

RESTORING THE RULE OF LAW IN NEPAL: CAN TRANSITIONAL JUSTICE DELIVER WITHOUT CRIMINAL JUSTICE?

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ABSTRACT

This Article examines the intersectionality of transitional justice and international criminal justice. In particular, the Article evaluates the impact of criminal justice and accountability mechanisms to address serious international crimes in post-conflict transitions on the broader transformative goals of strengthening the rule of law, restoring public confidence in the criminal justice system, fostering reconciliation, and, thereby, achieving sustainable peace. Looking at Nepal as a case study, the Article seeks to answer whether transitional justice can succeed in restoring the rule of law in Nepal in the absence of a meaningful criminal justice process. Through a comparative analysis of transitional justice experiences elsewhere, the Article argues that transitional justice cannot succeed in Nepal without a credible and robust criminal justice process that both delivers justice and accountability for victims of past abuses, and signals a commitment on the part of the State and political elites to the rule of law for the future.

In Nepal, transitional justice has thus far failed to move the country closer toward the rule of law and sustainable peace. The culture of impunity that was at the root of the conflict remains firmly in place and continues to act as an impediment to real progress. The political establishment has recently made overtures toward reinvigorating a thus-far unsuccessful transitional justice process that may include criminal accountability measures to address gross human rights

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abuses committed by both sides during the conflict. This renewed interest presents a critical opportunity to reevaluate the process to date in order to improve its chances for success moving forward.

The success of transitional justice in Nepal is critical not merely for its own future, but for its regional value as well, as a potential roadmap for neighboring countries dealing with their own post-conflict transitional justice and impunity issues. To date, South Asia has decidedly little or no “good practice” examples for combating impunity for serious international crimes or mass atrocities through meaningful accountability processes. Nepal is at a pivotal juncture in its own transitional justice journey and still has an opportunity to serve as the long-awaited “good practice” model for the region.

Finally, scholarship focusing on Asian transitions, and particularly South Asian transitions, is noticeably sparse. There is remarkably little or no in-depth scholarly literature on post-conflict justice and accountability in South Asia. While the international human rights community has documented extensively the alleged atrocities committed in various contexts in South Asia, systematic scholarly analyses of the successes and failures in addressing these crimes are less available. This Article attempts to begin filling this void.

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INTRODUCTION

This Article examines the intersectionality of transitional justice and international criminal justice. In particular, the Article evaluates the impact of criminal justice and accountability mechanisms to address serious international crimes in post-conflict transitions on the broader transformative goals of strengthening the rule of law, restoring public confidence in the

criminal justice system, fostering reconciliation, and, thereby, achieving sustainable peace. Even more specifically, looking to the transitional justice context of Nepal as a case study, the Article seeks to answer the following question: can transitional justice succeed in restoring the rule of law in Nepal without a meaningful criminal justice process? By comparing transitional justice experiences elsewhere with Nepal's own historically entrenched culture of impunity at the heart of its conflict and post-conflict struggles, the Article argues that transitional justice cannot succeed in Nepal without a credible and robust criminal justice process that at once delivers justice and accountability for victims of past abuses and also signals a commitment on the part of the State and political elites to the rule of law for the future.

This Article maintains that prosecutions strengthen the rule of law in countries in which the system may have been decimated by politicization, conflict, and corruption by (1) demonstrating the new State's renewed commitment to criminal justice, the rule of law, human rights, and representative governance; (2) demonstrating the equal treatment of the criminal justice system and the State generally, such that no individual or group—neither the military, the political or economic elites, nor any particular social or ethnic group—is above the law; (3) holding perpetrators of serious crimes accountable, rooting them out of previous positions of power, and thereby combating the systemic impunity that enabled the abuses of the conflict; and (4) vindicating the rights and dignity of victims.

While this proposition is not without its critics—some of whom argue that accountability will only destabilize peace if pursued too soon before the rule of law has had time to take hold,¹ and others who argue that empirical data to “scientifically” or conclusively answer the question of whether prosecutions help or hurt peace is hard to come by as transitions

1. See *infra* Section I.B.2.

are often multi-generational, complex processes²—an emerging consensus among experts nonetheless suggests that the appropriate question is not *whether* but *when* and *how* to pursue justice and accountability in transitions.³ The conventional wisdom, though not universal, is that criminal justice is a necessary but not sufficient condition to achieve successful transitional justice.⁴ Still, measuring the “impact” of criminal justice in achieving the goals of transitional justice remains a highly contextual and case study-driven exercise in demonstrating, often by negative inference, the relative importance of pursuing justice and accountability. This is true not least because transitional justice is a relatively new and still evolving area of international law, human rights, and peacebuilding.⁵ Only recently have the processes of post-conflict transition, peacebuilding, and dealing with past human rights abuses been articulated in the language of “transitional justice”—a language that now defines a distinct field of law.⁶ Further, countries undergoing transitions have realized, sometimes inadvertently, that it is a long and winding process.⁷ There is no quick and easily determinable transition period by which to conclude the transition and then measure success or failure.

While transitional justice discourse waits for sufficient empirical data to assess or measure “success,” comparative State practice can be highly instructive in predicting and/or prescribing the modalities for countries currently or soon undergoing their own transitional justice processes. This Article therefore examines select comparative examples of countries that have undergone or are undergoing some form of transitional justice, with and without criminal justice, to identify some predictors of transitional justice success. These case

2. See *infra* Section III.C.

3. See *infra* Section I.B.2.

4. See *infra* Section III.C.

5. See *infra* Section I.A.

6. For a brief overview of the evolution of the transitional justice field, see *infra* Section I.A.

7. For a discussion of South Africa’s experience twenty-five years after the end of Apartheid, see *infra* Part III. For a general discussion on empirical impact studies’ ability to conclusively measure success or failure, see *infra* Section III.C.

studies both test the theoretical assumption that accountability serves the interests of the rule of law and articulate lessons for Nepal's own transitional justice process.

In Nepal, transitional justice has thus far failed to move the country closer toward the rule of law and sustainable peace. The culture of impunity that was at the root of the conflict remains firmly in place and continues to act as an impediment to real progress.⁸ After years of undermining the justice system, the political establishment has recently made overtures toward reinvigorating a thus-far unsuccessful transitional justice process that may include criminal accountability measures to address gross human rights abuses committed by both sides during the conflict.⁹ Stakeholders and observers remain guarded at best and skeptical at worst as to Nepal's genuine commitment; however, this renewed vigor, itself spurred by civil society's efforts to pursue criminal justice at both the international and domestic levels despite State intransigence,¹⁰ is a critical opportunity to reevaluate the process to date in order to improve its chances for success moving forward.

Simultaneously, this Article attempts to contribute to the ongoing discourse testing the theoretical relationships between prosecutions and other transitional justice measures with the diverse goals of transitional justice processes. Moreover, while existing discourse has extensively evaluated the impact of such processes in other contexts, scholarship focusing on Asian transitions, and particularly South Asian transitions, is noticeably sparse. For all its challenges, Nepal stands at a momentous juncture not just for its own transition but as a potential roadmap for a South Asia region desperately in need of "good practice" examples to combat impunity and guarantee the rule of law. To that end, this Article attempts to begin to fill the void for a region that is acutely in need of accountability.

The Article is divided into four parts. Part I gives an overview of the legal and theoretical framework for transitional justice,

8. See *infra* Part II.

9. See *infra* Part II.

10. See *infra* Section II.B.2.

exploring why and how the pursuit of accountability is necessary to achieve transitional justice success. Part II provides a case study assessment of Nepal's transitional justice process to date. Part III analyzes other comparative transitional justice experiences in which prosecutions have been applied and not applied. Finally, Part IV draws lessons from these comparative points of reference for Nepal's future.

I. THEORETICAL FRAMEWORK

This Part lays out the theoretical and legal framework by which to analyze the hypothesis that a meaningful criminal justice process is imperative for successful transitional justice in Nepal. Transitional justice, simply defined, aims to address the human rights abuses of the past in order to achieve lasting peace; restore victims' dignity and vindicate their rights to truth, justice, remedy, and reparation; and prevent the recurrence of past violence and abuse. As the theory goes, justice and accountability processes—specifically criminal justice (that is, prosecutions)—reaffirm the rule of law by combating the impunity at the root of the past abuses, restoring public confidence in the State and the criminal justice system and, in turn, enhancing the prospects for sustainable peace.

This Part thus begins by outlining the basic goals and objectives of transitional justice. It then elaborates on the conceived link between criminal justice (i.e., prosecutions as opposed to other forms of accountability such as truth commissions) in advancing the rule of law in transitional justice. Finally, it articulates a basic rubric for measuring the impact of transitional justice—and accountability measures in particular—on the rule of law.

A. *Defining "Success" in Transitional Justice*

While there is no "official" definition of transitional justice, it is generally understood to be the process through which societies emerging from conflict come to terms with past human rights abuses to ensure justice, accountability, reconciliation,

and sustainable peace.¹¹ Some experts have defined it as “that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife and repression, and that are aimed at confronting and dealing with past violations of human rights and humanitarian law.”¹² The United Nations Secretary-General (UNSG) has expressly linked transitional justice to the rule of law, defining transitional justice as the “[f]ull range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”¹³ The UNSG further states that transitional justice is a critical component of the United Nations’ framework for strengthening the rule of law in post-conflict settings, that is, a legitimate way to prevent the return to conflict by addressing the root causes of conflict.¹⁴

The transitional justice field has rapidly evolved in a relatively short period of time.¹⁵ A gradual emergence of a global accountability norm—a “justice cascade”—spurred the development of international legal norms to provide greater accountability for past crimes in transitional contexts.¹⁶ In addition to providing redress to victims, these norms worked

11. See, e.g., Kai Ambos, *The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC*, in BUILDING A FUTURE ON PEACE AND JUSTICE: STUDIES ON TRANSITIONAL JUSTICE, PEACE AND DEVELOPMENT 21 (Kai Ambos et al. eds., 2009).

12. Padraig McAuliffe, *Transitional Justice and the Rule of Law: The Perfect Couple or Awkward Bedfellows?*, 2 HAGUE J. ON RULE L. 127, 130 (2010) (quoting TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 2 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006)).

13. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 8, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter U.N. Doc S/2004/616].

14. *Id.* ¶ 5.

15. See, e.g., Paige Arthur, *How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 HUM. RTS. Q. 321, 324 (2009); Johanna Herman et al., *Beyond Justice Versus Peace: Transitional Justice and Peacebuilding Strategies*, in RETHINKING PEACEBUILDING: THE QUEST FOR JUST PEACE IN THE MIDDLE EAST AND THE WESTERN BALKANS 48, 51–52 (Karin Aggestam & Annika Björkdahl eds., 2014). See generally Laurel Fletcher et al., *Context, Timing and the Dynamic of Transitional Justice: A Historical Perspective*, 31 HUM. RTS. Q. 163 (2009) (questioning presumptions about early transitional justice processes and offering guiding principles and policy to conduct better research in this field).

16. Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 CHI. J. INT’L L. 1, 4 (2001); see also Arthur, *supra* note 15, at 363.

to prevent recurrence by entrenching the rule of law, combating impunity, and restoring faith in State institutions.¹⁷ Thus, two basic goals of transitional justice are discernible: to provide some justice to victims of prior abuses, and to facilitate transition away from a repressive authoritarian or conflict-ridden period so as to prevent its recurrence.¹⁸ These goals have in turn solidified around four legal pillars—the rights to truth, justice, reparation, and guarantees of non-repetition. These rights have been extrapolated from a series of authoritative interpretations of core international human rights treaties and the four Geneva Conventions, which entrenched the rights of victims to effective remedy for certain gross human rights violations and grave breaches of international humanitarian law constituting serious international crimes.¹⁹

17. See Arthur, *supra* note 15, at 352–54; HUM. RTS. WATCH, TRUTH AND PARTIAL JUSTICE IN ARGENTINA: AN UPDATE 13 (1991), <https://www.hrw.org/sites/default/files/reports/argen914full.pdf>; Ambos, *supra* note 11, at 28–29; José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Constraints*, 13 HAMLIN L. REV. 623, 624–25 (1990); Kathryn Sikkink & Carrie Booth Walling, *Argentina's Contribution to Global Trends in Transitional Justice*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY 301, 314 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006).

18. Arthur, *supra* note 15, at 355; see also Zalaquett, *supra* note 17, at 628.

19. See, e.g., International Covenant on Civil and Political Rights art. 2(3), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 7, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Convention Against Torture]; Convention on the Prevention and Punishment of the Crime of Genocide art. 1, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention]; International Convention for the Protection of All Persons from Enforced Disappearance art. 6, *opened for signature* Dec. 20, 2006, 2716 U.N.T.S. 3 (entered into force Dec. 23, 2010) [hereinafter CED]; Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 18, U.N. Doc. CCPR/C/GC/31 (Mar. 29, 2004) [hereinafter General Comment No. 31]; Committee Against Torture, General Comment No. 3, Implementation of Article 14 by States Parties, ¶ 41, U.N. Doc. CAT/C/GC/3 (Dec. 13, 2012), [hereinafter General Comment No. 3]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 49–51, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 50–52, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War arts. 129–31, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 146–48, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention IV]; Comm. on

In this context, “justice” is broadly defined—encompassing accountability (both judicial and non-judicial), fairness, protection of rights, prevention of future wrongs, vindication of victims’ rights, restoration of victims’ and society’s dignity, and punishment of perpetrators—and generally emphasizes a process-oriented and victim-centered approach.²⁰ The UNSG once again has provided a useful formulation of the concept of “justice” in transitions:

For the United Nations, “justice” is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant.²¹

“Accountability,” broadly speaking, has itself come to include both punitive (or retributive) and non-retributive mechanisms—from criminal prosecutions to truth commissions, vetting procedures, and reparations—as means of assigning responsibility, acknowledging abuse, sanctioning

Human Rights, Revised Final Report Submitted by Louis Joinet Pursuant to Sub-Commission Decision 1996/119, U.N. Doc. E/CN.4/Sub.2/1997/20 (Oct. 2, 1997) [hereinafter Joinet Principles]; Comm. on Human Rights, Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) [hereinafter Updated Principles to Combat Impunity]; G.A. Res. 60/147 (Mar. 21, 2006) [hereinafter Basic Principles on the Right to Remedy and Reparation]; Human Rights Council Res. 18/7, U.N. Doc. A/HRC/RES/18/7 (Oct. 13, 2011) [hereinafter H.R.C. Res. 18/7]; Pablo de Greiff (Special Rapporteur), *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, ¶ 37, U.N. Doc. A/HRC/21/46 (Aug. 9, 2012) [hereinafter U.N. Doc. A/HRC/21/46]; U.N. Doc S/2004/616, *supra* note 13, ¶ 9.

20. Ambos, *supra* note 11, at 22; *see also* U.N. Doc. S/2004/616, *supra* note 13, ¶ 8.

21. U.N. Doc S/2004/616, *supra* note 13, ¶ 7.

individuals, and providing remedy to victims.²² This Article focuses on the link between criminal accountability and the rule of law.

B. *Why Prosecute?*

1. *Legal obligation to prosecute international crimes*

Elaborating on the scope of victims' rights to justice and to an effective remedy, the Joint Principles and their successor, the Updated Principles to Combat Impunity, as well as the Basic Principles on the Right to Remedy and Reparation,²³ have established, under core international human rights treaties and the four Geneva Conventions, a general duty on States to investigate and, where necessary, prosecute and punish perpetrators of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law.²⁴ This broad interpretation of a duty to prosecute serious international crimes, however, is not without controversy. To the extent that serious international crimes are prohibited by treaty or customary international law, it remains less well-settled to what extent this prohibition implies a uniform duty to prosecute in all instances.²⁵

22. See generally *id.* (discussing the importance and "language" of accountability and accepted methods for achieving it).

23. Basic Principles on the Right to Remedy and Reparation, *supra* note 19.

24. Joint Principles, *supra* note 19, ¶ 27; Updated Principles to Combat Impunity, *supra* note 19, ¶ 19; Basic Principles on the Right to Remedy and Reparation, *supra* note 19, ¶ 4.

25. See, e.g., Paola Gaeta, *International Criminalization of Prohibited Conduct*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 63, 70–72 (Antonio Cassese et al. eds., 2009); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2582 (1990); TRANSITIONAL JUSTICE INSTITUTE, UNIVERSITY OF ULSTER, THE BELFAST GUIDELINES ON AMNESTY AND ACCOUNTABILITY 38 (2013), https://peacemaker.un.org/sites/peacemaker.un.org/files/BelfastGuidelines_TJI2014.pdf [hereinafter BELFAST GUIDELINES] (discussing paragraph (c) of Guideline 6).

It is generally accepted that customary international law prohibits blanket amnesty for *jus cogens* crimes.²⁶ Cassese has stated, in pertinent part:

[W]henver general rules prohibiting specific international crimes come to acquire the nature of peremptory norms (*jus cogens*), they may be construed as imposing among other things the obligation not to cancel by legislative or executive fiat the crimes they proscribe. It would follow that amnesty passed for such crimes would not be applicable as contrary to international law.²⁷

The U.N. Human Rights Committee (HRC), tasked with interpreting and monitoring the International Covenant on Civil and Political Rights (ICCPR), has also stated that State parties may not enact amnesties to relieve perpetrators of violations amounting to crimes under international law—including those which, when committed as part of a widespread or systematic attack on a civilian population, are crimes against humanity—of personal responsibility.²⁸ The Committee Against Torture, the treaty-monitoring body of the Convention Against Torture and Other Ill Treatment (CAT), has likewise interpreted amnesties as incompatible with the CAT.²⁹ The International Committee for the Red Cross (ICRC) has stated that the allowance of amnesty to end non-international armed conflicts (NIACs), expressed in Article 6(5) of Additional

26. See, e.g., Leila Nadya Sadat, *The Lomé Amnesty Decision of the Special Court for Sierra Leone*, in *THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW* 311, 322 (Charles Chernor Jalloh ed., 2014); Mark Freeman & Max Pensky, *The Amnesty Controversy in International Law*, in *AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES* 42, 52–53 (Francesca Lessa & Leigh A. Payne eds., 2012); Lucia E.M. Savini, *Avoiding Amnesty in the Age of Accountability: Colombia's Proposal for Alternative Sentencing*, 13 *DEUSTO J. HUM. RTS.* 125, 135 (2015); *INTERNATIONAL HUMAN RIGHTS LAW* 535 (Daniel Moeckli et al. eds., 2018); Orentlicher, *supra* note 25, at 2582–83.

27. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 312 (3rd ed. 2013).

28. General Comment No. 31, *supra* note 19, ¶ 18.

29. General Comment No. 3, *supra* note 19, ¶ 41.

Protocol II to the Geneva Conventions, does not apply to attacks on civilians amounting to war crimes.³⁰

The Human Rights Committee has noted in a series of general comments that, for gross human rights violations such as arbitrary deprivation of life (e.g., extrajudicial killing), torture, and enforced disappearance,³¹ it is not enough merely to criminalize the acts; rather, taken together with Article 2 of the ICCPR, States have an affirmative duty to provide an effective investigation by competent authorities, and to bring those responsible for such violations to justice.³² The right to effective remedy under paragraph 3 of Article 2 implies a duty to investigate and where necessary bring those responsible to justice.³³ However, while the HRC requires that the investigation be prompt, thorough, effective, and conducted by an independent and impartial administrative body, the Committee itself does not specify that this duty to investigate and bring to justice implies a *judicial* remedy, or that those found responsible must face *criminal* justice, in every instance.³⁴ The duty to investigate, prosecute, and punish as interpreted by human-rights-treaty-monitoring bodies and authoritative texts, by virtue of the duty to provide effective remedy, is thus not necessarily uniform or absolute.³⁵

It therefore remains less well-settled what the scope of the obligation to prosecute is for serious international crimes and, still further, which of these prohibited conducts rise to the status of *jus cogens* norms such that they include a universal

30. See 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW § 159, at 612–14 (2005).

31. *Id.* § 98, at 340 (noting that the Human Rights Committee has defined “enforced disappearance” as implicating the rights to life, freedom from torture, and liberty and security of persons under Articles 6, 7, and 9 of the ICCPR, respectively).

32. General Comment No. 31, *supra* note 19, ¶¶ 8, 15, 18; Comm. on Human Rights, General Comment No. 20, Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 7, U.N. Doc. CCPR/C/GC/20, ¶¶ 14–15 (1992) [hereinafter General Comment No. 20]; Comm. on Human Rights, General Comment No. 6, Art. 6 (The Right to Life), U.N. Doc. CCPR/C/GC/6, ¶ 4 (1982) [hereinafter General Comment No. 6].

33. General Comment No. 31, *supra* note 19, ¶¶ 15, 18.

34. *Id.*

35. See, e.g., BELFAST GUIDELINES, *supra* note 25, at 43.

obligation to prosecute under customary international law.³⁶ It is generally agreed that serious international crimes include genocide, crimes against humanity, war crimes,³⁷ and gross violations of international human rights law including torture, enforced disappearance, and extrajudicial, summary, or arbitrary executions.³⁸ While most authorities have held that torture amounts to a *jus cogens* norm and is therefore prohibited by customary international law (in addition to treaty),³⁹ some commentators argue that torture is not a per se international crime under customary international law unless it amounts to a war crime or crime against humanity⁴⁰—that is, a “core crime,” defined as genocide, war crimes, and crimes against humanity.⁴¹

2. *Peace versus justice*

On a functional level, while the scope of the legal duty to prosecute serious international crimes remains crime- or treaty-specific, transitional justice has nevertheless developed a body of authority linking justice and accountability with transitional justice success as a necessary precondition. This Article does not dwell on the everlasting “peace versus justice” debate. Nevertheless, its evolution is illustrative of transitional justice and its relationship with human rights and the international

36. See, e.g., Orentlicher, *supra* note 25, at 2582; Gaeta, *supra* note 25, at 63–70.

37. While the term “war crimes” does not yet have an accepted legal definition, it is often understood to mean grave breaches of international humanitarian law as contained in the Geneva Conventions and Additional Protocol I, applicable to international armed conflicts or serious violations of Common Article 3, or Additional Protocol II in the context of non-international armed conflicts. See HENCKAERTS & DOSWALD-BECK, *supra* note 30, § 156.

38. See, e.g., Orentlicher, *supra* note 25, at 2582; BELFAST GUIDELINES, *supra* note 25, at 41, 64; Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 155 (Dec. 10, 1998); Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 143 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (affirming prohibition of grave breaches in NIACs).

39. Furundzija, Case No. IT-95-17/1-T, ¶ 155; Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, 2012 I.C.J. Rep. 422, 457, ¶ 99 (July 20); Int’l Law Comm’n, Rep. on the Work of Its Sixty-Sixth Session, ¶ 11, U.N. Doc A/69/10 (2014) [hereinafter 2014 ILC Report].

40. Gaeta, *supra* note 25, at 68–69.

41. *Id.* at 64.

criminal justice project generally. The debate can be summed up as follows: for some, political considerations militate toward those measures that serve the (according to them) paramount goals of peace and reconciliation by providing stability first, thereby allowing rule of law institutions to emerge and/or consolidate before pursuing justice. Under this view, justice and accountability processes should be treated with less urgency, and sacrificed entirely if needed, given their potential destabilizing effects on fledgling institutions.⁴² These peace advocates suggest to “remove spoilers first,” to allow time for the elite bargains necessary for the “long term development of rule of law” institutions to transpire, and to allow political and institutional “preconditions” to take root first so as to not destabilize the peace or the new government.⁴³ Until rule of law institutions are consolidated and capable of handling accountability for the past without threatening a return to conflict, proponents believe peace should supersede justice.⁴⁴

On the other side of the spectrum, the importance of building accountable legal and political institutions—particularly the criminal justice system—as elements of peacebuilding has gained prominence in peace processes; it is increasingly recognized that it is difficult or impossible to build lasting peace and a rule of law culture when the peace deal itself preserves and institutionalizes impunity.⁴⁵ Justice proponents argue that support for the rule of law and human rights cannot be established where perpetrators of serious crimes enjoy

42. Herman et al., *supra* note 15, at 3; Fletcher et al., *supra* note 15, at 165, 170; Jack L. Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT’L SECURITY 5, 6 (2004).

43. Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT’L L. 251, 253–56 (2007). “Spoilers” refers to those entrenched elements within the former combatant parties, State security forces, or non-State armed groups for whom the threat of criminal prosecutions and accountability for crimes committed during the conflict may lead them to scuttle prospects for a peace deal or destabilize a new, still-consolidating democratic government. *See, e.g., id.*

44. Zalaquett, *supra* note 17, at 625–26, 635; *see also* Herman et al., *supra* note 15, at 3–4.

45. Christine Bell, *The “New Law” of Transitional Justice*, in BUILDING A FUTURE ON PEACE AND JUSTICE: STUDIES ON TRANSITIONAL JUSTICE, PEACE AND DEVELOPMENT 105, 120 (Kai Ambos et al. eds., 2009); Laurel Fletcher, *A Wolf in Sheep’s Clothing? Transitional Justice and the Effacement of State Accountability for International Crimes*, 39 FORDHAM INT’L L.J. 447, 484 (2016).

impunity.⁴⁶ Alternative justice mechanisms such as truth commissions are not substitutes for criminal prosecutions but compliments to them, as they offer an additional approach to deal with the past and an effective way to take into account victims' interests, to contribute to national reconciliation, to address impunity at a systemic level, and to serve as impetus for institutional reform. The criminal justice system, for its part, still has an obligation to deal with individual perpetrators of crimes and must demonstrate its capacity (or lack thereof) to uphold the rule of law and protect the rights of individuals.⁴⁷

The UNSG's 2004 report to the U.N. Security Council, for instance, notes that 50% of all peace agreements fail within the first five years.⁴⁸ The UNSG's 2004 report recommends an integrated approach to peacebuilding that strategically prioritizes building accountable legal institutions and cultivating a rule of law culture that is not predicated on an underlying peace agreement that perpetuates impunity by, among other things, ignoring accountability and granting outright amnesty.⁴⁹ Thus, the question today is not *whether* but *when* and *how* to pursue criminal justice and accountability in peace processes.⁵⁰ The solution, these justice proponents argue, is not a binary choice between peace versus justice, but rather that long-term peace is best achieved through robust justice and accountability.⁵¹

3. *Linking criminal justice with the rule of law*

Priscilla Hayner has articulated a useful conception of the link between accountability and the rule of law: justice not only

46. BUILDING A FUTURE ON PEACE AND JUSTICE: STUDIES ON TRANSITIONAL JUSTICE, PEACE AND DEVELOPMENT 30–31 (Kai Ambos et al. eds., 2009) [hereinafter BUILDING A FUTURE ON PEACE AND JUSTICE].

47. See U.N. Doc S/2004/616, *supra* note 13, ¶¶ 21, 26, 39; Ambos, *supra* note 11, at 40–45.

48. BUILDING A FUTURE ON PEACE AND JUSTICE, *supra* note 46, at viii; see also JASMINE-KIM WESTENDORF, WHY PEACE PROCESSES FAIL: NEGOTIATING INSECURITY AFTER CIVIL WAR 7 (2015) (examining the different methods used to calculate the five-year outcomes of peace agreements).

49. U.N. Doc S/2004/616, *supra* note 13, ¶ 64; BUILDING A FUTURE ON PEACE AND JUSTICE, *supra* note 46, at viii–ix.

50. See Bell, *supra* note 45, at 120.

51. See Arthur, *supra* note 15, at 323.

implies taking accountability for the past, but also addressing what needs to be changed systemically in order to prevent a repeat of abuses in the future.⁵² Hayner argues that the pursuit of criminal justice is not only legally necessary by virtue of the international legal obligation to prosecute (such as it is), but also vital to restore and ensure the rule of law and the new social and legal order that the rule of law is intended to protect in post-conflict transitioning societies.⁵³ Other experts have similarly characterized the linkage: if impunity causes violence by signaling to perpetrators that violence is accepted, thereby emboldening them to do it again, then prosecution combats impunity, restores the rule of law, advances reconciliation, and in turn advances lasting peace.⁵⁴

In addition to serving retributive justice in each instant case, accountability—particularly criminal accountability—serves a demonstrative or expressivist dimension by restoring victims' dignity as fellow citizens and sending a message to perpetrators and society as a whole reasserting the State's commitment to human rights.⁵⁵ Prosecutions signal to society that the rule of law, exercised or applied through the criminal justice system and an independent, impartial, and effective judiciary, will be applied uniformly, equally, and without discrimination across all strata of society; in other words, irrespective of rank, class, caste, title, power, or wealth.⁵⁶ The cathartic impact of removing perpetrators from circulation so they are "delegitimized" and cannot do further harm—thus breaking the pattern of "rule by fear"—demonstrates that the justice system can be fair and equal to all classes of people regardless of status.⁵⁷

52. See PRISCILLA HAYNER, *THE PEACEMAKER'S PARADOX: PURSUING JUSTICE IN THE SHADOW OF CONFLICT* 22 (2018) [hereinafter HAYNER, *PEACEMAKER'S PARADOX*].

53. See, e.g., Ambos, *supra* note 11, at 31–32.

54. Bronwyn Anne Leebaw, *Judging the Past: Truth, Justice, and Reconciliation from Nuremberg to South Africa* 182 (2002) (unpublished Ph.D. dissertation, University of California, Berkeley).

55. Ambos, *supra* note 11, at 31–32.

56. See U.N. Doc S/2004/616, *supra* note 13, ¶ 35.

57. Stromseth, *supra* note 43, at 262–65; see also Brigitte Weiffen, *The Forgotten Factor—The Impact of Transitional Justice on the Development of the Rule of Law in Processes of Democratization*, 6 ZEITSCHRIFT VERGLEICHENDE POLITIKWISSENSCHAFT 125, 127–29 (2002); Office of the High

Prosecutions also feed into other aspects of justice, accountability, the rule of law, and lasting peace. There is, it is argued, a “capacity-building effect” to prosecutions on the rule of law.⁵⁸ Confronting human rights violations through the criminal justice system, particularly in a post-war context in which such institutions may have been ravaged by corruption and politicization, helps the rule of law by “reconstructing the legal and justice systems.”⁵⁹ In turn, an accountability norm is institutionalized in domestic practice by strengthening national institutions and encouraging fair processes and greater substantive accountability.⁶⁰ Prosecutions are imperative in both challenging impunity for serious crimes and helping to reform the judicial and security sectors and other institutions that committed, facilitated, or failed to prevent such crimes.⁶¹ Prosecutions can feed into a comprehensive reparation policy that includes contrition, acknowledgment, and apology, as opposed to merely *ex gratia* payouts.⁶² It can also serve a vital vetting function: identifying and removing those “spoilers” who have committed abuses from positions of power so that they cannot continue to do so.⁶³

Likewise, prosecutions serve a pedagogic role by making clear what is acceptable conduct and what is not, condemning the latter in a manner that carries the force of law.⁶⁴ Criminal justice in the context of post-conflict transitional justice, unlike ordinary domestic criminal law, is aimed, at least in part, at understanding how or why the system allowed such crimes to happen to ensure they do not happen again—not merely addressing the proximate results in terms of the specific

Comm’r for Human Rights, Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives, U.N. Doc. HR/PUB/06/4, at 4–12 (2006) [hereinafter Rule-of-Law Tools].

58. Stromseth, *supra* note 43, at 265–67.

59. Weiffen, *supra* note 57, at 127.

60. See Stromseth, *supra* note 43, at 265–67.

61. See U.N. Doc S/2004/616, *supra* note 13, ¶ 35.

62. See HAYNER, PEACEMAKER’S PARADOX, *supra* note 52, at 22, 41; McAuliffe, *supra* note 12, at 140–42.

63. See HAYNER, PEACEMAKER’S PARADOX, *supra* note 52, at 22, 41; McAuliffe, *supra* note 12, at 140–42.

64. McAuliffe, *supra* note 12, at 140–42.

crimes.⁶⁵ The process of criminal justice can help “elucidate the operation of the elements of the machinery,” and not just the specific carrying-out of the crime.⁶⁶

Under the best of circumstances, some commentators argue, other forms of alternative justice and accountability such as truth commissions can serve the interests of the rule of law by complementing, preparing, or even initiating prosecutions down the road.⁶⁷ Public reports of truth commissions, for instance, can help reestablish political accountability, call for needed reforms, identify patterns and roots of the conflict, establish a commitment to a culture of human rights, call out those institutions (and in some cases individuals) responsible for human rights abuses (even if they do not necessarily prosecute them) and thereby begin to reestablish needed trust with State institutions.⁶⁸ However, truth commissions as an *alternative* to prosecutions, even when viewed as a form of restorative justice or broader accountability measure, have only recommendatory powers and, given their temporal nature, can be and often are easily ignored and forgotten.⁶⁹ Criminal justice therefore has a crucial role to play in the restoration of the rule of law during transitions.

C. Measuring the “Rule of Law”

There is no universal definition of the “rule of law.” The World Justice Project’s (WJP) Rule of Law Index 2017-2018, for instance, defines the rule of law according to four “universal principles”: accountability; just laws, or laws that are clear, publicized, fair, applied equally, and protect core fundamental human rights; open government, such that the processes by which laws are enacted, enforced, and administered are accessible, fair, and efficient; and accessible and impartial dispute resolution, in which justice is delivered in a timely

65. Rule-of-Law Tools, *supra* note 57, at 11–12.

66. *Id.* at 12.

67. See Weiffen, *supra* note 57, at 129.

68. *See id.*

69. *See id.*

fashion by competent, ethical, and independent representatives and neutrals who are accessible, adequately resourced, and reflect the make-up of the community they serve.⁷⁰ Within this overarching definition, the WJP identifies eight broad factors and several sub-factors.⁷¹ Consistent with the United Nations' Rule of Law Indicators, discussed further below, the WJP emphasizes: (1) constraints on government power, (2) absence of corruption, (3) open government, (4) fundamental rights, (5) order and security, (6) regulatory enforcement (regulations and administrative proceedings applied and enforced without influence and conducted without undue delay), (7) civil justice, and (8) criminal justice.⁷²

Brigitte Weiffen—drawing on various indices including the UNSG's 2004 report to the U.N. Security Council, the Bertelsmann Transformation Index (BTI), and the World Bank Rule of Law Index from its Worldwide Governance Indicators—refers to “thin” (formal) and “thick” (substantive) indicators of the rule of law.⁷³ The BTI indicators focus on four factors in defining the rule of law: separation of powers, judicial independence and impartiality, effective oversight and prosecution of abuse of governmental office, and guarantee and protection of civil rights.⁷⁴ Among the formal or procedural aspects of the rule of law (the “thin” indicators), Weiffen includes proportionality, predictability, non-retrospectivity, universality, and impartiality.⁷⁵ The “thick” version includes “institutional performance” indicators for the effective application of these formal requirements, including separation of powers that rests on an independent and impartial judiciary, equal treatment and appropriate sentencing, due process and fair trial standards, public awareness, transparency, account-

70. WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2017–2018, at 11 (2018).

71. *See id.* at 8–13.

72. *Id.* at 12–13.

73. Weiffen, *supra* note 57, at 131–34.

74. *Id.* at 133–34 tbl.1.

75. *Id.* at 131.

ability of the public administration, and the inviolability of basic civil or fundamental rights.⁷⁶

For its part, the UNSG has again provided a well-considered and comprehensive definition of the “rule of law” that, for clarity, serves as a useful reference point for this article:

It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁷⁷

If defining “the rule of law” is a fluid and nebulous endeavor, measuring the rule of law, and more precisely the impact of certain policies on the rule of law, is even more so. Nevertheless, the United Nations has again helpfully developed Rule of Law Indicators for this purpose. The U.N. Rule of Law Indicators are designed as an implementation tool for U.N. field missions and operational staff,⁷⁸ but for the purposes of this Article they are nonetheless a useful point of reference. The U.N. Rule of Law Indicators have elaborated more than 135 specific indicators, grouped across three categories of criminal justice institutions: (1) the police; (2) the judiciary, including judges, prosecutors,

76. *Id.*

77. U.N. Doc S/2004/616, *supra* note 13, ¶ 6.

78. See U.N. Dep't of Peacekeeping Operations & Office of the High Comm'r for Human Rights, *The U.N. Rule of Law Indicators: Implementation Guide and Project Tools*, U.N. Sales No. E.11.I.13, at v (2011).

and defense counsel; and (3) the prison system.⁷⁹ These three categories are thereafter grouped into four “clusters”: (1) performance; (2) integrity, transparency, and accountability; (3) treatment of vulnerable groups; and (4) capacity.⁸⁰

The analysis in this Article focuses on the institution of the judiciary, discussing other institutions such as the security forces (including the police and military) as they relate to the judiciary. Adopting and applying the four indicator clusters, the Article keys in on those sub-indicators within each cluster that are most pertinent to the discussion. Thus:

- (1) “Performance” indicators refer to the ability of the judiciary and security forces to serve justice, as linked to public confidence, access to justice, and the effectiveness and efficiency of those justice institutions in conducting their work and having their directives respected and complied with.⁸¹
- (2) “Integrity, transparency, and accountability” indicators refer to the institution’s real and perceived independence and impartiality, transparency, and accountability.⁸²
- (3) “Treatment of vulnerable groups” indicators speak to basic principles of equality and non-discrimination in the application and enforcement of the law by the State justice institutions.⁸³ As the U.N. guide emphasizes, the treatment of vulnerable groups is a “litmus test” of the integrity of justice institutions, insofar as those that provide the most access, services, and benefits to the most marginalized or vulnerable groups to avoid unfair discrimination and ensure fair treatment, are also the most

79. *Id.* at 3. For a detailed elaboration of each of the indicators and their meanings and relevance, see *id.* at 41–65.

80. *Id.* at 3.

81. *Id.* at 7.

82. *Id.* at 7–8.

83. *Id.* at 8.

likely to provide the same treatment and application of the law to the wealthy and privileged.⁸⁴ Furthermore, in the context of conflict-related human rights violations and abuses, this is highly relevant as it is disproportionately these same marginalized or vulnerable groups that are most victimized during conflict. Therefore, this indicator includes the question of respect for and protection from ongoing/repeated human rights abuses moving forward.

- (4) “Capacity” indicators refer to both the human (i.e., personnel who are competent, fairly recruited and vetted, gender-balanced, and trained in international human rights and criminal legal standards, including investigation methods, evidence collection, analysis and preservation, and witness protection) and material (i.e., financial) resources necessary to effectively perform the functions of the justice institutions.⁸⁵ The analysis here focuses on the human capacity of the judiciary.

Applying these rule of law indicators where appropriate, Part II assesses Nepal’s transitional justice process to date and the degree to which it has succeeded in improving the rule of law in the country. Given the complexities and multiplicity of factors at play in Nepal’s transitional justice landscape, as with any post-conflict transition, the benchmarks identified here serve as an indicative framework by which to help focus and structure the discussion, rather than as a definitive, quantifiable checklist.

II. TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEPAL

This Part examines Nepal’s transitional justice process to date and assesses its impact on the rule of law in the country thus far. It begins with a brief background to the conflict, placing it in Nepal’s historical and socio-political context. It then reviews

84. *Id.* at 3–4.

85. *Id.* at 8.

the transitional justice steps employed to date. Finally, the Part briefly assesses the degree to which these measures have succeeded, by reference to the rule of law indicators identified in the previous Part where applicable.⁸⁶

A. Background to the Conflict

Nepal's decade-long internal armed conflict between the Government of Nepal (GON) and Maoist insurgents—an agrarian populist movement—came to an end in 2006 with the signing of the Comprehensive Peace Accord (CPA).⁸⁷ In addition to ending the armed conflict between the two principal combatant parties, the CPA also marked the formal end of the centuries-old monarchy that remained in place through the war.

Apart from its largely homogenous religious demographic—the vast majority of the population identifies as Hindu or Buddhist—Nepal is highly diverse linguistically, ethnically, regionally, and culturally.⁸⁸ As a consequence of its absolutist system and hierarchical traditions, Nepal's political and socio-economic culture is deeply stratified along these ethnic, caste hierarchical, and regional lines.⁸⁹ Upper castes of the high plains in and around the capital Kathmandu dominate the political class, while communities in the southern and western regions further away from the capital remain largely politically and economically marginalized, and disaffected as a result.⁹⁰ This has perpetuated and been perpetuated by the feudal class and caste structure separating the landed upper caste from the low-

86. See *supra* Section I.C.

87. Budhi Karki, *State Restructuring and Federalism Discourse in Nepal*, in *THE FEDERALISM DEBATE IN NEPAL* 1, 1 (Budhi Karki & Rohan Edrinsinha eds., 2014).

88. See generally U.N. Office of the High Comm'r for Human Rights, *Nepal Conflict Report* (2012), https://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report_2012.pdf [hereinafter *Nepal Conflict Report*] (describing the violence that occurred throughout Nepal in connection with the decade-long conflict from 1996 to 2006); Arjun Karki & David Seddon, *The People's War in Historical Context*, in *THE PEOPLE'S WAR IN NEPAL: LEFT PERSPECTIVES* (Arjun Karki & David Seddon eds., 2003).

89. See, e.g., *Nepal Conflict Report*, *supra* note 88, at 14.

90. See, e.g., Prachanda, née Pushpa Kamal Dahal, *Inside the Revolution in Nepal*, in *THE PEOPLE'S WAR IN NEPAL: LEFT PERSPECTIVES* 83 (Arjun Karki & David Seddon eds., 2003).

caste peasant class.⁹¹ Dalits (the low-caste menial laborer) in particular, along with the Muslim and other minority populations, remain marginalized from political, judicial, police, military, or other bureaucratic positions.⁹²

Nepal became a multi-party democracy and constitutional monarchy in 1991 following a pro-democracy “People’s Movement” to replace the party-less *Panchayat* or village council system with a representative system.⁹³ Yet despite the new democratic system, the old socio-political power structures and socio-economic conditions—including poverty, unemployment, widespread illiteracy, social and regional discrimination, and unequal distribution of wealth, development and power—persisted.⁹⁴ The upper “ruling” or landed class also maintained firm control over senior positions in the police, military, government bureaucracy, and judiciary.⁹⁵ According to estimates at the time of the conflict, 72% of the population was below the poverty line.⁹⁶ Yet, nearly 50% of the national income was controlled by 10% of the population, there was 60% illiteracy, 90% of the population in rural areas, and 80% of the population engaged in the still-feudal agricultural sector.⁹⁷ The People’s War launched by the Communist Party of Nepal (Maoist) (CPN-M) in 1996 was ostensibly a reaction to this entrenched State structure.⁹⁸

91. Arjun Karki, *A Radical Reform Agenda for Conflict Resolution in Nepal*, in *THE PEOPLE’S WAR IN NEPAL: LEFT PERSPECTIVES* 453–54 (Arjun Karki & David Seddon eds., 2003).

92. *See id.* at 454–55.

93. *See* Karki & Seddon, *supra* note 88, at 14; Nepal Conflict Report, *supra* note 88, at 14.

94. *See* Mukunda Kattel, *Introduction to “The People’s War” and Its Implications*, in *THE PEOPLE’S WAR IN NEPAL: LEFT PERSPECTIVES* 51 (Arjun Karki & David Seddon eds., 2003); Babu Ram Bhattarai, *The Political Economy of the People’s War*, in *THE PEOPLE’S WAR IN NEPAL: LEFT PERSPECTIVES* 129, 150 (Arjun Karki & David Seddon eds., 2003).

95. Karki, *supra* note 91, at 439.

96. *See, e.g.*, Prachanda, *supra* note 90, at 84; Bhattarai, *supra* note 94, at 117 (basing his figures on Nepal government sources including the Central Bureau of Statistics, as well as U.N. agencies and NGO surveys).

97. *See* Bhattarai, *supra* note 94, at 117–18; Prachanda, *supra* note 90, at 77.

98. *See* Kattel, *supra* note 94, at 51.

1. *Internal armed conflict from 1996 to 2006*⁹⁹

The armed conflict that erupted in 1996 was marked by gross human rights abuses and serious violations of international humanitarian law committed by both parties, including torture and other ill-treatment, enforced disappearances, rape and other sexual violence, unlawful killings, arbitrary detentions, and credible evidence of war crimes and crimes against humanity.¹⁰⁰ Conservative estimates are that at least 1300 disappearances and 13,000 deaths took place during the conflict.¹⁰¹ Of the approximately 13,000 killed—both civilian and combatant—credible estimates suggest that at least as many as 2000 incidents (not deaths) are suspected to amount to serious violations of international law and evince a pattern of unlawful killing as a matter of policy by both parties.¹⁰² Credible human rights monitoring reports document anywhere from over 2500 to 30,000 cases of some form of torture or other ill treatment, more than 1500 arbitrary detentions of political prisoners even by 1999, and conservatively, over 100 cases of sexual violence.¹⁰³ The instances of sexual violence are especially underreported due to cultural taboos, a patriarchal society, and lack of adequate legal redress and protection mechanisms in the criminal justice system.¹⁰⁴

99. For an authoritative, objective, and concise overview of the background to the conflict, see Nepal Conflict Report, *supra* note 88, at 36–54.

100. See, e.g., *id.* at 18, 72, 110–11; INT’L COMM’N OF JURISTS, AUTHORITY WITHOUT ACCOUNTABILITY: THE STRUGGLE FOR JUSTICE IN NEPAL 11 (2013), <https://www.icj.org/wp-content/uploads/2013/10/ICJ-AUTHORITY-WITHOUT-ACCOUNTABILITY-final-1.pdf> [hereinafter AUTHORITY WITHOUT ACCOUNTABILITY].

101. See Nepal Conflict Report, *supra* note 88, at 14; *Nepal: Key Moment for Justice*, HUM. RTS. WATCH (Feb. 3, 2017, 9:00 PM), <https://www.hrw.org/news/2017/02/03/nepal-key-moment-justice>. See generally AUTHORITY WITHOUT ACCOUNTABILITY, *supra* note 100 (emphasizing the obligation to provide relief and justice for victims of gross human rights violations and the duty to enforce perpetrator accountability).

102. Nepal Conflict Report, *supra* note 88, at 18, 72, 110–11.

103. *Id.* at 20–23, 124–26, 158, 163–67.

104. *Id.* at 22–23.

2. CPA halts the armed conflict

Though the CPA heralded an end to the armed hostilities and the inclusion of the erstwhile Maoist rebels, CPN-M, into the political mainstream as a political party, the peace process it engendered has continued to struggle, twelve years on, to consolidate its transition to a representative democracy that guarantees a sustainable and equitable peace.¹⁰⁵ The post-conflict period has been marked by political instability, frequent turnover of governmental power between the main political parties, and communal tensions periodically erupting into low-grade violence between minorities and security forces.¹⁰⁶ In 2018, Nepal saw its twenty-sixth prime minister in twenty-seven years of multi-party governance, with another coalition government formed between the Communist Party of Nepal-United-Marxist-Leninist (CPN-UML) and the Maoist CPN-M.¹⁰⁷ In particular, Nepal has continued to struggle to address past human rights atrocities committed by both sides of the conflict through a credible transitional justice process that will vindicate the rights of conflict victims to truth, justice, and reparation; combat the entrenched impunity that enabled the conflict-era abuses; and restore the sanctity of the rule of law and human rights as a means to ensure a sustainable peace.

The CPA undertook to set up a “high-level Truth and Reconciliation Commission” in order to probe into “those involved in serious violation[s] of human rights and crime[s] against humanity in [the] course of the armed conflict for

105. See Comprehensive Peace Accord, Nepal-Communist Party of Nepal (Maoist) (Nov. 22, 2006), https://peacemaker.un.org/sites/peacemaker.un.org/files/NP_061122_Comprehensive%20Peace%20Agreement%20between%20the%20Government%20and%20the%20CPN%20%28Maoist%29.pdf [hereinafter 2006 Comprehensive Peace Accord].

106. See, e.g., “Like We Are Not Nepali”: Protest and Police Crackdown in the Terai Region of Nepal, HUM. RTS. WATCH (Oct. 16, 2015), <https://www.hrw.org/report/2015/10/16/we-are-not-nepali/protest-and-police-crackdown-terai-region-nepal#> [hereinafter *Protest and Police Crackdown in the Terai Region of Nepal*].

107. See, e.g., Bhadra Sharma, *Conflict Victims Feel Further Disheartened After Left Unity*, MYREPUBLICA (May 20, 2018, 6:52 AM), <https://myrepublica.nagariknetwork.com/news/conflict-victims-feel-further-disheartened-after-left-unity/>; Om Astha Rai, *Doors Closed*, NEPALI TIMES (May 25, 2018), <https://www.nepalitimes.com/banner/doors-closed/>.

creating an atmosphere for reconciliation in the society.”¹⁰⁸ The CPA also promised to “guarantee the right to relief of the families of the victims of conflict, torture and disappearance.”¹⁰⁹ The Interim Constitution, passed a year later, still only made vague and passing reference to “transitional mechanisms” to address past violations of human rights and humanitarian law during the conflict.¹¹⁰ Regardless, despite the vague terminology reflecting the only passing interest of the parties to the task of transitional justice, the 2006 CPA and 2007 Interim Constitution serve as a reference point for Nepal’s commitment to undertake a meaningful transitional justice process.

B. Nepal’s Transitional Justice to Date: No (Armed) Conflict

1. Justice

Neither the 2006 CPA nor the 2007 Interim Constitution mention criminal justice specifically as part of a transitional justice process. Nonetheless, victims and human rights advocates have continued to press the issue of justice and accountability by pursuing select emblematic conflict-related cases through the regular criminal justice system as a form of strategic litigation. The record of these cases highlights a pattern of deliberate obstruction at every level of the criminal justice system and reflects the deeply entrenched culture of impunity undermining the rule of law in Nepal.¹¹¹ In Nepal’s criminal justice system, relatives of victims during the conflict generally bring complaints to police in the form of a First Information Report (FIR), based on which an investigation is initiated. In conflict-related cases, however, police and district-level prosecutors frequently ignore the FIR or refuse to act on

108. 2006 Comprehensive Peace Accord, *supra* note 105, ¶ 5.2.5.

109. *Id.* ¶ 7.1.3.

110. 2007 Interim Constitution of Nepal, 2063, art. 33 [hereinafter 2007 Interim Constitution].

111. For a comprehensive overview, see AUTHORITY WITHOUT ACCOUNTABILITY, *supra* note 100 (addressing the history of Nepali government officials acting without fear of punishment); Nepal Conflict Report, *supra* note 88, at 192–97.

it.¹¹² In such cases, complainants have to then go to court to get a writ of mandamus ordering the police to open an investigation, then again to compel the prosecutor to act on the investigation findings if it ever gets that far.¹¹³ Meanwhile, if and when local authorities are prepared to pursue the case, political pressure from the Attorney-General's Office, security forces, political parties, or others at the center often comes down on them to drop the case.¹¹⁴ A closer look at a few such emblematic cases highlights these challenges.

a. *Maina Sunuwar*

Maina Sunuwar¹¹⁵ was arrested and disappeared from her home at the age of fifteen by the Royal Nepal Army (RNA) in February 2004.¹¹⁶ After increasing pressure from domestic and international human rights groups, the army conducted an internal investigation in April 2004, and arrested, court martialed, and convicted three individuals on minor offenses including improper interrogation techniques and improperly disposing of her body.¹¹⁷ The six-month prison sentence was commuted for time served.¹¹⁸

112. See AUTHORITY WITHOUT ACCOUNTABILITY, *supra* note 100, at 16; Nepal Conflict Report, *supra* note 88, at 192–97.

113. See AUTHORITY WITHOUT ACCOUNTABILITY, *supra* note 100, at 67; Nepal Conflict Report, *supra* note 88, at 192–97.

114. See AUTHORITY WITHOUT ACCOUNTABILITY, *supra* note 100, at 67; Nepal Conflict Report, *supra* note 88, at 192–97.

115. For detailed summaries of the incident, see *Maina Sunuwar*, ADVOC. F., <http://www.advocacyforum.org/emblematic-cases/2011/01/maina-sunuwar.php> (last visited May 7, 2019); ADVOCACY FORUM, MAINA SUNUWAR: SEPARATING FACT FROM FICTION (2010) [hereinafter SEPARATING FACT FROM FICTION]; AUTHORITY WITHOUT ACCOUNTABILITY, *supra* note 100, at 79; *Nepal: Need Effective Steps to Enforce Court Verdicts*, INT'L COMM'N JURISTS (Apr. 20, 2017), <https://www.icj.org/nepal-need-effective-steps-to-enforce-court-verdicts/>.

116. See *Maina Sunuwar*, *supra* note 115; SEPARATING FACT FROM FICTION, *supra* note 115, at 1; AUTHORITY WITHOUT ACCOUNTABILITY, *supra* note 100, at 79; *Nepal: Need Effective Steps to Enforce Court Verdicts*, *supra* note 115.

117. *Maina Sunuwar*, *supra* note 115; SEPARATING FACT FROM FICTION, *supra* note 115, at 2; AUTHORITY WITHOUT ACCOUNTABILITY, *supra* note 100, at 79; *Nepal: Need Effective Steps to Enforce Court Verdicts*, *supra* note 115.

118. *Maina Sunuwar*, *supra* note 115; SEPARATING FACT FROM FICTION, *supra* note 115, at 2–3; *Nepal: Need Effective Steps to Enforce Court Verdicts*, *supra* note 115.

Dissatisfied, Maina's mother, Devi Sunuwar, filed an FIR complaint at the district police office in 2005 against the three individuals convicted in the court martial along with a fourth individual identified but not charged in the court martial proceeding, to initiate an investigation through the civilian justice system.¹¹⁹ Maina Sunuwar's body was eventually discovered in 2007 in an unmarked grave on an army barracks, appearing that she had been tortured, raped, and killed shortly after her abduction.¹²⁰

Following a writ of mandamus from the Nepal Supreme Court, the district prosecutor's office filed charges and issued an arrest warrant against the four individuals in August 2008.¹²¹ The arrest warrant was never executed.¹²² The trial, conducted *in absentia*, resulted in the conviction in April 2017 of the same three court martialed individuals for murder and the acquittal of a fourth individual.¹²³ It was claimed by authorities that the three that were convicted left the army following the court martial and fled the country, while the fourth that was acquitted has remained in the army and was promoted in rank to Major during the pendency of the investigation.¹²⁴ No attempts have been made to locate or arrest the three convicted personnel.¹²⁵ The fourth acquitted individual, Major Basnet, was in fact seconded to the U.N. peacekeeping operation in Chad and repatriated in 2009 in light of the criminal charges against

119. *Maina Sunuwar*, *supra* note 115; SEPARATING FACT FROM FICTION, *supra* note 115, at 3; AUTHORITY WITHOUT ACCOUNTABILITY, *supra* note 100, at 79; *Nepal: Need Effective Steps to Enforce Court Verdicts*, *supra* note 115.

120. *Maina Sunuwar*, *supra* note 115; SEPARATING FACT FROM FICTION, *supra* note 115, at 3; *Nepal: Need Effective Steps to Enforce Court Verdicts*, *supra* note 115.

121. *Maina Sunuwar*, *supra* note 115; SEPARATING FACT FROM FICTION, *supra* note 115, at 3; AUTHORITY WITHOUT ACCOUNTABILITY, *supra* note 100, at 80; *Nepal: Need Effective Steps to Enforce Court Verdicts*, *supra* note 115.

122. *Maina Sunuwar*, *supra* note 115; SEPARATING FACT FROM FICTION, *supra* note 115, at 3; AUTHORITY WITHOUT ACCOUNTABILITY, *supra* note 100, at 80–81; *Nepal: Need Effective Steps to Enforce Court Verdicts*, *supra* note 115.

123. *Nepal: Need Effective Steps to Enforce Court Verdicts*, *supra* note 115.

124. AUTHORITY WITHOUT ACCOUNTABILITY, *supra* note 100, at 79; *Nepal: Need Effective Steps to Enforce Court Verdicts*, *supra* note 115.

125. *See Nepal: Need Effective Steps to Enforce Court Verdicts*, *supra* note 115.

him.¹²⁶ He nonetheless remains with the army to date and was never arrested nor made to appear before the court in accordance with court summonses and arrest warrants.¹²⁷

b. *Colonel Kumar Lama*

Colonel Kumar Lama was accused of the torture and other ill treatment of two detained individuals in 2005, while he was commanding officer of an army barracks in southwestern Nepal.¹²⁸ He was arrested in the United Kingdom in 2013 on the basis of universal jurisdiction, tried there from 2015 to mid-2016, and eventually released as a result of a mistrial in September 2016.¹²⁹ The trial was beset with challenges from the outset: there were procedural delays due to witness access and lack of competent court interpreters; political pressure by Nepali authorities on witnesses and family members still in Nepal; legal complexities inherent in a domestic criminal system trying to deal with international crimes in the United Kingdom for events that took place in Nepal more than a decade prior; evidentiary challenges resulting from having to rely on circumstantial evidence due to the inability to gather hard evidence in Nepal; and the vagaries of a jury trial where the jury had no contextual reference to Nepal's political and cultural history or the circumstances of its conflict.¹³⁰

While his arrest and trial sent shockwaves through the Nepali military and political establishment, his eventual acquittal served as a fillip to the GON's arrogance of impunity. Indeed,

126. *See id.*

127. *See id.*

128. *See* INT'L COMM'N OF JURISTS, NEPAL: THE CASE OF COLONEL KUMAR LAMA: THE APPLICATION OF UNIVERSAL JURISDICTION 3 (2013), <https://www.icj.org/wp-content/uploads/2013/09/LAMA-leaflet-print-final.pdf> [hereinafter CASE OF COLONEL KUMAR LAMA]; INT'L COMM'N OF JURISTS, QUESTIONS AND ANSWERS—COLONEL KUMAR LAMA CASE 1 (2016), <https://www.icj.org/wp-content/uploads/2016/06/Nepal-Lama-QA-Advocacy-2016-ENG.pdf> [hereinafter QUESTIONS AND ANSWERS].

129. CASE OF COLONEL KUMAR LAMA, *supra* note 128, at 3; QUESTIONS AND ANSWERS, *supra* note 128, at 1, 8.

130. *See, e.g.,* Devika Hovell, *The 'Mistrial' of Kumar Lama: Problematizing Universal Jurisdiction*, EJIL: TALK! (Apr. 6, 2017), <https://www.ejiltalk.org/the-mistrial-of-kumar-lama-problematizing-universal-jurisdiction/>.

Col. Lama returned home to Nepal seemingly vindicated in the eyes of the military and was even promoted in the interim.¹³¹ It remains to be seen if the mere threat of arrest and exercise of universal jurisdiction abroad is nonetheless enough to force Nepali authorities to pursue more credible criminal justice at home going forward. As discussed further below, the prospects are dim.

c. *Dekendra Thapa*

In 2004, journalist Dekendra Thapa was abducted by Maoist rebels and was later alleged to have been buried alive.¹³² Thapa's wife filed an FIR in the district police office in 2008.¹³³ The police initially refused to register the FIR and open an investigation, but the Supreme Court granted a writ of mandamus in 2012 to compel the police to arrest five suspects in 2013.¹³⁴ Yet, the Attorney General's office, headed by a Maoist party member at the time, ordered the investigation to stop.¹³⁵ The Supreme Court again issued an order to the police to ignore the Attorney General's directive and continue the investigation.¹³⁶ The case was still ongoing in 2017, marked by a series of back and forths between courts and police to compel police to conduct a proper investigation, along with governmental pressure and threats from Maoist politicians against the lawyers and human rights defenders involved in the case to try and halt the process at various times.

131. *See id.*

132. *See, e.g.,* AUTHORITY WITHOUT ACCOUNTABILITY, *supra* note 100, at 17 (providing a detailed summary of the case); *Nepal: ICJ Calls for End to Political Interference in Case of Dekendra Thapa*, INT'L COMM'N JURISTS (Jan. 30, 2013), <https://www.icj.org/nepal-icj-calls-for-end-to-political-interference-in-case-of-dekendra-thapa-killing/>.

133. *See* Tufan Neupane, *Justice Under Threat: Key Witnesses in the Prosecution of Dekendra's Killers Forced to Retract Statements*, NEPALI TIMES (Aug. 22, 2014), <https://archive.nepalitimes.com/article/nation/justice-for-dekendra-thapa,1619>.

134. *See* AUTHORITY WITHOUT ACCOUNTABILITY, *supra* note 100, at 67.

135. *Id.*

136. *Id.*

d. *Bal Krishna Dhungel*

Bal Krishna Dhungel is a Maoist politician who was convicted in 2010 of a 1998 murder and sentenced to life imprisonment.¹³⁷ It required a Supreme Court order in April 2017 to eventually compel the police to enforce the conviction and arrest Dhungel.¹³⁸ He was recently pardoned in May 2018 by the current coalition government that includes the Maoist party.¹³⁹ The pardon dealt a huge blow to victims and advocates, who expressed a sense of betrayal with this outcome.¹⁴⁰ Dhungel was given a life sentence, amounting to twenty years, of which he effectively served only one as he was only arrested in 2017, seven years after his conviction.¹⁴¹ The outcome of this case, like the others, belies the rhetorical commitment to the rule of law on the part of the Nepali government.

2. *Truth-seeking*

The signature transitional mechanism that the GON has initiated to date has been the enactment of the 2014 Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act (TRC Act), which purported to establish two bodies: a Truth and Reconciliation Commission (TRC) and a Commission on Investigation of Enforced Disappeared Persons (CIEDP).¹⁴² The TRC Act was quickly criticized by domestic and international human rights groups and Nepali conflict victims for the flawed legal mandate and legislative process by which it was enacted. Specifically, the Act was criticized for (1) failing to comply with international human rights standards in

137. See *id.* at 37.

138. See *Nepal: Need Effective Steps to Enforce Court Verdicts*, *supra* note 15.

139. *Murder-Convict Dhungel Gets Presidential Pardon*, KATHMANDU POST (May 29, 2018), <http://kathmandupost.ekantipur.com/news/2018-05-29/murder-convict-dhungel-gets-presidential-pardon.html>; Binod Ghimire, *Dhungel Freed Despite Criticism*, KATHMANDU POST (May 30, 2018), <http://kathmandupost.ekantipur.com/news/2018-05-30/dhungel-freed-despite-criticism.html>.

140. *Murder-Convict Dhungel Gets Presidential Pardon*, *supra* note 139; Ghimire, *supra* note 139.

141. See Ghimire, *supra* note 139.

142. See *Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2071 (2014) c.2 (Nepal)* [hereinafter 2014 TRC Act].

allowing the possibility of unconditional amnesty for serious international crimes, (2) failing to take a transparent, victim-centered approach through consultations with or participation of victims, civil society, or the general public in its drafting and enactment, and (3) failing to ensure the independence and impartiality of the commission members through a credible appointment process.¹⁴³

In a constitutional challenge to the Act brought by more than 200 conflict victims, the Supreme Court of Nepal granted a writ of mandamus ruling that, among other things, the blanket amnesty provision in the TRC Act violated Nepal's constitutional guarantees of the right to life, liberty, equality, and prohibition against torture, along with Nepal's international human rights treaty obligation to investigate, prosecute, and provide effective remedy and reparation for gross human rights abuses.¹⁴⁴ On February 27, 2015, the Supreme Court ordered the GON to amend the TRC Act in line with its international and domestic legal obligations as set out in the ruling.¹⁴⁵ Again belying its level of good faith commitment to the transitional justice process and respect for the judiciary, the GON formally constituted the two statutory commissions on February 10, 2015, while the Supreme Court was still deliberating on the legality of the Act itself.¹⁴⁶

Despite being formally constituted in February 2015, the transitional justice commissions did not commence actual substantive operations until mid-2016, more than one year into

143. See, e.g., INT'L COMM'N OF JURISTS, JUSTICE DENIED: THE 2014 COMMISSION ON INVESTIGATION OF DISAPPEARED PERSONS, TRUTH AND RECONCILIATION ACT 5-6, 9-10 (2014) [hereinafter JUSTICE DENIED].

144. Order for Mandamus Including Certiorari, No. 069-WS-0057, at 43 (Supreme Court of Nepal, Feb. 26, 2015) (unofficial translation) (on file with author) [hereinafter Nepal Supreme Court, TRC Mandamus Order].

145. *Id.*

146. See, e.g., INT'L COMM'N OF JURISTS, NEPAL: AFTER A DECADE, STILL TIME TO PROVIDE JUSTICE (2016), <http://www.icj.org/wp-content/uploads/2016/11/Nepal-Statement-CPA-Anniversary-Advocacy-2016-ENG.pdf> [hereinafter NEPAL: AFTER A DECADE]; *Nepal: Government Must Implement Landmark Supreme Court Decision Against Impunity*, INT'L COMM'N JURISTS (Feb. 27, 2015), <https://www.icj.org/nepal-government-must-implement-landmark-supreme-court-decision-against-impunity/>.

their initial two-year mandate.¹⁴⁷ Their mandate has been twice extended already and, according to reports, they have been given another one-year extension from February 2019 to February 2020.¹⁴⁸ The commissions remain deeply politicized, inadequately resourced, non-transparent, and lacking in credibility among victims who feel that the members lack independence or impartiality.¹⁴⁹

Victim groups and civil society have reported that the commissions have failed to adequately take into account the confidentiality and security concerns of victims when filing their complaints at local offices, including the specific gender-sensitive confidentiality concerns of women and girl complainants, as well as threats and intimidation by GON security forces and Maoist former rebels.¹⁵⁰ To date the transitional justice commissions have reportedly received more than 60,000 such complaints at the TRC and more than 3000 complaints at the CIEDP.¹⁵¹ It is unclear if and how they plan to deal with the combined 63,000-plus complaints, or how they will preserve and/or publicize the information, evidence, and findings upon completion of their mandate.¹⁵²

147. See NEPAL: AFTER A DECADE, *supra* note 146.

148. TRC and Commission for the Investigation of Enforced Disappeared Persons to Get One-Year Extension, SETOPATI (Jan. 29, 2019, 6:06:55 AM), <https://setopati.net/political/138578>.

149. See, e.g., Conflict Victims Common Platform & Accountability Watch Committee, Two Years Achievement of Commission of Investigation on Enforced Disappeared Person and Truth and Reconciliation Commission: Mere Complaint Collection Position Paper, (Feb. 20, 2017) (on file with author) [hereinafter CVCP Victims' Position Paper] (noting that the commissions "have failed to focus on crucial aspects including truth-seeking, identifying perpetrators of grave offenses, recommending reparations to victims, studying the nature and pattern of serious human rights violations and providing recommendations on institutional reform").

150. *Id.*

151. See *Nepal: Transitional Justice, Accountability Stalled*, HUM. RTS. WATCH (Jan. 18, 2018, 3:10 AM), <https://www.hrw.org/news/2018/01/18/nepal-transitional-justice-accountability-stalled>; Binod Ghimire, *Transitional Justice Bodies to Wrap Up if Government Denies Extension*, KATHMANDU POST (Dec. 4, 2018, 7:24 AM), <http://kathmandupost.ekantipur.com/news/2018-12-04/transitional-justice-bodies-prepare-to-go-as-term-sees-end.html>.

152. See, e.g., Ghimire, *supra* note 151.

In July 2018, the GON floated a new working draft amendment bill for the TRC.¹⁵³ While addressing certain of the Supreme Court's directives and Nepal's international legal obligations, the draft bill remains problematic in its definition of crimes, jurisdictional scope, amnesty provisions, and relationship with a proposed new special court.¹⁵⁴

In any event, as of July 2019, the GON has extended the mandate of the two commissions for a further two years without any legislative amendment to rectify the flaws in the legal mandate and to bring it in line with international standards and the Supreme Court's directives.¹⁵⁵ Moreover, the GON has undertaken to rush through the appointment of new members to the two commissions, without any transparency or consultation with victims in the appointment process.¹⁵⁶ In the end, as flawed as the amendment bill was in its most recent form, it appears to have been a dead letter from the outset, and the newly constituted commissions risk losing their legitimacy and trust with victims even before they have started working under their renewed mandate and composition.

3. *Reparation and guarantees of non-repetition*

Nepal instituted an "interim relief policy" in 2007 intended to provide compensation to victims of the conflict.¹⁵⁷ This policy,

153. Bill to Amend the Act on Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2014, Nepal (2018) (on file with author) [hereinafter 2018 TRC Act Draft Amendment Bill].

154. See, e.g., Amnesty Int'l, *Preliminary Comments: Draft Bill to Amend the Act on Commission on Investigation of Disappeared Persons, Truth and Reconciliation*, 2018, AI Index ASA 31/8817/2018 (June 21, 2018) (noting that "the draft bill continues to fall short of the Supreme Court's rulings and international law and standards, particularly in two broad areas: (i) provisions affecting criminal accountability, including legal definitions and sentencing; and (ii) structural weaknesses undermining the independence and effectiveness of existing and proposed transitional justice bodies").

155. *Nepal: Reform Transitional Justice Law*, HUM. RTS. WATCH (Apr. 12, 2019), <https://www.hrw.org/news/2019/04/12/nepal-reform-transitional-justice-law>.

156. *Id.*; Binod Ghimire, *Conflict Victims Seek Role in Transitional Justice Bodies Appointments*, KATHMANDU POST (Apr. 7, 2019), <https://kathmandupost.ekantipur.com/news/2019-04-07/conflict-victims-seek-role-in-transitional-justice-bodies-appointments.html>.

157. See, e.g., Mandira Sharma, *Transitional Justice in Nepal: Low Priority, Partial Peace*, 26 ACCORD 32, 35 (2016).

however, was effectively an *ex gratia* payment rather than a genuine reparation policy, as it did not accompany any form of official public apology or acknowledgment.¹⁵⁸ Moreover, it did not apply to victims of torture or rape and sexual violence.¹⁵⁹ Recently, the commissions have circulated a five-page questionnaire to victims to get their views on reparations priorities.¹⁶⁰ Victims' representatives expressed concern that the latest questionnaire was a unidirectional, passive, and non-transparent process, the implications of which many victims do not fully comprehend.¹⁶¹

A new criminal code was passed in August 2017 and entered into force in August 2018.¹⁶² The Code, among other things, criminalizes enforced disappearance, rape and sexual violence, and torture and ill treatment.¹⁶³ The GON presented two earlier draft bills in 2014, one to amend the penal code to criminalize enforced disappearance and rape and sexual violence, and another to criminalize torture.¹⁶⁴ While both bills fell short of international human rights standards in defining the respective crimes, both bills were welcomed as positive, if late, reform

158. *See id.* at 32.

159. *Id.*

160. Interview with Suman Adhikari, Chairperson, Conflict Victims Common Platform, in Kathmandu, Nepal (Apr. 2018) (on file with author); *Conflict Victims Prepare Paper on Reparation*, KATHMANDU POST (Apr. 28, 2018, 8:20 AM), <http://kathmandupost.ekantipur.com/news/2018-04-28/conflict-victims-prepare-paper-on-reparation.html>.

161. Interview with Suman Adhikari, *supra* note 160.

162. The Criminal Code, alongside the Criminal Procedure Code, passed in August 2017, and went into effect in August 2018. Ashok Dahal, *Landmark Legal Reform Bills Passed*, MYREPUBLICA (Aug. 9, 2017), <https://myrepublica.nagariknetwork.com/news/landmark-legal-reform-bills-passed/>; *New Criminal, Civil Codes Come into Effect*, HIMALAYAN TIMES (Aug. 17, 2018), <https://thehimalayantimes.com/nepal/new-criminal-civil-codes-come-into-effect/>; *Faulty Provisions Will Be Changed*, KATHMANDU POST (Aug. 18, 2018), <http://kathmandupost.ekantipur.com/printedition/news/2018-08-18/faulty-provisions-will-be-changed.html>.

163. Interview with Conflict Victims and Civil Society Stakeholders, in Kathmandu, Nepal (Apr. 2018) (on file with author).

164. For detailed analyses of these bills, see INT'L COMM'N OF JURISTS, *THE TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT (CONTROL) BILL, 2014: A BRIEFING PAPER* (2016), <https://www.icj.org/wp-content/uploads/2016/06/Nepal-Torture-Bill-Advocacy-Analysis-Brief-2016-ENG.pdf> [hereinafter TORTURE BRIEFING PAPER]; INT'L COMM'N OF JURISTS, *SERIOUS CRIMES IN NEPAL'S CRIMINAL CODE BILL, 2014: A BRIEFING PAPER* (2017), <https://www.icj.org/wp-content/uploads/2017/03/Nepal-Serious-Crimes-Bill-Advocacy-Analysis-Brief-2017-ENG.pdf> [hereinafter SERIOUS CRIMES BRIEFING PAPER].

measures needed to address the entrenched impunity at the heart of the conflict-era human rights abuses.¹⁶⁵ According to those with knowledge, the new criminal law criminalizes torture, enforced disappearance, and rape along the same lines as the prior draft bills, but does not criminalize war crimes or crimes against humanity, which were also credibly alleged to have occurred during the conflict.¹⁶⁶

Beyond penal code reform, there has been no systematic security sector reform in Nepal. The complex web of security legislations and regulations that effectively give blanket impunity to security forces remain in force. The 2001 Terrorist and Disruptive Activities (Control and Punishment) Act provides a high degree of official immunity and authority to use force, including deadly force and even against unarmed groups.¹⁶⁷ The 2006 Army Act similarly ensures that army personnel cannot be investigated or prosecuted for unlawful use of force if the incident in question occurred while on duty and “in good faith.”¹⁶⁸ No vetting process has taken place following the conflict; to the contrary, as discussed above, alleged perpetrators of conflict-era crimes have been rewarded with promotion and/or secondment to U.N. peacekeeping missions.

C. *Assessing Transitional Justice in Nepal: No Peace?*

While not an exhaustive set of criteria, certain key rule of law indicators identified in Part I provide a useful rubric by which to assess Nepal’s transitional justice process to date.

165. See TORTURE BRIEFING PAPER, *supra* note 164, at 1; SERIOUS CRIMES BRIEFING PAPER, *supra* note 164, at 1.

166. Interview with Conflict Victims and Civil Society Stakeholders, *supra* note 163.

167. AUTHORITY WITHOUT ACCOUNTABILITY, *supra* note 100, at 8; Nepal Conflict Report, *supra* note 88, at 192–94.

168. See AUTHORITY WITHOUT ACCOUNTABILITY, *supra* note 100, at 8–9; Nepal Conflict Report, *supra* note 88, at 192–94.

1. Performance

According to a 2008 victims' perception survey conducted by Advocacy Forum (AF) and the International Center for Transitional Justice (ICTJ), when asked about the TRC (or potential TRC), 19% of respondents believed its objective should be to determine the truth, and another 19% of respondents believed its objective should be to deliver justice.¹⁶⁹ Yet only 0.3% believed it would in fact change the culture of impunity, ensure equality, or protect them against further human rights abuses.¹⁷⁰ Only 52% of respondents, all victims, had filed complaints concerning their issue with any State agency and, of those, 63% of the complaints filed with police and 50% of the complaints filed with the courts were rejected or ignored.¹⁷¹ Expectations and trust of State institutions was and is extremely low—80% of survey respondents had little or no expectation of receiving help from the army or police, and 70% of respondents expressed little or no confidence in receiving assistance from the Chief District Officer, the senior-most district-level civilian government official.¹⁷² Of the victim-respondents that never submitted complaints, 17% did so out of fear of the security forces, and 14% did so out of fear for their families and political parties.¹⁷³ According to the study, trust indicators revealed that 66% and 65% of respondents did not trust the police and army, respectively; 44%, 43% and 37% of respondents expressed distrust of the political parties, Maoists, and Parliament, respectively.¹⁷⁴ In contrast, 80% of respondents expressed either full or partial trust in the courts.¹⁷⁵

169. INT'L CTR. FOR TRANSITIONAL JUSTICE & ADVOCACY FORUM, NEPALI VOICES: PERCEPTIONS OF TRUTH, JUSTICE, RECONCILIATION, REPARATIONS AND THE TRANSITION IN NEPAL 33 (2008), <https://www.ictj.org/sites/default/files/ICTJ-Nepal-Voices-Reconciliation-2008-English.pdf> [hereinafter PERCEPTION OF TRUTH SURVEY].

170. *Id.*

171. *Id.* at 41.

172. *Id.* at 42.

173. *Id.*

174. *Id.* at 45.

175. *Id.*

2. Integrity

The obstacles faced in the emblematic cases discussed above are indicative of the obstructionist tactics by a politicized criminal justice system and unaccountable security forces generally. As a test case of the criminal justice system, that of Maina Sunuwar stands as a qualified success at best.¹⁷⁶ On one hand, Maina's case demonstrates the symbolic delivery of justice—albeit thirteen years later—to her mother, Devi, who has herself publicly expressed a sense of vindication.¹⁷⁷ On the other hand, the deliberate political obstruction and lack of cooperation from authorities in refusing to enforce the successive court orders—and even the court's questionable acquittal of the still-serving Major Basnet on grounds of superior orders—reflects the inherent challenges in delivering justice for victims of conflict-era abuses where the political will to confront the culture of impunity is absent.¹⁷⁸ Moreover, the three convicted persons have yet to be arrested or even attempted to be located in order to be arrested.¹⁷⁹

Colonel Lama's case similarly demonstrates a “mixed bag” of qualified success. On the one hand, the GON not only failed to take action against Colonel Lama despite credible evidence of his alleged crimes, he was promoted in the interim to the rank of Colonel.¹⁸⁰ On the other hand, observers agree that the exercise of universal jurisdiction by the United Kingdom put Nepali authorities on notice, forcing them to alter their own travel plans out of fear of being arrested, and reinvigorated recent official discussions on transitional justice accountability processes.¹⁸¹ Observers express the view that the GON initiative

176. See, e.g., *Nepal: Need Effective Steps to Enforce Court Verdicts*, *supra* note 115.

177. See Press Release, Advocacy Forum of Nepal, The District Court Kavrepalanchowk Convicts Three Out of Four Army Officers Accused of Maina's Murder (Apr. 17, 2017), <https://www.icaed.org/uploads/media/MainaPressRelease-ENG.pdf>.

178. See *Nepal: Need Effective Steps to Enforce Court Verdicts*, *supra* note 115.

179. See *id.*

180. See *supra* Section II.B.1.b.

181. Interviews with Domestic and International Observers and Stakeholders, in United Kingdom (2013) (on file with author) (including key witnesses in the universal jurisdiction trial in the United Kingdom); see also *Justice Expert Tells Nepal to Make Act Changes Public*,

to reform the penal code, initiated in 2013 shortly after Lama's arrest in the United Kingdom, is in direct response to his case.¹⁸² Based on private interviews with domestic and international officials in the wake of Colonel Lama's case, the need for "legal certainty" for political and military officials spurred the GON to resuscitate discussions on amending the Truth and Reconciliation Act.¹⁸³ In Bal Krishna Dhungel's case, while the conduct of the trial and his initial conviction—and eventual imprisonment after much official resistance—were important to uphold the principles of the rule of law, victims' rights, and judicial independence, the subsequent pardon undid all of this.

Between 2008 and 2012, more than 1000 cases, most involving serious international crimes, were reportedly withdrawn by three successive governments.¹⁸⁴ Although the government claimed the reason for the withdrawals was that the cases were overly broad and "politically motivated," in actuality the withdrawals were part of pre-election deals between political parties negotiating the formation of coalition governments.¹⁸⁵ Such mass withdrawal of hundreds of cases by the GON signals an official government policy of endorsing impunity in the eyes of the public, and undermines judicial independence and the rule of law.¹⁸⁶

As discussed further below, the GON has begun making overtures toward a criminal justice process through a proposed special court. While this discussion is welcome, there are potential concerns with its actual intended jurisdiction and

KATHMANDU POST (Apr. 20, 2018, 9:26 AM), <http://kathmandupost.ekantipur.com/news/2018-04-20/justice-expert-tells-nepal-to-make-act-changes-public.html>.

182. Interviews with Domestic and International Observers and Stakeholders, *supra* note 181; Interview with Mandira Sharma, Human Rights Lawyer and Founder of Advocacy Forum, in Kathmandu, Nepal (Apr. 2018) (on file with author).

183. Interview with Conflict Victims and Civil Society stakeholders, *supra* note 163; Interview with Human Rights Officers, United Nations Office of the High Commissioner for Human Rights, in Geneva, Switzerland (June 2018) (on file with author).

184. See AUTHORITY WITHOUT ACCOUNTABILITY, *supra* note 100, at 11, 113 n.263; see also Nepal Conflict Report, *supra* note 88, at 196–97.

185. See AUTHORITY WITHOUT ACCOUNTABILITY, *supra* note 100, at 11, 113 n.263; see also Nepal Conflict Report, *supra* note 88, at 196–97.

186. AUTHORITY WITHOUT ACCOUNTABILITY, *supra* note 100, at 113 n.263.

operation. As reflected in public statements and the most recent draft bill that has been made public: the list of crimes is unduly limited and inconsistent with international standards, and it impermissibly attempts to supersede the permanent jurisdiction of the national judiciary by seeking to coopt *sub judice* conflict-related cases and allow the AGO to withdraw cases without cause.¹⁸⁷ All of this undermines the independence, impartiality, and integrity of the proposed new body even before its inception, as well as the criminal justice system as a whole.

3. *Treatment of vulnerable groups*

Security forces continue to enjoy impunity for regularly employing abusive tactics that violate human rights, including excessive and deadly force to suppress public demonstrations, as well as torture, ill treatment, arbitrary arrests, and other abusive tactics during investigation and interrogation.¹⁸⁸ In December 2015, for instance, security forces resorted to deadly force against ethnic minority Madhesi and Tharu demonstrators in Nepal's southern Terai region.¹⁸⁹ The demonstrators were protesting against a newly-enacted constitution that they believed discriminatorily undermined their political representation and participation.¹⁹⁰ The ensuing violence resulted in the deaths of as many as fifty individuals, including ten police personnel.¹⁹¹ To date, no single individual has been investigated or held accountable for any of the abuses committed by either side during the violence.

187. 2018 TRC Act Draft Amendment Bill, *supra* note 153, ¶ 21.

188. See, e.g., *Protest and Police Crackdown in the Terai Region of Nepal*, *supra* note 106; see also Amnesty Int'l, *Nepal: Torture and Coerced Confessions: Human Rights Violations of Indigenous Tharus After the August 2015 Police Killings in Kailali*, AI Index ASA 31/4456/2016, at 6, 8–10 (July 2016) [hereinafter *Human Rights Violations of Indigenous Tharus*].

189. See *Protest and Police Crackdown in the Terai Region of Nepal*, *supra* note 106 (providing a full account of the incident and the historical context); *Human Rights Violations of Indigenous Tharus*, *supra* note 188, at 7; see also *infra* Part IV (discussing the impact on larger impunity issues in Nepal).

190. See *Human Rights Violations of Indigenous Tharus*, *supra* note 188, at 8.

191. See *id.*

In such a climate of distrust and ongoing impunity, the GON would have a severe uphill battle in reestablishing public trust and conducting a credible transitional justice process absent criminal justice. Thus far, it has failed.

III. COMPARING THE SOUTH AFRICAN AND CAMBODIAN EXPERIENCES

This Part tests the central hypothesis that criminal justice processes in transitional justice can, and do, advance the prospects for the rule of law, by examining the degree of “success” in this regard in selected transitional justice contexts elsewhere. It looks in detail at two examples—one in which there were no prosecutions, and one in which there was only criminal prosecution—and considers the degree to which either can be deemed successful in advancing the rule of law. Finally, it examines whether that relative success can be attributed, at least in part, to the presence or absence of criminal prosecutions.

Thus, this Part first considers South Africa’s experience, establishing a Truth and Reconciliation Commission (TRC) that provided conditional amnesties without a concomitant systematic criminal justice process, and then examines Cambodia’s Extraordinary Chambers in the Courts of Cambodia (ECCC), which has pursued criminal justice exclusively with little or no complementary non-retributive transitional justice processes. The lessons of the ECCC, as a largely domestically-driven hybrid tribunal, are particularly salient for Nepal. Given the current state of debate in Nepal, to the extent that any form of criminal process is being contemplated at present, the modalities being debated are essentially domestic—either through the national judiciary or a domestically-driven special court within the national judiciary. The likelihood of an international or even internationally-driven hybrid mechanism similar to, for example, the Special Chamber for Sierra Leone is unlikely at this stage.

For similar reasons, this Part does not focus closely on the impact of the International Criminal Tribunal for the Former

Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), or countries under scrutiny by the International Criminal Court (ICC). While the impact of the ICTY, ICTR, and ICC has been extensively scrutinized, all are or were externally driven international tribunals considerably removed geographically and existentially from the more indigenous and holistic transitional justice initiatives contemplated within the respective countries. Thus, a comparison with internationalized domestic or strictly domestic processes is more apropos for the purposes of this Article. As in the prior Part, this discussion applies the rule of law indicators identified in Part I to the extent they are relevant and illustrative. As above, given the complexity and contextual nature of each country situation, the indicators here serve as an indicative benchmark for the sake of analytical structure rather than as a definitive, uniformly applicable set of criteria.

Finally, while acknowledging the inherent limitations of both qualitative and quantitative “impact” studies, this Part briefly reviews other empirical studies conducted by experts to broaden the universe of available data from which to draw concluding lessons for Nepal. Though cursory and selective, such a comparative analysis may nonetheless be instructive for Nepal as it grapples with its own transitional justice process, in which the question of criminal justice is still at the forefront of the debate.

A. Truth Without Criminal Justice in South Africa's TRC

The transitional justice landscape, and international law underpinning it, has shifted since the South African TRC was established in 1994.¹⁹² The idea of trading justice for peace is no longer on the table; that sustainable peace cannot be achieved without accountability, and its corollary that there can be no amnesty for atrocity crimes (war crimes, genocide, crimes

192. See, e.g., HAYNER, PEACEMAKER'S PARADOX, *supra* note 52, at 51.

against humanity), has increasingly gained general acceptance.¹⁹³

Now transitional justice experts and practitioners no longer ask *whether* to pursue justice and accountability as part of a transitional justice process, but rather *when* and *how*—or as the UNSG has noted, the relevant question is “what kind of justice” should be pursued.¹⁹⁴ At the same time, the *how* and *when* of the accountability debate reflects the ongoing dilemma of what mix of retributive and restorative justice mechanisms can deliver the most accountability and, thereby, most effectively advance the rule of law.

In this vein, the South African TRC model of truth-telling in exchange for conditional amnesty remains the standard-bearer for “successful” transitional justice through alternative or restorative justice means rather than retributive justice. The South African TRC has been held up as an “alternative . . . for expressing community condemnation of human rights violations.”¹⁹⁵ However, with the benefit of hindsight, closer examination suggests that the absence of a more robust criminal accountability process to accompany or complement, and vice versa, the truth-seeking process may have dampened the impact of justice on the country’s post-conflict rule of law project.

1. Performance

The TRC concluded its work with the recommendation of some 300 persons for criminal investigation.¹⁹⁶ However, as a result of political resistance (even in the judiciary, the judges remained from the apartheid era), only two trials took place,

193. See, e.g., *id.* at 117, 134 (discussing UNSG’s policy directive in 1999 that U.N. peace mediators cannot sign onto any peace agreement entrenching amnesty for atrocity and other serious crimes); see also U.N. Doc S/2004/616, *supra* note 13, at 21. For discussion on the international law underlying this norm, see *supra* Part I.

194. HAYNER, PEACEMAKER’S PARADOX, *supra* note 52, at 204.

195. Martha Minow, *Making History or Making Peace: When Prosecutions Should Give Way to Truth Commissions and Peace Negotiations*, in LAW IN TRANSITION: HUMAN RIGHTS, DEVELOPMENT AND TRANSITIONAL JUSTICE 203 (Ruth Buchanan & Peer Zumbansen eds., 2014).

196. HAYNER, PEACEMAKER’S PARADOX, *supra* note 52, at 49.

and one of them resulted in acquittal.¹⁹⁷ The judges and the Attorney-General in this case were appointees of the former apartheid regime.¹⁹⁸

Some experts and human rights groups note that seeing these flawed trials emboldened others not to seek amnesty in the TRC.¹⁹⁹ Many have argued that only low- or mid-level officials came forward for amnesty.²⁰⁰ Not only did the vast majority of senior leadership not come forward, they were not prosecuted, and continue to enjoy positions within the government.²⁰¹ Those who were denied amnesty or never came forward, moreover, largely never faced criminal justice as intended.²⁰²

A 2004 study by James Gibson finds that the TRC process had only “ambivalent” effects on the rule of law, defined by Gibson as the cultivation of a human rights or legal culture.²⁰³ The “ambivalent” effects of the TRC on the rule of law are more pronounced, according to the study, when disaggregated along ethnic lines—South African whites being more confident in rule of law institutions than South African blacks.²⁰⁴ Gibson’s study principally focuses on the impact on reconciliation, defined by

197. See *id.*; PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS 99–102 (2d ed. 2011) [hereinafter HAYNER, UNSPEAKABLE TRUTHS].

198. *The State v. Wouter Basson*, 2003 SA (CC).

199. See, e.g., HUMAN RIGHTS WATCH, SELLING JUSTICE SHORT: WHY ACCOUNTABILITY MATTERS FOR PEACE n.15 (2009), https://www.hrw.org/sites/default/files/reports/ij0709webwcover_3.pdf [hereinafter SELLING JUSTICE SHORT] (“On December 12, 2008, the Pretoria High Court struck down amendments to South Africa’s Prosecution Policy that provided for an effective rerun of the Truth and Reconciliation Commission’s amnesty process under the guise of prosecutorial discretion.”); see also Press Release, Khulumani, Civil Society Organisations to Launch Urgent Legal Proceedings Against the President (Mar. 17 2009), <http://www.khulumani.net/in-the-media/media-statements/statements-2009/298-civil-society-organisations-to-launch-urgent-legal-proceedings-against-the-president.html>; Yasmin Sooka, *Fighting for Those Betrayed by TRC*, CAPE TIMES (May 17, 2018), <https://www.pressreader.com/south-africa/cape-times/20180517/281814284514852>.

200. See, e.g., HAYNER, UNSPEAKABLE TRUTHS, *supra* note 197, at 100–01; HAYNER, PEACEMAKER’S PARADOX, *supra* note 52; Sooka, *supra* note 199; David Dyzenhaus, *Judicial Independence, Transitional Justice and the Rule of Law*, 10 OTAGO L. REV. 345, 366 (2003).

201. See, e.g., HAYNER, UNSPEAKABLE TRUTHS, *supra* note 197, at 100–01; HAYNER, PEACEMAKER’S PARADOX, *supra* note 52, at 49; Sooka, *supra* note 199.

202. Sooka, *supra* note 199.

203. James L. Gibson, *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?*, 31 POLITIKON 129, 132–34, 140 (2004) [hereinafter Gibson, *Overcoming Apartheid*].

204. See *id.* at 132–34, 140.

Gibson as (1) acceptance of blame, apology, and forgiveness between individual victim and perpetrator; and (2) building social harmony between “beneficiaries and the exploited.”²⁰⁵ His study nevertheless addresses the development of a “human rights culture,” of which the rule of law (i.e., the respect for State institutions that protect human rights and apply the law equally and without discrimination) is a “first principal,” as the creation of a political “culture respectful of human rights” was an implicit element of the TRC’s mandate and a stated goal of the social reconciliation project that the TRC aimed to achieve.²⁰⁶ Thus, Gibson views the rule of law as the “cardinal foundation” of human rights and, thereby, a precondition, along with accountability, for reconciliation: “Unless South Africa can develop a culture respectful of the rule of law, it is difficult to imagine that human rights can prosper.”²⁰⁷ The study concludes, by inference, that the lack of systematic criminal prosecutions casts doubt on the rule of law institutions.²⁰⁸

By this measure, Gibson’s study concludes that the process made “some inroads” on social reconciliation but that the impact on the level of commitment to or confidence in the rule of law and protection of human rights is moderate.²⁰⁹ Comparing similar studies from 1996 and 2001, Gibson notes no improvement in support or respect for the rule of law as a result of the TRC process.²¹⁰ On the other hand, going deeper, he does conclude that those who “accepted the truth” as produced by the TRC were more likely to support the rule of law.²¹¹ This, however, does not conclusively show a causality. Gibson’s basic conclusion ultimately is that the TRC process “may well have” contributed to a culture of human rights, i.e., “commitment to

205. *See id.* at 132–33.

206. *Id.* at 134, 137; James L. Gibson, *Truth, Reconciliation, and the Creation of a Human Rights Culture in South Africa*, 38 *LAW & SOC’Y REV.* 5, 5 (2004) [hereinafter Gibson, *Human Rights Culture*].

207. Gibson, *Human Rights Culture*, *supra* note 206, at 10.

208. Gibson, *Overcoming Apartheid*, *supra* note 203, at 130–34.

209. *Id.* at 139; Gibson, *Human Rights Culture*, *supra* note 206, at 17–18.

210. Gibson, *Human Rights Culture*, *supra* note 206, at 21.

211. *Id.* at 22–23.

universalism (versus particularism) in the application of the rule of law.”²¹² In other words, it did not *not* help.

2. Integrity

Despite the perceived success of the TRC in advancing truth, justice, and reconciliation in South Africa, human rights advocates, including Yasmin Sooka, former Commissioner of the TRC and South African human rights lawyer, note that families of victims continue, twenty years later, to seek—and be frustrated by the lack of—justice.²¹³ Sooka references legal cases of ten years prior in which her human rights legal advocacy organization intervened on one occasion to stop a prosecution policy which amounted to a “back-door amnesty,” and on another occasion to prevent a political pardons policy.²¹⁴ Referring to a 2015 case in which her organization intervened to compel the National Prosecution Authority to initiate criminal action in a twenty-year-old unlawful killing case, Sooka argues that the failure of the State to pursue cases is due to political interference to suppress apartheid-era prosecutions.²¹⁵ Sooka contends that “old order personnel are strategically placed in key places to keep tabs and obstruct.”²¹⁶

Other commentators have similarly argued that the impact of the TRC process on accountability dividends in the criminal justice system was not as clear or universally received as externally perceived. Bronwyn Leebaw, for one, argues that “[w]hen the truth came out . . . the implications of amnesty grew more salient to people and many subsequently began to champion criminal prosecution for apartheid-era abuses,”²¹⁷ particularly against former officials who continued to refuse to accept or acknowledge any responsibility.²¹⁸ Leebaw points to a

212. *Id.* at 7–8.

213. Sooka, *supra* note 199.

214. *Id.*; see also SELLING JUSTICE SHORT, *supra* note 199, at 8.

215. Sooka, *supra* note 199.

216. *Id.*

217. Leebaw, *supra* note 54, at 245.

218. *Id.* at 249.

1998 Nielsen study showing that 60% of South African whites felt the TRC was unfair and 72% believed it worsened race relations, to argue that the TRC's perceived legitimacy is deeply divided among South Africans.²¹⁹ At the same time, consistent with Gibson's findings, the apparent degree of public confidence with the institutions of the rule of law and human rights protection in South Africa are inversely correlated when disaggregated by race.²²⁰

The evidence reflected by these studies suggests therefore that, despite its initial and rightful reception as a landmark initiative in post-apartheid South Africa, the advancement of the rule of law in South Africa has at least been stunted by the absence of credible criminal prosecutions nearly twenty-five years later.

B. *Criminal Justice Without the Rule of Law at Cambodia's ECCC*

Cambodia's ECCC has been fraught from its conception and inception, and it serves as a potential cautionary tale for Nepal. In addition to serving the interests of justice, an express purpose of the ECCC's mandate was to serve the expressivist goal of demonstrating to Cambodians the functioning of a judicial process with fair trials and due process.²²¹ Simultaneously, the day-to-day interactions of the staff would enhance the capacity of Cambodian judges and lawyers, who could then transfer that skill-building to the regular justice system.²²² Contributing to effective rule of law reform is a stated goal of the ECCC by all

219. *Id.* at 274.

220. See Gibson, *Overcoming Apartheid*, *supra* note 203, at 96 (concluding that "accepting the TRC's truth does not contribute to 'irreconciliation,' as so many feared (i.e. no negative relationship exists), and that the bulk of the available statistical evidence implies that truth did indeed contribute to producing more reconciled South Africans"); Gibson, *Human Rights Culture*, *supra* note 206, at 5 (concluding that "whether a South African prefers a universalistic approach to the rule of law depends upon truth acceptance, interracial attitudes, and support for strong majoritarianism").

221. Kirsten Ainley, *Justifying Justice: Verdicts at the ECCC*, JUST. CONFLICT (Sept. 16, 2014), <https://justiceinconflict.org/2014/09/16/justifying-justice-verdicts-at-the-eccc/>.

222. *Id.*

parties, including the Cambodian government.²²³ The expectation was that the ECCC could contribute to the strengthening of the rule of law by providing capacity-building for local legal professionals, serving as a model of accountability for the population and creating demand for real accountability from the national justice system.²²⁴

However, the politicized nature of the creation of the tribunal was apparent from the outset of the negotiation process and reflected by the fact that, despite requesting U.N. assistance to set it up as early as 1997, it was not until 2003 that a formal agreement between the Cambodian government and the United Nations for its creation was hammered out, not until 2004 that the enabling legislation was enacted, and not until 2006 that the ECCC in fact became operational.²²⁵ The ECCC was a product of political rather than legal or societal goals for the Cambodian government.²²⁶ The request for U.N. assistance was a power play by Prime Minister Hun Sen to maintain internal stability, to consolidate his own and his party's power by showing some commitment to bring some Khmer Rouge (KR) leaders to justice without alienating the large numbers of KR still in society and in his own governmental ranks, and to legitimize his own government by projecting the narrative that it was just a small clique of the top leadership of the KR who committed the atrocities of the past regime.²²⁷

223. HEATHER RYAN & LAURA MCGREW, OPEN SOC'Y JUSTICE INITIATIVE, PERFORMANCE AND PERCEPTION: THE IMPACT OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 51 (Kelly Askin & David Berry eds., 2016), <https://www.opensocietyfoundations.org/sites/default/files/performance-perception-eccc-20160211.pdf> [hereinafter 2016 ECCC IMPACT STUDY].

224. *Id.*

225. Rachel Killean, *Pursuing Retributive and Reparative Justice Within Cambodia*, in RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE 466, 471 (Cheryl Lawther et al. eds., 2017); DAVID SCHEFFER, THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 10 (2007), http://www.cambodiatribunal.org/assets/pdf/court-filings/Cambodia_Scheffer_Abridged_Chapter_July_2007.pdf.

226. Abby Seiff, *Seeking Justice in the Killing Field*, 99 A.B.A. J. 50, 53 (2013).

227. *Id.*

1. *Performance*

While public trust in the ECCC has been relatively positive, there remains little or no confidence in the Cambodian system.²²⁸ The deep distrust of the national justice system, moreover, has fed a general lack of public confidence that, despite its own overall positive experience, the ECCC will have any positive impact on the regular system.²²⁹

The limited jurisdiction of the ECCC has come under criticism for overlooking crimes that took place before and after the KR regime (the temporal jurisdiction of the ECCC is limited to the period of 1975 to 1979 when the KR were in power, even though there was ongoing conflict well until the mid-1990s), failing to hold mid- or lower-ranking officers accountable (the jurisdiction of the ECCC only focuses on “senior leaders”) and failing to hold any international actors accountable (given Cold War politics, China, the U.S.S.R., the United States, and Vietnam all had their hands in the conflict at various stages).²³⁰ To date, the ECCC has only managed to bring three individuals to trial, in two cases.²³¹ There is also no plan for domestic prosecutions where the ECCC leaves off, so these cases are expected to be the end of the process—leaving victims and civil society frustrated.²³²

2. *Integrity*

The ECCC’s own perceived independence has been damaged by the public distrust of the Cambodian government and the national judiciary. Precisely because of the control that the Cambodian government exerts over the justice system as a whole and the judiciary in particular, and given that the ECCC’s national staff are drawn from the regular judiciary, public

228. 2016 ECCC IMPACT STUDY, *supra* note 223, at 71.

229. *Id.* at 71.

230. Killean, *supra* note 225, at 472–74.

231. *Id.* at 473–74.

232. *Id.* at 476.

perception of the ECCC's institutional independence has diminished.²³³

This has borne out in reality as well, unfortunately. It has become apparent that the government, manifested by the recalcitrance of the national staff, is not interested in pursuing any additional cases beyond the three or four that have been or are currently proceeding.²³⁴ Even the initiation of cases number 003 and 004 themselves were the source of contention and division between the national and international staff.²³⁵ The Cambodian government has former members of the KR in its ranks, so it has used the "destabilizing peace" argument and fear of reigniting conflict to push for limiting trials.²³⁶ The Cambodian Prime Minister himself has directly intervened to oppose further indictments, claiming it will lead to violence.²³⁷ Many members of the government, including the Prime Minister himself, are former members of the KR and therefore do not want the trials to reach too far to protect their own.²³⁸ To this end, the government has gone so far as to deny the ECCC access to potential witnesses now holding influential government positions.²³⁹ Due to this lack of political will and executive interference, arrest warrants have not been executed by the police on suspects and cases 003 and 004 have essentially stalled at the investigatory phase.²⁴⁰

Experts, observers, and advocacy groups have consistently reported that widespread corruption, political interference, and human rights abuses persist, excessive use of force by police, violence by security forces against peaceful protesters, political imprisonment, and arbitrary detentions have continued, and no

233. 2016 ECCC IMPACT STUDY, *supra* note 223, at 71.

234. *See, e.g., id.*

235. *Id.*

236. Killean, *supra* note 225, at 473–74.

237. *See, e.g., Seiff, supra* note 226, at 52–57.

238. *See, e.g., id.* at 52. The Prime Minister was a lower-ranked officer who defected to Vietnam and then assisted the Vietnamese in ousting the KR in 1979 and being installed by the Vietnamese.

239. *See* 2016 ECCC IMPACT STUDY, *supra* note 223, at 67–69.

240. *Id.*; Killean, *supra* note 225, at 475–76.

accountability for these frequent and large-scale violations by security forces has occurred.²⁴¹ The judiciary remains as weak, corrupt, and politically influenced as ever, unable or unwilling to ensure due process and fair trial rights for defendants despite repeated calls from the United Nations and others.²⁴²

On the other hand, more optimistic assessments from Cambodians themselves suggest that a form of societal accountability—if not institutional accountability—has become noticeable as, for the first time in Cambodian society, the ECCC has encouraged a *culture of debate* where it did not exist before.²⁴³ In 2009, for example, a short history of the Khmer era was included in high school history books for the first time.²⁴⁴

Despite this, most commentators are skeptical that the credibility and legitimacy enjoyed by the ECCC among Cambodians will have any noticeable “spillover effect” in the regular justice system. The Cambodian government runs roughshod over the national judiciary, so the nature of the ECCC’s hybrid structure in which the balance of power favors the nationals (compare this with the Special Court for Sierra Leone, in which the balance favored the internationals, and the ad hoc tribunals of the ICTY and ICTR which had no national government involvement or national judges or prosecutors at all) is a recipe for interference, which has been borne out in reality.²⁴⁵ Ironically, the anticipated spillover effect has operated in reverse, according to some, whereby the bad practices of a weak, politicized, and corrupted national judiciary have seeped into the ECCC among the national staff.²⁴⁶

The Open Society Justice Initiative’s (OSJI) 2016 assessment of the impact of the ECCC on the rule of law at once lists “signs”

241. Ainley, *supra* note 221, at 2–3 (citing Human Rights Watch 2014 Country Report); Seiff, *supra* note 226, at 56.

242. Ainley, *supra* note 221, at 3 (citing 2013 US Department of State Human Rights Country Report); Seiff, *supra* note 226, at 56.

243. See 2016 ECCC IMPACT STUDY, *supra* note 223, at 67–69.

244. See Seiff, *supra* note 226, at 50–52; see also 2016 ECCC IMPACT STUDY, *supra* note 223, at 67–69.

245. Seiff, *supra* note 226, at 54–55.

246. *Id.* at 56.

of hope or progress in the capacity-building of the judicial and legal professions, while acknowledging that the impact is and will remain “modest” due to the lack of political will and funding, and the existence of a culture of corruption and influence-peddling in the judiciary.²⁴⁷ The Cambodian judiciary is historically viewed by the population with fear and distrust because of the endemic lack of judicial independence, the use of courts for political ends by leaders and the lack of any rule of law.²⁴⁸ The OSJI report concludes, similarly, that the ongoing political interference in the ECCC itself may end up being counter-productive in solidifying the belief that political interference in the Cambodian legal system is just the way it is and will be.²⁴⁹

3. Capacity

Despite this, local activists and observers claim some positive indicators of enhanced capacity: the good practices and capacity of the ECCC’s international staff have rubbed off on the national staff, in terms of understanding of international law, legal skills-building, professional integrity, and understanding what an independent and transparent judicial process looks like.²⁵⁰ Anecdotal information from email exchanges with the international prosecutor of the ECCC likewise suggests that there have been some limited positive capacity dividends.²⁵¹ International staff, including the chief prosecutors’ office, have conducted trainings or have had dialogues with national judges and lawyers, as part of the Office of the High Commissioner for Human Rights’ (OHCHR) justice reform initiatives, on the subject of judicial independence.²⁵² Some staff of the ECCC have

247. 2016 ECCC IMPACT STUDY, *supra* note 223, at 52.

248. *Id.* at 52–53.

249. *Id.* at 52.

250. Seiff, *supra* note 226, at 56.

251. E-mail from Nicholas Koumjian, International Co-Prosecutor, Extraordinary Chambers in the Courts of Cambodia, to Nikhil Narayan (June 26, 2018, 6:00 AM) (on file with author).

252. *Id.*

also engaged in trainings with the national police.²⁵³ Again anecdotally, it was mentioned that national judges and prosecutors have themselves approached ECCC counterparts to ask them how to deal with particular situations.²⁵⁴ OHCHR has claimed it has successfully worked with the Cambodian investigative judge on the ECCC to develop a form template for domestic court judges to make proper findings at pre-trial detention hearings, which is now being used around the country.²⁵⁵

The OSJI's 2016 assessment also points to a few improvements in the functioning of the judiciary as signs of positive impact of the ECCC on the capacity of the domestic justice system: increased awareness of defense right to counsel; written, reasoned judgments and decisions, and improved case management tools reducing a seven-year backlog of cases to within one to two years.²⁵⁶ The assessment also notes that some of the important substantive and procedural rulings of the ECCC on key issues that would have direct relevance to the Cambodian justice system, such as prolonged pre-trial detentions, have been annotated and made available to the national judiciary as best practice examples.²⁵⁷ According to the OSJI report, checklists and protocols have been designed based on the principles of these key ECCC decisions to guide the detention decision and review process in Cambodian courts.²⁵⁸

Notwithstanding these achievements, these same assessments caution against over-selling optimism by noting that these micro-level initiatives neither get at the core issue of entrenched power structures nor directly address the judicial independence and corruption problem in Cambodia, especially in the short-term.²⁵⁹ Until such time as these deeper structural issues are eradicated, the impact of Cambodia's criminal

253. *Id.*

254. *Id.*

255. *Id.*; see also 2016 ECCC IMPACT STUDY, *supra* note 223, at 57.

256. 2016 ECCC IMPACT STUDY, *supra* note 223, at 55–56.

257. *Id.* at 57.

258. *Id.*

259. See *id.* at 58.

accountability mechanism on improving the rule of law will be limited at best.

C. Empirical Studies of Transitional Justice's Impact on the Rule of Law

Transitional justice discourse, it is argued, suffers from a “critical impact gap” and lacks evidence-based research and data that could inform the design and implementation of responsive transitional justice mechanisms.²⁶⁰ Janine Clark itemizes the challenges of “impact” studies in transitional justice: nebulous concepts lacking consensus on definition; imprecise targets; multiple independent variables, not all of which are even known or understood; lack of clarity on how these multiple variables interplay; and the difficulty of establishing causation and difficulty of timing because “impact” is a process that can be fluid and non-linear—i.e., “not static but fluctuating.”²⁶¹ Some commentators criticize the generalized assumption that all transitional justice mechanisms equally restore the rule of law, arguing that this conclusion is not borne out by available empirical data.²⁶² Padraig McAuliffe, for example, argues that the “diversification of mechanisms”—i.e., beyond justice and the law—reflects the increasing concern of victims, perpetrators, and society as a whole, but neglects the impact of these extrajudicial mechanisms on the justice system that they bypass.²⁶³ Echoing others, McAuliffe notes the “surprisingly under-analyzed” impact of transitional justice on the rule of law in the long term, stating:

Rule of law issues such as bolstering the legitimacy of national justice systems, the exemplary purpose of de-politicized trials and equality before the law which were obscured and under-

260. See Janine Natalya Clark, *Transitional Justice, Truth and Reconciliation: An Under-Explored Relationship*, 11 INT'L CRIM. L. REV. 241, 243–44 (2011).

261. *Id.* at 246–47.

262. See McAuliffe, *supra* note 12, at 130–31.

263. See *id.* at 131.

played in earlier transitional justice discourse have returned to the fore, and alert practitioners to the dangers of revising the ordinary principles of justice even in the pursuit of the most laudable transitional imperatives.²⁶⁴

Later in the piece, McAuliffe questions the overall impact of alternative justice mechanisms, explaining:

The authority of law depends ultimately on its legitimacy, but systematically circumventing criminal statutes and the court system on the grounds of expediency [i.e., peace and stability, couched as “reconciliation”] can have deleterious effects on the rule of law in the long-term, and this possibility should temper at least some of the enthusiasm for the laundry list of alternative processes.²⁶⁵

Despite the inherent challenges, transitional justice experts have nevertheless begun to transition from case study analysis to more large-data empirical analysis as a means to glean broader lessons of relative “impact” and potential for “success” in transitional justice.²⁶⁶ To the extent that success can be measured, several of these studies have concluded that prosecutions have been necessary but not sufficient require-

264. *Id.*

265. *Id.* at 150.

266. See generally Herman et al., *supra* note 15 (examining the relationship between transitional justice and peacebuilding in countries emerging from conflict); Geoff Dancy & Eric Wiebelhaus-Brahm, *Timing, Sequencing, and Transitional Justice Impact: A Qualitative Comparative Analysis of Latin America*, 16 HUMAN RIGHTS REVIEW 321 (2015) (exploring how the timing and order in which transitional justice mechanisms are implemented impacts democratic development in Latin America); Tricia D. Olsen et al., *The Justice Balance: When Transitional Justice Improves Human Rights and Democracy*, 32 HUMAN RIGHTS QUARTERLY 980 (2010) (using data from countries that transitioned from authoritarian rule to democratic rule to demonstrate how combinations of certain mechanisms positively or negatively impact human rights and democracy); Sikkink & Walling, *supra* note 17 (discussing the development of transitional justice in Argentina).

ments in the vast majority of transitional cases.²⁶⁷ The same empirical evidence suggests that the choice of transitional justice measures ought not be binary—more successful processes have relied on a holistic approach engaging multiple tools, and not on any one or even two transitional justice mechanisms.²⁶⁸ Tricia Olsen’s study suggests, for instance, that while no one particular mechanism alone is decisive, the existence of trials and amnesties in some combination, irrespective of whether there is a TRC process, decisively produces a more positive effect on future human rights protection.²⁶⁹ This helps explain why the “legitimacy of the legal system is undermined” by not confronting human rights violations.²⁷⁰

Brigitte Weiffen’s study likewise acknowledges that the data does not definitively prove a clear correlation between transitional justice mechanisms and the rule of law, and that the degree of this impact is further affected by numerous other variables: timing, causality, and international pressure.²⁷¹ She does argue, nonetheless, that the survey demonstrates that confronting the past through prosecutions has a positive impact on the rule of law.²⁷²

To the extent that the level of ongoing human rights abuses or, conversely, protections against further abuses is a measure of the impact on the rule of law, Kathryn Sikkink and Hun Joon Kim have concluded based on their recent study that the impact of trials on the rule of law has been decidedly positive because it reflects an emerging respect for, or culture of, the rule of

267. See Herman et al., *supra* note 15, at 17; Dancy & Wiebelhaus-Brahm, *supra* note 266, at 335–37; Olsen et al., *supra* note 266, at 982, 996–99; Sikkink & Walling, *supra* note 17, at 308; Weiffen, *supra* note 57, at 129–30.

268. See Herman et al., *supra* note 15, at 17; Dancy & Wiebelhaus-Brahm, *supra* note 266, at 335–37; Olsen et al., *supra* note 266, at 982, 996–99; Sikkink & Walling, *supra* note 17, at 308; Weiffen, *supra* note 57, at 129–30.

269. Weiffen, *supra* note 57, at 129–30.

270. *Id.* at 130.

271. *Id.* at 138–42.

272. *Id.* at 138.

law.²⁷³ They endorse, based on their study, the “mutually reinforcing” nature of the rule of law and justice in transitional justice, declaring that “developments in the rule of law have contributed to transitional justice,” and, conversely, “successful” transitional justice may improve the rule of law.²⁷⁴

On the other hand, at least one such study of the impact of domestic and international trials on peace and human rights improvement—as a reflection of the respect for the rule of law—has concluded that trials have neither a positive nor a negative impact on either.²⁷⁵ The study suggests that it is those governments that provide human rights protections, as opposed to prosecutions or retributive justice for their abuse, that are in fact generating the respect for human rights and the rule of law that is necessary for lasting peace.²⁷⁶ The authors of this study themselves acknowledge, however, that such large-data statistical analysis does not reflect whether the instance of trials prevented further backslide.²⁷⁷ The survey cannot determine conclusively whether conditions might have continued to worsen in the absence of prosecutions²⁷⁸—that is, whether post-conflict justice might have been “necessary, but not sufficient.”²⁷⁹

In any event, all the studies referenced in this Article, including this one, whether quantitative or qualitative, suffer from similar constraints. Whereas qualitative analyses are limited in their prescriptive value by the fact that they are confined to examination of one or a few countries,²⁸⁰ quantitative studies are limited by an often reductive, binary examination of one or two mechanisms in isolation that provide some

273. See Kathryn Sikkink & Hun Joon Kim, *The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations*, 9 ANN. REV. L. & SOC. SCI. 269, 271 (2013).

274. *Id.* at 271.

275. See James D. Meernik et al., *The Impact of International Tribunals and Domestic Trials on Peace and Human Rights After Civil War*, 11 INT'L STUDIES PERSPS. 309, 320–22 (2010).

276. *Id.* at 320.

277. *Id.* at 322.

278. *Id.*

279. *Id.*

280. Chandra Lekha Sriram, *Beyond Transitional Justice: Peace, Governance, and Rule of Law*, 19 INT'L STUDIES REV. 53, 59 (2017).

evidence of positive correlation based on a static snapshot.²⁸¹ In either case, while such studies may be able to demonstrate correlation by negative inference, it is difficult to draw definitive conclusions of causation. The causal links may go, as Chandra Lekha Sriram argues, in opposite or circular directions.²⁸² Conclusions about causality can only be extrapolated, at best, by inference—and more precisely, by negative inference. Also, such studies cannot reflect relative weight of factors, or whether and to what extent other non-transitional-justice-related factors have any bearing, including actors themselves such as the United Nations, human rights organizations, or civil society.²⁸³ Hence, the referenced studies here have extrapolated that trials, at best, have been necessary but insufficient to positively influence human rights, the rule of law, and peace, and, at worst, have not had a negative influence on the rule of law or peace, as feared by “peace over justice” proponents.²⁸⁴

IV. A ROADMAP FOR TRANSITIONAL JUSTICE IN NEPAL

This Part draws together the preceding analysis in order to answer the question posed at the outset: whether transitional justice can deliver in restoring the rule of law in Nepal in the absence of criminal justice. It begins by drawing some observations and lessons from the comparative survey in the preceding Part. It then makes a case for why Nepal does need to initiate a meaningful criminal justice process in the interest of the rule of law and the broader transitional justice goals of lasting peace. This Part then provides a rudimentary roadmap for how that meaningful criminal justice process should be structured to ensure its meaningfulness.

281. *Id.*

282. *Id.*

283. *Id.*

284. *See supra* Section I.B.2.

A. Lessons from Comparative Studies

As the above discussion suggests, measuring the impact of transitional justice on the rule of law is far from an exact science. The case study analyses of both South Africa²⁸⁵ and Cambodia²⁸⁶ provide some anecdotal indicators of positive correlations between criminal justice, on one hand, and public confidence in and micro-level capacity dividends on the rule of law, on the other. But these case studies just as emphatically reaffirm the structural challenges of measuring impact at any given time on a concept—“the rule of law”—that is inherently fluid and often evolves in a non-linear fashion, and that is influenced by a complex mix of tangible and intangible factors. While South Africa’s TRC has been hailed internationally as a model for non-retributive justice and reconciliation in ethnically-divided transitioning societies, more than twenty years on, evidence suggests that the sentiment is not uniformly shared amongst South Africans themselves. Particularly when disaggregated by ethnic group, South Africans’ confidence in their justice system and the rule of law—and more broadly, their own perceptions of their country’s transitional justice process in reconciling race relations—has been dampened by the absence of a robust criminal justice process to complement the existing truth-seeking process.²⁸⁷ In contrast, Cambodia’s experience to date suggests that credible criminal trials are not the panacea to restore the rule of law in the absence of other critical factors, such as the political will and institutional reforms necessary to rebuild the system. Despite some beneficial spillover effect on the capacity of the national judiciary through sheer force of its presence and the demonstrative effect of its engagement of national staff, the impact of the ECCC on the overall legitimacy of the Cambodian justice system will be limited so long as the entrenched power structure, lack of political will for account-

285. *See supra* Section III.A.

286. *See supra* Section III.B.

287. For a detailed discussion, see *supra* Section III.A.

ability, and deep politicization of the judiciary remains in place.²⁸⁸

Some quantitative data analyses suggest that empirically there is no net impact from transitional justice mechanisms, including prosecutions, on the rule of law; at best, the impact is not detrimental.²⁸⁹ Other quantitative studies discussed above are more conclusive in determining that prosecutions in particular do in fact have a discernible positive impact and are, at worst, “necessary but insufficient.”²⁹⁰ Some experts go further and argue that the “level” of rule of law (however defined and measured) that existed prior to conflict is the “maximum” level of rule of law that can be “restored” after the conflict. McAuliffe argues, for instance:

The whiggish presentation of transitional justice as inherently restorative (as opposed to merely symbolic) of the rule of law is highly questionable in [post-conflict] states that historically have little in the way of institutional strength, history of cultural commitment on the part of rulers and the ruled to the rule of law or human rights norms, or enjoyed something approximating the rule of law but saw it eroded by conflict.²⁹¹

Sriram also suggests that the reverse causal connection may in fact exist: a strong independent judiciary must exist first in order to facilitate successful and legitimate accountability processes and, thereby, successful transitional justice.²⁹² At the very least, according to Sriram, these factors may be mutually reinforcing and not exactly linear.²⁹³

288. For a detailed discussion, see *supra* Section III.B.

289. See *supra* Part III.

290. See *supra* Part III.

291. Padraig McAuliffe, *Transitional Justice's Impact on Rule of Law: Symbol or Substance?*, in RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE 74, 84 (Cheryl Lawther et al. eds., 2017).

292. Sriram, *supra* note 280, at 61–62.

293. *Id.*

This line of argument helps explain Cambodia's shortcomings to date. Cambodia's experience was inevitable, according to some, given the "inherent danger" in a hybrid tribunal mixing with a legal system in a country with weak or non-existent rule of law and a weak and politicized judiciary that is ill-equipped to take advantage of and amplify the salutary benefits of the ECCC.²⁹⁴ Dahlia Simangan thus calls the ECCC a "trophy" for a government that was merely trying to consolidate its own power and legitimacy.²⁹⁵

McAuliffe concludes that the rule of law may not be the right objective of transitional justice.²⁹⁶ He argues that the rule of law should be perceived as cultural commitment with substantive rights-based content, which would give a more realistic understanding of whether, how, and to what extent transitional justice work can actually promote it.²⁹⁷ McAuliffe further asserts that the impact of the transitional justice process with respect to the rule of law is more symbolic and illusory than concrete, and that practitioners ought to focus on the germination of a culture of accepting certain norms and values predicated on respect of human rights and a commitment to restrain government interference.²⁹⁸ He recommends "embed[ding] initial mechanisms that can promote the emergence and the deepening of rule-of-law functions in the longer term."²⁹⁹

B. *Why (Meaningful) Criminal Justice Matters for Nepal*

Be that as it may, the historical context of Nepal's conflict and post-conflict experience—the social, economic, and political structures entrenching a culture of impunity that was at the root of the continuing conflict—distinguish it from the South

294. Dahlia Simangan, *When Hybridity Breeds Contempt: Negative Hybrid Peace in Cambodia*, 39 *THIRD WORLD Q.* 1525, 1532–33 (Feb. 21, 2018), <https://www.tandfonline.com/doi/pdf/10.1080/01436597.2018.1438184?needAccess=true>.

295. *Id.*

296. McAuliffe, *supra* note 291, at 90.

297. *Id.* at 88–89.

298. *Id.* at 87.

299. *Id.* at 92.

African and Cambodian experiences. Notwithstanding the qualified successes or failures of those and other studies discussed above, the demonstrative or expressivist value of a genuine criminal justice process has strong resonance for the chances of success in Nepal's transition.

As a static measure of "the rule of law" quantified, Nepal is not in the same dire situation as other countries emerging from conflict. While it is a low-income country, according to the WJP's rule of law index, Nepal's static rule of law indicators reflect a functional judiciary and, at least on paper, a constitution and laws protecting (to varying degrees of compliance with international standards) fundamental human rights that are above other similarly economically situated countries emerging from conflict.³⁰⁰ Indeed, as noted, during the period of conflict, the judiciary in Nepal, despite high degrees of systemic corruption, maintained a degree of functional independence and respect among the general public, even if regularly ignored by the government.³⁰¹ The national judiciary dealt with, by some accounts, as many as 200 conflict-related cases during the conflict period alone.³⁰² In its Universal Periodic Review (UPR) submission in 2015, the Nepal National Human Rights Commission (NHRC) noted that the Supreme Court had instituted a strategic plan to build the capacity of regional and district courts, to increase access to justice, and to train judges on fair trial standards such as the rights to counsel and habeas corpus—problems that the NHRC documented are still prevalent in the justice system and which amount to delays and denial of fair administration of justice.³⁰³

Yet, as the emblematic cases discussed in Part II demonstrate, the integrity and effectiveness of the judiciary has been pro-

300. See WORLD JUSTICE PROJECT, *supra* note 70, at 35, 39, 42.

301. See *supra* Part II; Interview with Pradeep Wagle, Nepali Human Rights Lawyer, in Geneva, Switzerland (June 6, 2018) (on file with author).

302. Interview with Pradeep Wagle, *supra* note 301.

303. Rep. Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, Submitted to the United Nations Human Rights Council on its Twenty-Third Session, U.N. Doc. A/HRC/WG.6/23/NPL/1, at 14, 17–21 (Nov. 13, 2015) [hereinafter 2015 Nepal Second UPR Submission].

gressively undermined by a government and security forces that have ignored or flouted repeated court directives.³⁰⁴ Nepal has not undertaken a systematic vetting process as a means of non-retributive accountability.³⁰⁵ To the extent that the judiciary served a de facto vetting function in investigating, trying, and convicting—at least in a handful of cases—perpetrators of abuses, the authorities have invariably reversed these accountability gains by granting pardons, as in the case of Dhungel in which authorities failed to implement convictions of the individuals convicted of Maina Sunuwar’s murder, or by generally ignoring overwhelming credible evidence of criminal responsibility, as in the case of Colonel Lama.³⁰⁶ This severely weakens the rule of law by not only undermining the integrity and effectiveness of the criminal justice system, but also by failing to remove or contain “spoilers” from positions of authority where they can continue to commit abuses in the future. The OHCHR concluded in 2012 that, despite credible reports of at least (conservatively) 9000 instances of serious human rights or international humanitarian law violations or abuses, the lack of any prosecutions to date amounted to a “systematic failure on the part of responsible authorities to bring individuals to justice, and . . . this lack of accountability served to perpetuate the commission of additional abuses during the conflict. Accountability, therefore, remains a matter of fundamental importance to Nepal as it deals with its legacy of conflict.”³⁰⁷

This failure to address impunity perpetuating more abuse was borne out again most recently in 2015 with the violence in Nepal’s southern Terai region.³⁰⁸ Nepal has a long history of tensions, subjugation, abuse, and flair-ups into violence and even low-grade conflict with the ethnic minorities in the

304. *See supra* Part II.

305. *See supra* Part II.

306. *See supra* Part II.

307. Nepal Conflict Report, *supra* note 88, at 176.

308. *See supra* Part II (discussing the Terai violence).

country.³⁰⁹ Some have noted that even during the period of conflict with the Maoist insurgency, ethnic and regional nationalist movements were cropping up as a result of sentiments of persistent marginalization along ethnic, class, and regional lines.³¹⁰ In August and September of 2015, this ethnic tension flared up again when as many as forty-five to fifty individuals, including at least nine police personnel, were killed in clashes between protesters and security forces.³¹¹ Demonstrations among ethnic minority groups in the southern Terai region of Nepal broke out in protest against a controversial constitution-making process in which a non-transparent political arrangement between the six main political parties attempted to demarcate new federal provinces in a manner that would potentially further politically marginalize these minority ethnic groups.³¹² The demonstrations reflected long-standing grievances among Madhesi and Tharu ethnic minority groups, predominantly in the southern and western regions, of discrimination and marginalization by the traditional hill-country-elite-dominated political power structure in Kathmandu.³¹³ Various human rights organizations reported that, while the demonstrations turned violent and resulted in the deaths of as many as ten police personnel, the security forces resorted to indiscriminate and excessive use of deadly force in order to suppress the demonstrations.³¹⁴ In the immediate aftermath, there were further credible reports of ongoing human rights abuse by police compounding the violence by

309. See, e.g., *Protest and Police Crackdown in the Terai Region of Nepal*, *supra* note 106, at 1–4 (providing a brief historical overview).

310. See, e.g., Kattel, *supra* note 94, at 66.

311. Amnesty Int'l, *Nepal: Police Must Refrain from Using Excessive Use of Force in Nepal Protests*, AI Index ASA 31/2300/2015 (Aug. 19, 2015), <https://www.amnesty.org/download/Documents/ASA3123002015ENGLISH.pdf> [hereinafter *Excessive Force*]; *Protest and Police Crackdown in the Terai Region of Nepal*, *supra* note 106, at 1–4.

312. *Excessive Force*, *supra* note 311; *Protest and Police Crackdown in the Terai Region of Nepal*, *supra* note 106.

313. *Excessive Force*, *supra* note 311; *Protest and Police Crackdown in the Terai Region of Nepal*, *supra* note 106.

314. *Excessive Force*, *supra* note 311; *Protest and Police Crackdown in the Terai Region of Nepal*, *supra* note 106, at 1–3.

arbitrarily arresting, torturing and forcing confessions from ethnic minorities in retaliation for the deaths of the police personnel.³¹⁵ To date, no credible investigations or accountability processes have been initiated by competent authorities, despite calls from the Nepal National Human Rights Commission (NHRC) and continued demands from victims as to the status of their “cases.”³¹⁶

In its 2015 Universal Period Report (UPR) to the HRC, the NHRC documented as many as ninety-seven unlawful killings, primarily in the southern and western Terai region, that occurred during the prior UPR reporting period, either due to excessive and deadly force in response to protests or due to custodial deaths.³¹⁷ The NHRC also points out that there have been no investigations into any of these documented incidents, despite calls by the NHRC and court orders by the Supreme Court, and reiterates that Nepal police often even refuse to file the FIRs.³¹⁸ The NHRC’s 2015 UPR submission also notes that incidents of torture and ill treatment continue to be prevalent.³¹⁹

The potential gravity and long-term consequences of this ongoing impunity for gross human rights violations is nowhere more apparent than in the aftermath of the 2015 Terai violence. Madhesi and Terai-based political parties have been demanding increased regional decentralization or federalism in a new constitution that guarantees regional semi-autonomy for some time.³²⁰ Following the 2015 Terai violence, there was a clear hardening of public sentiments on this issue along ethnic and regional lines. For their part, the assorted political parties encouraged and amplified this hardening of sentiments. If the broader issue of impunity and the rule of law is not adequately addressed, the tentacles of this impunity can conceivably have far-reaching consequences for renewed conflict along these

315. *Human Rights Violations of Indigenous Tharus*, *supra* note 188, at 5–6.

316. 2015 Nepal Second UPR Submission, *supra* note 303, ¶¶ 14–16; Interview with Mohna Ansari, Comm’r, Nepal National Human Rights Comm’n (June 2018) (on file with author).

317. 2015 Nepal Second UPR Submission, *supra* note 303, ¶ 17.

318. *Id.*

319. *Id.* ¶ 19.

320. *See, e.g., Protest and Police Crackdown in the Terai Region of Nepal*, *supra* note 106, at 3–5.

other societal fissures and fault lines.³²¹ Some have indeed expressed the fear that persistent socio-economic, political, and regional marginalization and inequality will feed into a regional nationalist movement that demands autonomy or outright independence.³²²

The failure to address impunity in the context of transitional justice is thus merely a microcosm of this broader culture of impunity in Nepal that self-perpetuates into ongoing cycles of violence, distrust, and abuse throughout Nepal's society. To combat the latter, Nepal must address the former.

C. Ensuring Criminal Justice in Nepal Is Meaningful

If effective criminal justice, in combination with a holistic set of transitional justice measures, has an expressivist value that leaves a positive mark on the rule of law, the converse is also true: whereas "successful" transitional justice demonstrates a renewed commitment to the rule of law, incomplete or unjust transitional justice undermines the rule of law by calling into question the basic principle of equality before the law and perpetuating the structural impunity at the root of the conflict.³²³ It is imperative, therefore, that the process itself is and is seen to be fair and credible in the conduct of accountability proceedings. An essential element of success therefore is that the process adheres to basic principles of the rule of law—transparency, legality, procedural fairness, equality, and non-discrimination in application—thereby "modeling" the transitional justice process for the rule of law.³²⁴ The focus of transitional justice ought to be on the process, not the outcome. This helps strengthen public confidence and expectations. This also helps emphasize a "consultative and participatory approach," "localizing" the process.³²⁵

321. See Kattel, *supra* note 94, at 66–67.

322. See, e.g., Bhattarai, *supra* note 94, at 149–54.

323. Weiffen, *supra* note 57, at 140–41.

324. Elizabeth Andersen, *Transitional Justice and the Rule of Law: Lessons from the Field*, 47 CASE W. RES. J. INT'L L. 305, 310–12 (2015).

325. *Id.* at 312–14.

A critical element of the legitimacy of any criminal justice mechanism in transitional justice is the selection of cases and alleged perpetrators to bring to trial. Given the scale of atrocities and the number of victims and perpetrators in the conflict, it is unrealistic to expect that each perpetrator can be brought to justice and every crime can be redressed in full—and Nepal is no exception. Pragmatism counsels toward prioritizing the most heinous crimes and the most culpable perpetrators.³²⁶ As an expressivist endeavor, selective prosecution can be acceptable when it advances the purpose of trials and larger goals of the transition.³²⁷ However, this selectivity must be objective, transparent, and based on strategic considerations rather than political expediency. McAuliffe warns:

[W]hen punishment is viewed not as legally obligatory but rather as a means to achieve socially desirable goals, the dominant paradigm is not . . . pure legal justice . . . but rather successful prosecution, which may . . . militate against it. . . . [T]he utilitarian benefits of trials such as retribution, truth and reconciliation, social pedagogy, and short-term pacification in mediating transition are potentially immense. However . . . pursuit of these goals has been underpinned by ambivalence as regards due process enshrined in national or international law, with strict legality circumvented where deemed necessary or expedient.³²⁸

Conversely, “exemplary prosecutions” based on proportionality of culpability (i.e., senior-most decision-makers first) and severity of the crime, may be unavoidable and may still serve

326. McAuliffe, *supra* note 12, at 134.

327. *Id.* at 134–35.

328. *Id.* at 137.

to affirm the rule of law when they are strategic and not political.³²⁹

In recent public statements, the GON has recognized that “Nepal’s peace process cannot be considered successful without completing the final step of dealing with conflict era human rights violations through the process known as transitional justice.”³³⁰ Yet, while recognizing the importance of prosecutions as a deterrent for future conflict, the GON has also publicly stated its desire for leniency in sentencing.³³¹ The AGO has stated publicly and privately that it intends to prosecute a select few emblematic cases, based on recommendations from the transitional justice commissions, through a special tribunal established to deal with conflict-era cases including those already *sub judice* in the regular courts.³³² These comments and the latest draft proposal for a special court³³³ raise precisely these concerns of an accountability process that will be no more than another “box-ticking” exercise, based on political expediency, rather than strategic objectives. The proposed criminal justice mechanism, which is much-needed in Nepal, must ensure that it fully addresses the interests of justice, the rights of victims, and the goals of the transitional justice process. Among other things, the jurisdiction of crimes must not be unduly limited and must be defined consistent with international standards; any form of alternative sentencing, if at all employed, must not be, nor appear to be, disproportionately or arbitrarily lenient relative to the crimes.³³⁴ There must not be

329. See *id.* at 134 (quoting RUTI TEITEL, *TRANSITIONAL JUSTICE* 4 (2000)); see also *Rule-of-Law Tools*, *supra* note 57, at 5–9.

330. Hari Phuyal, *The Struggle for Transitional Justice*, *NEPALI TIMES* (Apr. 6, 2018), <https://www.nepalitimes.com/here-now/the-struggle-for-transitional-justice/> (Mr. Phuyal is the former Attorney General of Nepal and currently chief adviser to the current Attorney General on the transitional justice process); Agni Prasad Kharel, Nepal Attorney General, Public Statement at the 2018 International Human Rights Conference to Address Impunity in South Asia (Apr. 9, 2018) (on file with author).

331. Interview with Conflict Victims and Civil Society Stakeholders, *supra* note 163; Phuyal, *supra* note 330.

332. Interview with Conflict Victims and Civil Society Stakeholders, *supra* note 163; Phuyal, *supra* note 330.

333. See 2018 TRC Act Draft Amendment Bill, *supra* note 153, ¶ 21; see also *supra* Part II.

334. See 2018 TRC Act Draft Amendment Bill, *supra* note 153, ¶ 21; see also *supra* Part II.

blanket pardons or amnesties for serious international crimes; the proposed special court cannot, by the Nepal Supreme Court's own jurisprudence, impermissibly usurp the primary jurisdiction of the national judiciary by coopting *sub judice* cases; and, also in keeping with Supreme Court directive, the AGO must not have unfettered discretion to withdraw pending cases without cause.³³⁵

On these last two points, the Nepal Supreme Court has made clear, through a series of conflict-era decisions, the exact jurisdictional boundaries and parameters of transitional justice mechanisms vis-à-vis the judicial branch of the government. Drawing on Nepal's international legal obligations, in its several rulings on the transitional justice process the Supreme Court has consistently held that the judiciary's primary criminal jurisdiction cannot be displaced, or ignored, by investigating and prosecuting authorities by virtue of any ad hoc transitional justice mechanism or political deal embodied in the CPA.³³⁶ The Supreme Court has ruled further that the AGO's discretionary authority to withdraw *sub judice* criminal cases as "politically motivated" must not be abused or manipulated to perpetuate impunity for politically influential defendants.³³⁷ The Court, in the same ruling, has elaborated that any such withdrawal would be deemed illegitimate if it is based on an over-broad interpretation of what constitutes a "political case," and if it fails to clearly and adequately demonstrate that the sole purpose of the matter in question is one of political retaliation.³³⁸ The Nepal Supreme Court has also ruled that the GON has an obligation to implement a vetting process by law, as a means of ensuring accountability, human rights, and the rule of law.³³⁹

The draft proposals to amend the TRC and establish a special court, as reflected by recent public statements by government

335. See 2018 TRC Act Draft Amendment Bill, *supra* note 153, ¶ 21; see also *supra* Part II.

336. See INT'L COMM'N OF JURISTS, TRANSITIONAL JUSTICE AND THE RIGHT TO REMEDY vii–xii (2012).

337. See *id.* at x (reprinting full translation of *Government of Nepal v. Gagan Raya Yadav*).

338. See *id.*

339. See *id.* at xi (reprinting full translations of *Lila Dhar Bhandari v. Government of Nepal* and *Sunil Ranjan Singh v. Prime Minister and Officer of the Prime Minister*).

officials and a recently publicized draft bill, risk running afoul of each of these directives from the Supreme Court.³⁴⁰ It remains to be seen, in light of recent developments in rushing through the renewal and reappointment of the two commissions, whether the GON genuinely intends to amend the TRC Act as promised. Nevertheless, a transitional justice process, and specifically a criminal justice process, that undermines the Supreme Court's clear directives, would run counter to the demonstrative aims of transitional justice in reaffirming the rule of law in Nepal. Even to the extent that a special judicial mechanism is contemplated, the national courts must still have a role to play in dealing with the numerous cases that any proposed special mechanism will necessarily be unable to handle. In South Africa, for instance, it has been argued that the South African TRC made the mistake of "sidelining" the regular judicial system, to the detriment of promoting judicial reform and the rule of law.³⁴¹ In the case of the South African TRC's conditional amnesty process, it has been argued, the application for amnesty ought to have been decided by the judiciary, so as to bring it into a "protagonist's role in rebuilding the legal system's credibility," and to "exploit" the political space available to support and strengthen the rule of law.³⁴² Nepal ought not make a similar mistake, even with a special court. Criminal justice in Nepal's transitional justice process must inspire public confidence by being victim-centered and transparent, such that the restoration of victims' dignity is central and the integrity of the process is guaranteed.³⁴³

1. *Non-retributive justice measures to complement criminal justice*

It is now axiomatic, to the point of cliché, to state that, as essential as criminal justice is, accountability in transitional justice must be a holistic, integrated, and victim-centered

340. See *supra* Part II.

341. See HAYNER, UNSPEAKABLE TRUTHS, *supra* note 197, at 106.

342. *Id.* (quoting Rob Weiner, Latin America Program Director, Lawyers Committee for Human Rights).

343. Rule-of-Law Tools, *supra* note 57, at 5–6.

process that utilizes the panoply of restorative justice tools to complement and mutually reinforce prosecutions in order to restore the rule of law and, thereby, achieve lasting peace.³⁴⁴ Having said that, Nepali conflict victims and civil society stakeholders have expressed several key criteria in addition to criminal accountability that are necessary to restore the rule of law through the transitional justice process moving forward.³⁴⁵

a. *Truth-seeking*

The draft amendment bill to the TRC Act will bar amnesties for four conflict-era crimes—murder, enforced disappearance, torture, and rape—but does not include in its jurisdiction crimes against humanity and war crimes, despite credible evidence of both.³⁴⁶ The draft TRC amendment also does not address a key concern expressed by victim representatives and civil society with respect to the composition of the transitional justice commissions. It was emphasized that no amendment would restore the credibility of the transitional justice commissions in the eyes of victims and other stakeholders without replacing the current members, who are deemed to be politically compromised, with those who are and are seen to be independent, impartial, and free of political interference.³⁴⁷ Finally, an essential function of the TRC is to address the structural inequalities and root systemic causes of the conflict.³⁴⁸ The proposed TRC amendment must not therefore effectively turn the commissions into the investigative arm of the AGO instead of an independent truth-seeking body, by tasking them with conducting the full scope of investigations in those

344. See, e.g., McAuliffe, *supra* note 12, at 147.

345. Interview with Conflict Victims and Civil Society Stakeholders, *supra* note 163.

346. *Id.*; Phuyal, *supra* note 330.

347. Interview with Conflict Victims and Civil Society Stakeholders, *supra* note 163; Phuyal, *supra* note 330.

348. See Ghanashyam Khadka, *Justice Expert Tells Nepal to Make Act Changes Public*, KATHMANDU POST (Apr. 20, 2018), <http://kathmandupost.ekantipur.com/news/2018-04-20/justice-expert-tells-nepal-to-make-act-changes-public.html> (quoting Ms. Priscilla Hayner, U.N. Mediation Support Unit Transitional Justice expert, on criteria for TRC amendments).

emblematic cases recommended for criminal prosecution *as a substitute for the AGO*.³⁴⁹

b. *Victim participation*

Victims maintained that neither the TRC Act amendments nor any possible future criminal justice process would sufficiently restore victims' faith in the legitimacy of the justice system if they continued to proceed in a non-transparent, non-victim-centered approach.³⁵⁰ Credible criminal investigations, even where no sufficient evidence was available to pursue prosecution, and credible, transparent, good faith reporting by the transitional justice commissions, including explaining why only certain complaints and cases could be addressed in recognition of realistic capacity constraints, would go a long way in advancing Nepal's transitional justice goals and the aspirations of victims.³⁵¹ In sum, both the process and the uncovering of the truth are as important to victims as the final punishment.³⁵² This—the process of completing the cases through the judicial pipeline, as opposed to the actual outcome of the individual cases themselves—is an integral part of the expressivist impact of prosecutions on restoring the rule of law.

V. CONCLUSION

This Article has attempted to determine whether transitional justice in the absence of criminal justice can succeed in restoring the rule of law in Nepal. Specifically, the Article has examined whether the transitional justice measures absent prosecutions that the GON and ruling parties have undertaken thus far are sufficient to restore victims' demands for justice and dignity and the public's trust in the State's commitment to the rule of law.

349. See 2018 TRC Act Draft Amendment Bill, *supra* note 153; Phuyal, *supra* note 330.

350. Interview with Conflict Victims and Civil Society Stakeholders, *supra* note 163.

351. *Id.*

352. *Id.*

What is apparent is that the transitional justice process in Nepal is inextricably linked to justice and accountability. As a by-product of the nature of the conflict, the subsequent peace process and transition to representative governance, and the conduct of the ruling parties, military, and other political establishment elites, the ongoing willingness of victims and civil society to invest faith in any transitional justice process depends on robust and credible accountability. The contours of this credibility are directly linked to the degree to which victims feel invested in the *process* of the transitional justice measures undertaken. As much as the result or outcome of any individual case, incident, or mechanism, the process by which these measures are undertaken—transparently, inclusively, and participatorily—will determine the likelihood of successful transition. Given Nepal’s history of conflict rooted in deep socio-economic and political hierarchies and inequalities, and its entrenched culture of impunity that has prevented any real progress in dealing with its past, the potential expressivist value of prosecutions on the rule of law makes criminal justice carried out in a credible manner crucial for Nepal’s transitional justice success.

The success of transitional justice in Nepal is critical not merely for Nepal’s own future prosperity and national well-being. Transitional justice in Nepal has regional value as well, as a potential roadmap for neighboring countries—such as Sri Lanka, Bangladesh, Myanmar, and even India—dealing with their own post-conflict transitions. To date, South Asia has demonstrably limited or no “good practice” examples for addressing serious international crimes or mass atrocities through criminal justice and accountability processes. Nepal is at a pivotal juncture in its own transitional justice journey and still has an opportunity to “get it right”; if it does, it can be the long-awaited “good practice” model for the region.

Finally, there is remarkably little or no in-depth scholarly literature on post-conflict justice and accountability in South Asia. While the international human rights community has documented extensively the alleged atrocities committed in

various contexts in South Asia, and has called for transitional justice and criminal accountability in these places, systematic analyses of the successes and failures to date, and keys to future success, are less available. This Article attempts to begin filling this void.