

# The Transitional Justice Process of Nepal: National and International Dimensions

Krishna Chandra Chalisey\*

## Abstract

Transitional justice is an evolving discipline for academics and researchers. It is the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, to ensure accountability, serve justice and achieve reconciliation. The transitional justice process of Nepal aims to address the humanitarian consequences of the non-international armed conflict that Nepal went through from 1996 to 2006. International law-human rights and humanitarian law-governs the transitional justice process together with domestic laws. The transitional justice process in Nepal is an issue of concern to the international community as well. It is now an element of Nepal's diplomatic intervention in various platforms and fora. Nepal is struggling to find an appropriate modality of transitional justice. This article has been prepared primarily based on desk research-consulting relevant publications, websites, positions of the stakeholders-and diplomatic representations of the Government of Nepal. It updates the readers on Nepal's initiative on transitional justice and argues that it falls within the wider scope of Nepal's foreign policy.

**Key Words:** *Transitional Justice, International Humanitarian Law, International Human Rights Law, Transitional Justice Mechanism, Truth/Justice/Reparation/Non-recurrence*

## Introduction

The term Transitional Justice (TJ) entered into public discourse following the conclusion of the Comprehensive Peace Agreement (CPA) between the Government of Nepal and the Communist Party of Nepal (Maoist) on November 21, 2006, that ended a decade-long non-international armed conflict. Transitional justice refers to a range of measures-judicial and non-judicial, formal and informal, retributive and restorative-employed by countries transitioning out of armed conflict or repressive regimes to redress legacies of atrocities and to promote long-term sustainable peace (United States Department of State, Transitional Justice Overview, 2022). It is not a distinct or 'soft' form of justice, but rather a set of approaches to achieving justice, broadly understood, to address legitimate grievances while also strengthening security, development, reconciliation, and good governance. Effectively addressing

---

\* Mr. Chalisey is a Life Member of the NCWA and former Head of Communication and IHL Program at the International Committee of the Red Cross (ICRC), Kathmandu.

past atrocities through these approaches is an important tool in preventing the recurrence of atrocities.

The TJ deals with the promotion of truth, justice, reparation, and guarantees of non-recurrence. If applied properly, TJ measures have the potential to mitigate the risk of further violence, promote civilian security, strengthen the rule of law, rebuild social cohesion, encourage respect for human rights, address the needs of victims, facilitate development, and restore trust in formerly abusive institutions (United States Department of State, Transitional Justice Overview, 2022).

The preamble of the 2006 Comprehensive Peace Agreement stipulates the commitment of the then parties to the conflict – the Government of Nepal and the Communist Party of Nepal (Maoist) - “Remaining committed to the 1948 Universal Declaration of Human Rights, international humanitarian laws and the fundamental principles and basic principles and norms related to human rights.” Article 5.2.5 of the same document reads “Both sides agree to set up with mutual consent a High-level Truth and Reconciliation Commission to probe into those involved in serious violation of human rights and a crime against humanity in course of the armed conflict for creating an atmosphere for reconciliation in the society (RELIEFWEB, 2006). Likewise, the Interim Constitution of Nepal 2007 (2063), article 33 (s) mentions the obligation of the state - “To constitute a high-level truth and reconciliation commission to investigate the facts about involved in gross violations of human rights, crimes against humanity during the course of armed conflict, and to create an environment of reconciliation in the society” (Government of Nepal, 2007).

The issues related to Nepal’s peace process, the peace agreement, and transitional justice are of course issues of national concern. At the same, these issues bear international dimensions. The foreign policy of Nepal states that the foreign policy will be guided by the norms of international law and world peace (Ministry of Foreign Affairs, 2020). The TJ process is governed by relevant international instruments – primarily international humanitarian law (IHL) and international human rights law (IHRL). The foreign policy document further adds - “The United Nations charter; bilateral, regional and multilateral treaties, agreements, and commitments/memorandum to which Nepal is a party will remain as basis of the foreign policy”. It means the international laws or the instruments concerning transitional justice are also the basis of the foreign policy of Nepal. The TJ process has been a part of the Nepal report and the statements made in the UN in Geneva and New York. They include the Nepal Universal Periodic Report presented to the UN Human Rights Council and the annual addresses in the UN General Assembly. The TJ is one of the issues of Nepal’s engagement with the diplomatic and international community at home and abroad.

### **Methods and Data**

The article is mainly exploratory and qualitative. Many publications on transitional

justices, both national and international, have been consulted. Websites of international organizations working in the field of transitional justice proved a good source of information. The publications of the Government of Nepal and the TJ mechanisms offered information on the many initiatives undertaken at the national level and the constraints associated with the process.

### **Transitional Justice Process in General**

The concept of the transitional justice process is relatively new. Transitional justice as a discourse with certain objects, concepts, actors, and characteristics can be traced back to their historical process of emergence. The emergence of the discourse of transitional justice can be followed through four events in the 1980s and 1990s: the transition to democracy in Argentina in 1983, the end of communism in Eastern and Central Europe after 1989, the reinvigoration of international criminal justice after the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, and the establishment of the South African Truth and Reconciliation Commission in 1995 (Zunino, 2022). Transitional justice has now developed as a separate discipline. On 29 September 2011, the Human Rights Council adopted resolution 18/7, in which it decided to appoint, a Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence. The mandate of the rapporteur has been extended periodically since then (OHCHR, 2011). In situations of transition from conflict or authoritarian rule where there have been gross violations of human rights and serious violations of international humanitarian law, the Special Rapporteur focuses on the measures adopted by the relevant authorities to guarantee the truth, justice, reparation, and guarantees of non-recurrence.

Transitional justice consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, truth-seeking, reparations programs, institutional reform, or an appropriate combination thereof. Whatever combination is chosen must conform to international legal standards and obligations. Transitional justice should further seek to take account of the root causes of conflicts and the related violations of all rights, including civil, political, economic, social, and cultural rights. By striving to address the spectrum of violations in an integrated and interdependent manner, transitional justice can contribute to achieving the broader objectives of prevention of further conflict, peacebuilding, and reconciliation (United Nations, 2010).

The United Nations identifies four pillars of transitional justice (TRIAL International, 2022) as key elements of the TJ.

**Truth:** establishing and acknowledging the truth about the violations committed is the first step towards social dialogue and even reconciliation. All parties to the conflict, and most importantly victims and their families, have the right to make their voices heard and their questions answered.

**Justice:** the identification and prosecution of perpetrators of gross human rights violations and international crimes are crucial, as it serves both a preventive and reparative purpose. Strong accountability mechanisms show that atrocities do not go unpunished, thereby deterring future abuses.

**Reparation:** victims of gross human rights violations have the right to receive adequate reparation for the harm suffered. Measures of reparation go well beyond economic compensation, and may also include symbolic gestures, such as public apologies and the building of memorials, and measures aiming at improving the lives of victims and their families, like scholarships or access to health services.

**Guarantees of non-recurrence:** By learning from past mistakes, all efforts must be made to prevent gross human rights violations in the future. This includes mainly institutional reforms reinforcing accountability, transparency, and fairness.

Over forty states including Nepal have gone through the TJ process and concluded it or are making efforts to conclude the process. Colombia is a recent example that is heading toward a successful conclusion of the TJ process following the 2016 peace accord. The accord ended five decades of conflict with the Revolutionary Armed Forces of Colombia (FARC). The Colombian model is hailed by some as a success story of “positive complementarity” between the international criminal court (ICC) and a national court system (JusticeInfo.net, 2021).

While discussing the issues related to the TJ, the question is often asked on the modality of the TJ mechanism. Is there an ideal modality? Can we make it contextual to the reality of the concerned country? Which was the most successful one? It is difficult to receive a specific response. It is determined by the local social, political, and cultural context. Now, there are standards and guiding principles as mentioned earlier. There is a UN Secretary-General report on the issue. There is increased focus by the UN on questions of transitional justice and the rule of law in conflict and post-conflict societies, yielding important lessons for our future activities. Success will depend on several critical factors, among them the need to ensure a common basis in international norms and standards and to mobilize the necessary resources for sustainable investment in justice. We must learn as well to eschew one-size-fits-all formulas and the importation of foreign models, and, instead, base our support on national assessments, national participation, and national needs and aspirations. (UN Secretary General, 2004).

Different societies take different routes, depending on the nature of the atrocities that occurred and the particularities of that society, including its culture, history, legal and political structures, and capacity, as well as its ethnic, religious, and socioeconomic makeup. How far along and how quickly a society travels along this path depends on the resolve, tireless effort, and collaboration of many stakeholders from government actors and politicians to victims, civil society organizations, and ordinary citizens (ICTJ, 2022).

## **Status of Nepal's Transitional Justice Process**

As mentioned in the introduction, the 2006 Comprehensive Peace Accord and the 2007 Interim Constitution of Nepal speak on elements of transitional justice to develop and implement. It is already sixteen years since the signing of the peace agreement. The state is yet to fulfill its obligations toward the victims of armed conflict. The Commission of Investigation on Enforced Disappeared Persons (CIEDP) has determined the number of disappeared persons as 2567 based on the complaints received (Bhattarai, 2022). Over 17000 people are reported to have been killed during the conflict (Upreti, 2022). Many commitments of the government and the Communist Party of Nepal (Maoist) remain unfulfilled. As an example, article 5.2.3 of the CPA states “Both sides agree to make public within 60 days of the signing of the agreement the correct and full names and addresses of the people who ‘disappeared’ or were killed during the conflict and convey such details to the family members.” Not a single case has been resolved in the last 16 years.

Despite the commitments expressed by the Government of Nepal and the Communist Party of Nepal (Maoist) through the 2006 Comprehensive Peace Agreement and 2007 Interim Constitution of Nepal, the effort to respond to the needs of conflict-affected people and address the violations of international humanitarian law and human rights began much late. The Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act came into force in 2014 (2071). Under the Act, the government formed twin TJ commissions – the Commission of Investigation on Enforced Disappeared Persons and the Truth and Reconciliation Commission (TRC) – in February 2015. The TRC has the mandate to investigate cases of serious human rights violations including unlawful killings, sexual violence, torture, and a range of other serious crimes committed during the conflict; and the CIEDP has a mandate specific to enforced disappearances. The commissions faced difficulties to act as envisaged by the Act from the beginning. The Act and the composition of the commissions were criticized by the international community including the UN and the conflict victims from the beginning. The government failed to amend the TJ Act as per the directives issued by the Supreme Court.

Despite the repeated Supreme Court rulings that any mechanism for transitional justice must conform to international standards and lead to criminal accountability for gross human rights violations (International Commission of Jurists, 2015), these commissions continue to have a legally flawed mandate which, among other problems, allows the commissions to recommend amnesties for gross human rights violations. In addition, the legislation establishing the commissions does not provide sufficient guarantees for the independent and impartial operation of the commissions and the commissioners, making them vulnerable to political pressures. For these reasons, the UN Office of the High Commissioner for Human Rights (OHCHR) also refused to provide technical support to the commissions (OHCHR, 2014).

The Nepal TJ commissions continue to exist since 2015. They were reshuffled once with a new team. Minister of Law, Justice, and Parliamentary Affairs Mr. Govinda Prasad Sharma (Koirala) took a concrete step to amend the Act as demanded by the victims, the international community, and the Supreme Court to conclude the TJ process in 2022 (2079). The Ministry adopted a wider consultative approach to draft the amendment bill. The consultation included political parties, parliamentarians, victims, civil society organizations, I/NGOs specialized in TJ, and the diplomatic community. The bill (House of Representatives, Nepal, 2022) that was being discussed in the thematic committee of the House of Representatives could not conclude the discussion due to impending parliamentary elections. The newly elected House of Representatives is expected to finalize the bill and eventually conclude the TJ process.

### **International Law and Transitional Justice**

“To conduct independent foreign policy based on the Charter of the United Nations, non-alignment, principles of *Panchsheel*, international law and the norms of world peace, taking into consideration of the overall interest of the nation, while remaining active in safeguarding the sovereignty, territorial integrity, independence and national interest of Nepal”, states the Constitution of Nepal (Constituent Assembly, 2015). Adherence to the principles of international law has been an integral part of Nepal’s foreign policy. The IHL and IHRL form the core part of international law applicable in the TJ process.

The international community is closely watching the initiatives taken by Nepal to fulfill the TJ obligations. While addressing the 77<sup>th</sup> session of the United National General Assembly in New York in September 2022, Head of Nepal Delegation and Foreign Secretary Bharat Raj Paudyal remarked “Nepal’s commitment to human rights is unequivocal. The Constitution of Nepal incorporates universally recognized human rights and fundamental freedoms. As a member of the Human Rights Council for the second consecutive term, Nepal continues to add value to the work of the Council. Our approach to human rights is firmly grounded in the principles of universality, indivisibility, objectivity, and non-selectivity. We are committed to concluding the transitional justice process by addressing the concerns of the victims, complying with the directive of the Supreme Court, and abiding by the spirit of the Comprehensive Peace Accord and our relevant international commitments. Taking this in earnest, the Government of Nepal presented an amendment bill to the parliament to reform the related laws (UNGA, 2022).”

Nepal Universal Periodic Review Report (3rd Cycle) submitted to Human Rights Council on 12 October 2020 reads “The Government of Nepal has reiterated its commitment to resolve the issues related to transitional justice by the spirit of the Comprehensive Peace Accord, rulings of the Supreme Court, relevant international commitments, concerns of the victims and ground realities. Two

independent Commissions- the Truth and Reconciliation Commission (TRC) and the Commission on Investigation of Enforced Disappeared Persons (CIEDP)- have been investigating the allegations of human rights violations during the conflict era (1996-2006) under the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2014 (TRC Act). The Government of Nepal has provided interim relief to the victims of conflict (Office of the Prime Minister and Council of Ministers, 2020).”

Pradeep Kumar Gyawali, Minister for Foreign Affairs and Head of Nepali Delegation to the 74th session of UNGA, 2019 said “We are fully committed to concluding the transitional justice process in line with the Comprehensive Peace Accord, the directive of the Supreme Court, relevant international commitments, concerns of the victims and the ground realities (74th UNGA, 2019).

### Conclusion

The armed conflict in Nepal lasted only for 10 years, but it failed to conclude the TJ process even in a period of 16 years. The parties to the conflict together with the victims need to agree on the modality of the TJ mechanism which conforms to international standards. While doing so they will have the liberty to contextualize the process considering the ground reality. It is already late and it should not be protracted further. The victims are waiting for a long for truth, justice, reparation, and a guarantee of non-recurrence. The Government of Nepal needs to amend the existing TJ Act at the earliest once the new government is in place. It may consider advisory services from international organizations like the UN, International Commission of Jurists (ICJ), International Center for Transitional Justice (ICTJ), and International Committee of the Red Cross (ICRC) as appropriate so that the TJ process is concluded.

### References

- 74th UNGA. (2019, September 27). *UN*. Retrieved November 22, 2022, from UN: <https://www.un.int/nepal/media/nepal-74th-session-unga-and-other-events-during-high-level-week>
- Bhattarai, S. K. (2022, June). Activities of Commission of Investigation on Enforced Disappeared Persons (Nepali). *Satyako Khoji (Seeking the Truth)*, 4(1), 19 - 42.
- Constituent Assembly. (2015). *Constitution of Nepal, Policies of the State, Policies Relating to International Relations*. Kathmandu: Nepal Law Commission.
- Government of Nepal. (2007). *MOLJPA*. Retrieved February 1, 2023, from Ministry of Law, Justice, and Parliamentary Affairs: <https://www.moljpa.gov.np/>
- House of Representatives, Nepal. (2022). *House of Representatives*. Retrieved June 15, 2022, from House of Representatives: <https://www.parliament.gov.np/np>
- ICTJ. (2022, November 20). *ICTJ*. Retrieved from ICTJ: <https://www.ictj.org/what-transitional-justice>

- International Commission of Jurists. (2015, February 27). *ICJ*. Retrieved 2022, from ICJ: <https://www.icj.org/nepal-government-must-implement-landmark-supreme-court-decision-against-impunity/>
- JusticeInfo.net. (2021, November 9). *JusticeInfo.net*. Retrieved 2022, from JusticeInfo.net: <https://www.justiceinfo.net/en/84121-icc-backs-colombia-transitional-justice-model.html>
- Ministry of Foreign Affairs. (2020). *Ministry of Foreign Affairs*. Retrieved November 20, 2022, from Ministry of Foreign Affairs: <https://mofa.gov.np/foreign-policy/>
- Office of the Prime Minister and Council of Ministers. (2020, October 12). *OPMCM*. Retrieved November 22, 2022, from OPMCM: <https://www.opmcm.gov.np/en/download/universal-periodic-review-report-3rd-cycle-of-nepal/>
- OHCHR. (2011, September 29). *OHCHR*. Retrieved December 4, 2022, from OHCHR: <https://www.ohchr.org/en/special-procedures/sr-truth-justice-reparation-and-non-recurrence>
- OHCHR. (2014). *OHCHR*. Retrieved 2022, from OHCHR: [https://www.ohchr.org/sites/default/files/Documents/Countries/NP/OHCHRTechnical\\_Note\\_Nepal\\_CIDP\\_TRC\\_Act2014.pdf](https://www.ohchr.org/sites/default/files/Documents/Countries/NP/OHCHRTechnical_Note_Nepal_CIDP_TRC_Act2014.pdf)
- RELIEFWEB. (2006). *Reliefweb*. Retrieved November 21, 2022, from Reliefweb: <https://reliefweb.int/report/nepal/full-text-comprehensive-peace-agreement-held-between-government-nepal-and-communist>
- TRIAL International. (2022, November 20). *TRIAL International*. Retrieved December 4, 2022, from TRIAL International: <https://trialinternational.org/topics-post/transitional-justice/>
- UN Secretary General. (2004, August 23). *The Rule of Law and Transitional Justice in Conflict*. Retrieved November 21, 2022, from The rule of law and transitional justice in conflict and: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>
- UNGA. (2022, September 26). *UNGA*. Retrieved November 22, 2022, from UNGA: [https://www.un.int/nepal/statements\\_speeches/statement-foreign-secretary-and-leader-nepali-delegation-mr-bharat-raj-paudyal](https://www.un.int/nepal/statements_speeches/statement-foreign-secretary-and-leader-nepali-delegation-mr-bharat-raj-paudyal)
- United Nations. (2010, March). *United Nations*. Retrieved December 4, 2022, from United Nations: <https://digitallibrary.un.org/record/682111>
- United States Department of State, Transitional Justice Overview. (2022, November 18). *United States Department of State*. Retrieved from United States Department of State: <https://2009-2017.state.gov/j/gcj/transitional/257566.htm>
- Upreti, D. B. (2022). Causes of Armed Conflict, Evolution and issues of Transitional Justice in Nepal (Nepali). *Seeking the Truth - Satyako Khoji*. 65-85.
- Zunino, M. (2022, November 21). *The Origins of Transitional Justice*. Retrieved 2022, from The Origins of Transitional Justice: <https://www.grojiil.org/blog2/2019/07/09/the-origins-of-transitional-justice>.