

THE RULE OF LAW AND TRANSITIONAL JUSTICE IN NEPAL

Options for Co-ordinating a Truth Commission,
Criminal Justice Mechanisms and Personnel Reforms

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[R]econciliation should not be conceived as either an alternative to justice or an aim that can be achieved independently of the implementation of the comprehensive approach to the four measures (truth, justice, reparations and guarantees of non-recurrence)'

*– Pablo de Greiff, UN Special Rapporteur
on the promotion of truth, justice, reparation and guarantees of non-recurrence.¹*

¹ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff (UN Doc A/HRC/21/46) (9 August 2012) at [37], <http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Index.aspx>. Unless otherwise stated, all web locations in this Paper were accessible on 1 February 2014.

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Executive Summary

As Nepal continues to debate how to deal with the legacy of the internal armed conflict of 1996-2006, the rule of law and transitional justice remain high on the national agenda. To achieve these goals it is vital that there should be proper co-ordination between transitional justice mechanisms. **This Paper draws upon international and comparative experience to consider the benefits of three key mechanisms – truth commissions, criminal trials and personnel reforms – as well as how to reduce the potential for conflict when they overlap.** This analysis is very relevant to the Nepali legal context, where the **2013 Ordinance ‘On the Investigation of Disappeared Persons, Truth and Reconciliation Commission’** is the only legal measure that has so far been promulgated on the subject of transitional justice. Parts of the Ordinance have been struck down by the courts, and this Paper considers how the Ordinance, or any other legal mechanisms for transitional justice that replace it, could be improved.

The legal framework and the rule of law

As **Section I** explains, the Comprehensive Peace Agreement (2006) and the Interim Constitution (2007) create obligations to establish a Truth and Reconciliation Commission, and the latter also envisages the establishment of an independent inquiry into enforced disappearances. Nepal has a duty under international law to investigate and prosecute gross violations of international human rights law and serious violations of international humanitarian law.

However, the domestic criminal justice system currently poses a number of obstacles to this, including the fact that violations such as torture and the practice of enforced disappearances are not specifically criminalised and victims often encounter difficulties in registering their complaints and ensuring that they are investigated by the police. It is a matter of concern that in many cases the criminal proceedings that have been initiated in relation to conflict-era crimes have subsequently been withdrawn. If Nepal were to become a party to the International Criminal Court Statute, this would bring important improvements at domestic level since the state would be required to overhaul its criminal legislation and improve investigatory and prosecutorial capacity.

Co-ordinating trials and truth commissions

Criminal trials and truth commissions can play complementary and mutually reinforcing roles in transitional justice, although comparative analysis shows that transitional countries have not found it easy to balance the competing demands of the two mechanisms (**Section II**).

Each offers distinct but related benefits for transitional justice. Truth commissions aim to produce an overarching view of the conflict and offer the possibility of healing through an official acknowledgement of the past, whereas trials, although sometimes effective in uncovering the truth about particular events, are primarily concerned with providing the more conventional forms of criminal justice. Both also contribute to identifying victims’ needs for reparation. Experience shows that it is unwise to delay criminal trials until after a truth commission has completed its work, or vice versa, for both are at their most effective at the start of a transitional period. Dividing work between the two bodies is also undesirable, since assigning the most serious cases exclusively to the criminal courts will hinder a truth commission from developing a coherent picture of the conflict as a whole.

It is therefore better to run the two processes simultaneously, even though this comes at the cost of potential evidential difficulties as both bodies seek access to the same evidence and alleged perpetrators. A truth commission should not be permitted to dominate the criminal justice system, starving it of resources for major trials, nor should the truth commission allow itself to become

judicialised by adopting excessively complicated procedures. Truth commissions and criminal trials should operate as distinct institutions, on the basis of equality, under an agreement that regulates their operations, and with the possibility of recourse to an independent resolution mechanism in the event of dispute.

The Ordinance ‘On the Investigation of Disappeared Persons, Truth and Reconciliation Commission’

Against this background, Nepal’s 2013 Ordinance ‘On the Investigation of Disappeared Persons, Truth and Reconciliation Commission’ is summarised and the paper makes proposals to improve it (**Section III**). Many of the proposals relate to provisions that the Nepal Supreme Court has found to be unconstitutional and in need of replacement. Among the key arguments made in these proposals are:

- The law should clearly exclude participants in the conflict and those with a history of violations from serving as members of the TRC, in order to ensure that the public will have confidence in the ability of the TRC to do its work.
- Where the powers of the TRC to compel the production of evidence and attendance of witnesses overlap with those of the criminal courts, the interaction of these bodies will have to be carefully managed. There should be greater protection for witnesses appearing before the TRC, including provision for confidentiality, in camera hearings or the giving of evidence by remote video-link.
- The TRC should not have the power, as the Ordinance would have given it, to order reconciliation between perpetrator and victim without the consent of the parties.
- The Ordinance would also have given the TRC the power to grant amnesty, of somewhat uncertain scope. This would have inappropriately blurred the functions of TRC and the courts, and was contrary to international obligations to the extent that amnesty might have been available for gross violations of human rights and serious violations of international humanitarian law.
- The provision for reparation should be on the basis that this is a right of victims and not a discretionary benefit.
- The scope for criminal prosecutions was unduly circumscribed as the Ordinance appeared to provide that conflict-era crimes would first be considered by the TRC and that prosecutions could only be initiated by the government after it had received the Commission’s report, and then only within a short limitation period of 35 days.

Personnel reforms

The focus on criminal trials and truth commissions should not detract from personnel reforms, another pillar of transitional justice (**Section IV**). The principal aim of personnel reforms is to prevent the recurrence of human rights abuses by identifying and removing perpetrators from state institutions, thereby improving the ability of victims and the general public to rely on those institutions. The most urgent need for personnel reform is usually in the justice and security sectors, where state employees may be facing allegations of complicity in past abuses at the very time when they are required to deal with sensitive transitional processes such as criminal proceedings in relation to conflict-era offences. Vetting programmes should not take the form of a categorical purge based on past political affiliation or other status, and should be conducted in a manner that is procedurally fair.

Nepal has not yet designated any state institutions for systematic vetting, although the Supreme Court ordered in August 2012 that security personnel should not be promoted unless allegations of past wrongdoing had been investigated. Although the scope of personnel reforms is affected by available resources, this principle could be extended by legislation to apply to other employees in order to reduce the likelihood that human rights abuses will recur.

Table of Abbreviations

CAVR	Timor-Leste Commission for Reception, Truth and Reconciliation
HRC	United Nations Human Rights Council
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICJ	International Commission of Jurists
ICRC	International Committee of the Red Cross
NHRC	National Human Rights Commission of Nepal
OHCHR	United Nations Office of the High Commissioner for Human Rights
TRC	Truth and Reconciliation Commission
UNCAT	United Nations Convention Against Torture
UNICEF	United Nations Children's Fund
UNTAET	United Nations Transitional Administration in East Timor

Introduction

Since the internal armed conflict between the Nepal government and the Communist Party of Nepal (Maoist) that took place in Nepal between 1996 and 2006, there have been demands for transitional justice measures in the country. In March 2013, the 'Ordinance on Investigation of Disappeared Persons, Truth and Reconciliation Commission',² was promulgated by President Ram Baran Yadav. This gave rise to calls to amend the text of the Ordinance to bring it into line with international legal standards.³ The Bingham Centre was asked to undertake research in order to support the efforts of Nepali advocacy organisations to ensure that transitional justice discussions in the country would be informed by international and comparative perspectives. In January 2014 the Supreme Court of Nepal struck down some parts of the Ordinance and ordered that they be revised. At the time this Paper was being finalised, a new bill had been introduced amid heated political debate.⁴ Since this bill does not have the status of law, the analysis in this paper focuses on the 2013 Ordinance, and considers what improvements could be made in any future transitional justice legislation.

This Paper aims to consider the content and scope of the Ordinance, and to explore possibilities for co-ordination between different transitional justice mechanisms in Nepal. By reference to the experiences of other countries, it will discuss options for co-ordination between a forthcoming truth commission, existing criminal justice mechanisms, and personnel reforms. The lack of a coherent and co-ordinated approach across transitional justice measures risks undermining their potential impact. By providing an analysis that considers both the Nepali Ordinance and past practice, this Paper aims to make a practical contribution to discussions about the rule of law and transitional justice in Nepal.

Section I provides an overview of the internal conflict in Nepal and the subsequent transitional justice discussions that have taken place in the country. It also highlights some key aspects of the international and domestic legal frameworks which are of particular relevance to the present discussion, including the obligation to investigate and prosecute human rights violations. Section II discusses the benefits brought by truth commissions and criminal justice mechanisms, the opportunities and challenges when seeking to co-ordinate these, and possible solutions. In this way, it suggests a framework for co-ordination in Nepal based on the experiences of other countries. In light of this framework and with regard also to Nepal's legal obligations, Section III then examines the Ordinance in more detail, identifying flaws both in content and scope; setting out recommendations for amendments to the text; and highlighting practical considerations for the Commission. Finally, Section IV offers a case study, highlighting key issues to consider regarding personnel reforms and setting out some recommendations for transitional justice measures that may be adopted to deal with this subject.

² This Paper considers an unofficial English translation of the Ordinance by the International Center for Transitional Justice (dated 2 April 2013, on file with authors).

³ OHCHR *Comments on the Nepal 'Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance' – 2069 (2013)* (3 April 2013), p 1, http://www.ohchr.org/Documents/Countries/NP/OHCHRComments_TRC_Ordinance.docx.

⁴ Kosh Raj Koirala, 'Victims, right defenders cry foul over revised TRC bill', *Republica*, 12 April 2012, http://www.myrepublica.com/portal/index.php?action=news_details&news_id=72585.

Section I: The Rule of Law and Transitional Justice in Nepal

1. Overview: The Internal Conflict and Transitional Justice Discussions in Nepal

The internal armed conflict between the Nepal government and the Communist Party of Nepal (Maoist) that took place in Nepal between 1996 and 2006 is reported to have resulted in over 13,000 people dead and 1,300 missing.⁵ Violations included unlawful killings, enforced disappearances, torture and other cruel, inhuman or degrading treatment or punishment, arbitrary arrests, and sexual violence.⁶ Impunity remains entrenched in Nepal for violations committed during the conflict and post-conflict. As the UN Office of the High Commissioner for Human Rights (OHCHR) recently observed, 'Impunity remains an endemic problem in Nepal, denying access to justice and an effective remedy to victims, weakening the rule of law and perpetuating a cycle of further human rights violations and abuses'.⁷

In the Comprehensive Peace Agreement (CPA) signed in November 2006, both parties to the conflict pledged to establish a 'High-level Truth and Reconciliation Commission in order to probe into those involved in serious violation of human rights and crime against humanity in course of the armed conflict for creating an atmosphere for reconciliation in the society'⁸ and committed to establishing a 'National Peace and Rehabilitation Commission'.⁹ Both sides also agreed to 'make public within 60 days of the signing of the agreement the correct and full names and addresses of the people who 'disappeared' or were killed during the conflict and convey such details to the family members'.¹⁰

While the CPA does not explicitly refer to a Disappearances Commission, the 2007 Interim Constitution of Nepal, in addition to repeating the CPA commitment to the establishment of a Truth and Reconciliation Commission,¹¹ also makes it the responsibility of the Nepali 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 disappearances made during the course of the conflict'.¹² Moreover, in June 2007, in the case of *Rajendra Dhakal*, the Supreme Court of Nepal ordered the government to criminalise enforced disappearances and to establish a commission of inquiry on disappearances.¹³ More recently, during the UN Human Rights Council's Universal Periodic Review of Nepal in 2011, the government accepted recommendations to establish the Truth and Reconciliation Commission and the Disappearances Commission.¹⁴ However, despite these commitments and several attempts to enact legislation over recent years, the Commissions have yet to be established.

Turning to personnel reforms, in August 2009, the OHCHR recommended that until 'an independent and impartial vetting mechanism is put into place, the promotion, extension, or nomination for UN service of individuals against whom there are credible allegations of involvement in human rights

⁵ OHCHR *Nepal Conflict Report* (2012), p 14, <http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/NepalConflictReport.aspx>.

⁶ *Ibid.*

⁷ OHCHR *Report on the Human Rights Situation and the Activities of the Office of the UN High Commissioner for Human Rights in Nepal* (2011) UN Doc A/HRC/19/21/Add.4 at [49],

http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.21.Add.4_English.pdf.

⁸ Unofficial English translation of the Comprehensive Peace Agreement (2006), clause 5.2.5, <http://un.org.np/node/10498>.

⁹ *Ibid.*, clause 5.2.4.

¹⁰ *Ibid.*, clause 5.2.3.

¹¹ Interim Constitution of Nepal (2007), article 33(s) <http://www.lawcommission.gov.np/en/documents/prevaling-laws/constitution.html>.

¹² *Ibid.*, article 33(q).

¹³ *Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal (Advocate) v Government of Nepal* (1 June 2007) Nepal Supreme Court, <http://www.icrc.org/ihl-nat.nsf/0/5EAB6202E55A6FF3C125753F003A5722>.

¹⁴ HRC *Report of the Working Group on the Universal Periodic Review* (1 March 2011) UN Doc A/HRC/17/5 at [106], <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/NPSession10.aspx>.

violations should be suspended'.¹⁵ Amnesty International has noted that this advice has not been followed.¹⁶ More broadly, in August 2012, Nepal's Supreme Court 'ordered the government to frame vetting laws strictly regulating the promotion and transfer of government officials including those from the security apparatuses'.¹⁷ However, it appears that this order has not been implemented.¹⁸

Finally, as will be discussed below, Nepal is also obligated to investigate and prosecute those responsible for violations committed during the conflict. In the CPA, both sides undertook that 'impartial investigation shall be carried out and lawful action would be taken against individuals responsible for obstructions in the exercise of the rights contained in the agreement and guarantee not to encourage impunity' and 'they shall also guarantee the right to relief of the families of victims of conflict, torture and disappearance'.¹⁹ However, the 'Nepal authorities have argued that transitional justice mechanisms ... trump the normal criminal justice system in relation to widespread human rights abuses committed during the conflict period'.²⁰ Indeed, impunity remains entrenched in Nepal and, as Human Rights Watch and Advocacy Forum-Nepal have noted, 'the families of numerous victims of human rights abuses are still waiting for justice'.²¹ This Paper will therefore examine options for coordination between a truth commission, personnel reforms and criminal justice mechanisms.

2. The Legal Framework

a) The International Legal Framework

Under international law, states have a duty to investigate and prosecute gross violations of international human rights law and serious violations of international humanitarian law.²² The *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation* provide that '[i]n cases of gross violations of international human rights law and serious violations of international humanitarian law constituting 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'.²³ International treaties to which Nepal is party also include the duty to

¹⁵ OHCHR Press Release, 'OHCHR calls for comprehensive human rights vetting as part of peace process' (28 August 2009), http://un.org.np/sites/default/files/press_releases/tid_74/2009-09-02-Press-Release-OHCHR-vetting-as-part-of-peace-process.pdf.

¹⁶ Amnesty International Nepal: *The Search for Justice* (2013), p 9, <http://www.amnestynepal.org/downloads/Nepal-Impunity-Briefing.pdf>.

¹⁷ 'SC Directs Government to Vet Officials', Advocacy Forum-Nepal, 13 August 2012, <http://www.advocacyforum.org/news/2012/08/sc-directs-government-to-vet-officials.php>.

¹⁸ Amnesty International, *Nepal: The Search for Justice*, above n 16, p 10.

¹⁹ Unofficial English translation of the Comprehensive Peace Agreement (2006), above n 8, clause 7.1.3.

²⁰ Human Rights Watch and Advocacy Forum-Nepal, Nepal: *Adding Insult to Injury: Continued Impunity for Wartime Abuses* (December 2011), p 3, <http://www.advocacyforum.org/downloads/pdf/publications/impunity/adding-insult-to-injury-nov-30-2011-english-version.pdf>.

²¹ *Ibid.*, p 1.

²² OHCHR *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* (adopted 16 December 2005) UN Doc A/RES/60/147, principle 4. See also the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, Principle 19.

²³ *Ibid.*

investigate and prosecute in respect of specific crimes.²⁴ Moreover, the obligation to investigate and prosecute international crimes is now widely regarded as customary international law.²⁵

This is closely tied to the right to an effective remedy and full and adequate reparation, which has been affirmed in a range of treaties,²⁶ in statements from UN bodies²⁷ and regional courts,²⁸ as well as in a series of declarative instruments.²⁹ Reparation is considered to include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.³⁰ Given these obligations, there is clearly potential for overlap between the subject matter, mandate and powers of truth commissions and criminal trials.

Transitional justice processes also often include institutional reforms in order to provide accountability and as a preventative measure.³¹ Institutional reform can include personnel reforms such as vetting, a measure frequently employed across a range of countries in transition. It has been described as 'a process of assessing integrity to determine suitability for public employment' where integrity refers to 'a person's adherence to relevant standards of human rights and professional conduct, including her or his financial propriety'.³² Vetting risks breaching several rights of the individuals under review.³³ Therefore (and given the serious consequences which may result from vetting such as termination of employment, restriction of access to employment, and suspension from employment etc.) vetting processes must operate in accordance with international standards in order to avoid undermining human rights and the rule of law, as will be discussed in more detail in Section IV.³⁴

²⁴ See, e.g., The Convention on the Prevention and Punishment of the Crime of Genocide (1948) (Nepal acceded 1969); The International Covenant on Civil and Political Rights (1966) (ICCPR) (Nepal acceded 1991); The International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) (Nepal acceded 1977); The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (UNCAT) (Nepal acceded 1991); and the four Geneva Conventions (Nepal became state party in 1964). See also The Rome Statute of the International Criminal Court (1998) (Rome Statute) and The International Convention for the Protection of All Persons from Enforced Disappearance (2006) (ICPPED) to which Nepal is not yet party.

²⁵ See discussion at pp 53ff in Alison Bisset, *Truth Commissions and Criminal Courts* (Cambridge University Press 2012). See also ICRC *Study on Customary International Humanitarian Law Database*, rule 158, <http://www.icrc.org/customary-ihl/eng/docs/home>.

²⁶ See, e.g., the Universal Declaration of Human Rights (Article 8); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965) (Article 6); The ICCPR (Articles 2(3), 9(5) and 14(6)); The UNCAT (Article 14); The Convention on the Rights of the Child (1989) (Article 39); The Rome Statute (Article 75); the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977) (Article 91); and The ICPPED (Article 24). It has also figured in regional instruments, e.g., The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (Articles 5(5), 13 and 41); The American Convention on Human Rights (1969) (Articles 25, 63(1) and 68); and The African Charter on Human and Peoples' Rights (1981) (Article 21(2)).

²⁷ See, e.g., The UNHR Committee, General Comment No. 31 *Nature of the General Legal Obligation Imposed on State Parties to the Covenant* (2004) (UN Doc CCPR/C/21/Rev.1/Add.13) at [15]-[18]; and UN Committee against Torture General Comment No. 2, *Implementation of Article 2 by States Parties* (2008) (UN Doc CAT/C/GC/2) at [15].

²⁸ See, e.g., *Velasquez Rodriguez Case, Inter-Am. C.H.R.* (1988) (Ser. C) No. 4 at [174]. See also e.g., *Papamichalopoulos v. Greece* (Art. 50) (1995) 21 EHRR 439 [36].

²⁹ See, e.g., OHCHR *Basic Principles and Guidelines*, above n 22. See also the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) UN Doc A/RES/40/34; and the Universal Declaration of Human Rights (1948), article 8.

³⁰ See, e.g., the OHCHR *Basic Principles and Guidelines*, above n 22, Principle 18.

³¹ Pablo de Greiff and Alexander Mayer-Rieckh (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council 2007), <http://ictj.org/publication/justice-prevention-vetting-public-employees-transitional-societies>.

³² UNDP *Vetting Public Employees in Post-Conflict Settings: Operational Guidelines* (2006), p 9 <http://ictj.org/sites/default/files/ICTJ-UNDP-Global-Vetting-Operational-Guidelines-2006-English.pdf>. See also OHCHR, *Rule of Law Tools for Post-Conflict States: Vetting: An Operational Framework* (2006), <http://www.ohchr.org/Documents/Publications/RuleoflawVetting.pdf>.

³³ Federico Andreu-Guzmán, 'Due Process and Vetting' in De Greiff & Mayer-Rieckh (eds), above n 31, pp 452-454.

³⁴ See, e.g., discussion in UNDP *Vetting Guidelines*, above n 32, p 22.

b) The Domestic Legal Framework – The Protection of Fundamental Rights in Nepal

(i) Incorporation of International Human Rights and Humanitarian Law Treaties

As discussed, Nepal is party to many of the major international human rights treaties³⁵ and humanitarian law treaties.³⁶ Under the Nepal Treaty Act 1990, provisions of international treaties to which Nepal is party form part of Nepali law and prevail in the event of conflict with domestic law.³⁷

Significantly, however, Nepal is not party to the Convention relating to the Status of Refugees (1951), the Protocol relating to the Status of Refugees (1967), the International Convention for the Protection of All Persons from Enforced Disappearance (2006), the Rome Statute of the International Criminal Court (1998), nor the Additional Protocols to the Geneva Conventions.³⁸ There have been calls for Nepal to ratify the Rome Statute of the ICC but, despite some actions in parliament, there has been little progress towards ratification.³⁹ Furthermore, the domestic legal framework in Nepal would require significant reform in order to bring it into line with international standards as set out in the Rome Statute. For example, several serious violations of human rights and humanitarian law are not specifically criminalised in Nepal (including torture and enforced disappearances) and gaps also exist in relation to procedural laws.⁴⁰ In its Nepal Conflict Report, OHCHR made a series of recommendations in this regard to the Constituent Assembly.⁴¹ Indeed, it has been suggested that a key benefit of accession to the Rome Statute would lie in strengthening domestic laws in Nepal and ending impunity, rather than the bringing of cases at the International Criminal Court itself.⁴²

(ii) Constitutional Protection of Fundamental Rights

The Interim Constitution of Nepal came into force in January 2007, replacing the 1990 Constitution.⁴³ It provides for an interim system of government and for the establishment of a Constituent Assembly to complete and promulgate a new constitution for Nepal.⁴⁴ The Assembly also doubled as a legislature, sometimes referred to as the Legislature-Parliament. The April 2008 elections were won by the Communist Party of Nepal (Maoist),⁴⁵ and the Constituent Assembly was created in 2008. The Constituent Assembly was given two years to finalise a permanent constitution.⁴⁶ However, despite its tenure being extended four times, the Constituent Assembly failed to complete the task of drafting a new constitution and was dissolved in May 2012.⁴⁷ Chief Justice Regmi was appointed in March 2013

³⁵ See 'Multilateral Treaties Deposited with the Secretary-General', United Nations Treaty Collection, <https://treaties.un.org/Pages/ParticipationStatus.aspx>.

³⁶ See 'Treaties and States Parties to Such Treaties', 'Nepal', ICRC, http://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=NP.

³⁷ Nepal Treaty Act 1990, Section 9, [http://www.lawcommission.gov.np/en/documents/Prevailing-Laws/Statutes---Acts/English/Treaty-Act-2047-\(1990\)/](http://www.lawcommission.gov.np/en/documents/Prevailing-Laws/Statutes---Acts/English/Treaty-Act-2047-(1990)/).

³⁸ 'The States Parties to the Rome Statute', International Criminal Court, http://www.icc-cpi.int/en_menus/asp/states_parties/Pages/the_states_parties_to_the_rome_statute.aspx.

³⁹ See 'Nepal', Coalition for the International Criminal Court, <http://www.iccnw.org/?mod=country&iduct=123>.

⁴⁰ OHCHR *Nepal Conflict Report* (2012), above n 5, p 14.

⁴¹ *Ibid.*, p 205.

⁴² See, e.g., Avocats Sans Frontières, *Preparing to Implement the Rome Statute: A study of the laws and procedures in place in Nepal and need for reform* (2012), p iii, http://www.asf.be/wp-content/uploads/2013/01/ASF_NEP_Preparing-to-Implement-Rome-Statute.pdf.

⁴³ Interim Constitution of Nepal (2007), above n 11.

⁴⁴ *Ibid.*, part 7.

⁴⁵ Prashant Jha, 'Nepal's Maoist Landslide', *Open Democracy*, 16 April 2008, http://www.opendemocracy.net/article/nepal_s_maoist_landslide; 'Nepal's election: The Maoists triumph', *The Economist*, 17 April 2008, <http://www.economist.com/node/11057207>.

⁴⁶ Leena Rikkila Tamang, 'Nepal, a constitutional impasse', *Open Democracy*, 21 June 2012, <http://www.opendemocracy.net/leena-rikkila-tamang/nepal-constitutional-impasse>.

⁴⁷ "T.B.", 'Nepal without a constitution: Into the wild', *The Economist*, 28 May 2012, <http://www.economist.com/blogs/banyan/2012/05/nepal-without-constitution>; 'Nepal calls elections as constitution deadline passes', *BBC News*, 28 May 2012, <http://www.bbc.co.uk/news/world-asia-18230358>.

as interim Prime Minister to lead an interim unity government⁴⁸ (amid calls for him to step down as Chief Justice to preserve the separation of powers and the rule of law).⁴⁹

Elections for a new Constituent Assembly were held in November 2013 and voters 'resoundingly rejected the Maoist parties that once dominated the country's politics'.⁵⁰ The Nepali Congress party won 196 seats; the Communist Party of Nepal (Unified Marxist Leninist) secured 175 seats; and the Unified Communist Party of Nepal (Maoist) came third with 80 seats.⁵¹ Given the focus in this Paper on personnel reforms, it is worth noting that the Supreme Court of Nepal ruled in September 2013 to disqualify individuals with a criminal conviction from contesting the November 2013 elections.⁵² However, the Asian Centre for Human Rights observed that 'a number of leaders who are facing serious charges of human rights violations' were still contesting the elections.⁵³ In December 2013, the Unified Communist Party of Nepal (Maoist) after initial protests about 'fraud' during the elections, agreed to take up their seats in the Constituent Assembly and participate in drafting the constitution, ending uncertainty.⁵⁴ The accord also included setting up two separate commissions – a Truth and Reconciliation Commission, and a Disappearances Commission; and the promulgation of a new constitution within a year.⁵⁵ Although the key parties committed to this timeline for drafting a new constitution, the Constituent Assembly has four years to do so.⁵⁶

The Constituent Assembly will now embark once more on the task of drafting the new constitution. In the meantime, the Interim Constitution remains in force.⁵⁷ Part 3 of the Interim Constitution contains many of the fundamental rights contained in the previous 1990 Constitution and adds other significant rights.⁵⁸ However, the emergency powers in the Interim Constitution, like its predecessor, provide for broad suspension of rights.⁵⁹ In fact, Nepal did declare a state of emergency during the conflict and derogated from certain obligations under the International Covenant on Civil and Political Rights on two occasions, for nine months in November 2001 and for three months in February 2005.⁶⁰ Finally, it is noted that certain fundamental rights are also contained in Nepal's Civil Rights Act 2012.⁶¹ It remains to be seen how fundamental rights will be framed in the new constitution.

⁴⁸ Gopal Sharma, 'Chief justice to lead Nepal's interim government to elections', Reuters, 13 March 2013, <http://www.reuters.com/article/2013/03/13/us-nepal-politics-government-idUSBRE92C1BL20130313>.

⁴⁹ See, e.g., 'ICJ calls on Nepali Chief Justice to step down as judge after appointment as Prime Minister', ICJ Press Release, 14 March 2013, <http://www.icj.org/icj-calls-on-nepali-chief-justice-to-step-down-as-judge-after-appointment-as-prime-minister/>.

⁵⁰ 'Maoists defeated in Nepal election', Financial Times, 4 December 2013, <http://www.ft.com/cms/s/0/674528d6-5cb8-11e3-81bd-00144feabdc0.html?siteedition=uk#axzz2pcfiye00>.

⁵¹ Ibid.; Utpal Parashar, 'Nepal EC extends deadline for parties to name lawmakers', Hindustan Times, 10 December 2013 <http://www.hindustantimes.com/world-news/nepal-ec-extends-deadline-for-parties-to-name-lawmakers/article1-1161344.aspx>.

⁵² Asian Centre for Human Rights, *Nepal's Constituent Assembly Elections: A Lesson for the Convicted Politicians?* (23 October 2013), p 1, <http://www.achrweb.org/briefingpapers/BPNepal-02-2013.pdf>.

⁵³ Ibid., p 2.

⁵⁴ Gardiner Harris, 'Maoists to Join Nepal Assembly After Ensuring Election Inquiry', New York Times, 24 December 2013, <http://www.nytimes.com/2013/12/25/world/asia/nepals-maoists-agree-to-join-constituent-assembly.html>; 'Nepal Maoists to join new constituent assembly' BBC News, 24 December 2013, <http://www.bbc.co.uk/news/world-asia-25509548>.

⁵⁵ 'Nepal parties reach four-point agreement', Business Standard, 24 December 2013, http://www.business-standard.com/article/news-ians/nepal-parties-reach-four-point-agreement-113122400574_1.html; Damakant Jayshi, 'Nepal impasse comes to an end as political parties reach accord', The Hindu, 24 December 2013, <http://www.thehindu.com/news/international/south-asia/nepal-impasse-comes-to-an-end-as-political-parties-reach-accord/article5497645.ece>.

⁵⁶ 'Nepal's election: Mountains to climb', The Economist, 21 November 2013, <http://www.economist.com/blogs/banyan/2013/11/nepals-election>.

⁵⁷ Interim Constitution of Nepal, above n 11, preamble.

⁵⁸ See for comparison, Constitution of the Kingdom of Nepal 1990, <http://www.asianlii.org/np/legis/const/1990/index.html>.

⁵⁹ Interim Constitution of Nepal, above n 11, article 143.

⁶⁰ OHCHR *Nepal Conflict Report* (2012), above n 5, p 6.

⁶¹ Civil Rights Act 2012 [http://www.lawcommission.gov.np/en/documents/prevailing-laws/prevailing-acts/Prevailing-Laws/Statutes---Acts/English/Civil-Rights-Act-2012-\(1955\)](http://www.lawcommission.gov.np/en/documents/prevailing-laws/prevailing-acts/Prevailing-Laws/Statutes---Acts/English/Civil-Rights-Act-2012-(1955)).

(iii) The National Human Rights Commission

The National Human Rights Commission (NHRC) was established in 2001, pursuant to the Human Rights Commission Act 1997,⁶² and was elevated to a constitutional body under the Interim Constitution.⁶³ Its functions include investigating human rights violations, making recommendations for actions against perpetrators, and ordering the provision of compensation to victims.⁶⁴ However, the NHRC has been beset by backlogs of complaints and, although compensation has been awarded, none of the perpetrators listed in its recommendations to the government had been prosecuted, according to its 2011-2014 Strategic Report.⁶⁵

More recently, the Human Rights Commission Act was enacted in January 2012, replacing the 1997 Act.⁶⁶ However, it has been suggested that the new Act is 'a step in the wrong direction' because it does not guarantee the independence and autonomy of the NHRC and imposes a six month time limit for filing cases.⁶⁷ In addition, since the existing Commissioners retired in September 2013 upon completion of their tenure, the NHRC has been without Commissioners.⁶⁸ Before their retirement, they delegated certain powers to Secretary B. Prasad Bhattarai. However, he is not able to take decisions about human rights complaints nor can he make recommendations to government.⁶⁹ There have been calls for the government to appoint new Commissioners and to comply with the *Paris Principles Relating to the Status of National Institutions* to ensure that the NHRC 'functions as a truly independent and empowered protector and promoter of human rights'.⁷⁰

(iv) Barriers to Access to Justice

There are several significant barriers to access to justice for human rights violations in Nepal. First, certain offences (such as enforced disappearance, torture, war crimes and crimes against humanity) are not specifically criminalised in Nepal. They do not appear in Schedule 1 of the State Cases Act 1992 and so the police 'systematically refuse to register such complaints'.⁷¹ Torture has not been criminalised, despite an order from the Supreme Court in December 2007.⁷² Similarly, as noted above, enforced disappearance has not been criminalised despite a June 2007 order from the Supreme Court.⁷³ This failure to implement court decisions is itself another impediment to justice in Nepal.

⁶² Human Rights Commission Act 1997, <http://www.lawcommission.gov.np/en/documents/law-archives/old-acts/Law-Archives/old-acts/English/Human-Rights-Commission-Act-2053-%281997%29/>

⁶³ See discussion in NHRC of Nepal, *Summary Report of NHRC Recommendations upon Complaints in a Decade (2000-2010)* (November 2010), p 1 http://www.nhrcnepal.org/nhrc_new/doc/newsletter/Sum-Report-NHRC-Recommendation.pdf.

⁶⁴ Interim Constitution of Nepal, above n 11, article 143, articles 131-133.

⁶⁵ NHRC of Nepal, *Strategic Plan 2011-2014*, p ii, http://www.nhrcnepal.org/nhrc_plan_details-33.html.

⁶⁶ National Human Rights Commission Act 2012, <http://www.lawcommission.gov.np/en/documents/func-startdown/1551/>.

⁶⁷ Pema Abrahams, 'New Act a Blow to Human Rights in Nepal', In *Asia*, 14 March 2012, <http://asiafoundation.org/in-asia/2012/03/14/new-act-a-blow-to-human-rights-in-nepal/>.

⁶⁸ 'Political dispute delays appointments at NHRC', *The Himalayan Times*, 16 October 2013, <http://www.thehimalayantimes.com/fullNews.php?headline=Political+dispute+delays+NHRC+appointments+&NewsID=393962>.

⁶⁹ *Ibid.*

⁷⁰ 'Nepal: Appoint Independent Rights Commissioners: With Terms Expired, Human Rights Protections in Limbo', *Human Rights Watch*, 19 September 2013, <http://www.hrw.org/news/2013/09/19/nepal-appoint-independent-rights-commissioners>; UNGA Res 48/34 Principles relating to the Status of National Institutions (The Paris Principles) (20 December 1993), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

⁷¹ TRIAL and others, *Written information for the adoption of the List of Issues by the Human Rights Committee with regard to Nepal's Second Periodic Report (CCPR/C/NPL/2)* (April 2013) at [73], http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/NPL/INT_CCPR_NGO_NPL_14698_E.pdf.

⁷² *Rajendra Ghimire et al. v. Ministry of Council and Office of the Ministry of Council* (17 December 2007), Supreme Court of Nepal.

⁷³ *Ibid.*

Second, civil society organisations have noted that the police have ‘exhibited serious failings in investigating crimes from the conflict period’ and ‘have on many occasions refused to register FIRs [First Information Reports] despite the legal obligation to do so’.⁷⁴ Without a registered FIR, it is not possible for a prosecution to proceed.

Third, successive governments have withdrawn criminal prosecutions concerning conflict-era cases deemed to be ‘politically motivated’ according to the CPA 2006 (Clause 5.2.7).⁷⁵ Civil society organisations have estimated that ‘successive governments of the State party have withdrawn, in total, up to 1,222 criminal cases between 2008 and the present involving an unknown number of alleged perpetrators’.⁷⁶ As OHCHR-Nepal and the NHRC have observed, ‘numerous cases withdrawn by the Government are clearly criminal in nature, and have nothing to do with politics’ and withdrawals ‘have effectually served to protect politically connected individuals from criminal accountability, promoting a policy of de facto impunity for the perpetrators of hundreds of serious crimes’.⁷⁷ The wider international community has also expressed concern about these withdrawals.⁷⁸

Fourth, the Police Act 2012 provides for the immunity of police employees for acts committed in good faith while discharging their duties.⁷⁹ The Army Act 2006 similarly provides protection for acts performed during the discharge of duties, with exceptions for certain offences.⁸⁰

Fifth, another procedural barrier, as far as civil liability is concerned, is the short limitation period specified for certain crimes. For example, complaints relating to torture under the Compensation Relating to Torture Act 1996, rape under the Muluki Ain (General Code) and for compensation for unlawful preventive detention under the Public Security Act, must be filed within 35 days;⁸¹ and claims under the Civil Rights Act must be filed within eight months.⁸² REDRESS and Advocacy Forum-Nepal have commented that ‘violations committed during the conflict period clearly fall out of the limitation period’ and even for post-conflict violations ‘the limitation period may be a significant barrier as victims – who have been abused at the hands of state actors – are often frightened to bring claims within such a short period of time’.⁸³ In this respect, the *UN Basic Principles on the Right to a Remedy and Reparation* provide that ‘[w]here so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law’ and that ‘[d]omestic statutes of limitations for other types of violations that do

⁷⁴ REDRESS and Advocacy Forum-Nepal, *Held to Account: Making the Law Work to Fight Impunity in Nepal* (December 2011), p 15 http://www.redress.org/downloads/country-reports/Nepal_Impunity_Report_-_English.pdf. See also, discussion in Advocacy Forum-Nepal, Occasional Brief, *Evading Accountability by Hook or by Crook: The Issue of Amnesties in Post-Conflict Nepal* (June 2011), <http://www.advocacyforum.org/downloads/pdf/publications/evading-accountability-by-hook-or-by-crook.pdf>.

⁷⁵ TRIAL and others, *Written information*, above n 71, at [8].

⁷⁶ *Ibid.*, at [89].

⁷⁷ OHCHR-Nepal and NHRC of Nepal *Legal Opinion: Remedies and Rights Revoked: Case Withdrawals for Serious Crimes in Nepal* (June 2011), pp 1-2, http://nepal.ohchr.org/en/resources/publications/2011/2011_06_23_Case-Withdrawals-for-Serious-Crimes-in-Nepal_E.pdf.

⁷⁸ *Ibid.*, p 2: ‘States participating in Nepal’s 2011 Universal Periodic Review (UPR) before the Human Rights Council likewise expressed considerable concern about the ramifications of the case withdrawals’.

⁷⁹ Police Act 2012, Section 37, [http://www.lawcommission.gov.np/en/prevailing-laws/prevailing-acts/Prevailing-Laws/Statutes---Acts/English/Police-Act-2012-\(1955\)/](http://www.lawcommission.gov.np/en/prevailing-laws/prevailing-acts/Prevailing-Laws/Statutes---Acts/English/Police-Act-2012-(1955)/).

⁸⁰ Army Act 2006, Section 22, [http://www.lawcommission.gov.np/en/prevailing-laws/prevailing-acts/Prevailing-Laws/Statutes---Acts/English/Army-Act-2063-\(2006\)/](http://www.lawcommission.gov.np/en/prevailing-laws/prevailing-acts/Prevailing-Laws/Statutes---Acts/English/Army-Act-2063-(2006)/).

⁸¹ Compensation Relating to Torture Act 1996, Section 5, [http://www.lawcommission.gov.np/en/documents/Prevailing-Laws/Statutes---Acts/English/Compensation-Relating-to-Torture-Act-2053-\(1996\)/](http://www.lawcommission.gov.np/en/documents/Prevailing-Laws/Statutes---Acts/English/Compensation-Relating-to-Torture-Act-2053-(1996)/); Muluki Ain (General Code), Chapter 14, Section 11, [http://www.lawcommission.gov.np/en/documents/prevailing-laws/prevailing-acts/Prevailing-Laws/Statutes---Acts/English/Muluki-Ain-\(General-Code\)-2020/](http://www.lawcommission.gov.np/en/documents/prevailing-laws/prevailing-acts/Prevailing-Laws/Statutes---Acts/English/Muluki-Ain-(General-Code)-2020/); and Public Security Act 1989, Section 12A, [http://www.lawcommission.gov.np/en/documents/prevailing-laws/prevailing-acts/Prevailing-Laws/Statutes---Acts/English/Public-Security-Act-2046-\(1989\)/](http://www.lawcommission.gov.np/en/documents/prevailing-laws/prevailing-acts/Prevailing-Laws/Statutes---Acts/English/Public-Security-Act-2046-(1989)/).

⁸² Civil Rights Act 2012, above n 61, Section 20.

⁸³ REDRESS and Advocacy Forum-Nepal, *Held to Account*, above n 74, p 85.

not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive'.⁸⁴

Finally, there is inadequate provision for remedies and reparation in domestic law. For example, the Compensation Relating to Torture Act provides only for compensation, a fine and 'departmental action' against the perpetrator, and not for other forms of reparation.⁸⁵

Overall, it has been commented by a coalition of NGOs that '[t]he government of Nepal consistently fails to acknowledge and address the prevailing situation of impunity for both past and present violations' and 'victims of human rights violations by State agents have virtually no prospect of success in seeking investigation and prosecution of the perpetrators in the domestic justice system'.⁸⁶ These substantive and procedural barriers pose often insurmountable barriers to access to justice for violations committed both during and after the conflict. Such obstacles must be overcome if Nepal is to comply with its international legal obligations to investigate and prosecute human rights violations, if the rights of victims are to be fulfilled, and if wider transitional justice objectives are to be achieved.

⁸⁴ OHCHR *Basic Principles and Guidelines*, above n 22. See also, e.g., Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (adopted 26 November 1968 entered into force 11 November 1970).

⁸⁵ Compensation Relating to Torture Act 1996, above n 81, Sections 6 and 7.

⁸⁶ TRIAL and others, *Written Information*, above n 71, at [8].

Section II: Co-ordinating Trials and Truth Commissions

Section II discusses the benefits brought by truth commissions and criminal justice mechanisms, and the ways in which they complement each other; and it examines the tensions that need addressing before these bodies can operate effectively together. In this way, it seeks to explain why both trials and truth seeking are important for the transition in Nepal and suggests a framework for co-ordination there based on the experiences of other countries.

1. Trials and Truth Commissions in the Transitional Justice Framework

Trials and truth commissions form two important components of the field of transitional justice. Along with reparations and reforms, they comprise the four principal mechanisms of transitional justice and, in different ways, contribute to the transitional justice objectives of truth, justice, reparation and non-repetition.⁸⁷ Within transitional justice practice and discourse, trials and truth commissions have become respectively aligned with the provision of justice and the delivery of truth. Trials serve to deliver criminal justice for victims and enable states to fulfil their obligation to investigate and prosecute those responsible for human rights violations. Truth commissions investigate and clarify past violations, enabling states to discharge their duty to investigate and provide victims, their families and wider society with the right to know or the right to truth.⁸⁸ Yet in fulfilling their primary aims, it is believed that these two mechanisms make significant, complementary and overlapping contributions to all four transitional justice objectives. Their impact is more complex and nuanced than simple delivery of truth and justice, as will be discussed below.

2. The Benefits of Trials and Truth Commissions

Transitional justice literature indicates that both trials and truth commissions play important roles in truth establishment. This is significant, as clarification of the truth about past events is considered essential for transitional societies to come to terms with their pasts, to prevent recurrences of atrocities, and to move forward to a reconciled future.⁸⁹ Trials deliver truth in specific cases, identifying the circumstances of particular crimes and those responsible for their commission. In contrast, truth commissions work to provide an overarching view of past violations, which encompasses the structural causes, broad patterns of violence and the intellectual authors of it.⁹⁰ Therefore, trials and truth commissions contribute to the clarification of different types of truth, both of which are needed if the individual and societal dimensions of the right to truth are to be realised.

⁸⁷ See Louis Joinet, *Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* (1997), UN Doc. E/CN.4/Sub.2/1997/20/Rev.1 ('Joinet Principles'), updated by Dianne Orentlicher, *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, (2005) UN Doc. E/CN.4/2005/102.Add.1 ['Updated Principles']; and OHCHR *Basic Principles and Guidelines*, above n 22.

⁸⁸ OHCHR, *Study on the Right to Truth Report of the Office of the United Nations High Commissioner for Human Rights*, (8 February 2006) E/CN.4/2006/91.

⁸⁹ Mark Imbleau, 'Initial Truth Establishment by Transitional Bodies and the Fight Against Denial' (2004) 15 *Criminal Law Forum* 159; Luc Huyse, 'Dealing with the Past and Imagining the Future', in Luc Reyckler and Thania Paffenholz (eds), *Peacebuilding: A Field Guide* (Lynne Rienner Publishers 2002), 327; Tristan Anne Borer, 'Truth Telling as a Peace Building Activity', in Tristan Anne Borer (ed), *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies* (University of Notre Dame Press 2006), 1 at pp 17-18.

⁹⁰ On micro and macro truth establishment see Audrey R Chapman, 'Truth Finding in the Transitional Justice Process' in Hugo Van der Merwe, Victoria Baxter and Audrey R Chapman (eds), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (United States Institute of Peace Press 2009), pp 91-115.

Likewise, both bodies are understood to contribute to the healing of victims through the provision of different forms of justice. Trials deliver the criminal justice that studies show the majority of victims desire.⁹¹ As non-judicial bodies, truth commissions cannot meet the demands of victims for retributive, criminal justice. However, because they do not operate under the procedural constraints of criminal trials, which require testimony from only a relatively small number of victims and exclude much of their account under exclusionary rules, truth commissions can offer victims a more central role. Indeed, victim testimony is of primary importance for truth commissions as they build an overall picture of the abuses of the past.⁹² In addition, as formally established institutions, truth commissions can provide official acknowledgement of the suffering of victims and their families.⁹³

The work of both bodies can also be used to inform the content of reparations programmes and packages. Truth commissions have often used the recommendations element of their mandates to suggest the form that reparations should take and who should receive them, based upon their overview of past violations and those most affected. Equally, the findings of trials can also be utilised to determine who should be eligible for reparations.

Finally, the work of trials and truth commissions can contribute to the longer-term objectives of reform and non-repetition. The very creation of both mechanisms is indicative of a break with the past, an acknowledgement that past abuses were wrong and an attempt to re-establish the orderly functioning of the state.⁹⁴ In addition, transitional states are believed to benefit from the assignment of responsibility that both mechanisms produce. The individualisation of responsibility brought about through trials is believed to ease collective guilt and offer an avenue away from cycles of blame, revenge and recrimination. Trials are also believed to deter violations, thereby maximising the possibilities for non-repetition of abuses.⁹⁵ While truth commissions are not concerned with individualising guilt, their focus on assigning institutional responsibility is considered equally important. The consequent recommendations for reform of the institutions implicated are seen as a means of reducing the likelihood of violations being committed in the future.⁹⁶ Institutional and personnel reforms will be discussed in more detail in Section IV below.

Trials and truth commissions thus play complementary and mutually-reinforcing roles within the transitional justice framework. Neither can deliver the benefits brought by the other and together they can make a significant contribution to transitional states. Therefore, practice increasingly favours the twin establishment of these institutions as part of a multi-faceted response to past violations.

3. The Challenges of Co-ordination

Co-ordinating the operations of trials and truth commissions poses an array of challenges in practice. In large part, this stems from a disharmony between their modes of operation and the powers they possess, which is brought into focus by their overlapping subject matter mandates to investigate past human rights violations and requirements to access the same evidence, information and witnesses. For

⁹¹ Ernesto Kiza, Corene Rathgeber and C Rohne Holger, *Victims of War: An Empirical Study on War-Victimization and Victims' Attitudes Towards Addressing Atrocities* (Hamburger Edition Online, 2006, on file with authors), p 97.

⁹² Priscilla Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (Routledge 2001), p 28.

⁹³ Martha Minow, *From Vengeance to Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press 1998), p 58.

⁹⁴ Ruti Teitel, *Transitional Justice* (Oxford University Press 2000), pp 28-30.

⁹⁵ Minow, *From Vengeance to Forgiveness*, above n 93, p 40; Karl Jaspers, *The Question of German Guilt*, (transl EB Ashton) (Dial Press 1947), pp 39-41; Dinka Corkalo et al, 'Neighbours Again? Intercommunity Relations after Ethnic Cleansing' in Eric Stover and Harvey M Weinstein (eds) *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, (Cambridge University Press 2004), pp 143-148.

⁹⁶ Tricia D Olsen, Leigh A Payne, Andrew G Reitger, Eric Wiebelhaus-Brahm, 'When Truth Commissions Improve Human Rights' (2010) 4 *International Journal of Transitional Justice* 457.

example, victim testimony may be equally relevant to a truth commission as it seeks to ascertain the nature, causes and patterns of abuses, as it is to a prosecutorial institution as it investigates the extent of the violations committed, determines whether the thresholds for its exercise of jurisdiction are met and establishes individual responsibility for serious crimes. Official records and documents of government, security forces and the military may also be relevant to the investigations of both bodies.

This problem is exacerbated by the fact that truth commissions are typically created with quasi-judicial truth seeking powers, such as powers of subpoena, search and seizure, and witness protection, as well as the capabilities to conduct questioning under oath, to hold public hearings,⁹⁷ and to grant confidentiality to those who offer testimony.⁹⁸ A situation arises where two bodies possess the ability to exercise judicial powers, often simultaneously, in relation to the same crimes and individuals but to achieve different goals. This creates areas of tension. At the most general level, for example, where trials and truth commissions operate contemporaneously, an inevitable and largely unavoidable consequence is that some witnesses and former perpetrators will be deterred from offering testimony to the truth commission for fear that their account will be passed to prosecutorial institutions.⁹⁹

However, the objectives and modes of operation of trials and truth commissions also give rise to some more complex problems. For example, there is conflict between the interests of truth commissions to protect from disclosure the information given by some categories of witnesses and those of prosecutorial institutions to have access to all relevant information. A variety of groups may seek guarantees of non-disclosure before offering information to a truth commission. Victims of sexual violence, former perpetrators and those who fear reprisals and recriminations may all require the protection of confidentiality in order to provide statements, as do child contributors.¹⁰⁰ For truth commissions, the participation of these groups enhances the potential for the establishment of the widest possible truth, maximising the possibilities for mandate fulfilment. However, for prosecutorial institutions, such information may be considered relevant as they seek to identify witnesses and amass the evidence necessary to compile cases and bring charges.

In addition, the need for prosecutorial institutions to protect the rights of accused persons to a fair trial and against self-incrimination is at odds with the objective of truth commissions to compile a complete account of the past and to offer to all the opportunity to share their story. The typical establishment of truth commissions to construct a comprehensive account of the past¹⁰¹ suggests that the accounts of all parties are relevant to commission proceedings, including those indicted and detained by prosecutorial

⁹⁷ The commissions of Nigeria (1999), Grenada (2001), East Timor (2001), Ghana (2002), Sierra Leone (2002), DRC (2004) and Liberia (2005) were all endowed with powers of subpoena. The commissions of Nigeria (1999), East Timor (2001), Ghana (2002) and DRC (2005) were given powers of search and seizure and the commissions of Nigeria (1999), Grenada (2001), Peru (2001), East Timor (2001), Ghana (2002), Sierra Leone (2002), Morocco (2004), Paraguay (2004), DRC (2004) and Liberia (2005) possessed the power to conduct public hearings. See Mark Freeman, *Truth Commissions and Procedural Fairness*, Appendix 1, Table A.1: Truth Commissions and their Key Powers.

⁹⁸ In some cases the truth commission's mandate has stipulated that proceedings be conducted on a confidential basis. See 'Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan Population to Suffer', Oslo, 23 June 1994; Supreme Decree No. 065-2001-PCM, Art. 7 on the establishment of the Peruvian TRC and Mexico Peace Agreements, Mexico City, 27 April 1991; Art. 7 on the establishment of the Commission on the Truth for El Salvador. Other commissions have had discretion to grant confidentiality. See Sierra Leone, Truth and Reconciliation Commission Act 2000, s.7(3); East Timor, UNTAET Regulation No. 2001/10, s. 44.2.

⁹⁹ See, e.g., PRIDE, *Ex-Combatant Views of the Truth and Reconciliation Commission and the Special Court for Sierra Leone*, A Study in Partnership with the International Center for Transitional Justice, Freetown, 12 September 2002, p 19. See also Sierra Leone's Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, (Graphic Packaging Ltd, 2004), Ch 6, para 59, Appendix 1, Statistical Report at 3, Figure 4.A1.1b, Percent of Statement Givers by Source, Type and Sex.

¹⁰⁰ On involving children in truth seeking see *Children and Truth Commissions*, UNICEF Innocenti Research Centre, August 2010.

¹⁰¹ See e.g., Chile, Supreme Decree No. 355 Creation of the Commission on Truth and Reconciliation, (25 April 1990), Article 1(a); South Africa, Promotion of National Unity and Reconciliation Act No 34 (1995), section 3(1)(a); An Act to Establish the Truth and Reconciliation Commission of Liberia (2005), section 4(f); Kenya, Truth, Justice and Reconciliation Act, 2008, section 5(a).

institutions. Thus, it is not simply the case that commissions might hold information of relevance to prosecutorial mandates, but vice versa. Some persons facing criminal charges may actually seek the opportunity to realise their rights to freedom of expression and testify before a commission, even publicly. Truth commissions may even be endowed with the powers, theoretically, necessary to obtain testimony of perpetrators. Yet this presents real difficulties for prosecutorial institutions. The participation of charged persons, particularly in public hearings, may compromise subsequent criminal proceedings by giving rise to challenges to the fairness of proceedings.¹⁰²

Therefore, it is clear that while, together, trials and truth commissions might deliver a range of complementary benefits to transitional states, their proceedings require careful co-ordination if they are to be able to coexist effectively.

4. Sequencing and Division

In light of the difficulties of co-ordinating the operations of trials and truth commissions, two key proposals have emerged: sequencing operations and dividing work between them, with trials targeted at those most responsible and truth commissions dealing with those remaining.¹⁰³

It has been suggested that the potential for conflict might be minimised by carrying out trials before the commencement of truth commission proceedings.¹⁰⁴ This would diminish the prospects for tension around access to witnesses and information that may occur where operation is concurrent. However, on balance, this presents more problems than it solves. The length of time that prosecutorial proceedings take to complete makes this an unfeasible option. Initiating truth commission proceedings perhaps a decade, or more, after the point of transition will likely have weakened the public appetite for participation in truth seeking that exists at the time of transition. The benefits that truth commission proceedings can bring would be denied to transitional societies at a time when they can be most useful. Legislative and institutional reforms will likely have been implemented without the benefit of truth commission proposals based on a thorough examination of the past.

Sequencing the other way around does not provide a solution either. While truth commissions generally complete their work more quickly than prosecutorial institutions, they are likely to operate for a number of years. In that time, prosecutorial investigations too would lose the momentum present at the point of transition. As time passes, evidence becomes more difficult to obtain and personal accounts are altered and influenced by subsequent events. Delaying trials may also detract from the truth seeking process. As a truth commission brings to light the nature and extent of past violations, it is likely that demands for criminal justice will increase and, where these demands are not met, dissatisfaction with truth seeking as the primary response may develop.

Dividing labour is equally unworkable, despite some evidence of role division within contemporary transitional justice practice.¹⁰⁵ To divide labour so as to require truth commissions to investigate only

¹⁰² On the problems caused by such as situation see *Prosecutor v. Samuel Hinga Norman* (Case No. SCSL-03-08-PT-101), Decision on the Request by the Truth and Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman, 29 October 2003; *Prosecutor v. Samuel Hinga Norman* (Case No. SCSL-03-08-PT-122-I and II), Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone and Chief Samuel Hinga Norman JP Against the Decision of his Lordship, Mr Justice Bankable Thompson, Delivered on 30 October 2003 to Deny the TRC's Request to Hold a Public Hearing with Chief Samuel Hinga Norman JP, 28 November 2003.

¹⁰³ Hayner, *Unspeakable Truths*, above n 92, pp 110-111.

¹⁰⁴ William W Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice', (2008) 49 *Harvard International Law Journal* 53, 104.

¹⁰⁵ Prosecutorial initiatives tend to focus on those who bear the greatest responsibility for the most serious crimes. This accords with the mandate of the ICC and was the approach adopted in East Timor and Sierra Leone. As a result, lower level perpetrators

lower level violations negates one of their central purposes, which is to document patterns of abuses and to situate violations within institutional frameworks. That objective requires consideration of the roles played by senior figures within political, military and security institutions, who may also become subjects of criminal prosecutions.

Thus, sequencing operations and drawing divisions within their work seems likely to undermine the valuable contribution that these mechanisms can make to transitional states. In order to maximise the benefits of their operation they should be established as close to the point of transition as possible and operate simultaneously, or at least with some overlap.

5. Co-ordination of Proceedings

Co-ordinating trials and truth commissions at the national level presents an assortment of dilemmas for establishing authorities: Should they interact and on what basis? Should they share information? Should they have unfettered access to the same persons? Should one be able to exercise powers over the other? These are undoubtedly difficult issues to grapple with and require careful consideration. Nevertheless, national authorities have a range of options when designing truth commissions and trials and creating a framework for their operation and coexistence.

Past practice informing synchronisation is limited, with only South Africa, East Timor and Sierra Leone having utilised prosecutions and truth commissions as part of multi-faceted transitional programmes. However, their experiences should inform future co-ordination efforts and suggest that following certain guiding criteria may promote effective coexistence. Thus, truth commissions and prosecutorial institutions should operate:

- As distinct institutions;
- On the basis of equality;
- Under an agreement that regulates their operations; and
- With the possibility of recourse to an independent resolution mechanism in the event of dispute.

a) *Distinct Institutions*

Analysis of the South African and East Timorese paradigms provides strong grounds for the view that trials and truth commissions should not be created with interlinked operations. Where they are too closely connected, the risk of obfuscation of purpose arises and the success of one will likely dictate that of the other.

In South Africa, using the threat of prosecution as the incentive for perpetrator participation in truth seeking and creating a commission with quasi-legal amnesty-granting powers¹⁰⁶ confused both processes. Prosecution operated as a central element of truth seeking and the truth commission fulfilled judicial functions, giving rise to regular legal scrutiny before the courts and the imposition of cumbersome procedural requirements to ensure fairness in truth commission proceedings. The resulting adversarial process intimidated a number of victims and inhibited others from offering testimony.¹⁰⁷ In

may be granted amnesty in the interests of national reconciliation as suggested in the enacting legislation of the Liberian and Kenyan truth commissions or reintegrated to society through a traditional justice mechanism as in East Timor.

¹⁰⁶ Promotion of National Unity and Reconciliation Act 1995, section 20.

¹⁰⁷ Truth and Reconciliation Commission of South Africa Report, (Cape Town: Truth and Reconciliation Commission, distributed by Juta and Co., 2002), Vol 1, Ch 7; Vol 6, Sec 1, Ch 4.

addition, the focus on truth seeking may have contributed to the failure to adequately resource prosecutorial bodies. The ineffectiveness of the prosecution service resulted in only a small number of successful trials for apartheid era violations and also impacted negatively on truth seeking by failing to provide the necessary impetus for many perpetrators to participate.¹⁰⁸

East Timor's experience similarly counsels against creating closely interconnected truth commissions and prosecutorial institutions. There, creating a Commission with an obligation to refer cases involving serious violations to the Office of the Prosecutor (OGP)¹⁰⁹ meant that the Commission could not be given powers to compel the provision of self-incriminating information¹¹⁰ or to guarantee the confidentiality of testimony, hampering its truth seeking abilities.¹¹¹ The information sharing relationship was also problematic in the Commission's administration of the Community Reconciliation Process (CRP), which allowed perpetrators of minor offences to obtain immunity from prosecution by submitting a statement of responsibility for past crimes to the Commission and undertaking an act of reconciliation.¹¹² Initial statements had to be forwarded to the OGP where it was decided whether the Prosecutor's jurisdiction would be exercised or whether the case could be dealt with through a CRP.¹¹³ In reality, the limited resources of the prosecuting authorities meant that retained cases were not acted upon, resulting in many perpetrators not being held to account through either process.¹¹⁴

These experiences illustrate the desirability of maintaining a distinction between the roles and operations of trials and truth commissions. In future models, they should be used as separate initiatives and imposing obligations which link their operations should be avoided. In particular, endowing truth commissions with the power to grant amnesty or the responsibility to administer amnesty-related programmes risks judicialising the truth seeking process and compromising the non-judicial character of truth commissions. The granting of amnesties for gross violations of human rights and serious violations of international humanitarian law would also be in violation of states' international legal obligations to investigate such violations and to bring perpetrators to justice, as will be discussed further in Section III below.

Instituting a multi-faceted transitional justice programme to address the past does not require that the mechanisms within it work together. States should be clear about their transitional aims and what they seek to achieve through the establishment and operation of different mechanisms.

b) Operational Equality

The South African and Timorese experiences demonstrate that where one mechanism is adopted as the central means of responding to the past, the other is forced to occupy a subsidiary role. Truth commissions should not serve as investigative arms of judicial institutions and prosecution should not be the impetus for truth recovery. This will create a hierarchy from the outset and subordinate the

¹⁰⁸ Ken Oh and Theresa Edlmann, 'Reconciliatory Justice: Amnesties, Indemnities and Prosecutions in South Africa's Transition', in Centre for the Study of Violence and Reconciliation (ed), *After the Transition: Justice, The Judiciary and Respect for the Law in South Africa: A Collection of Papers from a Project on Justice and Transition* (2007), pp 9-10; Antje Pedain, 'Was Amnesty a Lottery? An Empirical Study of the Decisions of the Truth and Reconciliation Commission's Committee on Amnesty', (2004) 121 South African Law Journal 785, 813-814.

¹⁰⁹ UNTAET *Establishment of a Commission for Reception, Truth and Reconciliation in East Timor*, (13 July 2001) UN Doc. UNTAET/REG/2001/10, section 3(1)(c).

¹¹⁰ *Ibid.*, sections 17.1 and 17.2.

¹¹¹ CAVR, *Chega! Report of the Commission for Reception, Truth and Reconciliation for East Timor*, (January 2006), Part 2: The Mandate of the Commission, at [23]-[24].

¹¹² *Ibid.*, Part 9.2.

¹¹³ *Ibid.*, [10].

¹¹⁴ *Ibid.*, [170].

operations of one to the other. Instead, their different roles ought to be reflected in transitional programme design through the creation of equally resourced and robustly equipped institutions. Truth commissions should operate with the primary objective of investigating the past and producing an accessible account for affected populations. Prosecutorial institutions should have as their focus the prosecution of past crimes. This will ensure the best possibility of transitional states benefiting from the merits of the effective operation of both mechanisms. Equal resourcing does not require that all available resources be divided strictly in half. Carrying out effective prosecutions is likely to be financially more costly than the operation of a truth commission. It does require, however, that one body is not resourced at the expense of the other.

c) Regulation

Agreements regulating the relationship between trials and truth commissions ought to be drawn up prior to the commencement of operations, a point demonstrated by the Sierra Leonean experience. There, failure to co-ordinate the Truth and Reconciliation Commission (TRC) and the Special Court resulted in the creation of a truth commission and court with potentially conflicting powers.¹¹⁵ When those powers led the two bodies into conflict, with the TRC seeking access to Special Court detainees,¹¹⁶ the result was protracted legal proceedings and a souring of previously harmonious relations.¹¹⁷

One example of such regulation is that information should not be shared. Information gathered through truth seeking should not be available to prosecutorial institutions and those indicted by prosecutorial institutions should not be accessible by truth commissions. This may necessitate the loss of some potentially useful information to both processes; however, this is preferable to prejudicing the integrity of either proceedings or undermining the operation of one in favour of the other. Regulating agreements will be particularly important if truth commissions are to possess quasi-judicial truth seeking powers. There is no reason why, at the national level, truth commissions should not possess these powers, as long as there are clear parameters for their use, which ensure compatibility with contemporaneous prosecutorial proceedings and avoid encroachment into the prosecutorial domain.

Prohibiting the flow of information between commissions and prosecutorial institutions will not dispel all problems, particularly the difficulties truth commissions face in gaining perpetrator testimony. In Sierra Leone, despite the lack of information sharing, the TRC's ability to grant confidentiality, and the Court's focus on only those most responsible for past violations, many perpetrators were reluctant to testify for fear that their information would be passed to the Special Court.¹¹⁸ Perpetrators may be reluctant to offer testimony to a truth commission for a myriad of reasons. However, the Sierra Leonean and Timorese experiences suggest that inhibition will be increased where there is an information sharing relationship, or the perception of one.

d) Independent Resolution Mechanism

The regulating agreement should make provision for an independent third party to resolve any conflict that arises. The situation that occurred in Sierra Leone, where the Court determined the outcome of the dispute,¹¹⁹ is unsatisfactory. It is impossible for one transitional justice mechanism to undertake an

¹¹⁵ Truth and Reconciliation Commission Act 2000, sections 7-8; Special Court Agreement (Ratification) Act 2002, section 21(2).

¹¹⁶ See above n 102.

¹¹⁷ Sierra Leone's Truth and Reconciliation Commission, *Witness to Truth*, above n 99, Ch 6.

¹¹⁸ *Ibid.*

¹¹⁹ See above n 102.

objective evaluation of an issue in which its powers are challenged and proceedings threatened. Recourse to a neutral and impartial body should be available to resolve any emerging conflict.

6. Concluding Remarks

Trials and truth commissions are neither truly complementary nor entirely incompatible. Instead, they give rise to operational difficulties, which if co-ordinated carefully, can be resolved, or at least reduced, so as to minimise the potential for conflict and ensure the delivery of their respective benefits to transitional societies. Maintaining clear boundaries between their proceedings and endowing each with a mandate focused on fulfilling its primary objectives, will maximise the possibilities for robust truth seeking alongside effective prosecutions.

Section III: The Ordinance on Investigation of Disappeared Persons, Truth and Reconciliation Commission

1. Background

Nepal's 'Ordinance on Investigation of Disappeared Persons, Truth and Reconciliation Commission' was promulgated by President Ram Baran Yadav in March 2013.¹²⁰ The text of the Ordinance was drawn from two bills tabled in 2011 – one to establish a TRC and one to establish a Disappearances Commission – and had been subject to extensive discussion and consultation by the Constituent Assembly before its dissolution in May 2012. However, an Ordinance for the establishment of the Truth and Reconciliation Commission submitted to the President by the Council of Ministers in August 2012 was described as containing 'important differences' from the earlier bill;¹²¹ and the Ordinance enacted in March 2013 included yet further amendments, most notably the amalgamation of the TRC and Disappearances Commission.¹²² This done with little consultation, a failure that has attracted heavy criticism,¹²³ and, as noted above, there have been calls by the UN and civil society groups for the government to review and amend the Ordinance in consultation with victims and civil society and to bring it into line with international legal standards.¹²⁴ The Ordinance has been criticised as lacking clarity and consistency in several respects, undermining legal certainty and the rule of law.¹²⁵

After promulgation, victims' groups took the matter to the courts. In April 2013, the Supreme Court of Nepal issued an interim order suspending the Ordinance from taking effect pending review.¹²⁶ More recently, in January 2014, the Supreme Court issued its final judgment. The main questions before the Court were whether or not provisions of the Ordinance were in violation of the 'Constitution, international human rights law, accepted principles of justice' and whether or not the Ordinance, if implemented in its present form, could 'achieve the goals of transitional justice'.¹²⁷ In summary, the Court ordered the establishment of two separate commissions, on truth and reconciliation and on enforced disappearances;¹²⁸ and the amendment of the provisions relating to amnesties and criminal prosecutions, and the 35-day limitation period for filing criminal cases. The Court also ordered that measures be taken for the 'criminalization of the criminal acts against serious human rights violations';

¹²⁰ This Paper considers an unofficial English translation of the Ordinance by the International Center for Transitional Justice, above n 2.

¹²¹ OHCHR *Comments on the Ordinance*, above n 3, p 1.

¹²² *Ibid.*

¹²³ See, e.g., 'Nepal: Truth & Reconciliation Law Betrays Victims', Human Rights Watch, 22 March 2013, <http://www.hrw.org/node/114432>.

¹²⁴ See, e.g., OHCHR, *An OHCHR Analysis of the Nepal Ordinance on Investigation of Disappeared People, Truth and Reconciliation Commission, 2012* (December 2012), p 2, http://www.ohchr.org/Documents/Press/Nepal_OHCHR_Analysis_TJ_Ordinance_Dec_2012.pdf. See also, 'Nepal: Truth & Reconciliation Law Betrays Victims', Human Rights Watch, above n 123.

¹²⁵ See e.g., OHCHR *Comments on the Ordinance*, above n 3, p 1.

¹²⁶ See 'Nepal court blocks civil war truth commission', BBC News, 1 April 2013 <http://www.bbc.co.uk/news/world-asia-21996638>; 'Stay TRC Ordinance: SC' Advocacy Forum-Nepal, 2 April 2013, <http://www.advocacyforum.org/news/2013/04/stay-trc-ordinance-sc.php>; Pranab Kharel, 'Supreme Court stays TRC ordinance move' *EKantipur.com*, 2 April 2013 <http://www.ekantipur.com/2013/04/02/editors-pick/supreme-court-stays-trc-ordinance-move/369348.html>; Pranab Kharel, 'Regmi reply to apex court in TRC case', *Kathmandu Post*, 14 May 2013 <http://www.ekantipur.com/the-kathmandu-post/2013/05/14/top-story/regmi-reply-to-apex-court-in-trc-case/248734.html>. See also the unofficial English translation of the summary of the case *Justice and Rights Organization v Government of Nepal* (2 January 2014) Supreme Court of Nepal, p 5 (on file with authors).

¹²⁷ Summary of *Justice and Rights Organization v Government of Nepal*, above n 126, p 4.

¹²⁸ *Ibid.*, p 6. See also, 'Form separate commissions on transitional justice: SC' *EKantipur.com*, 2 January 2014, <http://www.kantipuronline.com/2014/01/02/top-story/form-separate-commissions-on-transitional-justice-sc/383311.html>.

‘to initiate extensive campaigns to promote the spirit of reconciliation’; and ‘to provide for reparation to the victims and their families’.¹²⁹

As regards disappearances, the Court stated that the Ordinance was contrary to international human rights law which considers enforced disappearance as a crime,¹³⁰ and noted the ongoing failure to implement its order to form a separate Disappearances Commission in the case of *Rajendra Dhakal*, discussed above.¹³¹ The Court ordered the relevant provisions to be removed from the Ordinance, which it held should not be implemented in its present form.¹³²

2. The Content of the Ordinance

OHCHR provided extensive commentary on the Ordinance in April 2013.¹³³ By examining the Ordinance in light of Nepal’s legal obligations and with regard to the framework for co-ordination suggested above, this Paper seeks to make a further, practical contribution to this discussion. It will examine the Ordinance in detail, identifying flaws in its content and scope; setting out recommendations for amendments to the text; and highlighting practical considerations for the Commission or any other transitional body that is eventually established by legislation that may replace the Ordinance. Given our concern with co-ordination, the analysis will focus primarily on those provisions of the Ordinance which concern how the work of the Truth and Reconciliation Commission and/or the Disappearances Commission would relate to criminal justice and personnel reforms.

3. Preliminary: Chapter 1 (Sections 1-2)

Various definitions are set out in Section 2 of the Ordinance, including of ‘reparation’, ‘family’, ‘perpetrator’, ‘victim’, ‘serious human rights violation’ and ‘act of disappearing a person’. Clearly the scope of these definitions will impact on the reach of the law and access to the transitional justice measures provided therein. Therefore, it is strongly recommended that these definitions be brought into line with international standards.¹³⁴

4. Establishment and Formation of the Commission: Chapter 2 (Sections 3-12)

Personnel reforms and procedures to assess a person’s suitability to serve in public institutions will be discussed in detail in Section IV. An attempt can be seen here in Chapter 2 of the Ordinance to address specific concerns about the selection of the commissioners and, in particular, to exclude those who committed violations during the conflict.¹³⁵ Indeed, in its January 2014 judgment, the Supreme Court of Nepal ordered the formation of a Commission meeting international standards and that measures be

¹²⁹ *Summary of Justice and Rights Organization v Government of Nepal*, above n 126, p 7-8. See also, Kosh Raj Koirala, ‘SC rejects TRC ordinance over blanket amnesty’, *Republica*, 2 January 2014, http://www.myrepublica.com/portal/index.php?action=news_details&news_id=67287

¹³⁰ *Summary of Justice and Rights Organization v Government of Nepal*, above n 126, p 6.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ OHCHR *Comments on the Ordinance*, above n 3.

¹³⁴ As noted in, for example, *Ibid.*, at pp 2, 5-6.

¹³⁵ See also Section 20 of the Ordinance which calls for the Commission to ‘carry out its activities in an independent and impartial manner’ and to ‘abide by the universally accepted principles of justice and human rights’.

taken 'to ensure the autonomy and impartiality' of the Commission by excluding parties to the conflict and those with 'negative records of human rights violations'.¹³⁶

Sections 4 and 5 of the Ordinance set out criteria for the qualification and disqualification, respectively, of the chairperson and members of the Commission. Qualifications include those who have 'maintained high moral character' (Section 4(c)) and have 'worked in the field of human rights, peace, justice or conflict management or sociology' (Section 4(d)). Importantly, they must not be a member of a political party at the time of appointment (Section 4(b)). Criteria for disqualification include lack of Nepali citizenship (Section 5(a)), those 'convicted by a court on criminal offence involving moral turpitude' (Section 5(b)), those 'punished in offences regarding gross violation of human rights' (Section 5(c)), and those 'recommended to take actions for human rights violations' by the NHRC (Section 5(d)). Sections 6 to 12 then provide further details about the functioning of the Commission and Section 6(2) provides that a commissioner may be relieved of his/her post 'on charge of failing to honestly dispense positional duties, lack of working efficiency or being involved in bad conduct' and must have an opportunity to defend him/herself.

OHCHR has observed that the 'selection of commissioners and the design of the selection process are often the first test for the level of public trust and support that a commission will receive'.¹³⁷ OHCHR, therefore, recommended that the Ordinance be amended to add 'provisions detailing various steps in the selection process' and to 'ensure guarantees of broad public consultation and representation, as well as integrity, independence and impartiality'.¹³⁸ It also suggested the Ordinance 'provide additional specifications regarding the characteristics of the commissioners, including competence, independence, neutrality, integrity and expertise in human rights'.¹³⁹

Similarly, Sections 10 and 11 provide for the government to appoint the Commission Secretary and to make personnel available for the Commission. As OHCHR has noted, these 'do not provide the necessary guarantees of independence and impartiality' and measures will be required to ensure that Commission personnel 'meet the criteria of being impartial, and are not themselves implicated in any way in any of the violations or crimes falling under the mandate of the Commission'.¹⁴⁰ Part of this relates to resourcing and OHCHR has suggested a review of Section 12 to 'provide sufficient guarantees of financial independence'.¹⁴¹

As will be discussed below, it is important that the public should have confidence in the ability and willingness of transitional justice institutions to investigate past abuses and so the selection of commissioners and the exclusion of those who committed violations during the conflict will be crucial.

5. Functions, Duties and Powers of the Commission: Chapter 3 (Sections 13-27)

a) Overview: *The Mandate and Powers of the Commission*

The Commission's functions, duties and powers are stated in Section 13(1) to include: 'to bring the real fact before public by investigating truth of the cases in relation to the event of serious violation of human rights including the disappeared persons in course of armed conflict'; 'to conduct reconciliation

¹³⁶ Summary of *Justice and Rights Organization v Government of Nepal*, above n 126, p 8. See also, 'SC rejects TRC ordinance over blanket amnesty', above n 126.

¹³⁷ OHCHR *Comments on the Ordinance*, above n 3, p 7.

¹³⁸ *Ibid.*, pp 2, 8.

¹³⁹ *Ibid.*, p 8.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

between perpetrator and the victim'; 'to make recommendations in relation to the reparations to be provided to the victim or her/his family'; 'to recommend actions against perpetrators not chosen for granting amnesty'; and 'to carry out other works as mentioned in the Ordinance.'

Section 13(2) sets out the grounds on which the Commission will investigate cases of serious human rights violations, including disappearances: '(a) If a complaint is filed in the Commission by or on behalf of the victim; (b) If the Commission takes the cognizance of such matter through any source; (c) If the Commission deems it appropriate to investigate into such matters'.

Section 14 sets out the investigative powers of the Commission, such as the procedures for obtaining testimony, information and documents (including from the Nepal court system), for summoning witnesses, and for conducting searches. In particular, Section 14(1) provides that while carrying out its investigations, the Commission may 'exercise the same powers as conferred to the courts in accordance to the prevalent laws'. Section 15 relates to support to be given to the Commission's work; and providing testimony, information, documents and other evidence is described as a 'duty', and failure to do so can result in a fine or 'departmental action'. In addition, Section 16 provides for the Commission to take action for contempt, including the imposition of fines and/or imprisonment.

As discussed in Section II above, the Commission's overlapping mandate with criminal trials and, in particular, its powers of information gathering, need to be carefully managed in order to minimise the potential for conflict and to ensure the delivery of their respective benefits to transitional societies.

b) The Protection of Witnesses and Others, and Confidentiality

Section 17 provides for 'appropriate arrangements' to be put in place for the protection of witnesses and other persons, though specifics are not given. It also provides that '[n]o legal suit or action shall be initiated against any person merely on the ground that such person recorded her/his testimonies or statements or provided the information to the Commission' (Section 17(4)); and provides for the Commission to keep confidential the names of those providing notice, information or evidence to the Commission, where this is requested (Section 17(6)). Section 18 provides for the Commission to carry out public hearings where it is deemed 'necessary to find truth and facts on matters relating to serious violations of human rights'. Section 19 provides for the Commission's activities to be carried out in 'an open and transparent manner' and for the Commission to publicise its work, though it also provides for activities to be conducted 'in a confidential manner' in certain circumstances.

In this respect, in its January 2014 judgment, the Supreme Court of Nepal ordered the Commission to 'ensure the involvement and protection of victims and witnesses',¹⁴² and ordered the government to develop programmes 'for them to be able to tell their truth, to be able to effectively defend it, and to protect their individual identity related details; to arrange for, if needed, in-camera hearing or distance hearing by arranging for various means including of audio-visual technique'.¹⁴³ As discussed in Section II, guarantees of non-disclosure may be required to ensure the participation of certain groups in truth commissions, but such information might be relevant for criminal trials, and so proceedings require careful co-ordination if the two processes are to coexist effectively.

¹⁴² 'Nepal: Pillay welcomes Supreme Court's decision', OHCHR press release, 6 January 2014.

¹⁴³ *Summary of Justice and Rights Organization v Government of Nepal*, above n 126, p 8. See also, 'SC rejects TRC ordinance over blanket amnesty', above n 126.

c) Provisions Relating to Reconciliation

Section 22(1) provides that where an application for reconciliation is filed by either a perpetrator or a victim, the Commission 'may reconcile between victim and perpetrator'. Section 22(5) provides that, before doing so, the Commission 'may seek required consent from victim'. The Commission may ask the perpetrator to apologise to the victim (Sections 22(2)) or to provide reasonable compensation for damages (Section 22(3)), and may also carry out a range of activities 'in order to motivate the victim and the perpetrator' (Section 22(4)). Section 22(6) provides for reconciliation to be made with the family members of those victims who have been killed, are a minor or are mentally impaired. However, as OHCHR has commented, this 'empowers the Commission to conduct reconciliation between victims and perpetrators without consent of the parties involved' whereas reconciliation 'is more appropriately addressed at an inter-personal level and should not be forced upon people'.¹⁴⁴

d) Provisions Relating to Amnesty

Section 23(1) provides that the Commission 'may, if deemed reasonable' recommend amnesties to the government of Nepal. Several provisions are expressed as relating to Section 23(1). Section 23(3) provides that individuals must apply in writing to the Commission for amnesty 'by repenting for the misdeeds carried out... during the armed conflict to the satisfaction of the victim'; Section 23(6) provides that the 'bases and criteria' for making such recommendations will be prescribed; and Section 23(7) notes that the names of those granted amnesty will be published in the Nepal Gazette.

Section 23(2) provides that 'serious crimes, including rape, which lack sufficient reasons and grounds for granting amnesty following the investigation of the Commission shall not be recommended for amnesty by the Commission'. Again, several provisions are expressed as relating to Section 23(2). Section 23(4) provides that in such cases, the Commission 'may... consult the victim' before deciding whether or not to recommend amnesty in a particular case. In addition, Section 23(5) provides that before submitting an application, individuals must 'express the details of the truth and facts to the full extent of his/her knowledge' which the Commission must then document.

Although the language is unclear, Section 23 of the Ordinance appears to allow the granting of amnesties for gross violations of human rights and serious violations of international humanitarian law, which would be in violation of Nepal's international legal obligations to investigate such violations and to bring perpetrators to justice, and contrary to the right to an effective remedy and full and adequate reparation.¹⁴⁵ It would also be inconsistent with UN policy, which has been reaffirmed many times, 'to reject any endorsement of amnesty for genocide, war crimes, crimes against humanity, or gross violations of human rights'.¹⁴⁶ Moreover, as discussed above in Section II, caution should be exercised in giving truth commissions the power to grant amnesty or the responsibility to administer amnesty-related programmes as this risks judicialising the truth seeking process.

The issue of amnesties was a key focus of the Supreme Court's January 2014 judgment. The Court ruled that 'amnesties should not be granted for serious human rights violations committed during the 10-year internal conflict'.¹⁴⁷ The Court noted that the Ordinance 'does not appear to have guaranteed not to recommend for amnesty the crimes as mentioned under Section 2 (j) [serious human rights

¹⁴⁴ OHCHR *Comments on the Ordinance*, above n 3, pp 2, 6.

¹⁴⁵ As noted, for example, *Ibid.*, pp 2-5.

¹⁴⁶ See, e.g., UN Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies* (12 October 2011) (UN Doc S/2011/634) at [12] http://www.unrol.org/files/S_2011_634EN.pdf.

¹⁴⁷ 'Nepal: Pillay welcomes Supreme Court's decision', above n 142.

violations]’,¹⁴⁸ and that ‘instead of making the participation and consent of the victims for the amnesty process primary, it has been made secondary’.¹⁴⁹ It concluded that Section 23 was contrary to ‘victims’ fundamental right to justice including their right to life and liberty, right to information, right against torture, and against the accepted principles of justice’ and therefore needed to be amended.¹⁵⁰ Reflecting on this judgment and transitional justice discussions in Nepal, Advocacy Forum-Nepal recently observed that ‘[t]orn between ‘prosecution’ and ‘amnesty’, the TJ process in Nepal has come to a complete standstill’.¹⁵¹ Noting that transitional justice is ‘not synonymous with prosecutions of past violations’ but rather has ‘wide-ranging objectives’,¹⁵² Advocacy Forum-Nepal suggested starting ‘expert consultations’ to develop the legal and policy framework for amnesty.¹⁵³ Any such framework should of course be in line with Nepal’s international legal obligations to investigate and prosecute human rights violations.

e) Provisions Relating to Reparation

The Ordinance provides for the Commission to make recommendations to the government to ‘provide any type of compensation, to provide restitution or rehabilitation or any other appropriate arrangement’ (Section 24(1)) and to ‘provide facilities or concessions’ to victims or members of their families, such as, ‘(a) Free education and health-care facilities; (b) Skill-oriented training; (c) Loan facilities without or with concessional interests; (d) Arrangements of habitation; (e) Employment facilities; (f) Other measures, facilities or concessions as deemed appropriate by the Commission’ (Section 24(2)). It provides that in making such recommendations, ‘the interest or demand of the victim or his/her family also shall be taken into consideration’ (Section 24(3)) and that the basis and criteria will be prescribed (Section 24(4)). Section 24(5) provides that no victim will be barred from receiving such benefits on the basis that he or she has received compensation from the perpetrator, the Commission has recommended amnesty for the perpetrator or the perpetrator has not been identified. Section 24(6) provides for these to be received by family members in case of the victim’s death. Section 26 provides for the return of land, where the property of any victim has been seized or confiscated.

While these provisions appear relatively broad, we would endorse OHCHR’s suggestion that the definition of ‘reparation’ in the Ordinance be brought into line with international standards. In particular, OHCHR argued that the definition ‘should specify that victims have the *right* to reparation’ [emphasis in original],¹⁵⁴ and should state, as per the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, that ‘full and effective reparation’ includes ‘restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition’.¹⁵⁵

f) Prosecutions and Other Actions, and the Commission’s Report

The provisions relating to amnesty in Section 23 of the Ordinance have been discussed above. For those ‘perpetrators not designated for amnesty’, Section 25(1) of the Ordinance provides that the Commission ‘may recommend for action, as per the existing laws’ and Section 25(2) provides that it ‘shall do so through the report to be submitted pursuant to Section 27’. In addition, Section 25(3)

¹⁴⁸ Summary of *Justice and Rights Organization v Government of Nepal*, above n 126, p 7.

¹⁴⁹ Ibid. See also, ‘SC rejects TRC ordinance over blanket amnesty’, above n 126.

¹⁵⁰ Ibid., p 7.

¹⁵¹ Advocacy Forum-Nepal, *Special Brief: ‘Nepal: Transitional Justice at Crossroads* (January 2014), p 9, on file with authors.

¹⁵² Ibid., p 10.

¹⁵³ Ibid., p 11.

¹⁵⁴ OHCHR *Comments on the Ordinance*, above n 3, pp 2, 7.

¹⁵⁵ UN *Basic Principles*, above n 22, principle 18.

provides that the Commission 'may correspond to the Office of the Attorney General to prosecute perpetrators not designated for amnesty prior to submission of the report'.

In addition to Section 25, the Ordinance contains two other provisions, Sections 28 and 29, which address the linkages between a truth commission and criminal justice mechanisms. Therefore, these three provisions will be examined together in the discussion below about Chapter 4 of the Ordinance.

Turning first to the Commission's report, Section 27(1) of the Ordinance provides for the submission of a report to the government of Nepal by the Commission 'after the completion of its inquiry' which, pursuant to Section 27(3), the government shall then present to the legislature. Section 27(2) also provides that 'the Commission may from time to time, make interim reports to the Government of Nepal on matters investigated by the Commission'. Section 27(1) sets out the type of information to be included in the report, including details relating to: the complaints investigated; 'the actual truth and fact found' as a result of the investigations; reconciliation pursuant to Section 22; recommendations relating to amnesty, reparation, and prosecutions or other actions pursuant to Sections 23, 24 and 25; reforms required to ensure non-repetition; legal reforms required to implement the Commission's report; and measures needed for 'promoting human rights, strengthening justice system and creating an environment for reconciliation'.

6. Implementation and Monitoring of the Report: Chapter 4 (Sections 28-30)

Section 28 of the Ordinance provides that the responsibility to implement (or cause to be implemented) the recommendations made in the Commission's report 'shall lie with the Ministry', defined in Section 1 of the Ordinance as the Ministry of Peace and Reconstruction.

In relation to the Section 23 recommendations concerning amnesty, Section 28 provides that the Ministry shall forward these in writing to the Council of Ministers. As regards the Section 24 recommendations relating to reparation, it provides that the Ministry shall 'implement or cause to be implemented by the Commission itself or through other concerned agencies with the approval of the Council of Ministers, the Government of Nepal' these recommendations. Finally, in respect of the Section 25 recommendations relating to prosecutions and other actions, Section 28 provides that the Ministry shall 'correspond to the Office of the Attorney General pursuant to Section 29 in order to implement' these recommendations.

Section 29(1) then provides that 'The Attorney General or a Public Prosecutor designated by him shall decide on the matter whether a case can be prosecuted or not against any person, if the Ministry writes to it based on the report of the Commission to initiate a case against any persons who were found guilty on allegation of serious human rights violations'. Section 29(2) provides that the Attorney General or Public Prosecutor, 'should state the ground and reason' for their decision. Although not clear, Section 29(3) seems to suggest that the government of Nepal will notify the Public Prosecutor of the appropriate district for any prosecution and a notice will be published in the Nepal Gazette. Section 29(4) then provides that 'If the Attorney General [or] a Public Prosecutor designated by him decides to prosecute pursuant to Sub-section (1), case can be filed within 35 days of such decision notwithstanding anything contained in any other existing law'.

These provisions raise several concerns. First, the relationship between Sections 25 and 29 is not clear. OHCHR has observed that Section 29(1) 'would appear to inappropriately limit the powers of the Attorney General to initiate prosecution only upon receiving written instructions from the Ministry of Peace and Reconstruction' whereas Section 25(3) 'seems to allow the Commission to address directly

the Office of the Attorney General'.¹⁵⁶ Second, OHCHR has commented that the short limitation period in Section 29(4) may 'unduly limit the possibility of prosecution and result in impunity'.¹⁵⁷ Such procedural barriers to access to justice in Nepal were discussed in some detail in Section I above. Third, as OHCHR has argued, the Ordinance suggests that crimes relating to the conflict would be considered by the Commission, instead of being investigated and prosecuted in the criminal justice system, and that cases would go through the criminal justice process only where an amnesty is not recommended and only then 'if proceedings are initiated in accordance with the restrictive processes set out in articles 25, 28 and 29'.¹⁵⁸ OHCHR concluded that 'an exercise by the Commission of its powers under articles 25, 28 and 29 which may result in avoiding, delaying or otherwise compromising criminal investigations and prosecutions would be a violation of Nepal's legal obligations' and suggested the provisions be amended in line with international law.¹⁵⁹ It submitted that the 'Commission must not be used to avoid or delay criminal investigations and prosecutions, which should be reinforced, not replaced, by truth commissions'.¹⁶⁰ As discussed in Section II, maintaining clear boundaries between the proceedings of truth commissions and trials and endowing each with a mandate focused on fulfilling its primary objectives, will maximise the possibilities for robust truth seeking alongside effective prosecutions.

In its January 2014 judgment, the Supreme Court of Nepal ordered the amendment of Sections 25 and 29 of the Ordinance.¹⁶¹ It considered that Sections 25 and 29 of the Ordinance made criminal prosecution of serious human rights violations the 'subject of executive's reason and thus indefinite' so as to 'hinder the prospect of justice' and that they therefore needed to be amended.¹⁶² The Court also criticised the short limitation period which it considered could create impunity, as well as the failure to provide for accountability for the 'adverse effect' caused by a failure to file a case within the prescribed period. The Court therefore noted that these provisions needed to be amended,¹⁶³ however, it remains to be seen whether, and the extent to which, its judgment will be implemented.

In addition, Section 30 of the Ordinance provides that the NHRC 'shall monitor the implementation of the recommendations made in the Report'. However, the NHRC's shortcomings have been discussed above and it is given limited powers of follow-up in the text of the Ordinance as it stands: where the Ministry has failed to implement or cause to be implemented a recommendation, the NHRC 'may' simply 'draw the attention of the Ministry' to the need to implement the recommendation in question. Further consideration is needed to ensure the Commission's recommendations are effectively implemented.

7. Miscellaneous: Chapter 5 (Sections 31-40)

The term of office of the Commission is specified as two years from its formation, though this may be extended for one year by the government if the Commission so requests (Section 35). As commented

¹⁵⁶ OHCHR *Comments on the Ordinance*, above n 3, p 5.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*, pp 2, 5.

¹⁶⁰ *Ibid.*, p 5.

¹⁶¹ Summary of *Justice and Rights Organization v Government of Nepal*, above n 126, pp 6-8. See also, 'Supreme Court rules against amnesty offer to conflict-era rights violators' NepalNews.Com, 2 January 2014, <http://www.nepalnews.com/index.php/news/29116-Supreme-Court-rules-against-amnesty-offer-to-conflict-era-rights-violator>; 'Nepal top court rejects amnesty legislation', Jurist, 4 January 2014, <http://jurist.org/paperchase/2014/01/nepal-top-court-rejects-amnesty-legislation.php>.

¹⁶² Summary of *Justice and Rights Organization v Government of Nepal*, above n 126, p 7. See also, 'SC rejects TRC ordinance over blanket amnesty', above n 126.

¹⁶³ *Ibid.*

above, truth commissions and trials should be established as close to the point of transition as possible and operate simultaneously, or at least with some overlap. Given the length of time that has passed since the end of the conflict, it is important that real progress is now made towards the establishment of these transitional justice mechanisms. Finally, the Commission 'may frame necessary Rules for implementing the objectives of this Ordinance' (Section 40). Given their potential impact, there should be opportunity for public consultation on these implementing regulations.

8. Concluding Remarks

While acknowledging the challenges facing those charged with establishing a truth commission in Nepal, Section III has highlighted a number of significant shortcomings in the text of the Ordinance as it was promulgated in March 2013. There have been calls from civil society and now an order from the Supreme Court of Nepal to amend the Ordinance to bring it into line with international standards. We would also encourage consideration of the opportunities and challenges of seeking to co-ordinate the truth commission with criminal justice mechanisms in Nepal, and would draw attention to the possible framework suggested in Section II.

Section IV: Personnel Reforms

Insofar as state institutions are concerned, transitional justice may require additional measures that are beyond the scope of a truth commission or criminal prosecutions. Despite the large number of human rights abuses that have been attributed to state institutions in Nepal, there has been no systematic policy of identifying perpetrators and removing those found to have been responsible from their posts. Indeed, Human Rights Watch and Advocacy Forum-Nepal have observed that 'in some cases of alleged wartime human rights violations, the alleged perpetrators are being promoted, appointed into senior government positions, or allowed to go on peacekeeping duties without ever facing a genuine and independent investigation'.¹⁶⁴ There is thus a need to consider personnel reforms. Section IV offers a case study, highlighting key issues to consider regarding personnel reforms and setting out some recommendations for any transitional justice legislation that may be adopted after the Ordinance.

1. Personnel Reforms as a Transitional Justice Measure

Institutional reform is widely recognised as one of the four main transitional justice mechanisms, alongside truth commissions, trials and reparations. Sometimes this involves creating new institutions such as a constitutional court, human rights commission or a police complaints body. It can also involve personnel reforms, which are concerned with reviewing the body of officials serving in existing state institutions and deciding whether persons who served under the former regime and are implicated in its abuses should be dismissed and possibly barred from public service either temporarily or permanently. Terms that have commonly been used to describe such processes include 'vetting' and 'lustration'.¹⁶⁵

Personnel reforms may contribute to each of the transitional justice objectives of truth, justice, reparation and non-repetition, but they are most strongly associated with the last of these. The aim is to change the make-up of state institutions so that their members are less likely to commit further human rights abuses and better able to restrain non-state actors and to prevent conflict. According to the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, personnel reforms that succeed tend to do so by helping to dismantle criminal networks; ensuring that victims do not have to deal with those who abused them when accessing state services; and signalling to the public at large that the institution is committed to acting in accordance with fundamental rights, thereby strengthening public trust.¹⁶⁶ There may also be some gains in terms of truth when the past record of individual officials is investigated; justice may be served when those who abused their office are dismissed (indeed, failure to investigate serious crimes may breach a state's obligations to combat impunity),¹⁶⁷ though disciplinary measures alone are not an adequate response to human rights violations; and reparation may be aided if victims who require compensation are identified. Moreover, personnel reforms may improve the trustworthiness and legitimacy of officials who are responsible for other transitional justice processes, such as the prosecutors and judges involved in trying alleged perpetrators of historic abuse.¹⁶⁸ However, the principal aim remains to prevent human rights abuses

¹⁶⁴ Human Rights Watch and Advocacy Forum-Nepal, *Nepal: Adding Insult to Injury*, above n 20, p 1.

¹⁶⁵ De Greiff & Mayer-Rieckh (eds), above n 31; Roman David *Lustration and Transitional Justice* (University of Pennsylvania Press 2011); Teitel, *Transitional Justice*, above n 94, pp 149-189.

¹⁶⁶ Report of the Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence, 13 September 2012, UN doc A/67/368 at [41].

¹⁶⁷ Dianne Orentlicher, *Updated Principles*, above n 87, Principles 35-38.

¹⁶⁸ OHCHR, *Rule of Law Tools for Post-Conflict States*, above n 32, p 3.

from recurring, and there is a considerable risk of recurrence if a state is unwilling or unable to undertake any personnel reforms and perpetrators of past abuse remain in office.

2. Which Institutions to Reform and Why

The institutions selected to undergo personnel reform vary from state to state, and important considerations when identifying such institutions – leaving aside the practical obstacles that may prevent such efforts in particular instances – include the history of an institution and the gravity of abuses associated with it, as well as the role that the institution is expected to play in upholding human rights and the rule of law in the post-transitional state.¹⁶⁹ The security and justice sector is very often a target for reform efforts, since in addition to establishing whether individual officials have acted improperly (and may therefore be vulnerable to blackmail), it is important that the public should have confidence in the ability and willingness of institutions such as the police to maintain public safety and to investigate crimes including past abuses. Generally speaking, it has been more common for states to undertake personnel reforms in the military and the police than in the judiciary. A few countries have also brought other institutions such as universities and the media under scrutiny, for example, where these were suspected of having been infiltrated by the secret police.¹⁷⁰

3. Due Process and Avoiding Purges

Personnel reforms are liable to fail if they are indiscriminate or are intended as collective punishment of all those associated with the former regime. International best practice requires purges of this kind to be avoided. Instead, the use of one or other form of vetting process is recommended.¹⁷¹ Unlike a purge, vetting requires state officials to be individually considered and to have their fitness to remain in office assessed with regard to objective criteria. The criteria will vary depending on the institution in question but should generally enable the vetting authority to determine whether the individual possesses the integrity that is required for their role by examining their past conduct including any responsibility for human rights abuses.¹⁷²

As discussed in Section I above, vetting processes must operate in accordance with international standards in order to avoid undermining human rights and the rule of law. Purges are generally a violation of due process, because they do not permit the determination of individual responsibility, whereas vetting can be conducted in accordance with due process if it is carried out using fair and appropriate procedures. These vary depending upon the type of vetting exercise that is undertaken: if each official is 'reviewed' and subject to dismissal for misconduct, then burdens of proof and rules of evidence will apply in the same way as in ordinary disciplinary proceedings; on the other hand, if officials within a state institution are 're-selected', meaning that they have to compete with outsiders for the jobs they previously held, then due process only requires them to be considered fairly and without discrimination in the same way as new applicants.¹⁷³ It is also possible for a state to adopt a combination of these approaches. For example, in Bosnia and Herzegovina, police officers were reviewed and had to be certified as fit to serve, while judges and prosecutors were re-selected through an open appointments process.¹⁷⁴

¹⁶⁹ OHCHR, *Rule of Law Tools for Post-Conflict States*, above n 32.

¹⁷⁰ De Greiff & Mayer-Rieckh (eds), above n 31, p 39; Teitel *Transitional Justice*, above n 94, pp 182-185.

¹⁷¹ De Greiff & Mayer-Rieckh (eds), above n 31, p 38.

¹⁷² OHCHR, *Rule of Law Tools for Post-Conflict States*, above n 32, p 4.

¹⁷³ *Ibid.*, pp 23-28.

¹⁷⁴ Alexander Mayer-Rieckh, 'Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Offices in Bosnia and Herzegovina' in De Greiff and Mayer Rieckh (eds), above n 31.

4. Co-ordination, Practical Constraints, and Supporting Measures

There will often be public clamour for personnel reforms to take place as soon as possible during a transition, and also, at the same time, pressure for trials and truth commission hearings to begin. These overlapping demands give rise to similar problems to those discussed in Section II above. A truth commission may lose potential witnesses if their testimony could lead to vetting decisions being made which might cost them their jobs, or put other officials at risk of losing their jobs who might then be motivated to intimidate those witnesses. In stable, non-transitional circumstances it is common for disciplinary proceedings for misconduct to take place after criminal proceedings relating to the same event, to avoid adverse publicity that might influence the trial court to the detriment of the defendant. This might suggest that transitional countries should delay their personnel reforms until after any relevant criminal proceedings have been concluded. However, in many or even most cases, the costs of such a delay are likely to be very high. As already explained, state institutions may urgently need to undergo a process such as vetting, without which they may lack the legitimacy to discharge their important responsibilities during the transition. Moreover, there may only be a limited window of time during which there is sufficient political will to carry out personnel reforms, after which incumbent state officials become entrenched as part of the new status quo.

Even at the outset of a transition it may not be practically possible to carry out personnel reforms in some state institutions or at some levels of the hierarchy. There may be individuals in positions of high authority who are simply too powerful and whose cooperation is needed because they have the ability to derail the transition. At the other end of the spectrum, limited resources may make it impossible to vet large numbers of state employees in the lower ranks. It would be unwise to treat such constraints as an excuse for adopting procedures that are faster and easier to administer but lack the safeguards necessary to ensure due process; that would be to risk reducing the vetting process to a purge. It may be better to devote scarce resources to vetting the higher ranks with a view to disrupting networks of wrongdoing and criminality.¹⁷⁵

As an interim measure, it may help if institutions such as the police or the military are required to vet candidates for promotion by investigating allegations that they were responsible for wrongdoing. An August 2012 decision of the Supreme Court of Nepal which required this is to be welcomed.¹⁷⁶ However, this is by nature a compromise measure and the decision not to promote an individual does not address the problems caused by perpetrators of human rights abuses remaining in their current positions in state institutions, not least because this means that victims may have to deal with their abusers again when seeking to access state services.

By design, personnel reforms are a temporary and extraordinary measure. It is also necessary to put in place supporting measures to ensure that the benefits of personnel reform are fully realised and result in lasting improvements in the institution in question. A fair and inclusive appointments system is of vital importance, and needs to be speedily established to deal with vacancies arising as a result of a vetting process in which incumbents may be found unfit to remain in office. The permanent disciplinary procedures of state institutions also need to be improved to ensure that lessons are not lost and that officials cannot get away with similar abuses in the future.

¹⁷⁵ This was also the recommendation of the International Center for Transitional Justice in De Greiff and Mayer-Rieckh, above n 31, pp 7-9.

¹⁷⁶ 'SC Directs Government to Vet Officials', above n 17.

5. Personnel Reforms in Nepal

Nepal has not yet designated any institutions for personnel reform. The March 2013 Ordinance required the Commission to include in its final report the '[r]oot causes of the internal armed conflict, matters related to reforming policy, legal, organizational, administrative and practical issues for non-repetition of such incidents in future' and to recommend '[m]easures to be adopted forthwith and in future by the Government of Nepal in order to promoting human rights, strengthening justice system and creating an environment for reconciliation in the society' (Section 27(1)). OHCHR has argued that the Ordinance does not provide the Commission 'with a mandate to make recommendations in relation to guarantees of non-recurrence, including legislative and institutional reforms'.¹⁷⁷ However, these provisions are arguably broad enough to include personnel reforms and other institutional change, though we would endorse OHCHR's suggestion that it should be clearly spelled out in the Ordinance that the Commission may recommend vetting as well as the suspension of any state officials charged with serious crimes under international law and the dismissal of those convicted.¹⁷⁸ Perhaps a greater disadvantage of relying on these provisions is that any reforms recommended by the Commission would only begin to be implemented after the Commission had concluded its proceedings, which is likely to take several years.

The Interim Constitution of Nepal does appear to make specific provision for the judiciary to undergo a transitional process. It provides that the '[n]ecessary legal provisions shall be made to keep on making reforms in the judicial sector based on democratic values and norms for the independent, fair, impartial and competent Judiciary'.¹⁷⁹ This has led to discussion about Nepali judges possibly undergoing a vetting process,¹⁸⁰ but so far no action is known to have been taken, and any vetting process would have to be designed with due regard for judicial independence.¹⁸¹

6. Concluding remarks

Personnel reforms are an important mechanism for preventing the recurrence of human rights abuses. In order to satisfy due process, individual vetting processes should be used and not collective measures or purges. The scope of a vetting programme may be constrained by practical considerations of the power balance and available resources. However, to delay a vetting programme may be to miss a crucial window of opportunity for institutional change. In addition, co-ordination with criminal justice mechanisms is essential to ensure that practical considerations do not result in impunity for human rights violations.

¹⁷⁷ See OHCHR *Comments on the Ordinance*, above n 3, p 8.

¹⁷⁸ *Ibid.*

¹⁷⁹ See Interim Constitution of Nepal, above n 42, article 162(3).

¹⁸⁰ David Pimentel, 'Constitutional Concepts for the Rule of Law: A Vision for the Post-Monarchy Judiciary in Nepal' (2010) 9 Wash U Global Stud L Rev 283.

¹⁸¹ For an example of a recent judicial vetting process see the work of the Kenya Judges and Magistrates Vetting Board, www.jmvb.or.ke.

Conclusion

Since the end of the internal conflict in Nepal, there have been demands for transitional justice measures in the country. However, a truth commission and a disappearances commission have yet to be established, impunity remains entrenched for violations committed both during the conflict and post-conflict, and the government has not yet designated any institutions for personnel reform. By reference to the experiences of other countries, this Paper has suggested a framework for co-ordination in Nepal between a forthcoming truth commission, existing criminal justice mechanisms and personnel reforms. The lack of a co-ordinated approach across such measures risks undermining their potential impact. In light of Nepal's legal obligations, this Paper has examined the March 2013 Ordinance in detail, identifying flaws both in content and scope, has made recommendations for amendments to the text and highlighted practical considerations for the Commissions to be set up as a result of the January 2014 order of the Supreme Court. We hope that this Paper is a helpful contribution to the transitional justice discussions taking place in Nepal.

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