31/007/2007 (Public) <https://www.amnesty.org/download/Documents/64000/asa310072007en.pdf> accessed 13 January 2020; Human Rights Watch, 'Nepal: Truth Commission Bill Disregards Victims' Rights. Draft Bill Fails to Meet International Human Rights Standards' (22 August 2007) <https://www.hrw.org/news/2007/08/22/nepal-truth-commission-bill-disregards-victims-rights> accessed 13 January 2020; International Center for Transitional Justice, 'Nepal. Comments on the Draft Truth and Reconciliation Bill' (August 2007); OHCHR, 'OHCHR-Nepal raises concerns about Truth and Reconciliation Commission Bill' (Press release, 3 August 2007) <https://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202007/AUG

Civil society and victims demanded amendment to the draft following wider consultations, including with victims and civil society. [83] Their call was supported by the UNOHCHR and other international organisations.[84] This pressure led to the decision of the Ministry for Peace and Reconstruction (MOPR) to agree to consultations while finalising the Bill. The author was privy to some of the consultations, where victims had articulated their need for compensation, truth, assurance to act on the truth revealed and to bring those responsible to justice.

After 19 different consultations, the MOPR finalised and presented two draft Bills to the parliament to establish two Commissions; the Truth and Reconciliation Commission (TRC) and the Commission of Inquiry on Enforced Disappearances (COIED). [85] Bills prevented the Commissions from recommending amnesty for four categories of violations (extra-judicial execution, enforced disappearances, torture and rape or sexual abuse) but promoted amnesty and reconciliation in other cases.[86]

2007/2007_08_03_HCR_TRCB_E.pdf> accessed 13 January 2020.

[83] Rawski and Sharma (n 44) 198-99.

[84] Amnesty International, 'Nepal draft Truth and Reconciliation Commission Bill risks undermining justice' (n 82); Human Rights Watch, 'Nepal' (n 82); International Center for Transitional Justice, 'Nepal' (n 82); OHCHR, 'OHCHR-Nepal raises concerns about Truth and Reconciliation Commission Bill' (n 82).

[85] Bill were finalised after having consultations in different regions in Nepal, see UNGA, Human Rights Council, 'Annual Report of the United Nationals High Commissioners for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General*. Analytical study on human rights and transitional justice' (6 August 2009) UN Doc A/HRC/12/18, para 16; Advocacy Forum, 'Nepal Transitional Justice at Crossroad' (2014) Year 4, vol 1, Special brief <http://advocacyforum.org/downloads/pdf/publications/tj/transitional-justice-at-crossroads-2014.pdf> accessed 22 May 2020; Sharma (n 79) 34.

[86] Truth and Reconciliation Bill 2009, s 25(2).

However, these Bills were not passed as the parties in parliament could not agree on the Commissions' mandates, especially on the provisions preventing them from recommending amnesty and requiring prosecution in those four categories of cases.[87] In May 2012, the Maoist-led government withdrew both draft Bills from the parliament and instead approved an ordinance arguing that considering the lack of consensus among the parties on the mandates of the TRC, the ordinance was the only possible way to adopt a legal framework to establish the TJ mechanism, i.e. the TRC.[88] Although it was claimed that the ordinance was similar to the Bills presented in parliament, the ordinance had removed the restrictions that the earlier Bills had put on the Commissions being able to recommend amnesty in certain violations. Instead, it empowered the TRC to recommend amnesty irrespective of the violations, drawing significant criticism.[89] The ordinance was legally challenged in the Supreme Court,[90] resulting in the Court striking it down for its incompatibility with its previous decisions, the Constitution of Nepal and international law.[91]

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[87] Advocacy Forum, 'Nepal Transitional Justice at Crossroad' (n 85).
[88] Siddhi B Ranjitkar, 'Dr. Baburam Bhattarai Stays On-Part 43' *Kathmandu Metro* (20 January 2013) <http://www.kathmandumetro.com/news-analysis-and-views/dr.-baburam-bhattarai-stays-on-part-43> accessed 9 September 2019.
[89] Accountability Watch Committee (AWC), 'Amendments required in the Transitional Justice Bill before the Legislature-Parliament' (22 April 2014); Amnesty International, 'Nepal: Reject Draft Truth and Reconciliation Bill: Proposed Measure Contravenes International Law' (Press Release, 17 April 2014) <https://www.amnesty.org/en/press-releases/2014/04/nepal-reject-draft-truth-and-reconciliation-bill/> accessed 9 September 2019; OHCHR, 'An OHCHR Analysis of the Nepal Ordinance on Investigation of Disappeared People, Truth and Reconciliation Commission, 2012' (December 2012) <https://www.ohchr.org/Documents/Press/Nepal_OHCHR_Analysis_TJ_Ordinance_Dec_2012.pdf> accessed 9 September 2019; OHCHR, 'OHCHR Comments on the Nepal "Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance – 2069 (2013)" (3 April 2013) <http://www.ohchr.org/Documents/Countries/NP/OHCHR Comments_TRC_Ordinance.docx> accessed 9 September 2019.
[90] *Madhav Kumar Basnet et al v Office of the Prime Minister and Council of Ministers and Others* (2014) Issue No 9 Decision No 9051 Ne Ka Pa 2070 [2014] 1101.
[91] ibid.

5.3.1. Truth and justice: A difficult debate

Transitional Justice was relatively a new vocabulary for Nepali actors although having a commission of inquiry in cases involving human rights violations had been a longstanding practice. When victims and civil society started to demand TJ as the process of addressing past atrocities by adopting different mechanisms and processes, including prosecution, they continued to face difficulties as the political parties persisted to advocate that 'truth' and 'reconciliation' constituted the spirit of the CPA, not criminal accountability.[92] They argued that attempts to prosecute conflict era cases would derail the peace process.[93]

Those closely observing the negotiation of the CPA report that the political parties had agreed to the TRC with the South African TRC in mind, where they would document some truth but provide amnesty to everyone.[94] It is also noted that considering the context of Nepal where criminal prosecution of past crimes had never been taken seriously, at the time of drafting the CPA, no political leader had anticipated that the issue of accountability would emerge in the way

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[92] Farasat and Hayner (n 57) 20; Aditya Adhikari and others, *Impunity and Political Accountability in Nepal* (The Asia Foundation 2014) 7, 61.

[93] Trishna Rana, 'Truth, justice, constitution' *Nepali Times* (23-29 August 2013) <https://archive.nepalitimes.com/regular-columns/Here-We-Go/Here-we-go-truth-justice-constitution,155> accessed 9 September 2019.The Maoists argue that the sufferings of wartime were transient but the political transformations it brought are permanent. They imply that they should get credit for their achievements and that the violence they caused should be forgotten. Aditya Adhikari, 'The revolutionary and the lawyer' *the Record* (30 July 2018) <https://www.recordnepal.com/the-revolutionary-and-the-lawyer> accessed 5 June 2020.

[94] Farasat and Hayner (n 57) 20-21.

it did in subsequent years.[95] They seem to have thought that the TRC would be as any other past Commissions, posing no threat of prosecution. [96]

However, the ground was shifting this time. The political parties' proposal to provide amnesty to those involved in past crimes was widely criticised. Victims and civil society started to demand a comprehensive TJ process that deals with, truth, justice and reparation, not allowing amnesty to those involved in serious violations. Although the CPA is silent about amnesty, it had a provision allowing the withdrawal of 'accusations, claims, complaints and under consideration cases levelled against various individuals due to political reasons'.[97] While the discussion on the mandates and scope of TJ mechanisms, who can or cannot be amnestied were still being debated, the political parties agreed to release political party activists detained or imprisoned on various charges, including in criminal cases not related to the conflict and hundreds involved in serious conflict-era violations, promoting a sense of impunity.[98]

It is important to note that some HRDs in the country were also made aware of the political parties' tacit agreement not to prosecute anyone involved in past crimes as early as 2008. For example, a group of HRDs (the author was one of them) met then Prime Minister, Girija Prasad Koirala, demanding TJ mechanisms that include prosecution for those involved in serious violations. The Prime Minister revealed that he had assured no prosecution to both the army and

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[95] CS 12, 24 November 2019, Kathmandu.
[96] ibid.
[97] CPA (n 48) s 5.2.7.
[98] Advocacy Forum, 'Evading Accountability by Hook or by Crook' (2011) Year 2 vol 1, Occasional Brief <http://www.advocacyforum.org/downloads/pdf/publications/evading-accountability-by-hook-or-by-crook.pdf> accessed 20 December 2020); NHCR and OHCHR, 'Remedies and Rights Revoked. Case Withdrawals for Serious Crimes in Nepal. Legal Opinion' (June 2011).

the Maoists, when responding to their fear of criminal prosecution.[99] He argued that for the peace and prosperity of the country, both these armed forces would be engaged in development projects, building the nation.[100]

It was clear that TJ was not on the agenda of the major political parties. The long delay in the management of Maoist PLAs and the election of the Constituent Assembly also over-shadowed the TJ process. Despite the signing of the peace agreement, both parties (the Maoists and the Army) remained suspicious of each other.[101] There were fears that the Maoists would capture State power and equally that the army would stage a coup.[102] In the midst of this mistrust, the Maoists had established the Young Communist League (YCL), bringing young people into the People Liberation Army (PLA). Many suspected that the Maoists had inflated the numbers of new recruits, placing them in cantonment while leaving its hard-core fighters out in the public sphere. It was alleged that it was aimed at spreading fear and influencing the result of the forthcoming election.[103] Other political parties sided with the army. Neither the army nor the Maoists agreed to vet their cadres for their involvement in past abuses.[104] Under the pretext of this threat to the peace process, hard-core issues of accountability and vetting were not pursued by the UN and other international actors that were actively engaged with the Government and other political actors. A lack of vetting or any other reform measures in the security forces and

[99] Author was present at this meeting.
[100] ibid.
[101] Ian Martin, 'The United Nations and Support to Nepal's Peace process: The Role of the UN Mission in Nepal' in Sebastian von Einsiedel, David M Malone and Suman Pradhan(eds), *Nepal in Transition. From People's War to Fragile Peace* (CUP 2012) 224.
[102] ibid 225.
[103] Thomas A Marks, 'Terrorism as Method in Nepali Maoist Insurgency, 1996–2016' (2017) 28 Small Wars & Insurgencies 81, 85.
[104] Martin (n 101) 211-14.

public institutions resulted in those alleged to have been involved in human rights violations being promoted to higher positions,[105] making the TJ process even more difficult in months and years to come.

Other institutions, like the NHRC, remained weak as its recommendations to prosecute those involved in human rights violations during the conflict remained unimplemented. Political interference in the appointment of the Commissioners also made the Commission politically divided, weakening its strength to make it capable to push for truth, justice and accountability.[106] In summary, except offering some monetary relief to some victims for the harm they suffered,[107] the Government remained indifferent to broader issues of TJ.[108]

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[105] International Commission of Jurists, 'Nepal: suspend promotion of new police chief. Probe, don't promote, alleged human rights abuser' (18 September 2012) <https://www.icj.org/nepal-suspend-promotion-of-new-police-chief/> accessed 13 May 2020; Amnesty International, 'Nepal: Prosecute, Don't Promote, Notorious Army Officer' (Press release, 22 July 2012) <https://www.amnesty.org/en/press-releases/2012/07/nepal-prosecute-don-t-promote-notorious-army-officer/> accessed 13 May 2020; OHCHR, 'UN concerned over appointment of Cabinet Minister alleged to have committed human rights violations' (Press Statement, 5 May 2011) <https://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year% 202011/May/2011_05_05_PR_Agni_Sapkota_E.pdf> accessed 13 May 2020.

[106] For example, the NHRC had done investigation of extra-judicial killings of 19 unarmed Maoist cadre in Doramba by the Military and many other cases of enforced disappearances during the conflict.

[107] The Government rolled out compensation programme for conflict victims, which was later changed to interim relief. For more discussion see Sarah Fulton and Mandira Sharma, '*Raahat ki Aahat*: Reparation in Post-Conflict Nepal' in Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (2nd edn, Brill-Nijhoff 2020) 710-45; Elena Naughton, 'Pursuing Truth, Justice, and Redress in Nepal: An Update on the Transitional Justice Process' (February 2018) ICTJ Briefing; Govinda Sharma and others, *From Relief to Redress: Reparation in Post-conflict Nepal* (Reparations, Responsibility and Victimhood in Transitional Societies 2019).

[108] Human Rights Watch and Advocacy Forum, 'Waiting for Justice. Unpunished Crimes from Nepal's Armed Conflict' (September 2008); Advocacy Forum and Human Rights Watch, 'Indifference to Duty. Impunity for Crimes Committed in Nepal' (2010); Human Rights Watch. 'Adding Insult to Injury. Continued Impunity for Wartime Abuses in Nepal' (December 2011)

Having suffered from an entrenched problem of impunity and having had many 'commissions of inquiry' in the past failing to contribute to justice, allowing *de facto* amnesty to perpetrators, victims and civil society however continued to demand that the process would ensure both truth and justice, not juxtaposing one versus the other.[109] Some of these factors led HROs to design litigation strategies, not only to sustaining TJ agenda but also engaging the judiciary in TJ issues, forcing it to contribute significantly in shaping the TJ agenda today.

5.3.2. Litigation and role of the judiciary in shaping Nepal's TJ agenda

Informed of the tacit agreement of the parties to provide de-facto amnesty to those involved in past atrocities and the power balance posing challenges to a meaningful TJ process in the country, some HROs developed litigation strategies, helping victims to bring cases to the courts and to involve the judiciary in TJ issues to deepen the discourse on the State's legal obligation to provide effective remedies to victims of past crimes.

As a part of this strategy, HRDs assisted victims around the country to file complaints with the local police and courts demanding investigations, seeking compensation, while also organising networks of victims in many conflict-affected districts. Their call for investigation and prosecution was also supported by the UNOHCHR as it had also investigated a number of violations that took place during the conflict and had recommended prosecutions to the

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<https://www.hrw.org/report/2011/12/01/adding-insult-injury/continued-impunity-wartime-abuses-nepal> accessed 20 January 2020.

[109] Nepal has more than 40 commissions of inquires in recent history, they are considered to be promoting impunity than addressing, see International Commission of Jurists (n 60).

Government.[110] The police would refuse to register such complaints and investigate crimes committed during the conflict stating that they would come under the jurisdiction of the TRC.[111] As the police is the only institution empowered to investigate crimes in Nepal,[112] the refusal to accept complaints and investigate cases meant the end of any possibility of getting justice through the normal criminal justice system. However, the litigation strategies helped to engage the judiciary and contributed significantly to the TJ landscape in the country.[113] The case of Maina Sunuwar was an important case in this regard.

Maina Sunuwar was 15 years old when she was arrested by army personnel in early 2004 and was subjected to enforced disappearance. The Army and all other public offices denied her arrest and detention. No investigation was done by the police under the pretext there was no law criminalising enforced disappearance. As hardly any cases involving the army had been raised considering the threats involved, HRDs along with family members took enormous risk in this case, not only to investigate it to establish the involvement of the army in her arrest and detention but also by mobilising mounting national and international pressure, leading up to the exhumation of her body.[114] Evidence gathered established that she was tortured to death in an

[110] OHCHR, 'Report of investigation into arbitrary detention' (n 24); OHCHR, 'Conflict-Related Disappearances in Bardiya District' (n 24).
[111] To prevent the investigation in Dekendra Thapa's case the Prime Minister publicly opposed investigation, Attorney General ordered the prosecutor, not to prosecute.
[112] Upon whose investigation, the prosecutor makes a decision whether to file prosecution or not. Government Cases Act 1992, s 3-17.
[113] National Judicial Academy, 'Study Report On Execution Status of Supreme Court and Appellate Court Orders/Judgments relating to Transitional Justice 2016' (2016) 58-97.
[114] OHCHR, 'The torture and death in custody of Maina Sunuwar. Summary of concerns' (December 2006); OHCHR, 'Nepal Conflict Report' (n 7) 135-37.

army barrack.[115] A complaint was registered with police to investigate the case as murder but no progress was made in the investigation and prosecution. As victims in Nepal have no direct access to the courts to demand prosecution, innovatively using writ jurisdiction, a case was submitted to the Supreme Court, making it possible for the Supreme Court to lay down a number of principles that provided a way out in a number of other cases of similar nature and subsequent discussions on TJ mechanisms.

In response to the argument of the Government and the army that the cases from the conflict would be dealt by the TRC, once established,[116] the Supreme Court asserted that justice cannot be suspended on the basis that the remedy may be provided by the yet to be established TJ mechanisms, the mandates of which were not even confirmed.[117] Secondly, the Court held that a TJ mechanism, in this case a TRC, cannot supersede the right to justice; once they are established, they complement each other.[118] Thirdly, the Court stressed that police have the obligation to launch a criminal investigation when an allegation of murder comes to its notice and the prosecutor to prosecute if the evidence warrants it, irrespective of the context of conflict. The army had also argued before the Court stating that the persons responsible had already been court-martialled and they should not be prosecuted twice for the same case.[119] However, the Court rejected this, stating that a case of murder of a civilian by the army does not come under

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[115] Advocacy Forum, 'Maina Sunuwar. Separating Fact from Fiction' (2010); OHCHR 'Nepal Conflict Report' (n 7) 135-36; OHCHR, 'The torture and death' (n 114).
[116] Advocacy Forum (n 115).
[117] ibid.
[118] ibid.
[119] Three officers were not court martialed for the murder but for not using the proper interrogation techniques. Thus, army had claimed the principle of double jeopardy, which court stated does not apply in this case as they were not prosecuted for murder. OHCHR 'Nepal Conflict Report' (n 7) 135-37.

military court jurisdiction.[120] Furthermore, recognising the considerable delay in the investigation, the Court also ordered the police and prosecutor to complete the investigation within three months, resulting in the prosecutor charging four army officers for murder *in absentia* and filing charges in the District Court in 2008.[121]

The precedent set in this case opened up the possibility for other families of victims of extra-judicial killing to file complaints, seeking criminal investigation through the filing of a complaint known as First Information Report (FIR).[122] From 2006 to 2011, more than 120 FIRs were registered throughout the country.[123] HRDs not only accompanied those victims, they also continued to advocate for the implementation of court orders. For the first time in Nepal's history, so many victims had filed complaints against high-ranking officials (including police, army and politicians) demanding criminal investigation and prosecution. In many of these cases, the courts ordered investigation and prosecution, putting the government under pressure to address the past either by establishing TJ mechanisms or using the criminal justice system.[124]

Capitalising on the momentum created by these FIRs and mandamus orders in those cases, a strategy was built to file many other Public Interest Litigation (PIL) petitions, including those challenging the TRC ordinance,[125] objecting to the withdrawal of cases[126] and seeking

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[120] Three officers were not court martialed for the murder but for not using the proper interrogation techniques. Thus, army had claimed the principle of double jeopardy, which court stated does not apply in this case as they were not prosecuted for murder. ibid.
[121] Advocacy Forum (n 115).
[122] Preliminary information of crime, seeking criminal investigation.
[123] Advocacy Forum and Human Rights Watch, 'Waiting for Justice. Unpunished Crimes from Nepal's Armed Conflict' (September 2008).
[124] ibid.
[125] *Basnet* (n 90) 1101.

compensation in conflict-related cases[127] reached the Supreme Court. This resulted in a number of decisions and rulings requiring the government to develop a legal framework for TJ through a consultative process, involving victims and civil society,[128] preventing amnesty for gross violations,[129] seeking inputs from experts and people with knowledge and expertise in the field of human rights and conflict mitigation,[130] requiring a TJ process that includes both truth and justice.

Along with these litigation initiatives, HRDs were also bringing jurisprudence developed at international level on victims' right to effective remedy into national jurisdiction. Many of these cases referred to jurisprudence, including from Latin America, informing the judiciary about the developing jurisprudence on these subjects, which were reflected in the decisions of the Court. For example, referring to UN documents and jurisprudence from Latin American courts developed since the Barrios Altos case,[131] the Supreme Court reasoned that amnesty is impermissible in cases of gross violations where a duty to prosecute exists[132] as it impairs the

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[126] *Government of Nepal on behalf of Pawan Kumar Patel v Gagan Dev Raya Yadav et al* (2009) Issue No 9 Decision No 8013 Ne Ka Pa 2065 [2009] 1108,1113-114; *Madhav Kumar Basnet et al v Government of Nepal and Others* (decided on 23 February 2011) SC Writ No 065-WO-0357, 2-4; for further debates, see International Commission of Jurists, 'Authority Without Accountability' (May 2013) 54-60.

[127] *Liladhar Bhandari v Office of the Prime Minister and Council of Ministers et al* (2009) Issue No 9 Decision No 8012 Ne Ka Pa 2065 [2009] 1086, 1089.

[128] *Basnet* (n 90) 1101, 1155 [56(e)].

[129] *Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal v Government of Nepal, Ministry of Home Affairs and Others* (2007) Issue No 2 Decision No 7817 Ne Ka Pa 2064 [2007] 169, 246.

[130] *Basnet* (n 90) 1101.

[131] *Barrios Altos Case* (*Chumbipuma Aguirre et al v Peru*), Inter-Am Ct HR (ser C) No 74 (2001) [41].

[132] *Suman Adhikari et al v Office of the Prime Minister and Council of Ministers and Others* (2015) Issue 12 Decision No 9303 Ne Ka Pa 2071 [2015] 2069 para 69-70.

rights of victims to have effective remedies.[133] Working with the media, HRDs were maximising the coverage of these cases and the jurisprudence the courts developed.[134]

5.3.3. Misleading narratives of victims' needs

HRDs and lawyers (author was one of them) involved in these litigations were well aware of the extent of impunity in the country and of the *de facto* amnesty perpetrators enjoyed which made the justice system work only in favour of those in power, continuously subjugating lower strata of society as second-class citizens, and they were seeking to change this. They were also well aware of victims' need for truth, reparation, justice and reforms of public institutions, among others. As early as 2009, together with the International Centre for Transitional Justice (ICTJ), Advocacy Forum had conducted a study to understand victims' expectations from the TJ process.[135] The research had highlighted compensation being the immediate need along with other services such as education and medical treatment.[136] HRDs, informed of these, were advocating for a comprehensive TJ process that includes these different components of TJ, including prosecution.

Litigation strategies naturally require legal knowledge, and they were designed by lawyers, exploring how law could be used as a tool to expand victim's rights. These litigation processes

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[133] ibid.

[134] Different media had a person to cover impunity and TJ issues, who were also provided trainings and briefings by HRDs.

[135] International Centre for Transitional Justice and Advocacy Forum, 'Nepali Voices. Perception of Truth, Justice, Reconciliation, Reparations and The Transition in Nepal' (2008) <http://www.advocacyforum.org/downloads/pdf/publications/itj-nepali-voices-final.pdf> accessed 10 December 2020.

[136] ICTJ and Advocacy Forum, 'Nepali Voices. Perception of Truth, Justice, Reconciliation, Reparations and The Transition in Nepal' (2008) 45.

were also significantly empowering for victims as they had taken the lead in many of the petitions. Victims had started to use law, claiming their rights, seeking remedies. For the first time, they had been able to challenge high-ranking State officials and the Supreme Court had ruled in their favour in many cases. They had enjoyed pro-bono support of many senior lawyers, extending solidarity to their call for truth, justice and reparation. Although many victims were supported to bring individual cases demanding investigation, prosecution, the wider litigation strategy also included bringing PIL cases before the Supreme Court seeking orders for reforms of laws and policies that address victims' immediate needs, including for instance for a transparent and accessible interim relief programme and expansion of understanding of reparation.[137] Litigation was designed also to help unpack understanding of reparation to make it recognise victims' rights and the State's obligation.[138] It also included litigation, demanding a transparent process in TJ law-making that ensures consultations with victims, demanding legal and institutional reforms concerning several issues.[139] The outcome of these processes had opened greater space for negotiating truth, reparation and measures for non-recurrence in the context of TJ and also created a vibrant discussion on some of the issues relating to accountability which were neglected for decades in Nepal.

As the litigation work, combined with advocacy work was strategic, as discussed above, the cases started to trigger national debates on TJ in general and impunity in particular. However, this started to be read by some as TJ discourse being focused on the issue of amnesty and

[137]Advocacy Forum, 'Evading Accountability' (n 98).
[138] *Bhandari* (n 127) 1086.
[139] *Sunil Ranjan Singh et al v Office of the Prime Minister and Council of Ministers and Others* (2013) Issue 12 Decision No 8933 Ne Ka Pa 2069 [2013] 1826.

impunity, leaving other aspects of TJ behind.[140] Instead of expanding the debates on other aspects of TJ such as truth, reparation and guarantee of non-recurrence, also maximising the outcomes of these cases and court rulings, politicians and some western researchers argued that issues of prosecution which these HRDs and organisations focused on were not the priority for victims in Nepal[141] and that these processes were driven by lawyers and 'elites', depriving victims of their agency.[142]

For the first time in the history of Nepal, some momentum against impunity had started to be built in an organised way and political parties and Government were obviously nervous. As such findings of western 'researchers' provided legitimacy to the arguments of these political actors with interests to avoid accountability, findings of their 'research' were widely disseminated by political actors in the country, including through organising public events.[143] The Government also started to target victims and organisations bringing cases before the criminal justice system, stating that prosecution was not the priority of victims, but was imposed by the western world, aimed to derail the peace process.[144] Those HROs and lawyers using the law as a tool to push for

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[140] Simon Robins, 'Transitional Justice as an Elite Discourse: Human Rights Practice Where the Global Meets the Local in Post-conflict Nepal' (2012) 44 Critical Asian Studies 3, 6.
[141] Ibid.
[142] Robins (n 140) 6.
[143] Author was invited to one of the events in Kathmandu where donors, political party actors, victims and civil society were invited to share the findings of the research.
[144] 'Nepal's Maoist party are demanding withdrawal of civil war-era cases against UCPN-Maoist chairman Pushpa Kamal Dahal 'Prachanda' and other leaders from regular courts and repeal of Supreme Court verdicts, saying there was a conspiracy to derail the peace process….. Sources said the demand has come as the Maoists feel they may be jailed if cases of abuses are proven against them by the courts'. Anil Giri, 'Nepal's Maoists want withdrawal of war-era cases' *Business Standard* (Kathmandu, 21 April 2016) <https://www.business-standard.com/article/news-ians/nepal-s-maoists-want-withdrawal-of-war-era-cases-116042101166_1.html> accessed 31 May 2020.

accountability and the TJ process were accused of doing this for 'dollars'.[145] As victims were also divided based on political ideology, they also started to blame one another, for going or not going to the courts demanding criminal accountability.[146]

Compared to other institutions, the judiciary in general and the Supreme Court in particular enjoyed public confidence. This confidence was built through bold decisions in favour of citizens' rights even during the Panchayat.[147] The Supreme Court had also been seen guarding the principle during the state of emergency in defending the rights of citizen, ordering releases of a number of detainees accused of being 'terrorists'.[148] It had also questioned the legality and constitutionality of some of the decisions by the King after taking executive powers in 2005, when political parties were weakened to defend democratic space.[149] Some of the judges had maintained a high level of legal knowledge demonstrating their understanding to international human rights standards and jurisprudence and bringing them onto the national level, guarding the

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[145] Kanak Mani Dixit, 'Dollar Farming' *Himal Khabarpatrika* (14 April 2013) <https://kanakmanidixit.com/%E0%A4%A1%E0%A4%B2%E0%A4%B0%E0%A4%95%E0%A5%8B-%E0%A4%96%E0%A5%87%E0%A4%A4%E0%A5%80/> accessed 12 May 2020; Sneha Shrestha, 'The Curious Case of Colonel Kumar Lama: Its Origins and Impact in Nepal and the United Kingdom, and Its Contribution to the Discourse on Universal Jurisdiction' (TLI Think! Paper 2/2018) <http://dx.doi.org/10.2139/ssrn.3105720> accessed 20 December 2020.

[146] Although efforts are been made to bring all victims groups together, victims closed to the Maoist ideologies and the rests have organized themselves in different banners. Those, victims seen close to the Maoist are seen to be soft on prosecution, focusing more on compensation and reparation.

[147] Saroj Bista, 'Judicial Activism In Nepal (Analysis Of The Development Of Public Interest Litigation In Nepal)' (*Saroj Bista's Blog,* 20 February 2017) <https://bistasarojlaw.blogspot.com/2017/02/judicial-activism-in-nepal-analysis-of.html> accessed 22 December 2020.

[148] Amnesty International, 'Nepal: Escalating "disappearances" amid a culture of impunity' (2004) ASA 31/155/2004 <https://www.amnesty.org/download/Documents/96000/asa31155 2004en.pdf> accessed 31 May 2020.

[149] 'Attacks on the Press in 2005 – Nepal' (*Committee to Protect Journalists*, February 2006) <https://www.refworld.org/docid/47c5670c1e.html> accessed 21December 2020.

fundamental rights and principles of citizens without any fear of executive orders or decisions.[150] Some of the recent Supreme Court's judgements have been hailed regionally and internationally.[151] Because of these historical and contemporary outlooks of the Supreme Court, political parties could not openly disregard the decisions of the Supreme Court.

However, the narratives of victims not wanting prosecution and being driven by HROs and activists supported by the western organisations, suited those powerful individual perpetrators, not only to demoralise victims, HROs and lawyers but also defy court orders requiring prosecution, severely undermining the judiciary. the political parties in Government started to argue that the social transformation that was happening in Nepal by removing the king, having a republican State, a new Constitution with provision of fundamental rights and guarantees, going for devolution of power by adopting federalism and by adopting proportionate representation in the electoral process as a form of social inclusion merit credit for amnesty.[152] These measures are all in themselves forms of reparation for those family members whose loved ones sacrificed themselves for the political transformation in the country.[153] Although Maoist party leaders were vocal about their position, not letting the regular criminal justice system get involved with the crimes, which they considered political, committed during the conflict by the political

[150] The Court analyzed the international obligations binding upon the State with regard to clarifying whereabouts of the missing person and regarding the rights of missing person and their relatives to appropriate remedy and relief. *Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal v Government of Nepal, Ministry of Home Affairs and Others* (2007) Issue No 2 Decision No 7817 Ne Ka Pa 2064 [2007] 169.

[151] For example, the decision of the Supreme Court of Nepal on issue of enforced disappearances was taken as reference by the Supreme Court in Pakistan. Human Rights Case No 29388-K of 2013, PLD [2014] SC 305 (decided on 10 December 2013).

[152] Emma Björnehed, 'Ideas in Conflict: The effect of frames in the Nepal conflict and peace process' (DPhil thesis, Uppsala University 2012) 118-119; Adhikari, 'The revolutionary and the lawyer' (n 93).

[153] This has been articulated by the leaders of the Maoist party in a number of public meetings.

organisation, the NA too did not respect any of the court orders.[154] None of the arrest warrants issued by the courts were respected; on the contrary, many of those against whom cases were pending were promoted.

5.3.4. International justice and its impact

Privy to all these upheavals and challenges for TJ, prosecution in particular, organizations like Advocacy Forum started to explore universal jurisdiction (UJ), not only to expose the parties to the international dimension of this issue but also to bring the TJ discourse back on the political agenda. One of their efforts resulted in the UK authorities arresting Kumar Lama, a serving colonel of the Nepal army in early 2013, for his alleged involvement in the torture of two detainees in 2005 (during the conflict in Nepal).[155] As torture is routine in Nepal, and was not even criminalized at the time,[156] it was something unexpected for Nepal's political actors, which they denounced as an attack on Nepal's national sovereignty.[157] However, many high-profile leaders and high-ranking army officers cancelled their international travel fearing arrest.[158] This

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[154] C*aptain Saroj Regmi v Office of the Prime Minister and Council of Ministers and Others* (2017) SC Writ No 074-WO-0143.

[155] Ingrid Massage and Mandira Sharma, 'Regina v. Lama: Lessons Learned in Preparing a Universal Jurisdiction Case' (2018) 10(2) Journal of Human Rights Practice 327.

[156] Advocacy Forum, 'Torture Still Continues. A Brief Report on the Practice of Torture in Nepal. 2006-2007' (June 2007); Advocacy Forum, 'Torture in Nepal in 2014. More of the Same' (June 2015); Advocacy Forum, 'Advocating against Torture in 2016. The Challenges of Achieving Justice' (June 2017); Advocacy Forum, 'Rise of Torture in 2018. Challenges Old & New Facing Nepal' (June 2019); also see UNESC (n 16); UNGA, 'Report of the Committee against Torture. Report on Nepal adopted by the Committee against Torture under article 20 of the Convention and comments and observations by the State party' (9 May–3 June 2011) 47th session UN Doc A/67/44.

[157] Massage and Sharma, 'Regina v. Lama' (n 155).

[158] 'Prachanda's cancelled Australia visit: figures in talks with Aussie Ambassador Glenn White' *Onlinekhabar* (July 2016) < https://english.onlinekhabar.com/prachandas-cancelled-aussie-visit-figures-talks-australian-ambassador-glenn-white.html> accessed 23 January 2020.

case injected the knowledge in the mind of the Nepali actors that failure to ensure investigation and prosecution would provide grounds for other countries to exercise jurisdiction, which the political actors never seemed to have thought of as being possible before this arrest.

Following the arrest of Kumar Lama in the UK, the prosecutor in Surkhet district also prosecuted eight Maoist cadres (five of whom were arrested, others in absentia) for killing a radio journalist during the conflict.[159] Dekendra Thapa was abducted by the Maoists in June 2004 and killed in Maoist captivity in August 2004. In 2008, his body was exhumed by the NHRC and the family had filed a FIR, demanding criminal investigation and prosecution against those responsible.[160] Despite an order of the Supreme Court to prosecute, the local prosecutor was not able to do so because of political pressure. Capitalising on the wider public discussions on lack of accountability in the country resulting in Lama's arrest in the UK, the police in late January 2013 arrested five of the alleged perpetrators who were still serving as district-level leaders of the Maoist party,[161] reactivating the case which had been pending for eight years.

All these factors contributed to speed up the establishment of the TRC as a way for the parties to prevent the immediate national and international arrest of political activists and security officers under the regular criminal justice system and universal jurisdiction. They also contributed to the political parties reaching an agreement for the establishment of TJ mechanisms to deal with the

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[159] 'Five held on Dekendra Thapa's murder case' (Press release, 7 January 2013) <http://nepalpressfreedom.org/main/post-single/111> accessed 14 January 2018.
[160] 'Writ Filed in Dekendra Raj Thapa Case' (*Advocacy Forum*, 13 December 2012) <http://advocacyforum.org/news/2012/12/writ-filed-in-dekendra-raj-thapa-case.php> accessed 24 January 2018.
[161] 'Five held on Dekendra Thapa's murder case' (n 159).

legacies of past human rights violations, passing legislation in April 2014 with a link between the TRC and prosecution.[162]

5.4. Truth and Reconciliation Commission and Commission of Inquiry on Enforced Disappearances

In April 2014, the Parliament passed the 'Enforced Disappearances Inquiry, Truth and Reconciliation Commission Act, 2071 (2014)'.[163] The Act creates two Commissions: the Truth and Reconciliation Commission (TRC) and the Commission of Enquiry on Enforced Disappearances (CIEDP). The CIEDP's sole responsibility is to investigate cases of enforced disappearances. The TRC is mandated to look into other cases of gross violations.[164] As both Commissions have been established by the same Act and have exactly the same powers, the discussion hereafter refers to the Commissions as the TRC, and the Act as the TRC Act.

The Act sets out the mandate of the TRC that includes: to establish truth, identify victims and alleged perpetrators, make recommendations for legal action against those who were involved in those incidents and provide reparation to the victims and identity cards (identifying a victim's status) to them.[165] The TRC is also mandated to conduct reconciliation/mediation between victims and perpetrators and to recommend amnesty.[166]

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[162] SI 02, 27 March 2017, Kathmandu; CS 02, 12 March 2017, Kathmandu.
[163] Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act 2014 (TRC Act).
[164] ibid, s 5.
[165] ibid, s 3(1).
[166] ibid.

The Act stipulated that the TRC will have jurisdiction over gross violations of human rights committed from 13 February 1996 to 21 November 2006, the insurgency period. The following acts committed in the course of the armed conflict directed against unarmed persons or the civilian population or committed systematically are defined as gross violations over which the TRC will have jurisdiction:

- Murder,
- Abduction and hostage-taking,
- Causing mutilation or disability,
- Physical or mental torture,
- Rape and sexual violence,
- Looting, confiscation, damage or arson of private or public property,
- Forceful eviction from house and land or any other form of displacement,
- Any form of inhuman acts inconsistent with international human rights or humanitarian law or other crime against humanity.[167]

Enforced disappearances is also included in the Commissions' mandate with the CIEDP having the exclusive mandate to look into them.

One of the unique features of the TRC Act is that it had empowered the TRC to work as the sole investigatory arm of prosecution. It empowers the TRC to conduct investigation and recommend

[167] ibid, s 2(j).

prosecution against perpetrators.[168] Prosecution on conflict-related cases would be investigated only by the TRC and prosecution would take place only on its recommendation.[169] If the Commission does not recommend amnesty and conduct mediation, those cases could be recommended for prosecution.[170] The TRC could exercise powers equivalent to a court when investigating cases.[171] It could collect information and take statements from any person after making him/her present themselves before the Commission,[172] examine witnesses and take testimony,[173] issue an order to produce any evidence or document,[174] obtain any deed or make copies of documents from any governmental or public office or court,[175] examine evidence and carry out field inspection or issue orders to produce or exhibit any materials or evidence related to gross violations of human rights.[176] A Special Court was envisioned in the Act to try those recommended for prosecution by the TRC.[177]

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[168] 'Notwithstanding anything contained in sub-section (1), the Commission may, if it so wishes, make recommendation to the Government of Nepal in its interim report as referred to in sub-section (2) of Section 27 to prosecute the perpetrators who were found to be guilty of the offences of the gross violation of human rights prior to giving report pursuant to sub-section (1) of Section 27.' ibid, s 25 (3).

[169] The Commission has adopted the Rules that provides 'if recommendation is to be made for action against a person pursuant to Section 25 of the Act for the charge of committing gross violation of human rights, the Commission shall make recommendation to the Government of Nepal for action along with the following particulars: (a) Subject matter of gross violation of human rights, (b) Evidence the Commission has received to that effect, (c) Truth and facts revealed from the investigation, and (d) Opinion and recommendation of the Commission'. ibid, s 25.

[170] ibid, s 29.

[171] ibid, s 14.

[172] ibid, s 14 (1)(a).

[173] ibid, s 14 (1)(b).

[174] ibid, s 14 (1)(c).

[175] ibid, s 14 (1)(d).

[176] ibid, s 14(4).

[177] ibid, s 29(4)(2).

In early 2015, both Commissions were established with a two-year mandate. This mandate was extended twice, each time for one year. Over the 4 years, the TRC had registered more than 60,000 cases (the CIEDP has registered about 3,000 cases).[178]

Despite having wide powers and mandates, the TRC neither recommended any prosecutions nor released any reports about the truth it found over these four years. It also was not able to conduct public hearings to dwell on wider truth issues.

Although there were several reasons behind the failure of the TRC to deliver its mandate, the main ones relate to the legitimacy of the process and the content of the Act, coupled with a lack of political will to let the TRC succeed. The latter was caused by the political balance of power in the country, where those having personal direct interests to avoid prosecution continue to hold power in the government and the security apparatus.

5.4.1. The political balance of power

Although the conflict ended a decade after its start in an effective military and political stalemate, the State army not being able to decisively defeat the Maoist insurgents and with no realistic prospect for a Maoist military victory, a negotiated end to the conflict was possible. This 'draw' eliminated the possibility of victor's justice. However, the Maoists and the State security forces found a common core interest effectively obstructing a meaningful TJ process. The CPN-M became the leading party after the 2008 elections while the army resisted any efforts at security sector reform and became an increasingly important economic actor.

[178] Commission of Investigation on Enforced Disappeared Persons Nepal, 'Third Interim Report' (April 2019) <https://ciedp.gov.np/download/आयोगको-तेस्रो-अन्तरिम-प्/> accessed 9 January 2020.

One of the main political parties, the Communist Party of Nepal (United, Marxist, Leninist) (CPN-UML) with relatively less blood on its hands was initially supportive of the TJ agenda but started using TJ as a bargaining chip with the Maoists, seeking Maoist support for them to lead the government in return for CPN-UML silence on accountability issues.[179] The Nepali Congress (NC), another major political party, presided by Sher Bahadur Deuba, who served as Home Minister and Prime Minister in previous governments when the conflict was ongoing, has been alleged to have instructed and tolerated policies that resulted in gross violations of human rights and humanitarian law,[180] and has been standing firmly against prosecutions throughout. Taking advantage of the vulnerability of the political leadership, the security forces have argued that they were following orders of the political leadership, for which they alone cannot take the responsibility.[181] As a result, while politicians appreciate having the TRC to argue especially at international forums (such as the UN) that it is investigating human rights violations cases from the conflict era,[182] at home they made no effort to let the TRC succeed.

Coupled with this balance of power issue, a number of other factors contributed to the TRC failure to deliver on its mandate. These are important to analyse to prevent the repetition of the

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[179] 'CPN-UML, UCPN-M ink 9-pt agreement' *The Himalayan Times* (6 May 2016) <https://thehimalayantimes.com/kathmandu/cpn-uml-ucpn-m-ink-9-pt-deal/> accessed 20 September 2020 (it includes the picture of the agreement in Nepali); 'Nine Point Agreement between the CPN-UML and UCPN (Maoist)' <https://www.satp.org/Docs/Document/129.pdf> accessed 20 September 2020.

[180] Adhikari and others (n 92) 66.

[181] This has been expressed by Military Generals in various public forums.

[182] *Mukunda Sedhai v Nepal* Committee Communication No 1865/2009 UN Doc CCPR/C/108/D/1865/2009 (HRC, 28 October 2013) paras 4.1-4.2; *Subhadra Chaulagain v Nepal* Communication No 2018/2010 UN Doc CCPR/C/112/D/2018/2010 (HRC, 19 July 2013) para 4.2; *Gyan Devi Bolakhe v Nepal* Communication No 2658/2015 UN Doc CCPR/C/123/D/2658/2015 (HRC, 19 July 2018) paras 4.3-4.7.

same mistakes made in the past as Nepal continues to present a prospect for a new TJ process (will be discussed in chapter 6). The following sections analyse some of those factors.

5.4.2. Legal challenge to the Act and* legitimacy of the commission

When the Act was passed by the parliament, it was done by adopting a 'fast track' not allowing any parliamentarian to comment or debate provisions in the Bill, and excluding victims and civil society.[183] The Bill was agreed behind the scene among the top leaders of the three major political parties, with the army's agreement.[184]

Although it had provided investigative powers equivalent to a court for the TRC to investigate cases and recommend prosecution, it also provided powers to the TRC to recommend amnesty even to those involved in gross violations.[185] It also empowered the Commission to conduct reconciliation (basically mediation) between victims and alleged perpetrators, irrespective of the nature of the crimes committed.[186]

More than 230 victims challenged different sections of the Act in the Supreme Court and requested the government not to establish the Commission and appoint Commissioners, pending the decision of the Supreme Court. As these issues and subsequent court rulings on these issues provided important standards for designing the legal framework for the TJ process in Nepal, following sub-sections briefly analyse those concerns of victims and the court ruling on those concerns.

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[183] Advocacy Forum, 'Nepal Transitional Justice at Crossroad' (n 85).
[184] SI 08, 10 May 2017, Kathmandu; CS 03, 13 March 2017, Lalitpur.
[185] TRC Act (n 163) ss 25-26.
[186] ibid, s 13(c).

5.4.2.1 TRCs mandate to conduct mediation/reconciliation

Section 22 of the Act empowers the Commission to mediate between victims and perpetrators. It states that if a perpetrator or a victim files an application to the Commission for mediation, the Commission can facilitate mediation to reconcile them.[187] While facilitating mediation, the Commission shall ask the alleged perpetrator to apologise to the victims,[188] and make the alleged perpetrator pay compensation to them for the damages suffered.[189]

While challenging this provision on mediation/reconciliation in the Supreme Court, victims argued that allowing mediation/reconciliation even by the request of the perpetrator ignores the underlying principles of victim's informed consent for reconciliation, which the Supreme Court had already established,[190] and would ensure perpetrators *de facto* amnesty.[191] In the view of the victims, reconciliation is not a one-off event where victims and perpetrators are invited and the Commission declares them being reconciled. It is the outcome of continuous efforts to establish truth, providing reparation and making perpetrators accountable for the violations that they committed.[192] In their petition, the victims also argued that the provision in the Act seems to assume that there is just one perpetrator and one victim in incidents and ignores the involvement of multiple perpetrators and victims in violations as well as command responsibility.[193]

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[187] TRC Act (n 163) s 22.1.
[188] ibid, s 22.2.
[189] ibid, s 22.3.
[190] *Suman Adhikari et al v Office of the Prime Minister and Council of Ministers and Others* (Petition) (2014) SC Writ No 070-WS-0050, para 25-26; *Basnet* (n 90) 1101.
[191] *Adhikari* (Petition) (n 190) para 26.
[192] *Adhikari* (Petition) (n 190) para 26.
[193] ibid.

The victims further highlighted that this provision of reconciliation/mediation has to be read in conjunction with Section 25 of the Act. Section 25 provides that if the cases are reconciled the Commission will not make a recommendation for prosecution. In the view of the victims, this indirectly aims to provide impunity for the perpetrators.[194] They raised the vulnerability and pressure that this provision would create for and on victims in the given power balance in society where the perpetrators come from the most powerful institutions and backgrounds. The arguments of the victims were supported by the HROs and the UNOHCHR. The UNOHCHR raised serious concerns over the provision of mediation in the TRC Act and termed it highly problematic.[195] It stated that although mediation could be used as one form of restorative justice and finds its space in TJ, its use in relation to serious crimes, such as those under the jurisdiction of the TRC, was a matter of serious concern.[196]

Although what constitutes reconciliation or what activities would make a society achieve reconciliation is highly contentious, reconciliation at the societal level is more than just one-to-one encounters of victims and perpetrators, but a process that can be achieved in a sustainable

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[194] *Adhikari* (Petition) (n 190) para 26; The Supreme Court of Nepal has declared the section ultra-virus finding it contradictory to the constitution and Nepal's international obligation. The Court states reconciliation cannot be imposed on victims and cannot be done without the willingness and consent of the victims. It cannot be used as a tool to let perpetrators free from their criminal liability for their involvement in gross violations of human rights. *Adhikari* (n 132) para 63-64.

[195] OHCHR, 'Technical Note. The Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2071 (2014)' para 3.

[196] OHCHR, 'Technical Note' (n 195).

manner through measures of truth, justice, reparation and guarantee of non-recurrence among other reform policies.[197]

In response to the petition filed by the victims, the Supreme Court stated that reconciliation cannot be imposed on victims and cannot be done without the willingness and consent of the victims.[198] It cannot be used as a tool to let perpetrators escape criminal liability for their involvement in gross violations of human rights.[199] The decision of the Court does not prevent Commissions' from using their powers to facilitate mediation in its entirety but it invalidates their power in relation to gross human rights violations.

5.4.2.2. TRC's mandate to recommend amnesty

The mandate of the Commission to recommend amnesty was another issue that was challenged by the victims. The TRC Act provides powers to the Commission to recommend amnesty except for rape.[200] The Act provides certain requirements to be fulfilled before making such recommendations. For example, the perpetrator has to file an application disclosing detailed information on the case for which amnesty is requested, has to admit committing a gross violation of human rights in the course of the armed conflict, show regret for such an act, apologise and promise not to repeat such act in the future.[201]

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[197] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, 'Report to the Human Rights Council' (9 August 2012) UN Doc A/HRC/21/46, paras 37-38.
[198] *Adhikari* (n 132) para 63.
[199] *Adhikari* (n 132) para 64.
[200] TRC Act (n 163) s 26(2)
[201] ibid, s 26 (3), (4).

The way the TRC Act had designed the provisions related to amnesty and mediation would have the same effect. However, in terms of the process, mediation seems to be aiming at bringing the victims and perpetrators together to agree to close the case while that was not necessary in the case of amnesty, as TRC could do it at its discretion considering factors described above.

Challenging the section on amnesty, victims argued that the current provision of the Act violates victims' right to equality before the law[202] and their right to have an effective remedy from a competent court.[203] They argued, the provision of amnesty would subject them to different treatment compared to other victims. Just being subject to gross violations during conflict should not provide the Government the authority to derogate victim's constitutional rights.[204] They are particularly concerned about the power that the Commission has in granting amnesty even without their mandatory consent. For example, section 26 (5) reads 'if an application is submitted to the Commission for amnesty pursuant to sub-section (3), the Commission must decide to make recommendation for amnesty upon considering agreement and disagreement of the victim as well as the gravity of the incident for granting amnesty to that perpetrator.'[205] In the view of the victims, this provision would not ensure the full consent and willingness of the victims and their families while making any decision of recommending amnesty. They argued the Commission could not have any mandate or authority to grant or recommend amnesty without the consent of the victims as it affected the constitutional rights of the victims.[206] Although, this demand of claims may sound like amnesty is possible when they were willing to

[202] Interim Constitution (n 64), art 13.
[203] ibid, art 24 (9).
[204] *Adhikari* (Petition) (n 190) para 24.
[205] TRC Act (n 163) s 26(5).
[206] *Adhikari* (Petition) (n 190) para 25.

grant amnesty, as discussed in chapter 2 and 4, the emerging jurisprudence from the global and regional human rights bodies suggest that amnesty is not permissible even if the victims consent in certain categories of crimes where States are duty bound to prosecute. This was discussed by the Court in the decision it made on the TRC ordinance as discussed in previous sections.

The HROs established a network to fight against the proposal of amnesty for those involved in serious violations, staging protests and rallies.[207] While writing to the Government of Nepal, UNOHCHR also raised concerns on the provision related to amnesty in the TRC Act. It highlighted that the provision in the Act that gives the Commission powers to recommend amnesties for gross violations of international human rights law and serious violations of international humanitarian law fails to comply with Nepal's international legal obligations.[208] While explaining the inability of UNOHCHR to support Nepal's TRC, the UNOHCHR wrote to the Government of Nepal saying that '...in accordance with international laws and standards, it cannot condone or encourage amnesties for genocide, crimes against humanity, war crimes or gross violations of human rights.'[209]

This represented a changed UN position on amnesty. As chapter 4 highlighted, the UN's position on amnesty got changed after the Lomé Peace Agreement.[210] This position of the UN also impacted the events in Nepal. The public refusal of the UN to engage with the TRC on the basis

[207] Informal conversation with a senior HRD Kathmandu, March 2017.
[208] OHCHR, 'Nepal: OHCHR position on UN support to the Commission on Investigation of Disappeared Persons and the Truth and Reconciliation Commission' (16 February 2016).
[209] ibid.
[210] 'Benchmarks for Assessing Possible National Alternatives to International Criminal Courts Cases against LRA Leaders-A Human Rights Watch Memorandum' (Human Rights Watch 2007).

that it would violate the UN position on amnesty also became the position of the main donors and international organisations.[211]

Referring to the UN documents and the jurisprudence from Latin American courts developed since the Barrios Altos case,[212] the Supreme Court also reasoned that amnesty is impermissible in cases of gross violations where a duty to prosecute exists[213] as it impairs the rights of victims to have effective remedies.[214] Accordingly, the Supreme Court also found that the provision in the Act related to amnesty violated the Constitution of Nepal and its established jurisprudence.[215]

5.4.2.3. Links to prosecution

The other section of the TRC Act that the victims challenged relates to the link between the TRC and prosecution. Although victims did not question the Commission sharing evidence with the prosecution and its (the TRC's) link to prosecution *per se,* the victims' concerns related to how such link was made. For example, section 29 provided that if the TRC makes a recommendation for prosecution, it will first write to the Ministry, then the Ministry would write to the Attorney General, then the Attorney General will make the decision whether to prosecute or not.[216] Victims feared political parties may tacitly work not to write to the Attorney General for prosecution and the Prosecutor may decide not to prosecute.[217] They gave examples of many

[211] OHCHR, 'Nepal' (n 208).
[212] *Barrios Altos Case* (n 131).
[213] *Adhikari* (n 132) paras 69-70.
[214] ibid, para 68.
[215] ibid, paras 71-72.
[216] TRC Act (n 163) s 29.
[217] *Adhikari* (Petition) (n 190) para 25.

other Commissions such as the Mallik and Rayamajhi ones, described above that made recommendations for prosecution, which the Government never implemented.

Although the Supreme Court recognises the prerogatives of the Attorney General in making a decision whether to prosecute or not, it states that the indirect route to the Attorney General, as provisioned in the Act, has created unnecessary hurdles and suspicion among the victims and other actors that this intends to let the perpetrators off the hook. Thus, the Court ordered that the Government amend the provision, removing the ministry's role in the middle. This means, the TRC could send evidence directly to the Attorney General asking for prosecution.

As chapter 3 analysed, the legitimacy of any TJ mechanism is critical for the success of the TJ process.[218] Despite the case pending before the Supreme Court and the victims and civil society calls not to establish the TRC pending the decision of the Court, the government went ahead regardless.[219] As discussed, later in the same month, the Court found a number of the law's sections (including the section on amnesty) in violation of the Constitution, Nepal's international obligations and the Supreme Court's previous decisions,[220] requiring the government to amend a number of sections in the TRC Act. The government appealed this decision, seeking its revision, arguing that it constrained political efforts to consolidate peace and take the peace process to its

[218] James L Gibson 'On legitimacy Theory and the Effectiveness of Truth Commissions' (2009) 72 LCP 123.
[219] Jeremy Sarkin and Ram Kumar Bhandari, 'Why Political Appointments to Truth Commissions Cause Difficulties for these Institutions: Using the Crisis in the Transitional Justice Process in Nepal to Understand How Matters of Legitimacy and Credibility Undermine Such Commissions' (2020) 12 (2) Journal of Human Rights Practice 444, 456-457, 464.
[220] *Adhikari* (n 132) para 80.

logical end.[221] It further argued that the decision of the Supreme Court curtailed the power of the legislative in enacting laws and breached the principle of separation of powers.[222]

In addition to these factors, the Commission's own internal capacity, professionalism and qualification of Commissioners undermined its legitimacy. The TRC also lacked capacity to deliver its mandate. Although victims had provided it with the opportunity to prove itself, the Commission could not prove its ability to fulfil its mandate. The controversies in the adoption of the law and the legal challenge of the Act made people with credentials and expertise in the field, who could have been good candidates for the Commissions, refrained from joining the Commission. Many potential candidates decided not to engage with the Commissions until the Supreme Court decided on the Act. As the Government decided to appoint Commissioners before the decision of the Court, the pool of suitable people narrowed further, even if the Government wanted people with some credentials. The Government made no efforts to improve the situation as it continued to refuse amending the law as ordered by the Supreme Court. Although the Commission developed regulations on investigation, including for the purpose of prosecution and guidelines on conducting public hearings, it could neither conduct any public hearing nor finalise any investigations or recommend prosecution. It also could not provide any vision as to how it balances its truth-seeking and investigation roles. The Commissioners also lacked professionalism, with conflict among the Commissioners coming from different political backgrounds made the Commission suspend its meetings for weeks and sometimes months.[223]

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[221] *On behalf of Nepal Government Council of Ministers, Chief Secretary Lilamani Poudyal v Suman Adhikari et al* (2015) SC Writ No 070- WS-0050, para 3(d).
[222] ibid, para 3(a).
[223] 'Bhatta urges Gurung to call TRC meeting without delay' *The Himalayan Times* (Kathmandu, 17 February 2017) <https://thehimalayantimes.com/kathmandu/madhabi-bhatta-urges-surya-

5.5. The TRC's investigation for prosecution

The lack of professionalism and capacity of the TRC manifested itself in some of its work, mainly investigations and the way it was collecting evidence, which were supposed to be leading to prosecution, linking truth and justice. As the TRC continues to be considered as the sole investigatory arm of prosecution (as per the new amendment Bill discussed in subsequent chapter), it is important to analyse how the TRC has so far conducted its investigations, so additional measures could be considered while re-designing the TRC to remedy the weaknesses and make it more effective.

5.5.1. Preliminary investigation of the Commission

To execute its investigatory mandate, the Commission developed rules and guidelines setting out in detail the investigation process. The rules provided that after receiving complaints, the TRC conducts a preliminary investigation and after that, if the Commission finds it necessary to conduct detailed investigation, it appoints an investigating officer or a team, giving specific time to complete the investigation.[224] The detailed investigations would help to collect evidence for the purpose of prosecution.

The victims' complaints provided basic information to the Commission, helping it to make a decision on whether or not to go for detailed investigation or to take other measures.[225] Victims' complaints were used by the Commission also to assess their expectation from the TRC,[226]

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kiran-gurung-call-truth-and-reconciliation-commission-meeting-without-delay> 31 December 2020.

[224] Truth and Reconciliation Commission Rules 2016, r 11(1).

[225] SI 01, 18 March 2017, Kathmandu; SI 04, 31 March 2017, Lalitpur.

[226] SI 01 (n 225).

including any demands for prosecution.[227] Thus, in cases where victims in their complaints have not named perpetrators or demanded criminal investigation and prosecution, the Commission would refrain from proceeding to a detailed investigation for the purpose of prosecution.[228] It would rather recommend reparation and other measures as expected by the complainant.[229]

This methodology adopted by the TRC raised various concerns. For example, many victims were unaware of the fact that their complaints would serve as the basis for the Commission to decide whether to go for detailed investigation or not.[230] The outreach programme of the TRC was poor; victims were not well briefed about the process.[231] The mechanism used to collect complaints was also an issue for many victims. The TRC had announced that victims could file their complaints through the Local Peace Committees (LPCs). LPCs were established in 2008 with the objective of resolving local disputes related to the peace process. Although victims could send their complaints directly to the Commission (by post or email), many victims ended up at LPCs as they required external assistance to fill out the form as they could not understand it or they were illiterate.[232] Most of the victims had no confidence that the information would remain confidential in their local LPC and no further reprisal will be taken as many LPC coordinators were local level Maoist leaders, whom many victims considered as perpetrators.[233] In some places, there were rumours that the Nepal Army reviewed all complaints registered in the LPC

[227] ibid.
[228] ibid
[229] ibid.
[230] FGDV 02, 30 April 2017, Baglung.
[231] ibid.
[232] FGDV 01, 24 March 2017, Kathmandu.
[233] FGDV 02 (n 230).

before sending them to the TRC.[234] Arguably, this impacted the way victims framed their complaints, especially in terms of naming perpetrators and demanding prosecution.[235]

As a result, when the Commission decided to close some cases on the grounds that they did not have sufficient information (such as victims not naming the perpetrators in the petition and not demanding prosecution, etc.) to trigger further investigation after the Commission's preliminary investigation,[236] victims alleged this was a way to deny them justice and moved the Supreme Court.[237] They argued that the decision of the Commission, based on the forms that victims were asked to fill out without providing detailed information of their exact purpose and that by making the decision to shelve the case on the basis of this form, without the Commission doing any investigation, jeopardised victims' right to an effective remedy.[238]

In response to the petition, the Supreme Court issued a mandamus order against the Commission stating that before the Commission makes such a decision to suspend investigation or to shelve cases, victims should be fully notified.[239] Without conducting an effective investigation, the Commission cannot take a decision that would affect the constitutional rights of the victims.[240] The Court further argued that if the Commission is allowed to make a decision to shelve cases without explaining the basis, this could be used arbitrarily.[241]

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[234] CS 01, 2 March 2017, Kathmandu; CS 07, 11 April 2017, Kathmandu.
[235] ibid; FGDV 02 (n 230).
[236] *Binayadhoj Chanda et al v Chairperson Surya Kiran Gurung, Truth and Reconciliation Commission et al* (2017) SC Writ No 073-W0-0257, 13.
[237] ibid, 6.
[238] ibid, 5.
[239] *Chanda* (n 236) 15.
[240] ibid.
[241] ibid.

Although the Supreme Court did not rule out the possibility of the Commission deciding which cases to investigate, it was concerned about the lack of a transparent basis and criteria. As chapter 3 studied, it is practically not possible in the context of a transition to prosecute all cases where the States are duty bound to prosecute, States are encouraged to have prosecution strategies and prioritisation in prosecution.[242] Transparent criteria for prioritisation of cases and prosecution strategies are important to maximise the resources and impacts of the prosecution,[243] including to prevent the risk of rendering poor investigations and weak indictments, ultimately resulting in the acquittal of perpetrators.[244]

However, the Commission selected about 1,000 cases in batches, to be investigated in detail in each of Nepal's 7 provinces for the purpose of prosecution. These cases were selected on the basis of their registration number, meaning all those cases with registration number from 1-1,000 were selected first, without giving any consideration of the nature of the alleged violations.[245] Seemingly it was done to avoid any legal challenges but also coupled with a lack of capacity and strategy within the Commission's leadership as to how to address the issue at hand. Victims and civil society considered these activities done for mere formality.

[242] UNGA, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff' (27 August 2014) UN Doc A/HRC/27/56.
[243] See ch 3, s 3.6.1.
[244] UNGA (n 242) para 36.
[245] SI 01 (n 225).

5.5.2. Detailed investigations of the Commission

Seven investigation teams were formed to conduct detailed investigations in each of the 7 provinces.[246] The team had three members, two lawyers and a public prosecutor of the High Court.[247] They were seconded from the office of the prosecutor and legal profession. They were not working full-time for the TRC, but had full-time jobs elsewhere. They would receive some financial incentives and travel expenses for doing this work on top of their full-time work.[248] They were primarily taking statements from the victims or complainants, and verifying information.[249]

The TRC in a number of places instructed its investigation team to finalise investigations of a number of cases within a week.[250] Team members also did not have the required training and expertise, rendering poor investigations. For example, in some provinces, some of the victims who had submitted their complaints were called back just to verify their complaints.[251] In some places victims were interviewed but the statement taking process depended on the attitude of the officer. Some would ask many questions while others would ask for the name and incident date only, without following a consistent process and methodologies.[252]

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[246] 'List of the expert adopted by the TRC' <http://trc.gov.np/wp-content/uploads/2018/03/%E0%A4%B5%E0%A4%BF%E0%A4%9C%E0%A5%8D%E0%A4%9E%E0%A4%95%E0%A5%8B-%E0%A4%B8%E0%A5%81%E0%A4%9A%E0%A5%80.pdf> accessed 4 April 2020.
[247] ibid.
[248] SI 01, 10 August 2018, Kathmandu; SI 07, 13 November 2017, Biratnagar.
[249] ibid.
[250] SI 07 (n 248).
[251] Suman Adhikari, 'Insult to Injury for the Conflict Victims' *Nagarik* (14 September 2017) <http://www.nagariknews.com/news/27114/> accessed 15 September 2017.
[252] 'Reflection related to ICTJ activities in Nepal' (confidential report from ICTJ, made available to author, January 2018).

Observing the TRC's investigation, a number of questions have been raised whether the TRC could do investigations and collect evidence in the standard required for prosecution. Arguably, to convict anyone for gross violations with a prison sentence requires a higher threshold of evidence, i.e. beyond reasonable doubt, which Nepal's Evidence Act also requires. However serious doubts have been cast about the capacity of the TRC to investigate and collect evidence sufficient enough to convict alleged perpetrators to the standard required.[253] Although it is the role of the Court to analyse the evidence and determine criminal guilt, it will do so based on the evidence provided by the TRC. Courts in Nepal play very little or no role in investigation. It does not seem likely that the TJ Special Court is going to be different in this regard. Thus, the quality of evidence and the process through which it was obtained will also play an important role in the process of determining individual criminal guilt. Many have raised doubts about the capacity of the TRC to do this adequately.[254]

During the course of this research, a Commissioner interviewed argued that the TRC Act is a special Act and that as a substantive Act it trumps the procedural Acts.[255] He argued that the standards of evidence and the threshold and nature of evidence required in the TJ process could be different from those used in cases under the general criminal justice system. He argued that this is precisely the reason why the parties agreed to the special mechanism of TJ. In his view, if the same procedure and process of criminal investigation of the criminal justice system are to be followed, there would not have been the need for the investigatory mandates of the TRC and the

[253] CS 02 (n 162).
[254] FGD SC 01, 23 March 2017, Kathmandu.
[255] ibid.

TJ Special Court.[256] As the TRC Act, passed by the parliament, mandates the Commission to do the investigation and collect evidence, there is no reason to doubt the quality of the evidence that the TRC collects. [257]

The Commissioner interviewed further argued that, based on the substantive law on TRC, detailed rules on the TRC have been adopted by the Cabinet setting out the procedure to be followed in collecting evidence. The Commission has developed a detailed investigatory procedure setting out how evidence should be collected.[258] For example, under the criminal justice system of Nepal, evidence is never collected by conducting a public hearing, but when the TRC does an investigation, this is one of the ways in which evidence can be collected. He further argued that considering the nature of the crimes, the political context and the lapse of time since the crimes, it was agreed to give investigatory powers to the Commission and the agreement was made to establish the Special Court. Thus, the same measures that are there for ordinary crimes committed in ordinary time cannot be applied in the cases that the TRC presents before the TJ Special Court.[259] In his view, the TJ Special Court will consider statements, materials, documents and the analysis that the Commission makes as evidence while determining criminal guilt in the cases that the TRC recommends for prosecution.[260]

However, the nature of evidence could be different, and the threshold of evidence could be lower in relation to some of the work of the TRC. As discussed in the previous chapter, the threshold of

[256] SI 01 (n 225).
[257] ibid.
[258] ibid.
[259] ibid; SI 02 (n 162).
[260] SI 01 (n 225).

evidence could be different for naming alleged perpetrators in the report or recommending for vetting. For example, naming somebody in its report, the TRC could just respect certain principles and procedures such as to inform or notify those persons alleged to have committed gross violations and affording them a right to reply.[261] However, the threshold of evidence should be higher when the alleged perpetrators are to be referred to the Special Court and prosecuted and tried for gross violations. If the evidential threshold is not sufficiently high, the trial could be seen as a sham or politically motivated. This will not help to improve the rule of law; rather, it will weaken it thereby undermining the very purpose/goal of TJ. Considering the mandate of the TRC, the quality of the TRC's investigation will also determine the fairness of the trial.

This research found many victims and HRDs expressing opinions that the TRC has serious capacity limitations in terms of establishing the truth, conducting reconciliation and investigating complex cases for the purpose of prosecution, many of which include multiple victims and perpetrators.[262] They pointed to problems both at the level of capacity and political will. Although the TRC could bring both national and international experts, devise strategies to involve wider society,[263] it has not done this so far. The Commission does not even have an investigatory strategy.

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[261] Diane Orentlicher, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity', UN Doc E/CN.4/2005/102/Add.1, principle 9. See also UNHCHR, Rule of Law Tools for Post- Conflict States: Truth Commission (2006) 21.

[262] CS 01 (n 234); CS 02 (n 162)

[263] TRC Act (n 163) s 32. It provides the followings: Service of Specialist may be received: (1) The Commission may receive the service of native or foreign expert of the concerned subject or specialist or specialized agencies as per the necessity to carry out any act by the Commission pursuant to this Act. (2) The appointment, functions, duties, powers, and conditions of service of

Concerns have also been raised whether there is political will to collect evidence capable of determining criminal guilt and to have an effective TRC at all. Highlighting political interference in the appointment of the Commissioners, their political backgrounds, the political power balance in the country, victims and HRDs fear that the TRC could just be used to pollute investigation and evidence. So, the accused could be released on the grounds of insufficient evidence or on procedural grounds such as the Commission collecting evidence without due process. This could then be used to close the cases as the TRC Act has provision to foreclose any possibility of future investigation and prosecution of any of those cases investigated by the TRC.[264] The prolonged delay and ineffectiveness of the TRC also lies beneath the complexities of investigation and requirement of evidence for the purpose of prosecution and how it could balance its investigatory mandates with other mandates such as to seek truth and engaging with wider actors and agencies, without making them fear for prosecution.

It is not argued here that the TRC cannot do investigation for the purpose of prosecution as such, as this could provide a better relation between the truth and justice component of TJ. For example, in Peru, where the TRC had more financial resources and expertise in doing investigation in complex cases relating to human rights violations than the Office of the Prosecutor General to prosecute, the Peruvian Truth Commission, by establishing a Special Investigation Unit, investigated cases of serious human rights violations and forwarded the files to the prosecutors. [265] Investigations done by a TRC was considered to be more robust and of a

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the expert and specialized agencies rendering the service pursuant to sub-section (1) shall be as stipulated by the Commission.

[264] TRC Act (n 163) s 40.

[265] Edwardo González Cueva, 'The Contribution of the Peruvian Truth and Reconciliation Commission to Prosecution' in William A Schabas and Shane Darcy, *Truth Commissions and*

higher quality than those done by an office of the prosecutor and thereby facilitated prosecution. However, in Nepal there were serious concerns on the TRC's strategy, efficiency and capacity to fulfil its investigatory mandate and whether it could lead to any prosecutions, fulfilling required thresholds of evidence.[266]

5.6. Criminal liability, punishment, and statutory limitation

During the course of this research, the Commissioners and also other stakeholders raised their concerns that Government not enacting and amending necessary legal framework hindering their work.[267] Three major concerns were raised in this regard. Firstly, most of the violations committed during the conflict are not crimes under Nepalese law. Secondly many of the violations that Nepal experienced during the conflict such as recruitment of children in armed forces, war crimes and crimes against humanity are not under the jurisdiction of the TRC. Thirdly, the Special Court where the cases recommended by the TRC could be tried does not exist. Thus, even if the TRC does an investigation and makes recommendations, its recommendations won't be implemented until some legal measures are adopted.[268]

For example, if the TRC investigates cases of torture during the conflict and recommends prosecution, the prosecutor won't be able to prosecute.[269] Although in October 2017, the

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Courts. The Tension Between Criminal Justice and the Search for Truth (Kluwer Academic Publishers 2004) 63ff.

[266] CON 01, 16 September 2019, Kathmandu; FGDV 02 (n 230).

[267] SI 04 (n 225); SI 01 (n 248).

[268] SI 01 (n 248).

[269] Nepal has torture compensation Act 1996 but it does not make the perpetrator criminally accountable. It has a provision of compensation. For example, if the court finds the person being tortured in detention, it could order to pay compensation to the victim but cannot order criminal prosecution. The Court could order 'departmental action' which is administrative sanction that

Parliament of Nepal has adopted a new Penal Code criminalising torture that has come into effect from August 2018, the code will not cover conflict crimes as it does not have retroactive effect.

Similarly, statutory limitations for some violations that are already crimes under the Nepali law could put hurdles in terms of prosecuting them if the existing laws are not amended beforehand. For example, the statutory limitation for filing complaints of rape was 35 days. Although it has been changed to 6 months by the new Penal Code,[270] it is still not applicable for those who suffered rape during the conflict. Without lifting it, no court in Nepal would be able to prosecute perpetrators of rape that took place during the conflict of 1996-2006.

Absence of laws that criminalise offences that took place during the conflict and lack of jurisdiction of the Commission over offences like recruitment of children, Crimes Against Humanity and War Crimes also impacts the Commission's investigation process as it would exclude those crimes from detailed investigation. Thus, if the investigatory role of the TRC is to bring any result, many of those offences that took place during the conflict need to be criminalised first, this criminalisation need to be done with retroactive effect and with the statutory limitation in those cases lifting. Without taking these legal measures, hardly any case from the conflict period can be prosecuted even if the TRC does adequate investigations and

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could include transferring the perpetrator one place to another. Compensation Relating to Torture Act 1996, s 7.

[269] The Compensation is also limited. For example, the upper limit of the Compensation that the Act sets is one hundred thousand Nepalese rupees, equivalent to about US $ 800. Compensation Relating to Torture Act 1996, s 6.

[270] Although in a recent amendment to the Penal Code this has been expanded to 6 months, it still does not help to those victims of the conflict. National Penal Code 2017, s 170 (2).

recommends prosecution. Some of these issues are important to inform the analysis presented in the next chapter as the country continue to find ways to redesign the TJ process.

5.7. Lack of clarity on fair trial standards and procedural fairness

As chapter 4 discussed, the TRC's powers to compel witnesses to provide information or evidence, including self-incriminatory evidence, if used in the Court could violate the fair trial rights of the accused.

The TRC has several mandates that require self-incriminatory evidence and statements from alleged perpetrators. For example, the TRC facilitates mediation/reconciliation between the victims and perpetrators.[271] Before it reconciles a victim and a perpetrator, among other things the alleged perpetrator has to admit the violations he/she committed and apologise before the victim(s).[272] The TRC also has the mandate to recommend amnesty.[273] The process for recommending amnesty requires an alleged perpetrator to file an application disclosing all the facts to his/her knowledge, and the role that he/she played committing such violation.[274] In addition to these, during the course of an investigation, the TRC can issue a subpoena to bring anyone to the Commission to give statements or to provide documents related to the matter under

[271] Section 22(1) of the TRC Act states that 'if the perpetrator or victim makes an application to the Commission for reconciliation, the Commission may bring about mutual reconciliation between the perpetrator and victims.' TRC Act (n 163) 22(1).
[272] ibid, s 22(2).
[273] ibid, s 26.
[274] ibid, s 26(4).

its investigation.[275] In addition, the Commission can take action for contempt proceedings which could also lead to self-incriminatory evidence.[276]

Thus, the TRC has two ways through which it could obtain self-incriminatory evidence. Firstly, forcing people by subpoena and contempt proceedings to provide statements that could potentially be self-incriminatory. Considering the investigatory mandates of the TRC (leading up to prosecution), these statements could be used as evidence against the person providing such statement during the trial. The other way is more indirect, where the alleged perpetrator makes a confession to qualify for mediation/reconciliation and amnesty. As it is possible that after analysing the evidence from the alleged perpetrator, the Commission may not be able to proceed with reconciliation or recommend amnesty, the alleged perpetrator may have to face trial. This makes an alleged perpetrator vulnerable as the information he/she discloses for the purpose of mediation and amnesty could potentially be used in criminal proceedings against him/her.

Thus, some of these powers of the Commission could pose risks to Nepal's fair trial standards if not handled properly. The Constitution offers the right to fair trial to the accused,[277] including the right against self-incrimination,[278] right to have a legal representation,[279] and presumption of innocence until proven guilty.[280] In addition to this, Nepal has ratified several human rights

[275] For example, section 15.5 provides that if any person obstructs the Commission its act, the Commission may impose a fine up to fifteen thousand rupees on such a person on the case to case basis. ibid, s 15.5.
[276] ibid, s 15.
[277] Constitution of Nepal 2015 (entered into force 20 September 2015) (Constitution of Nepal) art 20(9).
[278] Constitution of Nepal, art 20(7).
[279] ibid, art 20(2).
[280] ibid, art 20(5).

treaties including the ICCPR and is obliged to ensure such rights of the accused as derived from those treaties.

Although the TRC Act, its Rules and the investigation guidelines provide alleged perpetrators with protection against coercion,[281] it does not define what coercion entails. The Evidence Act of Nepal also makes coerced evidence inadmissible in court[282] and Nepalese courts have dealt with self-incriminatory evidence obtained through coercion in a number of cases, declaring them inadmissible.[283] However, coercion under the Evidence Act is defined narrowly to cover physical and psychological torture or pressure. As self-incriminatory evidence is not automatically inadmissible in the court and the courts have used self-incriminatory evidence in the absence of any evidence of physical or psychological torture,[284] the risk exists of that self-incriminatory evidence being used against the accuse and violating international standards.

As discussed in chapter 4, global and regional human rights bodies have found it to be a violation to compel an individual to give statements in an administrative body with the threat of action such as contempt and to subsequently use these statements for criminal cases.[285] Thus, if the

[281] Truth and Reconciliation Commission Investigation Guidelines 2016, no 22(4).
[282] Evidence Act 1974, s 9(2) (a) (2).
[283] Advocacy Forum, 'Advocating against Torture in 2016. The Challenges of Achieving Justice' (June 2017) 33-50 <https://www.omct.org/files/2017/09/24527/nepal_advocating_against_torture_in_2016.pdf> accessed 20 November 2020.
[284] Advocacy Forum, 'Advocating against Torture' (n 283) 33-42.
[285] For example, in the case of Saunders v UK, Saunders was identified as one of the individuals identified by the prosecution officials as potential defendant in a financial offense. He was a subject of the administrative inquiry, where he was required to appear for questioning. He would have to answer some of the questions which could have been self-incriminatory. Subsequently the information was used for the criminal proceedings. The European Court of Human Rights found the right of Saunders being violated as the information received from compulsion were used for the prosecution. *Saunders v UK* App no 19187/91 (ECtHR), para 65.

TRC uses these powers without considering these rights of the accused, it could either contribute to violations of the fair trial rights of the accused, rendering the trial a sham or let the perpetrator escape justice on these grounds.

Considering the mandate of the TRC in Nepal, it would require having a robust procedural protection to avoid the risk of the TRC violating international obligations and the constitutional rights of the accused while fulfilling its mandate, which is lacking under the current Act and procedures. As the investigations by the TRC lead to prosecution, the TRC may be required to ensure legal representation to those who want to be represented by lawyers. It may also have to provide legal assistance to those who cannot afford a lawyer while giving their testimonies before the Commission. As discussed in chapter 4, the TRC in Timor Leste was criticised for not ensuring legal representation to those who had provided statements before the Commission for the purpose of a community reconciliation process, which were shared with the prosecution to verify if the prosecutor had any pending cases against the person applying for the community reconciliation.[286]

However, neither the rules nor the investigation guidelines of the TRC in Nepal provide any procedures on how the TRC will use self-incriminatory information received in the context of reconciliation and amnesty and what protection it would offer against such evidence being misused. Thus, some of these facts have not only affected the work of the TRC but have also resulted in calls for an approach where the self-incriminatory evidence/information could be exchanged for lower sentences, which could be done by designing the TJ process holistically,

[286] Ch 4, s 4.4.

and as such provide incentives to each other as chapter 3 discussed. Some of these problems could be addressed by redesigning the TJ process, including by amending the Act incentivising truth and justice, which the next chapter elaborates in detail.

5.8. Handling sub-judice cases

How to handle sub-judice cases was also raised by many stakeholders requiring clarity in the TJ process. Although many violations that were committed during the conflict are not criminalised, some violations, such as murder and rape, are. As discussed earlier, victims and human rights organisations have filed FIRs with police, demanding criminal investigations. Refusal by the police to register these complaints and to do investigations has resulted in a number of writ petitions in the Supreme Court by the victims. In response to many of those petitions, the Supreme Court has ordered the police to investigate and prosecutors to prosecute violations which were already crimes under Nepalese law.[287] Some of those cases are under consideration of the courts making them *sub-judice*.

One of the major problems in Nepal's criminal justice system is that victims of crimes do not have direct access to the courts. As per the existing system, a victim has to report the crime to the police.[288] Police does the investigation and presents its evidence to a public prosecutor, who will then make a decision whether to prosecute or not.[289] If the prosecutor decides to prosecute, then

[287] Human Rights Watch and Advocacy Forum, 'Waiting for Justice' (n 108).
[288] Police can also initiate investigation, irrespective of complaints from victim if police is informed about the crime by any other sources, however there are very few cases where police does investigation on its own.
[289] National Criminal Procedure Code 2017, s 31(3).

only the charge sheet is filed in the court.[290] Unlike under other jurisdictions, Nepalese law does not allow private prosecution and the court does not initiate investigation on its own.

However, victims have resorted to the extra-ordinary jurisdiction of the Supreme Court that is allowed in cases of breach of fundamental rights guaranteed by the Constitution to push for criminal investigation, meaning that some cases such as that of Maina Sunuwar reached the Court. However, a lack of clarity exists on how to handle those cases which are already under the jurisdiction of existing courts.

As it appears that the political parties' aim is to avoid the jurisdiction of the criminal justice system in conflict-related cases, the proposal of the political parties is to transfer all those *sub-judice* cases to the TRC.[291] However, this would create tensions as it could undermine the supremacy of the courts as the TRC is not an adjudicating body to replace courts. This issue has reached the Supreme Court, which clarifies that in the course of finding the truth, the TRC can study the cases/files pending before the courts with the court's permission. But these cases cannot be transferred to the TRC for the purpose of adjudication as the TRC cannot replace the courts,[292] and doing so would infringe the independence of the courts and may limit the right of victims to an effective remedy. Some of these legal challenges not only questioned the legitimacy of the TRC but provided strong grounds for amendment of the TRC Act and re-designing of the TJ process in the country.

[290] National Criminal Procedure Code 2017, s 32(1).
[291] SI 02 (n 162).
[292] *Adhikari* (n 132) para 62.

5.9. Conclusion

This chapter provided the context of TJ in Nepal and analysed factors that contributed to the establishment of the TRC. Different factors were analysed explaining how despite the unique design of the mandate, the TRC failed to deliver on its mandate. The analysis of those factors inhibiting the TRC to deliver on its mandate could inform the design of future TJ process in Nepal.

The Chapter also highlighted how victims and civil society have made the judiciary actively engaged in TJ issues, restraining the capacity of political actors in designing the TJ process on their terms but to design it holistically where both truth and justice could coexist and victims' interests are taken into consideration. This presents opportunity for reinvigoration of TJ process in the country, considering a holistic approach to TJ, which the next chapter will discuss.

Chapter 6

Reinvigorating the TJ process in Nepal: Way forward

6.1. Introduction

This chapter highlights how the possibility of redesigning the TJ process continues to exist in Nepal. The political power balance, continuous efforts of victims and civil society, the decisions of the Supreme Court, all bolster the ground for such redesigning of the process in Nepal.

Divided in three major sections, this chapter argues how Nepal could redesign its TJ process incentivising both truth and justice. In doing so, firstly, it will analyse how changing legal and political contexts are paving the way for the redesign of the TJ process. Secondly, it will discuss the Bill the Government proposed in 2018 aiming at redesigning the TJ process by incentivising truth and justice. After analysing the main features of the Bill, the main concerns raised by victims and civil society will be analysed. Then the third section of the chapter will present the way forward while redesigning the TJ process by analysing data gathered in the field.

6.1.1. Possibility of reinvigoration the TJ process

As the previous chapter highlighted, after the TRC existed for four years without making any progress, the Government made public a draft new TRC Act, aiming to incentivise truth and justice with the provision of lenient sentencing. Considering the lack of progress in the TJ process, a proposal of sequencing of TJ mechanisms was floated, having the TRC and reparation first in the sequence and dealing with prosecution later.[1] As chapter 4 highlighted, sequencing of TJ mechanisms could help to ease some tensions that prosecution brings in TJ processes, leaving

[1] SI 08, 10 May 2017, Kathmandu; CS 02, 12 March 2017, Kathmandu.

the future open, providing a hope for both sides wanting or not wanting prosecution.[2] Although initially victims' groups and civil society adamantly advocated for the coexistence of truth and justice mechanisms, fearing sequencing would prevent prosecution, they have started to change their positions, thinking that perhaps truth could provide possibilities for future prosecution, despite some disagreement among themselves.[3]

However, there seems to be a shift on the side of political actors. Perhaps learning from the experience of those countries where TJ mechanisms came in sequence, despite the original intention of such sequencing as discussed in chapter 4, they now seem to see the benefits of having both truth and justice working simultaneously through the use of criminal incentives so future prosecutions can be prevented.[4] This could also be the result of recent jurisprudence of the courts, informed by developments in international law as previous chapters analysed. For example, despites the Government's attempts to shield the accused, in April 2017, the District Court convicted in absentia three army officers involved in Maina Sunuwar's case for murder,[5] rejecting the argument that conflict-era cases will come under the jurisdiction of the TJ mechanisms, i.e. the TRC, as there was no progress in delivering justice through the TJ mechanisms. The Supreme Court has also rejected the possibility of providing the TRC discretionary power to recommend amnesty in gross violations, refusing to accept the arguments of the Government that prosecution may hinder political efforts to maintain peace and transition

[2] See ch 4, s 4.2.
[3] SI 08 (n 1) ; CS 02 (n 1).
[4] See s 5,s 5.3.4.
[5] *Nepal Government on behalf of Devi Sunuwar v Colonel Bobby Khatri et al* (2017) Kavrepalanchowk District Court Case No. 072-CR-0203.

by rejecting its petition to review the Supreme Court decision of February 2015 on the TRC Act.[6]

Furthermore, responding to a contempt of court case, the Supreme Court asked the Inspector General of Police (IGP) to furnish reasons why the Court should not take action against him for the police's failure to arrest a convicted murderer.[7] Balkrishna Dhungel, central committee member of the then ruling party, was convicted by the District Court for his involvement in murder during the conflict but was not arrested.[8] Responding to the Court notice, the police arrested him. It was done despite the ruling party objecting to the arrest.

As discussed in previous chapter, victims and civil society organisations are increasingly reaching out, seeking remedies internationally, including from the UN human rights mechanisms and through universal jurisdiction (UJ). For example, the UN Human Rights Committee, in nearly a dozen cases, has reminded Nepal of its obligation to prosecute and punish.[9] Furthermore, since the arrest of Kumar Lama, the Nepalese diaspora has become active

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[6] *Suman Adhikari et al v Office of the Prime Minister and Council of Ministers and Others* (2015) Issue 12 Decision No 9303 Ne Ka Pa 2071 [2015] 2069.
[7] *Dinesh Tripathi v Balkrishna Dhungel* (2017) SC 073- AP-0390.
[8] Balkrishna Dhungel was first convicted by the District Court for murder, spent two years in prison. However, he got released as the Appeal Court reversed the decision of the District Court. However, the Supreme Court again upheld the decision of the District Court, requiring him to serve the remaining prison sentence. He was not arrested despite the Supreme Court's decision. For further details, see Advocacy Forum-Nepal, 'First Information Report. Ujjan Kumar Shrestha' <http://www.advocacyforum.org/fir/2011/10/ujjan-kumar-shrestha.php> accessed 31 May 2021.
[9] *Sedhai v Nepal* Committee Communication No 1865/2009, UN Doc CCPR/C/108/D/1865/2009 (HRC, 19 July 2013) paras 4.1-4.2 ; *Chaulagain v Nepal* Communication No 2018/2010, UN Doc CCPR/C/112/D/2018/2010 (HRC, 28 October 2014) para 4.2 ; *Bolakhe v Nepal* Communication No 2658/2015, UN Doc CCPR/C/123/D/2658/2015 (HRC, 19 July 2018) paras 4.3-4.7.

exploring cases under UJ. Many people living abroad today were forced to leave the country during the conflict and are now settled in different countries in the west, where they have been exploring the possibility of bringing cases using UJ, putting international travel of many army generals and Maoist leaders at risk.[10] For example, in April 2019, then Maoist leader, Pushpa Kamal Dahal, revealed that he escaped possible detention and trial in the US as the US government did not invoke a detention order while he was on a short visit to the US for his wife's medical treatment.[11] This was his only trip to a Western country since the arrest of Lama. Previously, he had cancelled a trip to Australia as he feared arrest. [12]

The HROs increasingly demanded vetting of the UN peacekeepers and were successful in getting some of the security personnel to be repatriated from UN Peace Missions. These have been a blow to the face of the security institutions.[13] Some individuals who have been publicly named as alleged perpetrators in public reports have faced some practical difficulties such as participating

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[10] Ingrid Massage and Mandira Sharma 'Regina v. Lama: Lessons Learned in Preparing a Universal Jurisdiction Case' (2018) 10(2) Journal of Human Rights Practice 327, 343; Nikhil Narayan, 'Restoring the Rule of Law in Nepal: Can Transitional Justice Deliver without Criminal Justice' (2019) 11 Drexel Law Review 969, 999-1000.

[11] Yubaraj Ghimire, 'Former Nepal PM Prachanda says US ensured he wasn't arrested during visit *The Indian Express* (1 April 2019) <https://indianexpress.com/article/world/former-nepal-pm-prachanda-says-us-ensured-he-wasnt-arrested-during-visit-5652066/> accessed 12 January 2020.

[12] 'Prachanda's cancelled Australia visit: figures in talks with Aussie Ambassador Glenn White' *Onlinekhabar* (July 2016) < https://english.onlinekhabar.com/prachandas-cancelled-aussie-visit-figures-talks-australian-ambassador-glenn-white.html> accessed 13 January 2018.

[13] Amnesty International, 'Major Niranjan Basnet was repatriated from the UN peace keeping mission' (Press release, 18 December 2009) AI Index: PRE 01/440/2009 <https://www.amnesty.org/download/Documents/312000/pre014402009en.pdf> accessed 20 January 2020. Similarly, Deputy Superintendent of Police Basanta Kunwar was also repatriated for his alleged involvement in torture in police detention, see Advocacy Forum, *Vetting in Nepal: Challenges and Issues* (2014) 11, 29; Advocacy Forum, 'Human Rights Agenda Can-not be Sidelined in the Pretext of Election!' (Occasional Brief, October 2013) <https://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/501_afoccasionalbrief_/501_afoccasionalbrief_en.pdf> accessed 12 January 2020.

in international training programs,[14] UN peacekeeping[15] and international travel.[16] Although not used systematically, the vetting of UN peacekeepers through the introduction of a UN policy for the human rights screening of peacekeeping personnel seems to have had considerable impact.[17] Military officers aspiring to serve in peacekeeping have called for a process to clear their names to ensure they pass any vetting.[18]

The change of political parties' composition in recent years has further impacted the prospect for the TJ process. The CPN-UML merger with the Nepal Communist Party (Maoist-Centre, former rebel group) to create a new party, the Nepal Communist Party (NCP) in particular was a key factor. The new party secured nearly a two third majority in parliament and held the government since late 2017. The leader of the CPN-Maoist, Pushpa Kamal Dahal 'Prachanda', is now President of the NCP leading the government.

Furthermore, the alliance between the two strongest communist-leaning political parties in Nepal - the CPN-UML and Nepal Communist Party (Maoist-Centre) - and them leading the Government and building an increasingly close relationship with China has made Nepal's closest

[14] Nepali civil society used Leahy's law. For more about Leahy's law, see Nina M Serafino and others, '"Leahy Law" Human Rights Provisions and Security Assistance: Issue Overview' (R43361, Congressional Research Service, 29 January 2014) <https://fas.org/sgp/crs/row/R43361.pdf> accessed 12 January 2019 ; Lora Lumpe 'What the Leahy Law Means for Human Rights' (*Open Society Foundations*, 24 April 2014) <https://www.opensocietyfoundations.org/voices/what-leahy-law-means-human-rights> accessed 12 October 2019.

[15] Amnesty International, 'Major Niranjan Basnet was repatriated from the UN peace keeping mission' (n 13).

[16] 'Nepal: Investigate Maoist's role in Killing. US Denied Visa for Senior Maoist Politician' (*Human Rights Watch*, 1 July 2010) <https://www.hrw.org/news/2010/07/01/nepal-investigate-maoists-role-killing> accessed 13 December 2019.

[17] Advocacy Forum, *Vetting in Nepal* (n 13) 29.

[18] CS 02 (n 1).

neighbour, India, worry. In this context, India has also started to play the human rights card with Nepal, raising its concerns regarding the lack of accountability for past crimes and starting to demand justice and accountability for victims of conflict. For example, Nepal heard India raise the issue of accountability for the past crimes for the first time in the UN Human Rights Council's 30th session in 2015.[19] Although political actors in Nepal know that human rights are not a priority for India, they however got the message that accountability of the past crimes could be used in international forums by different countries (including India) if it is not resolved at home. Some of these factors seem to have resulted in some political interest to address TJ 'without bearing much damage',[20] while the NCP is in power, providing some legal certainty that they will not be subject to prosecution in future and in other countries.[21]

Thus, the CPN government continues to pledge publicly that it will address TJ by amending the law as required by the SC and Nepal's international human rights obligations, while considering Nepal's specific context of transition.[22] The government and the political parties in the

[19] Author was present during the session.
[20] SI 03, 31 March 2017, Kathmandu.
[21] ibid; CS 03, 13 March 2017, Lalitpur.
[22] Government of Nepal, Ministry of Foreign Affairs, 'Statement by Honourable Mr. Pradeep Kumar Gyawali Minister for Foreign Affairs of Nepal and Head of Delegation to the High-Level Segment of the 40th Session of Human Rights Council Geneva, 27 February 2019' (26 February 2019) <https://mofa.gov.np/tatement-by-honourable-mr-pradeep-kumar-gyawali-minister-for-foreign-affairs-of-nepal-and-head-of-delegation-to-the-high-level-segment-of-the-40th-session-of-human-rights-council/> accessed 13 May 2020; Section on Transitional Justice and Conflict Victims, 'UPR Action Plan 2016-2011. Matrix' [Nepali] <https://www.opmcm.gov.np/wp-content/uploads/2018/03/UPR-Action-Plan-2016-2011_Matrix_Nepali.pdf> accessed 26 September 2020.

government have publicly stated that the peace process will not be considered successful without completing the TJ process.[23]

It is also important to note that all major political parties have promised the public through their election manifestos that they would address the legacies of past human rights violations through TJ processes. Although the Maoist party did not spell out the justice and prosecution component, it promised monetary compensation, relief and various financial schemes for victims, and also establishing Commissions.[24] The Nepali Congress and the CPN-UML[25] explicitly mentioned bringing those responsible to justice while also establishing truth and providing compensation to victims. For example, the Nepal Congress had promised that it '...will work to investigate the past crimes, to establish truth and to ensure justice for victims while bringing perpetrators to justice...'[26] It also promised to respect the Supreme Court's orders and decisions in this regard.[27] The CPN-UML also made similar promises.[28]

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[23] ibid; Hari Phuyal, 'The Struggle for Transitional Justice' *Nepali Times* (6 April 2018) <https://www.nepalitimes.com/here-now/the-struggle-for-transitional-justice/> accessed 3 January 2019.

[24] Full Text of Election Manifesto of Communist Party of Nepal (Maoist-Centre), Constitutional Assembly Election 2013 <https://www.kathmandutoday.com/2013/10/8928.html> accessed 31 December 2020.

[25] Election Manifesto of Communist Party of Nepal (United Marxist Leninist) (CPN-UML), Constitutional Assembly Election 2013, 40-41. <http://cpnuml.org/assets/upload/files/CAmanifesto_2070.pdf > accessed 31 May 2020.

[26] Suman Adhikari, 'Constitutional Promise of the Political Parties and its Implementation' in Govinda Prasad Sharma Bandi (ed), *Transitional Justice in Nepal* (Nepal Bar Association 2013) 331, 333. See also Election Manifesto of Nepali Congress, Constitutional Assembly Election 2013, 28 < https://www.nepalicongress.org/single/notice/nepali-congress-manifesto-constituency-assembly-election-2070-bs-(detail) > accessed 31 December 2020.

[27] Adhikari (n 26) 334; See also Election Manifesto of Nepali Congress (n 26) 66.

[28] Election Manifesto of Communist Party of Nepal (United Marxist Leninist) (n 25) 58.

Thus, in public, all major political parties continued to pledge that they will respect court orders and have a TJ process that addresses the legacies of the past. In 2018, with the green signal of the major political parties in the country,[29] the government prepared a draft Bill to amend the existing legal framework, incentivising truth and justice with the provision of leniency of sentencing, providing some prospect for reinvigoration of the TJ process.

Although the Bill was criticised by different actors, and has not been able to make much progress at the time of finalising this thesis, it continues to provide a basis for negotiations and discussions among different actors including victims and civil society. The following section briefly studies the proposed Bill and its main features. It will analyse the concerns of victims and civil society about the Bill and where it falls short while presenting a way forward in subsequent sections.

6.2. The new proposed Bill (2018)

In June 2018, the Ministry of Law, Justice and Parliamentary Affairs (MLJP) presented a draft Bill (hereafter the Bill) intending to amend the TRC Act and presented it to victims and civil society organisations for their comments.[30] The Bill divides violations committed during the conflict into two categories: gross violations of human rights that include extrajudicial killings, enforced disappearances, torture, rape or other sexual violence,[31] requiring prosecution and 'other acts of human rights violations', that include abduction and hostage taking, causing

[29] SI 02, 27 March 2017, Kathmandu.
[30] Author was given a copy to comment and also invited to participate a meeting where the Minister for Law, Justice and Parliamentary Affairs presented a Bill to the victims and civil society activists (21 June 2018, Yalamaya Kendra, Patan).
[31] Proposed Bill for Transitional Justice Act, s 2(j) (PBTJA).

mutilation or disability, looting, confiscation, damage or arson of private or public property, forced eviction from house/land or any kind of displacement if committed by any party to the conflict or anyone else at the instigation of or with the deliberate aid or support of a conflict party.[32] Amnesty can be offered for the latter category but not the former.

The Bill recognises victims' rights to reparation and strengthens provisions related to reparation in the existing TRC Act by recognising various forms of reparation, such as financial compensation, psychosocial counselling, educational schooling, skills-oriented training and free interest loans to start a business, among others.[33] It mandates the Commission to recommend other measures for archiving and memorialisation.[34] It also mandates the Commission to identify the causes of the armed conflict and recommend policy, legal and institutional reforms to ensure that incidents of human rights violations are not repeated in the future.[35]

Completely new to the TRC Act, the Bill proposes leniency in sentences for perpetrators involved in gross violations in return for their cooperation with the truth-seeking and reparation process.[36] For example, if an alleged perpetrator involved in gross violations cooperates with the truth-seeking process by disclosing the truth and providing a confession before the Commission, he/she will get 3 years' sentence, to be served as community service.[37] In addition to 3 years' community service, the perpetrator will be liable to a fine not exceeding Npr. 500,000.00 (about

[32] ibid, s 2(i), (1)
[33] ibid, s 23(2).
[34] ibid, s 13(8)(l).
[35] ibid, s 13(8)(n).
[36]Yalamaya Kendra, Patan (21 June 2018).
[37] PBTJA (n 31) s 30(i)(6).

US$ 4500). Such a perpetrator cannot take any public position for a period of 3 years and will be banned from traveling abroad while serving the sentence.[38]

Similarly, if an alleged perpetrator of gross human rights violations does not disclose the truth at the TRC but does so during trial in the Special Court, he/she would get 75% reduction in the sentences provisioned by 'existing law'.[39] The remaining 25% of the sentence could be served in an open prison.[40] In addition to this, the person will be liable to pay a maximum of Npr. 700,000.00 (US$ 6,500) as a fine,[41] offer an apology to the victims, show feeling of remorse for committing the crime, promise not to repeat such crime and agree to pay compensation as determined by the Court.[42] Furthermore, those involved in other acts of human right violations are entitled to get amnesty if they seek amnesty by disclosing the truth, confessing to a crime, offering an apology to victims, agreeing to pay compensation as determined by the Commission and making a commitment not to repeat the crime.[43] It is not clear however whether perpetrators need to fulfil all these conditions to receive benefits or if some would suffice and if so what the consequences for partially fulfilling the conditions are.

The Bill continues to envision the Truth Commission as the sole investigatory arm of prosecution.[44] Prosecution will be done on recommendation of the TRC on the basis of evidence it collected.[45]

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[38] ibid.
[39] ibid, s 30(a)(6).
[40] ibid, s 30(i)(7).
[41] ibid, s 30(i)(3).
[42] ibid, s 30(i)(6).
[43] ibid, s 26(4).
[44] ibid, s 29(1).

Those engaged in negotiations (with political parties and the army) on the Bill argue that leniency in sentencing was the meeting point in bringing political parties and especially the Maoists and Nepal Army on board to make progress on TJ.[46] They further argue the Bill addresses victims' right to remedy, strengthening truth and reparation and making prosecution for gross violations possible.[47] It was also claimed that the Bill was inspired by the 'Colombian model' of TJ.[48]

However, the proposed Bill has been criticized by victims,[49] civil society organizations[50] and the UN.[51] Although they have commended the holistic approach that the Bill has attempted to embrace, their main concerns relate to the link between the severity of crimes and the proposed 'symbolic' punishment.[52] They have also highlighted a lack of consultations, transparency and clarity in many aspects of the Bill and have raised doubts whether it would strengthen the

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[45] ibid, s 13(d).
[46] Phuyal, 'The Struggle for Transitional Justice' (n 23).
[47] Minister for Law, Justice and Parliamentary Affairs, while presenting the Bill to the civil society and victims (21 June 2018, Yalamaya Kendra, Patan) author was present.
[48] SI 03, 4 May 2018, Kathmandu; CS 11, 22 November 2019, Kathmandu.
[49] Conflict Victims Common Platform (CVCP), 'Suggestion on Modality for the Consultation concerning the amendment of Transitional Justice Act' (22 September 2019).
[50] Civil Society Organizations, 'Preliminary Review and Recommendations by Civil Society Organizations on the Draft Bill on Transitional Justice' (20 July 2018) (copy on file with author); The copy was signed by 33 organizations. Amnesty International, International Commission of Jurists and Trial International, 'Preliminary Comments. Draft Bill to Amend the Act on Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2014' (20 July 2018) <https://www.icj.org/wp-content/uploads/2018/07/Nepal-Transitional-Justice-Advocacy-Analaysis-brief-June-2018-ENG.pdf> accessed 10 April 2020.
[51] OHCHR, 'Technical Note. Nepal Bill for amending the 2014 Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act' (July 2018).
[52] Civil Society Organizations (n 50); Amnesty International (n 50).
[52] OHCHR, 'Technical Note' (n 51).

possibility of truth, justice, reparation and guarantee of non-recurrence in the country.[53] As leveraging truth and justice for each other's benefits continues to be discussed as the possible solution paving the way for the stalled TJ process, the following sections analyse some of the concerns of victims and civil society on the proposed scheme with the hope of finding ways to address them as the country explores different options to take the TJ process forward.

6.2.1. Main concern: leniency in sentencing

The main concerns about the Bill relates to the penalties proposed. Victims and civil society have argued that leniency in sentences as proposed in the Bill could reinforce the deep-rooted problems of impunity and discrimination in society, where those in power are always above the law.[54] This has been echoed by the UNOHCHR, which stated that the total exclusion of imprisonment violates the international obligation to punish the most serious crimes under international law with appropriate penalties taking into account the gravity of the crime.[55]

As chapter 2 analysed, international law has laid down that punishment should be proportionate to the gravity of the crimes committed.[56] However, international law does not prescribe the length and type of sentences required, allowing some margin of appreciation to States in developing a sentencing policy as discussed in chapter 3. Chapter 4 also discussed how reduced sentence for accused cooperating with the justice process is recognised in international human rights treaties and practiced in TJ contexts. For example, the International Convention for the

[53] Civil Society Organizations (n 50); Amnesty International (n 50); 'Conflict Victims Slam Symbolic Prosecution' *my República* (24 June 2018) <https://myrepublica.nagarik network.com/news/conflict-victims-slam-symbolic-prosecution/> accessed 6 May 2020.
[54] Civil Society Organizations (n 50).
[55] OHCHR, 'Technical Note' (n 51) para 57.
[56] See ch 2, s 2.4.4.

Protection of All Persons from Enforced Disappearance (ICPPED) allows suspended sentences for information and truth provided for the establishment of the fate of the missing.[57] This has also been recognised by the UN Principles to Combat Impunity,[58] international criminal tribunals[59] and the ICC.[60] However, the legitimacy of such policy may depend on a number of factors, including how it is designed and implemented and whether it helps to achieve the sentencing goal and goals of TJ.

There have been no informed debates around the rationale for a scheme of lenient punishment, its value for TJ and its compatibility with international law in Nepal. Discussions, if any, have been limited to a small number of people, mostly politicians and a few lawyers assisting politicians.[61] Because of this lack of transparency and inclusivity during any consultations,

[57] International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICPPED).

[58] The Principle foresee the role of confessions, disclosure and repentance as a legitimate justification for reduction of sentence, but not an exemption from criminal or other responsibility, principle 28 ; UNESC, 'Impunity. Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher*. Addendum. Updated Set of principles for the protection and promotion of human rights through action to combat impunity' (8 February 2005) UN Doc E/CN.4/2005/102/Add.1.

[59] *Prosecutor v Vidoje Blagojević and Dragan Jokić* (Judgement) IT-02-60-T (17 January 2005) paras 858-860; *Prosecutor v Biljana Plavšić* (Sentencing Judgement) IT-00-39&40/1-S (27 February 2003) paras 85-94 ; *Prosecutor v Moinina Fofana, Allieu Kondewa* (Judgement) Case No.SCSL-04-14-T (2 August 2007) paras 94-96.

[60] For example, the rules of evidence of the ICC have a provision for early release taking into account different factors such as the 'genuine dissociation' of a sentenced person from their crime, the prospects of them being socialised or successful resettlement back into society, whether their release would give rise to 'significant social instability', any 'significant' action by the sentenced person for the benefit of victims and the impact of their release on victims and their families, and their individual circumstances, such as worsening health or advanced age. International Criminal Court, *Rules of Procedure and Evidence* (2nd edn, 2013) r 223.

[61] CS 11 (n 48); CS 12, 24 November 2019, Kathmandu.

victims and civil society see the proposed leniency as serving the interests of perpetrators, not victims.[62]

Although the context is different, as chapter 3 analysed, the use of leniency in sentencing, also for those involved in serious violations, has been and continues to be widely discussed in the context of the Colombian TJ process, where TJ mechanisms began to work while writing this thesis. The Colombian Peace Agreement between the Colombian government and the Revolutionary Armed Forces of Colombia (FARC) (2016) as well as the TJ system it has designed are very complex and a detailed discussion on it remains beyond the scope of this chapter. It is also premature to come to conclusions about its success and achievements given that the mechanisms are relatively new. As chapter 3 has already analysed some of the issues around the sentencing regime in the Colombian TJ process, a brief recap of the debates on leniency in sentencing in Colombia would be useful for the discussion on Nepal.

As chapter 3 highlighted, the issue of reduced and alternative sentencing has long been the subject of intense debates in Colombia, specifically since 2002, when it was introduced to demobilise thousands of paramilitaries. In 2006 although the Constitutional Court of Colombia (CCC) recognised that the imperative for peace justifies suspended sentences,[63] it set out a number measures required for allowing such sentencing policy.[64] This included those willing to be demobilised and to receive the benefits of suspended sentence to disclose the full truth and

[62] CON 01, 16 September 2019, Kathmandu; CON 03, 24 October 2019, Nepalgunj.
[63] *Gustavo Gallón Giraldo y otros* v *Colombia* (18 de mayo 2006) Sentencia No C-370/2006, Corte Constitucional [*Gustavo Gallón Giraldo* and others v Colombia (18 May 2006) Judgement No C-370/2006.
[64] Ibid.

that hiding any truth needs to result in them facing trial in the normal criminal justice system,[65] following full investigation of crimes and standard procedures of criminal law[66] and those convicted needing to serve their sentences in ordinary prisons.[67] The Court further required the government to ensure victims' participation in all stages of the proceedings,[68] and to make perpetrators contribute to victims' reparation by giving up their assets obtained illegally.[69]

The comprehensive approach to TJ that the Peace Agreement embraces includes a Truth Commission,[70] reparation,[71] a special mechanism for criminal justice,[72] a mechanism to investigate disappearances and measures to prevent future violations.[73] It offers 5-8 years reduced and alternative sentences for those most responsible, involved in gross violations of human rights or in serious violations of humanitarian law, in return for truth and agreeing to fulfil other conditions, such as to provide a confession, recognition of responsibility, reparation to victims and a contribution to non-repetition by full demobilisation.[74] This system is different to that established by the Justice and Peace Law in that here, those most responsible who comply with all requirements will not be imprisoned but will received an alternative sanction (*sancion propia*) that will restrict their liberty but not deprive them of it.[75] So, such persons, like a high

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[65] ibid [6.2.2.1.7.27-6.2.2.1.7.28].
[66] ibid [6.2.3.1.6.4].
[67] ibid [6.2.3.3.4.8- 6.2.3.3.4.9].
[68] ibid [6.2.3.2.1.10], [6.2.3.2.2.8].
[69] ibid [6.2.4.1.16-18].
[70] 'Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace' (24 November 2016) (Final Agreement) s 5.1.1.1 <http://especiales.presidencia.gov.co/Documents/ 20170620-dejacion-armas/acuerdos/ acuerdo-final-ingles.pdf> 30 August 2020.
[71] ibid, s 5.1.3.
[72] ibid, s 5.1.2.
[73] ibid, s 5.1.4.
[74] ibid, s 5.1.2.60
[75] ibid, s 60.

commander of the FARC, would be sentenced to social work, demining or a similar activity instead of imprisonment for a period of 5 to 8 years.[76] The other incentive is amnesty. Although it is not permitted for those involved in crimes against humanity, genocide and serious war crimes,[77] it is offered for political crimes on condition of an agreement to confess and demobilise.[78]

Whether the ICC and the IACtHR would find these measures acceptable is yet to be seen. However, as discussed in chapter 3, scholars and practitioners alike are increasingly arguing that in the contexts of transition like of Colombia, proportionality is not the only criteria while assessing the fulfilment of States' obligations under international law,[79] and that other obligations and interests of States also need to be weighed while implementing competing State obligations.[80]

Considering the different interests at stake, such as to restore peace and prevent ongoing violations in Colombia, the ICC has also indicated that the Rome Statute does not prescribe the

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[76] ibid, s 5.1.2.60.
[77] ibid, s 5.1.2.38.
[78] That includes sedition, carrying illegal weapon, assault, combat deaths inconsistent with international humanitarian law, conspiracy to commit crimes for the purpose of rebellion and other related offense, making it conditional to demobilisation. Final Agreement (n 70) para 38; see also Priscilla Hayner, *The Peacemakers Paradox. Pursuing Justice in the Shadow of Conflict* (Routledge 2018) 209.
[79] Oscar Parra-Vera, 'Inter-American Jurisprudence and the Construction of Transitional Justice Standards: Some Debates and Challenges' in Nelson Camilo Sánchez and others, *Beyond the Binary. Securing Peace and Promoting Justice After Conflict* (Dejusticia 2019) 154-73; Paul Seils 'Squaring Colombia's Circle. The Objectives of Punishment and the Pursuit of Peace' (ICTJ Briefing, June 2015); Kai Ambos, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC' in Kai Ambos, Judith Large and Marieke Wierda (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Springer 2009) 19, 49, 81.
[80] Parra (n 79); Seils (n 79).

specific type or length of sentences that States should impose for ICC crimes.[81] However, it states such policies should serve 'appropriate sentencing goals, such as public condemnation of the criminal conduct, recognition of victims' suffering, and deterrence of further criminal conduct'.[82]

Thus, the main argument in respect of leniency in sentencing is that its legitimacy depends on how the scheme is designed and how it balances different interests at stake. Although it is stated by key Nepal actors that the scheme of leniency of sentencing in the proposed Bill is informed by the Colombian model,[83] the leniency in sentencing in the Colombian TJ process is also attached to its efforts to secure peace by demobilization of thousands of militia members, dismantling criminal structures, ending the five decades long armed conflict and ongoing human rights violations. Therefore, the context and conditions that may give legitimacy to such a scheme in Colombia may not be the same in Nepal.

A decade has lapsed since the peace agreement was signed in Nepal. Thus, the Colombian scheme as a 'model' may not work in Nepal, as Nepal's tensions around TJ are not part of wider peace negotiations, but rather a peace accord remnant that has not been delivered on ten years later, while much of the political dynamics has changed. The value of such a scheme in Nepal has to be explored and justified based on national need, through national consultations, debates,

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[81] James Stewart, 'Transitional in Colombia and the Role of International Criminal Court' ('Transitional in Colombia and the Role of International Criminal Court' conference, Bogotá, 13 May 2015).
[82] ibid.
[83] Ram Kumar Bhandari, 'A Colombian model in the Himalayas?' *The Kathmandu Post* (2 July 2018) <https://kathmandupost.com/opinion/2018/07/02/a-colombian-model-in-the-himalayas> accessed 20 December 2020.

discussions and negotiations, involving different actors, primarily the victims. As chapter 3 highlighted, it is also important to note that the TJ framework in Colombia is developed through wider consultations; deliberations among different stakeholders, considering the nuances in the jurisprudence developed both at national and international level, which does not seem to be the case in Nepal.

Although leniency in sentencing, particularly in the form of reduced sentencing is an established concept in criminal law[84] and is not new to Nepal, its use in cases involving serious violations without much clarity may remain a problem. A number of laws and policies offering leniency in sentencing, mostly reducing sentences and pardon, have existed for a long time in Nepal.[85] The Courts are also given discretionary powers to reduce sentences, considering different mitigating factors such as the context of the crimes, age of the offender, and the nature of crimes, among others.[86] Pardon has also been widely used, especially for criminals who have served 50% of their sentence in prison and have shown reforms in their behaviour while serving the sentences.[87] The newly adopted Penal Code and the Prison Act also have provisions for open prison,[88] and community service.[89]

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[84] See ch 5.
[85] National Penal Code 2017, ch 5, s 47; National Criminal Procedure Code 2017, ss 33, 159; Criminal Offences (Sentencing and Execution) Act 2017, s 5; Prison Rules 1963, rule 29(1).
[86] General Code (*Muluki Ain*) 1963, s 188.
[87] Criminal Offences Act (n 85), s 37; Prison Rules (n 85) rule 29(1). Prisoners with good conduct could have a reduction in the duration of the sentence (up to 60 percent) as stated in 14th Amendment of the Prison Rules 1963. Prison Rules 1963, rule 29(1).
[88] Prisons Act 1963, s 2(j). It defines open prison as any such place 'to hold a prisoner in such a manner that the prisoner is allowed to go outside the place where he or she is detained and do any work during the time as specified'.
[89] National Penal Code (n 85) s 40(g). The Prisons Act (n 88) s 2 (i) defines community service as the 'service to be made in a school, hospital, local body, temple, elderly home, orphan as well as similar other body and social organisation'.

However, these schemes are envisioned only for those involved in less serious crimes and for those who have already served some part of their prison sentence in closed prisons and who show signs of improvement in their behavior.[90] The new Penal Code has put restrictions on offering pardon, remission and suspension of sentences even after serving 50% of the sentences for some crimes such as corruption, torture, hostage-taking and disappearances, homicide by cruel and inhumane means or control, rape, human trafficking, drug trafficking and money laundering.[91] Although the government has made a policy decision to establish open prison community service a long time ago, they remain new concepts to Nepal as they are not yet put into practice and have not yet shown how they function and help to achieve the goal of punishment.

In such legal and social context, what sort of punishment would help and how perpetrators should serve their sentence should be widely discussed and collectively designed, so the goal of punishment and also TJ are achieved. As Christine Bell argues, the contexts of transitions where justice needs to be negotiated are unique, requiring a 'new law'[92] that would allow 'creative locally tailored approaches and broad public debates over the connections between the means and the end of [TJ] mechanisms.'[93] This could also set a standard of participation of a broader range of actors, not only the armed forces.

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[90] Criminal Offences Act (n 85) s 24.
[91] National Criminal Procedure Code (n 85) s 159 (4)(a-j).
[92] Christine Bell, 'The "New Law" of Transitional Justice' in Kai Ambos, Judith Large and Marieke Wierda (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Springer 2009) 105.
[93] ibid 121.

This research finds civil society and victims in Nepal not being against leniency in sentencing *per se.*[94] They might accept it if it offers benefits to truth, justice, reparation and non-recurrence, restores rule of law and helps to prevent the cycle of impunity. Thus, it can be argued that leniency in sentencing could be used as leverage for both truth and justice to coexist. However, it has to be designed through a consultative process ensuring transparency and clarity about how it contributes to achieve sentencing goals and TJ in Nepal.[95]

Although there are certain general goals of TJ and punishment as discussed in chapter 2 and 3, there are contextual nuances that need to be taken into consideration for which a wider public discourse is necessary. Major actors, including victims and civil society, agreeing to a set of goal of TJ in Nepal would be an immediate next step. This would require a proper plan of the Government, with a dedicated institution and resources to facilitate that. This would also require openness and transparency of the process. However, at the time of writing this thesis, efforts to promote transparency and openness to genuinely engage with victims and civil society to discuss the common goal of TJ and the conditions giving rise to the scheme of leniency of sentences while balancing different interests at stake, are missing.

The Bill provided some momentum and could have been able to bring all actors together through extensive consultations on setting a common goal and understanding on incentivizing truth and justice. However, against the call of victims and civil society for wider consultations towards that

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[94] Civil Society Organizations (n 50); Conflict Victims Common Platform (CVCP), 'Preliminary Comments of Conflict Victims' Common Platform (CVCP) on proposed TJ draft bill to amend Commission of Inquiry on Enforced Disappearances, Truth and Reconciliation Act, 2014' (17 July 2018) <http://www.advocacyforum.org/downloads/pdf/press-statement/2018/preliminary-comments-of-CVCP-on-tj-bill-english.pdf> accessed 30 July 2020.
[95] ibid; CVCP (n 49).

direction, the government appointed the new sets of TRC Commissioners in early 2019, arguing that the TRC could not be left without office bearers and the amendment process could go hand in hand. However, the decision of the government to appoint Commissioners without making any progress in amendment of the Act since publishing the Bill in mid-2018 is widely criticized.[96] Appointing the Commissioners under the old Act means continuation of the same problems with the Commission, further widening the mistrust between the government and victims and civil society. For example, although the government organized consultations in January 2020 in all 7 provinces, the consultations were largely considered as window dressing, done to legitimatize the political parties' deal to have Commissioners of their choosing.[97] As a result, civil society and victims have continued to take a position of non-engagement with the Commission pending the amendment of the Act.[98]

[96] Accountability Watch Committee (AWC), 'Concerns about the Process of Recommendation of Commissioners for TRC and CIEDP' (18 November 2019); CVCP, 'Regarding latest developments on the restructuring of Transitional Justice Mechanism' (16 November 2019).
[97] CVCP, 'Advancing Transitional Justice Process without amending the Act, or completely disregarding victims' concerns will not give a sustainable solution. Rather than ensuring victims dignity and their rights to truth, justice, and reparation, these type of controlled and imposed process is merely the waste of time and abuse of the State's resources' (Press Statement, 13 February 2020); Accountability Watch Committee (AWC), 'Position of AWC regarding the Appointment of the Members of Truth and Reconciliation Commission and the Commission of Investigation on Enforced Disappeared Persons' (Press Statement, 19 January 2020) <http://www.advocacyforum.org/downloads/pdf/press-statement/2020/awc-press-statement-on-recommendatio-of-officials-19-January-2020-english-version.pdf> accessed 28 July 2020; Accountability Watch Committee (AWC), 'Serious objection to the Government's decision to extend the tenure of the Transitional Justice commissions without amending the law' (Press Release, 8 January 2018).
[98] ibid.

6.3. Possible way forward: re-designing the TJ process

Non-engagement of victims and civil society with the Commission pending the amendment of the Act,[99] the Supreme Court's rejection of the government's appeal for a revision of its 2014 decision that required prosecution in gross violations prohibiting amnesty,[100] and different factors discussed in previous sections, continue to put Government under pressure to amend the Act and redesign/renovate the TJ architecture.[101]

In this context, the following section proposes a possible way forward. This section draws on data collected through consultations by civil society organizations in different provinces of Nepal as explained in chapter 1. The developments in international law as discussed in chapter 2, learning from the changing landscape of TJ discussed in chapter 3 and experiences of other countries discussed in chapter 4 of the thesis also form the basis for this thesis to argue that the possible solution to the present problem of TJ in Nepal lies in designing a coexistence of truth and justice mechanisms, incentivizing them for each other by situating them in a holistic TJ system, following wider consultations and with international support.

While arguing how the coexisting truth and justice process could be designed, with the incentive of lenient sentencing in Nepal, it first analyses where the gaps are in the proposed Bill that introduced leniency in sentencing. It will then argue what reforms need to be made to enable Nepal's TJ process to deliver both truth and justice while also recognizing and respecting the right to reparation and contributing to non-recurrence of gross violations in future.

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[99] ibid.
[100] *Government of Nepal v Suman Adhikari et al* (decided on 26 April 2020) SC Writ No 072-RV-0005, 1-5.
[101] SI 08 (n 1); CS 11 (n 48).

6.3.1. Making sure that the process is consultative

This research finds a lack of transparency and consultations as major barriers in developing an acceptable TJ process in Nepal. As discussed in chapter 3, the success of TJ mechanisms depends on the quality of consultations and victims' participation in the design process.[102] A lack of victims' consultation and participation as well as a lack of transparency in the process have been highlighted as persistent problems in Nepal.[103] Many of the concerns on the Bill in general and about the incentives of leniency in sentencing for truth and justice in particular have emerged from a lack of consultations, collective reflections on the rationale for such incentives. As victims repeatedly expressed: 'it was designed by them'[104] to serve 'their interest.'[105]

Although Nepal has no culture of adopting consultative processes in law and policy making, and those in political parties involved in behind-closed-door negotiations are not prioritising these demands in this historical, political and social context,[106] it is important to have introspection and to learn from immediate past experience and use best practices in adopting a consultative

[102] See also OHCHR, 'Rule-of-Law Tools for Post-Conflict States. National consultations on transitional justice' (2009); Simon Robins, 'Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Post Conflict Nepal' (2011) 5(1) IJTJ 75; Simon Robins and Ram Kumar Bhandari, 'From Victims to Actors: Mobilising Victims to Drive Transitional Justice Process' (NEFAD 2012); UNSC, 'The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General' (12 October 2011) UN Doc S/2011/634; see ch 3 s 3.4.2.

[103] OHCHR, 'Joint Communications from Special Procedures' (12 April 2019); UN, 'Mandates of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Special Rapporteur on violence against women, its causes and consequences' (16 March 2020) UN Doc AL NPL 1/2020.

[104] CON 06, 25 November 2019, Dhangadi; CON 03 (n 62).

[105] CON 03 (n 62); CON 05, 16 November 2019, Biratnagar.

[106] Yvette Selim, 'The Opportunities and Challenges of Participation in TJ: Examples from Nepal' (2017) 29(8) Journal of International Development 1123, 1143.

approach. As the previous section highlighted, the lack of victims and civil society's support due to a lack of a meaningful consultative process has been one of the key factors severely impacting the legitimacy of the TRC.[107] This will recur if the same problem is repeated while drafting the Bill amending the Act.

The Bill that aimed not only to amend the TRC Act but to change the legal framework of TJ significantly was prepared without having any consultations with victims and civil society. Some victims and civil society got to know about it through diplomats,[108] while other from their trusted sources in political parties.[109] Although it was shared with victims and civil society at a later stage, victims and civil society had already started to feel excluded from the process and suspicious of the draft being the production of negotiations among the actors involved in past atrocities, favouring their interests not the victims.[110] Both victims and civil society organisations provided preliminary observations on the Bill, including a number of recommendations. One of such recommendations included wider consultations with victims and civil society organisations, not only in Kathmandu but also in the provinces.[111] Consultations improve legitimacy and ownership of victims on the Bill and the framework it presents, generating their support to its implementation. It could also improve the trust and confident of victims in the process generally.

[107] See s 5.4.2.
[108] CS 01, 2 March 2017, Kathmandu.
[109] CS 03 (n 21).
[110] FGDV 01, 24 March 2017, Kathmandu.
[111] Conflict Victims Common Platform, 'Preliminary Comments of Conflict Victims' Common Platform' (n 94); Civil Society Organizations (n 50).

As TJ is a long-term project, it cannot be 'quick-fixed.'[112] Although some political activists have presented pursuing accountability for the past crime as revenge,[113] it should be seen not as revenge but as a positive effort to improve the system to prevent its non-recurrence. *'Hamle hamra manche marnelai marna pau bhaneka chainau'* (we have not asked to let us kill those who killed our loved one), [114] *hamile nyaye deu bhaneko ho* (we are seeking justice) [115]are powerful reactions of victims' to the comments of politicians. Persistent denial of truth, justice, reparation for victims and denial to recognise their pain and suffering could in fact forced victims and society at large to resort violent path, including taking laws into their hands.[116] Thus, TJ is antithesis of revenge or any vengeance as it lies exactly at the 'intersection of revenge, on the one side, and forgetting or not pursuing any accountability on the other'.[117]

However, taking TJ process forward also requires political will, resources and commitment, especially from the government. Although availability of resources and institutional capacities also constrain the countries efforts in taking TJ process forward, the political will is assessed by assessing whether actors responsible for exercising this political will are continuously putting their efforts into implementing their obligation. [118] Lack of a dedicated public institution is also

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[112] CON 01 (n 62).
[113]In a number of public forums, political leaders have equated civil society' call for justice as call for revenge.
[114] CS 06, 2 April 2017, Kathmandu.
[115] ibid.
[116]'Victims of Maoist insurgency warn to launch agitation' *Hindustan Times* (Kathmandu, 2 July 2009) <https://www.hindustantimes.com/world/victims-of-maoist-insurgency-warn-to-launch-agitation/story-C2QQpHm4bVvhn7gTDYCv8N.html> accessed 24 December 2020.
[117] See also Martha Minow, *Between Vengeance and Forgiveness* (Beacon Press 1998).
[118] Phuong N Pham, Niamh Gibbons and Patrick Vinck, 'A framework for assessing political will in transitional justice contexts' (2019) 23 (6) The International Journal of Human Rights 993-1009.

considered as Government not having political will to take TJ process forward. Until 2018, the Ministry of Peace and Reconstruction (MOPR) was the focal institution for TJ issues. After it was dissolved in February 2018, its responsibilities were shared by different ministries, with no lead Ministry. As a result, different institutions and individuals in the government have been focal points on TJ, without sufficient clarity and coordination among them. This has resulted in contradictory and fragmented moves by government agencies, damaging public confidence and making any efforts fragile and unsustainable. An example is that on the one hand the MoLJP and the Office of the Attorney General were working on the draft Bill, introducing leniency in sentencing, promising to have consultations on a number of aspects of the Bill.[119] On the other hand, the Cabinet decided to appoint new TRC Commissioners without amending the law.[120] These uncoordinated and contradictory moves of Government have been found to be making everyone suspicious about the intent, further eroding the confidence of victims and civil society in the process. Another example is the Government hastily organising consultations in all seven provinces, just before the appointment of Commissioners in 2020, with victims and civil society criticising these consultations as 'window dressing'[121] and 'fake'.[122] These opaque consultation processes have further eroded the victims' confidence in the government.

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[119] It was promised that the Bill will be amended considering the inputs from victims and civil society (21 June 2018, Yalamaya Kendra, Patan).

[120] Binod Ghimire, 'Conflict Victims Condemn Parties for Bulldozing Decision on Transitional Justice Appointments' *The Kathmandu Post* (Kathmandu, 18 January 2020) <https://kathmandupost.com/national/2020/01/18/conflict-victims-condemn-parties-for-bulldozing-decision-on-transitional-justice-appointments> accessed 12 June 2020.

[121] Victim Groups' Joint Submission to the Universal Periodic Review of Nepal. Submitted in March 2020 for the Review of the United Nations Human Rights Council, the 37th Session of the Working Group on the Universal Periodic Review (2-13 November 2020).

[122] Advocacy Forum, 'Fake Transitional Justice Consultations. How Long Can The Government Fool Victims?' (February 2020) Briefing Paper <http://www.advocacyforum.org/downloads/pdf/publications/tj/briefing-paper-on-tj-consultation-february-2020.pdf accessed 12 January 2020.

Victims' demand is for 'meaningful consultations'[123] at all 'levels of the TJ process'.[124] This should not be limited to being invited to a meeting to hear about decisions taken but to allow victims' expectations to be reflected before decisions are taken.[125] Lack of meaningful participation could just be a tool to legitimatise already made decisions.[126] If victims' voices are not recognised and reflected in the policy outcomes, these consultations would rather disempower victims.[127] As chapter 5 discussed, there were several efforts even in the past (before the TRC Act was passed) to have consultations with victims. Some consultations were held, where different stakeholders, victims and civil society not only participated but actively supported.[128] However, the controversies started to arise when the political actors passed the Bill in 2014, negotiated outside the consultative process, losing the support of victims and civil society resulting in the legal challenge by the victims.

Furthermore, the design of the TJ process also has to be inclusive to bring the voices of different sectors of society that could provide ideas and more constructive energies. As the UN Special Rapporteur on TJ has highlighted 'a truly inclusive approach has great potential to leverage more of the constructive energy of different actors…'[129] Only an inclusive and consultative TJ process could capture the expectations of different actors, help to gain legitimacy for different incentives

[123] CS 06 (n 114); CS 07, 11 April 2017, Kathmandu; Conflict Victim Common Platform, 'Preliminary Comments of Conflict Victims' Common Platform' (n 94).
[124] ibid.
[125] CS 01 (n 108); CS 06 (n 114).
[126] Selim (n 106) 1123, 1137.
[127] Andrea Cornwall, '"Unpacking Participation": Models, Meanings and Practices' (2008) 43(3) Community Development Journal 269-270, 277; Selim (n 106) 1123, 1128.
[128] Mandira Sharma, 'Transitional justice in Nepal: Low Priority, Partial Peace' in Deepak Thapa and Alexander Ramsbotham, *Two steps forward, one step back. The Nepal peace process* (2017) 26 Accord 33-34.
[129] UNGA, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' (23 August 2018) UN Doc A/73/336, para 30.

and make truth and justice viable on the ground. The UN Special Rapporteur has further highlighted that ensuring victims' participation in the design process of TJ also means recognising victims as rights holders. It manifests and strengthens the right to truth; acknowledges the crucial role victims play in initiating procedures and in collecting, sharing and preserving evidence.[130] It also seeks to empower victims.[131]

Transparency in the process and wider consultations among different stakeholders is important also to promote synergies among different initiatives. This research has found different initiatives being undertaken by victims, civil society organisations and donors but they too face similar challenges of lack of coordination and transparency, sometimes creating division within and among the groups. For example, in November 2019, a group of 'civil society activists' and 'victims' called for a 'high level political mechanism' to take the TJ process forward.[132] The group developed a 'victim's charter' that demanded not only a high level political mechanism but also called for public commitments from the leaders of the main political parties to take the TJ process forward ensuring victims' participation in different stages of the process, among others.[133] Although many of these provisions in the charter were important and supported by victims and civil society organisations in the past, this initiative created controversies. It divided victims and civil society as some saw this being an opportunity to engage with the political

[130] UNGA, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff' (27 August 2014) UN Doc A/HRC/27/56, para 115.
[131] ibid.
[132] Dewan Rai, 'Fear of what happens next in transitional justice divides the victims' *the Record* (14 January 2019) <https://www.recordnepal.com/truth-and-reconciliation-commission-and-transitional-justice> accessed 31 May 2020.
[133] Conflict Victims' Common Platform (CVCP) 'Conflict Victims' Charter. Adopted by the National Conference of Conflict Victims on Transitional Justice. 20 – 21 November 2018' (21 November 2018) <https://www.satp.org/Docs/Document/1019.pdf> accessed 31 May 2020.

leaders, whose participation in the process was important for the TJ process while others saw it as a plot hatched to allow political leaders' high-handedness in the TJ process and to impose an agenda of reconciliation (meaning mediation).[134] There were a few other attempts, including by donors, that also remained controversial, again largely because of a lack of transparency, consultation and coordination.[135]

Although it is also true that not all negotiations could be made publicly and through consultative process as confidentiality would be necessary in some contexts to provide space for all actors (including perpetrators) to articulate their positions and demands. Clear understanding of the positions of different actors is important to negotiate and navigate a possible way forward acceptable to all. However, all these need to be part of a strategy and should be guided by the goal of TJ. In the context where important decisions are made by a few leaders, behind the scene, having no transparency and coordination, it is important to take all necessary measures to ensure that even the confidential negotiations are done within the parameters of the constitution, international law and the aspirations of victims and society at large.

6.3.2. Design incentives to strengthen truth-seeking

Designing both truth and justice to coexist as part of a holistic could provide incentives and leverage to each other, strengthen the possibility for both truth and justice and get the support of victims and wider actors.

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[134] CS 06 (n 114); CS 07 (n 123).

[135] Binod Ghimire, 'Swiss bankroll leaders' Bangkok junket' *The Kathmandu Post* (Kathmandu, 16 November 2018) <https://kathmandupost.com/national/2018/11/16/swiss-bankroll-leaders-bangkok-junket> accessed 31 May 2021; 'Leaders attend Bangkok gathering' *The Himalayan Times* (Kathmandu, 26 November 2016) <https://thehimalayantimes.com/kathmandu/leaders-attend-bangkok-gathering> accessed 31 May 2020.

Knowing the truth is a right of victims and the primary demand of a TJ process. However, as chapter 3 highlighted, the concept of truth is a contested one as there is no uniform definition.[136] It is not the objective of this section to define truth. However, in the context of Nepal, when victims are asked what they want from this process, their responses provide important insights about their expectations, which also provide further insights on how leniency in sentencing could offer value in establishing victims' right to truth and get victims' support.

Knowing the whereabouts of their disappeared loved one is an essential outcome from the truth-seeking process for those families whose loved ones are still disappeared.[137] What happened to them, who disappeared them and why and where their remains are seem to be important truths that victims are seeking.[138] For families, predominately coming from a Hindu background,[139] doing last rites (*'satgat')*[140] is critical religiously, culturally, socially and also psychologically. Finding the truth about the disappeared would require locating the remains of the disappeared, truth about possible burial sites, process and procedures for exhumation and identification of remains among other.

However, demand of truth is not just limited to establishing the whereabouts of those disappeared. Many victims who suffered torture in detention believe that their torturers were

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[136] Priscilla B Hayner, *Unspeakable Truths. Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2010) 80-84; R Mattarollo, 'Definition and Primary Objectives: to Search for the Truth and Safeguard the Evidence' in M Cherif Bassiouni (ed), *Post Conflict Justice* (Brill - Nijhoff 2002) 295, 300; Alex Boraine, *A Country Unmasked. Inside South Africa's Truth and Reconciliation Commissions* (OUP 2001) 287.
[137] CON 03 (n 62); CON 04, 7 November 2019, Pokhara; CON 06 (n 104).
[138] ibid.
[139] More than 80% of the population in Nepal is Hindu.
[140] Last religious ritual to be performed in Hindu tradition after death.

'trained' to inflict severe pain, leaving no physical evidence.[141] Some even argue that there was an institutional policy of targeting particular groups such as the Tharu indigenous peoples in Bardiya because of the historical socio-economic contexts.[142] Family members of those who were killed wonder why their loved ones were killed and what consequences the informers in the community providing mis-information about their loved one resulting in their death or disappearance should face.[143]

Thus, how institutions functioned, who financed and supported the violations; where they got training, what were the organisational plans, policies and operations that resulted in violations and who executed such polices are also important for both victims and society to know in order to prevent future violations.[144] Actions that follow truth revealed are also integral parts of truth-seeking process for victims. Victims have asked '*Bhanera ke huncha*?' (What will happen to our story?).[145] Their engagement and support to the truth-seeking process also seems to depend on whether they are confident that their story is listened to and acted upon as expressed *'satya*

[141] Kunda Dixit, 'The ghosts of Bhairabnath' *Nepali Times* (26 September 2013) <https://archive.nepalitimes.com/article/nation/nation-jitman-basnet-book-bhairabnath,761> accessed 10 May 2020.
[142] OHCHR, 'Conflict-Related Disappearances in Bardiya District' (December 2008); Simon Robins, 'Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Post Conflict Nepal' (2011) 5(1) IJTJ 75; Dewan Rai, 'Bardiya Tharus wait for justice' *the Record* (8 June 2018) <https://www.recordnepal.com/bardiya-tharus-wait-for-justice> accessed 10 December 2020; Aditya Adhikari ,'The machinery of brutality. Remembering the Royal Nepal Army's actions in wartime' *the Record* (20 August 2018) <https://www.recordnepal.com/the-machinery-of-brutality> accessed 10 December 2020.
[143] CON 03 (n 62).
[144] ibid.
[145] CS 01 (n 108).

thahapayera ke garnu, kasaila kasailai kehi garna sakine bhayepo? (What is the value of truth if no one acts on it?).[146]

It is also found that there were some unofficial truth-seeking processes, including public hearings. Many organisations also interviewed victims, documenting their version of the truth of the event and letting them share stories by organising public hearing. However, victims seem to be frustrated by the lack of action on their story/case. They raised their frustration, saying *'kati bhanne? bhanda bhanda thakiyo'* (how many times do we tell our story, we are just tired of repeating it).[147]

A meaningful truth-seeking process could restore human and civil dignity for people who have not only had their rights violated but also their requests for redress.[148] However, truth without consequences, that does not provide a 'bridge to the future' makes victims hopeless and frustrated. If the truth shared by victims is consistently ignored or repressed, it creates a culture of silence and exacerbates mental health problems or causes renewed trauma for victims and society suffering violence.[149]As previous chapter discussed, in the context where many Truth Commissions were established but having no impact to justice, reparation and reforms, benefits of truth-seeking needs to be well articulated.

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[146] CS 06 (n 114).
[147] ibid.
[148] Lisa J Laplante and Kimberly Theidon, 'Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru' (2007) 29 (1) HRQ 228, 237.
[149] Brandon Hamber and Richard Wilson, 'Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies' (2002) 1 J Hum Rts 35.

Victims also expressed how they think the perpetrators' engagement could be improved in truth-seeking process. Importantly, in the view of victims, the consequences that perpetrators face for not disclosing the truth determines whether any perpetrator cooperates with the TJ process and provides information/truth. 'Why would they tell the truth if they are not going to get anything in return for not doing so?'[150] Whether incentives of criminal sanction would contribute to truth would depend on whether the scheme makes those not cooperating with truth-seeking responsible in real terms for the crimes they committed. Thus, a real possibility of prosecution is a pre-requisite to improve truth-seeking and for incentives of leniency in sentencing, to work to promote truth-seeking.[151]

Although it was argued that the proposal of leniency in sentence in the proposed amendment Bill of 2018 was to promote both truth and justice, it was not designed thoughtfully to effectively use leniency in sentencing for promoting truth. For example, the Bill promises amnesty for truth for those involved in 'other acts of human rights violations'. If those involved in such acts refuse to cooperate with the truth-seeking process and do not apply for amnesty, the Bill has no provisions explaining how they are going to be held accountable for the crimes they committed.

The proposed Bill limited the jurisdiction of the proposed TJ Special Court only to the four categories of violations defined as 'gross violations of human rights'.[152] The regular criminal justice system will have no jurisdiction over the cases from the conflict period as both the Act and the Bill clearly state that no other mechanisms except the TRC will investigate the cases

[150] CON 03 (no 62)
[151] ibid; CON 05 (n 105); CON 06 (n 104).
[152] Proposed Amendment Bill for Transitional Justice Act, s 30 (a)-(b).

related to the conflict and the criminal justice system cannot be invoked in future in cases that come under the jurisdiction of the TRC.[153] This would leave no possibility of prosecuting those crimes falling under the category of 'other acts of human rights violations' (such as hostage-taking, beating and mutilation) even if alleged perpetrators do not seek amnesty and refuse to provide truth.

The way the proposed Bill presented the scheme, it would not make amnesty necessarily contributing to truth-seeking as many victims rightly question why anyone accused of committing abduction, mutilation, etc., would come to the Commission, disclosing the full truth, if there is no consequence for not doing so.[154] Although whether amnesty works as the better incentive for truth remains contested,[155] in the view of victims and civil society in Nepal, it may depend on whether there is any real consequence for not disclosing such truth.

The other question is the legality of the proposed amnesty. As the previous section discussed the provision of amnesty in the TRC Act was legally challenged, and the Supreme Court had found amnesty for gross violations being incompatible with Nepal's international obligations.[156] The Supreme Court has reinforced it further by rejecting the review of its decisions stating that there is no error in the decision. Thus, it is important to ask to what extent the new proposal on amnesty complies with international law and the Supreme Court's decisions. Although the

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[153] ibid s 40, 40(a).
[154] Civil Society Organizations (n 50).
[155] In South Africa, for instance, only 3 per cent and in Rwandan gacaca trial only about 5 per cent had confessed the crimes committed despite the offer of amnesty, see Lars Waldorf, 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice' (2006) 79(1) Temple Law Review 1, 54.
[156] See ch 5, s 5.3.2.

proposed Bill prevents amnesty for four categories of violations, known as gross violations, the restriction on amnesty imposed by international law is not limited only to those four categories of cases which the Bill considers 'gross violations'. As chapter 2 highlighted violations such as abduction and mutilation, if committed as part of a policy and plan could amount to crimes against humanity or war crimes, where amnesty is prohibited.[157] Amnesty for a crime considered a serious violation of human rights under international law 'would not prevent prosecution before foreign or international Courts'.[158] Thus, it is important not only to ensure that the future Bill avoids the possibility of amnesty in relation to those violations where States are under the obligation to investigate, prosecute and punish. This is important not only to improve legitimacy of the Act and the process but also to promote truth.

However, as chapter 2 highlighted, amnesty is not prevented in its entirety under international law. It could be made available for other categories of violations, contingent on their cooperation in the truth-seeking process, by making accountability possible for those crimes where perpetrators refuse to seek amnesty by disclosing the truth.

6.3.3. Designing leniency to make prosecution possible in practice

Leniency in sentencing for truth may only get legitimacy, if it is designed to facilitate prosecution when there is failure to provide truth. One of the problems in Nepal's proposed Bill is a lack of clarity on where to prosecute those not-cooperating to truth-seeking process. For example, the Bill provides that those involved in 'gross violations', cooperating with the truth-

[157] See ch 2, s 2.4.5.
[158] OHCHR, 'Technical Note' (n 51) para 44; OHCHR, 'Rule-of-Law Tools for Post-Conflict States. Amnesties' (2009) 29-30.

seeking process will first be prosecuted and tried in the Special Court for their crimes. Once their criminal responsibility is determined, they will then be offered leniency of sentencing. However, there is no clarity where and under which law those involved in gross violations refusing to cooperate with truth-seeking-process would be tried. It is hard to assume that all those perpetrators involved in gross violations would cooperate with the truth-seeking process. Thus, the scheme has to be designed in such a way that those involved in gross violations would face a genuine threat of prosecution with full sentencing so the leniency in sentencing could be a real incentive for them to engage in the TJ process.

However, for this to be materialised in practice, clear legal provisions need to exist criminalizing all those categories of violations where the State is under an obligation to prosecute. As discussed in chapter 5, no laws existed in Nepal criminalizing violations such as torture and enforced disappearances at the time they were committed.[159] Although the new Penal Code criminalises some of these violations, including torture and enforced disappearances, it has no retroactive effect.[160] One could argue that this is not a problem for enforced disappearances as it is a continuous crime, but the problem exists for torture and other violations amounting to gross violations.

Similarly, as chapter 5 also highlighted, other violations such as the use of child soldiers, which was common during the conflict, is also not criminalised.[161] As Chapter 2 studied the use of child

[159] James Gallen, 'Transitional Justice in Nepal: Prosecutions, Reforms and Accountability Strategies' in Agata Fijalkowski and Raluca Grosescu (eds), *Transitional Justice in Post-Dictatorial and Post Conflict Societies* (Intersentia 2015) 52-61.
[160] National Penal Code (n 85) s 1(2).
[161] Human Rights Watch, 'Children in the Ranks. The Maoist's Use of Child Soldiers in Nepal'

soldiers in conflict could amount to war crimes.[162] A legal provision is also required on command responsibility as no laws govern this.[163] Furthermore, different UN mechanisms have also indicated the prevalence of CAH in Nepal by highlighting the widespread and systematic practice of enforced disappearances and torture in Nepal.[164] As chapter 2 highlighted when torture and enforced disappearance are committed in a widespread or a systematic manner, it could amount to CAH. Despite such authoritative reports, these crimes are neither criminalised by the Penal Code nor put under the jurisdiction of the TRC. The proposed Bill also excludes these offenses from the jurisdiction of the TJ mechanisms. The exclusion of CAH as well as war crimes would mean denying the TJ body jurisdiction to investigate the systematic nature of crimes and to 'provide a more precise appreciation of their magnitude and gravity by describing them in accordance with international law.'[165] This would also risk the Commission conducting mediation between victims and perpetrators or granting amnesty even for these categories of violations.

(February 2007).

[162] *Prosecutor v Sam Hinga Norman* (Decision) SCSL-2004-14-AR72 (E) (31 May 2004), para 53.

[163] Ananda Mohan Bhattarai, 'Transitional Justice: An Overview' in Govinda Prasad Sharma Bandi (ed), *Transitional Justice in Nepal* (Nepal Bar Association 2013) 55, 83.

[164] UNESC, Commission on Human Rights, 'Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Mission to Nepal*' (9 January 2006) UN Doc E/CN.4/2006/6/Add.5, para 31; UNGA, 'Report of the Committee against Torture. Report on Nepal adopted by the Committee against Torture under article 20 of the Convention and comments and observations by the State party' (9 May–3 June 2011) 47th session UN Doc A/67/44; UNESC, 'Question of enforced or involuntary disappearances. Report of the Working Group on Enforced or Involuntary Disappearances. Addendum. Mission to Nepal***. 6-14 December 2004' (28 January 2005) UN Doc E/CN.4/2005/65/Add.1; UNESC, Commission on Human Rights, 'Civil And Political Rights, Including The Questions Of: Disappearances And Summary Executions. Question of enforced or involuntary disappearances. Report of the Working Group on Enforced or Involuntary Disappearances. Addendum Mission To Nepal* ** 6-14 December 2004' (28 January 2005) UN Doc E/CN.4/2005/65/Add.1, para 25.

[165] OHCHR, 'Technical Note' (n 51) para 32.

Thus, for leniency of sentence to be effective in promoting truth and justice, and to get any legitimacy, it is critical for those crimes where States are duty bound to prosecute to be brought under the jurisdiction of the TJ mechanisms, for them to be criminalised with retroactive effect and for any statutory limitations to be lifted.[166] In absence of these preconditions being met, the Government's attempt to pass the Bill offering leniency in sentences could be seen just an attempt to avoid justice and genuine truth and to provide impunity to those involved in past crimes.

6.3.4. Making trials fair and possible in practice

As chapters 2 and 3 analysed, prosecution and trials are important not only to truth-seeking and the upholding of the international obligation to prosecute but also to contribute to rule of law and prevent future violations.[167] However, for trials to have these effects, not only investigation, prosecution and adjudication is necessary but they also need to be seen to be fair, impartial and competent.[168] Thus, not only whether trials are conducted but also how trials are conducted and how fair they look in the eye of the public plays a role in whether these trials could contribute to achieving sentencing goals and the goal of TJ preventing future violation.[169]

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[166] Civil Society Organizations (n 50).
[167] Hayner (n 78) 22; OHCHR, 'Rule-of-Law Tools for Post-Conflict States. Prosecution initiatives' (2006) 4-12.
[168] Padraig McAuliffe,'Transitional Justice and the Rule of Law: The Perfect Couple or Awkward Bedfellows' (2010) 2 HJRL 127.
[169] ibid.

Various reports indicate Nepal's failure to signal its repudiation to human rights violations, and how this has emboldened perpetrators,[170] lowering public confidence in public institutions.[171] This promotes further violations, as manifested in the continuing routine practice of torture in detention,[172] extra-judicial killings in the *Terai* region,[173] and violence against women.[174]

As victims are mostly from lower economic and social strata of society, they have experienced a deep sense of inequality (also because the criminal justice system disproportionally affects them), popularly expressed as *'sanalai ain, thulalai chain'* (law is only for the poor).[175] It is therefore important that these trials aim to signal that the law treats everyone equally, that everyone is subject to the law, even the rich and powerful, and no one is above the law. As chapter 2 highlighted, fair trials include different elements, including independence of the judiciary and due process.

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[170] OHCHR, 'Nepal Conflict Report. An Analysis of Conflict Related Violations of International Human Rights Law and International Humanitarian Law between February 1996 and 2 November 2006' (October 2012) 176.
[171] ICTJ and Advocacy Forum, 'Nepali Voices. Perception of Truth, Justice, Reconciliation, Reparations and The Transition in Nepal' (2008) 42.
[172] Advocacy Forum, 'Rise of Torture in 2018. Challenges Old & New Facing Nepal' (June 2019); Advocacy Forum, 'Torture of Juveniles in Nepal. A Continuing Challenge' (June 2018).
[173] Southern plains of Nepal where people have been agitating, challenging States ongoing repression and human rights violations. OHCHR, 'Findings of OHCHR-Nepal's Investigations into the 21 March Killings in Gaur and Surrounding Villages' (April 2007); OHCHR, 'Investigation by the UNOHCH-Nepal into the Violence Incidents in Kapilvastu Rupandehi and Dang Districts of 16-21 September 2007' (June 2008); Asian Human Rights Commission, 'Nepal: Protests, violence, and killings persist in Terai, with no solution in sight' (Statement, 22 January 2016) <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-010-2016/> accessed 22 January 2020; UNGA, Human Rights Council, 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*. Nepal' (6 August 2015) UN Doc A/HRC/WG.6/23/NPL/1, para 17.
[174] WOREC, 'Anbesi: Realities of Violence against Women in Nepal' (November 2018).
[175] Expression that law is only for the poor.

Both the TRC Act and the proposed Bill provide that the Special Court will be established to try those cases recommended by the TRC. Although courts generally enjoy victims' confidence compared to other institutions in Nepal,[176] there seem to be some cynicism about the Special Court with people using the phrase, *'bises bektilai bises adaalat?'* (Special Court for special people?).[177] This seems to espouse largely from the lack of transparency around the reasons why parties preferred the Special Court and also parties' attempt to appoint judges loyal to political parties to the Court.[178] It also stems from the fear that this may deny victims justice, bypassing the jurisdiction of the regular court system.[179] These concerns also stem from the government's failure to establish the Special Court despite having such provision in the TRC Act passed in 2014.[180] The non-transparent way of the political actors negotiating the Bill to establish the Court in the past (as previous sections discussed) and the lack of progress in the investigations of cases through the regular justice system, using the TJ mechanisms as an excuse,[181] also fuel such fear and cynicisms.

In such a context, to improve victims support to the process and to get legitimacy to such scheme, it is important for Nepal to design the jurisdiction of the Special Court considering following different options.

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[176] ICTJ and Advocacy Forum, 'Nepali Voices' (n 171) 45; Narayan (n 10) 969, 999.
[177] CON 03 (n 62); CON 01 (n 62).
[178] See ch 5, s 5.7.
[179] ibid.
[180] Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2014 (TRC Act), s 29(4).
[181] None of the conflict era cases have been investigated since the establishment of the TRC in 2015 by the regular justice system.

Firstly, not to prevent victim's access to the regular justice system until the Special Court is established and it starts handling conflict-related cases. This would not only put pressure on the system to speed up the process of establishing the Special Court but also improve cooperation of different actors in the TJ process.

Secondly, introducing a bifurcated system, making the Special Court focus on trying those perpetrators cooperating with the truth-seeking process and those disqualified for leniency despite a confession and letting the regular justice system deal with others. This would not only address the concerns of victims and civil society but also unburden the TJ Special Court and signal that the leniency in sentencing is to ensure victims' rights to truth and to improve perpetrators' collaboration with the TJ process, and is not a case of justice for *special people*. This would also help to improve the truth-seeking process as perpetrators may feel the risk of prosecution and full sentences of the regular justice system for their failure to cooperate with the TJ process.[182] This could encourage perpetrators to cooperate with the truth-seeking process as they seem to have an interest in avoiding the jurisdiction of the regular courts.[183]

Thirdly, make the Special Court genuinely independent and impartial by strengthening the appointment process of judges. As discussed in the previous chapter, the attempts of the political parties in the past to appoint judges of the Special Court through a 'consensus among political parties' and the increasing politicization of public institutions, including the judiciary, in recent years have made many worry about the Court's independence.

[182] CON 01 (n 62)
[183] ibid.

Concerns were also raised by both the Maoists and the security forces, both doubting whether they would get fair treatment. The Maoist party considers the traditional State institutions, including justice institutions, being biased against them, not recognizing their sacrifice for political change but looking at matters from the perspective of pure criminal law and considered that as conspiracy to derail peace process.[184] They argue there were no personal interests and criminal intent to commit crimes in their political struggle but that it was done to pressure the State and gain political objectives.[185] They have raised concerns about some of the rulings of the courts requiring criminal prosecution and have been obstructing implementation of court decisions on the ground that they were politically motivated crimes, needing different treatment.[186] The security forces, and the army in particular, also ask whether its cadre will get fair treatment in the context where the Maoists are in the Government. They argue they cannot support the process if it is not fair.[187]

As the State charging political opponents in falsified cases is a long-standing problem in Nepal, fair trial, especially in cases involving political activists remains critical. Wider perception exists that the justice institutions, mainly the agencies conducting investigation and prosecution being

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[184] Anil Giri, 'Nepal's Maoists want withdrawal of war-era cases' *Business Standard* (Kathmandu, 21 April 2016) <https://www.business-standard.com/article/news-ians/nepal-s-maoists-want-withdrawal-of-war-era-cases-116042101166_1.html> accessed 31 May 2020.

[185] Aditya Adhikari, 'The revolutionary and the lawyer' (*the Record*, 30 July 2018) <https://www.recordnepal.com/the-revolutionary-and-the-lawyer> accessed 5 June 2020.

[186] Spokesperson Pampha Bhusal '"Dhungel's case is a political issue and this must be dealt with in line with the Comprehensive Peace Agreement (CPA)…. all conflict-era cases must be dealt with by the transitional justice mechanism as per the CPA,' Manish Gautam, 'Murder convict Dhungel sent to prison' *The Kathmandu Post* (Kathmandu, 1 November 2017) <https://kathmandupost.com/valley/2017/11/01/murder-convict-dhungel-sent-to-prison> accessed 5 June 2020.

[187] Statement by Chief of Army Staff (COAS) (10 September 2019) (copy of the statement on file with author).

monopolized by the parties in Government. For example, even in 2017 in a parliamentary debate on the election law, political parties across the board refused to accept the provision in the Election Law, making indicted accused ineligible to contest election stating that it could be misused by the parties in Government by using the police and prosecutors to prepare falsified case and indict people to prevent them from contesting the election.[188]

However, the irony is that instead of agreeing to reform the system and institutions that they considered vulnerable to political manipulation, political leaders have reinforced it by allowing alleged criminals to run for election, resulting in ones against whom arrests warrants are pending being elected as Members of Parliament, blocking any progressive legislation towards accountability and undermining the rule of law. They also prevent urgently needed reforms of institutions.

Thus, considering the peculiar political and historical context of Nepal, it is critical to select judges in the Special Court without any political influence, under a process that ensures judges are selected based on merit and integrity, not because of their loyalty to certain political parties. One way of doing this could be to make candidates with any political party affiliation in the past ineligible for the judgeship in the Court.

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[188] While explaining why they could not agree on the Bill, Radhyeshyam Adhikari stated that if people don't like them they can be rejected through the pool. 'SAC split on poll bill contents' *The Himalayan Times* (2 September 2017) <https://thehimalayantimes.com/nepal/state-affairs-committee-split-poll-bill-contents> 31 May 2021; 'Lawmakers file amendments to let corruption convicts contest polls' *Onlinekhabar* (Kathmandu, 1 August 2017) <https://english.onlinekhabar.com/lawmakers-file-amendments-to-let-corruption-convicts-contest-polls.html> 31 May 2021.

In addition to this, judgments should also be written with detailed arguments explaining why the Court reached a particular conclusion or decision. This would help to understand reasons behind Court decisions and minimize the speculation of biases in the Court. However, whether the Court can function independently or not would also be determined by their funding, technical resources and whether their orders and decisions are respected by all including those in power. Thus, taking these measures including public assurance and demonstration of respect for court orders would increase the legitimacy and acceptance of the Special Court.

Furthermore, ensuring fair trial also requires good quality investigation, capable of collecting evidence. As discussed in chapter 5, a unique provision in Nepal's TRC Act and also the Bill is TRC's investigation leading prosecution. However, as the previous chapter highlighted, there are widespread concerns about the quality of investigation undertaken by the TRC. Thus, the measures should be incorporated in the legal framework to improve investigation of the TRC, also balancing other fair trial related right of the accused, while it shares information with the prosecution. As previous chapters highlighted, sharing TRC's information to prosecution also poses some genuine legal tensions, which needs to be taken into consideration.[189]

6.3.5. Linking truth and justice with other components of TJ

Although the focus of the thesis is on truth and justice aspects of TJ, data gathered also provide insights on not only how coexisting truth and justice as a holistic TJ system could offer incentives to each other but also how such incentives could surpass truth and justice and promote

[189] See ch 4, s 4.4.1.

reparation and reforms, adding value to the coexistence of these mechanisms as a holistic TJ system.

When asked what they want out of the TJ process, victims' responses included *'ke bhayeko ho thaha pau' (*to know what happened to them), [190] *'aparadhilai kathagharama uvaune'* (to see the criminal in the witness box), [191] *'chatipurti'* (compensation), [192] *'sahid ghosana'* (declaring them martyrs), [193] *'uppachar'* (medical treatment), [194] *'parichaye patra'* (having victim's identity recognized by the State), [195] *'dosilai karbai'* (punishment for those culprit).[196] All these were referred to as justice sought from this process. Victims also express *'maile jasto arule bhogna naparos'* (may others not have to go through what I went through).[197] These are repeated expressions of victims, which have also been articulated during prior research.[198]

These articulations show how holistic TJ inherently is for victims, requiring different components to work as part of an integral TJ system. Although some researchers indicate prioritising victims needs in Nepal, [199] it is also very hard to do so when they are so interlinked . As chapter 4 highlighted, having one mechanism such as truth even if it is robust, or prosecuting a few top-ranking officials involved in past crimes, will not address the justice demands of

[190] CON 03 (n 62).
[191] CON 04 (n 137).
[192] CON 03 (n 62); CON 02, 20 October 2019, Janakpur.
[193] CON 04 (n 137).
[194] CON 03 (n 62)
[195] ibid.
[196] ibid; CON 04 (n 137).
[197] CON 04 (n 137).
[198] ICTJ and Advocacy Forum, 'Nepali Voices' (n 171); Robins (n 102); CVCP 'Reparative Needs, Rights and Demands of Victims of the Armed Conflict in Nepal' (Advocacy Paper 2018).
[199] Robins (n 102).

victims. This offers not only the opportunity to design truth and justice as part of a holistic TJ system in Nepal but also to provide legitimacy for leniency in sentencing and address problems caused by the political context as highlighted in this chapter.

It is argued that having coexisting truth and justice mechanisms, offering incentives to each other could also promote reparation and non-recurrence in a tangible way. For example, as part of the leniency in sentencing, perpetrators could do community service while serving their sentences.[200] Although victims seem sceptical about this,[201] partly due to how community service is generally perceived in Nepal (as something good that people with high social integrity and social respect do voluntarily in society and the use of this as part of punishment is something new, not implemented before), this research finds victims and civil society not being entirely adverse to it, if it is designed carefully. Victims want perpetrators to pay compensation, stating that *'hamra pidaama raaj garnele pani chatipurti tirun'* (those benefiting from our pain should also pay).[202] How 'community service' is designed may depend on whether it receives community support. It could be designed as a way to make perpetrators contribute to reparation, which would also correspond to their demand.

For example, most institutions composed of alleged perpetrators such as the Nepal Army (NA), Nepal Police (NP), Armed Police Force (APF) and Nepal Communist Party (composed of the then CPN-M), could also be made to pay compensation to affected communities. These institutions could also implement projects prioritised by victims as part of their share to

[200] PBTJA (n 31) s 30(i)(6).
[201] CON 03 (n 62); CON 06 (n 104).
[202] CON 04 (n 137).

reparation in the most conflict-affected districts. As corruption is a widespread problem in public institutions, including in these above-mentioned ones,[203] it is important that these institutions are made to implement those projects through their own institutional funds. Victims and community members could be empowered to monitor the progress through social auditing system.[204] This could be seen as institutional compensation paid by the institutions involved in human rights violations and violations of humanitarian law to the affected victims and communities. If this is done from their own institutional funds rather than the State treasury, it could be seen as their genuine contributions to repair the damage done to local communities, rather than having projects siphoning funding from the State treasury.[205]

Colombia, for example, has designed a robust reparation programme under Law 1448/2011, that has been complemented by the Peace Agreement, that in principle expects parties to the conflict

[203] Anil Kumar Gupta, Shiva Hari Adhikari and Gyan Laxmi Shrestha, 'Corruption in Nepal: Level, Pattern and Trend Analysis' (2018) 28 Journal of Management and Development Studies 36-52. Nepal is the 113 least corrupt nation out of 180 countries, according to the 2019 Corruption Perceptions Index reported by Transparency International. Transparency International, *Corruption Perception Index 2019* (2020).

[204] For more information on social audit practices in Nepal see Government of Nepal, Ministry of Health and Population, Department of Health Services, Curative Services Division, 'Strategic Review of Social Audit in the Health Sector' (2019); NHSSP and UK Aid, 'Health Sector Transition and Recovery Program. Social Audit Guidelines revised to include Equity Monitoring' (January 2017); Deutsche Gesellschaft für Internationale Zusammenarbeit, 'Making local health services accountable. Social auditing in Nepal's health sector' (January 2015); Mukunda Prasad Adhikari, 'Social Auditing: Practices And Challenges of Non-Government Organisations (NGOs) In Nepal' (Master thesis, Queensland University of Technology 2016); Basu Dev Neupane, 'A Review of Social Audit Guidelines and Practices in Nepal (DRAFT)' (NHSSP 2011); Madhab Karkee, Manna Sainju and Pranav Bhattarai, 'Practice of Social Accountability for Development Outcomes: Experiences of PRAN Action Learning Grants in Nepal' (Centre for International Studies and Cooperation 2013).

[205] CON 01 (n 62).

to return all illegal assets obtained to a reparation fund.[206] It requires perpetrators to get involved in various reparation-related programmes, such as infrastructure development work in the areas most affected by the conflict, programmes to clear landmines and explosive devises, to substitute crops used for illicit purposes, to contribute to the search for, location, identification and dignified return of remains of deceased persons or missing, and participating in programmes to repair environmental damage (e.g. reforestation),[207] as conditions to receive reduced and alternative sentences.[208]

Nepal could also learn from these experiences and include some of the same type of work as under the Colombian program, such as perpetrators to work in infrastructure developments in those districts and communities affected by conflicts.[209] They could also be made to work to contribute to the search for the location of potential gravesites, identification and dignified return of remains of disappeared persons,[210] work in community-level schools, hospitals and help victims with farming.[211]

Similarly, meeting the expectations of victims regarding the need for institutional reform, if linked to the sentencing scheme, could contribute to non-recurrence. The common expression of victims is that *'jata tatai tinai chan'* (they are everywhere),[212] referring to alleged perpetrators controlling many public posts. Thus, removing perpetrators from public posts could be one

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[206] Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2016) 10(1) IJTJ 88, 93-94.
[207] Final Agreement (n 70) 5.1.3.2.
[208] Ibid.
[209] CS 02 (n 1).
[210] CS 01 (n 108).
[211] Ibid.
[212]CON 01 (n 62).

optional penalty for the Special Court to impose, depending on the nature of the crimes and culpability of the perpetrators, among other factors. The Supreme Court has also issued a directive order to the government to develop a policy on vetting to remove those involved in gross violations from public posts.[213] This would also help to improve institutional reforms.

Vetting is not a new concept in TJ processes as it has been used in different contexts and forms.[214] Although mass vetting may not receive political support in Nepal because of the political context today, it can be designed as one of the sentencing options to be determined by the Court, depending on the nature of violations and culpability of the perpetrator. Having a law on vetting could promote accountability in future cases of human rights violations.

6.3.6. Support of international actors also necessary

Support from the UN and donor agencies determines not only the legitimacy of the process but also the capacity of Nepal to capitalise on the present opportunity and design and implement a TJ process that includes both truth and justice, without undermining international law.

It is critical to note that the UN and donors have played important roles in Nepal's peace process and in bringing the accountability agenda into the discourse. A joint strategy between civil society and the international community not only created pressure but also created some progress

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[213] *Sunil Ranjan Singh et al v Office of the Prime Minister and Council of Ministers and Others* (2013) Issue 12 Decision No 8933 Ne Ka Pa 2069 [2013]1826.

[214] See also Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention. Vetting Public Employees in Transitional Societies* (Social Science Research Council 2007); Roger Duthie, 'Introduction' in Roger Duthie and Paul Seils, 'Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies' (ICTJ 2017) 8-38.

in the past by extending technical and financial support to the government.[215] Both financial and political support to civil society had resulted in an enhanced capacity of civil society to intervene in a more strategic way to push for accountability for the past atrocities, series of trainings enhancing the capacity of the judiciary in understanding TJ,[216] helping victims to organise, advancing the involvement of victims and civil society in the TJ discourse and articulating their demands collectively.[217] Support for strategic litigations helped to bring cases to the courts, unpacking the challenges both victims and justice system face in dealing with cases involving gross human rights violations.[218]An "impunity working group" set up among the embassies helped to include the issue of accountability and rule of law in TJ discussions also helping victims, civil society and international community to devise strategies collectively.[219]

However, this started to wane from 2014, when the parliament passed the TRC Act, with the provision of amnesty. Civil society called on donors not to support the TRC pending the amendment of the TRC Act. The UNOHCHR's reminder to the government of its inability to engage with the TRC pending the amendment of the Act,[220] was a reflection of the normative development in international law requiring States to prosecute certain crimes and limitation on the use of amnesty. It provided important leverage for donors to promote a TJ process without undermining international human rights standards.[221] The subsequent Supreme Court's decisions

[215] CS 02 (n 1); SI 08 (n 1).
[216] National Judicial Academy had conducted a number of trainings on TJ. CS 03 (n 21).
[217] ibid.
[218] CS 02 (n 1).
[219] ibid.
[220] OHCHR, 'Nepal: OHCHR position on UN support to the Commission on Investigation of Disappeared Persons and the Truth and Reconciliation Commission' (16 February 2016).
[221] CS 02 (n 1).

had also offered important opportunities to push for the Act's amendment respecting court orders.

Although the call from UNOHCHR and civil society was to refrain from supporting the TRC unless the Act is amended respecting the SC orders, the donors largely refrained from engaging in TJ as a whole, resulting in a loss of momentum at a critical moment in time and weakening the concerted efforts that victims and civil society had started to generate.[222] Seeking to implement the SC decisions in a coordinated manner would have sent not only a strong signal to society about international support to rule of law in Nepal but would have paved strong grounds for a credible TJ process. However, this opportunity was missed.

At the time of writing this thesis, both civil society and victims were found to be significantly weakened. Victims and civil society seem to have lost support, resources and their ability to coordinate and collectively articulate their demands and mobilise pressure as they were able to do in the past. Division and mistrusts among the groups seem to be heightened.

Donors also seem to lack strategy and coordination on how best to support the TJ process in Nepal. They also seem to have lost their ability to bring about a coordinated response to TJ issues. The vibrant contacts and communication with victims and civil society and international agencies also seems to have waned. As already discussed some donors' initiatives, despite their

[222] ibid; SI 08 (n 1).

good intention have caught into controversies and victims and civil society also raised concerns about donors not supporting TJ in a strategic way, as they had done in the past.[223]

It is clear that Nepal's TJ process will not be able to succeed without the support of the donors, whether financial, political and technical. Local capacities in a number of areas such as exhumation, DNA sample collection and profiling, ballistics, demining etc are lacking.[224] Furthermore, designing prosecutorial strategies, improving prosecution's fairness and legitimacy, archiving of evidence, documents and materials also could be learned from different comparative experiences, which needs to be made available to Nepal. As Paige Arthur and Christalla Yakinthou articulate, low- and middle-income countries suffer from resources in putting TJ process in place,[225] so international support is important for such countries to implement TJ projects. Although much depends on the political will of the government and how it seeks and utilises any national and international support, the role of the UN and donor agencies in particular is important, not only to help design and implement the TJ process but also to trigger the political will to take the process forward, delivering on both truth and justice.

As the previous section discussed, the international community has the leverage of international justice at its disposal. How it impacts the TJ discourse was seen after the arrest of Kumar Lama in the UK.[226] In the past, embassies had denied visas to those alleged to have been involved in gross violations. One such high profile case that made national headlines concerned Information

[223] CS 02 (n 1); CS 01 (n 108).
[224] Bhattarai (n 163) 83.
[225] Paige Arthur and Christalla Yakinthou, 'Changing Contexts of International Assistance to Transitional Justice' in Paige Arthur and Christalla Yakinthou (eds), *Transitional Justice, International Assistance and Civil Society. Missed Connections* (CUP 2018) 1-12.
[226] SI 03 (n 20) ; SI 06, 27 April 2017, Kathmandu.

and Communication Minister, Agni Sapkota. His visa request to the US was refused on the grounds of "serious and specific human rights allegations associated with his conduct during the insurgency."[227] He was accused of abducting and murdering a local businessman, whose wife had filed a FIR resulting in the Supreme Court asking the police to investigate the case.[228] The Australian Embassy also refused visa on the same grounds making headlines in the national dailies.[229] UN vetting for participation in peacekeeping could also put pressure on the army to cooperate with the TJ process.

A combination of support to victims' groups, local civil society organisations and political actors as part of the UN and donor strategies would help Nepal to reinvigorate its TJ process, ensuring victims' right to truth and justice. Support to strategic litigations could help not only to keep victims' hope for justice alive but also to keep the agenda alive, put pressure on the State to make progress on TJ process. It would also signal victims that their demands to justice are not forgotten. It could help to unpack the challenges both victims and the justice system face in dealing with cases involving gross human rights violations, opening possibilities for necessary legal reforms. Supporting initiatives that help to strengthen the collaboration between victims and civil society, providing forums to forge common strategies and activities not only to mobilise pressure but also to engage with different actors in a constructive ways is critical.

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[227] 'Investigate Maoist's Role' (n 16).
[228] Advocacy Forum and Human Rights Watch, 'Waiting for Justice: Unpunished Crimes from Nepal's Conflict' (September 2008) case no 32.
[229] Kanak Mani Dixit 'Hearing set for case against Minister Agni Sapkota' *Nepali Times* (31 May 2011) <http://archive.nepalitimes.com/blogs/thebrief/2011/05/31/hearing-set-for-case-against-minister-agni-sapkota/> accessed 10 November 2020.

When a Truth Commission and prosecution mechanisms are designed to work simultaneously as part of a holistic TJ system that also offers a huge potential for law reform more generally, requiring 'greater policy integration between these measures and rule of law initiatives'.[230] Developing skills to draw plans and implementing strategies to tap the opportunities such a process creates is also important.

Furthermore, the establishment of a federal structure in Nepal has also presented some opportunities as some of the provincial Governments have expressed interest in engaging in reparation-related programmes. Although the approach so far has been piecemeal, *ad hoc,* lacking wider strategies, a huge potential nevertheless exists for the design and implementation of community- and victims-led reparation programmes, contributing to the wider process.

Although some donors have raised concerns whether it is practically possible and worth pushing for the simultaneous delivery of truth and justice in Nepal with the given political powers at play,[231] this research finds a shifting position among the political parties and an interest to avoid future prosecution and prosecution outside the country creating a somewhat favourable ground for truth and justice to coexist. The decisions of the Supreme Court also add a strong leverage. Thus, strategic engagement of the international community could strengthen the political will to have both truth and justice working simultaneously as TJ measures and as part of a wider holistic approach, which could allow some progress in the stalled TJ process and alleviate some of the challenges that Nepal is facing in TJ today.

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[230] Laurel E Fletcher and Harvey M Weinstein and Jamie Rowen, 'Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective' (2009) 31 Hum Rts Q 163, 220.
[231] Conversation with diplomats, 27 June 2018, Kathmandu; 24 September 2019, Kathmandu; 18 December 2019, Lalitpur.

6.4. Conclusion

The possibility of redesigning the TJ process continues to exist in Nepal. The political power balance, continuous efforts of victims and civil society, continuous failure of the TRC to deliver on its mandates, the decisions of the Supreme Court, the normative development at international law, enriching country experiences of countries with their TJ processes so far, all strengthen the ground for such redesigning of the process in the country.

The chapter also analysed the Government proposed TJ bill of 2018 that proposes redesigning of the TJ process, considering a holistic approach to TJ where all different mechanisms of TJ including truth and justice coexist, complementing each other, by introducing leniency of sentencing.

By analysing the Bill, the chapter highlighted where the gaps exist in the Bill and what measures need to be put in place to make the proposal of the Government acceptable to all actors and take the stalled TJ process forward with the hope that this could help to inform and design the ongoing process.

As chapter argued the TJ process in Nepal can be redesigned to provide mutual incentives between all TJ components. This would make simultaneous delivery of truth and justice viable in practice and alleviate some of the challenges faced on the ground. However, as chapter highlighted such a scheme needs to be designed following a genuine public consultative process with the support from both the national and international community.

Chapter 7

Conclusion

This research was undertaken considering the challenges that countries undergoing transition face in implementing a TJ process where truth and justice coexist, in particular with the context of Nepal in mind. It explored the complexities and challenges involved in having simultaneous truth and justice mechanisms and also the possible ways to address them. The following sections present the findings on the four research questions of this thesis.

7.1. Why have countries like Nepal that have gone through transition in recent years have attempted to develop a TJ process where truth and justice coexist as TJ mechanisms in the first place?

To answer this question, this research looked into how international law has developed since TJ (as understood today) was conceived and how the understanding of TJ has evolved.

Analysing the work of the human rights bodies, this research showed how normative standards on the States' duty to investigate, prosecute and punish cases involving gross violations of human rights, serious violations of humanitarian law and international crimes have evolved. Experiences of countries undergoing transitions, where prosecution was ruled out for various reasons and amnesty and Truth Commission were adopted as alternative means of accountability have informed the work of human rights bodies in developing normative standards relating to the State's duties and victims' rights to effective remedy.[1]

[1] See cha 2, s 2.2.2-2.4.5.

Lack of punishment was found to be promoting impunity and depriving victims their right to effective remedies typically through blanket and self-amnesty.[2] Although Truth Commissions were established as an alternative to prosecution, often when prosecution seemed impossible or unrealistic, they were not found to be sufficient to address the need of society undergoing transition and to satisfy victims' right to effective remedy.[3] Over the years the human rights bodies have found amnesty or other obstacles such as the statutory limitations, non-applicability of retroactive effects of the law being impermissible in those cases where the States are duty bound to prosecute.[4]

This research also showed how over the years human rights bodies have found truth being an equally important right of victims, requiring States to comply, irrespective of the possibility/likelihood of prosecution.[5] It also explored how jurisprudence is emerging to indicate the right to truth having a social dimension, requiring States in transition to provide truth not only to victims but also to society as a whole, although its contours are still not clear.[6] Jurisprudence from the human rights bodies now clarify that neither truth nor prosecution can substitute for the other.

These developments at international level empower victims, civil society and the judiciary at national level as victims and civil society are increasingly demanding to translate these developments and normative standards into reality at the national level. For example, the jurisprudence developed by the ICtHR on amnesty laws did not only provide legal grounds for

[2] See ch 2, s 2.4.5.
[3] Ibid.
[4] Ibid.
[5] See ch 3, s 3.4.
[6] See ch 3, s 3.4.1.

victims and civil society in Latin America to challenge the amnesty laws in their national jurisdiction,[7] but also influenced and informed other regions and contexts such as Nepal, where victims have challenged amnesty provisions, and the national courts have found amnesty impermissible for gross violations of human rights.[8]

Although conceived in the context of democratic transition, the use of TJ has expanded to a variety of contexts (increasingly including transitions from conflict to peace), exposing it to diverse contextual challenges and a wide range of needs of victims and societies undergoing transitions. Contexts of countries undergoing transitions also expose the need to deal with thousands of cases, involving thousands of victims and perpetrators and the need to balance competing interests at stake, including the constrain of resources and institutional capacities. The thesis argues that these practical realities on the one hand and the normative developments on the other, have encouraged TJ to adopt a holistic approach that includes both truth and justice. These changes have further influenced and informed TJ debates on the ground, forcing countries like Nepal to design TJ processes holistically to include both truth and justice.

7.2. What can be learned from experiences to-date on the coexistence of truth and justice mechanisms?

To answer this question, the thesis examined experiences of countries where these two mechanisms were implemented in sequence and others where they worked simultaneously.

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[7] See ch 4 s 4.3.2..
[8] See ch 5, s 5.4.2.2.

Firstly, it examined the contexts of countries undergoing transition, with the sequencing of truth first and prosecution later. Analysing the experience of Argentina, the thesis showed how the fragility of democratic transition in the early 1990s (because of social and political factors and the continued military hold on power) that was hinged upon amnesty made prosecution difficult, resulting in truth-seeking precede potential prosecution. Then the thesis examined how the government's weakening legitimacy with the public exposure of corruption created a conducive environment in South Korea to prosecute the top echelon of the *junta* before truth-seeking.

The thesis finds that although truth and justice mechanisms came in sequence in these countries, this was not by design.[9] When Argentina passed its amnesty law, preventing prosecution in 1986, it was not expected that the Constitutional Court would nullify the amnesty law 20 years later, opening the possibility for the prosecutions taking place today. Similarly, when South Korea tried the *junta* leaders, it believed it had established a clear break with the past.

These experiences show how dynamics and preconditions can change over time, enabling or disabling the possibilities of having one mechanism after the other in sequence in any given context. Through exploring these experiences, the thesis also tried to shed light on the limitations of both truth-seeking and prosecution mechanisms in the context of transition. For example, despite deciding on a Truth Commission in Argentina and prosecution in South Korea, did not irrevocably rule out further measures going forward. Victims and civil society successfully struggled for prosecution (in Argentina) and for a TRC (in South Korea), in an apparent reversal of the accepted sequence.

[9] See ch 4, s 4.3.2.

Although using these same examples of sequencing of TJ mechanisms, some TJ literature has suggested that one TJ mechanism paves the ground for the other. However, the thesis finds that starting with one TJ mechanism may not automatically pave the way for the other on its own. Different factors such as sustained resilience of victims and civil society, the role of the judiciary, involvement of regional human rights mechanisms, the international community and shifting levels of political will, among other factors, played important roles in making prosecution and truth eventually possible in Argentina and South Korea respectively.

These experiences also provide learnings on why TJ should be considered as a longer-term project, not a quick fix. Continuous efforts to pursue prosecution in Argentina even 30 years after the Truth Commission, efforts to have a Truth Commission 20 years after the prosecution of those most responsible in South Korea and 15 more years of negotiations to develop an acceptable TJ process and its legal framework in Nepal suggest to be mindful of a longer term vision and outlook while considering a TJ project.

Experiences such as Argentina and South Korea provide important learnings that inform the thinking and design of TJ processes today, including in Nepal. Firstly, TJ mechanisms can come in sequence. Although it was not planned to have truth and justice in the sequence that Argentina and South Korea experienced, these experiences nevertheless provide learning that sequencing now could be designed when it is not possible to have them both coexisting in some contexts.

Secondly, having one mechanism will not necessarily pave the way for the other, it needs to be designed consciously so the work of one provides the grounds for the other. For example, if the

TRC is designed to come first in sequence, its mandates and powers need to be designed in such a way that the evidence it collects is protected for future prosecution.

Thirdly, another important learning the research finds through these countries' experiences (especially those where Truth Commissions were established first as a deliberate alternative to prosecution but which did not manage to prevent prosecution later) is that how it contributes to the development of a knowledge base and changing mind-sets among political actors. The thesis argues that these experiences have made political actors realise that having a Truth Commission or the guarantee of amnesty would not necessarily prevent future prosecution. It could rather haunt them for a longer period of time jeopardising the future, when their grip on power is weakened. This learning makes them receptive to consider designing coexisting truth and justice mechanisms today, considering a holistic approach where both truth and justice could coexist offering incentives to each other, as we see in the case of Nepal and Colombia today.

7.3. What tensions and challenges were created by a coexistence of truth and justice mechanisms?

The research has found that the nature of tensions and challenges that countries undergoing transitions have been changing over time as TJ processes were built on more experiences and also the normative standards continued to evolve. Challenges those countries in transition faced in the early stage of the TJ discourse were somehow different than the ones that can be seen today as these developments also provide different grounds for those negotiating transition and TJ processes. The thesis argues that the tension seen today is not whether there should be truth, amnesty or justice (as neither truth nor peace could substitute for the obligation of States to prosecute and vice versa) but is about the incentives (which are not against international law) that

can be offered to different actors so that those willing to lay down arms can do so, commit to a peace process and support TJ and also satisfy victims' rights and demands within the limited resources country might have. In this context, countries undergoing transition today tend to explore a holistic approach so different mechanisms of TJ could be designed and implemented contributing to each other while also making up their collective limitations.[10]

However, country experiences where these two mechanisms have coexisted is still thin. Analysing the experience of Sierra Leone, where truth and justice mechanisms worked in tandem, this research explored tensions and challenges such an operation creates in practice. The thesis highlighted how the very idea of having these two mechanisms working in tandem created tensions in Sierra Leone. It was feared that such an operation would deter people from coming to the TRC because of the risk of prosecution, as they may think their disclosure would expose them to prosecution, severely hampering the truth-seeking process.[11]

Some of the tensions that the thesis found also include how, on the one hand, the TRC's access to information and statements from those involved in gross violations is important for the truth-seeking mandate. It could also be hindered by making the TRC share its information with the prosecution. On the other hand, the TRC withholding evidence from prosecution could also undermine the State's obligation to prosecute, creating tensions between these mandates. [12]

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[10] UNGA, Human Rights Council, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation, and Guarantee of Non-reoccurrence, Pablo de Greiff' (9 August 2012) UN Doc A/HRC/21/46, para 37.
[11] See ch 4, s 4.5.1.3.1
[12] See ch 4, s 4.5.3.1.

Unhindered access to sources of information is important for both mechanisms. In Sierra Leone, both had mandates and powers to access sources of evidence, including the power of search, seizure and contempt.[13] These powers were important for both mechanisms but they constrained both in their work in tandem. For example, the Special Court restricted the TRC from having confidential interviews with detainees of the Special Court and to hold public hearings with them, which the TRC thought hampered its mandate. On the other hand, the Court also considered that the attempt of the TRC to organise public hearings with detainees of the Court hampered its work.

However, the thesis found many of these tensions in Sierra Leone being the result of a lack of clarity at the design phase of the mandates and powers of the two mechanisms. The thesis examined how the decision to establish the Special Court was made, considering the events that evolved after the power and mandates of the TRC, as the alternative to prosecution, had already been decided. Despite the decision to offer amnesty to all those involved in past atrocities and to have the TRC as the accountability mechanism, peace could not be achieved, so the decision was taken to establish the Special Court.[14] Powers and mandates designed for the TRC to work as an alternative to prosecution (such as compelling people to speak the truth, initiate contempt charges, and search and seizure powers) created tensions when it had to coexist with the prosecution, sharing information with it.

The thesis highlighted how TRCs' powers such as search, seizure and contempt could result in compelling people to disclose a potentially self-incriminatory testimony. Such a disclosure could

[13] See ch 4, s 4.4.1.
[14] See ch 4, s 4.4.

be important for truth-seeking, healing and reconciliation.[15] However, if the prosecution uses such information, making the TRC shared such information, that could create some legal tensions, including the risk of violating international law.

Thesis highlighted, because of this lack of clarity while designing the TJ process, despite having favourable political conditions these two mechanisms in Sierra Leone could not function harmoniously. The context of Sierra Leone was different from many others, in the sense that the political will existed for both truth and justice, with the UN and international community supporting the TJ process, the TRC and the Court both included national and international judges/prosecutors and Commissioners in an attempt to ensure independence, providing required resources and favourable political conditions for the two mechanisms to coexist. However, despite this, they both felt constrained.

However, in countries like Nepal, where these favourable political conditions of Sierra Leone do not exist, having coexisting truth and justice mechanisms presents an additional set of challenges, which the thesis also examined by analysing the work of the TRC established in 2015 in Nepal. The research showed how, despite having a TRC with powers to not only uncover the truth but also to facilitate prosecution, the TRC could not function and deliver on its mandate. Research on Nepal finds that if such coexistence is designed with the objective of preventing the regular justice system to investigate past crimes rather than to promote both truth and justice, such a coexistence impedes both. Thus, the thesis also sheds light on how political will is important for these mechanisms to function on the ground, in addition to their carefully designed mandates and powers.

[15] See ch 4, s 4.5.1.3.1.

From these experiences, the thesis identified two sets of tensions arising from coexistence. Firstly, operational tensions, such as competing mandates, powers and coordination of these mechanisms (sharing of information, access to evidence, handling of self-incriminatory information, etc.). These arise mainly because of a lack of clarity while designing the TJ process where these two mechanisms coexist as highlighted through the case of Sierra Leone. Secondly, tensions arising from the political contexts, rendering a lack of political support for the TJ mechanisms, as highlighted through the case of Nepal. Any possible solutions thus need to address both these operational and political tensions, which the next research question attempted to address.

7.4. How to address these tensions in future transitions?

To identify possible ways of addressing these tensions, the thesis first took note of some of the proposals already made on how some of these challenges could be addressed. This includes having measures to address some operational challenges by restricting a TRC's mandate to compel testimonies, providing protection to TRC information (including by offering use immunity and privilege to a TRC's testimonies), preventing the prosecution from accessing a TRC's information as evidence, etc. It also took note of a proposal to have truth and justice mechanisms in sequence or targeting only those most responsible for the most serious crimes for prosecution.

The thesis argues that these proposals may not necessarily offer solutions appropriate to the tensions this research has identified. For example, they do not offer a solution to the tensions arising from coexistence of these mechanisms (such as sharing information, as these proposals prevent such sharing), which will continue to constrain truth and justice mechanisms in different

ways, limiting full access to sources of truth and evidence for prosecution respectively. These proposals also do not provide a solution for how to obtain political support to the process, to address tensions arising from a political power balance and the need for TJ to address different competing interests.

The option of targeting and prosecuting only the 'most responsible' would not work that well in all contexts as, for example, the most responsible in the eyes of victims at the community level could also be the lower ranking soldiers, who are seen as notorious and brutal, committing serious violations. If they are not somehow held accountable through the TJ process, victims may continue to agitate as we see in the case of South Korea. This could also leave an impunity gap. Sequencing of TJ mechanisms is also not seen as the solution to this problem, neither by victims nor by perpetrators. It could neither provide a sense of legal certainty, reducing the risk of future prosecution for perpetrators nor the assurance to victims and civil society of adequate future prosecution, as research showed through the example of Nepal.

Thus, a solution has to be found that addresses the demands of different actors, allows both mechanisms to work to their full potential, offering both truth and justice, having possibilities of full access to sources of information for the TRC and for prosecution without undermining each other's roles. As both of these mechanisms contribute to the same goal of TJ, they should not feel constrained by each other but be strengthened by receiving broader support, including from political actors. The challenge is that such a solution also needs to preserve and advance (at least not violate) the gains of three decades of struggles of victims and civil society as reflected in the normative requirements to ensuring victims' rights to effective remedies.

The thesis argues that this can only be done by designing truth and justice to coexist, incentivising each other, situating them as part of a holistic TJ system. Under such a design, they would offer incentives not only to each other, fulfilling the gaps each of these mechanisms create but also to different actors involved in the TJ process, generating their support and engagement in the process. Such a design could help to address some of the operational challenges and tensions that the simultaneous work of these mechanisms would create, by fostering close coordination and support between the truth and justice mechanisms and address the legal tensions arising from the potential use of self-incriminatory information gathered by a TRC. The benefits of leniency in sentencing could encourage voluntary disclosure with informed consent of self-incriminatory information and allow both the TRC and the prosecution to have access to such information and evidence, without legal tensions, helping both to achieve their mandates, facilitating rather than constraining each other.

This could also offer defined benefits to perpetrators, who might see the value of cooperating with a TJ process when getting benefits, including lenient sentences. It could also address some of the dilemmas that political actors face while balancing competing demands. This would also offer benefits to victims as they may not need to suffer for long in pain and anguish for not knowing the truth and being deprived of remedy.

Although there could be different incentives that coexistence could offer, the key, making political actors positively disposed, would be leniency in sentencing as the research shows through the case of Colombia and Nepal. While supporting the scheme of leniency in sentencing, the thesis also underscored the potential risks of such scheme that could disproportionately serve the interest of perpetrators, over those of victims and society. It highlighted that if a TJ process is

designed only by political elites and political actors, who were involved in past violations, first and foremost considering their interests, its legitimacy is likely to be questioned.

Thesis argues that the legitimacy of the leniency in sentencing should be tested, including by assessing how inclusive the design and implementation processes have been, whether it was designed through a consultative process, allowing and accommodating diverse views, perspectives and experiences and ensuring victims' and civil society's participation in design of the incentives. Opaque design processes, as Nepal's example so far suggests, lead to a stalemate with both perpetrators and victims and civil society in different ways and measures somehow able to veto the process, leading to paralysis. Thus, the policy, types and conditions for leniency in sentencing should be cultivated, considering the social, political and legal contexts in the country and through an inclusive consultative process. It cannot be imported from other countries of contexts.

Secondly, if such incentives are designed exclusively to get the support of alleged perpetrators, it could also lose sight of the holistic notion of TJ, not offering real benefits to victims and society. These incentives should also be designed putting the interests of victims at the centre, recognising them as right holders. Otherwise, it may not help to address the deep sense of inequality, the problem of rule of law in the country nor to achieve the goal of TJ. Thus, these incentives should be conditioned not only to make both truth and justice possible in practice but also passing the benefits to other pillars of TJ, situating them in a holistic system of TJ.

Thus, these risks need to be foreseen and mitigated not only through inclusive public consultations, but also through reviewing and amending laws, policies and structures, putting

resources and commitment in place. For example, the thesis highlighted how the lack of laws criminalising gross violations in Nepal makes it impossible to prosecute certain violations in practice, making the arguments in favour of leniency of sentencing as promoting prosecution unreliable.

Furthermore, to addresses some of the risks, that such scheme would pose in a context like Nepal, the thesis also proposes a mixed system, where those cooperating with the TJ process would go through the special prosecution and court system of TJ, which offer the benefits of leniency in sentencing and the rest would face the regular justice system. This will also require taking some measures to strengthen the capacity of the existing justice system in handling cases involving serious violations. This would not only prevent the risk of leniency in sentencing disproportionately benefiting the perpetrators but also improve the legitimacy of such scheme, as the benefits of leniency would be seen only for those cooperating with the TJ process.

Some of the proposals this thesis puts forward as possible solutions are however yet to be tested. Although the process has started in Colombia, where the leniency in sentencing is to be used for truth and other pillars of TJ, and Nepal is working on the framework, they both need to be properly assessed on how they help to achieve minimum goals of TJ, without undermining international law. This is a good opportunity for further research to assess the impact of these somewhat innovative efforts that would have important implications for future TJ processes. In this context, the thesis has identified the following future research pathways that would impact both scholarly and practical aspects of TJ projects.

7.5. Future research path

The thesis argues leniency in sentencing could offer benefits and make truth and justice viable on the ground, passing the benefits to other pillars of TJ, such as reparation and guarantees of non-repetition. However, it argues that this can be made possible by designing the TJ process holistically having different measures of TJ working to complement each other. It is however important to have longer-term research assessing the impacts of such design when they are tested in practice. As Colombia has just started and Nepal is exploring, it is also important to research how the leniency in sentencing is used in these countries and to assess its overall impacts and to avoid the potential risk of this being another 'avatar' of amnesty. There should be no reintroduction of amnesty through the back door by allowing the sentencing policy to subvert the whole integrity of the TJ process.

As the legitimacy and acceptance of such measures largely depend on how they contribute to both truth and justice while also providing tangible benefits to reparation and non-repetition, how we assess the success and what indicators we use for such assessments are also important research questions on the future direction of TJ processes.

Although the thesis focused on the coexistence of truth and justice components of TJ, considering the particular tensions they create in practice, it suggests further research that explores how all four components of TJ could coexist, leveraging and supporting each other to function harmoniously as part of a holistic TJ system.

Data collected in Nepal show victims having increased interest in how institutions could be reformed to ensure respect of human rights and rule of law. Thus, the research exploring the best

possible ways to foster reforms of institutions in the particular context of Nepal linking TJ mechanisms and other post-conflict peacebuilding projects towards that direction, would also help to create synergies and coordination among different initiatives, realising the holistic notion of TJ on the ground.

Research also show victims having significant interest in localised reparation projects and making local governments play roles in designing these projects, involving victims. This question was outside the scope of this thesis, but it is nevertheless very important for the overall implementation of the holistic TJ project. Thus, research exploring how to improve victims' participation in the design and implementation of reparation programmes would be useful for the future TJ process. This would empower not only the victims but also improve ownership and satisfaction of victims in the TJ process. It would also secure their support for the overall TJ scheme, including leniency in sentencing.

Although this thesis aligns with the holistic framework provided by Pablo de Greiff that reinforces the focus of TJ more on addressing gross violations of human rights, serious violations of humanitarian law and international crimes, it acknowledges different claims that have been made regarding TJ having a transformative potential that could alter social power relations and structural violence. Thus, future research on how that could actually be done in practice would also help to advance the debate on the holistic approach to TJ further.

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CON CS 01, Advancing TJ process: Overview of the Modality for Consultations, 19 participants (6 Female, 13 Male) (Kathmandu, 22 September 2019)

CON CS 02, Reflection on recent development on TJ, 41 participants (12 Female, 29 Male) (Kathmandu, 9 January 2020)

Consultation on the proposed TRC Act Amendment Bill with Victims in different provinces (Code: CON)

CON 01, Existing challenges of TJ process, 46 participants (16 Female, 30 Male) (Province 3, Kathmandu, 16 September 2019)

CON 02, Major Concerns of Conflict Victims in TJ process and the Proposed Bill, 48 participants (22 Female, 26 Male) (Province 2, Janakpur, 20 October 2019)

CON 03, Major Concerns of Conflict Victims in TJ process and the Proposed Bill, 36 participants (22 Female, 14 Male) (Province 5, Nepalgunj, 24 October 2019)

CON 04, Major Concerns of Conflict Victims in TJ process and the Proposed Bill, 42 participants (18 Female, 24 Male) (Province 4, Pokhara, 7 November 2019)

CON 05, Major Concerns of Conflict Victims in TJ process and the Proposed Bill, 37 participants (17 Female, 20 Male) (Province 1, Biratnagar, 16 November 2019)

CON 06, Major Concerns of Conflict Victims in TJ process and the Proposed Bill, 52 participants (26 Female, 26 Male) (Province 7, Dhangadhi, 25 November 2019)

Focus Group Discussion (FGD) with Lawyers and Human Rights Defenders (HRD's) in Kathmandu (Province 3) (Code: FGD SC 01)

FGD SC 01 (1), Lawyer, working with conflict victims' issue, Rupendehi District (Province 5) (Kathmandu, 23 March 2017)

FGD SC 01 (2), HRD, working on TJ issue, Banke District (Province 5) (Kathmandu, 23 March 2017)

FGD SC 01 (3), HRD, working on TJ issue, Kaski District (Province 4) (Kathmandu, 23 March 2017)

FGD SC 01 (4), HRD, working in TJ issue, Kathmandu District (Province 3) (Kathmandu, 23 March 2017)

FGD SC 01 (5), HRD, Kathmandu, working with women, Kathmandu District (Province 3) (Kathmandu, 23 March 2017)

FGD SC 01 (6), Lawyer, Katmandu District (Province 3) (Kathmandu, 23 March 2017)

Focus Group Discussion with Lawyers and Human Rights Defenders (HRD's) in Nepalgunj (Province 5) (Code: FGD SC 02)

FGD SC 02 (1), Academician (Nepalgunj, 4 May 2017)

FGD SC 02 (2), Journalist (Nepalgunj, 4 May 2017)

FGD SC 02 (3), Investigator, National Human Rights Commission (Nepalgunj, 4 May 2017)

FGD SC 02 (4), NGO Representative, Information and Human Right Research Centre (Nepalgunj, 4 May 2017)

FGD SC 02 (5), NGO Representative, Informal Sector Service Center (Nepalgunj, 4 May 2017)

FGD SC 02 (6), Lawyer, Nepal Bar Association (Nepalgunj, 4 May 2017)

FGD SC 02 (7), NGO Representative, Terai Human Rights Defenders Alliance (Nepalgunj, 4 May 2017)

FGD SC 02 (8), Lawyer, High Court Bar Association (Nepalgunj, 4 May 2017)

FGD SC 02 (9), Lawyer, Nepalgunj High Court Bar Association (Nepalgunj, 4 May 2017)

FGD SC 02 (10), Lawyer, Banke District Court Bar Association (Nepalgunj, 4 May 2017)

Focus Group Discussion with victims' leaders in Kathmandu (Province 3) (Code: FGDV 01)

FGDV 01 (1), Victim's leader, family member of victim subject to Extrajudicial Execution (EJE) (Kathmandu, 24 March 2017)

FGDV 01 (2), Victim's leader, wife of the disappeared (Kathmandu, 24 March 2017)

FGDV 01 (3), Victim's leader, family member of the victim subject to EJE (Kathmandu, 24 March 2017)

FGDV 01 (4), Victim's leader, victim of torture (Kathmandu, 24 March 2017)

FGDV 01 (5), Victim's leader, victim of displacement (Kathmandu, 24 March 2017)

Focus Group Discussion with victims filing complaints to the TRC in Baglung (Province 4) (Code: FGDV 02)

FGDV 02 (1), Family member of EJE (Baglung, 30 April 2017)

FGDV 02 (2), Family member of Disappearances (Baglung, 30 April 2017)

FGDV 02 (3), Family member of torture and EJE (Baglung, 30 April 2017)

FGDV 02 (4), Family member of Disappearances (Baglung, 30 April 2017)

FGDV 02 (5), Family member of EJE (Baglung, 30 April 2017)

FGDV 02 (6), Torture Survivor (Baglung, 30 April 2017)

Focus Group Discussion with victims coming from different provinces in Kathmandu (FGDV 03)

FGDV 03 (1), Displaced and torture survivor from Province 6 (Kathmandu, 9 May 2017)

FGDV 03 (2), Displaced and torture survivor from Province 7 (Kathmandu, 9 May 2017)

FGDV 03 (3), Torture survivor from Province 3 (Kathmandu, 9 May 2017)

FGDV 03 (4), Family of disappearances from Province 5 (Kathmandu, 9 May 2017)

FGDV 03 (5), Ex-child soldier from Province 3 (Kathmandu, 9 May 2017)

FGDV 03 (6), Family of EJE from Province 5 (Kathmandu, 9 May 2017)

FGDV 03 (7), Family of EJE from Province 6 (Kathmandu, 9 May 2017)

FGDV 03 (8), Family of disappearances from Province 3 (Kathmandu, 9 May 2017)

FGDV 03 (9), Torture survivor from Province 1 (Kathmandu, 9 May 2017)

Interviews with State Institutions (Code: SI)

SI 01, Interview with the Commissioner, Truth and Reconciliation Commission (Kathmandu, 18 March 2017; 10 August 2018)

SI 02, Interview with the Attorney General, Attorney General of Nepal at the time of the interview (Kathmandu, 27 March 2017)

SI 03, Interview with the Former Attorney General of Nepal (Kathmandu, 31 March 2017)

SI 04, Interview with the Commissioner Commission on Enforced Disappearances (Lalitpur, 31 March 2017)

SI 05, Interview with a Politician, Central Committee Member, Nepali Congress, Member of Parliament (Kathmandu, 21 April 2017)

SI 06, Interview with a Politician, Central Committee Member, Nepal Communist Party (Kathmandu, 27 April 2017)

SI 07, Interview with an Expert- Investigator, Truth and Reconciliation Commission (Biratnagar, 13 November 2017)

SI 08, Interview with the Advisor to the President (Kathmandu, 10 May 2017; Kathmandu, 23 March 2018)

SI 09, Interview with a Political Leader, Maoist, Member of Parliament (Kathmandu, 11 May 2018)

Interviews with Civil Society (Code: CS)

CS 01, Interview with a Victim, Executive Member of Conflict Victim Common Platform (CVCP) (Kathmandu, 2 March 2017)

CS 02, Interview with a Legal advisor to the INGO, a lawyer for the Supreme Court, lawyer in most of the writ petitions filed by victims (Kathmandu, 12 March 2017)

CS 03, Interview with a Lawyer at the Supreme Court (Lalitpur, 13 March 2017)

CS 04, Interview with a Victim leader, Conflict Victims for Society for Justice (CVSJ) (Kathmandu, 17 March 2017)

CS 05, Interview with a Victim, Leader (Kathmandu, 24 March 2017)

CS 06, Interview with a Victim Leader, working on the issue of sexual violence (Kathmandu, 2 April 2017)

CS 07, Interview with a Victims Leader, researching on victims movement (Kathmandu,11 April 2017)

CS 08, Interview with an Ex-child soldier (Kathmandu, 14 May 2017)

CS 09, Interview with an Academic, worked to facilitate dialogues among parties (Kathmandu, 16 May 2017)

CS 10, Interview with a President of NGO working with wives of those disappeared and killed (11 October 2017)

CS 11, Interview with an Expert involved in the drafting of the Bill (Kathmandu, 22 November 2019)

CS 12, Interview with a Political analyst, Columnist, following TJ issues (Kathmandu, 24 November 2019)

CS 13, Interview with a Human Rights Activist, Working For NGO (Kathmandu, 28 December 2019)

Informal Conversation

Informal conversation with a diplomat (Kathmandu, 29 March 2017)

Informal conversation with a retired bureaucrat (Kathmandu, 29 March 2017)

Informal conversation with a diplomat (Kathmandu, 11 April 2017)

Informal conversation with a bureaucrat (Kathmandu, 11 December 2019)

Informal conversation with a diplomat (Lalitpur, 18 December 2019)

Informal conversation with a politician, following up TJ issue (Kathmandu, 15 January 2020)

Informal conversation with a diplomat (Lalitpur, 16 January 2020)

Informal conversation with a visiting scholar from Colombia to the University of Essex (UK, 13 February 2020)

Informal conversation with a visiting fellow from Colombia to the University of Essex (UK, 18 February 2020)

Informal conversation with an expert working on TRC in Colombia (UK, 19 March 2020)

List of Abbreviations

AF	Advocacy Forum-Nepal
AHRLJ	African Human Rights Law Journal
AJIL	American Journal of International Law
APF	Armed Police Force
AWC	Accountability Watch Committee
Berk J Int'l L	Berkeley Journal of International Law
Buff Hum Rts L Rev	Buffalo Human Rights Law Review
Cal L Rev	California Law Review
Cardozo L Rev	Cardozo Law Review
Case W Res J Int'l L	Case Western Reserve Journal of International Law
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CIEDP	Commission of Investigation on Enforced Disappeared Persons, Nepal
CLR	Columbia Law Review
COAS	Chief of Army Staff
COI	Commission of Inquiry
Col J Asian L	Columbia Journal of Asian Law
Cornell Int'l LJ	Cornell International Law Journal
CPA	Comprehensive Peace Agreement
CPN-M	Communist Party of Nepal - Maoist
CUP	Cambridge University Press

CVCP	Conflict Victims Common Platform
CVSJ	Conflict Victims' Society for Justice
EHRLR	European Human Rights Law Review
EJIL	European Journal of International Law
Emory Int'l L Rev	Emory International Law Review
FIR	First Information Report
Fordham Int'l L J	Fordham International Law Journal
Geo Wash Intl L Rev	George Washington International Law Review
GJIL	Georgetown Journal of International Law
HJRL	Hague Journal on the Rule of Law
Hamline L Rev	Hamline Law Review
Harv ILJ	Harvard International Law Journal
Hastings LJ	Hastings Law Journal
Hous J Int'l L	Houston Journal of International Law
HRD	Human Rights Defender
Human Rts Rev	Human Rights Review
Hum Rts Q	Human Rights Quarterly
IACHR	Inter-American Commission on Human Rights
IACPPT	Inter-American Convention to Prevent and Punish Torture
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
ICLQ	International and Comparative Law Quarterly

ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICTJ	International Center for Transitional Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
IFP	Initiative for Peacebuilding
IJTJ	International Journal of Transitional Justice
ILC	International Law Commission
Int CLR	International Criminal Law Review
JICJ	Journal of International Criminal Justice
J Lat Am Stud	Journal of Latin American Studies
JPR	Journal of Peace Research
LCP	Law and Contemporary Problems
LJIL	Leiden Journal of International Law
Minn L Rev	Minnesota Law Review
MoPR	Ministry of Peace and Reconstruction
NA	Nepal Army
NC	Nepali Congress
NCP	Nepal Communist Party
NEFAD	National Network of Families of Disappeared & Missing Nepal
Ne Ka Pa	Nepal Kanoon Patrika
New Eng L Rev	New England Law Review
NHRC	National Human Rights Commission of Nepal
NHSSP	Nepal Health Sector Support Programme
NP	Nepal Police

NQHR	Netherlands Quarterly of Human Rights
NYL Sch J Hum Rts	New York Law School Journal of Human Rights
NYUJ Int'l Law & Pol	New York University Journal of International Law and Politics
OJLS	Oxford Journal of Legal Studies
OHCHR	Office of the United Nations High Commissioner for Human Rights
Pac Rim L & Pol'y J	Pacific Rim Law & Policy Journal
PBTJA	Proposed Bill for Transitional Justice Act
RNA	Royal Nepal Army
SACLS	South Asian Centre for Legal Studies
SCSL	Special Court for Sierra Leone
Stan J Int'l L	Stanford Journal of International Law
SUP	Stanford University Press
TADA	Terrorist and Disruptive Activities (Prevention and Punishment) Act
TADO	Terrorist and Disruptive Activities (Control and Punishment) Ordinance
T Jefferson L Rev	Thomas Jefferson Law Review
Tex Int'l LJ	Texas International Law Journal
TRC	Truth and Reconciliation Commission
UML	United Marxist Leninist
UNCCPR	United Nations Committee of the International Covenant for Civil and Political Rights
UNESC	UN Economic and Social Council

UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
UNMIN	United Nations Mission in Nepal
UNOHCHR	United Nations Office of the High Commissioner for Human Rights
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor
Va J Int'l L	Virginia Journal of International Law
Wash & Lee L Rev	Washington and Lee Law Review
WOREC	Women's Rehabilitation Centre
Yale LJ	Yale Law Journal

Appendices

Annex 1

Information Sheet

Introduction

I am doing a Ph.D. at the University of Essex, UK. I am researching the relationship between truth Commissions and criminal prosecutions after a period of systematic human rights violations. Nepal is the case study for my research.

Why this research?

Nepal has established two Transitional Justice (TJ) mechanisms, namely the 'Truth and Reconciliation Commission' (TRC) and the 'Commission of Inquiry on Enforced Disappearances of Persons' (CIEDP) to look into the legacy of past human rights violations. These Commissions are investigating cases of human rights violations and making recommendations, including regarding prosecution. A Special Court is going to be established to prosecute those whose prosecution is recommended by the Commissions. In the meantime, many cases, where victims have approached the police to initiate criminal investigations have been put on hold on the ground that they will later be transferred to the Special Court.

Scholars and practitioners alike are divided on the question of whether and how to link truth Commissions and prosecutions. Some argue that the objective of the TRC is to find truth. It can do this work effectively only if no one fears prosecution for providing information to such a Commission. If the TRC had to cooperate with the prosecution, its work will be hampered. In addition, this link might undermine the fair trial standards guaranteed under international human

rights law. Others believe that as truth and justice are not mutually exclusive and the truth-seeking process is not an end in itself, the objective of finding truth is to provide justice to the victims, among others. If truth is told but no other responses made, then it will severely affect the confidence of victims in the whole process. It will further strengthen impunity and contribute to the erosion of the rule of law, defeating the whole objective of TJ.

In this context, I am researching how Nepal's TRC and the CIEDP are linking their work to prosecution. How such links are maintained, how concerns regarding fair trial and confidentiality are addressed, and what other challenges they have faced? What measures are put in place to mitigate them? From this, lessons could be learned for future efforts to link truth Commissions and prosecution in achieving the aims of TJ.

Who are the interviewees?

I am interviewing victims of conflict who have engaged with the TRC and CIEDP to find out their experiences with such mechanisms and how these mechanisms would link to prosecution in relation to their cases. I am also interviewing the members and staff of these two Commissions, civil society organisations and politicians to find out why such a model was agreed upon, how the Commissions are linking their work with the prosecutorial bodies, what rules and procedures the Commissions are following, what challenges and difficulties they have been facing while making such links. I am also interviewing members of the Nepal Bar Association to get their views on whether such a model poses any legal challenges under national and international law.

What is the use of this research?

This research will help me to write up my thesis. I expect that the research will be helpful not only to the people of Nepal to understand how Nepal's TRC, CIEDP and prosecution work in tandem, but also to people of many other countries, as they may draw on the experiences from this research while designing TJ mechanisms, particularly when considering how to link different mechanisms.

How do you participate?

Participation is voluntary. You can leave the interview or focus group any time you want. You can also choose not to answer at all or not to answer specific questions. If you choose to leave the interview halfway through and you do not want me to use the information that you provided until then, please say so and the information will not be used.

How long will the interview take?

The interview will take 1 to 2 hours. You can ask to break up the interview anytime you wish.

Confidentiality

The interview will be recorded, and I will also take notes. During focus group discussions my assistant will be taking notes. All the recordings and notes will be kept securely. Your identity will be confidential, information will be anonymised.

Consent form

To take part in this research, you will be asked to sign a consent form.

How to contact and get further information

If you have any question or concern you can ask me now or contact me anytime at the following numbers and email.

Mandira Sharma,

University of Essex,

Human Rights Centre,

Wivenhoe Park, Co4 3SQ, Colchester, UK,

Email: msharmd@essex.ac.uk

Phone: +44(0) 7479522567 (UK number) 977-9851048475 (local number)

Concerns or complaints

If you have any concerns or complaints about any aspects of this research, in the first instance please contact the following person:

Prof. Sabine Michalowski,

Director of Research,

School of Law, University of Essex,

Wivenhoe Park, CO4 3SQ, Colchester, UK

Email: smichal@essex.ac.uk

Phone: 01206-872862

If you remain unsatisfied, please contact the University's Research Governance and Planning Manager, detail is following:

Sarah Manning-Press,

Research & Enterprise Office,

University of Essex,

Wivenhoe Park, CO4 3SQ, Colchester

Email: sarahm@essex.ac.uk

Phone: 01206-873561

Annex 2

Conset Form

Title of the Project: Truth Commission and Prosecution: A Case Study from Nepal

Researcher: Mandira Sharma

Please initial box

1. I confirm that I have read and understood the Information Sheet dated 30 January for the above study. I have had the opportunity to consider the information, ask questions and have had these questions answered satisfactorily.	☐
2. I understand that my participation is voluntary and that I am free to withdraw from the project at any time without giving any reason and without penalty.	☐
3. I understand that interview may remind me the painful memory of human rights violations that I suffered or threat that I faced, I am free to stop the interview or get help from the counsellor if I feel that is required.	☐
4. I understand that the identifiable data provided will be securely stored and accessible only to the members of the research team directly involved in the project and that confidentiality will be maintained.	☐
5. I understand that data collected in this project might be shared as appropriate and for publication of findings, in which case data will remain completely anonymous.	☐

6. I agree to take part in the above study.	☐

Participant Name	Date	Participant Signature
_____	_____	_____

Researcher Name	Date	Researcher Signature
_____	_____	_____

Annex 3

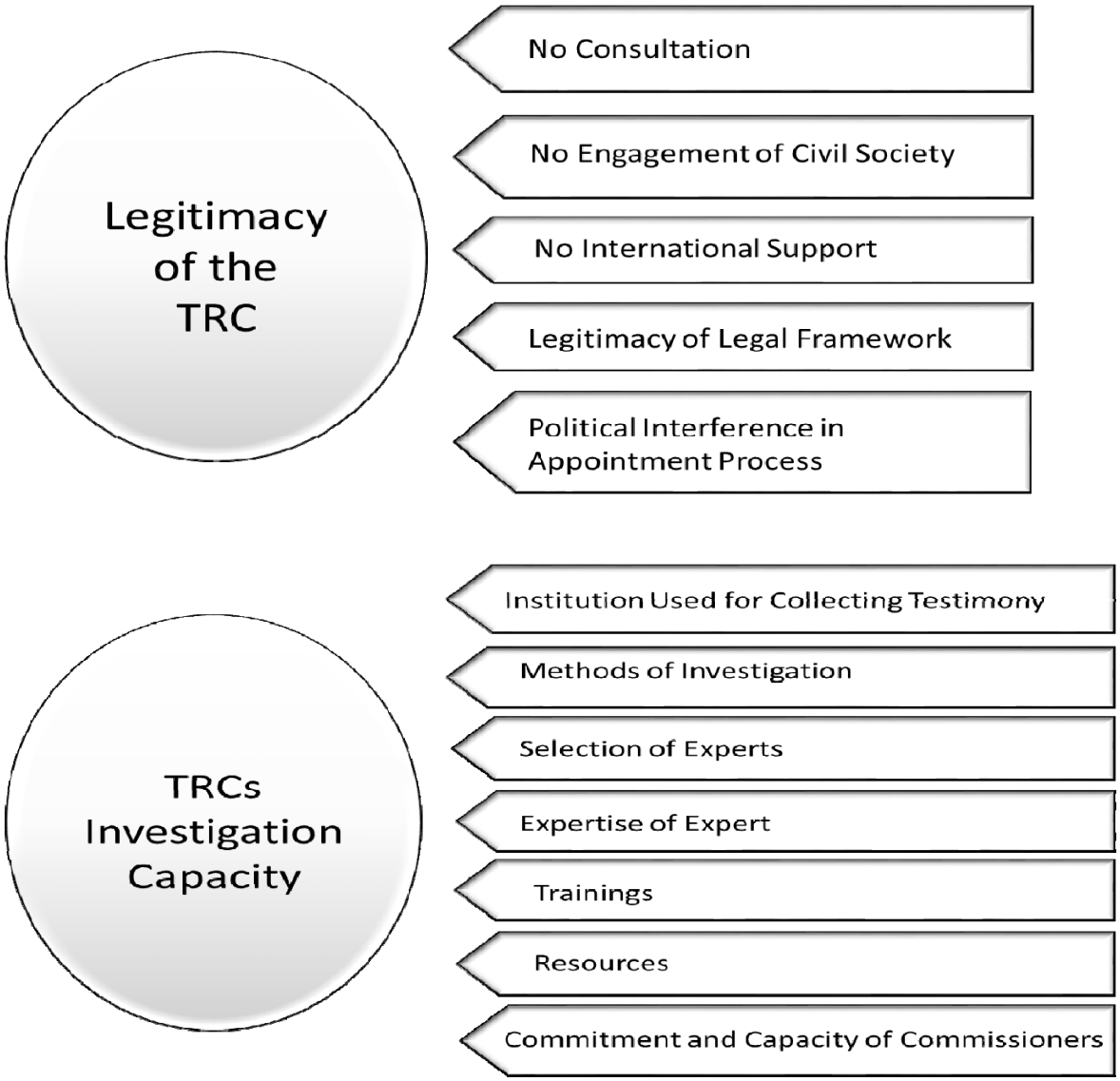
Frequently used interviews questions

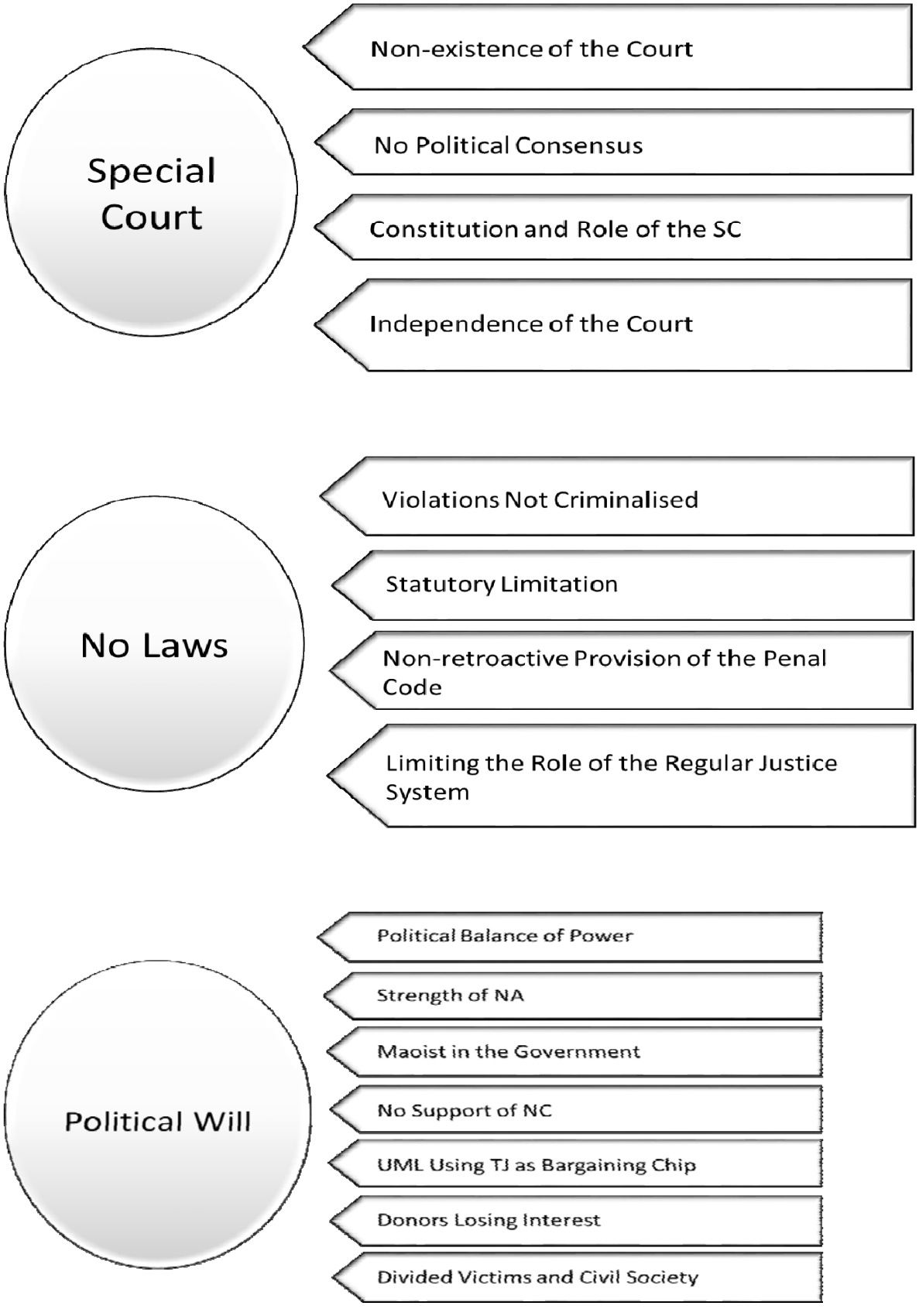
- In your view how is the TRC working to establish truth?
- How was your experience when submitting your complaint?
- Did you face any difficulties or challenges?
- Have you received any updates? What were they?
- In your view how is the TRC's investigation facilitating prosecution?
- Is your case under investigation, has anyone from the TRC came to further investigate?
- How did that go?
- What challenges that you see in making the TRC's investigation link to prosecution?
- How is civil society engaging with the TRC?
- What are your main concerns?
- What needs to be changed?
- What challenges you see for truth and justice in Nepal?
- How is the TRC coordinating with the AG's office?
- How are two Commissions interlinked? Coordinated?
- How about investigations of the TRC for the purpose of prosecution?
- Is there donor support for the TRC? By which donor and what kind of support?
- Why is TRC not been able to function properly?
- What was the understanding of the political parties while agreeing the TRC during the CPA?

- What roles did internationals play during the drafting of the CPA to have the TRC?
- What were the positions of different actors (NA, Maoist, NC, UML) during the negotiation of the TRC Act?
- What is the position of your party regarding accountability for past crimes?
- Will your party support prosecution if the TRC recommends prosecution?
- What kinds of truth will the TRC establish?
- Is the AG's office prepared to prosecute cases recommended by the TRC?
- How? Under which laws?
- What is happening with the establishment of the Special Court?
- What made parties work on the draft bill with leniency in sentencing?
- What roles are internationals/donors playing in this?
- What is the position of the NA and former Maoist on this?
- How will legitimacy for leniency be gained?
- What is your perspective on leniency in sentencing?
- In your view how will the proposed leniency in sentencing pave the way for the TJ process?
- What challenges that you foresee for such a scheme to work?
- How is the coordination between the victims and civil society?

Annex 4 (A)

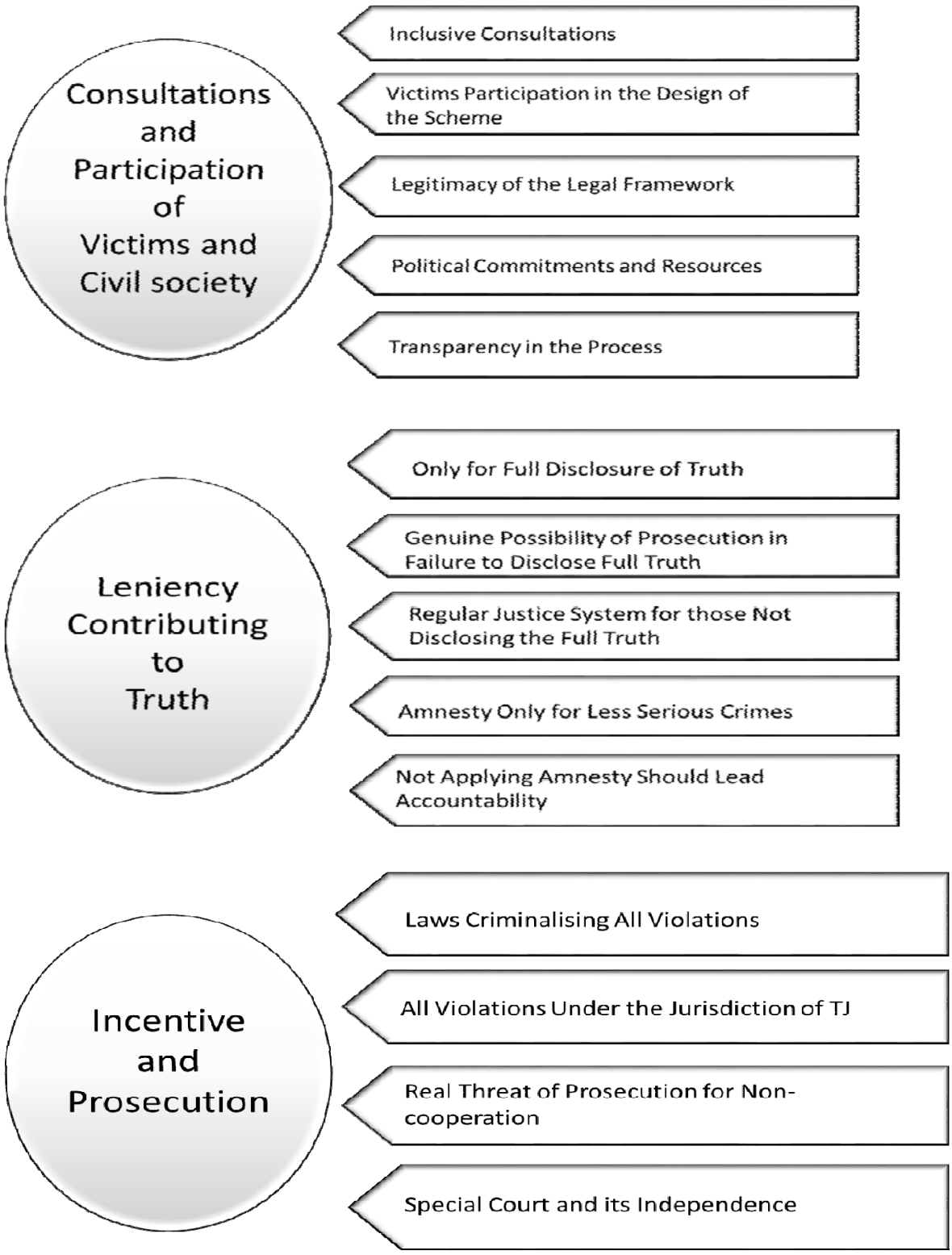
Themes Deriving from Data Cluster 1 (Concerns Regarding the Work of the TRC in Establishing Truth and Investigating for Prosecution)

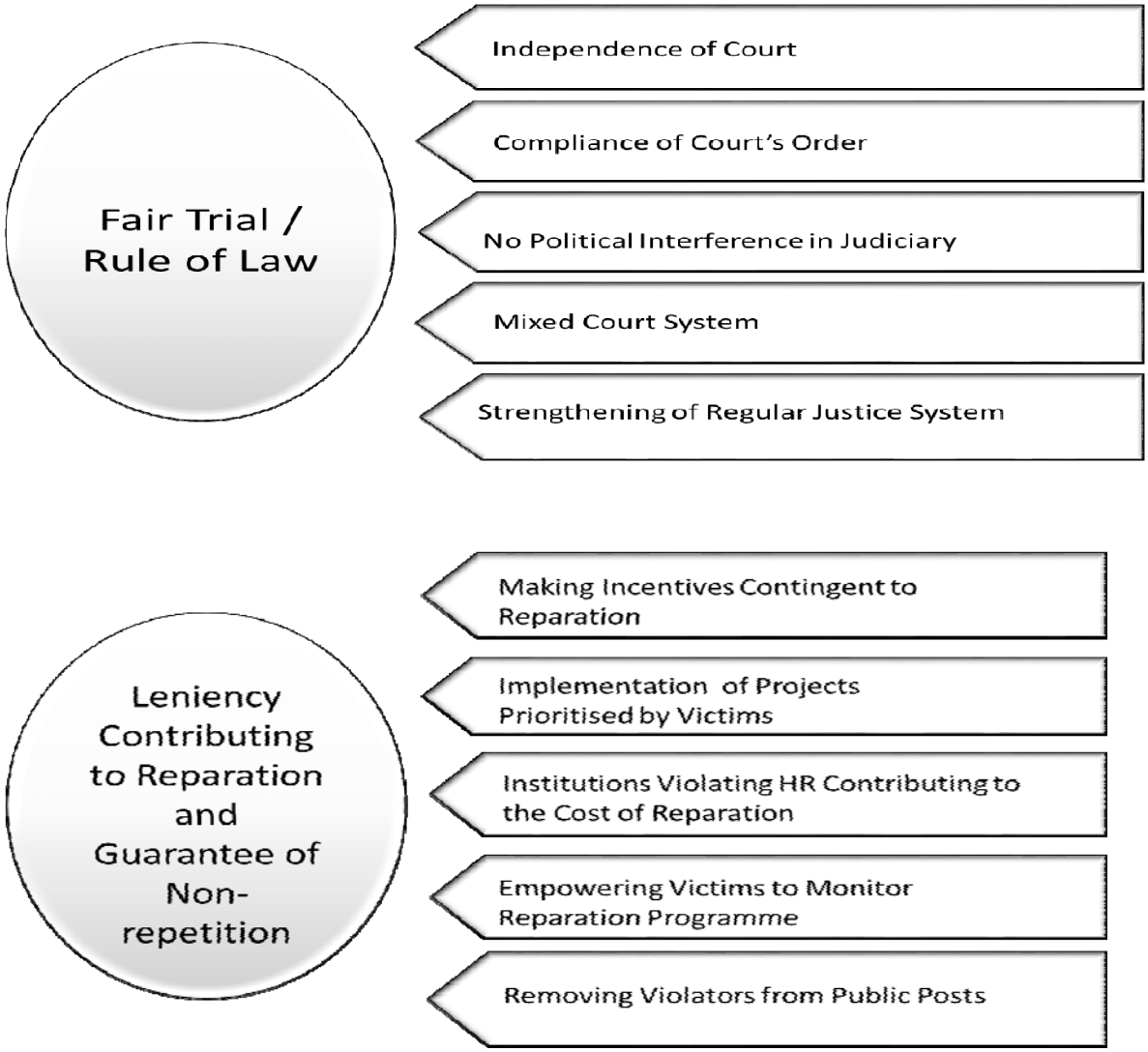



Special Court
Non-existence of the Court
No Political Consensus
Constitution and Role of the SC
Independence of the Court
No Laws
Violations Not Criminalised
Statutory Limitation
Non-retroactive Provision of the Penal Code
Limiting the Role of the Regular Justice System
Political Will
Political Balance of Power
Strength of NA
Maoist in the Government
No Support of NC
UML Using TJ as Bargaining Chip
Donors Losing Interest
Divided Victims and Civil Society

Annex 4 (B)

Themes Deriving from Data Cluster 2 (Concerns on Proposed Amendment Bill for the TRC Act Introducing Leniency in Sentencing)




Fair Trial / Rule of Law
Independence of Court
Compliance of Court's Order
No Political Interference in Judiciary
Mixed Court System
Strengthening of Regular Justice System
Leniency Contributing to Reparation and Guarantee of Non-repetition
Making Incentives Contingent to Reparation
Implementation of Projects Prioritised by Victims
Institutions Violating HR Contributing to the Cost of Reparation
Empowering Victims to Monitor Reparation Programme
Removing Violators from Public Posts