

TRANSITIONAL JUSTICE PROCESS IN NEPAL

THE STATE OF THE ART AND QUESTIONS AND SCENARIOS
FOR THE FUTURE IN NEPAL

CARLOS FERNÁNDEZ TORNÉ

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© Carlos Fernández Torné
carlosforne@gmail.com

© 2013 Institut Català Internacional per la Pau
Gran Via de les Corts Catalanes, 658, baixos 08010 Barcelona
T. +34 93 554 42 70 | F. +34 93 554 42 80
icip@gencat.cat | www.icip.cat

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ABBREVIATIONS

APF	Armed Police Force
<i>Basic Principles and Guidelines on the Right to a Remedy and Reparation</i>	Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
CA	Constituent Assembly
CAT	Convention Against Torture
CDO	Chief District Officer (Head of the Government at a District level in Nepal)
COI	Commission of Inquiry
CPA	Comprehensive Peace Agreement
CPN (Maoist)	Communist Party of Nepal (Maoist)
CPN-UML	Communist Party of Nepal (Unified Marxist-Leninist)
Declaration on Enforced Disappearances	<i>Declaration on the Protection of All Persons from enforced Disappearances</i>
FIR	First Information Report
GA	(United Nations) General Assembly
HRC	(United Nations) Human Rights Committee
IACtHR	Inter-American Court of Human Rights
IACHR	Inter-American Commission of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
IHL	International humanitarian law
IHRL	International human rights law
MOPR	Ministry of Peace and Reconstruction
NC	Nepali Congress
NP	Nepal Police
(R)NA	(Royal) Nepalese Army
OHCHR	(United Nations) Office of the High Commissioner for Human Rights
<i>1998 Policy Guidelines on Withdrawal of Case</i>	<i>Policy Guidelines and Procedures in Relation to Withdrawal of Criminal Charges Lodged on behalf of the Government of Nepal</i>
SC	Supreme Court (of Nepal)
SPA	Seven Party Alliance
TADO	Terrorist and Disruptive Activities (Control and Punishment) Ordinance
TRC	Truth and Reconciliation Commission
UCPN (Maoist)	United Communist Party of Nepal (Maoist)
UN	United Nations
UNSG	United Nations Secretary General
<i>Updated Principles to Combat Impunity</i>	<i>The Updated Set of principles for the protection and promotion of human rights through action to combat impunity</i> (United Nations)
WGEID	Working Group on Enforced or Involuntary Disappearances

INTRODUCTION¹

In its report on the rule of law and transitional justice in conflict and post-conflict societies, the United Nations Secretary General defines transitional justice as comprising,

The full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.²

In this research we will focus on prosecutions and truth seeking commissions and will leave aside reparations, institutional reform, vetting and dismissals. The relation between prosecutions and truth seeking mechanisms, mainly truth commissions and commissions of inquiry, has been controversial while trying to confront massive violations in the aftermath of an armed conflict or state repression under authoritarian rule. The debate was much fuelled by the South African truth commission, which operated from 1995 to 2002, and had the power to grant amnesties to perpetrators of serious violations of human rights. Although the South African model has not been replicated elsewhere, truth commission continued being envisioned as a mechanism to avoid prosecutions. Scholar Priscilla Hayner writes,

In the peace talks of Sierra Leone in 1999, the Democratic Republic of the Congo in 2002, Liberia in 2003, and in many other contexts, there has been either an explicit or an implicit link between an agreement for a truth commission and an agreement, understanding, or hope that there would be no trials.³

It was in this context that those advocating for criminal prosecutions referred to a trade-off between truth and justice while others raised the need of a compromise in the aftermath of large-scale violations. The debate about truth versus justice evolved towards a realization that both approaches were complementary and not alternative and, indeed, the investigations carried out by truth commissions have been used as the basis

¹ Please note that references to Internet Web sites (URLs) were accurate at the time of writing, but may have expired or changed since the manuscript was prepared.

² UN Security Council, *The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General*, 23 August 2004, S/2004/616, par. 8, available at: <http://www.unhcr.org/refworld/docid/45069c434.html> [accessed 3 July 2012]

³ Hayner, Priscilla, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (hereafter *Unspeakable Truths*), New York and London: Routledge, 2011, p. .91.

for future prosecutions. Currently, there seems to be an agreement that truth commissions do not affect prosecutions negatively and that the duality between truth and prosecutions has become obsolete. As Hayner points out, “among those advocating for criminal justice, the fear of a trade-off between truth and justice has largely receded.”⁴

I have been following the transitional justice process in Nepal and I had the chance to work three years as a human rights officer in this country, first with the international non-governmental organization Peace Brigades International and later, with the Office of the High Commissioner for Human Rights (OHCHR). During the hot debates surrounding the establishment of two truth-seeking mechanisms in Nepal, the question of amnesty has always been at the center of the discussions. Truth commissions provide an opportunity to incorporate amnesty provisions to remove the prospect and consequences of criminal liability for those who, during the conflict, committed violations. This is especially important in those countries where internal armed conflicts have ended through a peace agreement, without winners or losers. Usually in these contexts those who committed violations remain or access power through putting an end to the conflict. This is the case in Nepal today.

In Nepal the comprehensive peace agreement provides for the establishment of a truth and reconciliation commission. Previous agreements also foresee the establishment of a commission of inquiry on disappearances. The bone of contention regarding the legislation to establish these commissions has been the question of amnesty. In fact, if this legislation has not been passed yet it is precisely because of the amnesty clauses. Although an amnesty could be passed without the need of being attached to a truth commission, in Nepal this has not been the case. In fact, attaching an amnesty to a truth commission renders that amnesty more *legitimate*. The rationale being that the removal of criminal liability goes along with the disclosure of truth by those who committed violations, which contributes to establishing a more balanced historical account of the facts. In this research when looking into amnesties it will be in relation to truth commissions.

Building on my experience in Nepal, working with conflict victims, government officers and members of the Parliament, I thought truth commissions were still being used as a way to avoid prosecutions; that a *trade-off* between truth and justice was the reason behind establishing truth-seeking mechanisms in Nepal. The question at the basis of this research builds upon this concern:

Can the truth seeking mechanisms to be established in Nepal, a commission of inquiry on disappearances and a truth and reconciliation commission, substitute the State’s duty to prosecute serious violations committed during the armed conflict?

In order to answer this question some issues needed to be clearly defined, starting with delimiting which serious violations we would look into. Those should be violations allegedly committed during the armed conflict in Nepal, specifically, war crimes, crimes

⁴ Ibid., p. 92.

against humanity, and gross violations of human rights. In this regard, we will not look into the crime of genocide because there have not been allegations of the commission of this crime in Nepal. Furthermore, other questions needed to be asked, mainly, whether states, and in this case Nepal, have a duty to prosecute perpetrators of these crimes under international and domestic law. The first chapter will answer this question through the analysis of international law applicable to non-international armed conflicts and Nepal's obligations, in light of treaties ratified and customary international law. At the same time, we will examine relevant provisions in the various agreements and understandings that finally led to the comprehensive peace agreement. The analysis is relevant as it is in the signing of peace agreements when, often, the previous warring parties incorporate provisions intended to deter from future prosecutions at a domestic level. Finally we will also examine whether there is domestic legislation in Nepal that allows for the prosecution of perpetrators of these crimes.

Following on our research question, we are considering the possibility that truth-seeking mechanisms could substitute the duty of the states to prosecute. In that regard, we are assuming some form of legitimacy at the core of these mechanisms. We need to ask what is their source, what lies at the basis of their origin. In Nepal, the various peace agreements call for the formation of a commission of inquiry on disappearances and a truth and reconciliation commission. When looking at the rationale behind their formation, the peace agreements refer to forming a disappearance commission "to investigate and publicize the whereabouts of citizens stated to have been disappeared by the state and the Maoists in the past";⁵ and to constitute a truth and reconciliation commission "to investigate [the] truth about those who have seriously violated human rights and those who were involved in crimes against humanity in course of the war and to create an environment for reconciliations in the society".⁶ In both cases, what lies at the center is the need to know what happened, to find out the truth about past events. The victim's right to know the truth and the consequent State obligation to fulfill this right seems to be the explanation for establishing these commissions. At the same time, also knowing the truth of what happened could be a reason "powerful enough" to substitute the duty of the states to prosecute. But, can we talk about a victim's right to know the truth? To answer this question, in chapter II, we will trace what are the origins of this right, what are its content and scope and whether states have the obligation to fulfill it. Whether the existence of a right to know the truth can be claimed or not, states have formed truth commissions to confront large-scale violations in the aftermath of an armed conflict or state repression under authoritarian rule. To this end, approximately forty truth commissions have been established around the world. We will look into some of these commissions to understand what their objectives and main activities are and, more important, in order to assess whether the establishment of truth commissions has been traditionally intended to substitute the State duty to prosecute for the fulfillment of the victim's right to know the truth. In this regard, we will

⁵ Full text of the decisions of the Seven Party Alliance – Maoist Summit meeting, Section I. Relating to the implementation of the past agreements, Informal Sector Service Centre (hereafter INSEC), Documents related to the peace process, p. 9, available at

<http://www.insec.org.np/files/documents/PeaceProcess.pdf> [accessed 1 May 2012].

⁶ Ibid., Comprehensive Peace Agreement signed by the Government of Nepal and the Communist Party of Nepal (Maoist), Section 5- "Ceasefire", clause 5.2.5, p. 19.

end chapter II examining what has been the relationship between truth commissions, prosecutions and amnesties.

The previous analytical framework will provide the tools for examining our case study, Nepal. We will start chapter III with an overview of the armed conflict. From this point we will divide the chapter into two sections. The first one, linked with chapter I, will answer whether Nepal has been complying with its duty to prosecute since the end of the armed conflict and, if not, in which ways Nepal has been evading the realization of its duty. In the last section we will look into Nepal's commitment to establish two truth-seeking mechanisms and what is the status. To this end, we will examine the evolution of the successive draft legislation to establish a disappearances and a truth commission. In the study of the various draft bills we will focus on those provisions that either reinforce or absolve the State from its duty to prosecute. At this point we will be in a position to answer whether the truth seeking mechanisms are intended to substitute Nepal's duty to prosecute serious violations committed during the armed conflict for the fulfillment of the victim's right to know the truth.

The hypothesis we will try to probe in this research is,

If the states have the duty to prosecute those responsible for war crimes, crimes against humanity, and gross violations of human rights, a way in which states try to evade this duty is through the establishment of truth commissions, substituting the duty of the State to prosecute for the fulfillment of the right of the victims to know the truth.

In order to probe this hypothesis we will analyze both primary and secondary documentation. With regard to the first chapter, concerning the duty of the States to prosecute we will review relevant provisions, under international humanitarian and human rights law, including international treaties and customary international law. To find out whether Nepal has this obligation, we will focus on treaties ratified, peace agreements and domestic legislation. As for chapter II, we will examine international humanitarian law with regards to the right of the families to know the fate of missing relatives. As for the right to know the truth in international human right law, we will examine resolutions from the General Assembly, and case law by the United Nations Human Rights Committee and regional human rights bodies including the Inter-American Court and Inter-American Commission of Human Rights, as well as other international human rights studies and instruments of 'soft law'. Concerning truth commissions, their mandates, objectives and previous experiences in other countries, we will follow two of the leading experts in this topic, Mark Freeman and Priscilla Hayner. Both experts will be also considered when dealing with the relation between truth commissions and amnesties as well as scholar Louise Mallinder. For chapter III, the case study, we will use mainly secondary information for the overview of the armed conflict, including reports from international non-governmental organizations and other UN reports. For the section on Nepal's duty to prosecute we will examine mainly primary sources, including domestic legislation and jurisprudence from the Supreme Court of Nepal, but also other reports from non-governmental organizations. With regard to the section on truth-seeking mechanisms to be established in Nepal, we will analyze primary documentation comprising draft legislation for the establishment of a truth and disappearances com-

mission. We will support our study with other secondary sources, such as reports by governmental and non-governmental organizations which analyze this draft legislation. Some of the documents we will work with in this section are available on the Internet while others are not. We will refer to *working documents* for those which were made public but either have not been published in the website or, if they were published, they are not any longer. In some cases the years will appear in the official calendar of Nepal, Bikram Samwat (B.S.), which is 56.7 years ahead. In these cases, the western Gregorian calendar year will appear next to the B.S date.

In writing this research, my previous work in Nepal has proved very useful. I was quite familiar with the transitional justice process and with the documentation available, like reports and domestic legislation. I was also familiar with the various draft bills to establish both commissions. This previous “attachment” to the draft bills translated into finding most of the provisions important enough to be included in this research. Thus, deciding on what aspects of the bills were pertinent and which others were irrelevant for the object of this study became a real challenge.

Finally, I would like to thank Yu and Sora for their constant support, and more especially Yu for reading the various drafts and providing extremely valuable comments and feedback. I would also like to thank Professor Rafael Grasa for his guidance and wise advice. My thanks also to my former colleagues in OHCHR-Nepal for the time we worked together and our missions to the field, to explain the draft legislation to those to whom the bills will affect the most, the survivors of the conflict. And a final wish for the victims of the conflict in Nepal, that a day will come when their rights will be fulfilled, and their long fight acknowledged and praised.

Carlos Fernández Torné
carlosftorne@gmail.com
Bangkok, 3 September 2012

1. LEGAL FRAMEWORK: THE STATE'S DUTY TO PROSECUTE

In order to find out whether, in the aftermath of an internal armed conflict, states try to evade their duty to prosecute serious crimes under international law through the establishment of truth commissions, first we need to assess whether such a duty exists. In this chapter we will examine if Nepal has a clear duty to prosecute perpetrators of war crimes, crimes against humanity, and other gross violations of human rights. We will not look into the crime of genocide, as our aim is to analyze those crimes perpetrated during the armed conflict in Nepal, and, as of now, there have not been allegations of genocide.

We will start with a brief analysis of international law applicable to non-international armed conflicts and the commitments made by the warring parties in Nepal to abide by international human rights and humanitarian law. At this point, the analysis will turn into the assessment of Nepal's duty to prosecute, in light of international treaties ratified and international customary law. Along with this assessment, we will examine if there exists domestic legislation in Nepal allowing for prosecution of serious crimes committed during the armed conflict.

1.1. INTERNATIONAL LAW APPLICABLE TO NON-INTERNATIONAL ARMED CONFLICTS

The legal framework applicable to an armed conflict has both international and domestic origins. The international law consists of the treaties the State has signed as well as customary international law. Customary law is formed by the consistent practice of states over the course of time (usage), accompanied by the subjective element that it is considered binding as a matter of law (*opinio juris*). In that regard, if a certain norm has a customary character, it will bind states, regardless of whether such norm is incorporated or not in a treaty. On the other hand, the domestic law applicable will depend on the criminal legislation of the specific country, as well as other legislation or disciplinary regulations applicable to the security forces.

Among international law, we can distinguish two separate sources, international humanitarian law and international human rights law.

International humanitarian law (IHL) comprises the law applicable to the war, *jus in bello*, and it is applicable to armed conflicts of an international and non-international nature. Its aim is to restrict the suffering of those who actively participate in the con-

flict, as well as those who do not, and to guarantee protection and assistance to the victims.

IHL is mainly comprised of conventional law, the four Geneva Conventions and their additional protocols, as well as of customary law. Nepal has ratified the four Geneva Conventions but it is not a signatory of any of the additional protocols, including the second protocol relating to the protection of victims of non-international armed conflicts. Common article 3 to the four Geneva Conventions is the only article applicable to non-international armed conflicts. Common article 3 provides for the protection of people taking no active part in the hostilities and establishes those acts which are prohibited against these persons. Due to the lack of other international treaty norms, Customary IHL has been fundamental in establishing a legal framework applicable to armed conflicts taking place within the boundaries of one State.¹

Nepal suffered an internal armed conflict from 1996 to 2006. Non-international armed conflicts are,

[...] protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organization.²

To qualify as a non-international armed conflict the armed confrontation must reach a minimum of intensity. This level will depend on the number of battles and on the response from the government, for instance, if it is obliged to deploy military force against the insurgents instead of mere police forces.³ Regarding the parties to the conflict, they must possess a certain command structure and a certain capacity to sustain military operations.⁴

As opposed to IHL, international human rights law (IHRL) applies both during peacetime and during situation of armed conflict. IHRL is a set of international rules, established by treaty or custom, intended to protect the human rights and fundamental freedom of every individual human being, primarily in relation to State actors. IHRL also incorporates other non-treaty based principles and guidelines or “soft law”. Nepal has ratified seven out of nine core human rights instruments.⁵ Although certain provisions

¹ The International Committee of the Red Cross (hereafter ICRC) has published the *Customary International Humanitarian Law* study in which it has identified 161 rules of customary IHL that constitute the common core of humanitarian law binding on all parties to all armed conflicts, international or not, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul [accessed 17 May 2012].

² The definition is from the ICRC, on the basis of Common article 3; Article 1.2 of the Additional Protocol (AP) II (which excludes internal disturbances and tensions from the definition of non-international armed conflict); and legal opinion, including the judgments from the International Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v. Dusko Tadic* and *Prosecutor v. Fatmir Limaj*. In “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?”, Opinion Paper, ICRC, available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> [accessed 18 May 2012].

³ *Ibid.*, 3.

⁴ *Ibid.*

⁵ Nepal has ratified the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (ratified in 1971); the International Covenant on Civil and Political Rights, 1966 (ratified in 1991); the International Covenant on Economic, Social and Cultural Rights, 1966 (ratified in 1991); the Convention on the Elimination of All Forms of Discrimination against Women, 1979 (ratified in 1991); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (ratified in 1991); the Convention on the Rights of the Child, 1989 (ratified in

of IHRL can be suspended in times of public emergency, which threatens the life of the nation, including wars, key human rights provisions cannot.⁶ Among these provisions, the right to not be arbitrarily deprived of life, the right to be free from torture, cruel, inhuman or degrading treatment or punishment, and the right to be recognized as a person before the law remain in force even in times of war.⁷

Commitments to abide by International Law

The parties to the conflict in Nepal do not dispute the applicability of IHL and IHRL. On 26 March 2004, Surya Bahadur Thapa, the then Prime Minister of Nepal, announced *His Majesty's Government's commitment on the implementation of Human Rights and International Humanitarian Law in the country*, which contains detailed and concrete steps to protect and prevent human rights violations in the context of the Maoist conflict.⁸ The commitment includes provisions for the protection of human rights without discrimination (Clause 1); to respect the right to life, dignity and security and, for this purpose, issue immediate instructions to implement and respect the provisions of the Geneva Conventions, in particular common article 3 (Clause 2). Moreover the Government reaffirmed its commitment to not to subject anyone to arbitrary arrest or detention, to prevent illegal or arbitrary detention and enforced disappearances (Clause 3); to hold detainees in an officially recognized place of detention (Clause 6); to protect detainee's right to unhindered legal defence (Clause 5); and to not to subject the accused to torture or to cruel, inhuman or degrading treatment or punishment (Clause 8). Regarding the Communist Party of Nepal (Maoist) (CPN (Maoist)), as early as 2003 the Maoist leadership had pledged to abide by IHL.⁹ In the *Appeal of the Communist Party of Nepal* issued 16 March 2004, the Supreme Commander of the People's Liberation Army, Pushpa Kamal Dahal (*nom de guerre* Prachanda), stated that "our Party has been committed to the fundamental norms of human rights and the Geneva Conventions since the historic initiation of the People's War".¹⁰ On 13 April 2005, Prachanda had vowed to abide by IHL in a press statement.¹¹ Other commitments by the CPN (Maoist) include the 17 April 2006 statement declaring general respect for and commitment to IHL and human rights norms.¹² Moreover in the Code of Conduct for Cease-

1990) and the Convention on the Rights of Persons with Disabilities, 2006 (ratified in 2010). Not ratified: International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990 and the International Convention for the Protection of All Persons from Enforced Disappearance, 2006.

⁶ Derogations however must be notified, be the only means to confront the emergency, and be proportional to the crisis at hand.

⁷ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at <http://www2.ohchr.org/english/law/ccpr.htm> [accessed 22 May 2012].

⁸ "Implementation of human rights and international humanitarian law", South Asia Terrorism Portal, 26 February 2004, 2nd commitment, available at <http://www.satp.org/satporgtp/countries/nepal/document/papers/implement.htm> [accessed 21 May 2012].

⁹ "Nepal: Peace and Justice", *Asia Report* no 184, International Crisis Group, 14 January 2010, p. 9, available at <http://www.crisisgroup.org/en/regions/asia/south-asia/nepal/184-nepal-peace-and-justice.aspx> [accessed 21 May 2012].

¹⁰ "Between a Rock and a Hard Place: Civilians Struggle to Survive in Nepal's Civil War", *Human Rights Watch*, vol. 16, no. 12(C), October 2004, p. 10 (footnote 12), available at <http://www.hrw.org/sites/default/files/reports/nepal1004.pdf> [accessed 23 May 2012].

¹¹ "Nepal's Maoists: Their Aims, Structure and Strategy", *Asia Report* no. 104, 27 October 2005, International Crisis Group, p. 2, available at: http://www.crisisgroup.org/~media/Files/asia/south-asia/nepal/104_nepal_s_maoists_their_aims_structure_and_strategy.pdf [accessed 21 May 2012].

¹² "Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation, in Nepal", Human Rights Council, A/HRC/4/97, 17 January 2007, par. 29, available at <http://www2.ohchr.org/english/bodies/hrcouncil/4session/reports.htm> [accessed 22 May 2012]

fire signed between the Government of Nepal and the CPN (Maoist) on 25 May 2006 both sides expressed they would remain committed towards the Universal Declaration of Human Rights and the basic principles and norms concerning IHL and human rights.¹³ In the Comprehensive Peace Agreement (CPA), both sides “reconfirm their commitment to the respect and protection of human rights and commitment to the IHL”.¹⁴

1.2. NEPAL'S DUTY TO PROSECUTE UNDER INTERNATIONAL AND DOMESTIC LAW

Having seen what are the sources of international law applicable to non-international armed conflict and the commitment made by the warring sides to abide by this law, we will look now at whether Nepal has a duty to prosecute war crimes, crimes against humanity, and gross violations of human rights. This section will first consider two relevant preliminary aspects, mainly, what the parties to the conflict agreed in the various peace agreements they signed and how the international treaties Nepal has signed are incorporated and enforced at the domestic level. After these preliminary considerations, we will examine whether Nepal has a duty to prosecute the three categories of crimes under international and domestic law. Finally, we will complement this analysis with other principles of IHRL and international criminal law, which have an effect on the State's duty to prosecute.

1.2.1. PRELIMINARY CONSIDERATIONS

The analysis of relevant provisions in peace agreements is pertinent as it is in the signature of peace accords when, often, the previous belligerents incorporate provisions exempting from future prosecutions. These provisions, like amnesty clauses, would have the effect of deterring prosecutions at the domestic level. Secondly, we will examine how the international treaties are incorporated at the national level in Nepal so that they can be enforceable.

Relevant provisions in Nepal's peace agreements

In Nepal, the two warring sides signed various accords, which led, ultimately, to the CPA. The CPA incorporates all the previous agreements and understandings and, consequently, all of them are binding on both sides.¹⁵ The two sides include the Seven Party Alliance (SPA) or the Government of Nepal and the CPN (Maoist).¹⁶ Some of these

¹³ The Code of Conduct for Ceasefire, Preamble, Informal Sector Service Centre (hereafter INSEC), Documents related to the peace process, p. 3-4, available at

<http://www.insec.org.np/files/documents/PeaceProcess.pdf> [accessed 1 May 2012].

¹⁴ Ibid, pp. 20-21, section 7, Comprehensive Peace Agreement, 21 November 2006.

¹⁵ Ibid., , Preamble and Clause 1.4., pp. 15-16.

¹⁶ The SPA was formed on 5 May 2005, after the King dismissed the government on 1 February 2005. With the reinstatement of the House of Representatives, on 25 April 2006, the SPA appointed a new Primer Minister. Since then the different agreements that led to the signing of the CPA were signed either by the government or the SPA with the CPN (M).

agreements incorporate provisions regarding the duty to prosecute those who committed violations of human rights or IHL. At the same time, other provisions in these agreements guarantee the withdrawal of cases against individuals.

The Twelve Point Understanding, from 22 November 2005, was the first agreement between the SPA and the CPN (Maoist). In it both sides agreed that,

[...] regarding the inappropriate conducts that took place among the parties in the past, a common commitment has been expressed to investigate the incidents raised objection and asked for the investigation by any party and take action over the guilty one if found and make informed publicly.¹⁷

This commitment contains the strongest language against amnesty and clearly provides for affirmative action to investigate and take action against those found guilty, in accordance with the State duty to prosecute.

On 26 May 2006, both sides signed the Code of Conduct for Ceasefire. In it, both the parts agreed “to withdraw the accusation, prosecution, and cases induced against various individuals by both the parties and release the detainees gradually.”¹⁸ On 8 November 2006, both sides signed an understanding (known as the Baluwatar accord) in which they agreed to “conduct investigation about those who were involved in gross violation of human rights at the time of the conflict and those who committed crime against humanity.”¹⁹ This agreement also provided for to “make a public announcement regarding the withdrawal of all accusations and charges levelled by the State at the leaders and the cadres of the CPN (Maoist) and release all political prisoners from both the sides”.²⁰

The final document, the CPA from 21 November 2006, provides for the creation of a Truth Commission “in order to investigate [the] truth about those who have seriously violated human rights and those who were involved in crimes against humanity in the course of the war and to create an environment for reconciliation in the society”.²¹

The CPA also guarantees “to withdraw accusations, claims, complaints and cases under consideration alleged against various individuals due to political reasons and to make immediately public the state of those who are in detention and to release them immediately”.²² However, at the same time, both sides reconfirm their commitment to respect and protect human rights and IHL²³ and to ensure that impunity shall not be encouraged.²⁴

¹⁷ Twelve Point Understanding, 22 November 2005, par. 12, INSEC, documents related to the peace process, p.p. 34, op. cit. 13.

¹⁸ Ibid., 4, par. 16; The Code of Conduct for Ceasefire, 26 May 2006.

¹⁹ Ibid., 12-13, section IV, on management of the conflict victims; full text of the decision of the SPA-Maoist summit meeting, 8 November 2006, clause 4,

²⁰ Ibid., 9, section I, relating to the implementation of the past agreements, par. 4.

²¹ Ibid., 19, section 5, “Ceasefire”; Comprehensive Peace Agreement, 21 November 2006, clause 5.2.5.

²² Ibid., 19, clause 5.2.7.

²³ Ibid., 20, clause 7.1.1.

²⁴ Ibid., 20-21, clause 7.1.3 states, “both sides express the commitment that impartial investigation and action as per the law would be carried out against the people responsible in creating obstructions to the exercising of the rights envisaged in the letter of agreement and guarantee not to encourage impunity”.

The Code of Conduct for Ceasefire, from 26 May 2006, the Baluwatar accord, from 8 November 2006, and the CPA, from 21 November 2006, refer to the withdrawal of pending cases, and not future ones, and to facilitate the release of individuals who had been arrested for political activism. As Warisha Farasat and Priscilla Hayner point out:

*The context for the CPA pardoning provision explains its ambiguity: it was in essence a goodwill gesture to further the peace process, not a clear commitment to an amnesty provision. [...] However, the implications of the provision were unclear to those negotiating the agreement, and many have misunderstood the clause as offering a broad amnesty.*²⁵

The previous analyses can be reinforced with the provisions included in the Interim Constitution, drafted alongside the various peace agreements and finally adopted by the House of Representatives on 15 January 2007.²⁶ It includes, among the State's responsibilities, "to adopt a political system which fully abides by the universally accepted concepts of fundamental human rights" and "to maintain good governance by eliminating corruption and impunity".²⁷ It further provides for the establishment of a high-level truth and reconciliation commission to investigate the facts about those persons involved in serious violations of human rights and crimes against humanity committed during the course of conflict, and to create an atmosphere of reconciliation in the society.²⁸

From the previous we can conclude that none of the various agreements or the Interim Constitution drafted alongside provide for an amnesty to violations of human rights and IHL. On the contrary, many provisions hold the parts accountable to human rights and humanitarian law provisions.

Incorporation of international law at the national level

While looking at the international and national domestic law, a first issue to take into account is how the international law is incorporated at the national level. In Nepal, international treaty provisions are incorporated through the Nepal Treaty Act of 1990. According to this law, in case of conflict with the international law, the international treaty provisions will prevail over the domestic legislation and the treaty provisions shall be applicable as Nepali laws.²⁹ In its landmark decision from June 2007 regarding disappearances, the Supreme Court (SC) analyzed Nepal's obligations under international treaties. The Court ruled that, if existing national legislation were to prove inadequate to guarantee respect for the rights enshrined in international instruments, Nepal

²⁵ Farasat, Warisha, and Priscilla Hayner. 2009, "Negotiating Peace in Nepal: Implications for Justice", Initiative for Peacebuilding Mediation Cluster, June, available at: http://www.ictj.org/static/Publications/ICTJ-IFP_NPL_Negotiating-Peace-Nepal_pb2009.pdf [accessed 2 May 2012].

²⁶ In the Eight-Point Agreement between the SPA and the CPN (Maoist), 16 June 2006, both sides agreed to frame an interim constitution to form an interim government. The Baluwatar accord, signed on 8 November 2006, refers to "complete the interim constitution by November 21, 2006". In Documents related to the peace process, INSEC, op. cit. 13.

²⁷ "Responsibilities of the State", Interim Constitution of Nepal, 2063 (2007), article 33 (c), available at: <http://www.nic.gov.np/download/interim-constitution.pdf> [accessed 4 May 2012].

²⁸ Ibid., article 33 (s).

²⁹ Nepal Treaty Act, 9 November 1990, article 9, available at: <http://www.unhcr.org/refworld/docid/3ae6b51724.html> [accessed 4 June 2012]

has an obligation to ensure that necessary legislation is adopted. On the basis of the Treaty Act, the Court stated that “as section 9 of the Treaty Act provides that the treaties or agreements ratified by Nepal shall have the same force as national law, the State cannot exempt itself from fulfilling its obligations as set out in these instruments”.³⁰ Moreover, the Interim Constitution of Nepal also refers to the responsibility of the State to implement effectively international treaties and agreements to which Nepal is a State Party.³¹

The obligation of the State to incorporate international legislation criminalizing violations of IHRL and IHL in the domestic legislation is also enshrined in many treaties and other human rights instruments.

Article 2.2 of the International Covenant on Civil and Political Rights (ICCPR) provides for the obligation of each State Party to the Covenant “to undertake to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt legislative or other measures to give effect to the rights recognized in the present Covenant.”³² The Human Rights Committee (HRC) that monitors the implementation of the ICCPR has said that this article requires that States parties adopt legislative, judicial, administrative, educational and other appropriate measures in order to fulfill their legal obligations.³³ The ICCPR therefore requires states to ensure that violations of Covenant rights are also criminalized in domestic law. These obligations arise notably in respect of those violations recognized as criminal either under domestic or international law, such as torture and similar cruel, inhuman and degrading treatment, summary and arbitrary killing and enforced disappearance.

The Convention against Torture (CAT) also compels the State Party to ensure that domestic legislation criminalizes torture and the punishment is in line with the seriousness of the offense.³⁴ Further, the Declaration on the Protection of all Persons from Enforced Disappearance, which constitutes a body of principles for all states, provides that “all acts of enforced disappearances shall be offenses under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness”.³⁵

The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (hereafter referred to as the *Basic Principles and Guidelines on the Right to a Remedy and Reparation*) also calls the states to ensure that their domestic law is consistent with their international legal obligations by incorporating norms of IHRL and IHL into their domestic law and by adopting appro-

³⁰ *Rabindra Prasad Dhakal v. the Government of Nepal and Others*, Supreme Court of Nepal judgement, 18 June 2007, in International Commission of Jurists and Nepal Bar Association, *Transitional Justice and Right to a Remedy: Supreme Court Jurisprudence in Nepal* (hereafter ICJ and NBA, *Transitional Justice and Right to a Remedy*), Kathmandu, 2012, p. 240.

³¹ “Responsibilities of the State”, The Interim Constitution of Nepal, article 33 (m), op. cit. 27.

³² UN General Assembly, International Covenant on Civil and Political Rights, op. cit. 7.

³³ *General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, Human Rights Committee, 26 May 2004, par. 7, available at: <http://www.unhcr.ch/tbs/doc.nsf/o/58f5d4646e861359c1256ff600533f5f?Opendocument> [accessed 22 May 2012].

³⁴ UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, article 4, p. 85, available at: <http://www2.ohchr.org/english/law/cat.htm> [accessed 25 May 2012].

ropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice.³⁶

Notwithstanding the provisions in the Nepal Treaty Act, in the Interim Constitution or in the various treaties and human rights instruments mentioned above, the lack of domestic legislation has become one of the arguments for the State to justify the lack of prosecutions.

1.2.2. NEPAL'S DUTY TO PROSECUTE WAR CRIMES, CRIMES AGAINST HUMANITY, AND GROSS VIOLATIONS OF HUMAN RIGHTS

In this section, we will look into the international and domestic legislation regarding Nepal's duty to prosecute war crimes, crimes against humanity, and gross violations of human rights. With regard to gross violations of human rights, we will look separately into enforced disappearances and torture because of the separate treaties dealing with these crimes, which have consequences on the State's duty to prosecute.

A. WAR CRIMES

War crimes, also known as serious violations of IHL, are:

*Criminal offences against the law of war that are set forth within the particular body of international law known as Humanitarian Law. These are crimes in violation of international law committed by individuals, military or civilian, during an armed conflict and that involve individual criminal responsibility and universal jurisdiction.*³⁷

Common article 3 to the four Geneva Conventions, related to non-international armed conflicts, prohibits the following acts when committed against persons taking no active part in the hostilities: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court.

Common article 3 to the Geneva Conventions has crystallized into customary international law, and the breach of one or more of its provisions has been recognized as

³⁵ UN General Assembly, Declaration on the Protection of All Persons from Enforced Disappearance: resolution / adopted by the General Assembly 18 December 1992, A/RES/47/133, article 4, available at: <http://www2.ohchr.org/english/law/disappearance.htm> [accessed 25 May 2012].

³⁶ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution / adopted by the General Assembly* (hereafter referred to as the *Basic Principles and Guidelines on the Right to a Remedy and Reparation*), 21 March 2006, A/RES/60/147, par. 2 a) and b), available at: <http://www.unhcr.org/refworld/docid/4721cb942.html> [accessed 24 May 2012].

³⁷ Condé, H. Victor, *A handbook of international human rights terminology*, University of Nebraska Press, 2nd Edition, 2004, p. 274.

amounting to a war crime.³⁸ Moreover, on the basis of customary international law, other acts not included in Common Article 3, such as making the civilian population or individual civilians not taking a direct part in hostilities the object of attack; pillage; and committing sexual violence, in particular, rape, sexual slavery, enforced prostitution, enforced sterilization and enforced pregnancy are also serious violations of IHL in non-international armed conflicts which constitute war crimes.³⁹ State practice has established individual criminal responsibility for war crimes committed in non-international armed conflicts as a norm of customary international law.⁴⁰ The responsibility applies to the commission as well as for assisting in, facilitating, aiding or abetting the commission of a war crime and for planning or instigating.⁴¹

Provided the above, that violations of common article 3 constitute war crimes and that there exists individual criminal responsibility for the commission of these crimes, customary law also obligates the states to investigate war crimes and prosecute the suspects.⁴² Therefore, under customary IHL there is an affirmative duty for State parties to investigate war crimes and prosecute the alleged perpetrators.

Moreover, war crimes are one of the international crimes within the jurisdiction of the International Criminal Court (ICC).⁴³ As mentioned in the preamble of the Rome Statute, they are “among the most serious crimes of concern to the international community as a whole, that they must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”⁴⁴ The consensus among the international community to punish these crimes stands as an important statement in favour of prosecution. Although not a

³⁸ Rule 156 states, “serious violations of international humanitarian law constitute war crimes”. In this regard, the breach of provisions of common article 3 has been recognized as amounting to a war crime in the Statutes of the International Criminal Tribunal for Rwanda, of the Special Court for Sierra Leone and of the International Criminal Court, as well as by the International Criminal Tribunal for the former Yugoslavia. In *Customary IHL, Rule 156, Definition of War Crimes*, ICRC, available at: http://www.icrc.org/customary-ihl/eng/docs/v1_rule156 [accessed 22 May 2012].

³⁹ Ibid.

⁴⁰ Rule 151 of the ICRC study on Customary IHL establishes individual criminal responsibility for war crimes committed in non-international armed conflicts. The customary nature of this rule is based on its incorporation in three recent IHL treaties, namely the Amended Protocol II to the Convention on Certain Conventional Weapons, the Statute of the International Criminal Court and the Second Protocol to the Hague Convention for the Protection of Cultural Property. It is implicitly recognized in two other recent treaties, namely the Ottawa Convention banning anti-personnel landmines and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. It is also based on the fact that numerous states (53) have adopted legislation criminalizing war crimes committed in non-international armed conflicts, most of it in the past decade and in other countries (10) the legislation criminalising war crimes does not exclude non-international armed conflicts.

Another fact supporting the customary nature of this rule is the incorporation of criminal responsibility for war crimes committed in non-international armed conflicts in the statutes of the International Criminal Tribunal for Rwanda and of the Special Court for Sierra Leone.

Finally, the trials by the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda of persons accused of war crimes committed in non-international armed conflicts confirm that persons are criminally responsible for those crimes. Of particular interest in this regard is the analysis of the Appeals Chamber of the ICTY in the *Tadić* case in 1995, in which it concluded that there was individual criminal responsibility for war crimes committed in non-international armed conflicts. In *Customary IHL, Rule 151, Individual Responsibility*, ICRC, available at: http://www.icrc.org/customary-ihl/eng/docs/v1_rule151#Fn18 [accessed 15 May 2012].

⁴¹ Ibid.

⁴² Rule 158 states: “states must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects,” in *Customary IHL, Rule 158, Prosecution of War Crimes*, ICRC, available at: http://www.icrc.org/customary-ihl/eng/docs/v1_rule158 [accessed 22 May 2012].

⁴³ Article 5 establishes that the Court has jurisdiction with respect to the crime of genocide, crimes against humanity war crimes and the crime of aggression. With regard to war crimes, article 8.2.c) of the Rome Statute incorporates common article 3 to the four Geneva Conventions and article 8.2.e) provides for other war crimes in a non-international armed conflict. Rome Statute of the International Criminal Court (last amended January 2002), UN General Assembly, 17 July 1998, A/CONF. 183/9, available at: [http://untreaty.un.org/cod/icc/statute/english/rome_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf) [accessed 22 May 2012].

⁴⁴ Ibid., Preamble.

State Party, the ICC could exercise its jurisdiction and investigate war crimes committed in Nepal if the Security Council, acting under Chapter VII of the Charter of the United Nations, refers the case to the Prosecutor.⁴⁵

The State's duty to investigate and prosecute war crimes is also incorporated in other important human rights documents. The *Basic Principles and Guidelines on the Right to a Remedy and Reparation* stipulates that in case of serious violations of IHL, which constitute crimes under international law, "states have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him."⁴⁶

Therefore, notwithstanding its obligation to prosecute under IHL, Nepal has also a duty to prosecute war crimes pursuant to its obligations under customary international law on the basis of the Rome Statute and other human rights instruments.

Nepal has not incorporated war crimes in its domestic legislation. However, the Nepali Civil Code prohibits some acts like murder, battery, rape, illegal detention, kidnapping, abduction and hostage taking, and looting which are recognized as war crimes under common article 3 and customary IHL and which could be prosecuted under domestic law.⁴⁷

B. CRIMES AGAINST HUMANITY

Crimes against humanity are:

*Inhumane acts committed in the context of a widespread or systematic attack against civilian populations, where the perpetrator is aware of the connection between his act and the wider attack.*⁴⁸

Although there is no special treaty on crimes against humanity, these types of crimes have long been recognized in customary law. Crimes against humanity were first prosecuted in the Tribunal of Nuremberg and since then they have been included in the statutes of every other international or hybrid criminal tribunal.⁴⁹

As war crimes, crimes against humanity are also within the jurisdiction of the ICC. Article 7 of the Rome Statute establishes the individual acts that can be prosecuted as crimes against humanity. Among others, they include murder; extermination; enslavement; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution,

⁴⁵ Ibid., article 13.b) states: "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if (b) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations."

⁴⁶ *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, UN General Assembly, par. 4, op. cit. 36.

⁴⁷ Nepal Civil Code (Muluki Ain), 12 April 1963, available at:

<http://www.lawcommission.gov.np/ne/prevailing-laws/prevailing-acts/func-startdown/605/> [accessed 24 May 2012].

⁴⁸ Condé, H. Victor, *A handbook of international human rights terminology*, op. cit. 37.

⁴⁹ Article 6.c of the London Charter of the Tribunal of Nuremberg included crimes against humanity for the first time. Later, other international and hybrid tribunals that have incorporated this crime include, among others, the International Criminal Tribunal for the Former Yugoslavia; the International Criminal Tribunal for Rwanda; the Extraordinary Chambers in the Courts of Cambodia; and the Special Court for Sierra Leone.

forced pregnancy, or any other form of sexual violence of comparable gravity; enforced disappearance of persons; and other inhumane acts of a similar character. These acts, which could be prosecuted as war crimes or gross violations of human rights, are prosecuted as crimes against humanity if they are committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.⁵⁰ As with war crimes, the consensus among the international community to punish crimes against humanity stands as an important statement in favour of prosecution, even if a country is not a party to the Rome Statute. In that regard, the ICC could exercise its jurisdiction and investigate crimes against humanity committed in Nepal.

Moreover, Nepal has obligations regarding the prosecution of crimes against humanity under the ICCPR. Even though this treaty does not explicitly mention crimes against humanity, in its interpretation of article 2.3 of the ICCPR, which relates to the victim's right to an effective remedy, the HRC has said that states must ensure that those responsible for violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment, summary and arbitrary killing, and enforced disappearance, are brought to justice. It has recognized that "when committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity."⁵¹ Finally, the *Basic Principles and Guidelines on the Right to a Remedy and Reparation* also provides for the duty of the States to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish.⁵²

From the above, we can conclude that Nepal has a duty to prosecute crimes against humanity pursuant to its obligations under the ICCPR and under customary international law on the basis of the Rome Statute and other human rights instruments.

Nepal has not incorporated crimes against humanity in its domestic legislation. However, the latest Truth and Reconciliation Commission (TRC) bill, tabled at the Legislature-Parliament in May 2010, establishes that the TRC will investigate crimes against humanity and will end impunity by "bringing the persons involved in crimes against humanity within the confinements of law".⁵³ The draft bill does not define crime against humanity but it mentions that serious violations of human rights are acts committed systematically or targeting unarmed person or community like, among others, crimes against humanity.⁵⁴

C. GROSS VIOLATIONS OF HUMAN RIGHTS

Although widely used in human rights resolutions, declarations and treaties, the term "gross violations of human rights" has not been formally defined. Even the *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, which applies to victims of gross violations of IHRL, does not define the term.

⁵⁰ Rome Statute of the International Criminal Court, article 7, UN General Assembly, op. cit. 43.

⁵¹ *General Comment No. 31*, Human Rights Committee, op. cit. 33.

⁵² *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, par. 4, UN General Assembly, op. cit. 36.

⁵³ *A Bill Made for Making Provisions Related to a Truth and Reconciliation Commission*, (unofficial translation), Nepal Secretariat of Legislative Parliament. Working document.

⁵⁴ *Ibid.*, article 2.

In its rule of law tool on amnesties, the UN Office of the High Commissioner for Human Rights (OHCHR) includes

*[...] extrajudicial, summary or arbitrary executions; torture and similar cruel, inhuman or degrading treatment; slavery; and enforced disappearance, including gender-specific instances of these offences, as widely recognized gross violations of human rights.*⁵⁵

It further mentions that other crimes falling in this category include genocide, slave trade, murder, prolonged arbitrary detention, deportation or forcible transfer of population, systematic racial discrimination and deliberate and systematic deprivation of essential foodstuffs, essential primary health care or basic shelter and housing.⁵⁶ Gross violations of human rights result in irreparable harm to victims.⁵⁷

More recently the *Guidance Note of the Secretary General on the United Nations approach to transitional justice* has enumerated, among gross violations of human rights, “torture and similar cruel, inhuman or degrading treatment; extra-judicial, summary or arbitrary executions; slavery; enforced disappearances; and rape and other forms of sexual violence of comparable gravity.”⁵⁸

Under the ICCPR, article 2.3 compels the State parties to ensure that, in case of violation of the rights enshrined in the Covenant, individuals have accessible and effective remedies to vindicate these rights. The HRC has stated that in case of serious violations of human rights, and in particular in case of violation of the right to life, disciplinary and administrative actions do not constitute an effective remedy within the meaning of article 2.3 ICCPR. Confronted with such violations, the right to an effective remedy entails recourse to criminal processes.⁵⁹ The recourse to criminal processes builds on the acknowledgement that it plays a necessary role in combating impunity, which, at the same time, prevents the recurrence of such violations.

Moreover the *Basic Principles and Guidelines on the Right to a Remedy* also stipulate that in case of gross violations of human rights, which constitute crimes under international law, states have the duty to investigate, prosecute and punish the perpetrators.⁶⁰

Consequently, Nepal has an obligation to prosecute gross violations of human rights under the ICCPR and, possibly, under customary international law.

Moreover, as mentioned in the section for war crimes, the *Nepali Civil Code* prohibits many acts which are recognized as gross violations of human rights and could be prosecuted under domestic law.⁶¹

⁵⁵ *Rule of Law Tools for Post-Conflict States: Amnesties*, 2009, HR/PUB/09/1, UN Office of the High Commissioner for Human Rights (hereafter OHCHR), p. 21, available at:

http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf [accessed 24 May 2012].

⁵⁶ *Ibid.*

⁵⁷ Condé, H. Victor, *A handbook of international human rights terminology*, p. 103, op. cit. 37.

⁵⁸ “Guidance Note of the Secretary General: The United Nations approach to transitional justice”, UN Secretary-General (UNSG), March 2010, available at:

http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf [accessed 24 May 2012].

⁵⁹ “Communication No 778/1997: Colombia”, 29 November 2002, CCPR/C/76/D/778/1997, UN Human Rights Committee, par. 6.2, available at:

<http://www.unhcr.ch/tbs/doc.nsf/o/bc2327670bb5f2c7c1256cb8003ab560?Opendocument> [accessed 30 May 2012].

⁶⁰ *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, par. 4, UN General Assembly, op. cit. 36.

In its latest draft, the TRC bill defines serious violation of human rights as:

*The following acts when committed systematically or targeting unarmed person or community: (1) murder; (2) abduction and hostage taking; (3) disappearance; (4) causing deformities or disability; (5) physical or mental torture; (6) rape and sexual violence; (7) looting, seizure, breaking or arson of private and public property; (8) forceful eviction from house and land or displacement by any other means; or (9) any types of inhuman act committed against international human rights or humanitarian law or other crime against humanity.*⁶²

Moreover, the preamble of the TRC draft bill provides for the establishment of an independent and impartial TRC in order to end impunity and “to bring those involved in serious violations of human rights within the confinements of law, to ensure non-repetition of such acts in the future and to make all aware that such acts would be punishable.”⁶³

Therefore, both the Nepal Civil Code and the latest TRC draft bill tabled in Parliament provide for prosecutions in case of gross violations of human rights.

Due to the separate treaties and obligations regarding the duty to prosecute some gross violations of human rights, such as enforced disappearances and torture, we will look at these two crimes separately.

D. ENFORCED DISAPPEARANCES

According to the International Convention on the Protection of all Persons from Enforced Disappearances (hereafter referred to as the Convention on Enforced Disappearances), enforced disappearance is

*[...] the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.*⁶⁴

The Rome Statute criminalizes enforced disappearances as a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. The Statute defines enforced disappearances as

⁶¹ Nepal Civil Code (Muluki Ain), op. cit. 47.

⁶² *A Bill Made for Making Provisions Related to a Truth and Reconciliation Commission*, Section 2 (j), definitions, op. cit. 53.

⁶³ Ibid., Preamble.

⁶⁴ International Convention for the Protection of All Persons from Enforced Disappearance (hereafter Convention on Enforced Disappearances), article 2, UN General Assembly, 20 December 2006, available at: <http://www2.ohchr.org/english/law/disappearance-convention.htm> [accessed 25 May 2012].

*[...] the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.*⁶⁵

The definition in the Rome Statute is broader as it includes those acting with the authorization, support or acquiescence of a political organization. The case is particularly important in Nepal as the CPN (Maoist), a political organization, also committed enforced disappearances.

While Nepal has not signed either the Convention on Enforced Disappearances or the Rome Statute, Nepal has a duty to prosecute enforced disappearances in light of its obligations under IHL and IHRL. Under IHL, common article 3 to the four Geneva Conventions does not prohibit explicitly the act of disappearing someone forcefully. However, this crime is prohibited under the rules of customary IHL as it violates, or threatens to violate, other norms of customary IHL, such as the prohibition of arbitrary deprivation of liberty, the prohibition of torture and other cruel or inhuman treatment and the prohibition of murder.⁶⁶ Therefore, as enforced disappearance is a serious violation of IHL which amounts to war crime, customary law obligates the States to investigate and prosecute the suspects.⁶⁷

Under IHRL, although the ICCPR does not contain a specific right to be protected against enforced disappearance, the commission of this act would violate other relevant rights, such as the right to recognition as a person before the law (article 16), the right to liberty and security of the person (article 9), the right of detainees to be treated with humanity and respect for the dignity (article 10), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (article 7). Moreover, it could violate, or constitutes a grave threat, to the right to life (article 6). Among them, the right to life, the right not to be subjected to torture and the right to recognition as a person before the law cannot be derogated even in time of public emergency.⁶⁸ On the basis of the victim's right to an effective remedy, enshrined in article 2.3 of the ICCPR, the HRC has said that States have the duty to prosecute those responsible of committing enforced disappearances.⁶⁹

In Nepal, enforced disappearance is not a crime under domestic legislation. Neither Nepal is a party to the Convention on Enforced Disappearances. In its landmark decision from 18 June 2007, the SC issued an order directing the Government of Nepal to enact legislation defining the act of disappearance as an offense and consistent with the definition provided in the Convention on Enforced Disappearances⁷⁰. Although legisla-

⁶⁵ Rome Statute of the International Criminal Court, article 7.2.i), UN General Assembly, op. cit. 43.

⁶⁶ In Rule 98, "Enforced Disappearance", *Customary IHL*, ICRC, available at: http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule98 [accessed 25 May 2012].

⁶⁷ Rule 158, "Prosecution of War Crimes", op. cit. 42.

⁶⁸ International Covenant on Civil and Political Rights, article 4.2, op. cit. 7.

⁶⁹ *General Comment No. 31*, par. 18, Human Rights Committee, op. cit. 33.

⁷⁰ *Rabindra Prasad Dhakal v. the Government of Nepal and Others*, Supreme Court of Nepal judgement, 18 June 2007, in ICJ and NBA, *Transitional Justice and Right to a Remedy*, p. 262, op. cit. 30.

tion criminalizing disappearances was tabled in the Parliament in May 2010, the bill has yet to be passed.

In the same judgement, the SC ruled that although it has not ratified the Convention on Enforced Disappearances, Nepal has responsibilities on the basis of customary human rights law. According to the Court, “the Convention has not established new principles (...) but rather it has reinforced the values enshrined in customary human rights law”.⁷¹ To reinforce this argument, the Court referred to the HRC interpretation that an act of enforced disappearance would violate the right to life, the right not to be subjected to torture and the right to liberty and security, all of them guaranteed in the ICCPR.⁷² Accordingly, the Court ordered the Ministry of Home Affairs, the Government of Nepal and the Office of the Attorney General to establish a powerful Commission to conduct an in-depth inquiry and produce a report regarding the cases of enforced disappearances and, on the basis of that report, “to conduct criminal investigations as needed, including making a decision to file charge sheets against the responsible persons”.⁷³

As expressed by the highest Court, Nepal has a duty to prosecute and punish those involved in enforced disappearances under the ICCPR and customary human rights law.

E. TORTURE

According to the CAT, torture means

*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*⁷⁴

Following on the definition, the perpetrator can only be a public official or other person acting in an official capacity or should be acting at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The CAT clearly establishes the obligation of the State parties either to prosecute acts of torture or to extradite the perpetrators for prosecution.⁷⁵ The State obligation to prosecute torture is also clear under customary IHL and under IHRL. Common article 3 to the four Geneva Conventions prohibits explicitly cruel treatment and torture. As violations of common article 3 amounts to war crime, the State has a duty to investigate and prosecute the suspects under customary IHL. The ICCPR provides explicitly for the

⁷¹ Ibid., 237.

⁷² Ibid., 240.

⁷³ Ibid., 264.

⁷⁴ UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 1, op. cit. 34.

⁷⁵ Ibid., article 7.1.

right not to be subjected to torture and the HRC has interpreted the victim's right to an effective remedy as encompassing the State's obligation to bring the perpetrators to justice.⁷⁶

In Nepal, the 2007 Interim Constitution criminalizes torture for the first time.⁷⁷ However, the current legislation on torture, the Compensation for Torture Act, 1996, does not criminalize the practice of torture and is, therefore, inconsistent with international law and with the Interim Constitution. The act provides for the payment of compensation to the victim and departmental action against the employee who has inflicted torture.⁷⁸ The Nepal SC has ordered the Government to formulate legislation that declares the act of torture a crime in line with the CAT and with Nepal's obligation, under the Interim Constitution, to implement effectively international treaties.⁷⁹ The lack of domestic legislation entails that current incidents of torture are not prosecuted and punished.

In April 2012, a new law entitled Act on Torture, Degrading Treatment, Punishment and Compensation, 2012 was forwarded to the Parliament for approval.⁸⁰

1.2.3. FINAL CONSIDERATIONS

Finally we will refer to other principles and guidelines of IHRL and international criminal law, which affects the State's duty to prosecute.

The Updated Set of principles for the protection and promotion of human rights through action to combat impunity (Updated Principles to Combat Impunity)

Although not legally binding, the *Updated Principles to Combat Impunity* represent a set of guidelines to assist states in developing effective measures to combat impunity.⁸¹ They establish, as a general principle, the duty of the State to undertake prompt, thorough, independent and impartial investigations of violations of human rights and IHL and to "take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under

⁷⁶ *General Comment No. 31*, par. 18, Human Rights Committee, op. cit. 33.

⁷⁷ Article 26, "Right against torture", states that (1) No person who is detained during investigation, or for trial or for any other reason, shall be subjected to physical or mental torture, or be treated in a cruel, inhuman or degrading manner. (2) Any such an act pursuant to clause (1) shall be punishable by law, and any person so treated shall be compensated in a manner determined by law, Interim Constitution of Nepal, op. cit. 27.

⁷⁸ Article 4 states that "in case it is proved that any employee of His Majesty Government (HMG) has inflicted torture on any person, compensation shall be paid to the victim according to this act" and article 7 states that "in case it is proved that torture has been inflicted, the district court shall order the appropriate agency to take departmental action according to the current law against the government employee who has inflicted torture." Compensation for Torture Act, 18 December 1996, available at <http://www.unhcr.org/refworld/docid/3ae6b4fac.html> [accessed 4 May 2012].

⁷⁹ Article 4 of the Convention against Torture, provides "each State Party shall ensure that all acts of torture are offences under its criminal law." Convention against Torture, UN General Assembly, op. cit. 39. Article 33 (m) of the Interim Constitution establishes that "the State is responsible to implement effectively international treaties and agreements to which the State is a party", Interim Constitution of Nepal, op. cit. 27.

⁸⁰ "New torture law in offing", *The Kathmandu Post*, 6 April 2012, available at <http://www.ekantipur.com/the-kathmandu-post/2012/04/06/top-story/new-torture-law-in-offing/233515.html> [accessed 9 May 2012].

⁸¹ UN Commission on Human Rights, *Report of the independent expert to update the Set of principles to combat impunity (Updated Principles to Combat Impunity)*, 8 February 2005, E/CN.4/2005/102/Add.1, Preamble, available at: <http://www.unhcr.org/refworld/docid/42d66e780.html> [accessed 30 May 2012].

international law are prosecuted, tried and duly punished.”⁸² In non-international armed conflicts, serious crimes under international law refer to war crimes, genocide, crimes against humanity, and other violations of internationally protected human rights, such as torture, enforced disappearance, extrajudicial execution, and slavery.⁸³

Non-applicability of statutes of limitations to war crimes and crimes against humanity

This principle was first adopted in The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity adopted by the General Assembly (GA) in 1968 and which entered into force in 1970. State parties to this Convention agreed to adopt legislative or other measures to ensure that statutory or other limitations do not apply to the prosecution and punishment of war crimes and crimes against humanity and that, if they exist, they should be abolished.⁸⁴ The Rome Statute also stipulates that the crimes within its jurisdiction, genocide, war crimes, crimes against humanity, and the crime of aggression, shall not be subjected to any statute of limitation.⁸⁵

More recently, the *Basic Principles and Guidelines on the Right to a Remedy and Reparation* establishes that statutes of limitation shall not apply to gross violations of IHRL and serious violations of IHL, which constitute crimes under international law.⁸⁶

Although Nepal is not part of the 1968 Convention or the Rome Statute, State practice establishes the rule of non-applicability of statutes of limitations to war crimes and crimes against humanity as a norm of customary international law and, therefore, binding on states.⁸⁷

Retroactive application of Penal Provisions allowed

This principle in international criminal law goes against the general principle of non-retroactivity of criminal offenses (*nulla poena sine lege*). In normal circumstances, a governmental authority cannot prosecute and punish anyone for a crime, unless a law in force prohibited that act.⁸⁸ However, there is an exception concerning some acts, which are criminal according to the *general principles of law recognized by the community of nations* and for which perpetrators cannot claim they were unaware of their

⁸² Ibid., Principle 19, “Duties of the states with regard to the administration of justice”.

⁸³ Ibid., Definitions, B. “Serious crimes under international law”.

⁸⁴ The Convention refers to war crimes and crimes against humanity, as defined in the Charter of the International Military Tribunal, Nuremberg. Crimes against humanity also include inhumane acts resulting from the policy of apartheid and the crime of genocide, as defined in the 1948 Convention. UN General Assembly, *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 26 November 1968, A/RES/2391(XXIII), available at <http://www.unhcr.org/refworld/docid/3ae6b37818.html> [accessed 30 May 2012].

⁸⁵ Rome Statute of the International Criminal Court, article 29, UN General Assembly, op. cit. 43.

⁸⁶ *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, UN General Assembly, op. cit. 36.

⁸⁷ *Customary IHL*, Rule 160, “Statutes of limitation may not apply to war crimes”, ICRC, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule160 [accessed 30 May 2012].

⁸⁸ Article 15.1 ICCPR states, “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.” UN General Assembly, ICCPR, op. cit. 7.

illegality.⁸⁹ In these cases, whenever a crime is based on customary international law, it is allowed to enact a law establishing and punishing a crime with retroactive effects.

This principle is of particular importance in Nepal as many violations of IHL and IHRL, such as war crimes, crimes against humanity, enforced disappearances, torture and other international crimes are not incorporated in its domestic legislation.

CONCLUSION

Nepal has a duty to prosecute war crimes, crimes against humanity and gross violations of human rights committed during the armed conflict. This obligation stems from the international treaties Nepal has ratified as well as from customary international law. Moreover, none of the various peace agreements and letters of understanding that the former belligerents signed include any provisions on amnesty. On the contrary, they hold the parts accountable to international human rights and humanitarian law.

Customary IHL has established individual criminal responsibility for war crimes committed in non-international armed conflicts as well as the State's obligation to investigate these crimes and to prosecute the suspects. Similarly, Nepal has an obligation to prosecute crimes against humanity pursuant to its obligations under the ICCPR. Moreover, war crimes and crimes against humanity are international crimes within the jurisdiction of the ICC. The Court has jurisdiction as these are among the most serious crimes of concern to the international community as a whole. While Nepal is not a party to the Rome Statute, the consensus among the international community to punish these crimes stands as an important statement in favour of prosecution. Nepal has also a duty to prosecute gross human right violations on the basis of the victim's rights to an effective remedy, which encompasses the State obligation to bring to justice those responsible. This obligation arises in respect of violations such as, among others, torture, and similar cruel, inhuman and degrading treatment, extrajudicial executions, summary and arbitrary killing and enforced disappearances. In the case of torture, the CAT explicitly establishes the obligation of the State Parties to prosecute.

Nepal has not incorporated international crimes in its domestic legislation, even though international treaties, like the ICCPR and the CAT, bind the states to do it. Other important human rights instruments, like the *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, also call the states to incorporate norms of IHRL and IHL into their domestic law and by adopting appropriate and effective legislative and administrative procedures that provide fair, effective and prompt access to justice.

At the national level, the Interim Constitution and the Nepal Treaty Act also compel the State to implement international treaties and agreements to which Nepal is a party. The SC has issued orders directing the Government of Nepal to enact legislation criminalising enforced disappearances and torture. In spite of these obligations, Nepal has not incorporated war crimes or crimes against humanity in its domestic legislation and

⁸⁹ Ibid., article 15.2.

neither enforced disappearance nor torture are currently a crime in Nepal. This emerges as an obstacle to prosecutions at the domestic level.

However, the Nepal Civil Code prohibits some acts like murder, battery, rape, illegal detention, kidnapping, abduction and hostage taking, and looting, which are recognized as violations of human rights and humanitarian law under international treaties and which could be prosecuted under domestic law.

Nepal is emerging from an armed conflict and is currently going through a transitional justice process. Although the warring parties agreed in the various peace accords to establish truth-seeking mechanisms, almost six years later, the State still has to fulfil this obligation. The main aim of these two mechanisms is to unveil the truth through the investigation of serious violations that took place during the conflict. In fact, knowing what happened has emerged as a right of victims and their families; a right that the State has the duty to fulfil.

2. THE RIGHT TO KNOW THE TRUTH AND TRUTH COMMISSIONS

In the previous chapter we have seen that Nepal has a duty to prosecute war crimes, crimes against humanity and gross violations of human rights committed during the armed conflict, in light of the international treaties Nepal has ratified as well as customary international law. Following our hypothesis, we argue that states try to evade this duty through the establishment of truth commissions. We sustain states try to substitute their duty to prosecute for the fulfilment of the victim's right to know the truth with these truth-seeking mechanisms.

In this chapter we are going to examine whether victims have a right to know the truth about violations of human rights and IHL and whether states have an obligation to fulfil this right. In that regard, we will trace what are the origins of this right and what is, currently, the content and scope of the right to truth. We will argue that, under international law, states do not have an enforceable obligation to fulfil the victim's right to know the truth.

However, state practice has led to a *de facto* recognition of this right through the establishment of truth commissions in the aftermath of an armed conflict or state repression under authoritarian rule. We will look into some of these commissions to understand what their objectives and main activities are. Finally, we will examine what has been the relationship between truth commissions, prosecutions and amnesties in order to assess whether the fulfilment of the victim's right to truth, through the establishment of truth commissions, is intended to exonerate the State from its duty to prosecute.

2.1. THE EMERGENCE OF A RIGHT TO KNOW THE TRUTH

The Convention on Enforced Disappearances, from 20 December 2006, and which entered into force in December 2010, is the first treaty to make the victim's right to truth enforceable.¹ Article 24.2 provides that

[...] each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investiga-

¹ As of June 2012, 94 countries have signed, and 33 of them have also ratified the Convention.

*tion and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.*²

The obligations of the State parties intended to fulfil this right include searching for, locating and releasing disappeared persons and, in the event of death, to locate, respect and return their remains.³

The incorporation of the right to know the truth in an international human rights treaty dealing with enforced disappearances is not a coincidence. The origins of the right to know the truth can be traced in IHL with regard to the right to know the fate of those missing or dead in international armed conflicts.

The right to know in IHL

The four Geneva Conventions from 1949 incorporate implicit obligations for the belligerent parties to search for and collect the wounded and sick and to search for the dead;⁴ to facilitate enquiries made by members of families dispersed owing to the war;⁵ and to establish a central search agency to collect and forward information on prisoners of war and civilians.⁶

In 1974, the GA, following up on resolution V of the XXII International Conference of the Red Cross celebrated in Teheran in 1973, adopted Resolution 3220, “Assistance and cooperation in accounting for persons who are missing or dead in armed conflict”. The resolution referred to the “desire to know the fate of loved ones in armed conflicts as a basic human need”.⁷ Taking into account this resolution, the working group drafting article 32 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol Additional I), incorporated as a general principle the *right* of the families to know the fate of their relatives who are missing or dead.⁸ However, this right did not impose obligations on a state with respect to its own nationals.⁹ On the other hand, article 33, Protocol Additional I, incorporates the obligation of the parties to an armed conflict to search for

² International Convention for the Protection of All Persons from Enforced Disappearance, (hereafter Convention on Enforced Disappearances), UN General Assembly, 20 December 2006, available at: <http://www2.ohchr.org/english/law/disappearance-convention.htm> [accessed 25 May 2012].

³ *Ibid.*, article 24.3.

⁴ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), article 15; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), article 18; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), article 16. *The Geneva Conventions and their Additional Protocols*, International Committee of the Red Cross (ICRC), available at:

<http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp> [accessed 22 June 2012]

⁵ *Ibid.*, Fourth Geneva Convention, article 26.

⁶ *Ibid.*, Third Geneva Convention, article 122, Fourth Geneva Convention, article 136.

⁷ “Assistance and cooperation in accounting for persons who are missing or dead in armed conflict”, UN General Assembly, 6 November 1974, 3220 XXIX, available at <http://www.un.org/documents/ga/res/29/ares29.htm> [accessed 25 June 2012].

⁸ Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol Additional I), 8 June 1977, article 32, available at <http://www.icrc.org/ihl.nsf/INTRO/470> [accessed 26 June 2012].

⁹ As referred to in the commentaries to the Protocol I, the report of the working group on the section on missing and dead persons contained a paragraph in square brackets (Article 20 quater, paragraph 5), which provided that: “this Section does not impose on any High Contracting party or Party to a conflict obligations with regards to its own nationals”. Although this paragraph was later deleted by consensus, this was, according to the report by Committee II, “because it was self-evident that the article did not apply to a Party’s own nationals”. *Commentary to the Introduction to Part II, Section III on Missing and dead persons, Protocol I*, ICRC, available at <http://www.icrc.org/ihl.nsf/COM/470-750038?OpenDocument> [accessed 26 June 2012].

the persons who have been reported missing by an adverse Party, as soon as circumstances permit.¹⁰

The right of families to know the fate of their missing relatives has been recognized as a norm of customary IHL. Rule 117 states that “Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate”.¹¹ This norm establishes a double obligation for the parties to the conflict. First, to make every effort to clarify the fate of all persons unaccounted for, including combatants and civilians; second, to inform the families accordingly. The character of customary law is based on the provisions in the Geneva Conventions and Additional Protocols, on state practice, military manuals, and resolutions adopted by international organizations and case law of the HRC and regional human rights bodies. Building upon the practice of the states, the right of the families to know the fate of those missing can be claimed also in non-international armed conflicts.¹² As a consequence, the right of the families to know the fate of their relatives currently imposes an obligation on states with respect to their own nationals.

The existence of a customary right to know in IHL means that the relatives of non-combatants who were disappeared forcefully have the right to know their fate. This is important in the context of Nepal, as, in 2004 during its internal armed conflict, Nepal was the source of the largest number of urgent-action cases transmitted by the Working Group on Enforced and Involuntary Disappearances (WGEID).¹³ However, under customary IHL the right to know is limited to knowing the fate of the missing. Hence, other victims of serious violations of IHL, like torture victims, or those summarily executed but whose bodies are not missing, would not be entitled to a right to know. Neither would be any victim of gross human rights violations outside the context of an armed conflict.

To find out the basis for the entitlement to the right to know of other victims, we have to look into how the right to know under IHL, became the right to know the truth in IHRL.

*The right to know the truth in IHRL*¹⁴

The right of the families to know the whereabouts of those missing during armed conflicts extended during the 1970s to the sphere of IHRL, and therefore out of the context of an armed conflict. This change was motivated by the emergence of the practice of enforced disappearances, by law enforcement or security authorities, and the consequent refusal to acknowledge the deprivation of liberty. Amid growing practice in various parts of the world, the GA called upon the governments to search for such persons

¹⁰ Protocol Additional I, article 33, op. cit. 8.

¹¹ Rule 117, “Accounting for Missing Persons”, in *Customary International Law*, ICRC, available at: http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule117 [accessed 20 June 2012].

¹² Ibid.

¹³ *Question of enforced or involuntary disappearances, Report of the Working Group on Enforced or Involuntary Disappearances*, UN Commission on Human Rights, 23 December 2004, E/CN.4/2005/65, available at: <http://www.ohchr.org/EN/Issues/Disappearances/Pages/Annual.aspx> [accessed 10 July 2012]

¹⁴ We will use indistinctively “right to know the truth” or “right to truth”.

and to undertake speedy and impartial investigations.¹⁵ Furthermore, the GA called upon all governments to guarantee the full enjoyment of the right to *amparo*, *habeas corpus* or other legal remedies to the same effect, in order to clarify the whereabouts and fate of missing and disappeared persons.¹⁶ For instance, the GA urged the Chilean authorities to investigate and clarify the fate of persons reported to have disappeared for political reasons, between 1973 and 1977, and to inform relatives about the outcome.¹⁷ In view of this practice, the GA requested the then UN Commission on Human Rights to consider the question of disappeared persons with a view to making appropriate recommendations.¹⁸ The Commission decided, on 29 February 1980, to establish a working group to examine questions relevant to enforced or involuntary disappearances.¹⁹ In its first report from 26 January 1981, the WGEID expressed that the enforced absence of a person infringes various human rights of the members of the family and, among them, the right of the families to know the fate of their relatives, on the basis of the Protocol Additional I to the Geneva Convention.²⁰

Case law of the Human Rights Committee (HRC) and regional human rights bodies, above all the Inter-American Court (IACtHR) and the Inter-American Commission of Human Rights (IACHR), recognized the right of the families to know the fate of their relatives disappeared as well as the duty of the State to investigate the facts, to inform the relatives of the fate of the victims and, if killed, the location of their remains. Responding to a communication in a case of forced disappearance, the HRC confirmed the right of the families to know what happened to their relatives.²¹ With regard to the State's obligations, the IACtHR ruled:

*The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.*²²

Further to recognizing both the right of the families to know and the duties of the State to investigate and to inform the relatives, human rights bodies helped to shape the content of the right to know. In its report from 1985-1986, besides referring to the family

¹⁵ "Disappeared persons", UN General Assembly, 20 December 1978, A/RES/33/173, available at: <http://www.un.org/documents/ga/res/33/ares33.htm> [accessed 20 June 2012].

¹⁶ "The right of *amparo*, *habeas corpus* or other legal remedies to the same effect", UN General Assembly, 17 December 1979, A/RES/34/178, available at: <http://www.un.org/Depts/dhl/resguide/r34.htm> [accessed 20 June 2012].

¹⁷ Ibid., "Human rights in Chile", UN General Assembly, A/RES/34/179.

¹⁸ "Disappeared persons", UN General Assembly, 20 December 1978, A/RES/33/173, available at: <http://www.un.org/documents/ga/res/33/ares33.htm> [accessed 20 June 2012].

¹⁹ "Question of missing and disappeared persons", UN Commission on Human Rights, 29 February 1980, E/CN.4/RES/1980/20, available at: http://www.ohchr.org/Documents/Issues/Disappearances/E-CN.4-RES-1980-20_XXXVI.pdf [accessed 20 June 2012].

²⁰ "Question of human rights of all persons subjected to any form of detention or imprisonment, in particular the question of missing and disappeared persons", UN Commission on Human Rights, 26 January 1981, E/CN.4/1435, available at: <http://www.ohchr.org/EN/Issues/Disappearances/Pages/Annual.aspx> [accessed 20 June 2012].

²¹ *Almeida de Quinteros v. Uruguay*, UN Human Rights Committee, CCPR/C/19/D/107/1981, 21 July 1983, par. 14, available at <http://www.estadodederechocdh.uchile.cl/media/documentacion/archivos/AlmeidaDPCCPR.pdf> [accessed 21 June 2012].

²² *Velásquez Rodríguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACtHR), 29 July 1988, par. 181, available at:

right to information, the IACHR recognized a collective right to know the truth. The IACHR referred to “an inalienable right of every society to know the truth about past events as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future.”²³

The recognition of the IACHR of this “societal right” needs to be contextualized in the democratization processes many countries were going through in Latin America at the time. In Argentina and Uruguay, the commissions of inquiry, established to find out about the fate of those who had disappeared during years of military rule, released their reports in September 1984 and November 1985 respectively.²⁴ In that regard, besides the work done by human rights bodies, establishment of truth commissions in various parts of the world contributed to shape the right to know the truth.

Although linked at the beginning within the context of enforced disappearances, truth commissions gradually extended to investigating other serious violations of human rights. Similarly, the HRC also recognized the right to truth to victims of other violations of human rights beyond enforced disappearances. In its concluding observations, regarding the implementation of the ICCPR by Guatemala, the HRC recognized the right to the truth of victims of human rights violations, including finding out what happened and knowing who the perpetrators were.²⁵

In 1997 the then UN Commission on Human Rights endorsed the “Set of principles for the protection and promotion of human rights through action to combat impunity” (hereafter referred as Set of Principles to Combat Impunity), which constitute the first articulation of a right to truth in an international policy forum.²⁶ The Set of Principles to combat Impunity recognized that “every people has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through the consistent pattern of gross violations of human rights, to the perpetration of aberrant crimes.”²⁷

Although not binding on states, the Set of Principles to Combat Impunity fortified the lead taken by regional human rights bodies in the recognition of the victim’s right to truth and the duty of the State investigate the facts and to inform the family members. At the same time, these principles acknowledged the State practice of establishing extrajudicial commissions of inquiry in the search for truth.

<http://www.unhcr.org/refworld/docid/40279a9e4.html> [accessed 22 June 2012]

²³ Inter-American Commission of Human Rights, *Annual report 1985-1986*, available at:

<http://www.cidh.org/annualrep/85.86eng/chap.5.htm> [accessed 23 June 2012]

²⁴ In Argentina, the National Commission on the Disappearances of Persons (CONADEP) submitted its final report on 20 September 1984 and in Uruguay, the Investigative Commission on the Situation of Disappeared People and its Causes, on November 1985.

²⁵ UN Human Rights Committee, *Concluding Observations: Guatemala*, 3 April 1996, CCPR/C/79/Add.63, par. 25, available at: <http://www.unhcr.org/refworld/docid/3ae6bo290.html> [accessed 20 June 2012]

²⁶ The Set of Principles were submitted by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which was renamed in 1999 as the Sub-Commission on the Promotion and Protection of Human Rights.

²⁷ UN Sub-Commission on the Promotion and Protection of Human Rights, *The Human Rights of Detainees*, 2 October 1997, E/CN.4/Sub.2/1997/20/REV.1, Annex II, “Set of Principles for the protection and promotion of human rights through action to combat impunity”, Principle 1, “The inalienable right to the truth”, available at: <http://www.unhcr.org/refworld/docid/3boof4298.html> [accessed 22 June 2012]

The analyses will turn now into the study of the definition, contours, scope and nature of the right to truth.

2.2. WHAT IS THE RIGHT TO KNOW THE TRUTH?

Currently, there is no treaty on the right to truth. The content and scope of this right has been evolving and still continues being developed and debated. However, some elements of the right to truth are clear.

The right to truth is inalienable and imprescriptible.²⁸ It is an autonomous right, in the sense that it needs to be fulfilled independently from other rights.²⁹ It is a fundamental right of the individual, non-derogable and, therefore, should not be subject to limitations. Accordingly, amnesties or other measures should not be used to restrict, limit or compromise it.³⁰

The right to know the truth encompasses both an individual and a collective right. The individual right implies knowing the truth to the fullest extent possible, irrespective of any legal proceedings. It includes knowing the truth about the circumstances in which violations took place, the causes that led to the abuses, the identity of the perpetrators and, in the event of death or disappearances, the right to know the victim's fate,³¹ and the right of the families to have the remains of their relative returned to them.³² The right to know the truth encompasses a duty of the State to provide information to victims, families and the society about human rights violations. Collectively, people have the right to know their own history in order to prevent from violations taking place in the future. This collective right entails a duty on the side of the State to remember, in the sense of preserving information for public memory.

With regard to the material scope of the right to truth, victims of gross violations of human rights as well as victims of serious violations of IHL are entitled to the right to know the truth.³³ International human rights instruments and regional and international human rights bodies and courts have confirmed the existence of a right to truth beyond enforced disappearances.

As for international human rights instruments, the *Updated Principles to Combat Impunity* refers to “the right to know the truth about the circumstances in which viola-

²⁸ - “The victim’s right to know”, UN Commission on Human Rights, *Report of the independent expert to update the Set of principles to combat impunity (Updated Principles to Combat Impunity)*, 8 February 2005, E/CN.4/2005/102/Add.1, Principle 4, available at: <http://www.unhcr.org/refworld/docid/42d66e78o.html> [accessed 30 May 2012].

²⁹ UN Commission on Human Rights, *Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights*, 8 February 2006, E/CN.4/2006/91, available at: <http://www.unhcr.org/refworld/docid/46822b6c2.html> [accessed 5 July 2012]

³⁰ “The victim’s right to know”, *Updated Principles to Combat Impunity*, Principle 24 (b), UN Commission on Human Rights, op. cit. 28.

³¹ Ibid., Principle 4. Also in *Study on the Right to the Truth*, par. 59, UN Commission on Human Rights, op. cit. 29..

³² UN Human Rights Council, *Report of the Working group on Enforced or Involuntary Disappearances*, 2 March 2012, A/HRC/19/58/Rev.1, par. 59, available at

<http://www.ohchr.org/EN/Issues/Disappearances/Pages/Annual.aspx> [accessed 10 July 2012]

³³ *Study on the Right to the Truth*, par. 33, UN Commission on Human Rights, op. cit 29.

tions took place”³⁴ and calls for commissions of inquiry to focus their investigation on violations constituting serious crimes under international law.³⁵ The *Basic Principles and Guidelines on the Right to a Remedy and Reparation* provide for the victim’s right to remedies which include, under international law, access to relevant information concerning violations.³⁶

With regard to human rights bodies, the HRC has urged the Government of Guatemala “to allow the victims of human rights violations to find out the truth about those acts and to know who the perpetrators of such acts are”.³⁷ The Committee has also explicitly recognized the right to know the truth in a case of secret execution,³⁸ and the IACHR has also confirmed the right to truth in cases of extrajudicial executions.³⁹ Regional courts, like the IACtHR have recognized the victim’s right to know the truth in cases of summary execution⁴⁰ and in cases of illegal detention and torture.⁴¹

As seen, the right to know the truth in IHRL is much broader than the original right to know in IHL, limited to the right to know the fate of those missing, either combatants or non-combatants, during or after an armed conflict. In that regard, the recognition of the right to know as a norm in customary IHL does not presuppose the existence of the same norm in IHRL. In fact, notwithstanding the claim that the right to truth is a fundamental, inalienable, imprescriptible, autonomous and non-derogable right, it has been traditionally invoked in relation to other rights.

The basis to justify the right to know the truth in international law

The WGEID has claimed that it “acknowledged the existence of the right to truth as an autonomous right in its very first report”.⁴² In fact, in its first report, the WGEID expressed that the enforced absence of a person infringes various human rights of the members of the family, among them, the right of the families to know the fate of their relatives, on the basis of article 32 of the Additional Protocol I to the Geneva Conven-

³⁴ *Updated Principles to Combat Impunity*, Principle 4 - “The victim’s right to know”, UN Commission on Human Rights, op. cit. 28.

³⁵ Ibid. According to the *Updated Principles to Combat Impunity*, serious crimes under international law include grave breaches of the Geneva Conventions and of Protocol Additional I as well as other violations of IHL that are crimes under international law; genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law [...] such as torture, enforced disappearance, extrajudicial executions and slavery.

³⁶ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution / adopted by the General Assembly* (hereafter referred to as the *Basic Principles and Guidelines on the Right to a Remedy and Reparation*), 21 March 2006, A/RES/60/147, par. 11, available at: <http://www.unhcr.org/refworld/docid/4721cb942.html> [accessed 24 May 2012].

³⁷ *Concluding Observations: Guatemala*, UN Human Rights Committee, op. cit. 25.

³⁸ *Mariya Staselovich v. Belarus*, UN Human Rights Committee, CCPR/C/77/D/887/1999, 24 April 2003, par. 9.2, available at <http://www.unhchr.ch/tbs/doc.nsf/o/2b1c441baa682a5fc1256d250036448c?OpenDocument> [accessed 8 July 2012].

³⁹ *Ignacio Ellacuria et al v. El Salvador*, Inter-American Commission of Human Rights, Case 10.488, Report N° 136/99, December 22, 1999, available at <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=131&IID=1> [accessed 8 July 2012].

⁴⁰ *Case of Barrios Altos v. Peru*, Inter-American Court of Human Rights, (Ser. C) No. 75 (2001), 14 March 2001, par. 48, available at

http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf [accessed 20 June 2012].

⁴¹ *Case of Tibi v. Ecuador*, Inter-American Court of Human Rights, (Ser. C) No. 114 (2004), 7 September 2004, par. 257, available at

http://www.corteidh.or.cr/docs/casos/articulos/seriec_114_ing.pdf [accessed 2 July 2012].

⁴² *General Comment on the Right to Truth in Relation to Enforced Disappearances*, WGEID, available at http://www.ohchr.org/Documents/Issues/Disappearances/GC-right_to_the_truth.pdf [accessed 2 July 2012]

tion.⁴³ The recognition of the right to truth under IHL, would only entitle the families of those missing, including those forcefully disappeared, during an armed conflict leaving victims of enforced disappearances, in a non armed conflict situation, outside the protection of this right.

Later on, the WGEID has invoked the right to truth, on the basis of the Declaration on the Protection of All Persons from Enforced Disappearances, in connection with the establishment of mitigating circumstances for perpetrators who bring the victim alive or who provide information which contributes to clarify the cases of enforced disappearance (article 4.2) and in relation to the victim's right to a prompt and effective judicial remedy (article 9).⁴⁴

Not only the WGEID has justified the right to truth on the basis of other rights. The HRC has linked the right of the family to know with the right to be free from torture, guaranteed in article 7 of the ICCPR. The Committee considered that the anguish caused by the disappearance amounted to a breach of the right to be free from torture.⁴⁵ Further, in a case of secret execution, the HRC also considered the victim's right to an effective remedy, enshrined in article 2.3 ICCPR, as the basis for the State's obligation to provide the family with information on the location of the burial site.⁴⁶

The Human Rights Chamber for Bosnia and Herzegovina has also based the right of families to know the truth about the fate and whereabouts of missing persons on the right not to be subjected to torture or ill treatment and also on the right to family life and the State's duty to conduct effective investigations.⁴⁷

The IACHR first upheld that the right to truth was subsumed under the right to judicial protection, article 25 of the American Convention of Human Rights, which encompasses the State obligation to provide victims, or their next-of-kin, simple and prompt legal recourse for violations of fundamental rights. Under the right to judicial protection, the right to truth flows from the State's obligation to "use all means at its disposal to carry out a serious investigation of violations committed within its jurisdiction [in order] to identify those responsible".⁴⁸ Later on, the Commission understood that, under the American Convention of Human Rights, the right to truth found also its grounds in the State obligation to respect rights (article 1.1), the victim's right to a fair

⁴³ "Question of human rights of all persons subjected to any form of detention or imprisonment, in particular the question of missing and disappeared persons", par. 187, UN Commission on Human Rights, op. cit. 20.

⁴⁴ In its general comment on article 18 of the Declaration on the Protection of All Persons from enforced Disappearances, the WGEID has said that an amnesty law should be considered contrary to the Declaration if it results in "concealing the names of the perpetrators of disappearance, thereby violating the right to truth and information, which can be inferred from articles 4 (2) and 9 of the Declaration". UN Commission on Human Rights, *Report of the Working Group on Enforced or Involuntary Disappearances*, 27 December 2005, E/CN.4/2006/56, p. 18, available at <http://www.ohchr.org/EN/Issues/Disappearances/Pages/Annual.aspx> [accessed 10 July 2012]

⁴⁵ The Human Rights Committee concluded, "the Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7." *Almeida de Quinteros v. Uruguay*, UN Human Rights Committee, par. 14, op. cit. 21.

⁴⁶ *Mariya Staselovich v. Belarus*, UN Human Rights Committee, par. 11, op. cit. 38.

⁴⁷ *Case Palic v. Republica Srpska*, Case N° CH/99/3196, in UN Commission on Human Rights, *Study on the Right to the Truth*, op. cit. 29.

⁴⁸ *Manuel Stalin Bolaños Quiñones v. Ecuador*, Inter-American Commission of Human Rights, Case 10.580, Report N° 10/95, 12 September 1995, par. 45, available at: <http://www1.umn.edu/humanrts/cases/1996/ecuador10-95.htm> [accessed 11 July 2012]

trial (article 8) and the right to freedom of thought and expression (article 13).⁴⁹ The IACtHR has confirmed this view adding that the victim's right to truth also encompasses a State responsibility to investigate and prosecute under the right to a fair trial and the right to judicial protection guaranteed in the American Convention.⁵⁰

The IACtHR has also invoked the right to truth as a measure of reparation. The Court has ruled,

*The right to truth has been sufficiently developed in the international human rights law and, as this court has stated previously, the right of the relatives of the victims to know what has happened to the latter and, if applicable, the location of the remains, constitute a measure of reparation that the State must satisfy towards the relatives and towards society as a whole.*⁵¹

The right to truth has also been invoked as a measure of reparation in international human rights instruments. The *Basic Principles and Guidelines on the Right to a Remedy and Reparation* establish that victims of gross violations of IHRL and serious violations of IHL should be provided with full and effective reparation for the harm suffered, including measures of satisfaction. These measures entail verification of the facts and full and public disclosure of the truth and, in case of missing and disappeared, the right to truth also entails to know the fate and the search for the whereabouts of the victim.⁵²

Summary Conclusion

Under customary IHL, each party to the conflict has an obligation to make all efforts to clarify the fate of those reported missing and to inform the families either in international or non-international armed conflicts. This obligation entails a right of the families to know the fate of those missing, including the fate of non-combatants who were forcefully disappeared during the conflict.

Outside the scope of IHL, we cannot argue that victims have an enforceable right to know the truth. We could claim the existence of this right out of the many resolutions, from international, regional and national bodies. As seen, it has been justified on the basis of other rights, like the right to an effective remedy, the right to be free from torture, the right to judicial protection, the right to a fair trial, the right to freedom of thought and expression; as a measure of reparation; and also, on the basis of the State's duty to investigate. This wide range of sources shows both the weaknesses and

⁴⁹ *Ignacio Ellacuría et al v. El Salvador*, Inter-American Commission of Human Rights, op. cit. 39.

⁵⁰ The Court ruled, "the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution that are established in Articles 8 (right to a fair trial) and 25 (right to judicial protection) of the Convention", *Case of Bámaca-Velásques v. Guatemala*, Inter-Am.Ct.H.R. (Ser. C) No. 70 (2000), Inter-American Court of Human Rights, 25 November 2000, par. 201, available at: http://www.corteidh.or.cr/docs/casos/articulos/Seriec_70_ing.pdf [accessed 20 June 2012]

⁵¹ *Case of Trujillo Oroza v. Bolivia*, Inter-Am Ct. H.R. (Ser. C) No. 92 (2002), Inter-American Court of Human Rights, 27 February 2002, par. 114, available at: http://www.corteidh.or.cr/docs/casos/articulos/Seriec_92_ing.pdf [accessed 8 July 2012]

⁵² *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, par. 22.b and 22.c, UN General Assembly, op. cit. 36.

strengths of the right to know the truth under IHRL. If we were in front of a clear and enforceable right, international human rights bodies and regional courts would not need to invoke its existence on the grounds of other rights. At the same time, these justifications offer several legal bases for its recognition and denotes a *de facto* existence of this human right.

Nowhere the existence of a *de facto* right to truth is clearer than through the State practice of establishing truth commissions, aimed at fulfilling victims right to truth. In several cases, the right to truth has been explicitly cited as the legal basis for the establishment of these commissions.⁵³ Whether the existence of a right to truth can be claimed or not, in these cases states have made the right to know the truth enforceable through the obligation to set up truth commissions in order to confront and come to terms with a legacy of large scale past abuses.

In the following section we will look into the establishment of truth commissions as a way to confront massive violations of human rights, either in the aftermath of conflict or State repression under authoritarian rule.

2.3. TRUTH COMMISSIONS: WHAT THEY ARE AND WHAT THEY DO

In this section, we will provide an overview of the basic features of truth commissions, how they are traditionally established and for which purpose and what are their main functions, activities and powers.

Mark Freeman, a leading scholar on transitional justice, defines truth commissions as,

*[...] an ad hoc, autonomous, and victim-centred commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendation for their redress and future prevention.*⁵⁴

In order to ascertain whether a body is a truth commission, Freeman suggests that, after assessing it conforms to the technical definition, “one should gauge, as best as possible, whether there is also broad domestic and international consensus that it is a truth commission.”⁵⁵ If such consensus exists, Freeman maintains, we are in front of a truth commission, otherwise, its classification would be open to question. The argument leads this author to maintain that some traditionally considered truth commissions might not be such.⁵⁶ The discussion on what is a truth commissions is still open, in part due to their heterogeneous character.

⁵³ *Study on the Right to the Truth*, par. 14, UN Commission on Human Rights, op. cit. 29.

⁵⁴ Freeman, Mark, *Truth Commissions and Procedural Fairness*, New York: Cambridge University Press, 2006, p. 18.

⁵⁵ *Ibid.*, 21-22.

⁵⁶ *Ibid.* As opposed to Hayner, Freeman does not consider the Ugandan commission of inquiry, 1974, the Uruguayan parliamentary commission from 1985, or the Chilean torture commission of 2003 as truth commissions.

In its report on the rule of law and transitional justice in conflict and post-conflict societies, the UN Secretary General (UNSG) has recognized that “truth commissions have the potential to be of great benefit in helping post-conflict societies establish the facts about past human rights violations.”⁵⁷ Around 35 to 40 truth commissions have so far been established to confront massive violations in the aftermath of conflict or State repression, under authoritarian rule. Freeman traces the origin of truth commissions in the Commonwealth commissions of inquiry, traditionally “set up by governments as an exceptional recourse in response to particularly urgent public controversies or concerns”.⁵⁸ In fact, originally they were called commissions of inquiry and the term *truth commission* would not emerge until 1990, with the National Commission on Truth and Reconciliation in Chile and the Commission on the Truth in El Salvador, in 1992.⁵⁹

The mandate of truth commissions

Truth commission mandates are usually established either by the executive, through presidential decree, such as the commissions established in Latin America, including Bolivia (1982), Argentina (1983), Chile (1990), Uruguay (2000), Panama (2001), and Peru (2001) or by the legislative branch, as in South Africa (1995), Ghana (2002) and Kenya (2009). In other cases, they have also been established through peace agreements, like in El Salvador (1992) and Guatemala (1997) or through domestic legislation expanding the terms of reference under a peace agreement, like in Sierra Leone (2002), Democratic Republic of Congo (2004), and Liberia (2006).

Traditionally, the process to establish a commission through a presidential decree has been more expeditious than establishing them through a parliament. However, going through a legislative process is usually perceived as more legitimate because the discussion encompasses the various political forces, instead of only those parties in the government. At the same time, going through a legislative process could potentially weaken a future commission, for instance limiting its powers, if any of the political forces is against its establishment. Yet, conversely, going through the legislative process could grant the commission with quasi-judicial powers, which would not be the case, attending to most of the constitutions, if the executive branch establishes the commission.⁶⁰ Whichever is the source, the authority establishing the commission will impact its legitimacy.

A key factor defining the commission are the persons selected to serve as its members. Commissioners have been appointed through the executive or legislative branch, a mix of both and even in cooperation with international authorities such as the United Nations (UN). The lesson learnt in appointing commissioners is the need to have a consultative and transparent process inviting nominations from the public and forming a selection panel to vet nominations, interview the finalists and recommending the final commissioners. This process should include an honest attempt to include representa-

⁵⁷ UN Security Council, *The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General*, 23 August 2004, S/2004/616, available at: <http://www.unhcr.org/refworld/docid/45069c434.html> [accessed 3 July 2012].

⁵⁸ Freeman, Mark, *Truth Commissions and Procedural Fairness*, p. 22, op. cit. 54.

⁵⁹ Hayner, Priscilla, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (hereafter *Unspeakable Truths*), New York and London: Routledge, 2011, p. 10..

⁶⁰ Freeman, Mark, *Truth Commissions and Procedural Fairness*, p. 28, op. cit. 54.

tives from different political views, ethnic, regional or religious groups, and gender balance.

The period of operations during which commissions have carried out their activities has varied considerably, from less than a year to six or seven years. However, a majority of them have worked in a period of two to three years. Truth commissions look into a span of time depending on the years of armed conflict, military rule or authoritarian regime.

Truth commissions mainly focus on acts of physical violence or repression. Although the first commissions were mandated to look exclusively into enforced disappearances, later on mandates have included broader expressions like serious/gross human rights violations and humanitarian law, if truth commission are established to look into violations committed during an armed conflict.⁶¹

The primary objective of a truth commission is to investigate serious past violations, find out the causes that led to such violations, so as to avoid repetition. Beyond this primary objective, truth commissions may have others, like recognizing the victim's experiences or promoting reconciliation.

To be able to carry out an investigation, truth commissions are vested with powers, which help to determine its strength and reach. The powers of truth commissions have differed considerably. As opposed to the early Latin America commissions which were vested with few powers, in Commonwealth countries, commissions have traditionally had a wide range of important investigative powers, like subpoena powers, search and seizure powers and witness protection.⁶² Some of these powers are becoming standard features of truth commissions and being adopted in non-Commonwealth countries.

Commissions carry out a wide range of activities in order to find out the truth about serious past violations. These can include taking statements from victims and witnesses; conducting research into the causes and consequences of the violence or repression; or inspecting locations where violations were systematically committed. Commissions can also organize public hearings, which provide victims and survivors a chance to tell their story in front of a public audience reducing the likelihood of continued denial of the truth. They may also include all other activities intended to uncover the truth within its mandate.

Upon completion of its work, commissions submit a report summarizing its findings and making recommendations. The commissions recommendations may suggest legal, institutional or legislative reforms to prevent abuses in the future. They may also recommend for exhumations or further investigations into key areas where they were not able to conclude all the work needed. Commissions have also recommended reparations programmes for victims, as well as other relevant programmes to address the weaknesses pointed out in their findings. One of the most controversial aspects is the

⁶¹ The first truth commissions mandated to look exclusively into disappearances: commission in Uganda (1974, report made public in 1975); in Bolivia (1982 to 1984, disbanded before finishing); in Argentina (1983 to 1984, report made public in 1984); in Uruguay (1985, report made public in 1985). The first commission to investigate other violations than disappearances was established in Zimbabwe to look into government repression of dissidents (1985, report was never made public); in Uganda to look into murder and arbitrary deprivation of life, torture, cruel and degrading treatment and displacement (1986 to 1995, report made public in 1994). In Hayner, Priscilla, *Unspeakable Truths*, Appendix 2, op. cit. 59.

⁶² Freeman, Mark, *Truth Commissions and Procedural Fairness*, p. 34, op. cit. 54.

commissions recommendation for action against those found guilty. In the next section we will examine the relation between truth commissions, prosecutions and amnesties.

2.4. THE RELATIONSHIP BETWEEN TRUTH COMMISSIONS, PROSECUTIONS AND AMNESTIES

In this section we will look into past truth commissions to analyse what has been the relation between the commission's report and future prosecutions against those found guilty. We will also look at what has been the link between truth commissions and amnesties. The analysis will allow us to assess whether truth commissions have traditionally been established to exonerate the State from its duty to prosecute.

The relationship between truth commissions and prosecutions

As seen, truth commissions are ad hoc non-judicial bodies established to investigate serious past violations. As such, truth commissions cannot prosecute anyone. What they can do, and they have done in the majority of cases, is to recommend in their final reports for criminal prosecutions on the basis of its investigations.

Although truth commissions will probably take thousands of statements from victims, it will only select a number of representative cases for an in-depth investigation. In fact, truth commissions are not intended to investigate each and every incident.

As mentioned, the primary objective is to investigate serious past violations, find out the causes that led to such violations, so as to avoid repetition. So the investigation is aimed at finding out the patterns of the violations, the State institutions involved either in committing those violations or failing to prevent them. For instance, if people were forcefully disappeared, what was the involvement of the security forces and what was the response from the State machinery, the police and the judiciary, when relatives approached these institutions.

So, keeping in mind that most commissions will only be able to provide a global truth of what happened and a description of patterns, one can realize it is not for the commission to prepare the grounds for prosecuting each and every perpetrator. As for those incidents it has investigated in-depth, documented and collected evidence, the commission, in most of the cases, will hand-over this information for the prosecuting authorities to do their job.

In recommending for prosecutions, truth commissions have, in some cases, specifically named perpetrators, for instance in Chad (1991), El Salvador (1992), South Africa (1995), Nigeria (1999), Peru (2001), Timor Leste (2002), Ghana (2002), and Liberia (2005) among others. Naming perpetrators has been the source of much controversy. As scholar Priscilla Hayner points out, two contradictory principles lay at the basis of this controversy. On the one hand a truth commission does not follow the same strict procedures as a court of justice and alleged perpetrators could be named without being allowed to defend themselves. On the other, telling the full truth involves naming those

who committed violations when there is a clear evidence of their culpability. Naming perpetrators is specially important when trials are not expected due to the weakness of the judiciary system or the clear lack of will to engage in prosecutions, once the truth commission report is made public.⁶³

Other commissions, which have not named perpetrators, have made general recommendations for further investigations by the prosecutorial agencies. Even when perpetrators have not been named, future prosecutions have turned to the investigation done by the commission. This was the case in Argentina for the prosecutions that took place in the mid eighties and after the amnesty laws were annulled. As Hayner describes, “by 2009 several hundred trials were under way with over fourteen hundred suspects identified in relation to crimes that took place during the dirty war. Again the prosecutors turned to the CONADEP [the Argentinian truth commission] files as a key source of information.”⁶⁴

In Guatemala, those pushing for international prosecutions submitted the commission’s report to support their cases. In the on-going trial against Guatemala’s former military dictator, Efraim Rios Montt, on charges of genocide and crimes against humanity, the commission’s report is an important source documenting security forces violations against indigenous communities.

Although commissions have recommended for prosecutions, in most of the cases those recommendations have not been implemented due to unwillingness by the government prosecutorial agencies and/or a weak judicial system. South Africa provides a clear example of unwillingness to prosecute. Although the South African truth commission handed over a list of 300 cases naming specific perpetrators for further criminal investigation, not a single perpetrator was prosecuted.⁶⁵ In other cases, very few prosecutions have taken place. The Peruvian truth commission contained a special unit to organize evidence of crimes, and criminals, that could be presented to prosecutors. In its final report, the commission handed over dossiers of cases to the Office of the General Prosecutor. However, the prosecutorial agencies raised doubts over the evidence collected by the commission and the validity of the testimonies. Over the following years, perpetrators were tried though most of them were acquitted.⁶⁶ Some of the reasons leading to the lack of convictions were the refusal by the courts that violations constituted crimes against humanity and the rejection of the command responsibility doctrine.⁶⁷

As seen, the reasons for not implementing the commission’s recommendations to prosecute alleged perpetrators are various. The lack of a strong judicial system is a general rule in post-conflict societies. Other reasons may include different standards of proof between the commission’s investigations and that of prosecutorial agencies. But usually these reasons are accompanied by a lack of political will to prosecute perpetrators as those responsible still hold positions of power. Whatever the reasons might be, truth

⁶³ Hayner, Priscilla, *Unspeakable Truths*, p.121, op. cit. 59.

⁶⁴ *Ibid.*, 95.

⁶⁵ *Ibid.*, 102.

⁶⁶ In *ibid.*, 96, Hayner points out that 52 were acquitted and 12 convicted in the years that follow the submission of the commission’s report. And in 2008-2009, there were only 2 convictions out of 31 verdicts, and one of them was overturned by the Supreme Court.

⁶⁷ *Ibid.*

commissions accomplish their objective by investigating past violations and submitting their report and they should not be blamed for lack of prosecutions. Notwithstanding their non-judicial nature, truth commissions have been blamed for legitimizing a trade-off between truth and justice. In the following section we will look into the reasons behind this accusation through examining the relationship between truth commissions and amnesties.

The relationship between truth commissions and amnesties

Amnesties can be defined as

“an extraordinary legal measure whose primary function is to remove the prospect and consequences of criminal liability for designated individuals or classes of persons in respect of designated type of offenses irrespective of whether the persons concerned have been tried for such offenses in a court of law.”⁶⁸

Granting amnesties is impermissible when they prevent prosecution of those responsible for serious crimes under international law, including genocide, crimes against humanity, war crimes and other serious violations of IHL, torture, enforced disappearances and other gross violations of human rights.⁶⁹ Consequently, a domestic amnesty granted for such crimes would not prevent prosecutions before foreign or international courts.⁷⁰ Neither an amnesty that interferes with the victim’s right to an effective remedy, including the right of victims and societies to know the truth would be allowed under international law.⁷¹

The UN policy on amnesties has evolved and is now consistent with the above position. Initially, the 1999 *Guidelines for United Nations Representatives in Certain Aspects of Negotiations for Conflict Resolution* stated that the UN could not condone amnesties for war crimes, crimes against humanity or genocide, in line with the Rome Statute establishing the ICC.⁷² The UNSG made this position public and clear in the 2000 report to the Security Council on the establishment of a Special Court in Sierra Leone, when he stated that “the UN has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law”.⁷³

Soon after, the 2004 UNSG report *The rule of law and transitional justice in conflict*

⁶⁸ Freeman, Mark, *Necessary Evils: Amnesties and the Search for Justice*, New York, Cambridge University Press, 2009, p.13.

⁶⁹ See Chapter I regarding the duty of the State to prosecute these crimes, which translates into the impermissibility of granting amnesty.

⁷⁰ In that regard, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia has expressed its view that a domestic amnesty covering crimes whose prohibition has the status of a *jus cogens* norm, such as the prohibition of torture, would not be accorded international legal recognition; *Prosecutor v. Anto Furundžija*, par. 155, in *Rule of Law Tools for Post-Conflict States: Amnesties*, 2009, HR/PUB/09/1, UN Office of the High Commissioner for Human Rights (hereafter OHCHR), p. 29-30, available at:

http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf [accessed 24 May 2012].

⁷¹ *Ibid.*, 11.

⁷² The Office of the Secretary General issued these guidelines as a confidential cable to all UN representatives around the world. See Freeman, Mark, *Necessary Evils: Amnesties and the Search for Justice*, p. 89, op. cit. 67.

⁷³ UN Security Council, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, 4 October 2000, S/2000/915, par. 22, available at: <http://www.unhcr.org/refworld/docid/3ae6afbf4.html> [accessed 3 July 2012]

and post-conflict societies expanded the prohibition of amnesty to gross violations of human rights.⁷⁴ This position would be confirmed in the *Updated Principles to Combat Impunity*, which defined serious crimes under international law as encompassing gross violations of human rights and declared that perpetrators of these crimes could not benefit from amnesties.⁷⁵ Since then, this has been the UN position on amnesties, which the UNSG has repeatedly confirmed in following reports and Guidance Notes.⁷⁶

Truth commissions have been linked to amnesties, mainly due to the power of the South African TRC to grant amnesty in exchange for truth. This trade-off was allowed even in cases where perpetrators had committed gross human rights violations. The commission could decide to grant amnesty on an individual basis and on the condition of full disclosure of crimes, if it considered the crimes to be politically motivated. Even though it refuted more than half of the applications for amnesty⁷⁷ and it handed over a list of 300 cases naming specific perpetrators for further criminal investigation, the reality is that not a single perpetrator was prosecuted.⁷⁸ Thus, the legacy of the South African TRC would be that of a model granting amnesty in exchange for truth, a trade-off between truth and justice. The South Africa amnesty process was not challenged before an international human rights body and it is doubtful whether it would have passed such a test, attending to the impermissibility of amnesties under international law.

After the South African TRC, no other commission has had the power to grant amnesty. However, variations of this model have been adopted in other countries, mainly through allowing truth commissions to recommend for amnesties.⁷⁹ Scholar Louise Mallinder points out that the South African model contributed to a rise in the number of amnesties that are related to truth-seeking processes.⁸⁰ This relationship can take place either because truth commissions are given the authority to recommend for amnesties or because amnesty laws are introduced before, at the same time, or after the establishment of truth commissions. According to Mallinder, truth commissions are more commonly established in a span of time of plus-minus five years of the amnesty

⁷⁴ *The rule of law and transitional justice*, par. 9, UN Security Council, op. cit. 57.

⁷⁵ *Updated Principles to combat Impunity*, p. 6, UN Commission on Human Rights, op. cit. 28.

⁷⁶ See the 2010 *Guidance Note of the Secretary General on the UN Approach to Transitional Justice*: “The UN cannot endorse provisions in peace agreements that preclude accountability for genocide, war crimes, crimes against humanity, and gross violations of human rights”, p. 4, available at:

http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf [accessed 3 July 2012].

See also the 2011 UNSG report to the Security Council: “The Security Council is encouraged to reject any endorsement of amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights and to support the implementation of transitional justice and rule of law provisions in peace agreements”, in UN Security Council, *The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General*, 12 October 2011, S/2011/634, par. 67, available at: <http://www.un.org/Docs/sc/sgrep11.htm> [accessed 3 July 2012].

⁷⁷ The South African TRC denied 4,500 out of 7,000 applications for amnesty, on the grounds of lacking political motivation.

⁷⁸ Hayner, Priscilla, *Unspeakable Truths*, p. 102, op. cit. 59.

⁷⁹ The difference is very important. In the case of South Africa the commission had the legal attribute to grant amnesty. This legal attribute does not exist if the commission only recommends for amnesty. Freeman refers to “truth commissions wielding “adjudicative” powers (i.e., the power to settle legal rights)”. In Freeman, Mark, *Truth Commissions and Procedural Fairness*, p. 34, op. cit. 54.

⁸⁰ In her study, Louise Mallinder concludes that the number of truth commissions accompanying amnesty processes increased more rapidly after the South Africa TRC submitted its report in October 1998. Mallinder, Louise, “Exploring the Continual Reliance of States on Amnesties during Times of Transition”, paper prepared for presentation on the panel, *The Amnesty Surge: A Twist in the Road to Accountability or the End of a Regime?* at the International Studies Association 49th Annual Convention, San Francisco, March 27, 2008.

law and, most commonly, amnesties are introduced at the same time as truth commissions.⁸¹

Focusing on those commissions that have had the authority to recommend for amnesties after the South African TRC, we find that none of them could recommend amnesty for serious crimes under international law, including genocide, crimes against humanity, war crimes and other serious violations of IHL, or other gross violations of human rights. In that regard, the 2002 Commission for Reception, Truth and Reconciliation of Timor-Leste had the power to extinguish criminal liability but only for non-serious crimes. This waiver of criminal responsibility was conditioned to the full admission of the crime, apology and fulfillment of community service or an agreed symbolic payment to the victim or community.⁸² Soon after the truth commission in Timor-Leste concluded its report in 2005, the Governments of Indonesia and Timor-Leste announced plans for a Commission of Truth and Friendship. The commission's mandate allowed for recommending amnesty, including for serious crimes, which led the UN to refuse to cooperate with the commission, alleging violation of its policy on amnesties. In the end, the commission did not recommend for amnesty.⁸³ In Liberia, the TRC could recommend for amnesty in exchange for truth except in cases of serious violations of IHL, crimes against humanity and gross violations of human rights. A same approach was adopted in relation to the Kenyan Truth, Justice and Reconciliation Commission. The mandate provided explicitly that no amnesty could be recommended in respect of genocide, crimes against humanity, and gross violation of human rights including extrajudicial execution, enforced disappearance, sexual assault, rape and torture.⁸⁴

Truth commissions and the duty to prosecute, is there a trade-off?

Truth and prosecutions are complementary and not alternative responses to past violations. Truth commissions are State sponsored ad hoc non-judicial bodies established to investigate serious past violations, find out the causes that led to such violations, so as to avoid repetition. Upon completion of their work, truth commissions submit a report summarizing its findings and making recommendations. In most of the cases, the commission's report recommends for actions against those who are found guilty. As non-judicial bodies, truth commissions do not prosecute perpetrators.

Although truth commissions have recommended for prosecutions, in most of the cases those recommendations have not been implemented. This failure should not be blamed on the commission. Rather there are many reasons for states not to prosecute perpetrators in the aftermath of an armed conflict or authoritarian rule. The lack of a strong judicial system is a general rule in post-conflict societies. But as seen, other reasons also point out at the State unwillingness to undertake prosecutions. Notwithstanding

⁸¹ In *ibid.*, 22-23, Mallinder however clarifies that where there are multiple truth commissions within a state, she only takes into account the first truth commission and where there are multiple amnesty laws, she only considers the amnesty that immediately preceded or followed the commission.

⁸² UN OHCHR, *Rule of Law Tools for Post-Conflict States: Truth Commissions*, 2006, HR/PUB/06/1, p.12, available at <http://www.ohchr.org/Documents/Publications/RuleofLawTruthCommissionsen.pdf> [accessed 24 May 2012]

⁸³ Hayner, Priscilla, *Unspeakable Truths*, p. 64, *op. cit.* 59.

⁸⁴ The Truth, Justice and Reconciliation Commission of Kenya, *The Truth, Justice and Reconciliation Act, 2008*, available at: <http://www.tjrcKenya.org/images/documents/TJRC-Act.pdf> [accessed 25 August 2012]

this unwillingness, the commission's report represents a unique document, which can be used in the future when those preventing prosecutions are not in power anymore.

On the other hand, truth commissions have been blamed to allow for a trade-off between truth and justice, mainly due to the power of the South African TRC to grant amnesty in exchange for truth. After South Africa, other commissions have had the power to recommend for amnesty. However, in most of the cases recommendations for amnesty have been for lesser crimes. Only the Indonesian and Timor-Leste joint Commission of truth and Friendship was allowed to recommend amnesties for serious crimes, although it did not after the UN refusal to cooperate with the commission. Today a South African model or a commission recommending amnesties for serious crimes would be impermissible under international law and the UN policy on amnesties.

We cannot state that truth commissions have exonerated the State from its duty to prosecute. In that regard, our hypothesis has proved wrong and is only fully supported by the South African TRC. Besides realizing the victim's right to truth, the report of a truth commission represents, at a minimum, a first step towards the fulfilment of the State's duty to prosecute those responsible for war crimes, crimes against humanity, and gross violations of human rights.

3. CASE STUDY: NEPAL

In the previous chapters we have seen that Nepal has a duty to prosecute war crimes, crimes against humanity, and gross violations of human rights committed during the armed conflict, attending to its obligations under international law. In chapter two, we have seen that, although states do not have an enforceable obligation to fulfil the victim's right to know the truth, they have recognized this right through the establishment of truth commissions. After examining truth commissions established in post-conflict and post-authoritarian regimes, we have seen that, in most of the cases, truth commissions have not led to exonerating the State from its duty to prosecute.

In this chapter we are going to examine if our hypothesis is valid for Nepal. We will start the chapter with an overview of the armed conflict. Next, we will examine whether Nepal is complying with its obligations to prosecute those responsible for serious crimes committed during the armed conflict. The last section we will look at Nepal's commitment to fulfil the victim's right to truth through the establishment of two truth-seeking mechanisms, a commission of inquiry into disappearances and a truth and reconciliation commission, and will analyse whether these commissions are intended to substitute the duty of Nepal to prosecute those responsible for conflict-related violations.

3.1. OVERVIEW OF THE ARMED CONFLICT AND POST-CONFLICT NEGOTIATIONS

On 4 February 1996 the CPN (Maoist) submitted a 40-point demand to the Prime Minister of Nepal along with a two-week ultimatum to respond to these demands. Even before the deadline had expired, on 13 February 1996, the CPN (Maoist) declared the "People's War". Initially perceived as a problem of law and order, the State responded to the Maoist uprising through the deployment of the police. The armed conflict that ensued would last for ten years leaving more than 17,000 people dead.¹

In Nepal, the first multiparty elections took place in 1959 leading to the victory of the Nepali Congress (NC). However, just a year after, King Mahendra Bir Bikram Shah Dev dismissed the elected government, revoked the Constitution and dissolved the Parliament. The King banned all political parties and declared a party-less *Panchayat* system centred on the King with the support of the army, the police and the administration.

¹ According to the latest figures dated 29 March 2011, the Ministry of Peace and Reconstruction said the conflict had left 17,265 people dead; 1,302 people still missing; 4,305 disabled and 78,675 displaced. See "Recording Nepal Conflict: Victims in numbers", *Nepal Monitor*, available at: http://www.nepalmonitor.com/2011/07/recording_nepal_conf.html [accessed 8 August 2011]

The *Panchayat* system lasted until 1990 when a multi-party democracy under a constitutional monarchy supplanted it. The change came after the NC and the United Left Front, a group of various communist parties, launched, on 18 February 1990, the Movement for Restoration of Democracy, or first *Jana Andolan*. Thousands of people took to the streets demanding the restoration of democracy. The authorities resorted to the use of force killing forty-five people and injuring 23,000 others during fifty days of violence.² Under pressure, King Birendra Bir Bikram Shah, who had succeeded his father in 1972, agreed to officially end the *Panchayat* system and to lift the ban on political parties. In November King Birendra promulgated the new Constitution allowing for a multiparty parliament. However, the new constitutional monarchy retained significant legislative and judicial power, as well as full command over the army.

In May 1991 the NC won the parliamentary elections. The popular hopes for change, equal access to power, land reform and economic development slowly faded as discontent with the government increased. Lower casts and ethnic minorities continued being excluded as new political leaders failed to tackle the traditional hierarchies in political, economic and social organizations.

The Maoist was a small communist faction among a number of extremist communist parties before 1996. Before the elections in 1994, the Communist Party of Nepal-Unity Centre and its political front, the United People's Front Nepal, split and the factions led by Puspa Kamal Dahal (Prachanda) and Baburam Bhattarai boycotted the elections, in part because the Election Commission had not recognized their front.³ The elections in 1994 did not result in a majority for any political party. From 1994 to 1999 there would be a continuous change in successive governments, including five different coalitions and one minority government.

In March 1995 the Communist Party of Nepal-Unity Centre, led by Prachanda, held its third *plenum*, in which the Party changed its name into CPN (Maoist) and decided to begin an armed insurgency.

Even before the Maoist launched the People's War, the NC-led government, conducted a police operation named Operation Romeo in Rolpa district, a Maoist stronghold, to suppress Maoist activities. Operation Romeo resulted in gross violations of human rights, including the arbitrary arrest and detention of more than two hundred members of the United People's Front Nepal, rapes, extra-judicial executions and disappearances. Operation Romeo increased people's resentment against the State and, in turn, support for the People's War.⁴

On 4 February 1996, Baburam Bhattarai submitted a list of forty demands to the NC Prime Minister Sher Bahadur Deuba. The list included social, economic and political issues. Some of these demands included abolishing the practice of untouchability, es-

² According to the report of the Mallik Commission, established on 23 May 1990 to investigate abuses committed by the *Pachayat* government in suppressing the *Jana Andolan* protests. In *Commissions of Inquiry in Nepal: Denying remedies, entrenching impunity*, International Commission of Jurists, June 2012.

³ Lawoti, Mahendra, "Evolution and growth of the Maoist insurgency in Nepal", in Lawoti, Mahendra and Pahari, Anup K. (Ed.), *The Maoist Insurgency in Nepal: Revolution in the twenty-first century*, London and New York: Routledge, 2010, p.6-7.

⁴ "Between a Rock and a Hard Place: Civilians Struggle to Survive in Nepal's Civil War", *Human Rights Watch*, vol. 16, no. 12(C), October 2004, p. 11, available at <http://www.hrw.org/sites/default/files/reports/nepal1004.pdf> [accessed 23 May 2012].

establishing gender equality, ending ethnic oppression, setting a minimum wage, constructing infrastructure such as roads, providing electricity and water supply to rural areas, controlling corruption and ensuring freedom of speech. More controversial demands were adopting a republican constitution, establishing a secular state and civilian authority over the army, and nationalizing dubious property.⁵ On 13 February, before the two weeks deadline had expired, the CPN (Maoist) launched the 'People's War'. The same day, there were eight incidents in five different districts, including attacks on police posts and district government buildings.

The government initially responded to the conflict as a law and order problem, through the Nepal Police (NP). The Maoist routinely targeted police posts, particularly in remote areas. In a report from March 1997, Amnesty International detailed human rights violations and abuses by the government security forces and the Maoists. The report expressed concerns over the killing of at least 50 people by the police. Contrary to the claims that such killings were during armed encounters, the report suggested the police was resorting to lethal force as an alternative to arrests. It also found police torturing prisoners, in some cases leading to their death in custody. The report also highlighted the killing of 16 civilians by the Maoists.⁶

On 26 May 1998, under the NC minority government led by Girija Prasad Koirala, the police started a counter-insurgency operation, named Kilo Sierra II, in the Maoist heartland of Rukum and Rolpa districts in the Midwestern Region and other districts, in other parts of the country. The police operation resulted in an increase in reports of extra-judicial killings, disappearances, torture and arbitrary arrests. According to the Ministry of Home Affairs, between 26 May and 7 November 1998, 227 people were killed and 1,659 people were arrested. In the same period, the CPN (Maoist) reportedly killed 24 civilians and injured at least 52.⁷

In February 2000, at the invitation of the government, the Special Rapporteur on extrajudicial, summary or arbitrary executions, visited Nepal. According to his report, since the beginning of the conflict, more than 1,100 people, including civilians and police, had been killed, and this number had been increasing with more than 600 people reportedly killed in 1999 alone. The report also indicated that the government reported that the CPN (Maoist) had killed 126 police and 182 civilians since the conflict started and the police had killed more than 800 people, described as armed CPN (Maoist) members, during armed encounters. However, the Special Rapporteur stressed that information from non-governmental organizations indicated that those killed by the police included a large number of civilians.⁸

⁵ Lawoti, Mahendra and Pahari, Anup K. (eds.), *The Maoist Insurgency in Nepal*, Annex A: 40-point Maoist demand, February 1996. op. cit. 3.

⁶ "Nepal: Human rights violations in the context of a Maoist 'people's war'." Amnesty International, AI Index: ASA 31/01/97, March 1997, available at <http://www.amnesty.org/fr/library/info/ASA31/001/1997/en> [accessed 5 June 2012].

⁷ "Nepal: Human Rights at a turning point?" Amnesty International, available at <https://www.amnesty.org/en/library/asset/ASA31/001/1999/en/0ac795eb-e34a-11dd-a06d-790733721318/asa310011999en.html> [accessed 17 June 2012].

⁸ UN Commission on Human Rights, *Report on extrajudicial, summary or arbitrary executions, submitted pursuant to Commission resolution 2000/31, Addendum / Mission to Nepal*, 9 August 2000, E/CN.4/2001/9/Add.2, available at <http://www.unhcr.org/refworld/docid/3ae6b12f8.html> [accessed 9 August 2012].

With the armed conflict escalating, the political situation deteriorated even further. The NC won a majority in the 1999 elections, but a power struggle within the leadership led to different weak governments.⁹ On 1 June 2001, Crown Prince Dipendra allegedly killed nine members of his family, including his father and mother, King Birendra and Queen Aiswarya. After allegedly shooting himself, the Crown Prince died three days later and Prince Gyannedra Bir Bikram Shah, the former King's brother, was crowned.

Meanwhile, by mid 2001, the CPN (Maoist) had established effective control in 22 of the 75 districts in Nepal, setting up parallel justice systems and controlling schools, development projects and health facilities.¹⁰

In July 2001, the government and the CPN (Maoists) declared a ceasefire. On 21 November 2001, after three rounds of talks, the Maoists announced the end of the ceasefire. The day after, the Maoists launched an attack on the Royal Nepalese Army (RNA) barracks in Dang district, the Mid-Western Region, killing 14 soldiers and injuring dozens.¹¹ On 26 November, the government declared a state of emergency and deployed the RNA for the first time. The government designated the CPN (Maoist) a terrorist organization and promulgated the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO). Under this Ordinance, security forces had the power to arrest without warrant and hold anyone suspected of terrorist or disruptive activities in preventive detention. Such person could be held for up to 90 days without being brought before a court and the Home Minister could authorize additional 90 days. In April 2002, the Parliament approved the Terrorist and Disruptive Activities (Control and Punishment) Act, limiting the preventive detention to 90 days without possibility of extension.

Since its deployment, the RNA had *de facto* control over the NP and the newly formed Armed Police Force (APF),¹² even though a formal unified command was only established in November 2003.¹³ At the same time, following the deployment of the army, there was a dramatic increase in reports of human rights violations by security forces.¹⁴ Under the TADO, in Bardiya district, Midwestern Region, more than 5,000 people were arrested between November 2001 and February 2002 alone on suspicion of being Maoists. Widespread torture was reported and at least 200 disappearances after arrest took place in Bardiya district from late 2001 until a ceasefire in January 2003.¹⁵ During 2002, Amnesty International submitted details of more than 200 people killed by the security forces in approximately 100 incidents to the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, including “deliberate killing of civilians on

⁹ In March 2000, the NC Prime Minister K.P. Bhattarai, was ousted and another NC leader, G.P. Koirala, replaced him. In December 2000, 56 NC parliamentarians withdrew their support to the PM forcing him out.

¹⁰ “Between a Rock and a Hard Place”, *Human Rights Watch*, p. 11-12, op. cit. 4.

¹¹ Still under the command of the King, the army had refused various calls from the government to get involved in the conflict.

¹² In January 2001, the government created the Armed Police Force (APF), a paramilitary force to support the Nepal Police, which was struggling in their fight against the Maoist.

¹³ “Nepal: Peace and Justice”, *Asia Report* no 184, International Crisis Group, 14 January 2010, p. 7, available at <http://www.crisisgroup.org/en/regions/asia/south-asia/nepal/184-nepal-peace-and-justice.aspx> [accessed 21 May 2012].

¹⁴ For an insight, see “Nepal: Killing with impunity”, ASA 31/001/2005, Amnesty International, 20 January 2005, available at <http://www.amnesty.org/en/library/asset/ASA31/001/2005/en/5d1f7f86-f7a6-11dd-8fd7-f57af21896e1/asa310012005en.pdf> [accessed 21 June 2012].

¹⁵ See *Conflict-related Disappearances in Bardiya District*, OHCHR-Nepal report, December 2008, available at http://nepal.ohchr.org/en/resources/Documents/English/reports/HCR/2008_12_19_Bardiya_Report_Final_E.pdf [accessed 21 June 2012].

suspicion of providing food, shelter or financial assistance to the Maoists.”¹⁶ At the same time, landowners, teachers and politicians were among those attacked, abducted, tortured and unlawfully killed by the Maoists, on accusations of being *enemies of the revolution*. The Maoist also recruited those under 18-years old into their ranks.

On 22 May 2002 King Gyanendra, at the recommendation of the NC Prime Minister Sher Bahadur Deuba, dissolved the House of Representatives and called for elections to be held on 3 November 2002. However, due to increasing violence and lack of security, on 3 October 2002, Deuba proposed elections to be delayed one year. The following day, King Gyanendra relieved Deuba of his post, alleging failure to conduct timely elections, dismissed the Council of Ministers and appointed Lokendra Bahadur Chand, a royalist who had served as a Prime Minister during the *Panchayat* system, as the new Primer Minister.

On 3 December 2002, the CPN (Maoist) issued a press release indicating their openness to peace talks, sticking to their political demand of elections to form a Constituent Assembly (CA). On 29 January, the government and the Maoists declared a ceasefire and started negotiations. However, on 17 August 2003, during the ceasefire, the army captured 19 Maoists while they were attending a meeting in Doramba village, Ramechap district in the Central region. After taking them into custody, they were extrajudicially executed. The incident contributed to the breakdown of the peace negotiations. On 27 August the Maoists officially announced the end of the ceasefire. In November 2003, the APF and the NP were formally placed under the unified command of the RNA.

The resumption of the armed conflict brought a dramatic increase in human rights violations by both sides. The National Human Rights Commission recorded over 700 disappearances within the year following the end of the ceasefire.¹⁷ The significant increase in the number of enforced disappearances led the WGEID to request a visit to Nepal, which took place at the end of 2004. In its report, the WGEID urged the government to immediately rescind the new TADO, adopted in 2004, which had extended the allowed preventive detention to one year.¹⁸ The report raised serious concerns over the appalling argument by senior government figures that TADO should be seen in a positive light because “allowing detention for up to one year would reduce the number of disappearances and extrajudicial killings.”¹⁹ The report called on the government “to exert proper disciplinary control over the security forces to limit disappearances and killings.”²⁰ The WGEID report further pointed out at the increased number of reports of alleged extrajudicial executions, arbitrary arrests and torture.²¹ In fact, as other reports also emphasized, security forces were shifting the tactic from widespread disappear-

¹⁶ “Nepal: A deepening human rights crisis”, ASA 31/072/2002, Amnesty International, December 2002, available at <http://www.amnesty.org/en/library/asset/ASA31/072/2002/en/ad246553-d772-11dd-b024-21932cd2170d/asa310722002en.pdf> [accessed 21 June 2012].

¹⁷ “Nepal: Killing with impunity”, p.5, Amnesty International, op. cit. 14.

¹⁸ With the suspension of Parliament in May 2002, the previous act (TADA) was transformed into an Ordinance issued by the executive authority, and the period of lawful preventive detention was extended for up to one year.

¹⁹ UN Commission on Human Rights, *Question of enforced or involuntary disappearances. Report of the Working Group on Enforced or Involuntary Disappearances. Mission to Nepal*, 28 January 2005, E/CN.4/2005/65/Add.1, par. 46, available at <http://www.ohchr.org/EN/Issues/Disappearances/Pages/Visits.aspx> [accessed 22 June 2012].

²⁰ Ibid.

²¹ Ibid., par. 7.

ances to extrajudicial executions, as a response to international and domestic pressure on the issue of disappearances.²²

On 1 February 2005, the King dismissed the government and imposed a state of emergency in the country, jailing or placing under house arrest senior party and civil society leaders. After freeing some political detainees from house arrests, the King lifted the state of emergency on 29 April 2005. However, on 5 May 2005, seven of the political parties sidelined by King Gyanendra, among them the main parties, began talks to form the SPA. On 20 June, the SPA called on the Maoists to renounce violence and to join a peaceful and democratic movement against the royal rule. The two previous enemies had found in the figure of the King a common enemy and a way to put an end to the conflict.

In September 2005, Prachanda, the Maoist leader, announced a three-month unilateral ceasefire and on 22 November, the SPA and the Maoists signed, with the support from the Indian government, a letter of 12-point understanding to jointly combat the royal rule in Nepal. The agreement included a commitment to hold CA elections and for the Maoists to renounce violence and join the democratic mainstream.²³ The 12-point understanding marked the beginning of the peace process.

On 19 March 2006, the SPA and the Maoists announced an agreement to launch separate movements against the royal rule starting on 6 April. As in 1990, the political parties called for a pro-democracy protest, known as the second *Jana Andolan*. The protests continued until 24 April, when King Gyanendra announced the reinstatement of the House of Representatives.

On 25 April the SPA appointed NC leader Girija Prasad Koirala as new Prime Minister. On 26 May, the government and the Maoists signed the Code of Conduct for Ceasefire.²⁴ In a second meeting, on 15 June, the parties agreed to form a committee to monitor the previous Code of Conduct for Ceasefire and requested the UN Office of the High Commissioner for Human Rights to provide assistance in monitoring the human rights situation.²⁵ On 16 June, the two sides signed an Eight-point Agreement to draft an interim constitution, form an interim government and announce the date of the elections to a Constituent Assembly.²⁶ On 9 August, the government and the Maoists formally requested the UN to assist in the management of arms and armed personnel of both sides and to monitor the Maoist combatants and the Nepal Army (NA).²⁷ On 8 November, the SPA and the Maoist reached a final understanding on disputed issues and, on 21 November 2006, the Government of Nepal and the Maoists signed the CPA.

The CPA formally ended the armed conflict and provided a roadmap for the peace process. It included provisions related to the investigation of human rights violations

²² See “Nepal: Killing with impunity”, p.5, Amnesty International, op. cit. 14.

²³ Letter of 12-point understanding, 22 November 2005, In Informal Sector Service Centre (hereafter INSEC), Documents related to the peace process, p. 33-34, available at <http://www.insec.org.np/files/documents/PeaceProcess.pdf> [accessed 1 May 2012].

²⁴ Ibid., 3-4, Code of Conduct for Ceasefire between the Government of Nepal and the CPN (Maoist).

²⁵ Ibid., 4-5, Four-point agreement between the Government of Nepal and the CPN (Maoist). The OHCHR established its largest field office in Nepal in May 2005.

²⁶ Ibid., 5-6, Eight-point Agreement between the Seven Political Parties and the CPN (Maoist).

²⁷ Ibid., 8-9, Five-point Letter sent to UN by the Nepal Government and Five-point letter sent to UN by the CPN (Maoist). Formally the change from Royal Nepal Army to Nepal Army came with the Army Act, 2006.

committed during the conflict and the fulfillment of the victim's right to know the truth through the establishment of a truth commission. The CPA paved the way for the promulgation, on 15 January 2007, of the Interim Constitution, which established an interim Legislature-Parliament and an interim government.

The Interim Constitution is "interim" as it provides for the setting up of a CA in charge of drafting the new Constitution. The interim government headed by NC leader Girija Prasad Koirala and formed by members of the SPA and the Maoists, agreed to hold elections to establish the CA on 20 June 2007, but later postponed to 22 November 2007. However, on 17 September 2007, the Maoists quitted the interim government, over the refusal by the other political parties to declare the country a republic, prior to the CA elections, and to adopt a fully proportional electoral system. On 30 December 2007, the Maoist rejoined the government after the SPA agreed to declare Nepal a republic in the first sitting of the new CA and to select some of its members through proportional system.

The CA election finally took place on 10 April 2008 and the CPN (Maoist) received a clear victory with 220 seats, more than the sum of the second and third party.²⁸ The CA formed after the April 2008 elections acted also as a Legislature-Parliament.

On 28 May, in its first session, the CA declared Nepal a republic. After long negotiations, the CA elected CPN (Maoist) Prachanda as the first Prime Minister of the Federal Democratic Republic of Nepal and Ram Baran Yadav, a NC representative, the first President of Nepal. Although the intention was to form a consensus government led by the CPN (Maoist) and including all the main political forces, the second biggest party in the CA, the NC, finally withdrew its support. The new government included the CPN (Maoist), and the third and fourth biggest parties, the Communist Party of Nepal (Unified Marxist-Leninist) (CPN-UML) and the Madhesi People Rights Forum.

For the first CPN (Maoist) government, which governed from August 2008 to May 2009, as well as for the successive ones, the two priorities were to draft the new constitution and to *bring the peace process to a logical conclusion*. This latter priority meant to negotiate the future of some 20,000 Maoist combatants, living in seven cantonments, and to establish the disappearances and the TRC. Because of its strength in the CA and its support of a 20,000 combatants force, only when the Maoists have led the government there has been a real chance to advance on both fronts.

On 2 February 2009, the CPN (Maoist) changed its name to United Communist Party of Nepal (Maoist) (UCPN (Maoist)) after merging with the Communist party of Nepal-Ekata Kendra Masal. On 5 February 2009, while the Parliament was in recess, the UCPN (Maoist)-led government decided to introduce a bill to form the disappearances commission by an executive ordinance. The move was seen as avoiding the legislative discussion and scrutiny of the bill at the Parliament. In fact, by introducing such an ordinance, the UCPN (Maoist) might have attempted to *please* many of the alleged vic-

²⁸ Out of the 601 seats, 575 were elected through the polls and the rest, 26, through the Constituent Assembly. The second party, the Nepali Congress, obtained 110 seats and the third force, the Communist Party of Nepal (Unified Marxist-Leninist) (CPN-UML), got 103. The rest of the seats were divided among 22 other political parties.

tims of disappearances and their families who are affiliated with the party.²⁹ Out of the people who currently remain disappeared, the Maoists are allegedly responsible for 109 while the security forces account for 825.³⁰

The ordinance lapsed at the end of May, as it was not adopted within 60 days from the commencement of the session of the Legislature-Parliament.³¹ In fact the political situation had become unstable after a confrontation between the UCPN (Maoist) Prime Minister and the then NA Chief. On 4 May 2009, Prachanda announced his resignation after the President revoked the Cabinet's decision to sack the then NA Chief Rookmangud Katwal on the ground that the dismissal did not meet constitutional requirements and due process. The confrontation led to the dissolution of the first UCPN (Maoist) led government.

After Prachanda's resignation, on 25 May 2009, CPN-UML leader Madhav Kumar Nepal became the Prime Minister. He was elected unopposed as no other candidate ran for the post. Under the CPN-UML led government, in June 2009, the Ministry of Peace and Reconstruction (MOPR) published a new draft bill on disappearances. In May 2010, both the disappearances and the TRC bills were tabled in the Legislature-Parliament.

On 30 May 2010, the main three political parties, the UCPN (Maoist), NC and CPN-UML agreed to extend one year the tenure of the CA, as the two-year period to promulgate the new Constitution had already expired.

The CPN-UML Prime Minister Madhav Kumar Nepal resigned on 30 June 2010 to pave the way for a national consensus government. However, due to the inability of the political parties to produce a majority to nominate an alternative Prime Minister, he remained in the post, leading a caretaker government for the following seven months. On 3 February 2011, another CPN-UML leader, Jhala Nath Khanal, became the Prime Minister with the support of the UCPN (Maoist).

On 30 May 2011, the parties agreed for another six months extension of the CA term. In August 2011, UCPN (Maoist) leader Baburam Bhattarai became the fourth Prime Minister after the 2008 CA elections. On November 2011 the political parties agreed for a further six months extension of the CA term. However, on 25 November, the SC ruled that the CA members could not extend anymore the tenure of the CA beyond 27 May 2012.

On 27 May 2012 the Prime Minister dissolved the CA after failing to promulgate the new Constitution on time.

²⁹ "Nepal: Peace and Justice", International Crisis Group, p.21, op. cit. 13.

³⁰ According to Informal Sector Service, (INSEC), in "Enforced Disappearances in Nepal", available at <http://www.inseconline.org/pics/1292493203.pdf> [accessed 31 July 2012].

³¹ Article 88.2.c of the *Interim Constitution* establishes: "(2) An Ordinance promulgated under Clause (1) shall have the same force and effect as an Act, provided that every such Ordinance: c) shall, unless rendered ineffective or repealed under sub-clause (a) or (b), cease to have effect at the expiration of sixty days from the commencement of the session of the Legislature-Parliament", *Interim Constitution of Nepal*, 2063 (2007), available at: <http://www.nic.gov.np/download/interim-constitution.pdf> [accessed 4 May 2012].

3.2. NEPAL'S DUTY TO PROSECUTE CONFLICT-RELATED CASES

As showed in chapter I, Nepal has a duty to prosecute those responsible of having committed war crimes, crimes against humanity, and gross violations of human rights, including enforced disappearances and torture, during the decade-long armed conflict.

Notwithstanding this obligation, not even a single perpetrator from the State security forces or from the Maoist has been convicted in a civilian court for a crime related to the armed conflict. To understand this situation of impunity, we need to look into the various ways the successive Governments in Nepal are avoiding to comply with its obligations to prosecute under international law.

In this section we will see how the State is failing to investigate incidents related to the armed conflict. In some cases, this failure can be attributed to the police inactivity to carry out investigations and, in others, to the government's attempts to divert investigations from the traditional criminal system into other ad hoc mechanisms controlled by the government itself. In this context, the establishment of truth seeking mechanisms with appropriate powers, as seen in chapter II, would provide the basis for an independent investigation of serious past violations. Without proper investigation, prosecutions against those responsible for human rights violations cannot take place.

Moreover, we will examine how successive governments are trying to withdraw conflict related-cases pending in lower courts, using domestic legislation originally enacted for other purposes. Finally, we will look into recent directives prepared by the Government intended to grant pardons.

3.2.1. THE POLICE FAILURE TO INVESTIGATE: TWO EMBLEMATIC CONFLICT-RELATED INCIDENTS

The State Cases Act 1992 provides for the procedures to follow when the government is the plaintiff and in relation to the defence of cases filed against the government.³² Following an application, verbally or in writing, submitted by any person who knows about a crime committed, being committed or going to be committed, known as First Information Report (FIR), the police shall register this information in the registration book and, as soon as possible, collect evidences if there is a risk that they could be destroyed or disappear.³³ Before starting any investigation, the police officer shall send a preliminary report to the Government Attorney Office (the public prosecutor at the district level) explaining the matters to be investigated and the Government Attorney may give directions relating to the investigation of the crime.³⁴ At this point, the police officer in-charge of the investigation shall investigate and collect evidence.³⁵ Once the police investigation has been carried out, the police officer must send a report to the public

³² The State Cases Act includes a list of crimes the Act regulates, among them homicide and rape. Nepal Constitution Foundation, State Cases Act, 2049 (1992), available at http://www.ncf.org.np/upload/files/189_en_government-cases-act.pdf [accessed 9 May 2012].

³³ Ibid., article 4, "Arrangement for evidences not to disappear or destroy and perpetrator not to escape".

³⁴ Ibid., article 6, "Sending Preliminary Report".

³⁵ Ibid., section 7, "Collecting Evidence through Investigation".

prosecutor stating whether the suspect has been identified and whether there is enough evidence to prosecute. On the basis of this report, the prosecutor will either direct the police to collect additional evidence or decide whether or not to file a case against the alleged perpetrator.³⁶ To file a case, the public prosecutor will prepare the charge sheet and will submit it to the concerned court along with the evidence.³⁷

When confronted with crimes related to the armed conflict, police have refused to register FIRs on the grounds that crimes committed during the conflict are political crimes or that they should be investigated by transitional justice mechanisms, rather than by the ordinary criminal system. The consequence of rejecting an FIR is the paralysis of the whole process.

In some cases, police have registered an FIR, sometimes as a result of court orders and some others after intense pressure from lawyers and human rights organizations.³⁸ According to the law, before starting the investigation, police shall send a preliminary report to the district public prosecutor explaining the object of the investigation and the prosecutor may provide direction. In practice, police do not send this preliminary report nor the public prosecutors have requested the police to do so.³⁹ The State Cases Act does not foresee what are the consequences if the preliminary report is not made available to the public prosecutor.

Having registered an FIR, in most of the cases police have not carried out an investigation into the incident.⁴⁰ As a result of police inactivity, victims have been compelled to turn to the judiciary to force the police to investigate, delaying the process. In some cases, the courts have ordered the police and the public prosecutor to carry out effective and timely investigations but in few cases the court decisions have been implemented. When police officers have finally started an investigation, they have met with other obstacles, among others, lack of cooperation and interference when the incidents implicate powerful actors such as the NA or the UCPN (Maoist).⁴¹

In general, the lack of investigation has led to the police failure to submit a report to the public prosecutor. The State Cases Act only compels the police to send the report fifteen days before the expiry of the limitation period, which for homicide is twenty years.⁴²

³⁶ Ibid., section 17, “Submitting Report with Opinion”.

³⁷ Ibid., section 18, “Filing Charge Sheet”.

³⁸ Human Rights Watch and Advocacy Forum have examined 62 emblematic conflict-related incidents, committed between 2002 and 2006. The report points out that in 36 cases police and the Chief District Officer refused to register a complaint at the time of the killing on the grounds that the crimes were a political issue. The FIRs were only filed after the end of the conflict and because of continuous pressure from families and NGOs. In 15 cases, the Nepal Police had not registered FIRs at the time of publishing the report. In *Waiting for Justice, Unpunished Crimes from Nepal’s Armed Conflict*, September 2008, p.28, available at http://www.hrw.org/sites/default/files/reports/nepal0908web_o.pdf [accessed 30 July 2012].

³⁹ Ibid., 38. According to the report, public prosecutors have not actively questioned the police when they do not receive preliminary reports.

⁴⁰ Ibid., 30. According to the report, in 46 out of the 62 cases families or witnesses provided the names of the alleged perpetrators in addition to *prima facie* evidence that the crime had been committed through direct witnesses to the crime, and information on the officers in charge of the unit involved. Even in these cases, police failed to investigate.

⁴¹ A study finds, among other problems, the susceptibility to political interference and the lack of cooperation by state security services and political parties as central obstacles to investigations. *Held to Account: Making the Law Work to Fight Impunity in Nepal*, Redress and Advocacy Forum, December 2011, p. 62-65, available at <http://www.redress.org/downloads/Nepal%20Impunity%20Report%20-%20English.pdf> [accessed 1 August 2012].

⁴² Only in case someone has been detained the police shall submit the report to the public prosecutor within 25 days, see State Cases Act, Article 15, op. cit. 32.

Without the police report, the public prosecutor cannot file a case against the alleged perpetrator.⁴³

To see how the previous analysis applies in practice, the study will look into the police investigation into two incidents related to the armed conflict.

Two conflict-related emblematic cases: Arjun Lama and Maina Sunuwar

The abduction and killing of Arjun Bahadur Lama

Arjun Bahadur Lama, a social worker, was kidnapped by the Maoists on 19 April 2005. In late June, witnesses told the family that the Maoists had killed him. On 28 June 2007, his wife, Purnimaya Lama, attempted to file a FIR at the District Police Office, but the police refused. The victim submitted an application to the higher-level authority, the Chief District Officer (CDO), who also rejected on the grounds that the incident would fall under the jurisdiction of the TRC, once formed. As a result, on 16 July 2007, the victim filed a writ, requesting the SC to order the police to register the FIR.

On 10 March 2008, the SC overruled the argument put forward by the CDO ruling that, until legislation is promulgated specifying that certain crimes fall under the jurisdiction of such a Commission, it is the responsibility of the concerned police office to receive, register and conduct investigation into all criminal offenses in which the government is a plaintiff.⁴⁴ The SC stressed that activities such as conducting investigations on any criminal offenses, ensuring justice, controlling crime and punishing perpetrators, according to the law, are basic obligations of any State operating according to the rule of law. The SC ordered the District Police Office and the District Administration Office to register the FIR, in accordance with the State Cases Act. On 11 August 2008, the police office registered the FIR, ordering the arrest of the respondents, among them Agni Sapkota, a UCPN (Maoist) elected member of the Parliament.

On 4 May 2011, the accused Agni Sapkota was appointed to the post of Minister of Information and Communication.⁴⁵ A group of lawyers filed a writ petition asking the SC to issue a stay order to prevent the Minister from working in this capacity until the incident was resolved. The lawyers based their petition on the basis of the FIR registered and the possibility that the new appointed Minister could interfere in the investigation by causing evidences to disappear and by exerting undue influence on personnel involved in the investigation, manipulating the results of the investigation.

In its 21 June 2011 judgement, the SC examined the status of the police investigation since the filing of the FIR, almost three years earlier, and observed that no significant investigation had been carried out. The SC emphasized that “the unnecessary and un-

⁴³ Only 3 of the 49 FIRs examined in a report have made it to the Court as of August 2008. *Waiting for Justice*, p.37, Human Rights Watch and Advocacy Forum, op. cit. 38.

⁴⁴ *Purnimaya Lama v. District Police Office, Kavrepalanchok and Others*, Supreme Court of Nepal judgement, 10 March 2008, in International Commission of Jurists and Nepal Bar Association, *Transitional Justice and Right to a Remedy: Supreme Court Jurisprudence in Nepal* (hereafter ICJ and NBA, *Transitional Justice and Right to a Remedy*), Kathmandu, 2012, p. 286.

⁴⁵ See also “UN concerned over appointment of Cabinet Minister alleged to have committed human rights violations”, OHCHR-Nepal press release, 5 May 2011, available at: http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202011/May/2011_05_05_PR_Agni_Sapkota_E.pdf [accessed 2 August 2012].

due delay in investigation renders the objective of the rule of law meaningless and fosters impunity” and that “the investigations carried out so far have been disappointing”.⁴⁶

The defendants argued again that conflict-related incidents should be dealt by the TRC to be established, on the basis of the CPA and the Interim Constitution. In fact, on 13 December 2010 and on 18 January 2011, the SC had issued interim orders preventing the execution of arrest warrants against Maoist cadres charged with murder in conflict-related cases. In these cases, the SC accepted the argument, put forward by one of the accused, a UCPN (Maoist) Member of Parliament that both the Interim Constitution and the CPA provided for the formation of a TRC to deal with conflict-related crimes.⁴⁷

However, the SC ruled that until transitional justice mechanisms were not in place the criminal justice system must prevail in a situation where an FIR on homicide has been filed. But the SC also recognized that once a transitional justice system is in place, cases investigated or under investigation might be pursued under a changed jurisdiction, if provided by law.⁴⁸

As for the appointment to the post of Minister, the court judged that no one could be declared a criminal on the basis of a FIR, but only after a charge sheet had been filed on the basis of evidence collected after completion of investigation.⁴⁹ Rendering inappropriate to prevent the Minister to carry out his duties on the basis of a FIR, the SC ordered the police to continue the investigation and to present, through the Attorney General (AG)’s Office a detailed report to the court every fifteen days.⁵⁰ Notwithstanding the order, as of November 2011, the AG’s Office had not provided any updates.⁵¹

On 8 November 2011, the Council of Ministers decided to appoint another of the accused, CA member Suryaman Dong, as Minister of State for Energy, despite an arrest warrant in relation to the abduction and murder of Arjun Lama.⁵²

The torture and death in custody of Maina Sunuwar

The most famous conflict-related incident in Nepal is possibly the torture and killing of Maina Sunuwar. Maina, a 15-year-old girl, was tortured and killed in the custody of the then Royal Nepal Army (RNA) in February 2004 at the Birendra Peace Operations Training Centre in Panchkhal, Kavrepalanchok district, where she was subsequently

⁴⁶ *Sushil Pyakurel and Others v. Prime Minister Jhalanath Khanal and Others*, Supreme Court of Nepal judgement, 21 June 2011, ICJ and NBA, *Transitional Justice and Right to a Remedy*, p. 305, op. cit. 44.

⁴⁷ “Evading accountability by hook or by crook, The issue of amnesties in post-conflict Nepal”, *Occasional Brief*, Year 2, Vol.1, June 2011, in *Advocacy Forum*, available at: <http://www.advocacyforum.org/downloads/pdf/publications/evading-accountability-by-hook-or-by-crook.pdf> [accessed 7 August 2011]

⁴⁸ *Sushil Pyakurel and Others v. Prime Minister Jhalanath Khanal and Others*, Supreme Court of Nepal judgement, 21 June 2011, ICJ and NBA, *Transitional Justice and Right to a Remedy*, p. 305, op. cit. 44.

⁴⁹ *Ibid.*, 309.

⁵⁰ *Ibid.*, 310.

⁵¹ *Adding insult to injury, Continued impunity for wartime abuses*, Human Rights Watch and Advocacy Forum, December 2011, p. 14, available at: http://www.hrw.org/sites/default/files/reports/nepal1211Upload_0.pdf [accessed 2 August 2012]

⁵² “UN concerned over recent Govt. decisions to appoint, pardon and promote alleged perpetrators of human rights violations”, OHCHR Nepal press release, 10 November 2011, available at:

buried.⁵³ In September 2005, after public and international pressure, three NA officers were brought before a court martial. They were sentenced to six months imprisonment, which they did not serve as they were judged to have already spent that time confined in barracks during the investigation. In November 2005, the family of Maina Sunuwar tried to file an FIR naming four NA personnel as responsible for her death. Three weeks later, on 6 December 2005, the police registered the FIR. The District Police Office requested the NA to produce the four accused in the FIR for investigation, though the NA did not hand them over. Instead, on 26 May 2006, the NA wrote to the police arguing that, as a court martial had already rendered a verdict the police could not carry out a criminal investigation into the incident.⁵⁴ On 10 January 2007, the family filed a writ, requesting the SC to order the police to expedite the investigation process, to arrest the accused and to file a charge sheet in accordance with the State Cases Act. The petitioners argued that the killing of a 15-year-old girl after taking her into custody should fall under the jurisdiction of a civilian court and not under a military court.

In its 18 September 2007 judgment, the SC ruled that civilian courts have jurisdiction over the killing of civilians by the army during the conflict. The court observed that, in accordance with the State Cases Act, it is the duty of the police to conduct effective investigation and inquiry in order to determine whether Maina's death occurred as a result of a criminal act and whether prosecution should be initiated. In case of prosecution, it should be under the provisions of the State Cases Act. The SC ordered the police to complete the investigation within three months. In January 2008 the Police brought murder charges against the four army officers named in the FIR. Despite the arrest warrants issued by the District Court, the alleged perpetrators have not been arrested. In September 2009, the District Court ordered the NA to suspend Major Basnet, the only accused still serving in the army. Instead, the NA sent Major Basnet on a UN peacekeeping mission. After it became publicly known, the UN repatriated Major Basnet in December 2009. Immediately upon his arrival to Nepal, the NA took him under control, despite an arrest warrant against him. Since then, there have been several requests to the army to hand him over to the police. In July 2010, the NA Chief of the Legal Department stated "It is clear that the army was acting against a common enemy then and functioning under the Terrorism and Disruptive Activities Act. Therefore, there is no case against Basnet."⁵⁵

In the absence of political will, both the police and the prosecutor are powerless to force the army to cooperate.

http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202011/November/2011_11_10_PR_Dhungel_pardon_E.pdf [accessed 20 July 2012]

⁵³ According to the investigations by the Court of Inquiry Board, established by the Nepal Army, the torture consisted in submerging Maina's head in a large pot of water for one minute six or seven times. The soldiers then administered electric shocks to her wet hands and feet four or five times. The torture continued for one and a half hours. She was left blindfolded and handcuffed. Later, she began vomiting and foaming at the mouth and died before medical assistance could arrive. Ironically the Birendra Peace Operations Training Centre is where members of the Nepal Army are given training before being deployed on UN peacekeeping missions. See "The torture and death of Maina Sunuwar", OHCHR, December 2006, available at

http://nepal.ohchr.org/en/resources/Documents/English/reports/IR/Year2006/2006_12_01_HCR%20_Maina%20Sunuwar_E.pdf [accessed 1 August 2012].

⁵⁴ Ibid. In the letter written by the Brigadier General B.A. Kumar Sharma of the Nepal Army Legal Section, the Nepal Army appears to partly blame Maina Sunuwar for her own death, stating that she did not die as a result of torture but "due to the wrong process and techniques adopted out of carelessness, whims and senselessness, and her own mental weakness".

⁵⁵ *Adding insult to injury*, Human Rights Watch and Advocacy Forum, p.19, op. cit. 51.

3.2.2. PREVIOUS COMMISSIONS OF INQUIRY INTO CONFLICT-RELATED INCIDENTS: INVESTIGATIONS INTO THE DEATHS DURING THE APRIL 2006 PEOPLE'S MOVEMENT

In accordance with the State Cases Act and the Police Act, police have the legal authority to carry out investigations into criminal offenses. However, on the basis of the Commissions of Inquiry (COI) Act from 1969, the government has also the power to constitute COI to look into any matter of public importance.⁵⁶ This legislation is the primary means through which the Government of Nepal has created COI to look into all sorts of incidents, including human rights violations.⁵⁷

However, this act does not include the relevant international criteria regarding the establishment of COI mandated to investigate human rights violations, as provided in the *Updated Principles to Combat Impunity*.⁵⁸ The COI Act provides for the government to design the Chief Justice, or another judge of the SC, or a judge of the Court of Appeal or District Court, to carry out a judicial inquiry or a legal or judicial investigation, in accordance with the Interim Constitution.⁵⁹ However, the law does not foresee the need of expertise in the field of IHRL or IHL among its members; neither it establishes any requirement on their independence or impartiality.⁶⁰ The lack of independence and impartiality is of special concern when most of the commissions have been set up by the Ministry of Home Affairs, and, in some cases, those commissions have been mandated to look into incidents of excessive use of force by security forces operating under that Ministry.⁶¹

One of the main concerns in the 1969 law relates to the confidentiality surrounding all the activities and procedures of the commission as well as the exceptions that would allow for the non-disclosure of the report. While the *Updated Principles to Combat Impunity* allows for the confidentiality of parts of the inquiry, due to security reasons, the COI Act provides that all activities and procedures will remain secret.⁶² As for the publicity of the report, the law allows for the non-disclosure, if it contains matters that can “cause an adverse impact on the sovereignty, integrity or strategic importance or public peace and order or harmonious relations between different tribes or communities and relations with friendly nations”.⁶³ This provision is against the internationally

⁵⁶ Commissions of Inquiry Act, 1969, article 3.2, available at http://www.ncf.org.np/upload/files/16_en_commissions-of-inquiry-act-2026-1969-e.pdf [accessed 4 August 2012].

⁵⁷ A recent study compiles 38 COI formed in Nepal between 1990 and 2010 to investigate into circumstances surrounding violent incidents. The report includes COI formed through the Commission of Inquiry Act; other commissions, outside this legislation, formed by the government; Legislature-Parliament inquiry committees; and high-level investigative committees supervised by the Supreme Court. In *Commissions of Inquiry in Nepal: Denying remedies, entrenching impunity*, International Commission of Jurists, June 2012.

⁵⁸ UN Commission on Human Rights, *Report of the independent expert to update the Set of principles to combat impunity (Updated Principles to Combat Impunity)*, 8 February 2005, E/CN.4/2005/102/Add.1, available at: <http://www.unhcr.org/refworld/docid/42d66e78o.html> [accessed 30 May 2012].

⁵⁹ Commissions of Inquiry Act, 2026 (1969), article 3.1, op. cit. 56.

⁶⁰ As for Principle 7, “Guarantees of Independence, Impartiality and Competence”. *Updated Principles to Combat Impunity*, UN Commission on Human Rights, op. cit. 58.

⁶¹ The ICJ report further mentions that frequently one of the Secretaries of the Ministry of Home Affairs and, at times, the Deputy Inspector General of Police have been appointed as members of the commission. In *Commissions of Inquiry in Nepal*, International Commission of Jurists, p. 28-29, op. cit. 57.

⁶² Commission of Inquiry Act, Section 8A, “Activities of Commission to be Secret”, op. cit. 56.

⁶³ Ibid.

accepted practice to make the final report public in full and to disseminate as widely as possible.⁶⁴ Not surprisingly, most of the reports by COI have not been made public.⁶⁵

The Nepali SC had the chance to examine the 1969 COI Act, in light of international human rights standards, and to assess the appropriateness of such legislation in being the basis to establish a commission to look into disappearances. In its ruling on 1 June 2007, the SC observed that the objective of the COI Act is to look into matters of public importance under normal circumstances, but not to cover incidents of a special nature that emerge from a time of armed conflict. According to the Court, under domestic legislation, the commission would not be obliged to continue the search for the disappeared until the fate is determined, which is a requisite under international law.⁶⁶ The Court also referred to the lack of provisions regarding the competency, expertise, independence and impartiality of the commissioners and the absence of measures to protect victims and witnesses. Further, most importantly, the court emphasized that the COI Act does not offer guarantees that the inquiry by the commission will not replace the jurisdiction of the court and that the report will be made public. The court concluded that “there are no reliable grounds to believe that an inquiry commission constituted in accordance with this Act to find out the status of disappeared citizens would have the capacity to conduct an effective investigation.”⁶⁷

In the previous ruling, the SC must have taken into consideration the result of previous inquiries into human rights violations. One of them, the Rayamajhi commission, was established after the second *Jana Andolan* as a response to excessive use of force by the law enforcement agencies.⁶⁸

The Rayamajhi commission

The commission was established after the 19-day protest movement, from 5 to 24 April 2006, organized by the SPA and civil society and which ended with the King reinstating the House of Representatives. Immediately after taking office, the new government appointed the commission on 5 May 2006 to investigate human rights violations and abuse of State funds since 1 February 2005, including those committed during the April 2006 protests. The report was submitted to the government on 22 November though it was not made public. Instead, the Council of Ministers appointed another commission, the Oli Commission, to study the findings of its predecessor. In August 2007, after intense pressure, the government finally made public the report of the Rayamajhi commission. The report recommended action against named government and former government officers, including the prosecution of thirty members of the NA, APF and NP. However, the AG took no action, as he believed the evidence gathered was insufficient.

⁶⁴ *Updated Principles to Combat Impunity*, Principle 13, “Publicizing the Commissions Report”, UN Commission on Human Rights, op. cit. 58.

⁶⁵ A study, in 2010, found 53 inquiry commissions and other task forces, formed between 2006 and 2010. The report points out that in most of the cases, the reports were not made public. Bhattarai, Binod, *Impunity in Nepal*, Kathmandu: Center for Investigative Journalism and The Asia Foundation, October 2010, p. 104, available at: <http://asiafoundation.org/resources/pdfs/EnglishImpunitydesignNepal.pdf> [accessed 15 May 2012]

⁶⁶ UN General Assembly, Declaration on the Protection of All Persons from Enforced Disappearance: resolution / adopted by the General Assembly 18 December 1992, A/RES/47/133, articles 13(6) and 17(1), available at: <http://www2.ohchr.org/english/law/disappearance.htm> [accessed 25 May 2012].

⁶⁷ *Rabindra Prasad Dhakal v. the Government of Nepal and Others*, Supreme Court of Nepal judgment, 18 June 2007, in ICJ and NBA, *Transitional Justice and Right to a Remedy*, p. 252, op. cit. 44.

⁶⁸ The Commission was named after the chairperson, former Supreme Court Justice Krishna Jung Rayamajhi.

Police did not launch an investigation in any of the 18 killings that took place during the protests, not even in the seven cases where FIRs were filed, shortly after the deaths. According to the OHCHR, police had expressed they would not take any action until the results of the investigation by the Rayamajhi commission were known.⁶⁹ Instead, in November 2011, the government promoted to the position of Additional Inspector General of the APF one of the accused for the killing of pro-democracy demonstrators and for whom the Rayamajhi commission had recommended criminal prosecution.⁷⁰

Traditionally, the Government of Nepal has established such COI to respond to certain incidents whenever there are demands for accountability from civil society. However, the consequences of establishing such commissions differ from initial intentions. In most of the cases the reports have not been made public. If, after social pressure, they are finally released, recommendations for prosecutions against those who committed violations are not implemented.⁷¹ Consequently, COI provide the government with a tool to divert investigations from the traditional criminal system into an ad hoc and toothless mechanism controlled by the government itself.⁷²

3.2.3. THE GOVERNMENT'S INITIATIVES TO WITHDRAW CONFLICT-RELATED CRIMES

The Government of Nepal is also trying to evade its duty to prosecute conflict-related crimes using legislation that allows for the withdrawal of criminal incidents.

Article 29 of the 1992 State Case Act allows the government to request permission from the respective District Court for the withdrawal of criminal cases filed by or against the government. With the court agreement, the government claim ceases and the defendant is absolved. The provision is applicable to any type of state case, except crimes related to private property.⁷³

Originally, the law was passed to withdraw charges against those jailed for political reasons, at a time when political parties and organizations had been banned.⁷⁴ In 1994, the SC ruled that “before permission is granted to the government for the withdrawal of cases, the court should investigate whether the intention is for good cause or not”.⁷⁵

⁶⁹“Human Rights in Nepal, One year after the Comprehensive Peace Agreement”, OHCHR Nepal, December 2007, available at <http://nepal.ohchr.org/en/resources/Documents/English/reports/HCR/CPA%20Report.pdf> [accessed 6 August 2012].

⁷⁰ “UN concerned over recent Govt. decisions to appoint, pardon and promote alleged perpetrators of human rights violations”, OHCHR Nepal press release, 10 November 2011, available at http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202011/November/2011_11_10_PR_Dhungel_pardon_E.pdf [accessed 20 July 2012].

⁷¹ Out of 53 inquiry commissions and other task forces, formed between 2006 and 2010, 19 were mandated to probe incidents that had resulted in about 100 deaths. However, no one has been found criminally accountable. In Bhattarai, Binod, *Impunity in Nepal*, p. 104, op. cit. 65.

⁷² The report by the International Commission of Jurists concludes that “though ostensibly formed to provide a measure of public accountability, more often than not, COIs have promoted impunity by diverting investigation of human rights violations and crime through the criminal justice process into a parallel ad hoc mechanism vulnerable to political interference and manipulation”, *Commissions of Inquiry in Nepal*, Executive Summary, International Commission of Jurists, op. cit. 57.

⁷³ State Cases Act, 2049 (1992), article 29, op. cit. 32.

⁷⁴ During the *Panchayat* system, in place until 1990, political parties and political organizations were banned. In Bhattarai, Binod, *Impunity in Nepal*, p. 89, op. cit. 65.

⁷⁵ *Government of Nepal v. Dil Bahadur Lama and others*, OHCHR Nepal and National Human Rights Commission Nepal, *Remedies and Rights Revoked: Case Withdrawals for Serious Crimes in Nepal*, June 2011, p.20, available at

In August 1998, the government approved the *Policy Guidelines and Procedures in Relation to Withdrawal of Criminal Charges Lodged on behalf of the Government of Nepal* (hereafter the 1998 Policy Guidelines on Withdrawal of Cases). These guidelines classify criminal cases into two groups, cases of political nature, including subversion, treason, and revolt against friendly states; and general cases, like homicide, corruption, rape, robbery.⁷⁶ The guidelines provide that the general cases

*[...] shall only be withdrawn in the rarest of instances, taking into account circumstantial evidence, any prior criminal history of the accused, social standing of the accused, and other related factors, including whether the case is filed with a motive of political vengeance or malicious intent.*⁷⁷

The CPA of 21 November 2006 provides for the withdrawal of accusations, claims, complains and cases under consideration due to *political reasons*, though it fails to explain what political reasons mean.⁷⁸ Generally, political reasons would relate to the charges being political crimes, such as rebellion, treason, sedition, subversion and membership in a banned political party or similar crimes. In that regard, soon after the end of the conflict, the 2007 interim government released political prisoners and withdrew charges against them, on the basis of the CPA. This was done in the case of alleged Maoists detained under the Terrorist and Disruptive Activities Act as well as for those charged with sedition.⁷⁹ On the other hand, accusation due to political reasons could also mean that the charges are based on false allegations, which are politically motivated. If that was the case, those implicated could submit evidence to the court alleging the charges were false and let the courts decide, rather than preventing the courts from reviewing the cases.

The SC of Nepal has ruled that the approval of the respective District Court is a substantive legal requirement in order to withdraw a case. The Court has also stated that the government is required to put forward the grounds and reasons for withdrawing any case taking into account that the government's right to withdraw has to be used with a good intention. The Court further related to the need to balance the reasons to withdraw the case with the victim's right to justice, taking into consideration that it is the responsibility of the judiciary to protect the victim's rights and, in cases where violations of human rights or humanitarian law have taken place, the court needs to be more sensitive and give special scrutiny.⁸⁰

However, political parties have failed to explain publicly what reasons allow for the withdrawal of political crimes or what are the requirements to consider a certain crime

http://nepal.ohchr.org/en/resources/publications/2011/2011_06_23_Case-Withdrawals-for-Serious-Crimes-in-Nepal_E.pdf [accessed 7 August 2012].

⁷⁶ "Evading accountability by hook or by crook", *Advocacy Forum*, op. cit. 47.

⁷⁷ *Ibid.*

⁷⁸ Section 5.2.7 "Both sides guarantee to withdraw accusations, claims, complaints and cases under consideration alleged against various individuals due to political reasons and to make immediately public the state of those who are in detention and to release them immediately", Comprehensive Peace Agreement, INSEC, Documents related to the peace process, p.19, op. cit. 23.

⁷⁹ At least 367 detainees held under the Terrorist and Disruptive Activities Act were released and charges against them withdrawn. Similarly, the government released prisoners who were facing trials on charge of sedition under the Crime Against the State and Punishment Act 1989. "Evading accountability by hook or by crook", *Advocacy Forum*, op. cit. 47.

⁸⁰ *Government of Nepal v Devendra Mandal*, Supreme Court decision, 3 September 2007, and *Government of Nepal v Gagandeve Raya Yadhav*, Supreme Court decision, 13 February 2008, In OHCHR Nepal and NHRC Nepal, *Remedies*

as being politically motivated. The only reasons put forward by the government to justify decisions to withdraw cases against their political supporters, are that the CPA allows for it and the need to move forward the peace process. The understanding, among political parties, is that any charges against alleged perpetrators who are involved in politics are by definition politically motivated.

In October 2008, under the UCPN (Maoist) led government, the Council of Ministers took the decision to withdraw 349 criminal cases against political connected individuals. Most of them were conflict-related incidents and the government justified the move on the basis of the CPA and in order to promote peace. However, 98 of these cases related to murder and 30 to attempted murder, which are not political crimes;⁸¹ around 40 percent related to property crimes, which cannot be withdrawn under article 29 of the State Cases Act; and 15 percent dealt with crimes alleged to have taken place after the armed conflict, for which the CPA provision would not be applicable.

Responding to public interest litigation, on 1 January 2009, the SC issued an interim order preventing the government from implementing the decision to withdraw the 349 cases. The Court ruled that on the basis of the CPA the government could only withdraw cases filed for political reasons and that the cabinet's decision included other crimes not related with political offenses.⁸² However, when the SC delivered its verdict, on 23 February 2011, it considered the government's decision lawful in accordance with the 1998 Policy Guidelines *on Withdrawal of Cases* and the CPA. The court however, referred to the approval of the District Court on a case-by-case basis as a legal requirement to withdraw a case.⁸³

In November 2009, under the CPN-UML led government, the Council of Ministers decided to withdraw 282 cases, including 200 cases of murder and 82 cases of arson.⁸⁴ As opposed to the previous decision by the UCPN (Maoist), most of the cases withdrawn under the CPN-UML government were not related to the conflict. Again, there is no legal basis to withdraw these cases, as murder is not a political crime and cases of arson involve crimes related to property, which cannot be withdrawn under article 29 of the State Cases Act.

On 27 February 2012, the UCPN (Maoist) led government decided to withdraw 425 criminal cases against political cadres, on the recommendation of the main political parties. Of them, 117 were murder related cases and 77 attempted murder. Crimes related to property included 149 cases of robbery and 54 cases of arson.⁸⁵

On 17 April, the SC issued a mandatory order directing the government and a district court involved not to withdraw cases involving serious crimes, even if they were of a

and Rights Revoked, op. cit. 75. For excerpts of the SC decision in *Government of Nepal v Gagandev Raya Yadhav*, see Bhattarai, Binod, *Impunity in Nepal*, p. 90-92, op. cit. 65.

⁸¹ Other crimes involved robbery (98), civil offenses (20), arms and ammunition (39), and arson (57). "Evading accountability by hook or by crook", *Advocacy Forum*, op. cit. 47.

⁸² *Madhav Basnet et al. v. Prime Minister Puspa Lamal Dahal et al.*, in OHCHR Nepal and National Human Rights Commission, *Nepal, Remedies and Rights Revoked*, p. 22 op. cit. 75.

⁸³ "Evading accountability by hook or by crook", in *Advocacy Forum*, op. cit. 47.

⁸⁴ *Ibid.*

⁸⁵ Other crimes involved abduction (27) and arms and ammunition (1), in "Parties in agreement on criminal case withdrawals", *República*, 6 March 2012, available at http://www.myrepublica.com/portal/index.php?action=news_details&news_id=32530 [accessed 7 August 2012].

political nature. The SC directed the government to amend provisions in the 1998 Policy Guidelines on *Withdrawal of Cases* so that the government does not have the authority to withdraw cases related to serious crimes, including war crimes, crimes against humanity and serious human rights abuses.⁸⁶

3.2.4. MEASURES OF CLEMENCY: THE GRANTING OF PARDONS

The Nepali government is also trying to avoid its duty to punish through the granting of pardons. Pardons relate to an official act that exempts a convicted criminal from serving the sentence, in whole or in part, and without expunging the underlying conviction.⁸⁷

Article 151 of the 2007 Interim Constitution authorizes the Council of Ministers to grant pardons, and suspend, commute or reduce any sentence imposed by any court, special court, military court or by any other judicial or quasi-judicial, or administrative authority or institution.⁸⁸

In Nepal not even a single perpetrator has been convicted in a civilian court for conflict-related crimes, and, consequently, governments have not need to use this clemency measure. However, on 24 June 1998, Maoist Balkrishna Dhungel was convicted to life imprisonment for murder. Although the killing was committed during the conflict time, it related to personal disputes between the families of the victim and the perpetrator.⁸⁹ The Appellate Court overturned the District Court verdict alleging that the case should be dealt by transitional justice mechanisms, rather than by the criminal justice system. The public prosecutor appealed to the SC, which on 8 September 2010 upheld the original murder conviction.⁹⁰ On 8 November 2011, the Council of Ministers decided to request the President to pardon the convicted, who had been elected UCPN (Maoist) Member of the CA in the April 2008 elections.⁹¹ The SC stalled the petition on 13 November 2011. In spite of the conviction, Dhungel continued to be an active member of the CA and has not yet been arrested.

On 3 July 2012, media reported the Ministry of Home Affairs had prepared directives to better enforce article 151 of the Interim Constitution.⁹² The document, entitled *Directive on Granting Pardons, Suspending, Commuting or Remitting Sentences*, currently in the bills committee of the cabinet, would allow the Ministry of Home Affairs to recommend to the cabinet pardons, suspension or remittance of sentences passed by

⁸⁶ "SC to govt: Don't withdraw serious criminal cases", *The Kathmandu Post*, 17 April 2012, available at <http://www.ekantipur.com/the-kathmandu-post/2012/04/17/top-story/sc-to-govt-dont-withdraw-serious-criminal-cases/233872.html> [accessed 7 August 2012].

⁸⁷ *Rule of Law Tools for Post-Conflict States: Amnesties*, 2009, HR/PUB/09/1, UN Office of the High Commissioner for Human Rights (hereafter OHCHR), p. 5, available at: http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf [accessed 24 May 2012].

⁸⁸ Interim Constitution of Nepal, 2063 (2007), op. cit. 31.

⁸⁹ *Adding insult to injury*, Human Rights Watch and Advocacy Forum, p.26, op. cit. 51.

⁹⁰ "Evading accountability by hook or by crook", *Advocacy Forum*, op. cit. 47.

⁹¹ "UN concerned over appointment of Cabinet Minister alleged to have committed human rights violations", OHCHR-Nepal, op. cit. 45.

⁹² "Ministry proposes pardons on party recommendation", *Republika*, 3 July 2012, available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=37290 [accessed 11 August 2012].

courts, special courts or by any other judicial, quasi-judicial or administrative authority or body, upon the recommendation of the major political parties.

Although the directive refers to crimes for which pardon could not be granted, it does not mention murder, crimes against humanity and serious human rights violations, including torture.⁹³ However, under international law and practice these crimes could not be subject to pardon.

CONCLUSION

The Government of Nepal is not complying with its duty, under international law, to prosecute those responsible for war crimes, crimes against humanity, and other gross violations of human rights committed during the armed conflict. To that end, successive governments are both passively and actively engaged in evading its obligations.

Passively, in not fostering prosecutions through the regular criminal justice system, starting with police investigations. Police do not investigate incidents, paralyzing the whole criminal process and preventing cases from reaching the courts. Whenever cases make it to the courts, it is usually seeking orders for the police to carry out investigations. In these cases, the government has consistently argued that conflict-related crimes should not be dealt by the regular criminal system, as they will fall under the jurisdiction of transitional justice mechanisms to be established. Although the SC has issued contradictory judgments, it has been lately consistent in ruling that incidents cannot be deferred to TJ mechanisms, as they have not been established yet, hinting however that, once established, they could have jurisdiction.

In some instances, the government has established commissions of inquiry to investigate certain incidents as a response to civil society demands for accountability. However, the lack of proper legislation establishing these commissions results in a toothless mechanism controlled by the government itself. The government decides whether the commission report will be made public and whether the recommendations, including for prosecutions, will be implemented. As a result most of the reports have not been made public. Whenever they have been released, recommendations for prosecutions have not been implemented showing that these ad hoc mechanisms have been used to draw investigations away from the traditional criminal system.

The government's attempt to withdraw conflict-related crimes constitutes a violation of Nepal's duty to prosecute these crimes under international law. Under domestic legislation, mainly the State Cases Act and the 1998 Policy Guidelines, the door is wide open for the government to abuse provisions that allow for the withdrawal of cases. Moreover, there is currently no clear domestic legislation on what constitutes a political crime. Beyond these shortcomings, the government is interpreting the CPA provision on withdrawal of political crimes, as the need of the moment in order to move forward the peace process. As a result, the government conveniently understands that any

⁹³ Ibid. The directive mentions that pardon could not be granted to those convicted of corruption, involvement with illegal drugs, crimes related to immigration and passports, leakage of revenue, rape, money laundering, terrorism, disruptive activities, illegal organ transplant, espionage and leaking of state secrets.

charges against alleged perpetrators who are involved in politics are by definition politically motivated. The withdrawal of conflict-related crimes has the same effect as a blanket amnesty. However, the measure goes beyond conflict-related human rights violations as it is already benefiting criminals with political links.

Finally, there are signs that the government may use measures of clemency to pardon perpetrators of conflict-related human rights violations. As currently not even a single perpetrator has been punished in a civilian court for conflict-related crimes, the government has not needed to use of this prerogative. However, the directives the government has prepared would allow the Ministry of Home Affairs to recommend the cabinet for pardons, suspension or remittance of sentences, upon the recommendation of the major political parties. Granting pardons for conflict-related human rights violations would constitute a violation of Nepal's obligation to punish perpetrators.

By not carrying out prosecutions, those most responsible who are currently holding positions of power in the state apparatus, either in the executive or legislative branch or in the security forces, are not accountable for their past misdeeds. It is in this context, in which the Government is using the argument of the establishment of future commissions to evade its current obligations to prosecute. Meanwhile, these mechanisms are not being established.

3.3. THE TRUTH-SEEKING MECHANISMS TO BE ESTABLISHED IN NEPAL⁹⁴

In the previous section we have seen that the successive governments in Nepal are not complying with the State's duty to prosecute those responsible for serious crimes committed during the armed conflict. We have also seen that the various governments are using the argument of the establishment of future truth-seeking mechanisms as a way to postpone its current obligations to prosecute. In this section we want to find out whether Nepal is trying to substitute its duty to prosecute serious crimes under international law for the fulfillment of the victim's right to know the truth, through establishing a commission of inquiry on disappearances and a truth and reconciliation commission.

In line with our argument of a *de facto* recognition by states of a victim's right to know the truth, as presented in chapter II, we will first examine this recognition in Nepal through the State various commitments to establish truth-seeking mechanisms. Next we will look into the evolution of the successive draft legislation to establish two truth-seeking mechanisms in Nepal, with a focus on those provisions that either reinforce or absolve the State from its duty to prosecute. The analysis of these provisions will be complemented with concerns raised by human rights organizations and victim groups. The evolution of the successive bills has been separated in two periods, the first covering until May 2010, when the bills were sent to the Legislative Committee of the Parliament for discussions and the second, from this moment and until the dissolution of the Constituent Assembly. The reason being that prior to May 2010 the bills followed

different processes and dynamics whereas from that moment they were considered jointly. The chapter will conclude by answering whether in Nepal the establishment of truth seeking mechanisms is intended to exonerate the State from its duty to prosecute.

3.3.1. NEPAL'S COMMITMENT TO ESTABLISH TRUTH-SEEKING MECHANISMS

Nepal's commitment to establish truth-seeking mechanisms is reflected in several of the agreements that the SPA or the Government of Nepal signed with the CPN (Maoist) and that finally led to the CPA. As the CPA incorporates all the previous agreements and understandings, all of them are binding on both sides.

In the Code of Conduct for Ceasefire both sides agreed to disclose the whereabouts of the citizens who had disappeared.⁹⁵ On 8 November 2006, two weeks before the signing of the CPA, the SPA and the CPN (Maoist) signed an understanding in which they agreed “to form a high-level commission to investigate and publicise the whereabouts of citizens stated to have been disappeared by the State and the Maoists in the past”⁹⁶, “[c]onduct investigation about those who were involved in gross violations of human rights at the time of the conflict and those who committed crime against humanity” and “[f]orm a high level Truth and Reconciliation Commission to create an environment for social reconciliation.”⁹⁷

The CPA does not provide explicitly for the creation of a commission of inquiry on disappearances (COID), but it incorporates an agreement to make public the information about the people who were disappeared and killed by both sides.⁹⁸ With regard to the TRC, the CPA reiterates previous commitments to establish a TRC “in order to investigate truth about those who have seriously violated human rights and those who were involved in crimes against humanity in course of the war and to create an environment for reconciliation in the society.”⁹⁹ The Interim Constitution further incorporated the State responsibility to constitute both commissions.¹⁰⁰

On 23 December 2007 the six governing parties and the Maoists signed a 23-point agreement that brought back the Maoists to the interim government. Among other issues, the parties agreed to form the COID and the TRC within a month and based on consensus.¹⁰¹

⁹⁴ In this chapter we will refer to working documents which have been made public but either have not been published in the website or, if they were published, are not available any longer.

⁹⁵ The Code of Conduct for Ceasefire agreed between the Government of Nepal and the CPN (Maoist), 25 May 2006, Paragraph 17, in INSEC, Documents related to the peace process, p. 4, op. cit. 23.

⁹⁶ Ibid., 9, Full text of the decision of the SPA-Maoist summit meeting, 8 November 2006, Section I, paragraph 2.

⁹⁷ Ibid., 12-13, Section IV, Clause 4.

⁹⁸ Ibid., 19, Comprehensive Peace Agreement, Section 5, Clause 5.2.3.

⁹⁹ Ibid., Section 5, Clause 5.2.5.

¹⁰⁰ Article 33.q establishes the responsibility of the State “to provide relief to the families of the victims, on the basis of the report of the Investigation Commission constituted to investigate the cases of persons who were the subject of enforced disappearance during the course of the conflict”. And article 33.s, provides for the State obligation “to constitute a high-level Truth and Reconciliation Commission to investigate the facts about those persons involved in serious violations of human rights and crimes against humanity committed during the course of conflict, and to create an atmosphere of reconciliation in the society.” Directive Principles and Policies of the State, Interim Constitution of Nepal, 2063 (2007), op. cit. 31.

¹⁰¹ “23-point Agreement between the Top Leaders of the Seven-Party Alliance”, South Asia Terrorism Portal, December 23, 2007, available at

Finally, in January 2011, during the Universal Periodic Review of Nepal's human rights situation before the UN Human Rights Council, the government's delegation reiterated that both the COID and the TRC bill had been submitted to the Parliament and that the government remained committed to have them cleared as expeditiously as possible.¹⁰² The government's delegation also supported the recommendations from other countries to establish both commissions as per the CPA fully in accordance with international standards.¹⁰³

3.3.2. THE SUCCESSIVE BILLS TO ESTABLISH TWO TRUTH-SEEKING MECHANISMS IN NEPAL

We first look into the rationale for establishing two commissions. In fact, Nepal could be the first country where two separate truth-seeking mechanisms are established at the same time to examine violations related to an armed conflict. A first explanation is that the COID is mandated to look exclusively into disappearances while the TRC will look into other serious violations of human rights and IHL. However, the division of tasks is not so clear when, for instance, many people who were forcefully disappeared were systematically tortured. To make things more confusing, the latest TRC bill tabled in the Parliament has the mandate to investigate the truth regarding serious violations of human rights, among them, disappearances.¹⁰⁴ This bill also provides that the TRC will not look into any matters already looked into by the COID, hinting that it could look into disappearances if, for instance, the disappearances commission starts its work at a latter stage.¹⁰⁵

Although it is not the purpose of this paper to look into the potential conflicts arising as a result of establishing two independent truth-seeking mechanisms at the same time, we will briefly look into the reasons behind having two commissions.

As seen, the various agreements and understandings signed between the two sides and which led to the CPA already foresaw the establishment of two commissions, as also did the Interim Constitution. The idea of having two commissions was to respond to different needs.

As seen in chapter II, states have an obligation under customary IHL to make all efforts to clarify the fate of those reported missing. Moreover, Nepal has a history of establishing commissions of inquiry under the 1969 Commission of Inquiry Act (COI Act), to

http://www.satp.org/satporgtp/countries/nepal/document/papers/23-point_Agreement.htm [accessed 30 July 2012].

¹⁰² "Report of the Working Group on the Universal Periodic Review on Nepal", UN Human Rights Council, 8 March 2011, A/HRC/17/5, par. 89, available at

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/116/42/PDF/G1111642.pdf?OpenElement> [accessed 30 July 2012].

¹⁰³ *Ibid.*, par. 106.34.

¹⁰⁴ Article 3, "Establishment of the Commission", provides that the TRC "has been established for investigating the truth of incidents of serious violations of human rights" and article 2(j), defines disappearance as a serious violations of human rights. *A Bill Made for Making Provisions Related to a Truth and Reconciliation Commission*, (unofficial translation), Nepal Secretariat of Legislative Parliament. Working document.

¹⁰⁵ *Ibid.*, article 35.1 provides: "Notwithstanding anything contained elsewhere in this Act, the Commission shall, in accordance with this Act, not look into any matters already looked into by the Commission established pursuant to the existing laws in relation to the Disappearance."

look into matters of public importance.¹⁰⁶ Under this legislation, Nepal established in 1990 the Commission of Inquiry to Find the Disappeared Persons during the Panchayat Period. The commission succeeded in investigating about 100 cases and completed its report in 1991. After national and international pressure, the report was finally released in 1994 though few recommendations were implemented and the commission's report didn't lead to trials for the alleged perpetrators.¹⁰⁷

The original idea to establish a COID was more intended to follow the traditional way Nepal had been dealing in creating such commissions. In fact, on 21 June 2007 the government appointed a three member High Level Commission on Disappeared Persons under the COI Act, although the commission never started its work, due to the SC decision on 1 June 2007. In its judgment, the SC declared that a commission under the COI Act would not comply with international standards and would not have the capacity to conduct an effective investigation. The SC ordered the government to enact a single bill criminalizing enforced disappearances and providing for the establishment of a powerful commission able to conduct an in-depth inquiry.

As for the idea to establish a TRC, it was more of an international suggestion, with little domestic debate and with a view to the South African model of truth in exchange for amnesty.¹⁰⁸

After successive drafts, both bills were registered and tabled in the Parliament in May 2010. Since then, the bills went through the same legislative process until the dissolution of the CA on 27 May 2012.

Having looked into the reasons behind establishing two commissions, we will now examine the evolution of the successive bills, keeping in mind the objective of this study, to find out whether the truth seeking mechanisms are intended to exonerate the State from its duty to prosecute war crimes, crimes against humanity, and other gross violations of human rights. To that end, we will examine those provisions that either reinforce or absolve the State from its duty.

A first clarification concerns the different nature of the disappearances and the TRC bills. While the disappearances bill has two different aims, to enact the crime of enforced disappearance and to provide for the establishment of a COID, the only aim of the TRC bill is to provide for the establishment of a commission.

Therefore, as for the disappearances bill, we will look into the provisions criminalizing enforced disappearances separately from the provisions establishing the commission. Regarding the provisions criminalizing enforced disappearances, we will look at the evolution of the main provisions concerning criminal responsibility and the concerns raised by human rights organizations and victim groups.

¹⁰⁶ For more on the 1969 Commission of Inquiry Act, see Chapter 3.2, "Nepal's duty to prosecute conflict-related cases", and Section 2, "Previous commissions of inquiry into conflict-related incidents: investigations into the deaths during the April 2006 people's movement".

¹⁰⁷ Hayner, Priscilla, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (hereafter *Unspeakable Truths*), New York and London: Routledge, 2011, p. 244-45.

¹⁰⁸ "Nepal: Peace and Justice", International Crisis Group, p. 20, op. cit. 13.

As for the provisions establishing the commission, we will briefly present an overview of the commission and will center the analysis in those provisions, which either reinforce or absolve the State from its duty to prosecute. We will also look into the reactions from human rights organizations and victim groups. The analyses will examine the bills in a chronological order, keeping track of the changes in the successive bills.

With regard to the TRC bill, we will present an overview of the commission and will center the analysis in the successive bills on those provisions, which either reinforce or absolve the State from its duty to prosecute. We will refer to the concerns raised by human rights organizations and victim groups regarding these provisions.

A. THE COMMISSION OF INQUIRY ON DISAPPEARANCES

Committees and taskforces before the bills

On 1 July 2004, during the armed conflict, the Prime Minister established an Investigative Committee on Disappearances, under the Home Ministry, to find out the fate of people disappeared. This committee issued four reports confirming a list of 320 disappearances but failed to establish the fate of the disappeared due to the lack of cooperation from the army and the absence of powers to compel the security forces to cooperate.¹⁰⁹ A second committee, also under the Home Ministry, was established in June 2006 to clarify the status of 776 persons reported as disappeared.¹¹⁰ The committee found out the whereabouts of more than 100 disappeared persons as either released or killed in crossfire but failed to account for more than 600 persons due to lack of capacity to carry out investigations.¹¹¹

On 7 November 2006, the SC constituted a Detainee Investigation Task Force, to determine the whereabouts of four persons mentioned in *habeas corpus* petitions that had been, reportedly, arrested and detained by security forces. This task force presented its report to the SC on 8 April 2007. The report concluded that one of the disappeared had been taken by the army and died in custody due to cruel torture and the other three had been arrested and forcefully disappeared by security forces. In its report, the task force recommended, among other measures, the establishment of an independent and impartial high-level commission to investigate conflict-related disappearances and the enactment of laws allowing the retroactive prosecution of crimes against humanity.¹¹²

¹⁰⁹ *Waiting for Justice*, Human Rights Watch and Advocacy Forum, p. 20, op. cit. 38.

¹¹⁰ The number of disappearances included 570 persons named by the National Human Rights Commission and the rest by other human rights organizations and relatives. In Farasat, Warisha, and Priscilla Hayner. 2009, "Negotiating Peace in Nepal: Implications for Justice", Initiative for Peacebuilding Mediation Cluster, June, p.20, available at: http://www.ictj.org/static/Publications/ICTJ-IFP_NPL_Negotiating-Peace-Nepal_pb2009.pdf [accessed 2 May 2012]

¹¹¹ UN Human Rights Council, *UN Human Rights Council: Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation and the Activities of her Office, Including Technical Cooperation, in Nepal*, 17 January 2007, A/HRC/4/97, par. 48, available at http://nepal.ohchr.org/en/resources/Documents/English/reports/HC/Report_HC_Nepal_07.pdf [accessed 13 July 2012].

¹¹² *Rabindra Prasad Dhakal v. the Government of Nepal and Others*, Supreme Court of Nepal judgment, 18 June 2007, in ICJ and NBA, *Transitional Justice and Right to a Remedy*, p. 225, op. cit. 44.

On 20 April 2007. The Ministry of Law, Justice and Parliamentary Affairs registered, with the Interim Legislature-Parliament, a bill to amend the Civil Code by adding provisions to criminalize disappearances, kidnaping, abduction and hostage taking. This was the first attempt to enact a law criminalizing disappearances.

The 2007 Civil Code amendment

The bill consisted of an amendment to the Civil Code to incorporate two chapters, one on causing disappearances and the other on kidnaping, abduction and hostage taking.¹¹³

With regard to the criminalization of enforced disappearances, the provisions failed to comply with international human rights instruments. The definition deviated from the internationally recognized definition of disappearance, and provisions on who is criminally responsible were not consistent with international standards. The provisions also failed to reflect the seriousness of the crime and did not take into account the continuous nature of the offense.

Reactions to the provisions criminalizing disappearances¹¹⁴

Concerns focused on the absence of provisions recognizing the retroactive application of the bill to acts of enforced disappearance committed during the armed conflict,¹¹⁵ as well as on the lack of a provision recognizing the exclusive jurisdiction of civilian courts over all persons alleged to have committed enforced disappearances. The issue was important, as the Army Act allowed for special court martials with jurisdiction over the NA personnel alleged to have committed enforced disappearances and torture.¹¹⁶

Organizations also criticized the definition of enforced disappearances in the bill. On the one hand, they called to incorporate the elements of the internationally accepted definition of enforced disappearance¹¹⁷ and, on the other, they raised the need to widen

¹¹³ The bill was formally named Country Code (12th Amendment) Act, 2007, working document.

¹¹⁴ See *Letter to Speaker of the Interim Legislature-Parliament*, ICJ, 30 May 2007, available at http://www.icj.org/dwn/database/recommendation_on_Disappearance_draft_bill_final_30.05.2007-english_version.pdf [accessed 25 July 2012].

¹¹⁵ Although international human rights law generally prohibits the retroactive application of criminal laws, article 15 of the ICCPR provides for two exceptions: when the crime constituted a criminal offense under international law at the time when it was committed; and when the act was criminal according to the general principles of law recognized by the community of nations. UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at <http://www2.ohchr.org/english/law/ccpr.htm> [accessed 22 May 2012].

¹¹⁶ Army Act, 2063 (2006), Article 62, available at http://www.ncf.org.np/upload/files/329_en_army-act-2063-2006-e.pdf [accessed 16 July 2012].

¹¹⁷ The four elements of the definition are: the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to disclose the fate or whereabouts of the person concerned or a refusal to acknowledge the deprivation of his/her liberty; this places such a person outside the protection of the law. International Convention for the Protection of All Persons from Enforced Disappearance (hereafter Convention on Enforced Disappearances), UN General Assembly, 20 December 2006, Article 2, available at: <http://www2.ohchr.org/english/law/disappearance-convention.htm> [accessed 25 May 2012].

the definition to include non-state actors, considering the CPN (Maoist) had acknowledge committing enforced disappearances during the conflict time.¹¹⁸

Rights groups also demanded the inclusion of the crime against humanity of enforced disappearance, when carried out as part of a wide or planned attack targeted against civilians, and the need to incorporate the principle of command responsibility.¹¹⁹

Criticism also focused on the failure of the bill to reflect the extreme seriousness of the offense. Human rights organizations demanded to incorporate a minimum penalty, to increase the punishment beyond the five years foreseen in the bill, and to extend the six months statute of limitation for filing a case.¹²⁰ Moreover, they called for the statute of limitation to start once the enforced disappearance ceases, attending to the continuous nature of the offense.¹²¹

Notwithstanding these demands, the strongest setback to the passing of the bill came from the SC judgment on 1 June 2007. As a consequence, on 28 November 2007, the Parliamentary Committee withdrew the widely criticized chapter on the crime on disappearances from the bill and adopted only the chapter on kidnapping, abduction and hostage taking. We will look into the SC judgment as it set out the requirements for the legislation to come.

Supreme Court Judgment

The ruling came in response to a number of petitions submitted by relatives of persons who were disappeared, allegedly by the State security forces, between 18 January 1999 and 18 December 2004.¹²²

In the ruling, the SC ordered the Ministry of Home Affairs, the government and the AG's Office to enact a law criminalizing enforced disappearances in line with international human rights instruments. The Court referred "to the necessity to create legislation defining the act of disappearance as an offense consistent with the definition provided in the International Convention for the Protection of All Persons from Enforced Disappearance, 2006".¹²³

Furthermore, the SC found that a commission established under the 1969 COI Act would not comply with international human rights instruments and would not have the capacity to conduct an effective investigation. Consequently, the court directed the re-

¹¹⁸ Article 7.2.(i) of Rome Statute considers that not only the State but also a political organization can commit an act of enforced disappearance. Rome Statute of the International Criminal Court (last amended January 2002), UN General Assembly, 17 July 1998, A/CONF. 183/9, available at:

[http://untreaty.un.org/cod/jcc/statute/english/rome_statute\(e\).pdf](http://untreaty.un.org/cod/jcc/statute/english/rome_statute(e).pdf) [accessed 22 May 2012].

¹¹⁹ *Ibid.*, article 28. Principle of command responsibility provides, "any person who knew or should have known that a subordinate was committing or about to commit a crime, but failed to take all necessary measures to prevent or punish the crime, must also be held responsible for serious human rights violations".

¹²⁰ In accordance with the Declaration and the Convention for the Protection of all Persons from Enforced Disappearance. Regarding punishment, see article 4 of the Declaration and article 7.1 of the Convention. Regarding statutes of limitation, article 17(3) of the Declaration and article 8(1)(a) of the Convention. Declaration on the Protection of all Persons from Enforced Disappearance, *op. cit.* 66 and *Convention on Enforced Disappearance*, *op. cit.* 117.

¹²¹ *Ibid.*, article 17(1) Declaration and article 8(1)(b) Convention on Enforced Disappearances.

¹²² More than eighty petitions concerning people who had disappeared in circumstances like taken from their homes in the middle of the night; while returning from college; picked up from their shops etc.

spondents to include, in the same legislation criminalising disappearances, provisions to establish a powerful commission able to conduct an in-depth inquiry, produce a report and, based on that report, conduct criminal investigations and prosecute those responsible.¹²⁴

Following the judgment of the SC, on 21 June 2007 the government announced the formation of a commission of inquiry into disappeared persons. However, contrary to the SC judgment, the commission was established under the 1969 COI Act. Human rights organizations questioned the legitimacy of such a commission.¹²⁵ The commission never started its work as the members appointed refused to take their oaths of office, in view of the limited mandate of a commission under this act.¹²⁶

A year later, on 15 November 2008, the government made public a new draft bill on enforced disappearances.

*The 2008 bill on disappearances*¹²⁷

Following the SC judgment, the new draft criminalized enforced disappearance in an independent bill and provided for the formation of a COI in the same text.

With regard to criminalizing enforced disappearances, the bill addressed few of the concerns previously raised by human rights organizations. It established the retroactive application to acts during the armed conflict and incorporated non-state actors in the definition. The other demands remained unattended and rights groups continued demanding compliance with international law and with the SC ruling.¹²⁸

The new bill also provided for the formation of a commission to investigate conflict-related disappearances. The change entailed an acknowledgement that a commission created under the 1969 COI Act would not comply with international human rights standards and that new legislation was needed in order to establish a commission able to conduct an effective and independent investigation

Overview of the commission

The bill included a five-member commission appointed by a recommendation committee formed by the CA Chairperson, a Minister and a representative from the civil society

¹²³ *Rabindra Prasad Dhakal v. the Government of Nepal and Others*, Supreme Court of Nepal, in ICJ and NBA, *Transitional Justice and Right to a Remedy*, p. 225, op. cit. 44.

¹²⁴ *Ibid.*, 264..

¹²⁵ For instance, see “OHCHR-Nepal Calls for Disappearance Commission of Inquiry Which Meets International Human Rights Standards”, OHCHR-Nepal press release, 5 July 2007, available at http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202007/JUL2007/2007_07_05_Disappearances_E.pdf [accessed 17 July 2012].

¹²⁶ *Commissions of Inquiry in Nepal*, ICJ, p. 13, op. cit. 57.

¹²⁷ The bill was formally named Disappearances (Crime and Punishment) Act, 2065.

¹²⁸ See for instance *Letter to the Honorable Chairperson of the Constituent Assembly of Nepal*, ICJ, 24 November 2008, available at <http://www.icj.org/dwn/database/Disappearances - ICJ Letter to Speaker 21st Nov 2008 GB.pdf> [accessed 18 July 2012].

Letter to the Speaker of Nepal's Constituent Assembly, Human Rights Watch, 25 November 2008, available at <http://www.hrw.org/news/2008/11/25/human-rights-watch-letter-speaker-nepals-constituent-assembly> [accessed 18 July 2012]. OHCHR, *Comments and Recommendations on Draft Disappearances (Crime and Punishment) Act 2065*, 18 December 2008. Working document.

chosen by the Prime Minister. The bill mandated the commission to establish the truth by conducting investigations, to identify the suspects of having committed the crime and to make recommendations for reparations.¹²⁹ The commission had the authority to initiate investigations on its own and also on the basis of complaints filed by victims, or anyone on their behalf.¹³⁰ It had the power to summon any person, collect information, obtain any document from any government or public office or court, call for evidences, enter properties and engage in search and seizure, conduct onsite inspections, and carry out exhumations.¹³¹ The bill also provided for the protection and security of victims and witnesses.¹³²

As for prosecutions, the bill empowered the commission to write for actions against those found guilty through the AG's Office. This could be done in case the commission found, while carrying out investigations and before submitting its report, anyone guilty of committing disappearances or any other crime.¹³³ The government was also authorised to write to the Office of the AG to initiate legal actions, on the basis of the report submitted by the commission. In both cases, it was left to the Office of the AG to decide whether or not to file a case.¹³⁴

The bill provided for the commission to submit a report to the government for later submission to the CA. Finally, the bill did not specify the term of office of the commission but rather empowered the government to decide once the commission had been formed.

Reactions to the provisions concerning the commission

Human rights organizations demanded changes on the provisions to comply with international law.¹³⁵ They raised concerns regarding the lack of independence and impartiality of the recommendation committee in charge of appointing the commissioners and demanded a transparent and participatory selection process. Other issues related to the need to broaden the mandate to determine institutional responsibility and to recommend necessary changes to avoid repetition. They also demanded to foresee the length of operations of the commission in the bill itself.

As for provisions related to prosecutions, concerns pointed at the need to define clearly the relationship between the commission, the prosecutorial agencies and the courts to avoid different standards of proof. In this regard, consensual guidelines from the start would later avoid allegations by government prosecutors that collected evidence was inadequate to file cases, as had happened in previous investigations by commissions of inquiry.

Other reports called for an independent mechanism, under the Office of the AG, to carry out further investigations and filing cases against those persons on whom credible

¹²⁹ Article 15, "Functions, Duties and Powers of the Commission", Disappearances (Crime and Punishment) Act, 2065. Working document.

¹³⁰ Ibid., article 16, "Power to probe complaints".

¹³¹ Ibid., article 17, "Powers of the Commission relating to inquiry".

¹³² Ibid., article 19, "Protection of witnesses and other persons".

¹³³ Ibid., article 23, "To forward in writing for actions".

¹³⁴ Ibid., article 25, "Provisions relating to filing cases".

¹³⁵ See footnote 128 in this chapter for a full overview of amendments suggested by human rights organizations.

evidence had been found, given the political context in which disappearances took place and the need to establish special courts.¹³⁶

The Cabinet approved the draft bill on 19 November 2008 but did not table it in Parliament. On 5 February 2009, while the Parliament was in recess, the UCPN (Maoist) led government decided to introduce the bill by executive ordinance, in order to avoid the legislative discussion and scrutiny at the Parliament. Despite opposition from political parties and national and international human rights organizations, the government sent the ordinance to the President who promulgated it on 12 February 2009.

*The 2009 ordinance on disappearances*¹³⁷

Although very similar to the 2008 bill, there were few changes. Concerning criminalizing enforced disappearances, this ordinance incorporated a provision to address command responsibility.¹³⁸ As for the establishment of the commission, the ordinance made changes intended to improve the independence of the three-member committee in charge of appointing the commissioners. Instead of a government Minister, the ordinance appointed a human rights activist and expert nominated by the government.

However, the ordinance lapsed at the end of May, as it was not adopted within sixty days from the commencement of the session of the Legislature-Parliament.¹³⁹ Also at this time, the UCPN (Maoist) government resigned and, on 25 May 2009, a new Prime Minister, from the CPN-UML, was elected. Under this new government, the MOPR made public a new draft bill on disappearances, in June 2009.

*The 2009 draft bill on disappearances*¹⁴⁰

Although similar to the 2009 ordinance, the 2009 draft bill contained some improvements regarding criminalization of enforced disappearances. It provided a punishment of up to ten years and increased the statute of limitation from six months to one year. The provisions concerning formulation of the commission remained unchanged.¹⁴¹

¹³⁶ In *Comments and Recommendations on Draft Disappearances (Crime and Punishment) Act 2065*, OHCHR, working document.

¹³⁷ The ordinance was formally named Disappearance of Persons (Crime and Punishment) Ordinance, 2065.

¹³⁸ Section 5.2 of the ordinance states: "Any person ignoring or failing to take up necessary measures to prevent an act of disappearance of person knowing well that his or her subordinate official, agency or group is committing or causing to commit such act, he or she shall also be deemed to have committed an offence pursuant to this Ordinance", Disappearance of Persons (Crime and Punishment) Ordinance, 2009 (2065 B.S.), available at <http://www.peace.gov.np/admin/doc/Dis-Ord-Eng.pdf> [accessed 19 July 2012].

¹³⁹ Article 88.2.c establishes: "(2) An Ordinance promulgated under Clause (1) shall have the same force and effect as an Act, provided that every such Ordinance: c) shall, unless rendered ineffective or repealed under sub-clause (a) or (b), cease to have effect at the expiration of sixty days from the commencement of the session of the Legislature-Parliament." Interim Constitution of Nepal, op. cit. 31.

¹⁴⁰ The bill was formally named Bill on Disappearances (Crime and Punishment) Act, 2066.

¹⁴¹ See "Nepal: Joint Memorandum on the Disappearances of Persons (Crime and Punishment) Bill", submitted by Accountability Watch Committee, Advocacy Forum, Amnesty International, Asian Federation Against Involuntary Disappearances, Human Rights Watch, International Center for Transitional Justice, International Commission of Jurists, and INSEC, 30 August 2009, available at http://www.icj.org/dwn/database/Disappearance_Memo_English_Final.pdf

The bill was approved by the Council of Ministers in October 2009. In May 2010, it was registered and tabled in the Parliament with some changes from the June 2009 draft.

*The 2009 bill on disappearances*¹⁴²

Concerning the criminalization of enforced disappearances, the punishment was reduced to seven years, from ten years in the previous bill, and it was left to the commission to decide on the statute of limitation for filing complaints regarding conflict-related disappearances.¹⁴³

In relation to the formation of the commission, the three-member committee in charge of appointing the commissioners included the CA Chairperson, one member of the National Human Rights Commission and one person nominated by the government from among human rights activists and experts.¹⁴⁴ The new bill established two years tenure from the date the commission commenced its work with a possibility of an extension for up to six months.¹⁴⁵

Up to this point, consultations with families of those who disappeared during the armed conflict had been scarce. They had not been given the chance to put forward their views on the latest legislation tabled at the Legislature-Parliament. To address this gap, OHCHR-Nepal organized a round of regional consultations on the 2009 bill, culminating in a high-level interaction program, where victims submitted their suggestion in the form of amendments.¹⁴⁶

Victim's consultations

In relation to the crime of enforced disappearance, victim groups emphasized the need of a definition in line with international standards and the inclusion of the crime against humanity of enforced disappearance. With regard to the penalty, victims demanded 20 years punishment for perpetrators and life imprisonment for those responsible of crime against humanity of enforced disappearance. They also urged the removal of any time limit to file a case of enforced disappearance.

Concerning the formation of the commission, victims demanded guarantees for an impartial, transparent and consultative process to appoint commissioners making sure that those appointed have no affiliation with political parties or any of the institutions or groups accused of committing violations during the conflict. They also called for the

[accessed 18 July 2012]. See also *Recommendation letter to the Peace Minister*, International Commission of Jurists, 16 July 2009, available at: http://www.icj.org/IMG/Recommendation_Letter_to_Peace_Minister_16July_2009.pdf [accessed 18 July 2012].

¹⁴² Disappearance (Crime and Punishment) Act, 2066, available at <http://nefad.files.wordpress.com/2012/01/disappearance-bill.pdf> [accessed 18 July 2012].

¹⁴³ Ibid., article 6, "Punishment", and article 26 (3), "Limitations".

¹⁴⁴ Ibid., article 10 (3). Experts could be psychologists, legal experts, forensic experts, conflict experts, sociologists or those involved in peace process.

¹⁴⁵ Ibid., article 37.

¹⁴⁶ "Victims' voices for truth and justice merit a response: UN Human Rights Office", OHCHR-Nepal, Media Advisory, 14 June 2011, available at http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202011/June/2011_06_14_Media_Advisory_Victims_voices_for_truth_n_justice_E.pdf [accessed 27 July 2012].

protection of burial sites and to have the chance to be present during the exhumation process.

Victims emphasized the important role of the commission in recommending for actions against those found guilty and urged the government to actively support further prosecutions.

Observations on the process leading to the tabling of the disappearances bill

Between the first draft and the latest bill tabled in Parliament, the legislation criminalizing disappearances and establishing a commission improved.

However, with regard to criminalizing enforced disappearances the latest bill was clearly not in line with international human rights instruments and standards. The maximum penalty of seven years did not reflect the seriousness of the offense and the fact that there was no minimum could entail, in practice, a lack of punishment. Also, the bill did not incorporate the crime against humanity of enforced disappearances when committed as part of a planned attack against civilian populations. The fact that the bill was discussed in the aftermath of the armed conflict hindered from having a stronger bill able to prevent the commission of this crime in the future.

As for the formation of the commission, the SC decision in June 2007 was crucial in avoiding a commission under the COI Act and in prompting a new legislative framework for the commission. The bill established a clear process for the commission and for the government to write for actions against those found guilty through the AG's Office. The bill left the final decision of whether or not to prosecute to the prosecuting agency. In practice this would mean leaving the decision to the AG, who is appointed and could be removed by the Prime Minister. In past experiences of commissions of inquiry, the AG has not initiated prosecutions alleging the evidence gathered was not enough to file cases. However, the process established did not exonerate the State of its obligations to prosecute conflict-related disappearances under international law.

B. THE TRUTH AND RECONCILIATION COMMISSION

The MOPR made public a first draft of the TRC bill on 2007 and invited interested parties to provide comments to the legislation.

The 2007 TRC bill¹⁴⁷

Overview of the Commission

Under this draft, the mandate of the Commission included to investigate the facts about persons involved in gross violations of human rights and crimes against humanity committed during the course of the armed conflict, and to establish an environment of

¹⁴⁷ The bill was formally named Truth and Reconciliation Act, 2064 (2007), available at: www.peace.gov.np/uploads/Publication/TRC-English.doc [accessed 19 July 2012].

reconciliation in the society.¹⁴⁸ According to the draft, the Commission was to consist of a maximum of seven members and to have a period of two years to finish the work, with the possibility of extending one more year.¹⁴⁹

The Commission had the power to carry out inquiries and investigations if the victim, or someone else on his or her behalf, filed a complaint and also if the commission received the information through any source or if it deemed appropriate to do so.¹⁵⁰ However, the commission did not have power to investigate on matters already decided by existing laws or on matters that were being dealt by a court in accordance to existing laws.¹⁵¹ Under the bill, in the course of carrying out investigations, the commission had the same powers as those conferred to a court of law. This included requiring any person to appear before the commission; summoning witnesses and examining them; ordering the production of any document, from any government or public office or the court; carrying out on-site inspection and ordering the production of any physical evidence.¹⁵² The bill also provided for the possibility of the commission to carry out public hearings.¹⁵³ And it foresaw, upon completion of its work, the submission of a report to the government to be later handed over to the Legislature-Parliament or the CA. The report would include the findings of the commission, the details relating to the reconciliation made between victim and perpetrator, and recommendations for prosecutions, amnesty and reparations, as well as measures to be adopted by the State for non-repetition of incidents.¹⁵⁴

Under this draft, the MOPR was mandated to implement the commission's recommendations and the National Human Rights Commission to monitor this implementation.¹⁵⁵

Analysis of the provisions exonerating the State of its duty to prosecute

The bill contained three layers under which perpetrators could avoid prosecution: an amnesty clause, a reconciliation process, and the power of the Council of Ministers to veto any recommendation for prosecution.

The draft contained a provision explicitly empowering the commission to recommend amnesty for gross violations of human rights or crimes against humanity, if these crimes were committed "in the course of abiding by his/her duties or with the objective of fulfilling political motives".¹⁵⁶ However, there was no further explanation as to when these situations may apply or a definition of what *political motives* meant. And article 25.2 established that amnesty would not be applicable to "any kind of murder committed after taking under control or carried out in an inhumane manner, inhumane and cruel torture and rape". But again, the bill failed to define the meaning of "taking under

¹⁴⁸ Ibid., article 3, "Establishment of the Commission".

¹⁴⁹ Ibid., article 4, "Formation of the Commission", and 36, "Term of Office".

¹⁵⁰ Ibid., article 14, "Power to inquire and investigate in complaints".

¹⁵¹ Ibid., article 15, "Commission not to have Powers".

¹⁵² Ibid., article 16, "Powers of the Commission relating to Examination".

¹⁵³ Ibid., article 19, "Public hearing may be made".

¹⁵⁴ Ibid., article 27, "Report to be submitted".

¹⁵⁵ Ibid., articles 28, "Responsibility to implement the report", and 31, "Monitoring of the report submitted by the Commission".

¹⁵⁶ Ibid., article 25, "Recommendation may be made for amnesty".

control” or “inhuman manner”, and left it to the criteria of the commission to assess whether the murder was committed under those circumstances. As for torture, the bill also left it to the commission to decide, on a case-by-case basis, whether it reached the threshold of being inhumane or cruel.¹⁵⁷

The bill further established the process for the perpetrator to seek amnesty, through an application in writing regretting the misdeeds carried out during the armed conflict.¹⁵⁸ However, the bill did not foresee any obligation on the side of the perpetrator to explain the truth about the facts surrounding the crimes committed.

The bill incorporated a reconciliation process through which perpetrators could also be pardoned. Article 23 provided, “the Commission may, by making the victim and the perpetrator present, cause to be made reconciliation mutually, if any individual is found guilty while carrying out inquiry and investigation in accordance with this Act.”¹⁵⁹ For the reconciliation to be made, the perpetrator had to apologize and to provide reparations to the victim, to be decided by the commission after consultation with the victim. The bill did not foresee crimes for which reconciliation would not be applicable. On the contrary, article 24 allowed the commission to recommend for action, except “on such matters upon which reconciliation between the victim or his/her family members and the perpetrator has been made”.¹⁶⁰ Consequently, if a perpetrator was denied amnesty, s/he could still go through the reconciliation process to avoid prosecution. Moreover, the process could lead to a perpetrator pressurizing the victim to accept reconciliation.

Finally, article 24 provided for the commission to make recommendations for prosecution to the government against those found guilty. Under article 28, the MOPR had the responsibility to implement the report and, therefore, to forward recommendation for prosecutions to the AG’s Office. However, according to the bill, the MOPR would need beforehand the approval of the Council of Ministers. Consequently, the Council of Ministers could veto any recommendation for prosecution.

National and international human rights organizations demanded amendments to the bill in order to comply with international law and standards.¹⁶¹ They also raised concerns regarding the lack of consultations with victims and civil society. As a response to these demands, the MOPR started a round of regional consultations.

¹⁵⁷ Ibid., article 25.3 states “The Commission shall decide whether any act as referred to in Clause (b) of Sub-section (2) is an inhumane or cruel torture”.

¹⁵⁸ Ibid., article 25.4

¹⁵⁹ Ibid., article 23.1.

¹⁶⁰ Ibid., article 24.2.

¹⁶¹ *Comments and Recommendations on Truth and Reconciliation Commission Bill*, OHCHR, 6 August 2007, available at http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202007/AUG2007/Comments%20on%20draft%20Truth%20and%20Reconciliation%20Bill_03_09_07.doc.pdf [accessed 19 July 2012]. See also *Nepal: Truth Commission Bill Disregards Victims’ Rights*, Human Rights Watch press release, 23 August 2007, available at <http://www.hrw.org/news/2007/08/21/nepal-truth-commission-bill-disregards-victims-rights> [accessed 19 July 2012]. See also *Nepal- Reconciliation does not mean impunity. A Memorandum on the Truth and Reconciliation Commission Bill*, August 2007, AI Index: ASA 31/006/2007, Amnesty International, available at <http://www.amnesty.org/ar/library/asset/ASA31/006/2007/en/e045e741-d373-11dd-a329-2f46302a8cc6/asa310062007en.pdf> [accessed 19 July 2012].

Victim's consultations

The first round of regional consultation took place between December 2007 and January 2008 in three different regions. The participants included victims, NGO representatives, media and political parties.

Victims demanded to incorporate a clear definition in the bill of what constitutes gross violations of human rights and crimes against humanity. As for provisions exonerating the State of its duty to prosecute, victims demanded to remove provisions granting amnesty and to incorporate that those proved guilty of violations of human rights and IHL should be recommended for prosecution.¹⁶² To that end, they urged to expand the list of non-amnestiable crimes to extrajudicial murder, torture, rape, sexual abuses and enforced disappearances.

However, the consultations were strongly criticized for being done rashly and without a predesigned strategy as well as for being carried out in main towns, faraway from the communities most affected by the armed conflict.¹⁶³

Although being strongly criticized, or precisely because of that, the MOPR made some amendments in line with the concerns raised and made public the modified version of the bill.¹⁶⁴

The amended 2007 TRC bill

Analysis of the provisions exonerating the State of its duty to prosecute

As demanded by victims, the new draft bill incorporated a list of gross violations of human rights.¹⁶⁵ As for amnesty provisions, the draft broadened the scope by removing the circumstances “in the course of one’s duty or with the objective of fulfilling political motives” in which the commission could recommend for amnesty.¹⁶⁶ Concerning the list of non-amnestiable crimes, the new bill incorporated “murder of an unarmed person” but failed to include others, like enforced disappearances or crimes against humanity to the previous list.¹⁶⁷ The bill still referred to “inhumane and cruel torture”,

¹⁶² Regional Consultation on draft bill of Truth and Reconciliation Commission, *Report of the Consultation organized by the Ministry of Peace and Reconstruction*, 21 December 2007. Working document.

¹⁶³ See “Public consultations on TRC Bill must not be cut short”, OHCHR Nepal press release, 4 January 2008, available at http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202008/JAN2008/2007_01_04_TRC_E.pdf [accessed 28 July 2012]. See also, “Disappearances in Nepal”, *Occasional paper series*, ICTJ, June 2008, p. 8, available at <http://ictj.org/sites/default/files/ICTJ-Nepal-Disappearances-2008-English.pdf> [accessed 28 July 2012].

¹⁶⁴ The Amended Truth and Reconciliation Act, 2007 was first distributed at a regional consultation in January 2008. Working document.

¹⁶⁵ Article 2 (f), “Gross violations of human rights means the following act conducted systematically or targeting against unarmed person or community: (1) Murder; (2) Abduction; (3) Causing disappearance; (4) Causing deformities; (5) Physical or mental torture; (6) Rape; (7) Looting, breaking and arson of private and public property; (8) Forceful eviction from house and land or displacement by any other means, or (9) Any types of inhuman act committed against international human rights or humanitarian law or other crime against humanity.” Working document.

¹⁶⁶ *Ibid.*, article 26, “Recommendation may be made for Amnesty”, states: “(1) Notwithstanding anything contained in Section 25, the Commission may, if deemed reasonable for amnesty to any person found guilty pursuant to this Act, make recommendation to the Government of Nepal explaining sufficient grounds and reasons thereof.” Working document.

¹⁶⁷ The list in the previous bill included “any kind of murder committed after taking under control or carried out in an inhumane manner, inhumane and cruel torture and rape”, Truth and Reconciliation Act, 2007, article 25.2, op. cit. 147.

thus allowing the commission to recommend for amnesty in case torture did not reach the threshold of being inhumane or cruel.¹⁶⁸

In relation to the amnesty process, the commission still retained the power to decide whether or not to recommend for amnesty, although the new draft foresaw the possibility of consulting with the victim. A new provision incorporated the obligation of the amnesty seeker “to express the details of the truth and facts to the extent of his/her knowledge in relation to activities conducted by him/her during the course of armed conflict and also the Commission shall have to document such details”.¹⁶⁹ However, the bill did not incorporate a formal process through which the commission could cross-examine the information provided by the amnesty seeker. Hence, although the amnesty appeared to be conditional, in line with the South African model, the bill did not foresee any mechanism to confront the perpetrators recount of the facts.

The new draft bill maintained the reconciliation process through which perpetrators could also be pardoned.¹⁷⁰ However, it clarified that the commission would recommend for action against those perpetrators of crimes for which no amnesty was available, regardless if reconciliation had been made between victim and perpetrator. As enforced disappearances, crimes against humanity and torture were not included as non-amnestiable, reconciliation for these crimes could still be possible.

The new text maintained the third layer to prevent from prosecution. The Council of Ministers retained its power to veto any recommendation to prosecute perpetrators.

Victims Consultations

After the amended TRC bill was made public, seven consultations with victims were carried out between December 2008 and September 2009.¹⁷¹

Amnesty and reconciliation provisions attracted great attention from victims. Participants asked for deletion of provisions allowing for amnesty for serious crimes. Victims raised concerns that they would be compelled to accept the application for amnesty or reconciliation from powerful perpetrators. While some victims demanded the complete suppression of any reference to amnesty, others accepted amnesty could be recommended for minor cases, although with their consent. In any case victims emphasized it should be for them, and not for the commission, to recommend amnesties and to consent to a reconciliation process.¹⁷²

The draft bill was revised and approved by the Council of Ministers on 1st February and sent to the Legislature-Parliament on 17 February 2010. In May 2010, the draft bill was sent to the Legislative Committee of the parliament for discussions.

¹⁶⁸ Article 26.3 states: “The Commission shall decide whether any act as referred to in Clause (b) of Sub-section (2) is an inhumane or cruel torture”. Amended Truth and Reconciliation Act, 2007, op. cit. 164.

¹⁶⁹ Ibid., article 26.6.

¹⁷⁰ Ibid., article 24.

¹⁷¹ Consultations were carried out in the Far Western Region, Dhangadi (Dec 2008), in Central Region Hetauda (Feb 2009) and in Godavari/Kathmandu (March 2009); and four cluster consultations in Eastern Region, Udayapur (July 2009), Central Region, Ramechhap (Aug 2009, and Midwestern Region, Jumla (Aug 2009) and Dang (Sep 2009).

¹⁷² Working document, September 2009.

*The 2009 TRC bill*¹⁷³

Analysis of the provisions exonerating the State of its duty to prosecute

The bill incorporated hostage taking, disability causing, sexual violence and seizure of private and public property as serious violations of human rights.

It also included disappearance, abduction and hostage taking as non-amnestiable crimes, and it removed the reference to “inhumane and cruel” torture, referring only to torture.¹⁷⁴ The bill, however, failed to provide for a formal process through which the commission could cross-examine the facts disclosed by the amnesty seeker.

Concerning the reconciliation process, the bill explicitly provided for the victim’s consent to reconcile.¹⁷⁵ As in the previous bill, if victim and perpetrator had reconciled the commission would not recommend for action, unless the perpetrator had committed one of the non-amnestiable crimes.

The new bill also eliminated the power of the Council of Ministers to veto any recommendation for action sent by the commission to the AG’s Office.¹⁷⁶

Victim’s consultations

OHCHR organized a round of regional consultations on the 2009 bill tabled in the Legislature-Parliament, which culminated in a high-level interaction program. In the interaction program with political leaders, victims submitted their amendments to the bill.¹⁷⁷ In their demands, victims emphasized the need to include child recruitment and forceful recruitment as serious violations of human rights. Victims demanded the bill should explicitly exclude any amnesty for serious violations and abuses of international human rights and humanitarian law. Moreover, with regard to other crimes for which amnesty was allowed, they stressed on the need to have their free consent.

As for reconciliation, victims pointed out the role of the commission as a facilitator leaving the final decision to their full and free consent. Moreover, in order to reach reconciliation, perpetrators should disclose all details requested by the victim and acknowledge fully their part in the crime. In any case, reconciliation should not lead to compromising accountability or any diminution of the victim’s rights to legal redress.

Finally, with respect to provisions encompassing the power of the commission to recommend for action, the commission should be empowered to write directly to the AG’s Office to initiate a case against anyone found guilty without the need to go through the government.

¹⁷³ The bill was formally named Truth and Reconciliation Act, 2066. *A Bill Made for Making Provisions Related to a Truth and Reconciliation Commission*, (unofficial translation), Nepal Secretariat of Legislative Parliament, working document.

¹⁷⁴ Ibid., article 25.2, which also maintained the crimes recognized in the previous bill as non-amnestiable, including “any kind of murder committed after taking under control; murder of an unarmed person; and rape”.

¹⁷⁵ Ibid., article 23.6 establishes: “Notwithstanding anything contained in this section, reconciliation cannot be made without the consent of the victims”.

¹⁷⁶ Ibid., article 28.2.a) provides that the MOPR, as the responsible agency to implement the recommendations made in the report by the Commission, will forward in writing to the Office of the Attorney General for implementation of the recommendations for action, as mentioned in article 24, thus eliminating the previous reference to the approval of the Council of Ministers.

¹⁷⁷ UN Human Rights Council, *Report of the United Nations High Commissioner for Human Rights: Addendum, Report on the human rights situation and the activities of the Office of the High Commissioner, including technical cooperation, in Nepal*, 16 December 2011, A/HRC/19/21/Add.4, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-21-Add4_en.pdf [accessed 28 July 2012].

Observations on the process leading to the tabling of the TRC bill

The various draft bills evolved from exonerating to reinforcing the duty of the State to prosecute.

While under the first draft, almost every crime could have been subject to amnesty, the TRC evolved to exclude war crimes and other serious violations of IHL, crimes against humanity, and gross violations of human rights from being subject to amnesty.

The provisions on reconciliation process also evolved satisfactorily. While in the previous drafts perpetrators of any crime could have been pardoned, the last bill excluded from the reconciliation process all the non-amnestiable crimes. Moreover, under the last bill, reconciliation also required the consent from the victim.

Further, the last bill did not include the power of the Council of Ministers to veto any recommendation for prosecution.

As a result the bill tabled in the parliament did not exonerate the State from its duty to prosecute under international law.

However, the events that unfolded would go completely in an opposite direction.

3.3.3. DEVELOPMENTS AFTER THE LAST BILLS WERE TABLED AT THE PARLIAMENT

While in the Legislative Committee of the parliament, members proposed a total of 77 and 90 amendments to the COID and TRC bill respectively. While they reached agreement on some of the issues, others remained unresolved.

In April 2011, the CA's Legislative Committee formed a five-member sub-committee mandated to finalize the disappearances bill. At the same time, the TRC bill was being discussed in the Legislative-Parliament. On 13 May 2011, the Legislative Committee completed clause-wise discussion on the TRC bill. As the Committee itself could not finalize all the issues in dispute, it decided to mandate the sub-committee formed earlier for the disappearances bill to finalize the TRC bill as well. To that end, the five-member sub-committee was expanded with two new members. The seven-member subcommittee was tasked with reviewing the contentious pending issues in both the bills and to submit a report to the Legislative Committee.

Despite being given a ten-day period, the work of the sub-committee was delayed due to differences among political parties. Although the sub-committee resolved some of the contentious issues, it failed in others.

On 1 November 2011, Nepal's major political parties agreed that the parliament would endorse the TRC and COID bill, after building consensus in the spirit of reconciliation and to form the commission within a month.¹⁷⁸ To that end, the government estab-

¹⁷⁸ "Breakthrough in peace process, finally", *The Himalayan Times*, 2 November 2011, available at: <http://www.thehimalayantimes.com/fullNews.php?headline=Breakthrough+in+peace+process,+finally&NewsID=307683&a=3> [accessed 20 July 2012].

lished a task force to propose necessary suggestions. Declarations from the Primer Minister that the commissions were going to be formed to create an enabling environment for reconciliation started raising concerns among victims, the human rights community and international donors that the bills were going to include a broad amnesty for perpetrators.¹⁷⁹

On 15 December 2011, Nepali media reported an agreement had been reached between the two biggest political parties, the UCPN (Maoist) and the NC, on the granting of blanket amnesty for crimes perpetrated by both the State and the Maoists.¹⁸⁰

On 19 December 2011, media published the news of a letter sent by the UN High Commissioner for Human Rights “cautioning the Maoist led government and the major political parties that any breach of the UN conventions in course of handling serious human rights abuses may affect UN support to Nepal in the future”.¹⁸¹

Human rights activists started protesting against the political agreement to grant amnesty through the disappearances and TRC bills and, on 1 January 2012, some of them were detained.¹⁸² A few days later, media made public the report by the task force appointed by the government with the mandate to finalize the bills in the spirit of reconciliation.¹⁸³ The following section deals with the main outcome of this report.¹⁸⁴

Suggestions by the Task Force regarding the bills on Disappearances and TRC

The report did not give a final solution, but rather provided different options to be considered. However, it provided the grounds for bringing the debate back to the initial stage of discussion on the bills: to use the commissions as mechanisms to exonerate the State of its duty to prosecute.

The report acknowledged that Nepal is a party to different international human rights instruments and that, in order to finalize the bills, it was necessary to make it clear that commitments to human rights, peace and constitution should be kept at the center. At the same time, the report stressed that the main objective of the transitional justice mechanisms was to establish the truth surrounding the incidents that took place during the conflict in order to avoid repetition. Stating that the prime responsibility was to build an atmosphere of reconciliation, it recognized the importance of perpetrators repenting and apologizing to victims, as an important aspect of justice.

¹⁷⁹ See for instance, the press release by the Transitional Justice Advocacy Group, a loose network of national and international human rights organizations and representatives from victim groups, demanding the passage of the TRC and COID bills in line with international human rights standards. “Truth without justice will not be acceptable”, NEFAD, available at: <http://nefad.wordpress.com/2011/12/> [accessed 20 July 2012].

¹⁸⁰ “Parties go for blanket amnesty”, *The Kathmandu Post*, 16 December 2011, available at <http://www.ekantipur.com/the-kathmandu-post/2011/12/16/top-story/transitional-justice-parties-go-for-blanket-amnesty/229380.html> [accessed 20 July 2012].

¹⁸¹ “Top UN official warns political parties against blanket amnesty”, *The Kathmandu Post*, 19 December 2011, available at <http://www.ekantipur.com/2011/12/20/top-story/transitional--justice-top-un-official-warns-political-parties-against-blanket-amnesty/345824.html> [accessed 20 July 2012].

¹⁸² “Rights activists detained, released”, *The Kathmandu Post*, 2 January 2012, available at <http://m.ekantipur.com/the-kathmandu-post/2012/01/02/nation/rights-activists-detained-freed/229956.html> [accessed 20 July 2012].

¹⁸³ “Prez, PM's 'emotional appeal' to replace TRC?”, *The Himalayan Times*, 5 January 2012, available at <http://www.thehimalayantimes.com/rssReference.php?headline=Prez%26sbquo%3B+PM's+'emotional+appeal'+to+replace+TRC%3F+&NewsID=315428> [accessed 20 July 2012].

¹⁸⁴ Working document, January 2012.

To that end, the report came up with four possible alternatives to move forward. First, seeking truth through both the commissions and granting amnesty. However, it acknowledged that a general amnesty could not meet expectations from victims, would not be in compliance with Nepal's international commitments and it would be difficult to pass a general amnesty through the Legislative-Parliament. The second alternative suggested establishing the truth through the commission's report and allowing the government to take the necessary decisions to implement the report recommendations. Third, once the truth was established, decide what to do with incidents of human rights violations seeking the opinion of victims. Finally, to reduce the list of non-amnestiable crimes to the most heinous violations.

The report further proposed, if reconciliation was to be at the center of the process, to merge both bills, providing for the TRC to look also into cases of disappearances. One of the reasons behind the "reconciliation" argument to merge the bills was possibly that the disappearances commission was perceived as pro-Maoist, as the State security forces were responsible for most of the enforced disappearances against alleged Maoists. The report provided other arguments supporting one single commission, like preventing repetition of the work, in terms of investigations, methodology, and process of reporting and legal proceedings.

The report recognized some consequences if the bills were to be merged. First, the bill on disappearances not only provided for the establishment of the commission, but it also enacted the crime of enforced disappearances. The report suggested including in the pending Criminal Code the part of the bill enacting the crime of disappearance. Interestingly, the first bill on disappearances, back in April 2007, was in the form of an amendment to the Civil Code. The report, however, acknowledged certain complications in the process as the bills had already been discussed in the Legislative Committee.

What the report did not recognize as a consequence of merging both the bills was that it would allow providing amnesty for the crime of enforced disappearance, which would not have been possible under the disappearances bill.

Furthermore, the task force report suggested amendments to the bills. Concerning the disappearances bill, to remove the power of the commission to write to the AG's Office, through the government, to file a case against those found guilty. As for the TRC bill, the task force proposed to revise the Preamble to the TRC substituting the expression "punishment to the perpetrator" for "to make the perpetrator repent for what he/she had done and [to take] necessary action". The task force further suggested removing the list of the non-amnestiable crimes, leaving a general amnesty under article 25.1.¹⁸⁵

¹⁸⁵ By removing article 25.2 TRC, which establishes for which crimes the commission can not recommend for amnesty, article 25.1 would provide for a de facto general amnesty: Article 25. "Recommendation may be made for Amnesty: (1) Notwithstanding anything contained in section 24, the Commission may, if deemed reasonable to grant amnesty to any person found involved in any accusations of serious violations of human rights, make recommendation to the Government of Nepal explaining sufficient grounds and reasons thereof. (2) Notwithstanding anything contained in sub-section (1), no recommendation for amnesty shall be made to a person involved in the following crimes: a) Any kind of murder committed after taking under control; (b) Murder of an unarmed person; (c) Torture; (d) Rape; (e) Disappearance; (f) Abduction and hostage taking", Truth and Reconciliation Act, 2066, Op. Cit. 350.

The report further suggested that, once the bills were passed and the commissions formed, either the head of the State, or the head of the government or the political parties, on behalf of the nation, should “issue an emotional appeal to motivate victims to help exploring the truth, perpetrators to repent by openly accepting their wrongdoings and to promote reconciliation and goodwill in the society by healing old wounds.”

Finally, the report provided a list of issues yet to be agreed upon. The list included, among others, whether to have one single commission and whether rape, disappearances and the heinous murder of an unarmed person, or any person under control, should not be subject to amnesty.

The follow-up to the report by the Task Force

Once made public, human rights organizations and victim groups raised objections to the report, as they saw it as an attempt to use the commissions as mechanisms to exonerate the State of its duty to prosecute. Their actions to mobilize the public opinion included meeting lawmakers with human rights background to compel them to exert pressure against the government bid to grant amnesty,¹⁸⁶ seeking the help of diplomats and international rights organizations to put pressure on political parties,¹⁸⁷ and the submission of letters, urging the CA members not to reach any agreement granting amnesty to perpetrators of serious crimes and create the commissions immediately in line with international law.¹⁸⁸

On 11 March 2012, media reported that political parties had agreed to follow international norms and practice while drafting the disappearances and TRC bills. However, the main three parties were at loggerheads over what crimes should not be subject to amnesty. While the UML and NC were for categorizing instances of rape, murder of civilians and enforced disappearances under the category of serious crimes and, therefore, non-amnestiable, the UCPN (Maoist) only wanted rape to be listed under that category.¹⁸⁹

On 21 March, media echoed warnings from the High Commissioner for Human Rights that Nepal “would be placed in the list of those breaching international treaty obliga-

¹⁸⁶ See “Blanket amnesty bid gets flak”, *The Himalayan Times*, 15 January 2012, available at <http://www.thehimalayantimes.com/fullTodays.php?headline=Blanket+amnesty+bid+gets+flak&NewsID=316824> [accessed 20 July 2012].

¹⁸⁷ See for instance, “British ambassador Tucknott decries blanket amnesty”, *The Himalayan Times*, 15 January 2012, available at <http://www.thehimalayantimes.com/fullTodays.php?headline=British+ambassador+Tucknott+decries+blanket+amnesty+&NewsID=316950> [accessed 20 July 2012].

See also, “German against blanket amnesty”, *República*, 7 March 2012, available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=32588 [accessed 20 July 2012].

¹⁸⁸ 135 human rights defenders formed a loose network under the name of Civil Campaign against General Amnesty.

¹⁸⁹ “Parties to follow int’l norms in TRC bill”, *República*, 11 March 2012, available at http://www.myrepublica.com/portal/index.php?action=news_details&news_id=32705 [accessed 28 July 2012].

tions if the country goes for amnesty”.¹⁹⁰ Human rights activists in Nepal started opposing the formation of a TRC intended to grant a blanket amnesty to perpetrators.¹⁹¹

Under pressure from national and international human rights organizations, the three major political parties claimed they had found a suitable solution acceptable to all. Although they had decided to remove the list of non-amnestiable crimes, the TRC could only grant amnesty in cases where the two sides, abusers and victims, had consented to go for reconciliation, reparation and pardon. Therefore, they agreed that the bill should explicitly define murder in cold blood, rape and forced disappearance as serious violations of human rights. In these cases, the abuser could only get amnesty if the victim agreed to go for reconciliation. On the contrary, if perpetrators were not pardoned, the commission would recommend for action to the government.¹⁹²

Human rights activists and victim representatives objected to the agreement to remove article 25.2 of the draft TRC, considering it a violation of international law.¹⁹³ International pressure continued mounting, with the UNSG urging the political parties to respect internationally accepted principles of justice while setting up transitional justice mechanisms.¹⁹⁴ In Nepal, hundreds of human rights activists staged a protest in front of the CA to press the political parties to not introduce blanket amnesty through the proposed bills.¹⁹⁵

In a turn of events, the three parties reached an agreement to prepare an integrated bill, proposing a single commission to look into conflict era crimes. The new bill would focus mainly on reconciliation by removing provisions on prosecutions. The Prime Minister expressed commitment to withdraw the two bills from the Parliament and introduce a new integrated bill.¹⁹⁶ Some of the CA members working on the bill objected the move, stating that, while the previous understanding intended to give priority to the victim consent for purposes of reconciliation, pardon or punitive action, under the

¹⁹⁰ The news related to the presentation of the last OHCHR report on the human rights situation in Nepal to the 19th session of the United Nation Human Rights Council (HRC). , “UN report decries deal on amnesty”, *The Kathmandu Post*, 21 March 2012, available at: <http://www.ekantipur.com/the-kathmandu-post/2012/03/21/nation/un-report-decries-deal-on-amnesty/232902.html> [accessed 20 July 2012].

¹⁹¹ “Human rights activists against forming Truth and Reconciliation Commission”, *The Himalayan Times*, 22 March 2012, available at <http://174.36.181.226/fullNews.php?headline=Human+rights+activists+against+forming+Truth+and+Reconciliation+Commission+&NewsID=324984> [accessed 20 July 2012].

¹⁹² “Parties agree to remove clause prohibiting amnesty from TRC bill”, *The Kathmandu Post*, 31 March 2012, available at <http://www.ekantipur.com/the-kathmandu-post/2012/03/31/top-story/parties-agree-to-remove-clause-prohibiting-amnesty-from-trc-bill/233282.html> [accessed 20 July 2012].

¹⁹³ “Parties come under fire from rights activists”, *The Himalayan Times*, 2 April 2012, available at <http://www.thehimalayantimes.com/fullNews.php?headline=Parties+come+under+fire+from+rights+activists&NewsID=326429> [accessed 20 July 2012]. From the victims perspective, see Ram Kumar Bhandari in “Truth without Justice: It would be better to have no Truth Commission at all than a toothless commission”, *Nepali Times*, 6-12 April 2012, available at: <http://www.nepalitimes.com/issue/2012/04/06/GuestColumn/19168> [accessed 20 July 2012].

¹⁹⁴ “UN concerned about transitional justice”, *The Himalayan Times*, 15 April 2012, available at <http://thehimalayantimes.com/fullNews.php?headline=UN+concern+over+transitional+justice&NewsID=328253> [accessed 20 July 2012].

¹⁹⁵ “Activists tell parties to shun blanket amnesty”, *The Himalayan Times*, 18 April 2012, available at <http://www.thehimalayantimes.com/fullNews.php?headline=Activists+tell+parties+to+shun+blanket+amnesty+&NewsID=328687> [accessed 20 July 2012].

¹⁹⁶ “Big three parties decide to go for a single commission”, *The Kathmandu Post*, 19 April 2012, available at <http://www.ekantipur.com/the-kathmandu-post/2012/04/19/top-story/big-3-parties-decide-to-go-for-a-single-commission/233939.html> [accessed 20 July 2012].

new proposal, it was exclusively for the commission to decide whether or not to pardon any perpetrator or to take any action.¹⁹⁷

Due to lack of time to follow the parliamentary process in tabling a new integrated bill, the government decided to introduce the single bill through an ordinance. Members of Parliament objected the decision arguing it was a tactic intended to avoid parliamentary scrutiny.¹⁹⁸

Finally, on 20 May 2012, the Prime Minister, along with other UCPN (Maoist) leaders, admitted their failure to table the bills due to the lack of majority in Parliament and on 27 May 2012 the Prime Minister declared the dissolution of the CA after the deadline to promulgate the new constitution expired.

On 28 August 2012, the Council of Ministers approved an ordinance and sent it to the President for approval. The ordinance establishes a Commission of Inquiry on Disappeared Persons, Truth and Reconciliation, hence, merging both previous commissions. The ordinance authorizes the commission to recommend the granting of amnesties for serious human rights violations, including crimes under international law. Moreover the selection process to nominate commissioners lacks public consultation and transparency. Although the ordinance proposes a retired judge from the SC as the chairperson of the selection committee, commissioners can be appointed on the basis of consensus between the political parties. Finally, the ordinance provides for the AG, a political appointee, to retain discretion in prosecuting criminal cases. Human rights organizations have raised concerns and urged the President not to approve the ordinance.¹⁹⁹ The long way to establish truth-seeking mechanisms in Nepal is not over yet.

3.3.4. ARE THE TRUTH-SEEKING MECHANISMS TO BE ESTABLISHED IN NEPAL INTENDED TO SUBSTITUTE THE DUTY OF THE STATE TO PROSECUTE?

In Nepal, the establishment of truth-seeking mechanisms are intended to exonerate the State from its duty to prosecute through recommending amnesty to perpetrators of serious crimes under international law.

The successive draft legislation has been improving, in part due to pressure by human rights organizations and victim groups. In fact, during the discussions on both the bills there seemed to be a commitment by the successive governments to establish commissions in line with international law and standards. However, when decisions have been made, the provisions have gone back to allowing amnesty for serious crimes. Even the last attempt to establish one single commission is intended to allow amnesty for the

¹⁹⁷ "Top leaders prepare for blanket amnesty", *República*, 19 April 2012, available at http://www.myrepublica.com/portal/index.php?action=news_details&news_id=34080 [accessed 20 July 2012].

¹⁹⁸ "Government likely to table new bill through ordinance", *The Kathmandu Post*, 20 April 2012, available at <http://www.ekantipur.com/the-kathmandu-post/2012/04/20/top-story/transitional-justice-mechanism--govt-likely-to-table-new-bill-through-ordinance/233979.html> [accessed 20 July 2012].

¹⁹⁹ "NEPAL: Open letter concerning the executive ordinance on Commission of Inquiry on disappeared persons, truth and reconciliation", Amnesty International, International Commission of Jurists, Human Rights Watch and Track Impunity Always, 30 August 2012, available at <http://www.amnesty.org/en/library/asset/ASA31/004/2012/en/f21595fa-dbof-4310-b830-8a9fe2e9aa50/asa310042012en.pdf> [accessed 1 September 2012].

crime of enforced disappearance, which could not have been possible under the disappearances bill.

Truth commissions are created to investigate serious past violations, find out the causes that led to such violations in order to avoid repetition. As non-judicial bodies they do not prosecute perpetrators nor should they be established to recommend amnesties for serious crimes. Truth and prosecutions are complementary and not alternative approaches. However, the establishment of truth commissions presents an opportunity, for those who are in power and who could be prosecuted, to protect themselves from future prosecutions.

If Nepal finally establishes a commission under the latest ordinance, it will be one of the few commissions authorized to recommend amnesties for serious crimes. In fact, the South African model, which could grant amnesty for serious crimes, has not been replicated elsewhere. This model was not challenged before an international human rights body and it is doubtful whether it would have passed such a test. But international human rights, humanitarian and criminal law have evolved since the South African TRC submitted its report in October 1998. The Nepal commission would provide for an alternative model of institutionalizing impunity. Currently, a commission recommending amnesties for serious crimes under international law, as would be the case in Nepal with the latest ordinance, would clearly be against international law. In fact the Nepal solution has been tried before. The Indonesian and Timor-Leste joint *Commission of truth and Friendship* was allowed to recommend amnesties, including for serious crimes. However, it did not after the UN refusal to cooperate alleging violation of its policy on amnesties. The same situation could happen in Nepal.

CONCLUSIONS

Throughout this research we have been answering the questions previously formulated. We first saw that, taking into account the ratified international treaties as well as customary IHL and IHRL, Nepal has a duty to prosecute those responsible for war crimes, crimes against humanity, and gross violations of human rights committed during the armed conflict. Furthermore, none of the peace agreements signed between the former warring parties include provisions of amnesty that could remove the prospect and consequences of criminal liability for perpetrators of these crimes. On the contrary, many provisions hold the parts accountable to IHRL and IHL. However, the lack of domestic legislation criminalizing war crimes, crimes against humanity, and other gross violations of human rights, such as enforced disappearances or torture, emerges as an obstacle to initiate prosecutions at the domestic level. At a minimum, Nepal could prosecute those responsible for some acts like murder, battery, rape, illegal detention, kidnapping, abduction and hostage taking, and looting, which are recognized as violations of human rights and humanitarian law under international treaties, and which are criminalized in the Nepalese Civil Code.

In the various peace accords, the former warring parties agreed to establish two truth-seeking mechanisms, a COID and a TRC. In chapter II, we have traced the origins of the right to know in IHL and the right to truth in IHRL. We concluded that relatives have, under customary IHL, the right to know the fate of those missing, including the fate of non-combatants who were forcefully disappeared during the conflict. However, outside the scope of the missing as a result of an armed conflict, we cannot argue that victims of other violations have an enforceable right to know the truth.

Notwithstanding that the right to know the truth is not enforceable under IHRL, we have seen that State practice has led to a *de facto* recognition of this right through the establishment of truth commissions, intended to confront and come to terms with a legacy of large scale past abuses. In that regard, the research moved to ascertain whether states have established truth commissions as a way to substitute their duty to prosecute for the fulfillment of the victim's right to know the truth. Through the analysis of previous truth commissions and their relationship with prosecutions and amnesties, we have confirmed that truth and prosecutions are complementary responses to past violations. In that regard, we concluded that, with the exception of the South African TRC, which had the power to grant amnesty to perpetrators of gross violations of human rights, truth commissions have not exonerated the State from its duty to prosecute. On the contrary, we found that, besides realizing the victim's right to truth, the report of a

truth commission represents, at a minimum, a first step towards the fulfillment of the State's duty to prosecute. We also found that, although truth commissions have recommended for prosecutions, in most of the cases those recommendations have not been implemented. In light of the examples examined, this failure should not be attributed to the work of these commissions but in most of the cases, to the State unwillingness to undertake prosecutions.

Moving into the case study of Nepal, we aimed at answering whether Nepal has been complying with its obligation to prosecute, since the end of hostilities and, whether the truth seeking mechanisms are being established as a way to exonerate the State from its duty to prosecute.

With regard to the first issue, we found that under the successive post-conflict governments, the State is failing to investigate incidents related to the armed conflict. In some cases, this failure can be attributed to the police inactivity to carry out investigations and, in others, to the government's attempts to divert investigations from the traditional criminal system into other ad hoc mechanisms controlled by the government itself. In this context, the establishment of truth seeking mechanisms could provide the basis for an independent investigation of serious past violations. Moreover, successive governments are also withdrawing conflict related-cases pending in lower courts, using domestic legislation originally enacted for other purposes. We concluded that, far from complying with its international obligation to prosecute, successive governments are fostering impunity using available means of the State machinery. And by not carrying out prosecutions, those most responsible, who are currently holding positions of power, are not accountable for past misdeeds. On the other hand, we also found that the successive governments are using the argument of the establishment of future commissions to postpone their current obligations to prosecute.

In the last section we sought to find out whether Nepal has an obligation to fulfill the victim's right to truth and whether the establishment of truth seeking mechanisms are intended to substitute the State's duty to prosecute for the fulfillment of the victim's right to truth. To the first question, and following on the conclusions reached in chapter II, Nepal has an obligation, under customary IHL, to find out the whereabouts of those missing as a result of the armed conflict. In that regard, Nepal is compelled to establish a COID. Also taking into account IHRL, Nepal would not be bound to establish a TRC. However, Nepal has committed to establish both commissions through the various peace agreements and through the Interim Constitution. In that regard, Nepal has an obligation to form both.

In order to respond to the second question, we started examining the main provisions in the successive draft bills to form a COID and a TRC that either reinforce or absolve the State from its duty to prosecute. The analysis provided an insight to a satisfactory evolution from initial drafts to the last bills tabled in the Parliament. This evolution seemed to point at a commitment by the political parties represented in the Parliament to abide by international norms and standards in the formation of truth seeking mechanisms. However, the negotiation about the bills, and specifically about the amnesty clauses, ended up being discussed among the leaders of the three main political parties,

the UCPN-M, the NC and the CPN-UML. Among them, the leaders of the two major political parties, the UCPN (Maoist) and the NC, were the two previous warring sides during the armed conflict. After examining the report of the task force, the news published in the media as well as the last Executive Ordinance from 28 August 2012, we have concluded that Nepal is indeed trying to evade its duty to prosecute through establishing a commission with the ability to recommend amnesty for serious crimes under international law. In Nepal, the establishment of truth seeking mechanisms presents an opportunity, for those in power, to protect themselves from future prosecutions.

Our hypothesis presented in the introduction of this research, has proved wrong in general but right for the commissions to be established in Nepal. It has proved wrong because the establishment of truth commissions has not, traditionally, substituted the duty of the State to prosecute for the fulfillment of the right of the victims to know the truth. Only the South African TRC was empowered to grant amnesties for serious crimes. Although the Indonesian and Timor-Leste joint Commission of truth and Friendship tried to imitate the South Africa model, finally it only recommended amnesty for lesser crimes. The formation in Nepal of a Commission of Inquiry on Disappeared Persons, Truth and Reconciliation, as provided in the latest ordinance, would be entitled to recommend amnesties for war crimes, crimes against humanity, and gross violations of human rights. Such a commission would be impermissible under international law. In this regard, our hypothesis has proved valid. In the case of Nepal, the truth commission is intended to substitute the State's duty to prosecute for the fulfillment of the victim's right to truth.

UPDATE ON THE SITUATION IN NEPAL

Since the dissolution of the Constituent Assembly, in late May 2012, the political parties have not been able to form a consensus based government. The political parties in the opposition have been demanding the Maoist Prime Minister Baburam Bhattarai to resign in favor of an opposition candidate. The Prime Minister, with the support of coalition partners, has been insisting that opposition parties join his government to prepare for new elections.

At the time I submitted this dissertation, in September 2012, the Council of Ministers had just approved the ordinance on the Commission of Inquiry on Disappeared Persons, Truth and Reconciliation, and had sent it to the President of Nepal to seek his approval. This ordinance provides for the commission to recommend amnesties for serious human rights violations, including crimes under international law. So far the President has not approved it.

Notwithstanding the political stalemate over the last months, some important events have taken place. On 3 October 2012, the Maoist government promoted Nepal Army Colonel Raju Basnet to the rank of Brigadier General. Basnet commanded the Bhairabnath battalion in 2003, which was directly implicated in the arbitrary detention, torture and disappearance of alleged Maoists at Maharajgunj army barracks, in Kathmandu.¹

Few days later, on 8 October 2012, the Office of the High Commissioner for Human Rights released the “Nepal Conflict Report” along with the “Transitional Justice Reference Archive,” a database comprising around 30.000 documents.² The report examines violations of international humanitarian and human rights law committed during the armed conflict in Nepal and points at the obligation of the Government of Nepal to investigate and prosecute those responsible. The report estimates that up to 9.000 such violations were committed during the armed conflict and deplores that no one has been prosecuted in a civilian court for a serious conflict-related crime.

¹ A 2006 report from the Office of the High Commissioner for Human Rights in Nepal found the Bhairabnath battalion, under Basnet command, played a central role in the then Royal Nepal Army’s operations that led to the disappearance of at least 49 detainees from the barracks. Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu in 2003-2004, OHCHR Nepal, May 2006, available at: <<http://nepal.ohchr.org/en/index.html>> [accessed 22 January 2013]

² Nepal Conflict Report, Office of the High Commissioner for Human Rights, October 2012, available at: <<http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/NepalConflictReport.aspx>> [accessed 22 January 2013]

However, on 3 January 2013, Nepal Army Colonel Kumar Lama was arrested in the United Kingdom, following a process under universal jurisdiction, on the charge of torturing two individuals during the armed conflict in Nepal.³ Colonel Lama, who was deployed with the United Nations Peacekeeping Mission in South Sudan, was reportedly in the UK visiting family members. While the Government of Nepal and representatives of the main political parties objected to the arrest arguing it was an attack against Nepal's sovereignty, human rights defenders welcomed the move alleging it will help end impunity.

The following day, on 4 January 2013, police arrested five district-level Maoist leaders suspected to have been involved in the abduction and murder of journalist Dekendra Thapa in Dailekh district in 2004. Following their confession, media reported the Attorney General had piled pressure on the District Public Prosecutor of Dailekh to change the statement of the arrested.⁴ Media also echoed the Prime Minister's public statements that the arrest was aimed at derailing the peace process.⁵ As a result of a writ petition, on 18 January 2013 the Supreme Court of Nepal directed the Prime Minister and the Attorney General to clarify their statements and intervention in the murder investigation so as to decide whether they could be held in contempt.⁶

The arrest of both the Nepal Army Colonel Lama and the five district-level Maoist leaders have reminded the Government of Nepal that it urgently needs to establish the transitional justice mechanisms. Whether there will be one or two commissions and how they will look like is still not clear. The only certainty is that victim representatives and other human rights defenders will continue pressing the government and political parties for these mechanisms to be established in line with international law and standards.

Bangkok, 23 January 2013

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