

350 Fifth Avenue, 34<sup>th</sup> Floor  
New York, NY 10118-3299  
Tel: +1-212-290-4700  
Fax: +1-212-736-1300; 917-591-3452

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August 23, 2018

Agni Prasad Kharel  
Attorney General  
Office of the Attorney General  
Ramshah Path, Kathmandu

Dear Attorney General,

Thank you for the opportunity to meet on June 21 and offer our views on the proposed bill amending the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2014.

The draft amendments are a welcome step forward. However, to comply with international standards, the law still needs strengthening. The current draft law fails to address the many gaps in Nepali law that make it difficult to prosecute, especially at senior levels, for international crimes such as torture and crimes against humanity. As you are aware, the existing law falls far short of international standards, as has been reflected both in Supreme Court rulings and in a technical note provided by Office of the United Nations High Commissioner for Human Rights.<sup>1</sup> The amendments should take those concerns into account.

The Nepal government has for now extended the terms of its two transitional justice commissions, while also committing to future amendments to comply with international standards and Supreme Court rulings. The two commissions—the Commission of Investigation on Enforced Disappeared Persons (CEIDP) and the Truth and Reconciliation Commission (TRC)—have already received over 60,000 complaints. We are concerned, however, that victims and families of victims have been disappointed with the commissions because thus far they have not obtained justice for victims on either side of the conflict. They are particularly worried that the present commissions are not independent or impartial as required by international standards. Instead, the

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<sup>1</sup> "Nepal: Government Must Implement Landmark Supreme Court Decision Against Impunity," International Commission of Jurists, February 27, 2015, <https://www.icj.org/nepal-government-must-implement-landmark-supreme-court-decision-against-impunity>; "OHCHR Technical Note: The Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (2014)," Office of the United Nations High Commissioner for Human Rights, June 2014, [https://www.ohchr.org/Documents/Countries/NP/OHCHRTechnical\\_Note\\_Nepal\\_CIDP\\_TRC\\_Act2014.pdf](https://www.ohchr.org/Documents/Countries/NP/OHCHRTechnical_Note_Nepal_CIDP_TRC_Act2014.pdf).

commissions were established to represent the interests of various political parties and the army.

The proposed bill does not properly address concerns around entrenched impunity, and should instead ensure—on conviction, following a fair trial—punishment proportionate to the gravity of the crimes. Several groups have already written to you articulating their concerns about the proposed law, so we will not go into great detail on these issues here.<sup>2</sup>

During our meeting in Kathmandu, we discussed the remit of universal jurisdiction and what would make it likely—or less likely—that Nepali citizens would risk arrest and prosecution in other countries for certain crimes such as torture. Please find in the attached appendix a detailed explanation under international law.

We look forward to continuing our discussion on these matters and stand ready to answer any questions you may have. Please feel free to contact us via my colleague Shayna Bauchner at [bauchns@hrw.org](mailto:bauchns@hrw.org).

With regards,

A handwritten signature in black ink, appearing to read 'Clive Baldwin', written in a cursive style.

Clive Baldwin  
Senior Legal Advisor  
Human Rights Watch

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<sup>2</sup> “Nepal: Draft Bill on Transitional Justice Falls Short of International Law and Standards,” Amnesty International, July 20, 2018, <https://www.amnesty.org/en/latest/news/2018/07/nepal-draft-bill-on-transitional-justice-falls-short-of-international-law-and-standards/>.

## Appendix: Universal Jurisdiction and Nepal's Draft Law on Transitional Justice

### *What is universal jurisdiction?*

Universal jurisdiction is a legal doctrine whereby a state makes it possible for its domestic criminal justice system to investigate and prosecute certain crimes committed by any person anywhere in the world. It is limited to crimes considered to be international crimes, such as war crimes, crimes against humanity, genocide, torture, and enforced disappearances. Some international treaties, such as the Convention against Torture, require all states that sign up to these treaties to pass laws that ensure their courts can prosecute, under universal jurisdiction, persons suspected of those crimes who are in their territory.

This means that a citizen of any country, including Nepal, suspected of such crimes who travels to a country that has given its courts the power to prosecute persons under universal jurisdiction, faces the risk of arrest and prosecution in that country. This is more likely to be so if the police and prosecutors in that country have obtained evidence suggesting responsibility for such crimes.

Citizens of countries that have extradition agreements with second states would also risk arrest by those countries when third states, using their universal jurisdiction laws, request extradition.

The case of Colonel Kumar Lama, prosecuted in the United Kingdom by the Crown Prosecution Service, is a case in point.<sup>3</sup> Lama was charged with crimes of torture which allegedly occurred during Nepal's decade-long civil war that ended in 2006. Although Lama was acquitted of the charges against him, his case shows that those accused of the most serious crimes risk arrest and prosecution in other countries, and that victims will continue to pursue justice throughout the world, particularly if they do not see any options in their home countries. It also shows that prosecutors are prepared to bring cases concerning events far away—and many years ago—when the allegations amount to international crimes such as torture.

Several countries, including in Europe, now have specialist police and prosecution units devoted to the gathering of evidence and prosecution of persons suspected of international crimes on their territory. Improved communications have made it easier for

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<sup>3</sup> Ingrid Massagé and Mandira Sharma, "Regina v. Lama: Lessons Learned in Preparing a Universal Jurisdiction Case," *Journal of Human Rights Practice*, vol. 10, no. 2 (2018): 327-345, <https://doi.org/10.1093/jhuman/huyo20>.

them to have access to evidence from countries around the world, as well as awareness of who is in their territory.

***Would a foreign court consider the Nepali laws and record on transitional justice?***

A court in a foreign country considering a request to prosecute or extradite a Nepali citizen for international crimes committed in Nepal would likely consider if it would be better to try the person in the country where the crimes took place. In doing so, it would likely consider whether the justice system in Nepal is willing and able to pursue fair trials for such crimes, including for those at the highest level of responsibility. Among the legal and factual issues such courts would consider in deciding if the Nepali justice system met this standard, the following six points would be key.

**1. Incorporation of International Crimes into Domestic Law**

The court would consider whether Nepal has incorporated these serious offenses as specific crimes under domestic law that meet the international definitions, such as in the Rome Statute of the International Criminal Court (ICC) and the Convention against Torture. For example, it would consider whether Nepal has made war crimes, crimes against humanity, and torture crimes under domestic law so the Nepali justice system can prosecute persons for such crimes.

The definition of crimes against humanity under the Rome Statute is “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: a. Murder; b. Extermination; c. Enslavement; d. Deportation or forcible transfer of population; e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; f. Torture; g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; h. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law; i. Enforced disappearance of persons; j. The crime of apartheid; k. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

For the purpose of the crimes enumerated above, an “attack directed against any civilian population” means a course of conduct involving the multiple commission of acts against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack.

## **2. Potential for the Most Senior People To Be Prosecuted**

Another key test for Nepal's justice system is whether the most senior people suspected of war crimes can and will be prosecuted. One indication is whether Nepal has adopted the criminal principle of command responsibility for such crimes. In international criminal law, this creates criminal responsibility for military and civilian commanders when their subordinates commit war crimes or crimes against humanity, they knew or should have known about those crimes, and they failed to take all reasonable measures to prevent the crimes or failed to hand over the persons responsible for prosecution.

Another key test is whether there are any immunities in law or in practice that stop the prosecution of senior officials.

There should be no time limitation period for prosecution of international crimes.

## **3. Membership of the International Criminal Court**

A key benchmark that would show Nepal is serious about holding those responsible for the worst crimes accountable is whether it has ratified the treaties and joined the international bodies that promote international criminal justice, in particular the ICC, and adopted those standards in its domestic law.

## **4. Independence of Judges and Prosecutors**

A vital indicator that the most serious crimes will be prosecuted is whether the justice system is independent and impartial, and whether the prosecutors and judges involved in such cases are able to make decisions independently.

One sign that this is not the situation is where government ministers or senior army commanders can intervene arbitrarily, formally or informally, in decisions to prosecute or try such crimes, including the assignment of individual judges to cases.

Another crucial element is the provision of adequate security for judges, prosecutors, witnesses, and defendants, allowing decisions to be made on prosecutions and trials without fear of repercussions.

## **5. Punishments Match the Crime**

Once an individual is convicted of international crimes, the punishment should be commensurate with the crime, taking into account individual circumstances. International standards suggest that a period of incarceration should be the norm even for a single case of torture.

## 6. Nepal's Record on Prosecuting the Most Serious Crimes

A final issue for courts to consider would be the record of Nepal's justice system in prosecuting war crimes, torture, crimes against humanity, and other international crimes, especially whether those most responsible for the most serious crimes have been prosecuted in fair trials.

### ***What is Nepal's record on these points, and does the draft transitional law address them?***

1. Nepali law does not have specific offenses for war crimes, crimes against humanity, or torture. The Supreme Court has previously ordered Nepal's justice laws to comply with international standards. The draft law does not address this, and avoids defining war crimes or crimes against humanity.

Nepal's attorney general has pledged to amend the transitional justice laws so that they are in compliance with international norms and Supreme Court directives, but so far the commissions are operating under laws which do not define the crimes according to international standards.

***Recommendation:*** Nepal should adopt laws that make war crimes, crimes against humanity, torture, and other international crimes offenses under domestic law, matching the international definitions of these crimes.

2. Nepali law does not set out the principle of command responsibility for such crimes. The draft law does not address this. The draft law states that there will be no limitation periods for the crimes it addresses, although it also suggests cases should, where possible, be handed over by the police to the commission within 35 days.

***Recommendation:*** The draft law should set out the principle of command responsibility according to international standards. It should abolish the 35-day limit, or make clear that investigations and prosecutions that are not addressed within the 35-day limit will continue.

3. Since 2005, successive governments in Nepal have indicated they would ratify the Rome Statute and join the ICC. This would require adoption of a law implementing the Rome Statute. The draft law is silent on this.

***Recommendation:*** The government should announce it will ratify the Rome Statute as soon as possible, and that it will extend the jurisdiction of the ICC back to 2002, the earliest date possible under the Rome Statute. The draft law should be adapted to reflect this and implement the Rome Statute.

4. Nepali judges face political pressure in varying degrees. Many have shown a great degree of resilience against political pressure. However, judges and lawyers continue to report considerable concern about political interference with the judiciary. It appears the draft law would do nothing to protect the legal and practical independence of judges and prosecutors in such cases.

The draft law gives exclusive power to refer cases for prosecution to the commissions.

The draft law appears to give the government the power to intervene and withdraw cases. The attorney general has the key role under the draft law in deciding to proceed or withdraw prosecutions. However, the law says nothing about ensuring the independence of this office from governmental control or interference.

The draft law says nothing about requiring everyone in Nepal and every institution, including the military, to comply with rulings by civilian courts.

The draft law says nothing about security of judges, prosecutors, victims, or witnesses.

***Recommendation:*** The draft law should make clear that the attorney general is an independent office, and that the government can have no role in influencing cases. It should remove any role for the government, ministers, and ministries in deciding on prosecutions or ending or withdrawing prosecutions.

The draft law should ensure the attorney general and courts can open and pursue investigations and prosecutions for international crimes independently of references from the commission.

The draft law should make interference with the independence of the judiciary, prosecutors, and the attorney general a criminal offense, including inappropriate attempts to influence the prosecution or judicial decision-making on individual criminal cases.

The draft law should make clear that every individual and institution in Nepal has to comply with rulings by civilian courts, and make it an offense not to comply.

5. The draft law suggests that individuals could avoid prison sentences for international crimes.

**Recommendation:** The draft law should be clear that prison sentences should be the standard punishment for international crimes, starting with individual cases of torture, and that punishment should be commensurate with the offense. The law should require Nepali courts to take into account international standards for punishment of the offenses.

6. Nepal has not seen any successful prosecutions since the end of the civil war for crimes such as torture, war crimes, or crimes against humanity. Lower courts have ordered investigations, but the army and others have refused to comply with such orders. Nepali authorities have claimed that cases pending before the courts should only be heard by the transitional justice mechanisms. There are many cases pending before the regular criminal courts, but these have been stalled for years.<sup>4</sup> The draft law does not address this and suggests an accused's contrition, reconciliation with the victims, and promises not to repeat the offense should influence decisions on whether or not to prosecute.

**Recommendation:** The draft law should make issues of contrition, reconciliation, and risk of repeat offenses relevant to punishment after conviction, not factors to be taken into account on decisions to prosecute.

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<sup>4</sup> Human Rights Watch, *Waiting for Justice: Unpunished Crimes from Nepal's Armed Conflict*, September 2008, [https://www.hrw.org/sites/default/files/reports/nepal0908web\\_o.pdf](https://www.hrw.org/sites/default/files/reports/nepal0908web_o.pdf); *Still Waiting for Justice: No End to Impunity in Nepal*, October 2009, <https://www.hrw.org/sites/default/files/reports/nepal1009webwcover.pdf>.